NON-BENTHAMITE INFLUENCES
ON THE ENGLISH LAW OF EVIDENCE: 1828 – 1898

CHRISTOPHER JOHN WALLACE ALLEN
University College London

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ABSTRACT

Title of Thesis: Non-Benthamite Influences on the English Law of Evidence: 1828-1898

Candidate: Christopher John Wallace Allen
(University College London)

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The thesis investigates developments in English evidence law during this period and concludes that it is necessary to revise the traditional view, presented for example by Holdsworth, that nineteenth-century developments in evidence law were largely a response to Bentham's critique. This view exaggerated Bentham's role in the statutory reforms and ignored common law developments. An examination of contemporary debates in Parliament, as well as in pamphlets, journals and newspapers, shows that reformers had widely different concerns from those expressed in Bentham's published and unpublished writings. While Bentham had wanted to extend competency as part of a reform of adjective law aimed at abolishing the "technical system" of procedure which supported the "sinister interests" of Church and State, the statutory reforms were achieved for pragmatic reasons that had nothing to do with any radical programme. Success depended on convincing enough lawyers and politicians that increased social stability made it safe to change, and that proposed reforms involved no threat to the relatively new balance of power in criminal trials between judge, counsel and the accused. A case study of selected topics shows that common law developments in evidence took place on lines very different from those proposed by Bentham. Instead of a system of free proof, with guidelines rather than judge-made law, there developed a judge-made, rule-based system which excluded whole classes of evidence on the basis of supposed lack of weight. What emerges is a more complex story in which evidence law no longer appears free-standing, capable of being influenced by the work of a great jurisprudent but invulnerable to social pressures. Instead, we see the subject as itself a feature of society, shaped by social pressures throughout its development.
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In this chapter I propose to set out what I am attempting in the present study and why. In essence, this thesis is a general survey of non-Benthamite influences on the English law of evidence between 1828 and 1898. The argument of the thesis is that this period saw two main lines of development. One consisted of statutory reforms which were inclusionary in character, making competent as witnesses many persons who had been excluded by earlier law. It will be argued that these statutory reforms were brought about for a variety of reasons. Benthamite influence was only one of the factors which motivated change. Others were political pragmatism, the needs of a growing profession, a convergence of religious scepticism and social stability, principles embodied in existing legislation and in forms of dispute settlement which operated beyond the sphere of the superior courts of common law, concern to preserve an acceptable face of justice, and a predisposition in favour of reforms which encouraged individual responsibility.

The other line of development affected the common law. Its features, more clearly to be seen in civil than
in criminal evidence, were a reduced judicial discretion in the application of evidence law, and the growth of a system of judge-made, rule-based law which excluded whole classes of testimony on the basis of assumptions about evidential weight.

In the light of these statutory and common law developments, it will be argued that Bentham's role in the development of English evidence law has been overestimated and that the changes taking place during this period were part of a more complex story than has yet been realised.

This chapter will set out (1) the reasons for the study; (2) its scope, both (a) in relation to its content, and (b) in relation to the sources used; and, (3) a summary of the argument that I am putting forward to account for developments in the law of evidence during this period.

1. Reasons for the Study

A study of developments in the law of evidence in this period is of interest for two reasons. In the first place, it serves as a corrective to previous theories about the part played by Bentham's ideas in the changes that took place. Secondly, it shows the wide variety of considerations that have to be taken into account in any story of the development of evidence law during this period.
According to Lord Brougham,

The age of law reform and the age of Jeremy Bentham are one and the same. He is the father of the most important of all the branches of reform, the leading and ruling department of human improvement. No one before him had ever seriously thought of exposing the defects in our English system of jurisprudence. All former students had confined themselves to learn its principles ... and all former writers had but expounded the doctrines handed down from age to age.¹

Later, in 1861, Maine wrote of "Bentham's immense influence in England during the past thirty years",² and twenty years later he expressed the opinion that Bentham and his supporters had "suggested and moulded the entire legislation of the fifty years just expired".³ "Bentham's immense influence" soon became a commonplace, as can be seen from a students' handbook published in 1875. In this work the author wrote:

Generally speaking, legislation has in all countries been directed rather at symptoms than at causes, and has been quite as likely as not to open a new sore while closing an old one. That the legislation of this century has been in some degree an exception, that amidst all its shortcomings and inconsistencies there is traceable something which is not mere quackery, something like a clear perception of the true conditions of health in the body politic, is due mainly to the presence of one new element - to the faithful labours, prolonged over more than half a century, of one man who dared to sit still and think, while others were acting at random, who dared to believe that law is capable of scientific treatment. What Socrates did for moral philosophy, what Adam Smith did for political economy, that Bentham did, so far as England is concerned, for jurisprudence.

A similarly strong case was made in the entry under Bentham's name in the Encyclopaedia Britannica in 1875. According to T.E. Holland, the writer of the article, "To trace the results of his teaching in England alone would
be to write a history of the legislation of half a cen-
tury." Ten years later, in the Dictionary of National
Biography, Sir John MacDonnell wrote that the amendments
made since Bentham's time in the administration of jus-
tice were, to a surprising extent, applications of the
principles which he had expounded. The article referred
in particular to "the abolition of arbitrary rules exclu-
ding from the cognisance of juries facts material for
them to know", and to the passing of legislation whereby
"the legislature approached step by step towards [Ben-
tham's] principle that no class of witnesses should be
incompetent and no species of evidence excluded, but that
every fact relevant to the inquiry should be admitted for
what it is worth". Zealous disciples of great ability
such as Brougham, Romilly, Horner and Mackintosh had
assisted the work of legal reform, but the originating
spirit had been that of Bentham.6

It was in this intellectual context that Dicey
wrote Lectures on the Relation between Law and Public
Opinion in England during the Nineteenth Century. In this
work he argued that from about 1825 onwards the teaching
of Bentham had found ready acceptance among "thoughtful
Englishmen", because "when it became obvious to men of
common sense and of public spirit that the law required
thoroughgoing amendment, the reformers of the day felt
the need of an ideal and of a programme".7 But Dicey's
argument was weakened by the very broad interpretation
which he put upon "Benthamism" and "Benthamite doctrine", terms which he used interchangeably. He argued that although the men who had guided the course of legislation "were in many instances not avowed Benthamites", and although "some of them would have certainly repudiated the name of utilitarians", nevertheless they

were all at bottom individualists. They were all, consciously or unconsciously, profoundly influenced by utilitarian ideas ... they were utilitarians, but they accepted not the rigid dogmas of utilitarianism, but that Benthamism of common sense which, under the name of liberalism, was to be for thirty or forty years a main factor in the development of English law.

Dicey extended still further the scope for Benthamism by suggesting that it possessed a latent "despotic or authoritative element" and that between 1868 and 1900 changes took place which brought this element into prominence. He concluded that "English collectivists" had "inherited from their utilitarian predecessors a legislative doctrine, a legislative instrument, and a legislative tendency pre-eminently suited for the carrying out of socialistic experiments".  

The extent of Bentham's role was not revised by Holdsworth, who endorsed and explained Brougham's opinion in these words:

Bentham was the first English lawyer to think out a comprehensive set of philosophical principles upon which reforms in the law ought to be made. In the light of these principles he devoted his long life to the production of detailed programmes of reform in the subject matter of the law, in the form of its statement, in the machinery of its enforcement, in the institutions of the state; and he insisted on the duty of the Legislature to make all these reforms by direct legislation. It is for these reasons that
Brougham could truly say that 'the age of law reform and the age of Jeremy Bentham are one and the same'.

This left open the extent to which Bentham's work had affected particular reforms in the law, but elsewhere Holdsworth stated that in the period 1833-75 the legislative changes in the law of evidence, "though not extensive, were almost as important, as those made in the law of civil procedure and pleading, for, as we have seen, Bentham had paid as much attention to evidence as to procedure and pleading". The words emphasised show Holdsworth's assumption that there had been a connection between Bentham's writings on procedure and evidence and the enactment of reforming legislation. In another passage Holdsworth, after stating that some of Bentham's best work had been done in evidence, added, "and as a result of it important changes in the law had been made by the Legislature". 11

Similarly, in a collection of essays published in 1948, Keeton and Marshall attributed to the cogency of Bentham's arguments the progressive abandonment of the "best evidence rule" and claimed that his work had been "directly responsible for the removal of disabilities due to the form of the oath". 12

Dicey had created a substantial problem of falsifiability by his wide interpretation of "Benthamism". What would have counted as evidence against the part played by Benthamism on his theory? But this difficulty
has not prevented the lengthy debate on his contentions which has since taken place in the context of the "Victorian revolution in government". That debate was significant because it gave rise to a considerable degree of scepticism about Bentham's status in an area where traditionally it had been considered substantial, thus suggesting that there might be other areas, such as evidence law, where Bentham's status had been similarly exaggerated.

Nevertheless, H.L.A. Hart maintained the view that "Bentham's attack inspired the great statutory reforms of the law of evidence of 1843, 1851, and 1898". More recently, Robert Stewart in his biography of Brougham wrote:

The middle years of the 19th century were an age of reform as much in the operation of the law and the courts as in anything else. The intellectual foundations of that reform were laid by Bentham.... Others before him, like Justinian and Napoleon, had codified the law; others, too, like Montesquieu and Locke, had exhibited its defects; but Bentham was the first man to examine defects over the whole range of the law and at the same time to propose general principles upon which laws should be constructed. None before him had treated the study of law as a science. That, as Brougham justly affirmed, was Bentham's pre-eminent distinction, as proud a title to fame as any philosopher ever possessed.

More cautiously, John Dinwiddy has said that, "[t]he extent and nature of [Bentham's] influence on legislation and government have been one of the most controversial issues in the historiography of nineteenth-century Britain". While pointing out that Bentham's hopes
for a total reconstruction of the English legal system were never fulfilled, he added that, "his contribution to the process of law reform was nevertheless substantial, and some of the outstanding agents in that process, including Sir Samuel Romilly, Lord Brougham, and Lord Denman, explicitly acknowledged their indebtedness to him".16

David Lieberman, in The Province of Legislation Determined,17 has recently shown that traditions of law reform that were independent of Bentham flourished during the eighteenth century. He has argued that "Bentham's legislative science should be regarded not as the definitive ideology of law reform produced in eighteenth-century England, but rather as one among several approaches to legislation and legal improvement elaborated at this time". He added that the recovery of these rival reform traditions would "revise our understanding of Bentham's legacy and of the intellectual orientation of the Victorian law reform movement".18

Lieberman did not pursue such a revision, but he demonstrated that among the rival traditions of law reform was that of a creative common law, believed by adherents such as Blackstone and Mansfield to be better adapted than statute to respond to new social and legal needs. He also perceived a tradition of attempts at statutory consolidation which went back at least to the time of Bacon, and which found expression in the work of eighteenth-century
writers such as Daines Barrington and Richard Burn.\textsuperscript{19}

The story of evidence law in the nineteenth century has traditionally been that of one man and the legislation that his writings inspired. I shall argue that this is a misleading story. There is another which is both more complex and more reliable. In this story Bentham has a part to play but it is not the only, or even the leading, part. Two lines of inquiry will be of particular importance: (1) What other factors should be included in an account of the statutory reforms? (2) What part was played by the rival traditions of reform identified by Lieberman? In particular, what was the role of the common law judges?

2. Scope of the Study

There are three issues involved in the scope of the thesis. The first is the general nature of the study; the second is the period covered; the third, the sources used. The three are interrelated.

(1) The General Nature of the Study

The object of the study is a survey of non-Benthamite influences on the law of evidence during this period. It is not primarily either (i) a study of the statutory provisions affecting evidence in this period, or (ii) a study of specific common law rules and their evolution, or (iii) an attempt to assess the extent of Bentham's contribution to the development of evidence law
in this period. This does not mean that I shall not
discuss statutory provisions, or specific rules, or
Bentham's contribution. But I shall do so as part of an
investigation of a variety of circumstances affecting
evidence law.

I have taken the concept of influence as the most
helpful in providing an explanatory account of develop­
ments in evidence law during this period. At least one
other concept, that of causation, is suggested by any
account that attempts to explain events. However, I
prefer "influences" to "causes" as a means of explain­
ing this particular story for reasons that I shall set
out briefly before considering what is to be understood
by "influences", and what influences would count as
"non-Benthamite".

(a) "Causes"

I prefer "influences" to "causes" as an explanatory
device because the latter has philosophical resonances
that may prove a distraction in a purely explanatory
account. The difficulty arises because of the various
ways in which the concept of causation can be used. For
example, a distinction is often drawn between a natural
relation of causality, said to hold between things in
nature, and a non-natural explaining relation, said to
hold between facts or truths.²⁰

In addition, varied emphasis can be placed on the
concept of necessity in different accounts of causation.
One account commonly given is that a state of affairs, A, is the cause of another state of affairs, B, when A is the totality of conditions from among all those, but only those, that occurred, each of which was necessary, and the totality of which was sufficient, for the occurrence of B. To say that A was "necessary" for B means that B would have been impossible, given the non-occurrence of A. To say that A was "sufficient" for B means that the non-occurrence of B would have been impossible, given A.

It might seem implausible that any particular set of conditions is ever sufficient for the occurrence of any particular change, or that any particular condition is ever necessary for the occurrence of such a change. A sceptic in these matters might accept, for example, that certain conditions preceded and were relevant to the passing in 1828 of a bill to give members of some Christian sects the right to give evidence on affirmation in criminal trials: government support, the limited scope of the bill, alarm at a perceived increase in crime, and a campaign to further Catholic emancipation. But the sceptic would also say:

(i) It could have been the case that all those conditions were present but the bill was not passed because, for example, a majority of members of Parliament believed more strongly than in fact they did that a man's life and liberty ought not to be put at risk on the basis of unsworn
testimony. In those circumstances the conditions described would have been insufficient to secure the passing of the bill.

(ii) Any one of the conditions described could have been absent, yet the bill could still have been passed because the remaining conditions had sufficient weight to achieve this. In those circumstances it could not be said that any one condition was necessary to pass the bill.

The short answer to the sceptic would be that he had overlooked an essential element in the causal analysis. What was claimed was that the cause of a given change was that set of conditions which were, within the totality of those other conditions, and only those, that in fact occurred, individually necessary and jointly sufficient for the change in question. The analysis is therefore not vulnerable to an argument based on a supposed condition which was not in fact present, or on the supposed absence of a condition which was in fact present.

But the sceptic might then go on to question the usefulness of the original analysis. He might suggest that the common notion of causation has features that vary from context to context, and that there may be different types of causal inquiry. He might add that for an event of a given kind there need not be just one set of jointly sufficient conditions, but several independent
causes; that an event of a given kind may be produced by different causes; and that the question, "Would X have happened if Y had not?" can be a misleading test of causal connection.

Many would support the sceptic because it does seem to be the case that two causes may be present on the same occasion, each of them sufficient to bring about the same effect. Thus two men may simultaneously fire a gun and lodge a bullet in their victim's brain, or may simultaneously approach an escaping gas with a lighted candle. We cannot say that either cause was necessary on the particular occasion because the other cause would have sufficed to produce the effect in question. Nor does there seem to be anything intrinsically absurd in the statement that a person who decided to do something for two independent reasons would have done the same thing for either of the reasons alone.²³

Because of the problematic nature of the concept of causation, of which these difficulties are examples, an account in which an attempt is made to explain legal developments is likely to benefit from having as its central theme something more philosophically neutral; hence the place given to "influences".²⁴

(b) "Influences"

I shall adopt as a starting point Collingwood's distinction between the "outside" and the "inside" of an event. By the "outside" of an event he designated
"everything belonging to it which can be described in terms of bodies and their movements". An example in this study would be the voting by members of Parliament on a bill to extend competency, and the passing of that bill by a majority of votes cast. By the "inside" of an event Collingwood referred to "that in it which can only be described in terms of thought". He saw the historian's task as "penetrating to the inside of events and detecting the thought which they express".

When an historian asks, 'Why did Brutus stab Caesar?' he means 'What did Brutus think, which made him decide to stab Caesar?' The cause of the event, for him, means the thought in the mind of the person by whose agency the event came about: and this is not something other than the event, it is the inside of the event itself.

Thus, to understand the "inside" of the actions involved in passing a bill to extend competency, it would be necessary to try to determine what thoughts were in the minds of members of Parliament which induced them to vote in favour of that measure. Those thoughts would be influences which helped to bring about that particular development in the law of evidence. Similarly, when a judge decided a question of admissibility in a particular way, the "outside" of the event would be the utterance by which the judge made a ruling in the case before him; the "inside" of the event would be the thoughts that led him to rule as he did.

At this stage two problems have to be considered. The first is that Collingwood's reference to "the thought
in the mind of the person by whose agency the event came about" suggests that Collingwood was thinking of the sort of situation where the thought is a fully conscious one which the agent would have little difficulty in articulating if necessary. His illustrations - the assassination of Caesar by Brutus and Caesar's crossing of the Rubicon - clearly fit into this category. But an agent may also act on the basis of thoughts which he never articulates fully, even to himself. There are also events which cannot be adequately explained by a sum total of human thoughts because underneath the surface of stated intentions and conscious preoccupations there may lie a level of mental processes of which the agents were aware only dimly, if at all. People may reach decisions on the basis of generalisations which they have accepted unquestioningly, and often unconsciously, about the way things are, or ought to be, in the world. The thesis therefore considers not only the thoughts of individuals such as writers, legislators and judges, but wider mentalities which may have affected the way in which evidence law developed in this period.

The second problem arises when we attempt the more limited task of determining what were the thoughts that moved an agent to pursue a particular course of action. The vital question may be whether we can trust the agent's own account of what he thought. If we cannot, does it follow that the ideas disingenuously expressed by
the agent had no influence on the course of action under consideration? The problem can be particularly acute when considering the speeches of politicians because they may have wished to conceal their objectives, and a historian who takes what is said at face value may fall into error. This problem was considered by Quentin Skinner, who rejected "the belief that it is only if an agent's professed principles can be shown to have served as a motive for his actions that it is necessary to refer to those principles in order to explain the agent's actions". Instead, he argued that

> [t]he agent's principles will also make a difference to his actions whenever he needs to be able to provide an explicit justification for them. This will make it necessary for the agent to limit and direct his behaviour in such a way as to make his actions compatible with the claim that they were motivated by an accepted principle and that they can thus be justified. This in turn means that such an agent's professed principles invariably need to be treated as causal conditions of his actions, even if the agent professes those principles in a wholly disingenuous way.

This argument has its most obvious application where a course of action extending over some years is under investigation. Skinner developed it in the context of Bolingbroke's opposition to Walpole, and it has also been applied in the context of the British war against revolutionary France from 1793 to 1798. Its application is less obvious where the speech of an individual member of Parliament in relation to one piece of legislation is being considered, because in such a case the
opportunity for self-contradiction is substantially reduced. But much of the legislation affecting evidence had to come before Parliament in more or less the same form on several occasions before reform could be achieved. This was notoriously so with the Criminal Evidence Act 1898. Proposals for extending competency to the accused in criminal cases had come before Parliament frequently for about twenty years before this Act was finally passed. It seems to me that there remains sufficient scope for the operation of Skinner's argument to justify an examination of what was said in Parliament for and against various proposals for reform, quite apart from the possibility that members of Parliament were not dissembling when they spoke.

In determining what counts as an "influence", therefore, I shall accept these propositions:

(i) The thought in the mind of the person by whose agency an event came about is an influence.

(ii) What is disingenuously expressed to be a thought in an agent's mind may be an influence to the extent that it operates to constrain the agent's conduct.

(iii) There may be an influence which does not feature as a conscious thought in an agent's mind. This is particularly likely to be so in the case of ways of thinking which form part of an agent's intellectual background but of which he is not, or not
wholly, aware.

But there is a further difficulty. Even if we are able to identify possible influences on the matter under investigation, the available evidence is unlikely ever to be sufficiently full and unambiguous to place a judgement about influences beyond doubt, not least because very often the sources do not directly address the problem of historical explanation at all. Even where they provide such evidence, the evidence alone cannot tell us the relative importance of all the varied factors, or present a comprehensive picture of how they interacted with each other. As a result, questions of influence, like other questions of historical explanation, cannot be resolved by reference to the evidence alone. Historians have to be guided also "by their intuitive sense of what was possible in a given historical context, by their reading of human nature, and by the claims of intellectual coherence". Since historians are likely to differ in each of these areas, does it follow that attempts to trace influence should be abandoned, as any theory must depend largely on factors that are personal to the historian making the enquiry? Such an extreme course of action would not be justified. All historical study is based on incomplete information, and no one can write history of any kind from a standpoint outside his own experience of the world or of human nature. Provided the inevitable limitations are borne in mind, it may still be possible
to suggest connections that further our understanding of the past.  

(c) Benthamite or Non-Benthamite?

For the purpose of making this distinction, something must be said about what would count as a Benthamite influence. The wide scope of influence suggested by Dicey cannot now stand. The problem of falsifiability has already been mentioned. Further, as a recent biographer of Dicey has written, *Law and Public Opinion* has misled historians of Victorian England ever since its publication. The materials for the history of Victorian opinion were diverse and complex, so his reductionist technique distorted more than enlightened when applied to historical causation. Modern investigation into the data Dicey so cavalierly researched has terminated its influence.

A classic example of law reform inspired by Bentham is to be found, not in England, but in the North American state of Maine. John Appleton, a justice of the supreme court from 1852 until 1862 and then chief justice until his retirement in 1883, was an enthusiastic supporter of evidence law reform and also a follower of Bentham. He wrote a number of articles in legal periodicals on the subject and in 1860 published them in a collection entitled *The Rules of Evidence Stated and Discussed*.  

In its preface he acknowledged that he had read with great interest "the masterly work of Bentham on the subject of Evidence". He continued, "But as that is not readily accessible, and is so voluminous, it occurred to
me, that a careful examination of the more important rules of law, as to the admission and exclusion of evidence ... would not be without interest to the legal profession and would be of utility to the public." He was careful to emphasise that he regarded his task as one of spelling out Bentham's ideas and their implications. "In what I have done, I have only endeavored to apply the reasoning and principles of Bentham, of which I have made free use, to the law as found in the treatises of jurists and the decisions of the courts;..." 33

Nor was Appleton content merely with writing. He campaigned, using the authority of his judicial position, for legislation which would bring into effect some of the changes advocated by Bentham. He was the prime mover behind the adoption in 1856 of legislation which extended competency to the parties in civil suits. But his most significant achievement was to secure for defendants in criminal trials the right to testify on their own behalf. As a result of a campaign which relied heavily on Bentham's arguments, Maine became in 1864 the first common law jurisdiction in the world to allow this. 34

There may be some parallels in England with the support for reform that came from Brougham and Denman, 35 but to take the case of Appleton as an exclusive model for the operation of Bentham's influence would be to neglect the many possibilities of indirect influence exerted by his ideas. An analysis that took these into
account was adopted in the context of the debate over the Victorian revolution in government by S.E. Finer. He suggested that Bentham's influence operated through a complex process of absorption and interpretation by others involving three elements:

(i) **Irradiation**  This was "the process by which small knots of Benthamites attracted into their salons, their committees and their associations a much wider circle of men whom they infected with some at least of their enthusiasms".

(ii) **Suscitation**  This was "the process of arranging public inquiries or the press or both together in such a way as to create a favourable public opinion, of a temporary kind, amid influential groups in the country".

(iii) **Permeation**  This was "the process of securing official employment of oneself and thereafter using this position" to promote Benthamite policies by further irradiation and suscitation. 36

Finer's categories suggest a more organised campaign in the field of government than existed in that of law reform. Among law reformers there were those, including Denman and Brougham, who set out to place some of Bentham's views before the public in a more readily digestible form, such as that of an article in the Westminster Review or Law Magazine. Writers of this kind, though they might in some respects be critical, had been
persuaded by at least some of Bentham's arguments. Occasionally persons speaking or writing in favour of reforms mentioned the name of Bentham in that connection, and a similar presumption may be made. But references to Bentham of this kind were unusual.

Far more frequently we find people who advocated some reform or other using arguments that Bentham had used without any acknowledgement of a source. Here caution is necessary. Bentham's arguments were not by any means all original, and the fact that a member of Parliament used an argument that Bentham had used does not show that he followed Bentham in using it. For example, one of the arguments used by Bentham against the employment of oaths in judicial proceedings was that it led to a double standard of truth. This was an argument used later in debates on the requirement that all testimony should be on oath. Yet the argument had been familiar to Shakespeare, as we can tell from the objection made by Brutus when Cassius proposes that the conspirators should bind themselves by an oath. It should also be remembered that there was a tradition of conservative utilitarianism represented, for example, in the writings of Paley. Even where we find an argument that looks as if it is a utilitarian one, it does not follow that the person adopting it was influenced by the radical utilitarianism of Bentham.
The Period Covered

A study of developments in the law of evidence requires a survey of some decades at least - a period too long to permit very detailed study. Further, the decision to pursue a general survey inevitably limits the sources used.

The starting point for the period chosen - the year 1828 - seemed appropriate for three reasons. In the first place, it was in that year that a bill was introduced to allow Quakers and Moravians,\(^40\) whose understanding of Christianity forbade them to take oaths, to affirm in criminal cases. A similar bill was passed in 1833 in favour of Separatists,\(^41\) and other relaxations of the law relating to competency followed. Previous statutory inroads on the law which required witnesses to give evidence on oath had not been made since legislation in the reign of William III had allowed Quakers to affirm in civil proceedings.\(^42\) In retrospect, therefore, 1828 can be seen as the start of a new period during which old restrictions on competency were gradually relaxed by statute.

Secondly, 1828 was the year of Brougham's famous speech on law reform. He included evidence law in his wide-ranging review and was particularly critical of the restrictions placed on competency by virtue of interest.\(^43\)

Thirdly, by 1828 much of Bentham's critical work on...
evidence had been published. Swear Not At All had been published in 1817; the Traité des preuves judiciaires had been published in 1823; its English translation had been published in serial form in 1824 and as a complete work in 1825; in 1827 the Rationale of Judicial Evidence had been published. Scotch Reform, containing important criticisms of evidence law, had been published in 1808. 44

1898 was selected as a convenient stopping point because the Criminal Evidence Act passed in that year broke down the last of the great exclusionary barriers by enabling accused persons to testify in their own defence.

(3) The Sources Used

The core of the research into influences on statutory reforms has been the series of Parliamentary Debates for the relevant period. Reference has been made for the text of bills to the collections of sessional papers of the House of Lords and House of Commons.

For Bentham's critique of the old law I have referred mainly to Swear Not At All and to the Rationale of Judicial Evidence. Similar criticisms can be found in the Treatise on Judicial Evidence, in Scotch Reform, and in the Introductory View of the Rationale of Evidence, as well as elsewhere in Bentham's published and unpublished writings. Among the latter, I have made some use of the Bentham MSS at University College London. My aim throughout has not been to provide a complete survey of
Bentham's writings on particular topics, but a summary of the case that he made against existing restrictions, so as to facilitate recognition of any affinities with Bentham's critique in the arguments of subsequent reformers.

For opinions within the legal profession on reform I have relied on a number of periodicals. At the beginning of this period there were a few short-lived series, such as the *Jurist* and the *Legal Observer*, but in the main I have relied on periodicals which in one form or another covered either the whole period or a substantial part of it. Foremost among these is the *Law Magazine* which provided articles and reviews on legal matters in the style of the more general quarterly periodicals such as the *Edinburgh Review*. More in tune with the mundane requirements of professional men, though still capable of providing interesting criticism, are the *Solicitors' Journal* and the *Law Times*. I have also relied on some contemporary pamphlets published by members of the Bar.

For opinions outside the profession I have relied mainly on *The Times* and on the *Westminster Review* and the *Edinburgh Review*. Although anything like a complete survey of general periodicals and newspapers was impracticable, my attempts to find evidence law reform more widely discussed suggest that the subject was regarded by most editors as of too specialised a nature for a general readership. The debate on allowing accused persons to
testify at their trials found a slightly wider audience. I discovered some articles, albeit written by lawyers, in *Nineteenth Century*, and one editorial item written by Charles Dickens in the popular magazine *All the Year Round*.

Lord Denman was an influential figure in connection with statutory reforms of evidence law during the earlier decades of this period, and I have made use of letters written by him on the subject which are in the Brougham MSS at University College London.

The core of the research into influences on common law development in this period has been the nominate reports of civil and criminal cases reprinted in the *English Reports*. For later decades I have relied chiefly on the *Law Reports* and on *Cox's Criminal Cases*. Another important source has been the various treatises on evidence published during this period; I have relied particularly on those by Phillipps, Starkie, Best and Taylor. Two contemporary accounts of the conduct of trials have been referred to: M. Cottu's *On the Administration of Criminal Justice in England* (1822), and a work by J.P. Collier published under the pseudonym "Amicus Curiae", *Criticisms on the Bar* (1819).

The scope of the survey both in the subject-matter and in the period covered meant that anything like an examination of all possibly relevant sources was impracticable, and reliance has had to be placed on secondary
works, particularly those by Langbein, Lieberman and Lobban. At the heart of the research into influences on statutory reforms, however, lies a survey for the period of the Parliamentary Debates, of material in The Times, the Law Magazine, the Westminster Review and the Edinburgh Review. By this means I have attempted to avoid some of the dangers involved in a selection of evidence. A process of selection was unavoidable when considering common law development. Here I chose topics which the treatises had already indicated to be growth areas, or at least areas of potential growth. Despite the inevitable incompleteness of the overall survey, I think that the sources that have been used have provided sufficient material to allow significant conclusions to be drawn.

3. The Argument

The thesis shows that the traditional story of Bentham's great influence on the law of evidence which is to be found, for example, expressly in the writings of Holdsworth and impliedly in those of Hart, can no longer be maintained.

The traditional story had always ignored common law developments in evidence law, preferring instead to concentrate on nineteenth-century statutory reforms. The latter had three main concerns: (i) relaxation of the requirement that all testimony should be on oath; (ii) abolition of those remaining rules which
disqualified certain convicted persons from giving testimony; and, (iii) abolition of rules which disqualified persons, in particular the parties to civil proceedings and the accused in criminal proceedings, from giving testimony by reason of their interest in the outcome of the trial.

Relaxation of the requirement that all testimony be on oath took place in two main stages. Attention was directed during the first stage, from 1828 to 1854, towards the relief of those who had religious scruples against taking an oath. During the second stage, from 1854 to 1869, reformers directed their attention towards the concerns of those who objected to taking an oath because of their lack of religious belief. It will be argued that it is improbable that Benthamite influence affected the extension of a general right to affirm at either stage, and that the reforms came about as a result of the convergence of two lines of development: one of growing religious scepticism, and the other of increased social stability.

Lord Denman's Act of 1843 abolished those rules of incompetency by reason of criminal conviction that had survived; it also abolished those rules which affected the competency of non-parties by reason of their interest in the outcome of civil litigation. These were reforms which Bentham had advocated and which came about as the direct result of the efforts of Lord Denman, whose
thinking on law reform had clearly been influenced by Bentham's work. However, it will be argued that Denman's position was not that of a convinced Benthamite, and that the success of his legislation depended on a conviction within the legal profession - particularly on the part of the common law judges and the Attorney General - that the reforms were merely a logical extension of previous common law developments.

The Law of Evidence Amendment Act 1851, which made competent the parties to civil litigation in the superior courts of common law, is the most likely product of Benthamite influence among nineteenth-century statutes dealing with evidence. But it will be argued that support for this reform was equally consistent with a gradualist approach which relied on the principle embodied in the 1843 Act, and on the extension of existing practices of dispute resolution outside the sphere of the superior courts of common law.

The general extension of competency to persons accused in criminal cases did not take place until more than sixty years after Bentham's death. It will be argued that this development came about primarily because of pressure to provide accused persons with more opportunity to participate in their own trials than they were permitted under the adversary process that had developed between the last decades of the eighteenth and the early decades of the nineteenth centuries. The reform emerged
largely from debates within the legal profession, whose members carried the debate into the House of Commons where significant numbers of them were members. It is to be seen as the last stage in the hammering out of the relatively new adversary process in criminal trials, and it could not be achieved until a majority of the profession was satisfied that it would involve no radical alteration to the recently developed balance of power in criminal trials between judge, counsel and the accused. It will be argued that if there was any Benthamite influence at work at this late stage, it must have been operating in a very weakened form. For example, the 1898 legislation largely protected the accused from comprehensive cross-examination, and thus limited the search for truth which Bentham had declared to be the object of extending competency to the accused. The accused's right to silence, which Bentham had notoriously criticised, was developed by the judges in relation to pre-trial proceedings during the early decades of the nineteenth century and was recognised by statute in 1848. The accused's right to silence at trial remained unaffected by the 1898 legislation, and the right to comment on its exercise was limited.

As for common law developments in evidence law, the silence of writers who supported the "great influence of Bentham" story is itself significant. Such developments as did take place, mainly in civil evidence, pointed in a
direction from which Bentham would have recoiled, for it led to the emergence of a judge-made, rule-based system which excluded whole classes of testimony because of supposed lack of weight.
NOTES TO CHAPTER 1

1. H. Brougham, Speeches of Henry Lord Brougham upon questions relating to Public Rights, Duties & Interests; with historical introductions, and a critical dissertation upon the eloquence of the ancients (Edinburgh, 1838), vol. 2, 287-88.


6. DNB, s.v. "Bentham, Jeremy". For a similar approach see John Forrest Dillon, "Bentham's Influence in the Reforms of the Nineteenth Century," in Select Essays in Anglo-American Legal History, compiled and edited by a committee of the Association of American Law Schools, (Cambridge, 1907), vol. 1, 492-515. According to Dillon, Bentham, though producing no immediate effect had, "scattered the seeds of truth. Though they fell on stony ground they did not all perish. But verily reform is a plant of slow growth in the sterile gardens of the practising and practical lawyer." The credit for initiating the great improvement which abolished incompetency for interest, even in relation to the parties in civil cases, was due not to Denman and Brougham but essentially belonged to Bentham, although he had died before these reforms were effected. His failure in directly realising greater practical results grew out of his mistaken notion that the work of actual amendment could be accomplished without experts - i.e., without the aid of the Bar and without its active support. (Ibid., 510.)
7. Dicey, Law and Public Opinion, 2nd ed., (1914), 168. In this he followed Maine, who had been of the opinion that the secret of "Bentham's immense influence" had been his success in placing before the nation "a distinct object to aim at in the pursuit of improvement". (Maine, Ancient Law, 1930 ed., 90.)


9. Ibid., 308, 310.


16. John Dinwiddy, Bentham, (Oxford, 1989), 117. In a radical criticism T.S. Midgley has argued that whatever influence Bentham had was solely on a tradition of legal historiography, and not on the upsurge of legal reform in the nineteenth century.

Benthamism was a phenomenon of this upsurge: the "influence of Bentham" was no more responsible for it than the influence of the Greeks, who asserted "the good life" as the goal of political society, long before Bentham appeared on the scene. There is a vicious circularity for those who would use the "profound influence of Bentham" theory in the explanation of the tidal wave of legal reforms throughout the nineteenth century. The phenomenon of Benthamism ... cannot explain away the many and varied reforms constitutive of this "upsurge" because, as a lowest common denominator, it is a crude reflection of the very thing.

(T.S. Midgley, "The Role of Legal History," British
Thus, according to Midgley, the "influence of Bentham" theory explained nothing. It became current and survived because a substantial body of legal historians favoured an account of their subject which showed law as an autonomous development, its integrity and binding authority preserved intact from the vagaries of political and economic forces. For Midgley, this was a betrayal of the historian's vocation, because to perform his function adequately the historian must reduce the noises which the law makes on its own behalf to the level of raw material. Otherwise historical inquiry is futile, or, as is the case of "legal history", part of the problem which remains unanswered.

(Ibid., 163.)


18. Ibid., 3-4.

19. Ibid., 122-44, 179-98.


22. See chap.2 below.


24. It has also been suggested that a historian who talks in terms of cause and effect may run the risk of superficiality, and that a better approach may lie in the realisation that certain changes coincided in such a way that one cannot be understood without reference to the other. (Peter Brown, The World of Late Antiquity AD 150-750 (London, 1971), 9.)


33. Ibid., iii-iv.


35. See chaps. 2 & 3 below.


37. See chap.2 below.


39. It might be tempting to suggest that there were reformers who had been deeply influenced by Bentham's writings but who, for diplomatic reasons, encouraged reforms without relying on the radical arguments that would have established a link between themselves and Bentham. But I have found no evidence that this was so, and the theory obviously presents problems of falsifiability. Cf. the criticism of "ad hoc hypotheses" in Colin Howson & Peter Urbach, Scientific Reasoning: The Bayesian Approach (La Salle, Illinois, 1989), 106-8.

40. Members of the Moravian Church, also known as the Renewed Church of the Brethren, or Unitas Fratrum. It originated as an evangelical Christian communion in Bohemia among followers of John Huss (c. 1372-1415). Persecution reduced its members, but a renewal took place during the eighteenth century in Saxony. Moravian congregations were later founded in other countries, including
Holland, England, the West Indies and North America.

41. Separatism, later known as Congregationalism, was a form of protestant church organisation in which each local group, or congregation, had control over its own affairs. The movement began in the sixteenth and seventeenth centuries in England as a revolt against the established church.

42. By 16 Charles II c 4 the refusal to take an oath had been made punishable as a criminal offence. By 7 & 8 William III c 34 Quakers were allowed to affirm in civil proceedings only. This provision was continued by 13 William III c 4 and was made perpetual by 1 George I Stat 2 c 6.


45. See Bibliography.
CHAPTER 2
INCOMPETENCY FROM DEFECT OF RELIGIOUS PRINCIPLE

Statutes in the nineteenth century did much to extend the range of admissible evidence. At the beginning of this period two great classes of witnesses were excluded: those who, as Phillipps put it, were incompetent "from defect of religious principle", and those who were incompetent by reason of interest. In addition, there were some cases where witnesses were excluded on account of their criminal convictions. This chapter deals with the reforms, completed by 1869, which affected the first of these classes. In order to put the reforms in their context, I begin with a summary of the common law as it stood at about 1828 in relation to incompetency on religious grounds. This section is followed by an outline of the arguments used by Bentham in favour of reform. The third section is an overview of the legislative reforms, and the fourth is an analysis of influences on the reforms. A final section contains a summary of conclusions.

1. The Common Law circa 1828

The common law required that all witnesses should take an oath which was believed to operate as "a solemn invocation of the vengeance of the Deity upon the wit-
ness, if he do not declare the whole truth, so far as he knows it." 2 As late as 1852 Phillipps justified this requirement by stating that without belief in the existence of God, by whom truth was enjoined and falsehood punished, one sanction was wanting: the fear of Divine punishment invoked by the witness upon himself. It was not enough that the witness should believe himself bound to speak the truth from a regard to his own good character, or to the common interests of society, or through fear of punishment for perjury. "Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth." 3

It followed that atheists were not competent to give evidence. 4 Coke had held that infidels could not be witnesses. 5 Hawkins had thought it a sufficient objection to the competency of a witness that he believed neither the Old nor the New Testament. 6 But Hale had pointed out the unreasonableness of excluding indiscriminately all heathens, as well as the inconsistency of compelling them to swear in a form which they might not consider binding. 7

These differences were resolved by the decision in Omychund v Barker, 8 which held that the depositions of witnesses professing the Gentoo religion, 9 who had been sworn according to the ceremonies of their religion under a commission out of Chancery, ought to be admitted in
evidence. It was afterwards regarded as an established rule "that not only Jews, but infidels of any country, believing in a God who enjoins truth and punishes falsehood, ought to be received as witnesses". Omychund v Barker also established that although the substance of the oath must be the same in all cases, it was obviously necessary to allow men to swear according to the particular ceremonies of their religion in such manner as they considered binding on their conscience.

Prospective witnesses could be examined before taking the oath for the purpose of determining their competency in relation to religious principle. However, the proper mode of such examination was not to question the witness as to his particular opinions, but to ask him whether he believed in a God, in the obligation of an oath, and in a future state of rewards and punishments.

Although Quakers had been permitted to make a solemn affirmation in civil proceedings, an oath was still required of them in criminal trials, and they might be punished for contempt of court if they refused to swear.

2. Bentham's Critique

In Bentham's view, the true sanction for securing the truthfulness of testimony was not the sanction of religion, but that of public opinion. "The same formulary, which undertakes to draw down upon a man the
resentment of the Deity in case of contravention, does actually, in the same event, draw down upon him (as experience proves) the resentment and contempt of mankind." An oath could have a powerful effect, but only where it invoked the force of public opinion. Unorthodox religion, and even atheism, were therefore improper grounds for the exclusion of testimony. The religious opinions of a witness should lead to the exclusion of his evidence only, perhaps, if his religion enforced lying in court. Bentham directed a number of arguments against the use of oaths. These arguments are chiefly to be found in *Swear Not At All* (1813) and in the *Rationale of Judicial Evidence* (1827).

(1) **False Testimony Could Be Punished Without Oaths**

Bentham's view was that "in the character of a security for good conduct in the present life, the religious sanction is incomparably less efficient than either the moral or the political".

(2) **The Existing Law Was Contradictory and Absurd**

Bentham observed, for example, that a Catholic as such was not excluded; he had to be a "popish recusant", that is to say, someone who had refused to take an appropriate oath renouncing his religion. A greater absurdity was that the door of the witness box was thrown open to anyone willing to lie about his ability to fulfil the religious requirement.
(3) Oaths Led to a Double Standard of Veracity

This was so because the effect of requiring an oath to support some assertions, such as those contained in testimony in court, was to provide a "mendacity-licence" in other contexts, such as pleadings, where an oath was not required to support assertions.18

(4) Oaths Weakened the Law

Bentham's fundamental objection was that the exclusion of testimony which resulted from insisting that witnesses be sworn weakened the efficiency of the law. He pointed out, for example, that the existing law in effect granted a licence "to all such crimes as from time to time it shall happen to any man to feel himself disposed to commit (other persons out of the question) upon the bodies, or in the presence, of any number of quakers".19

(5) Oaths Were Supported by Bad Theology

According to Bentham, oaths involved the unwarranted assumption not only that God would invariably punish an oathbreaker, but that such divine intervention could be compelled as the result of a human ceremony.20 Such ceremonies were, in any case, prohibited according to the precept "Swear not at all", ascribed to Jesus in Matt. 5:34. Even according to the Articles of "that modification of the religion of Jesus which is established in England", the use of oaths, though allowable, was not in any case enjoined.21
(6) **Oaths Were Ineffective**

Bentham argued that oaths were inadequate as security for the trustworthiness of testimony. The threatened divine punishment was of such an uncertain nature that the mere utterance of an oath could not be relied upon to indicate the honesty of the person taking it.\(^{22}\) That oaths were accorded little weight was shown by the regular violation of jurors' oaths when verdicts were reached which mercifully but knowingly under-estimated the value of stolen property so as to avoid a sentence of death.

Many and notorious are the occasions on which, in violation of their oaths, a set of jurymen, - for the purpose of screening a criminal from a degree of punishment to which the legislature has declared its intention of devoting him, - ascribe to a mass of stolen property a value inferior in any proportion to that which, to the knowledge of everybody, is the real one; and this under the eyes and direction of a never-opposing, frequently applauding, or even advising judge: so that here we have in perpetual activity as many schools of perjury as there are courts of justice, having cognizance of these the most frequently committed sorts of crimes; schools in which the judge is master, the jurymen scholars, and the by-standers applauders and encouragers.

(7) **Oaths Were an Instrument of Sinister Interest**

Bentham's opposition to oaths cannot be fully understood without seeing it in the context of his opposition to the sinister interests of the legal profession and to those of the established church.

The existing system of procedural law, an important feature of which was the requirement that testimony should be on oath, had been framed "not in pursuit of the
ends of justice, but in pursuit of private sinister ends - in direct hostility to the public ends". The sinister interests of "Judge and Co." had encouraged the growth of the "technical" or "fee-gathering" system. The first object of this system was to render the number of claims and defences, whether or not bona fide, as great as possible in order to increase the number of occasions for the payment of fees. But provided there was no loss of opportunity to earn fees, it was in the interest of judges to keep hearings short. On one pretence or another witnesses were therefore excluded. To hear too many would be "a work of trouble", and deciding a case after hearing too many would be even more troublesome.

To free himself from this trouble, [the judge] lays hold of the difficulty and converts the magnitude of it into a pretence for shrinking from it. To untie the knot would be too much trouble. In this pretence he finds a sword, with which he cuts it.

One obvious sword was the law which excluded witnesses who would not give testimony on oath.

Another reason for Bentham's opposition to the administration of oaths may well have been that he regarded the legal requirement as upholding the sinister interests of the established church. Bentham's destructive criticisms of religious doctrine make it probable that he was an atheist, though too cautious to acknowledge this openly. In manuscript writings on procedure and evidence, however, jurisprudence and religion are on several occasions linked in critical comments. For
In jurisprudence as in religion, swallowing absurdities is an exercise of faith, and faith is fortified by exercise.

Religion excepted, jurisprudence is the only science — pretended science, in which the use of reason continues to be openly discountenanced, in which the adherence to unkind barbarism has been commended as a duty: in which the privilege of thinking for one's self has been made the object of monopoly in the hands of those that are no more.

Priests and lawyers were criticised equally for self-interest:

Priests, if bound by any tie political or moral to maintain for true propositions relative to religion whatever may be their opinions concerning the truth of them, are the natural and implacable enemies of whatever is true in matter of religion. Lawyers whose emoluments in all shapes arise out of and are proportioned to the imperfections of the law, are the natural enemies of whatever is good in matters of law.

In the fabrication of Priest-made religion, even in the most pernicious forms, the predominance of sinister interest would scarcely be found more incontestable than it may be be [sic] seen to be in Judge-made law,...

If in the instance of such a multitude of religions, theology according to a universal and universally reciprocal observation as is reciprocally observed [sic] had no other end in view than the power exaltation and enrichment of the contrivers of them the priests, why should jurisprudence have any other view than the exaltation and enrichment of the lawyers?

In the light of all the arguments summarised above it is likely that Bentham would have preferred to see oaths abolished altogether. That was certainly the wish of the writer of an article in 1826, who wrote expressly to extend knowledge of Bentham's writings to those who would not read them in their original form. In his
conclusion he hoped that the "fruitless and pernicious ceremony" of the oath might be "for ever abolished".  

Bentham did believe, however, that if the oath ceremony was to continue it should be reformed so as to emphasise the force of political and moral sanctions as well as those of religion. In support of the religious sanction he suggested that in every court of justice there should be a painting or engraving of the death of Ananias and Sapphira, and that the oath should be administered by a minister of the established religion, or of the witness's own religion if it were different.

To emphasise the political sanction, tables stating the punishment for perjury should be set up in courts. While the witness was pronouncing the oath, an officer of the court should point with a wand to the appropriate provision. On special occasions, where the temptation to lie was thought to be particularly great and where the cause was an important one, a curtain should be drawn up to reveal "a graphical exhibition, representing a convict suffering the characteristic punishment for perjury".

The moral sanction was to be emphasised by changing the wording of the oath so as to make reference to the contempt or abhorrence of all good men in cases of mendacity.
3. An Overview of the Legislative Reforms

The reforms took place in two stages. During the first, attention was directed towards the relief of persons, such as Quakers, who had religious scruples against taking an oath. After some piecemeal reforms, complete success was achieved so far as civil actions were concerned with the passing of the Common Law Procedure Act 1854. The reform contained in that Act was extended to criminal trials in 1861. Attention then turned to the relief of those who refused to take an oath because they subscribed to no religious belief. These attempts succeeded with the passing of the Evidence Further Amendment Act 1869.

(1) From 1828 to 1861

In 1828 the Marquis of Lansdowne introduced in the House of Lords a law of evidence bill which extended to Quakers and Moravians in criminal cases the right to affirm which they already possessed in civil proceedings. The bill rapidly passed both Houses and received the royal assent on 27 June 1828.

In 1833 the statutory benefits which had been given to Quakers and Moravians were extended to Separatists, but there was as yet no general permission for evidence to be given on affirmation, even by those whose unwillingness to take an oath stemmed from religious, as opposed to deistic or atheistic, beliefs. Nevertheless,
a cautious parliamentary movement for reform developed, which was led by Lord Denman in the Lords and by Benjamin Hawes, member for Lambeth, in the Commons.

In the parliamentary session of 1838 Denman brought before the Lords a proposal that an affirmation should be substituted for an oath wherever a witness had conscientious scruples against being sworn. This was the effect of the second clause of a bill which he introduced, the first being a far less controversial provision that all witnesses taking an oath should be sworn according to the form which they regarded as binding on their consciences. Before putting the bill forward, Denman had communicated with all members of the House of Lords who filled, or had filled, judicial situations. With one exception he had discovered them to be in favour of the measure. He lacked, however, the general support of the common law judges. Opinion in the Lords was opposed to the second clause. Denman, seeing the strength of his opponents, was content to split the bill, having the first clause passed and the second made the subject of a separate bill. This latter bill was defeated in the Lords on 19 July. The more acceptable of the two bills passed both Lords and Commons and received the royal assent on 14 August 1838.

In 1839 a bill to provide a general right to affirm for those opposed on religious grounds to taking an oath was proposed in the Commons by Benjamin Hawes. It was
defeated by 125 votes to 93. Hawes made a second attempt with a similar bill in 1840. To meet earlier objections that a witness might make a pretence of religious scruples on the spur of the moment to avoid taking the oath, Hawes proposed elaborate safeguards. To obtain the benefit of the legislation a person must previously have obtained a certificate from a bench of two or more justices of the peace sitting in the area where he resided. He must afterwards have produced the certificate, have signed a register kept for the purpose, and have made a solemn affirmation and declaration to the effect that he believed the taking of any oath to be forbidden by his duty to God. This bill passed in the Commons by a majority of thirty-two, but it failed subsequently in the Lords.42

On 10 March 1842 Lord Denman presented a bill in the House of Lords for rendering Baptists' affirmations equivalent to an oath in courts of justice. The bill was read for a first time, but on 2 May Denman announced that he had since found that strong objections were entertained against making the measure applicable to Baptists alone. He stated that he had frequently been asked why this privilege should not be granted to other sects with the same scruples. He therefore begged leave to withdraw the bill and said that he would return to the general question in a day or two.43

On 6 June 1842 Denman moved the first reading of a
bill "to provide a general Form of Affirmation for all Persons who believe the taking of any Oath to be forbidden by their Duty towards God". The form of declaration provided for such persons included a declaration of belief "that the taking of any Oath is contrary to the Law of God". This was not, therefore, legislation from which an honest atheist could benefit. In the debate on the second reading the Lord Chancellor suggested that a committee should be directed to inquire into the general subject of the administration of oaths in courts of justice and elsewhere, and Lord Denman consented to withdraw the bill.  

When Denman next turned to the matter in Parliament, in 1849, it was to speak in support of a bill which had already passed the Commons. The object of this bill also was to relieve those who had a religious objection to taking an oath, and it contained provisions similar to those of the 1840 bill to ensure that objection to the administration of an oath could not be made on the spur of the moment. This bill, like its predecessor, was defeated in the Lords.

The question of examination on oath was considered in the Second Report of the Common Law Commissioners, published in the 1852-53 Parliamentary session. The Commissioners recited the arguments which they had heard for and against a general practice of insisting on sworn evidence and said that they were unable to agree on any
recommendation. They remarked, though, that sometimes an individual, not being a Quaker, Moravian or Separatist, refused from conscientious religious motives to be sworn. In such a case, that witness's evidence was lost and sometimes the individual was punished for contempt of court. They continued, "In principle, there does not appear to be any reason why the same regard which is had to the scruples of a body of persons should not be extended to those of an individual."  47

On 12 August 1854 the Solicitor General stated in the House of Commons that the Government would introduce a bill in the next session which would be founded on the Report of the Commissioners and which would make proper provision for witnesses who had a religious objection to taking an oath.

The bill, which in due course became the Common Law Procedure Act 1854, provided in clause 21 that if any person called as a witness should refuse from alleged conscientious motives to be sworn, it should be lawful for the court or judge or other presiding officer, upon being satisfied of the sincerity of the objection, to permit the witness instead to make a solemn affirmation or declaration. Thus far there was nothing to prevent an atheist from taking advantage of the legislation, but this was precluded by the form of the affirmation or declaration, which required the witness to declare that the taking of any oath was, according to his religious
belief, unlawful.

In the Lords there was a division on a motion by Lord St. Leonards to omit the clause, as the result of which the clause was retained by a majority of ten. In the Commons the bill was passed with no significant debate on the new power to affirm. 48

The result of this legislation was that different rules applied to the admissibility of evidence on affirmation in civil and criminal cases. The removal of this anomaly was proposed by a Criminal Proceedings Oath Relief Bill which was introduced with the approval of the Law Officers of the Crown by John Locke QC, member for Southwark, on 2 May 1861. The bill was passed in the Commons on 22 July. It was later passed in the Lords, where it had the support of Lord Denman and the Lord Chancellor, and received the royal assent on 1 August 1861. 49

(2) From 1861 to 1869

During the 1860s attempts were made, unsuccessfully until 1869, to legislate in order to permit those without religious beliefs to give evidence on affirmation.

On 21 February 1861 Sir John Trelawny, member for Tavistock Borough, obtained leave to bring in a bill which provided that a person should be allowed to affirm if he stated that an oath would not in his judgement add to his obligation to speak the truth. By a majority of
seventy it was resolved that the bill be put off for six months, thereby ensuring that it would be lost through the expiration of time. In the following year Trelawny brought in a similar bill, but for lack of time it proceeded no further than a first reading. He failed in a similar attempt in 1863.

The next move to achieve this reform was not made until 26 February 1869 when George Denman brought in a bill for further amendment of the law of evidence. One of its main provisions was, as he described it in moving for leave, that parties should not be deprived of the evidence of witnesses through some defect in the witnesses' religious belief. On this occasion the proposal for reform had the support of the Attorney General, Sir Robert Collier. The bill was read a second time without a division. No argument at all appears to have been directed against the proposed amendment of the law concerning the right to affirm. The bill experienced a similarly smooth passage in the Lords, where it had the support of the Lord Chancellor, Lord Hatherley. The bill as originally drafted had allowed a witness to avoid the oath where he simply objected to taking it. This was amended in committee so as to require him to satisfy the judge that taking an oath would have no binding effect on his conscience. In this form the legislation received the royal assent on 9 August 1869.
4. Influences on the Reforms

Why had religious considerations ceased to be a ground of incompetency by 1869? I shall argue that this development came about as a result of the convergence of two lines of development: one of religious scepticism, the other of social stability. Sceptical thought on religious matters can be seen at least as early as the second half of the eighteenth century in the writings of Gibbon and Paine. Thereafter it can be traced through the early and middle decades of the nineteenth century. It extended, of course, beyond that period, but after 1869 was of no further significance for the question of competency. But until the 1860s it was difficult for members of Parliament to support legislation which might seem to weaken the connection between the state and Christianity. In the earlier decades it was even difficult to support measures which might seem to weaken the position of that form of Christianity represented by the established Church.

The reason for this was that until at least the 1850s there were substantial fears for the stability of society among the propertied classes. Christianity, particularly in its established form, was seen as a social cement, and any attempts at reform that might diminish its influence were opposed. The sanction of oaths, which were administered not only in courts of law but as a condition of entry to many positions of
responsibility, was seen as an essential part of this social cement. By the late 1860s, however, a change in outlook had developed. Society was seen to be far more stable; the need for established religion, even any religion at all, as a social cement appeared to have diminished. Oaths appeared to be less important, and so the reforms could be made. Probably as a result of this change in the way society was viewed, there developed a change in perception on the part of some convinced Christians who now developed a distaste for the compulsion of consciences involved in the administration of oaths under the unreformed law.

It can be seen from the overview of the reforms set out in section 3 above that during the period 1828-61 there were four reforms: (a) the 1828 grant to Quakers and Moravians of the right to affirm in criminal cases; (b) the 1833 extension to Separatists of the rights already granted to Quakers and Moravians; (c) the general grant in 1854 of the right to affirm in civil cases to persons with religious scruples against taking an oath; (d) the extension of that right in 1861 to criminal cases.

The Acts of 1833 and 1861 seem unlikely to assist an inquiry into the subject of this thesis. The 1833 extension, while perhaps of interest to historians of English nonconformity, appears to have no special significance for the development of the law of evidence. And
whilst an extension of competency from civil to criminal proceedings aroused great controversy in the period which preceded the Criminal Evidence Act 1898, no controversy was aroused over the very much more limited proposals enacted in 1861.

By contrast, the 1828 legislation is potentially of significance, occurring as it did in the year of Brougham's reform speech and against a background which featured the publication in the previous year of Bentham's *Rationale of Judicial Evidence*.

But the 1828 Act stands in isolation from the later reforms of 1854 and 1869. The legislation of 1854 was quite different in kind from that of 1828. Unlike the earlier Act, its object was to grant a general right to affirm, albeit confined to those who wished to do so on religious grounds, and it generated a substantial controversy. The 1869 Act which extended the general right to atheists and those who would later be called agnostics was similarly controversial. Despite the difference in scope between the legislation of 1854 and that of 1869, the arguments employed differed very little and I shall therefore consider the influences on these reforms as part of the development of a general right to affirm.

This section is divided into three parts. The first deals with the 1828 legislation. The second deals with the development of a general right to affirm. The third deals with the question of Bentham's influence on the
reforms as a whole.

(1) The 1828 Legislation

At the beginning of the period examined in this thesis irreligion, which might amount to atheism or take some less extreme form, could excite great hostility. This was at least partly due to its connection with the radical movement, originating with Thomas Paine and Robert Owen, which had developed in Britain in response to the French Revolution.\(^54\)

Two incidents show the emotions that could be excited. The first occurred in 1826 when Joseph Hume wished to present to the House of Commons a petition which he believed to be that of Robert Taylor, a clergyman of the established church. The petition declared that the petitioner, after a most mature consideration, found himself unable any longer to give credence to the doctrines of Christianity, and that he had in consequence resigned his cure and now declared himself to be a deist. The petition then stated that in various instances deists had been deprived of legal protection because they could not take an oath according to the prescribed forms. The petition concluded by reciting that "your petitioner considers the law, as it now stands, is injurious to the fair and equal administration of justice, and is at variance with the interests of the State, inasmuch as it allows persons guilty of atrocious crimes to escape with
impunity, and deprives your petitioner and others of justice".

In presenting the petition, Hume said that the rights of a British subject and the cause of civil and religious liberty were deeply concerned. He argued that it was inconsistent to refuse the oath of a person who disbelieved in Christianity, but at the same time to receive the oaths of those who were Hindus, sworn according to the form of their faith. The profession of a belief in God was surely sufficient for the purpose of taking an oath in a court of justice. Every man, he asserted, should be allowed to enjoy liberty of conscience uncontrolled by civil disability.

In the debate that followed, Mr Serjeant Onslow said that Hume's speech had been "such as should never have been addressed to a British House of Commons", and he asked what form of oath could bind a man who openly professed no creed. Onslow's opinion was shared by at least one of the younger members, as the remarks of the member for Beverley, Charles Batley, show. He intervened to say that a person who did not believe in our Saviour ought not to be tolerated in a British House of Commons, and that it was astonishing that Hume had not been interrupted in his speech and an objection taken to his arguments before they had been suffered to proceed. Sir Edmund Carrington expressed his horror that any gentleman, educated in a Christian country, could be found to
entertain the doctrine stated in the petition. The member for Norwich, William Smith, to some extent redressed the balance by saying that the interests of justice were much more likely to suffer from the oath of a man who swore, though unbelieving, on the gospels than from that of a man who, though denying the gospels, acknowledged the existence of a God. Yet when Hume later moved that the petition be printed so that members should be acquainted with its objects he was met by a general cry of "No, no" which forced him to withdraw the motion.55

The second incident took place at the Old Bailey in November 1833. On that occasion a man called Henry Berthold was on trial for theft. He called as a defence witness a man who, when handed the Bible to be sworn, declared that he had no belief in its contents and that he was an atheist. This observation evoked "strong marks of disapprobation and disgust from all parts of the court". Having established that he was unable to take the oath, he retired "amidst the strongest manifestations of disgust and execrations from all present". Another defence witness presented the same problem. According to the report, "It was some minutes before silence was produced, so general were the expressions of execration at the declaration and demeanour of the witness, who left the court amid hisses and loud cries of 'Turn him out', in which several of the jury joined."56

The violence of opinion illustrated by these two
incidents might have been expected to create some difficulties for Lansdowne's bill of 1828. It is likely that there were four reasons why opposition was not encountered.

(a) It was a government bill. By contrast, the member who had tried to present the petition and who had spoken in support of deists in 1826 had been notorious for his radical views and may, as Batley's remarks suggest, have been regarded himself as a deist, if not worse.

(b) The extent of reform was very limited. It applied only to Quakers and Moravians - persons who were undoubtedly Christians. In addition, the bill merely increased the extent of a reform that had already been conceded to them in civil cases.

(c) A persuasive case could be made that public safety would benefit from this reform. In his speech in support of the bill, Peel emphasised that it was not intended as a boon to Quakers and Moravians - they had not wanted that - but "as a means of rendering them competent witnesses for the purpose of benefiting thereby the community". Lansdowne had made the same point at the committee stage of the bill in the Lords. During the period 1821-27 crime had substantially increased and contemporaries were aware of this. In February 1828 The Times summarised a pamphlet, recently published by Sir Eardley Wilmot, on what the newspaper described as "the
awful subject of the increase of crime in England". In April of that year the same newspaper noted a return printed by order of the House of Commons which showed that in the period 1821-27 there had been an increase in convictions outside London and Middlesex of between one half and one third, while within those areas convictions had increased by over one half.59

(d) The bill could be seen as a tactical device to further Catholic emancipation. By 1828 the success of this cause seemed only a matter of time. Nevertheless, it still seemed that anti-Catholics were too strong to be overthrown by direct assault, and that success was more likely to be achieved by indirect methods. One of the tactics adopted by supporters of Catholic emancipation was to press for repeal of the Test and Corporation Acts to the extent that they affected Protestant dissenters, for it had become a familiar argument of opponents of emancipation that Catholics should not be put in a better position than Protestant dissenters.

In accordance with this policy Lord John Russell, backed by a powerful Nonconformist pressure group known as the United Committee, introduced a bill in February 1828 for the repeal of the Test and Corporation Acts to the extent that they excluded Protestant dissenters from office. Wellington and Peel at first opposed it; they then tried to compromise, and the bill was eventually passed with very minor amendments later that year.60

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Lansdowne himself was much engaged at this time in the cause of Catholic emancipation and his evidence bill may have been intended as part of the project of Protestant emancipation designed to precede that of the Catholics.

Lansdowne's bill may therefore have been initiated, and could certainly have been supported, for several reasons. Might the influence of Bentham have been one more? The Rationale of Judicial Evidence had been published in 1827, and Lansdowne could have been no stranger to Bentham's ideas. His father, the second Earl of Shelburne and first Marquis of Lansdowne, had been a friend of Bentham, and it was probably on the latter's advice that he had chosen Edinburgh rather than Oxford for his son's further education. After Edinburgh, the young man had proceeded to Cambridge, whence in 1802 he had set out on the grand tour in the company of Etienne Dumont, Bentham's translator and redactor. The real difficulty with the suggestion that the 1828 legislation might have been influenced by Bentham's ideas is the minimalist nature of the reform. With such good reasons already available to account for the introduction of the bill and for the support that it gained, it seems superfluous to look beyond those reasons to the much wider scope of Bentham's vision, or to that of Brougham who, in his speech on law reform on 7 February 1828, had urged that any person who believed in the existence of a God and a
future state of rewards and punishments should be able to give evidence in civil and criminal proceedings. 63

(2) The Development of a General Right to Affirm

This part is subdivided. The first subdivision deals with the growth of religious scepticism, and the second with the growth of social stability. In the third, I shall attempt to show that the contributions to the debate inside and outside Parliament support my contention that a general right to affirm emerged as the result of a convergence of religious scepticism and social stability.

(a) The Growth of Religious Scepticism

Thomas Gisborne, 64 writing at the end of the eighteenth century, thought that religious scepticism had made significant progress in the higher and middle classes of society. He attributed this to several causes. Some, such as travellers or historians, had compared different societies and had concluded that all religions were alike. In their view, the Supreme Being had enabled mankind to discover by the power of reason the plain precepts of morality; the object of all religions, albeit encumbered with fanatical rites and doctrines, was to inculcate those precepts. Others thought that religion of every kind was superstition, and that though certain modes of conduct ought to be followed from principles of honour and for the good of society, it was absurd to
judge that men were bound to act thus by reference to the supposed will of a deity. Some had become unbelievers through the study of philosophy. Others had persuaded themselves of their unbelief through a desire to pursue a way of life that was incompatible with Christian beliefs. Others had reached a stage of disbelief through immersion in political, commercial or professional business, or through "a continued succession of dissipated amusements".65

By 1845 a writer in the British Quarterly Review66 felt able to state that a large number of educated men had come to reject Christianity, considered as a divine revelation, and that only a small minority of the educated and upper classes, including perhaps a fifth of the House of Commons, were earnest and convinced adherents of Christianity. The 1830s, 1840s, and 1850s saw the development of what John Morley called "dissolvent literature",67 and rational Christian writers such as Priestley and Paley may also have helped to spread an attitude that was essentially secular and pragmatic.68

The lives of individual men and women show the doubts that were being felt. For example, in 1863 James Fitzjames Stephen indicated in private correspondence that he was supported by the belief that God ordered all things. By 1879 his correspondence showed that he had reached an agnostic position. "The whole theory about the relations (if any) between God (whatever he may be) and man is so
hopelessly obscure that one is simply reduced to silence." But he worried about the implications of this. "However it may go with individuals I feel much alarmed at the spread of my own opinions. I do not doubt their truth but I greatly doubt the capacity of people in general to bear them." 69

Tractarianism, before losing its original impetus in the late 1840s, had strengthened the defences against scepticism. 70 But by the 1860s a change in intellectual spirit could be seen. In 1868 Carlyle wrote in his Journal, "An immense development of Atheism is clearly proceeding, and at a rapid pace, and in joyful exultant humour, both here and in France." A year later he made the same observation:

The quantities of potential and even consciously increasing Atheism, sprouting out everywhere in these days, is enormous. In every scientific or quasi-scientific periodical one meets it.... Not only all Christian churches but all Christian religion are nodding towards speedy downfall in this Europe that now is.... France is amazingly advanced in that career. England, America, are making still more passionate speed to come up with her, to pass her, and be the vanguard of progress.

A similar entry appeared in 1870. 71

It was in connection with the campaign to extend the right to affirm to those without a religious belief that we first find organised support outside Parliament. When Trelawny was preparing to introduce the first of his bills in 1861, George Jacob Holyoake 72 set up an "Evidence Committee" to gather arguments against the existing
law. He announced a policy, based on Bentham's ideas, of carrying the bad law into operation until all the mischief it could produce had an effect on the legislature. He even went so far as to institute a collusive action which was designed to fail because of the law requiring testimony on oath. However, this scheme was forestalled by reality in the case of Madan v Catanach, a case decided in November 1861 which was given considerable publicity and which became the subject of a leading article in The Times.  

The case was heard by the Court of Exchequer, sitting in banc on appeal from a decision of the Rochdale County Court. The plaintiff had issued a plaint in detinue for a pianoforte which had belonged to his wife before her marriage to him. In the County Court Mrs Madan had gone into the witness box to give evidence in support of the claim. She had been about to take the oath when she had been stopped by the advocate for the defendant, who had then asked her about her religious beliefs. It had become clear that she believed neither in a deity, nor in a future state of rewards and punishments. The judge had thereupon ruled that she was not competent to give evidence. In the Court of Exchequer it was argued that the decision of the judge had been wrong, and that such a circumstance ought not to have deprived her of her right to give evidence, but should have affected only her credibility. The Court of Exchequer dismissed the appeal.
without calling on counsel for the respondent. But the extent of organised support for secularism is shown by the fact that Mrs Madan obtained support from two secular societies: the Rochdale Secular Society funded her appeal, and the Manchester Secular Society raised a subscription for a new piano.

The advance of secularism was both illustrated and encouraged by the publication from the end of the 1850s of more books encouraging a secular, or at least a critical, outlook. Mill's essay *On Liberty* was published in 1859. H.T. Buckle's *History of Civilization in England*, showing that the growth of civilisation in various countries depended on the interrelation of climate, food production, population and wealth, was published between 1857 and 1861. 1859 saw the publication of Charles Darwin's *On the Origin of Species*. In 1860 a collection of broad church essays entitled *Essays and Reviews* was published. This was followed in 1861 by J.W. Colenso's commentary on *St. Paul's Epistle to the Romans*, in which everlasting punishment was denied, as well as much orthodox sacramental theology. William Lecky's *History of the Rise and Influence of Rationalism in Europe* was published in 1865.

Owen Chadwick summed up the intellectual changes of the 1860s in this way:

The forties was the time of doubts, in the plural and with a small d; turmoils of Arthur Hugh Clough or John Sterling or young James Anthony Froude. In the
sixties Britain and France and Germany entered the age of Doubt, in the singular and with a capital D. I have shown that a literature favourable to religious scepticism had been developing from the 1830s; Gibbon and Paine had been writing earlier still. Yet it was not until the 1860s that people who were sceptical of the claims of revealed religion began generally to be less reluctant to reveal their opinions. The believers had effective weapons in the criminal law. But pressure could be exerted in less direct ways. One of the reasons why Mark Pattison was rejected in 1851 as Rector of Lincoln College may have been that his orthodoxy was suspect. Benjamin Jowett encountered similar difficulties in securing advancement. As late as 1863, Edward Bowen referred to the "notoriety and odium" which opposition to religious dogmatism, especially the dogma of biblical infallibility, incurred.

Another reason for reticence may frequently have been that a person who was sceptical of religious beliefs had, as did George Eliot, "too profound a conviction of the efficacy that lies in all sincere faith, and the spiritual blight that comes with no-faith, to have any negative propagandism". J.S. Mill described the 1850s as a period "in which real belief in any religious doctrine is feeble and precarious, but the opinion of its necessity for moral and social purposes almost universal". A similar view was taken by J.F. Stephen as late
as 1879,\textsuperscript{84} and by Henry Sidgwick in 1881.\textsuperscript{85}

(b) The Growth of Social Stability

What was needed before the rights of atheists could be acknowledged was a sufficient degree of social stability to diminish the need for religion to function as a social cement. Until the 1860s this was lacking.

(i) The social function of religion.\textsuperscript{86} By the beginning of the nineteenth century a close connection between religion and civil government had been a commonplace of political thought in England for at least three hundred years. Hooker, writing in the sixteenth century, had recognised what he called the "politic use of religion".

Men fearing God are thereby a great deal more effectually than by positive laws restrained from doing evil; inasmuch as these laws have no farther power than over our outward actions only, whereas unto men's inward cogitations, unto privy intents and motions of their hearts, religion serveth for a bridle.\textsuperscript{87}

In particular, the use of oaths to ensure order and stability had for long been recognised. For example, in 1637 the Earl of Manchester declared in the Star Chamber:

Now, my lords, your lordships well know, that every man's state, every man's credit, his possessions and livelihood, much depends upon oaths; for if not upon the jurors, yet the witnesses in any case of evidence, be it for matter of title, or matter of fact ... if they be caused to swear against their consciences, and that tye be taken away whereby they stand obliged before God and men to give right to the truth, no man is sure of any thing that he enjoys, nor can expect to get any thing that is unjustly detained and withheld from him in the proceeding of any court whatsoever.\textsuperscript{88}
In the judgement of Hale CJ, Christianity was "parcel of the laws of England", and to say that religion was a cheat was to dissolve all those obligations whereby civil societies were preserved. According to Lord Raymond CJ, "whatever strikes at the very root of Christianity, tends manifestly to the dissolution of the civil government".

During the eighteenth century, however, Christian political thought concentrated less on the social function of religion and more on themes made significant by the Revolution Settlement of 1688-89, such as the origin of political authority and obligation, the importance of representation and consent, and the nature of political, civil and religious rights. This emphasis was changed as a result of the fears for political stability aroused at the end of the century by events in France. These encouraged a reversion to the old theme of the social function of religion in preserving order. So, for example, on the eve of the French Revolution Bishop Tomline argued that civil government in general was ordained by God, and that a man sinned who, by word or action, weakened the particular form duly established and justly administered in his community.

It is allowed even by atheists, that society derives the greatest advantages from the influence of religion.... And of all religions the Christian is indisputably the best adapted to restrain the turbulent passions, and control the unruly appetites, of mankind. Duty to God, and just submission to our earthly Governors, are in their own nature, and by the doctrines and tenor of the Gospel, as closely
joined together, that they cannot, without the utmost violence and most heinous guilt, be put asunder.

A theory developed that the revolution in France was the result of a conspiracy of philosophes, freemasons and others to destroy religion and government. This conspiracy theory, the state of the war with France, the invasion scares and food crises ensured that emphasis remained on the social function of religion during the years after 1789. The political and religious thought of the first three decades of the nineteenth century were dominated by the same idea, for even after 1815, post-war distress and disturbances kept the idea in a prominent place. Vivid examples can be found in the writings of Hannah More. In her Christian Morals, first published in 1812, she emphasised that it was

> no less our interest, than our duty, to keep the mind in an habitual posture of submission.... If the barbarian ambassador came expressly to the Romans to negotiate from his country for permission to be their servants, declaring, that a voluntary submission, even to a foreign power, was preferable to a wild and disorderly freedom, well may the Christian triumph in the peace and security to be attained by a complete subjugation to Him who is emphatically called the God of order. [Original emphasis.]

She regretted the decline in the practice of family prayers, remarking that this institution could be a bond of political, as well as moral, union. It was the only occasion on which rich and poor in a household met together and, "[i]n acknowledging their common dependence on their common Master, this equality of half an hour would be likely to promote subordination through the rest
of the day". The interests of the superiors would be promoted by periodically reminding dependents of the latter's duty to God, which necessarily involved every human obligation. 92

Fear of revolution remained a factor in political and religious thought until after the collapse of the Chartist movement in 1848. In 1844, for example, the Bishop of Ripon said of a Chartist demonstration that it was mainly prompted not "by the urgency of temporal want", but by "principles of discontent and insubordination" which had been "too readily imbibed by hearts undisciplined by religious restraints". By contrast, "it was equally evident that just in proportion as the sound doctrine and discipline of the Church were inculcated did respect for the law and a patient and exemplary submission to privations generally prevail". 93

(ii) A half-century of instability. The Gordon Riots of 1780 had already shown what a mob could do in the centre of London, and the French Revolution produced among propertied Englishmen an intense fear of mob violence. For example, when a Westminster mob became out of hand at an election in 1818, Greville noted that it "displayed the savage ferocity which marked the mobs of Paris in the worst times". Sir Samuel Romilly observed the result of this fear:

If any person be desirous of having an adequate idea of the mischievous effects which have been produced in this country by the French Revolution and all its attendant horrors, he should attempt some reforms on
humane and liberal principles. He will then find not only what a stupid spirit of conservation, but what a savage spirit, it has infused into the minds of his countrymen. Although this attitude did not prevail in extreme form for much more than nine years after 1815, instability continued for different reasons.

The fall of Charles X of France in 1830 caused considerable excitement in England and brought about a revival of interest in parliamentary reform. During autumn 1830 troubles broke out in the agricultural districts of southern England, and many towns in the north were disturbed by strikes. In January 1831 a writer in the Quarterly Review thought that the "appellations of Whig and Tory" should be dropped; the struggle was no longer "between two political parties for the ministry, but between the mob and the government, between the conservative and subversive principles, between anarchy and order". In the debate on the first reform bill Macaulay appealed to the Commons to "[s]ave the multitude, endangered by their own ungovernable passions". He thought the danger terrible, and the time short. When the Lords rejected the bill in October 1831, riots broke out in Derby and Nottingham, and there were lesser disturbances at Leicester, Tiverton, Yeovil, Blandford, Sherborne, Exeter and Worcester. The greatest disorder broke out at Bristol almost three weeks after the rejection of the bill. A mob sacked the Bristol Mansion House,
broke into prisons, and burned a number of buildings including the bishop's palace. Troops had to be used to restore order.\textsuperscript{97}

After the passing of the Reform Act in 1832 stability remained elusive. By 1838 ideas of violent revolution were gaining ground in the Chartist movement, and the threat to stability from this source was a cause of anxiety for the next ten years.\textsuperscript{98}

Behind the unrest during these decades was a pattern of economic crises which peaked in 1837 and 1842, leading contemporary observers to deplore a divided society, where a cash nexus had taken the place of older patterns of social relationships. "Distress after 1815 had quickened the pace of English politics; in the late 1830s and early 1840s it dominated the whole mood of the nation."\textsuperscript{99} 1843-50 was a period of revival despite a further financial crisis in 1847. The mid-1840s saw an economic boom based largely on the rapid expansion of railways. This expansion stimulated demand for the products of other industries such as coal, iron and engineering; it also permitted the cheaper movement of goods, and so widened local markets.\textsuperscript{100} A sense of greater tranquillity emerged between 1848 and 1851. The Times, for example, commenting on the size of the crowds at the Great Exhibition, observed that only a few years before such numbers would have been regarded as most dangerous to the safety of the state, yet there had been
no disorder and very little crime.\textsuperscript{101} Perhaps Mill's comment in the 1850s on the need for religion\textsuperscript{102} shows that there could not immediately be confidence that the new prosperity and stability would last. But by the 1840s some Christians were beginning to criticise the use of their religion as a social cement. Charles Kingsley, for example, complained that it reduced the Bible to a "mere special constable's hand-book, an opium dose for keeping beasts of burden patient while they were being overloaded".\textsuperscript{103} In the event, the need for the restraining influence of religion diminished, for in almost every respect the 1860s "seemed either to confirm assumptions of prosperity based on the boom of the fifties or to promise expectations of increased prosperity for the future".\textsuperscript{104}

\begin{center}
(c) The Contributions to the Debate
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In this subdivision I shall attempt to show that the contributions to the debate displayed on both sides an overwhelming concern for the stability and security of society. This was the underlying emotion and the standpoint from which many of the arguments were expressly directed. Arguments from other standpoints did appear, but they played only a minor part. This common standpoint made it probable that when society could be seen to be sufficiently secure and stable, there would be nothing to stand in the way of an accommodation with secularism. The
contributions to the debate therefore support my contention that it was the convergence of religious scepticism and social stability that led to the extension of a general right to affirm.

Concern for the stability and security of society was at the root of the arguments of supporters of reform who maintained that the community would benefit from having more evidence available and that the exclusion of evidence weakened the efficiency of the law.

There are many examples. In a Commons debate in 1839, Daniel O'Connell, member for Dublin, recalled a case in which he had been counsel for a man accused of "a horrible crime imputed to him by a female". Only the evidence of a Quaker who had been prepared to violate his conscience had enabled the accused to establish an alibi and secure an acquittal.¹⁰⁵

In 1840 Henry Warburton, member for Bridport, said in a Commons debate that in ninety-nine cases out of a hundred, the testimony in question was for the benefit of other parties. The House was not legislating for individuals but for the public generally.¹⁰⁶

In 1842 Lord Denman, moving the second reading of his bill, stated that his grievance was "the exclusion of Truth - an inevitable consequence of the rejection of such witnesses as are convinced that they are forbidden by the word of God to take an oath". He then pointed to the consequences of excluding evidence: the most just of
debts might be lost to a creditor, property might be unjustly taken away and, above all, crime was encouraged because criminals escaped justice — and this at a time when crime was increasing. Sydney Smith, in a letter written to Denman on the subject of the bill, commented:

Your great difficulty is akin to that of proving that two and two are equivalent to four. All that the Legislature ought to enquire is, whether this scruple has now become so common as to cause the frequent interruption of justice. This admitted, the remedy ought to follow as a matter of course. We are to get the best evidence for discovering truth — not the best we can imagine, but the best we can procure — and if you can't get oaths you must put up with affirmations as far better than no evidence at all; but one is ashamed to descant on such obvious truths.

In the debate in May 1854 on clause 21 of the bill which in due course became the Common Law Procedure Act 1854, Lord Cranworth, the Lord Chancellor, said that to ask why persons were to be relieved from the obligation of taking oaths was to put the question upon a most absurd foundation. The person to be considered was the party who required the testimony of the witness. It was entirely unimportant to the witness whether his testimony was received or not; but it was a serious misfortune to a tradesman suing a debtor if the only person who could prove the debt was a very honest man, who neither was nor had been a Quaker, a Moravian, or a Separatist, who might be a member of the Church of England, a Baptist, or connected with some other persuasion, but who entertained conscientious scruples against taking an oath, and whose

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evidence, therefore, could not be received. Ought the plaintiff to be punished because a court of law refused to take his witness's evidence, except on oath?\textsuperscript{109}

In these and similar arguments there appears one major concern: the security of property. This was threatened by a law which enabled just debts to be avoided or property wrongly taken away, and which assisted criminals to avoid conviction. It is not surprising to find this concern reflected in the debates. As opportunities for trade increased from the mid 1840s onwards, so did opportunities to default on debts, and those engaged in commerce can have had little patience with laws which deprived them of the means to establish their just claims. At the same time, published statistics appeared to show an ever-increasing rise in crime. This had been noted earlier in the century, but concern is particularly evident in the 1840s and 1850s, possibly because, as a result of the railway boom of the mid 1840s and the more general expansion of the 1850s, greater prosperity had increased the number of potential victims.\textsuperscript{110}

Other arguments were directed towards establishing that security would not be diminished by the absence of an oath. For example, in a Commons debate in 1839 Dr Lushington expressed the belief that the main-stay with respect to the lower class of witnesses was not so much the oath that they took, as the fear of the consequences if they were proved guilty of perjury.\textsuperscript{111}
A further argument was that the existing law did little to support credibility. Thus Sir John Trelawny argued that if an honest unbeliever stated that he was such, he was credible, but the law disbelieved him. Yet if another unbeliever said that he was a Christian, he told a lie, but his evidence was received.112

The opponents of reform laid equal emphasis on the security and stability of society. Of the arguments marshalled against reform in the period before 1854, the ones most frequently used were that an extension of the right to affirm would weaken the weight of evidence, and that society would be weakened also. A connection was sometimes seen between the two. Thus Henry Goulburn, member for Cambridge University, argued in 1839 that an unwilling witness would be able to reduce the weight of his testimony by electing to affirm instead of taking the oath. He might thereby affect seriously the rights, character and property of individuals.113 In the same debate, Sir Robert Peel's speech showed a fear that the value of evidence would be reduced, and the administration of justice impeded, if the bill were to be passed.114

Similar fears were expressed by Brougham in 1849. Contrary to his views expressed in 1828, he argued, when opposing a bill to extend the right to affirm, that affirmations did not encourage truth to the same extent as oaths.115 He had had experience of persons - Irish
persons were an example - who would tell an untruth without a scruple, but who would refuse to swear to it. He had seen a man staggered when it had been put to him, after some careless assertion, "Upon your oath will you say so - upon your oath?" In the case of those allowed to affirm, however, such a form of examination was never used. "Upon your affirmation will you say so?" did not have the same effect and was never used in pressing a witness. Admittedly, Quakers, Moravians and Separatists had already been exempted. But, he said, there was a great difference between a man who merely declined to take an oath and a man who was bound to declare as well that he belonged to one of these sects. The bill tended to take away one at least of their securities against false testimony.

Brougham also argued that to extend the power of affirmation would involve the evasion of all law. If a lawgiver were to listen to all the objections of private individuals, however much respected they might be, there would be no end to the evasion of law. Another man would say that it was against his conscience to pay his debts because by doing so he would rob his children, who must then either starve or go to a workhouse. Another would refuse to give evidence at all, either on oath or affirmation, because it would injure his neighbour whom he was commanded to love.

This part of Brougham's argument reflected the
fears of the staunchest opponents of a general right to affirm: it would, in some way, lead to the weakening of society. For example, Lord Ashburton, arguing in 1838 against a bill proposed by Lord Denman, said that the lives and property of the people would be less secure under "so loose a mode of admitting evidence". In a debate in the Commons, Sir Robert Inglis, member for Oxford University, thought that if a bill granting a general right to affirm were to be passed, within a year there would be an attempt to get rid of oaths altogether. But no civilised society, he alleged, had ever been kept together without these solemn appeals to God: in fact, belief in God had in some less civilised countries been kept alive by them. There may have been many members of Parliament who believed, as did Lord Abinger, that oaths were in all countries part of the system for administering justice, or who feared, like the Bishop of London, that a general extension of the right to affirm would lead to the abolition of oaths in courts of justice, and so to the removal of a natural security against misdecision and injustice.

In 1854 Lord St Leonards defended the existing law which favoured Quakers, Moravians and Separatists on the basis that members of those sects had at least some ties with the community that made their testimony more likely to be truthful. There was security, he argued, in that "the witness allowed to affirm was a man who, in the face
of the world, and to the particular knowledge of everybody around him, had joined a particular sect, and they knew that he was influenced, or affected to be influenced, by religious motives in objecting to an oath". But the bill then under consideration would enable any man, upon his own mere unsupported assertion that he had a religious scruple, to avoid the taking of an oath.\textsuperscript{119}

When the wider question of extending the right to affirm to atheists was being debated, similar considerations were taken into account. Opponents of reform argued that the absence of the oath would allow unacceptably weak evidence to affect the outcome of the case, or, worse still, that the removal of oaths would loosen the bonds of society.

In 1842, for example, The Times realised that the limited reforms proposed by Lord Denman might lead to an extension of competency to atheists. A leading article on 15 June presented a careful argument confined to the effect that such a reform would have on the weight that could be given to testimony.

The writer began by acknowledging that "we are far from wishing to exclude from our courts the evidence of Jew, Mahometan, or Hindoo". What should be excluded was the least credible evidence. The atheist stood on quite a different footing from those of non-Christian faiths and "we cordially assent to the caution which refuses any judicial weight to his statement". An oath was plainly
necessary to ensure that the mass of professing Christians gave evidence that was true — "a fact which is not less true because it is humiliating". How could it be safe to remove that sanction in the case of others who had torn themselves free from the authority of those motives which sway the mass of men to follow truth and honesty?

They are incapable of fulfilling those conditions which the law exacts as a security for truth; and they proclaim themselves uninfluenced by those great motives, the admission of which, almost alone, makes other men credible. We have not the same reasons for trusting even to their word which we have in the case of other men, and they are incapacitated from giving us any more powerful voucher. Call it weakness, ignorance, superstition — call it what names you will — it is absolutely certain that the mass of men, even of notorious liars, if you choose to take such, do shrink from perjury, and that, not from a fear of fine or imprisonment, but from a consciousness, more or less distinctly brought out, 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 — their kissing of thumbs — their taking the Testament in the wrong hand — their evasions and equivocations still show, wretched and senseless as they are, a sense of the supernatural power which they are provoking — an awe of that which they so miserably understand — a basis of fear, if not of goodness, on which society draws much, and might draw more, protection against falsehood.

Arguments on these lines were being used in Parliament twenty years later. Thus in 1861 the Solicitor General, in opposing a bill introduced by Sir John Trelawny, said that the interests of society required that persons without religious conscience and belief should not be accepted as witnesses in courts of justice. In the same debate Sir William Heathcote,
member for Oxford University, allowed that many men would
give their evidence as truly unsworn as sworn. But
equally, he said, it was true that the administration of
an oath made most people more careful and accurate in
their statements than without it. There were also many
who believed that their obligation to tell the truth
depended solely on the complete and formal administration
of the oath. He observed that so recently as 1858 an Act
had been passed to enable the House of Commons to swear
witnesses before committees, it being felt that committ­
ees of the Lords secured more accuracy from their
witnesses because they were always sworn. 121

One of the most vigorous exponents of the "bonds of
society" argument was Lord Robert Montagu. In the 1861
debate he drew a picture of atheists as persons who had
deliberately rejected Christianity. For him, such people
had been presented with a choice which could equally well
have been exercised in favour of religion. There is even
a suggestion that atheists were insincere in their dis­
avowal of religious belief. Trelawny, referring to the
fact that non-believers in India were allowed to affirm,
had argued that the right should be extended to English
subjects. 122 Montagu replied:

There, no doubt, the Natives were permitted to affirm
instead of being sworn; but the affirmation of a
black man was taken at what it was worth, and would
not be weighed against a white man's oath.... It was
one thing to allow these persons, who clung most
tenaciously to the scraps and shreds of belief handed
down to them by their forefathers, to make affirma­
tions in courts of justice, and quite another to
allow those persons who had been taught the Christian religion and knew all its doctrines, and had learnt from childhood about God, but who had deliberately discarded and rejected them and professed to disbelieve in God to do the same.

For Montagu, the religious sanction was fundamental to the worth of any testimony because religion was fundamental to morality:

What is honour? What is honesty without belief in God? I challenge any honourable Member to define these terms. He cannot do so without assuming the presence of a God who orders all the events and arranges all the details in the world. Honour and honesty, apart from religion, were nothing but pride and self-interest.

Amongst other things, religion was a social cement without which society would fall apart. "A consistent Atheist must be a bad citizen and capable of every Machiavellian scheme and falsehood." 

John Walter, owner of The Times and member for Berks County, supported Montagu's arguments for the most part, but had a different opinion of atheists. In Walter's view they were mad rather than wicked. How, he asked, could a man believe in the distinction between right and wrong if he did not believe in the moral government of the world? He objected to the bill because it would destroy the principle of conduct which was the main distinction between man and the beasts. It might be a hard case not to receive the evidence of an atheist, but the same hardship would occur in the case of a lunatic. In his opinion, they ought to treat the wretched persons whose minds were so constituted that they were unable to
see what everyone else saw, and to believe in the
existence of an Almighty Power, as not in their right minds. 124

Such views took a long time to die completely. For example, after the law had been changed in 1869, John Pitt Taylor commented:

The policy of thus relaxing in favour of Atheists one of the fundamental safeguards of truth, and of encouraging the public avowal, if not the collusive assumption, of infidelity and irreligion, may admit of a serious doubt; and the more so, as the cases, in which any inconvenience could arise from the old law, are unquestionably of very rare occurrence. 125

But by the 1860s, such views had become a rarity. By contrast, in a debate on Sir John Trelawny's bill in 1863, Sir Francis Goldsmid QC, member for Reading Borough, illustrated the extent to which religious scepticism and social stability had developed when he said that although those who were strongly attached to revealed religion might rationally maintain that, had there been no revelation, the leading principles of morality would not have been as clearly recognised as they were, those principles had come so completely to form part of public opinion that they were admitted by all, whether believing or not in the source from which they might originally have proceeded. In the same debate William Coningham, member for Brighton Borough, said that he for one did not regard speculative or abstract religious opinions as the true measure of a man's veracity, though it might be of his intelligence. What was required was
that a man should be restrained by moral convictions, which appeared to him to be altogether independent of speculative ideas on sacred matters.\(^{126}\)

J.F. Stephen, writing in the same year, saw the rule which rendered atheists incompetent to give evidence as the residue of an obsolete political theory.

The real reason why the rule is maintained is a vague impression that it is a legal protest against atheism, and sets a stigma on that way of thinking, and that its removal would indicate something like a relenting on the part of the nation at large towards atheists. This reason is perfectly intelligible, but hardly any one would explicitly avow it. It has passed into a commonplace that it is no part of the duty of the state to stigmatize opinions, and that the principal effect of the attempt to do so is to prejudice generous minds in their favour.\(^{127}\)

Throughout the period when the granting of a general right to affirm, either to a limited or to a full extent, was being debated, other subsidiary arguments do appear. But their proportion in relation to the major arguments based on stability and security was small.

Some of these subsidiary arguments remind the reader of parts of Bentham's critique. For example, it was quite often argued that the existing law gave rise to contradictions, absurdities or embarrassments. As early as 1838 the Attorney General, Sir John Campbell, acknowledged that a general measure to allow affirmation on religious grounds must come soon, and that in many cases justice had been defeated as a result of the existing law.\(^{128}\) Lord Denman in 1842 referred to the invidious position of the judge when an oath was refused, adding
that the exceptions for Quakers and Separatists
highlighted the injustice done in other cases.\footnote{129} In the
debate on Sir John Trelawny's bill in 1861 Lewis Dillwyn,
member for Swansea Borough, pointed out that if a man was
willing, from his regard for truth, to submit to the
obloquy of avowing his doubts and being rejected as a
witness, he was likely to be a person who would give
truthful evidence.\footnote{130}

Another criticism was that the use of oaths estab­
lished a double standard of veracity. It recognised a
principle that it was possible by some human contrivance
to increase the obligation to tell the truth. The natural
consequence of this was to discredit the simple assertion
of an individual and to encourage the notion that what a
man said was immaterial so long as he was not put on his
oath.\footnote{131} It was on this basis that Philip Harwood,
writing in the Westminster Review in 1843, criticised
Denman's proposals for reform because they would have
allowed sworn and unsworn testimony to exist side by
side. If the law once allowed that a solemn affirmation
was trustworthy, why complicate the matter "by showing
this morbid anxiety to get, if possible, something more
and better"?\footnote{132}

An argument used mainly by writers was that false
testimony could perfectly well be punished even in the
absence of an oath. For example, the writer of an article
in the \textit{Law Magazine} in 1834 thought it probably right
that in the large majority of cases the fear of being punished by a criminal court for perjury was the only operative sanction. Because the existing law of perjury could be adapted to cover those who wilfully gave false evidence, the oath was superfluous.\textsuperscript{133} Best observed in his \textit{Treatise} that there were four sanctions of truth; atheism merely meant that one of them, the religious sanction, did not operate on the mind of the witness. But the other three remained. These were the natural sanction, which resulted from the fact that it was easier to tell the truth; the moral sanction, by which infamy was attached to liars by public opinion; and the political or legal sanction, by which the state punished false testimony.\textsuperscript{134} The same point was made by a speaker at the congress of the Social Science Association in 1868.\textsuperscript{135}

The argument that an oath was not a necessary prerequisite for the punishment of false testimony seems to have played no part in the parliamentary debates, perhaps because it could be seen to support the total abolition of oaths. This, for example, had been the recommendation of the writer in the \textit{Law Magazine} in 1838.\textsuperscript{136} Ironically, the force of the argument was acknowledged by the Lord Chancellor, Lord Hatherley, in the final stages of the 1869 legislation when he declared that he had long been of the opinion that it was undesirable to draw a distinction between the duty of telling the truth at all times and the duty of telling it in a court of law. All that
was necessary in giving evidence was that, instead of taking an oath, a witness should know that he had a solemn duty to perform, for any breach of which he would be liable to a legal penalty.¹³⁷

It is possible that a belief in the efficacy of prosecutions for perjury was not confined to writers and may have formed an undercurrent of professional legal thought considerably earlier in the century. In an article published in the Jurist in 1827, a year after the incident involving Joseph Hume and six years before the trial of Berthold,¹³⁸ the writer described an apparently recent case in which a Mr Taylor appeared before the Lord Mayor to answer a charge brought against him by a Mr Collins. Collins was sworn, whereupon Taylor asked him if he believed the book on which he was sworn. The witness said that he did, but the Lord Mayor interjected, saying that he did not know what this had to do with the question. Taylor said that he wished to know what security he had that the witness would speak the truth. The Lord Mayor replied that the law attached penalties to those who were guilty of perjury, and that these penalties were the security which the prisoner had on the one hand, and public justice on the other, that nothing but the truth would be spoken. The writer in the Jurist thought that this was "the language of common sense", but noted that common sense and the law were "not unfrequently at variance".¹³⁹
As well as arguments which Bentham had used, there can be found arguments which suggest a different critique based on individual rights. For example, Joseph Hume referred to the rights of a British subject and the cause of civil and religious liberty when he attempted to present a petition in 1826.140 Benjamin Hawes in 1839 reminded the House of Commons that the effect of the existing law was to exclude "from civil rights", including the right to membership of a profession, all those who had conscientious objections but were not covered by existing legislation in favour of members of particular sects.141

In support of a bill in 1849 to relieve individuals who had a religious objection to taking an oath, Lord Denman argued that such a bill was the necessary result of accepting the principle of religious toleration. In the same debate the Duke of Argyll declared that in supporting the measure he would take "the highest and broadest and firmest ground at once". The bill should be passed because "it was needed to give effect to the rights of individual conscience; for until that great principle was conceded to the greatest possible extent, he held that the Government could not be said to have paid due respect to the rights of the individuals over whom it ruled."

To summarise, I have attempted to show that most of the contributions to the debate on the development of
a general right to affirm, from the first suggestions in the 1830s until final success in 1869, were made from the standpoint of a concern for the stability and security of society. Other arguments appeared from time to time, but they did so relatively infrequently. Some of these other arguments had affinities with parts of Bentham's critique, but others criticised the existing law from a standpoint which concentrated more on the rights of individuals.

(3) The Question of Bentham's Influence

I have already shown that the 1828 legislation can be explained without reference to Bentham. It remains to be considered whether his thinking had any influence on the extension of a general right to affirm.

Bentham had a place in the intellectual background to the reforms, but such a position can be occupied without any necessary influence on later developments, and the evidence suggests that it is improbable that there was any Benthamite influence on these particular reforms.

Bentham's opinions received their most extensive publicity in the 1820s. That decade saw the publication of Traité des preuves judiciaires in 1823, followed by an English translation in serial form in 1824 and as a complete work in 1825. The Rationale of Judicial Evidence followed in 1827. It was also a period when several
articles were published which set out his ideas in more accessible form.¹⁴⁴

For example, in March 1824 Denman reviewed Dumont's *Traité* in an article that drew attention to defects in the law of evidence, although showing that he was not an uncritical supporter of Bentham's ideas.¹⁴⁵

In 1826 Bentham's arguments in *Swear Not At All* (1813) were set before a wider audience in an article, probably by Peregrine Bingham, in the *Westminster Review*. The writer began with an avowal of his purpose to extend knowledge of Bentham's writings to those who would not read them in their original form. The public "by a provoking, but not inexplicable negligence" had seemed "resolved to turn a deaf ear to them, as if all that he has written concerned rather an Atlantis or an Utopia, than those institutions on which their happiness and prosperity depend".¹⁴⁶

In 1828 an article by J.A. Roebuck in the *Westminster Review* summarised a number of the arguments contained in the *Rationale of Judicial Evidence*.¹⁴⁷ In the same year William Empson published a lengthy review of the *Rationale of Judicial Evidence* in the *Edinburgh Review*.¹⁴⁸

Thus what was probably the most extensive publicity to be given to Bentham's writings on evidence appeared nearly two decades before the first stage of the extension of a general right to affirm in 1854, and over
forty years before the right was finally granted to those without any religious belief. Had there existed the opportunities for irradiation, suscitation and permeation which Finer saw at work in the administrative reforms of the nineteenth century, these lapses of time might not be significant. But the methods described by Finer of bringing influence to bear on administrative developments depended on the effective organisation of Bentham's supporters. This could not be achieved in the field of legislation because of the numbers that had to be won over before a private bill could be successful. While a group of Benthamites might sway other members of a committee, for example, the House of Commons and House of Lords were too unwieldy for such attempts. There were also time constraints that tended to block any reform that did not have government support. If a measure did not succeed within a session it was lost, and the whole process of getting up support had to start again. Bills introduced by Sir John Trelawny in 1861, 1862 and 1863 failed for this reason.

Despite the passing of time, Bentham's position as an advocate of evidence law reform was occasionally acknowledged, but not always with approval. For example, in 1861 a leading article in The Times, commenting on the decision in Madan v Catanach, observed that so long as it was supported by public opinion, the effect of the oath was not to be measured by the faith or scepticism of
the witness taking it:

He knows that, however he may pretend to laugh at it, the mass of spectators regard it with unaffected reverence, and that one perjury will sink him far deeper in the estimation of his neighbours than a lifetime of falsehood. These considerations must fairly be set off against those which might dispose us to accept BENTHAM'S guidance in this difficult question.152

In 1863 Sir John Trelawny quoted from Bentham and Mill in a speech in support of his bill to extend the right to affirm to atheists.153 A leading article in the Solicitors' Journal and Reporter noted Sir John's attempts but expressed the opinion that, notwithstanding that his principle had been advocated by writers such as Bentham and W.M. Best, his attempts were likely to remain unsuccessful.154

A difficulty in detecting a specific Benthamite influence on the reform of the law requiring testimony to be on oath is that supporters of reform from time to time adopted arguments that Bentham had used, but they could well have done so without having been influenced by him. For example, it has already been shown that at least one of Bentham's arguments against the use of oaths pre-dated him by over two hundred years.155 A similar point was made by a contemporary critic who remarked on Bentham's lack of originality when, in a review of the Rationale of Judicial Evidence, he complained of "the parade with which there is so often trumpeted to the world the laying of an egg, whose chickens have long been selling in the
public market". 156

The need for caution in detecting Benthamite influences is shown by an article on oaths published in 1834 in the Law Magazine. 157 Although the writer and Bentham shared some views on this subject, Bentham was mentioned only in connection with a criticism of his idea of the nature of an oath. This is unlikely to have been an example of diplomatic distancing from Bentham on the part of the writer. The tone of the Law Magazine at about this time does not seem to have been in favour of radical reform. A few years later, for example, the writer of an article referred to "... Mr. Bentham and his disciples, who, by their utter ignorance of the real character of the evil, and the ludicrous extravagance of their amending schemes, have probably done more to retard the progress of rational measures than ever was or ever could be effected by Lord Eldon and the now rapidly decreasing supporters of his principles". 158

Because Parliament was almost exclusively the arena in which this reform was discussed and developed, one way of trying to resolve the question of Bentham's influence might be to construct a sort of intellectual family tree for those taking a leading part in the legislative process. In such a structure Lord Denman and his son George would have the closest connection to Bentham. Although Lord Denman was by no means an uncritical follower of Bentham, he pursued a limited reform of the law requiring
testimony to be on oath, and his connections with Lansdowne and Brougham, as well as his interest in Dumont's work, suggest that he may have been influenced by Bentham's ideas. George Denman was influential in extending competency to those without religious beliefs, a reform of which Bentham would certainly have approved. His speech in the Commons debate on 28 April 1869 referred to an argument in favour of this reform used by Mill. It is likely that he came into contact with Bentham's ideas either through his father or through the writings of Mill, whose task it had been to edit the *Rationale of Judicial Evidence*.

Brougham, though closer to Bentham than either Lord Denman or his son, played little part in promoting this reform; in 1849 he actually opposed one of Denman's bills in the Lords. Hawes, Trelawny, Dillwyn and others who supported legislation in the Commons may have had Bentham's writings, at either first or second hand, as an intellectual influence.

The intellectual family tree is suggestive, but little more. What cannot be ignored is the fact that the part of Bentham's critique that was typically Benthamite - its radical nature - hardly appeared at all. Very occasionally a writer - never a politician - can be found who seems to have taken up a full Benthamite critique. But the rarity with which this is encountered emphasises the lack of support that was given to Bentham's critique.
as a whole. One example is an article in the *Jurist* commenting on Brougham's law reform speech of 1828. The writer favoured competency not only for those then rendered incompetent because of interest, but also for those who were incompetent because of criminal conviction, or for failure to believe in God or a future state. All these matters, he insisted, affected weight only. This was a perception that lay at the root of Bentham's critique, but it was not often acknowledged.\(^\text{161}\)

A similarly radical critique was adopted in 1843 by Philip Harwood\(^\text{162}\) who argued in the *Westminster Review* that the proposed reforms of Denman and Hawes did not go far enough. Harwood's recommendation was that all oaths whatsoever should be forthwith abolished.

> We object, first and chiefly, to the present law of oaths, that it contains provisions for excluding evidence from the ear of justice; giving, to the extent of such exclusion, impunity and inducement to wrong, and inflicting right with helplessness and impotence. We put this objection first, because it seems to us to stand first in importance; and also because, on looking through the debates on the subject during the last few years, we find it much less insisted on than it deserves.

He excepted Denman's speech from this criticism, but pointed out that the argument had previously been centred on the indulgence of individual consciences. That was not the point:

> The point is the admission of truth into courts of justice. The relief really needed is not merely, nor chiefly, relief of a comparatively small number of estimable persons from legal obligations that offend their particular consciences, important and desirable as such relief always is. It is the relief of that very much larger class - potentially co-extensive
with the whole community - of individuals who have suffered, or may suffer, or may know or fancy themselves liable to suffer, in property, person, reputation, or civil rights, in consequence of the legal silencing and suppression of facts.

The present state of the law tended "to exclude evidence, to silence truth, to paralyse justice, and to license crime". Yet if you dissociated the oath sanction from the other, natural sanctions associated with telling the truth, such as self-respect, love of truth, and fear of prosecution for perjury, the power of the oath to ensure veracity was "expressible only by zero". He concluded that on every ground, the universal abolition of oaths was greatly preferable to a "mere legalising ... of the nonjuring scruples of individuals".163

While it is likely that Bentham would have preferred to see the oath ceremony abolished altogether,164 that was never the aim of the parliamentary reformers. Nor does one find in the parliamentary debates any echoes of Bentham's criticism of oaths as an instrument of sinister interest. I have already shown that those who favoured and those who opposed reform were in the main concerned to preserve the stability and security of society. They differed only in the way in which they thought this principle should be applied. Ultimately, Bentham's own position was based on an acknowledgment that security was "the principal object of law in general and in every branch".165 But in his view, security required the destruction of Judge & Co and of their
sinister interest. This was the characteristically Benthamite critique, but it is not reflected in the parliamentary debates.

In those debates some speakers used less radical arguments which Bentham also had used, such as the argument that false testimony could be punished without the need for oaths, arguments based on the contradictions and absurdities of the existing law, or the "double standard of veracity" argument. But it was not necessary to have read Bentham, or an epitome of Bentham, to use such arguments and, in any case, they played a minor part in the debate by comparison with arguments based on concern for the stability and security of society.

The probability is that Bentham played little or no part in the story of the reforms considered in this chapter, and that he was mistakenly thought to have done so because of his strenuous opposition to the compulsory administration of oaths. Insufficient weight has been given to the fact that the law was changed in limited ways and for reasons that had nothing to do with Bentham's radical critique. The reforms were piecemeal and to this day oaths are routinely administered in courts.

5. Summary of Conclusions

In this chapter I have shown that the removal of incompetency from "defect of religious principle" took place in two distinct stages. Attention was directed
during the first stage, from 1828 to 1854, towards those who had religious scruples against taking an oath. The legislation of 1828 can be explained without reference to Bentham. Its minimalist nature makes the reform difficult to link to Bentham's wide-ranging critique. Sufficient explanation can be found in the government's concern for public security in a time of rising crime. In addition, the legislation may have been supported as a tactical device to further Catholic emancipation. The extension to Separatists in 1833 of the rights already given to Quakers and Moravians showed the same piecemeal approach.

After 1833 proposals for reform aimed at the extension of a general right to affirm, at first to those with religious scruples and later to those without religious beliefs. I have argued that these reforms came about as a result of the convergence of two lines of development: one of religious scepticism, and the other of social stability. This contention is supported by an examination of the contributions to the debate made inside and outside Parliament by reformers and their opponents. These contributions show an overwhelming concern for the stability and security of society. The existence of this common standpoint made it likely that when society was perceived to be more stable and secure than it had been in the early decades of the century, and in particular during the 1830s and 1840s, there would be nothing to prevent a reform of the law requiring testimony to be on

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oath if that was likely to provide still more security, even if the price to be paid was some accommodation with secularism.

It is improbable that Benthamite influence affected the extension of a general right to affirm, either to those with religious scruples or to those without religious beliefs. Bentham's opinions on the reform of evidence law received their most extensive publicity nearly two decades before the 1854 Act and over forty years before the final removal of restrictions in 1869. During the decades after Bentham's death, effective organisation had enabled his supporters to maintain an influence on administrative reforms. But the House of Commons and House of Lords were too unwieldy to be susceptible to such manoeuvres, and procedural constraints requiring that legislation be passed within a single session made the success of a bill that lacked government support even more difficult. In 1869 as in 1854, government support was crucial to success.

Although some supporters of reform adopted some of the arguments that Bentham had used, this is insufficient to make a case for Benthamite influence. Arguments not based on the need for stability and security were relatively scarce and thus were unlikely to have done much to influence parliamentary or government opinion. Further, those who used them could have done so without being influenced by Bentham, either because the arguments had
been developed before Bentham or because they were developed contemporaneously with Bentham but by more conservative utilitarians who would have rejected Bentham's radical critique.

It was this radical critique, which saw oaths as the instruments of sinister interest not only of Judge and Co but of the established Church, that was characteristically Benthamite. But this line of criticism was never adopted by supporters of reform in Parliament and only rarely by critics outside. However, in a situation where reformers and opponents based their arguments largely on the need for stability and security, it is necessary, if Benthamite influence is to be established, to show reformers adopting Bentham's radical application of the security principle.
NOTES TO CHAPTER 2

1. Phillipps, Treatise, 10th ed. (1852), vol.1, 12.

2. Starkie, Treatise, 2nd ed. (1833), vol.1, 22.


4. Omychund v Barker (1744) 1 Atk 21, 40; 26 ER 15, 27, per Parker LCB.

5. Sir Edward Coke, The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton, ed. Francis Hargrave and Charles Butler, 19th ed. (London, 1832), vol.1, sec. 6b. According to Willes LCJ he had included Jews as well as heathens under this head. See Omychund v Barker (1744) 1 Atk 21, 44; 26 ER 15, 30.


8. See n.4 above. The case was heard before the Court of Chancery where it was determined by Lord Hardwicke in consultation with the common law Chief Justices Willes and Lee, and Parker LCB.


11. 1 Atk 21, 42, 48-49; 26 ER 28-29, 32-33.


13. See chap.1 above, n.42.


15. Swear Not At All was printed in 1813 but not published until 1817. The title page indicated that the pamphlet was "Pre-detached from an Introduction to the 'Rationale of Evidence'". (A.D.E. Lewis, "The Background to Bentham on Evidence," Utilitas 2 (1990): 195, 210-11.)

17. Ibid., 424.

18. *Works*, vol. 6, 316.


20. Ibid., 192.

21. *Works*, vol. 6, 28–29. Bentham's reference is to Article 39, "Of a Christian man's Oath," of which the full text is as follows:

As we confess that vain and rash Swearing is forbidden Christian men by our Lord Jesus Christ, and James his Apostle, so we judge, that Christian Religion doth not prohibit, but that a man may swear when the Magistrate requireth, in a cause of faith and charity, so it be done according to the Prophet's teaching, in justice, judgement, and truth.

("Articles of Religion," *Book of Common Prayer*, 1662.)


23. *Works*, vol. 6, 308.


26. Among the benefits to the judge of excluding parties Bentham identified:

Making ease (without prejudice to profit,) by exempting himself from the plague and indignity of having to do with low people, with the mob, the rabble, the populace, - i.e. the great majority of the people; wretches, who, being ignorant of things in general, and of jurisprudential science in particular, are in proportion to their ignorance, apt to be troublesome.

(*Works*, vol. 7, 232.)


28. UCL 58: 140.

29. UCL 58: 227.

30. UCL 47: 63.
31. UCL 47: 246.
32. UCL 58: 152.
34. For the fate of Ananias and Sapphira see Acts 5: 1-10. Bentham's suggestion was criticised in the Edinburgh Review:

At present, since nurseries have found it no longer prudent to tell children that the test of their credibility is a pimpled or unpimpled tongue, it is passing strange to read a recommendation from Mr. Bentham that every court should be ornamented with a picture of Ananias and Sapphira. Considering that perjurers, instead of dropping down dead in court, walk out as lively as their truth-telling neighbours, a practical appeal to this particular chapter of divine interposition would have precisely the same tendency as the sceptical satire of Aristophanes in the "Clouds".

(Edinburgh Review 59 (1834): 465.)
35. Works, vol.6, 319-20.
36. See chap.1, n.40.
37. 9 George IV c 32. See further Parl. Deb., New Series, xviii, 1357-58 (28 March 1828); xix, 350-51 (5 May 1828). In the debate on 5 May in the Commons the member for Norwich, William Smith, emphasised that the exception in favour of Quakers and Moravians had "become expedient for the sake of the interests of the public". (The Times, 6 May 1828.) For the reluctance of Quakers themselves to press for reform, see a letter from a former Quaker in The Times, 14 April 1828.
38. 3 & 4 William IV c 82. For Separatists see chap.1, n.41.
41. 1 & 2 Vict c 105.
42. Parl. Deb., 3rd series, liv, 681-82 (28 May 1840); lv, 869-80 (22 July 1840), 1246-51 (4 August 1840).


45. Parl. Deb., 3rd series, civ, 441-51 (18 April 1849); cvi, 714-29 (22 June 1849).


47. Ibid., 14-15.

48. Parl. Deb., 3rd series, cxxxiii, 797 (23 May 1854), 1145-56 (30 May 1854).

49. Parl. Deb., clxii, 1372 (2 May 1861); clxiii, 601-4 (5 June 1861), 977-78 (13 June 1861); clxiv, 1032-34 (17 July 1861), 1284 (22 July 1861), 1340 (23 July 1861), 1479-80 (25 July 1861), 1779 (30 July 1861), 1816 (1 August 1861).


52. 1819-96. 4th son of Lord Denman and member for Tiverton Borough. Barrister, 1846; QC 1861; Justice of the Court of Common Pleas, 1872; Justice of the Common Pleas Division of the High Court of Justice, 1875; Justice of the High Court of Justice, Queen's Bench Division, 1881-92.

53. The bill brought in by George Denman appears in House of Commons Sessional Papers 1868-9 II.411 [Bill 25]. The form in which it reached the Lords is in House of Lords Sessional Papers 1868-9 IV.583 (110). For the bill as amended in committee and finally on report see House of Lords Sessional Papers 1868-9 IV. 587 (239); 589 (260).


55. Parl. Deb., New Series, xvi, 171-78 (29 November 1826). The affair had a strange sequel: on 12 April 1827 Hume informed the House that the petition which he
had presented had been discovered to be a forgery. (Parl. Deb., New Series, xvii, 389-90.)

56. Annual Register (1833), 159-61 (23 November).

57. See n.37 above.

58. Commitments in England and Wales (excluding London and Middlesex) showed an increase of 86% over the period 1811-17; convictions in this period increased by 105%. The increase in London and Middlesex was not so great, but was still considerable: commitments increased by 48% and convictions by 55%. (Radzinowicz, History of English Criminal Law, vol.1, 588-89.)

59. The Times, 9 February 1828, 2 April 1828.


61. DNB, s.v. "Petty-Fitzmaurice, Henry, third Marquis of Lansdowne".

62. Ibid.


64. Religion and social control were subjects considered in the mid 1790s by a number of Christian thinkers, from the utilitarian William Paley to his Evangelical critic Thomas Gisborne. In his Enquiry into the Duties of Men (1795) Gisborne examined the Christian basis of duty. (Robert Hole, Pulpits, Politics and Public Order in England 1760-1832 (Cambridge, 1989), 81, 136.)


67. See, e.g., Lyell's Principles of Geology (1833), the Life of Blanco White (1842), Robert Francis Newman's Phases of Faith (1842), Chambers's Vestiges of Creation (1844), W.R. Greg's The Creed of Christendom (1851), and Alexander Bain's The Sense and the Intellect (1855). For Morley's description see his Miscellanies (London, 1888), vol.3, 242. The examples given are those
cited in Burn, *Age of Equipoise*, 274.


72. 1817-1906. English social reformer and follower of Robert Owen; established a free-thought movement which campaigned for a secular, pluralist society. His movement formed the basis for the National Secular Society set up by Bradlaugh (1866). See his memoirs, *Sixty Years of an Agitator’s Life* (1892) and Royle, *Victorian Infidels*, 2-4.

73. *The Times*, 12 November 1861, p.9; 16 November 1861.


77. See n.67 above.

78. The Blasphemy Act 1697 barred from office all those, educated as Christians, who denied the doctrine of the Trinity, the truth of Christianity, or the divine authority of the Bible. A second offence might incur penalties of inability to hold land, to bring an action at law, to receive a legacy, and imprisonment for up to three years. A prosecution might also be brought for the common law offence of blasphemous libel. The Blasphemy Act was not repealed until 1813, and the common law offence remained unaffected by the repeal. Its abolition was recommended by the Law Commission in 1985. (J.C.D. Clark, *English Society 1688-1832* (Cambridge, 1985), 283-89, 379-82; Law Com. No. 145.)


84. See n.69 above.

85. In 1881 Henry Sidgwick wrote to J.R. Mozley:

While I cannot myself discover adequate rational basis for the Christian hope of happy immortality, it seems to me that the general loss of such a hope, from the minds of average human beings as now constituted, would be an evil of which I cannot pretend to measure the extent. I am not prepared to say that the dissolution of the existing social order would follow, but I think the danger of such dissolution would be seriously increased, and that the evil would certainly be very great.


86. See generally for this section Hole, Pulpits, Politics and Public Order (1989).


88. Cobbett's Complete Collection of State Trials and proceedings for high treason and other crimes and misdemeanours from the earliest period to the present time (London, 1809), vol.3, 789-90.

89. Taylor's Case (1676) 1 Vent 293, 86 ER 189.

90. R v Woolston (1729) Fitzg 64, 94 ER 655.

91. George Pretyman, afterwards Tomline, A Sermon preached before the Lords Spiritual and Temporal in the Abbey Church of Westminster, on Friday, January 30, 1789 (London, 1789), 16.

93. Charles Thomas Longley, A Charge addressed to the Clergy of Ripon at the Triennial Visitation in September 1844 (1844), 9.

94. Quoted in Walter Bagehot, Biographical Studies, ed. R.H. Hutton, new ed. (London, 1907), 315-16. Bagehot gives no reference and I have been unable to trace his source.

95. Quarterly Review 44 (1831): 315


99. Briggs, Age of Improvement, 294. For this paragraph and for the remainder of this subsection see ibid. 294-97, 404-5.


102. See n.83 above.


104. Richard Shannon, The Crisis of Imperialism 1865-1915, Paladin ed. (London 1976), 29. But popular disturbances continued on some issues. There were anti-Catholic and anti-Irish disturbances, disturbances at election times and during labour disputes, and as part of political demonstrations in London, especially in connection with the passing of the second Reform Bill. (Stevenson, Popular Disturbances, 275-76.)


109. **Parl. Deb.**, 3rd series, cxxxiii, 797 (23 May 1854). See also the speech of Lord Campbell, who thought that to commit a man for refusing to take the oath was cruel not only towards the witness, but also towards the parties who were deprived of his testimony. The argument was not a new one. See, e.g., a speech of Lord Ashburton in 1838: **Parl. Deb.**, 3rd series, xliv, 315-17 (19 July). Similar arguments were adopted after 1854 in support of an extension of the right to affirm to those without religious beliefs. See, e.g., the speeches of Sir John Trelawny and Lewis Dillwyn in 1861: **Parl. Deb.**, 3rd series, clxi, 1936-40 (13 March 1861); clxiii, 953-73 (12 June 1861). See also the speeches of George Denman and Sir Robert Collier AG in 1869: **Parl. Deb.**, 3rd series, cxcv, 1798-1814 (28 April 1869).

110. Martin J. Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830-1914* (Cambridge, 1990), 14-16; see also section (b) above.

111. **Parl. Deb.**, 3rd series, xlv, 833 (22 February 1839). Stephen Lushington DCL was member for Tower Hamlets Borough. He had been a practitioner in civil law, and in the year of this debate he was appointed a judge of the High Court of Admiralty. As was then permitted, he remained in Parliament after submitting himself for re-election.

112. **Parl. Deb.**, 3rd series, clxi, 697 (21 February 1861). See also Lewis Dillwyn, **Parl. Deb.**, 3rd series, clxiii, 953-55 (12 June 1861), and George Denman, **Parl. Deb.**, 3rd series, cxcv, 1798 (28 April 1869).


114. Ibid., 834-37.

115. **Parl. Deb.**, 3rd series, cvi, 720-22 (22 June 1849). Cf. Brougham, *Speech on the Present State of the Law*, 41. But Brougham may have been engaged only in tactics. At the time he was conducting a campaign which he had begun in 1845 to make the parties to civil actions competent witnesses; he may have wanted to do nothing to alienate conservative opinion more than necessary. See chap.3 below.


118. **Parl. Deb.**, 3rd series, lxiv, 627-28, 630-31
(27 June 1842). Lord Abinger was wrong. In a few legal systems there has been either a weak oath tradition or none at all. The oath never became the focal point of Russian procedure in the way that it did in Germanic procedure. In several Swiss cantons the oath had disappeared by the eighteenth century. The Chinese never had an oath tradition. It has been suggested that this is to be attributed to the influence of Confucian teachings, the basic tenets of which were that man is by nature good and that government by the influence of ethical standards is preferable to government by law. (Helen Silving, "The Oath: I," *Yale Law Journal* 68 (1959): 1329, 1375-81.)


121. Ibid., 967-68.

122. Trelawny observed that by 6 & 7 Vict c 22 "barbarians and uncivilized people", destitute of the knowledge of God and of any religious belief, were allowed to make affirmations in lieu of oaths.


124. Ibid., 964-65.


128. Parl. Deb., 3rd series, xliv, 999 (3 August 1838). His opinion was echoed in the Law Magazine where a commentator thought that objectors who relied on the superior sanctity of an oath mistook "the nature of the check by which offenders against public justice are restrained....[P]erjury will be as much restrained by any species of solemn affirmation as by an oath, so long as the same punishment is denounced against false testimony." (Law Magazine 20 (1838): 233-34.)


1861). Cf. the speech of George Denman in 1869: cxcv
1803, 28 April.


132. Westminster Review 39 (1843): 80-104. Cf. the
speech of the Earl of Wicklow: Parl. Deb., 3rd series,
lxiv, 627 (27 June 1842).

133. Law Magazine 12 (1834): 279-81, 283. See also
80-104.

134. Best, Treatise, 4th ed. (London, 1866), 15-16,
62, 231-33. This was a point made by Bentham: see n.16
above and accompanying text.

135. Law Magazine & Law Review 24 (1868): 157-58,
265-78.

136. See n.133 above.

137. Parl. Deb., 3rd series, cxcviii, 678 (26 July
1869). Cf. the comment in the Law Times after the Act was
passed: "The value of an oath is very questionable. The
only punishment a false witness fears is prosecution for
perjury." (Law Times 46 (1869-69): 422.

138. See nn.55 and 56 above and accompanying text.

139. "Law of Evidence," Jurist, or Quarterly Jour-

140. See n.55 above and accompanying text.

141. Parl. Deb., 3rd series, xlv, 823 (22 February
1839).

142. Parl. Deb., 3rd series, cvi, 717, 724 (22 June
1849).

143. See section (1) above.

144. See the bibliography by C.W. Everett in Elie
Halévy, The Growth of Philosophic Radicalism, trans. Mary
Morris, (London, 1928); A.D.E. Lewis, Bentham's View of
the Right to Silence," in Current Legal Problems 1990,
ed. Roger Rideout and Bob Hepple (London, 1990), 135,
138-39.


149. See n.36 to chap.1 above and accompanying text.

150. See nn.50 and 51 above and accompanying text.

151. See n.73 above and accompanying text.

152. The Times, 16 November 1861.


155. See n.38 to chap.1 above and accompanying text.

156. Edinburgh Review 48 (1828): 457, 461. In the Rationale of Judicial Evidence Bentham himself disclaimed originality for his views, but he did so on the assumption that to find models for his proposed improved system it was necessary only to look at systems which had been adopted locally in former times. "By doing away the work of five or six hundred years, and throwing back the system of procedure, as to the most fundamental parts, into the state in which it was at the time of Edward I and much earlier, a mountain of abuse might be removed, and even a near approach to perfection made." (Works, vol.7, 599.)


158. Law Magazine 23 (1840): 357.

159. See n.130 above.

160. See n.115 above and accompanying text.


162. 1809-1887. Harwood was a unitarian pastor who also worked at various stages of his life on a number of periodicals, including the Examiner, the Spectator, and the Morning Chronicle. From 1854 he worked on the Saturday Review, becoming its editor in 1868. See DNB.

163. Westminster Review 39 (1843): 80, 89-90,
95-97, 98-104.

164. See n.27 above and accompanying text.

CHAPTER 3
INCOMPETENCY FROM INFAMY AND INTEREST

The nineteenth century saw the removal of those witness disqualifications which had been based on moral grounds and on interest. Three main stages can be seen. The first was reached in 1843; in that year Lord Denman's Act abolished the rule whereby persons convicted of certain criminal offences had, in principle, been disqualified from giving evidence. The Act also made a substantial inroad on the rule that a witness with an interest in the outcome of the litigation was unable to testify. The second stage was reached in 1851, when the Evidence Amendment Act (also known as Lord Brougham's Act) made parties to civil proceedings competent in most cases. The third stage was reached only in 1898, when the Criminal Evidence Act accepted as a general principle the competency of the accused in all criminal cases.

The first two stages are dealt with in this chapter and the third stage in chapter 4.

This chapter is divided on lines similar to those followed in chapter 2. I begin with a summary of the common law as it stood in about 1828 in relation to incompetency from infamy and interest. This section is
followed by an outline of the arguments used by Bentham in favour of reform. The third section is an overview of the legislative reforms, and the fourth is an analysis of influences on the reforms. A final section contains a summary of conclusions.

1. The Common Law circa 1828

(1) Incompetency from Infamy

A person who had been convicted of an infamous crime and who had had judgement recorded against him was in principle disqualified from giving evidence because it was thought that no sufficient weight could attach to any testimony that he might give. Starkie explained the rule in this way:

Where a man is convicted of an offence which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to affect the property or liberty of others. 1

It was originally the infamy of the punishment, not the nature of the crime itself, that was the test of incompetency. 2 However, well before the beginning of the nineteenth century it came to be the crime that rendered the offender unworthy of belief. 3 The rule gave rise to many anomalies.

Witnesses of the most infamous and depraved character, though not credible, may yet be competent; and it frequently happens, that a witness is suffered to give evidence, because not absolutely disqualified by the rules of law, though at the same time he may be far lower in point of credit and real character, 4 than another, who is at once excluded as incompetent.
Probably because of this, the rule was restricted in a number of ways by both statute and common law, yet in many cases the restrictions served only to emphasise the anomalies. The law can be conveniently considered under three heads: (a) Crimes rendering a person incompetent. (b) Proof of conviction. (c) Restoration of competency.

(a) **Crimes rendering a person incompetent** These fell into three categories: (i) Treason.\(^5\) (ii) Felony.\(^6\) By 31 George 3 c 35 convictions for the felony of petty larceny were excluded from this category. (iii) All offences which were founded in fraud, such as perjury, forgery and varieties of cheating.\(^7\)

(b) **Proof of conviction** For a witness to be incapacitated it had to be proved that judgement had been pronounced by a court of competent jurisdiction.\(^8\) Proof of the conviction without the judgement was insufficient because the conviction might subsequently have been quashed on a motion in arrest of judgement.\(^9\) An admission by a witness that he had committed perjury or any other offence would not incapacitate him. The same was true even of an admission by a witness that he was currently confined in prison under a judgement for felony.\(^10\)

(c) **Restoration of competency** Competency could be restored in three ways:

(i) Under benefit of clergy, by proof that the witness had been admitted to his clergy and had undergone such punishment as was equivalent to clerical purgation
at common law, or by proof that he had undergone a sentence in accordance with certain statutory provisions.\textsuperscript{11}

(ii) By showing that the witness had received a pardon for his offence, either from the King under the great seal or under an Act of Parliament.\textsuperscript{12} It was not presumed that either King or Parliament could by a pardon convert a wicked man into an honest one, or confer credibility on one who through the infamy of his conduct was not credible. But it was said that such a pardon must be presumed to have been conferred after inquiry and upon sufficient grounds on someone who was worthy of the indulgence, and so worthy of being heard. Nevertheless, the degree of credit to be given to the testimony of such a witness was a matter for the jury.\textsuperscript{13}

(iii) By proof of reversal of the judgement by writ of error.

(2) \textbf{Incompetency from Interest}

The general rule was that all witnesses who were interested in the outcome of a cause were to be excluded from giving evidence in favour of that party whom their interest might lead them to favour. According to Phillipps, the ground of this exclusion was a presumed lack of integrity or impartiality rather than a desire to save the proposed witness from the temptation to commit perjury. Had the latter been the true principle, he argued, there would have been some inconsistency in excluding witnesses even though they had an interest that
was minute, while admitting others who might be subject to the more powerful influence of relationship or friendship. This reason seems to have been supported by Starkie also. He wrote that the rule

is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. There are, no doubt, many whom no interested motive could seduce from a sense of duty, and by their exclusion this rule may, in particular cases, operate to shut out the truth. But the law must prescribe general rules; and experience renders it probable that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion.

But Starkie recognised the need to limit the operation of the principle for the sake of certainty in the law and to prevent an excessive exclusion of evidence.

As Phillipps's justification indicates, a disqualifying interest had to be a legal interest in the outcome of the suit, and not just prejudice or bias arising, for example, from a relationship between the witness and the party on whose behalf he was to testify. It was this restriction on the scope of the rule that allowed an accomplice to give evidence against his companion in crime, despite his own expectation of a pardon in the event of the latter's conviction. The interest had to be a present, certain, vested interest, and not one that was uncertain or contingent. This could give rise to anomalies. For example, the heir apparent to an estate was competent to give evidence in support of the claim of his
ancestor because he had as yet no vested interest. But a remainderman, who did have such an interest, was incompetent. Brougham highlighted this inconsistency in his speech in 1828 on the state of the law:

If I have the most distant interest, even the interest of a shilling in reversion, on an estate of 50,000 £ a year, I am incompetent to give evidence on any point that affects that estate; but supposing that I have a father, ninety years of age, lunatic, bed-ridden, and quite incapable of doing any legal act for himself, and that he is in possession of an estate in fee simple, and not in fee tail, and that I expect to be his heir, and that nothing can prevent me from becoming so, I may be a witness on any point which affects his estate ...

As Brougham observed, the size of the interest was immaterial. This was justified on the pragmatic ground that a plain and simple rule was absolutely necessary, and if a small degree of interest did not disqualify a witness it would be impossible to draw a practicable line of distinction.

Even so, in some instances the testimony of an interested witness was admitted, from the extreme necessity of the case, where it was exceedingly improbable that any person not interested possessed any knowledge of the facts. For example, the evidence of a tradesman's servant was admissible to prove delivery of his master's goods, or the payment of money.

Incompetency on the ground of interest could be removed by extinguishing the interest. This could be achieved by a release, executed by the witness himself or by those who would have a claim on him, or by payment.
A party on the record was not a competent witness; neither was the husband or wife of a party.\textsuperscript{23} It was held by Tindal CJ in Worrall \textit{v} Jones \textsuperscript{(1831)}\textsuperscript{24} that the basis for this exclusion was the interest which a party usually had in the outcome of the proceedings, rather than the mere fact of being a party. No other relation of the party was excluded. The reason for excluding the spouse of a party from giving evidence either for or against her partner was founded partly on their identity of interest, and partly on a principle of public policy which deemed it "necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice".\textsuperscript{25}

2. Bentham's Critique

Bentham believed that justice had two ends. The first, to give effect to substantive law, was the special task of adjective law, of which the law of evidence was a part. The other end of justice was the reduction of concomitant vexation, expense and delay. At times a utilitarian calculation would have to be made, and if the price in vexation, expense or delay of obtaining the benefit of the substantive law exceeded the value of that benefit, it ought not to be paid. He was optimistic about the ease with which such a calculation could be made.

Here and there a case may present itself, in which it may be matter of doubt on which side the balance lies, but in general there will be no difficulty: all
doubt will be removed by clear and indisputable principles.

Evidence ought to be excluded where the ends of justice required it and only in those circumstances, that is to say, where to admit it would produce preponderant inconvenience in the shape of vexation, expense or delay, the suffering of which was an injustice in itself.

Even evidence, even justice itself, like gold, may be bought too dear. It always is bought too dear, if bought at the expense of a preponderant injustice. 26

Other reasons justifying the exclusion of evidence were that it was irrelevant; that it was superfluous because there was enough evidence without it, either from a different source or of a better kind from the same source; and that it was useless "because sure to be refuted or outweighed by other evidence". Bentham gave as an example of this last case an incorrect transcript tendered on one side, the original being produced on the other. 27

Bentham emphasised that in every case where exclusion in accordance with his principles was being considered, the question to be decided was one of fact, not law. There was therefore no need to refer to any rules of law in the decision process and, in order to ensure that an unwanted body of judge-made law did not develop, Bentham recommended that judges who decided for admission or exclusion in a particular case should be forbidden to make any reference to what might have been
done in an earlier case by himself or any other judge. In arriving at such a decision,

the looking to precedent for a rule would be exactly as incongruous and mischievous as if, on an account between A and B, the balance were to be deduced, not from a comparison of the sum of the items on one side with the sum of the items on the other, but by copying the balance of a former account, in which the items, as well as the persons, were all different: an account between C and D. 28

Bentham's general view of exclusionary rules of evidence was that they were "manifestly an extreme and a most disastrous remedy" because of the misdecision to which exclusion might give rise. 29 There was but one mode of searching out truth: "see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it - the parties." 30

He acknowledged that the basis of exclusionary rules was the fear of deception, though he suggested an additional motive: "the more unforeseen exclusions there are, and the more unforeseen exceptions to exclusions, the more arguments; and the more arguments, the more fees." 31 But the real mischief, against which exclusion was unable to provide security, was not deception but misdecision. If you excluded necessary evidence, you were bound to produce misdecision. If, however, you admitted evidence that was false, the falsity would not inevitably go undetected.

Against danger of misdecision, resulting from the
admission of a lying witness, or rather of a witness disposed to lie, there are abundant remedies. There is the natural sagacity of the jury - there is the cultivated sagacity of the judge - there is the perhaps equally cultivated, and still more keenly sharpened, sagacity of the counsel for the defendant - there is, in penal cases (especially in cases of the most highly penal nature, the candour of the counsel for the prosecution.  

Bentham was particularly critical of exclusion on the ground of infamy. In the first place, he condemned the law for its uncertainty. In his *Principles of Penal Law* he wrote, "I could wish to give the reader a precise list of the offences to which this punishment [of exclusion from testifying] is annexed, but this I find to be impossible. Every principle delivered on this subject teems with contradiction." Secondly, he held a witness's past improbity, even including perjury, to be a ground for regarding his evidence with suspicion, but not for excluding it. Often a witness would have been guilty of only a single transgression and, in any case, an exclusionary rule could not take into account degrees of improbity. "To all these different levels the eye of judicial suspicion has the power of adjusting itself. Exclusion knows no gradations; blind and brainless, it has but one alternative; - shut or open, like a valve; up or down, like a steam-engine." Besides, the natural instinct of every man was to speak what he believed to be the truth.

To relate incidents as they have really happened, is the work of the memory: to relate them otherwise than as they have really happened, is the work of the
invention. But, generally speaking, comparing the work of the memory with that of the invention, the latter will be found by much the harder work.

Provided there was no interest in giving a false account, "the most abandoned criminal that ever was upon the earth" might be trusted to give an account he believed to be true "as safely as the man of the most consummate virtue". 36

3. An Overview of the Legislative Reforms

In 1842 Lord Denman introduced a bill which had a preamble of which Bentham would surely have approved.

Whereas the Inquiry after Truth in Courts of Justice is often obstructed by Incapacities created by the present Law, and it is desirable that full Information as to the Facts in issue, both in Criminal and in Civil Cases should be laid before the Persons who are appointed to decide upon them, and that such Persons should exercise their Judgment on the Credit of the Witnesses adduced, and on the Truth of their Testimony ...

The bill went on to provide "that no Person offered as a Witness shall hereafter be excluded by reason of Inca­pacity from Crime or Interest from giving Evidence". The major exception to this broad rule and to the spirit of the preamble was that the parties to a suit remained incompetent as witnesses.

The bill achieved a second and third reading and was sent to the Commons, but there it was an unintended casualty of a procedural device directed against another piece of legislation. 37

In 1843 Lord Denman presented an identical bill. It
passed the Lords without difficulty and was debated in the Commons on 17 August. The Attorney General, Sir Frederick Pollock, spoke in support. The bill passed the Commons without a division and in due course received the royal assent.\(^{38}\)

Competency of parties was advocated by Lord Brougham when, on 19 May 1845, he made a long speech in the House of Lords reviewing the progress that had been made in law reform since his last great speech on that subject in 1828. Turning to the law of evidence, he asked why parties to suits should not be examined. It was done in Chancery; why not, under due restrictions, in courts of Common Law? At the conclusion of his speech he presented a number of bills for first reading, among which was "a Bill to enable Parties to be examined on the Trial of Civil Actions".\(^{39}\) But the occasion was a sad contrast to that which had taken place seventeen years before. With the solitary exception of Lord Campbell, every peer on the opposition benches had left the House by the end of his speech, and on the government side only the President of the Council remained. Her Majesty's Ministers, Campbell supposed, were considering the affairs of the nation, or perhaps refreshing themselves after their labours, and he added that "the noble and learned Lord on the Woolsack and the noble President of the Council appeared eager to join them".\(^{40}\)

The bill to make parties competent seems to have
made little, if any, progress. A year later we find Brougham referring to the delay that had affected several of his bills, explaining this by reference to changes which had recently taken place in the government, and announcing that it had been necessary to postpone several bills for full discussion until the next session.41

Although Brougham's attempts to introduce this reform in the Common Law courts were unsuccessful, the principle was adopted when the new county courts were set up by Parliament in 1846. This was a reform which Brougham had done much to bring about. For a number of years he had been attempting to establish a new system of local courts in which parties would to some extent be competent to give evidence. He had not always aimed to make them witnesses at the trial of the action just like any others; his original local courts bill had limited their right to the examination of each other in the presence of the judge before trial - a provision presumably aimed at clarification of the issues between the parties.42 However, section 83 of the statute setting up the county courts system43 provided that on the hearing or trial of any action or on any other proceeding under that Act, the parties thereto, their wives and all other persons, might be examined on behalf of the plaintiff or the defendant on oath, or, where permitted, on affirmation.

In 1851 a bill to allow parties to give evidence in
the superior courts was prepared by J. Pitt Taylor and submitted to Denman for his approval. Denman approved it, but because of ill health was unable to take charge of it in the Lords. The passage of the bill was therefore entrusted to Brougham. The House of Lords gave the bill a second reading on 11 April 1851; after consideration in Committee it received a third reading on 27 June. In the Commons the bill received a formal first and second reading but was more fully considered in Committee.

There was some debate concerning clause 3, which prevented the examination of a wife on behalf of a husband and vice versa. The Attorney General, Sir Alexander Cockburn, admitted that he could not defend this and knew of no good reason for it, but said that he understood there to be a strong opinion in the House of Lords in its favour. The Commons later agreed an amendment which had the effect of enabling husbands or wives to be examined in civil, but not in criminal, cases, either for or against their partners.

The Commons amendments were considered by the Lords on 5 August 1851. Objection was made to some of them, including the amendment to clause 3. The report of the Parliamentary proceedings indicates that subsequently the Commons did not insist on their amendment to this clause and that the bill received the royal assent on 7 August 1851. However, when the Act was printed, section 3 appeared in the amended form approved by the Commons:
it provided that nothing in the Act should make competent or compellable any person charged with a criminal offence, or render any person compellable to answer any question tending to criminate himself, or render in any criminal proceeding any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The Act came into force on 1 November 1851.

One substantial criticism of the legislation was made. It was assumed that it left husbands and wives of parties incompetent to give evidence, and it was thought that in many cases this worked great injustice. The Law Times made the point in this way:

Among the middle classes matters of business are often conducted by [the wife] for her husband. Yet in such cases we have the practical absurdity that the husband, who knows nothing about it, may be called, while the wife, who knows all about it, may not. The object of the Lords in excluding her was to prevent the violation of domestic confidence; they forgot that at the same time they prevented the proof of all that had come to her knowledge apart from her husband, and in which there was no confidence to violate.

The Evidence Amendment Act 1853 was passed to meet this criticism. Section 1 provided that on the trial of any matter, husbands and wives of the parties were to be both competent and compellable as witnesses. Section 2 provided that nothing in the Act should apply to any criminal proceeding or proceeding instituted in consequence of adultery. By section 3, no husband was to be
compellable to disclose any communication made to him by his wife during the marriage, and wives were similarly protected in relation to communications made to them by their husbands.

4. Influences on the Reforms

This section is divided into two parts. The first deals with the background to the passing of Lord Denman's Act in 1843, and the second with those factors which led to the passing of the Law of Evidence Amendment Act in 1851. I shall argue in relation to both pieces of legislation that Bentham's ideas, mediated through Denman and Brougham, can be seen at work, but that other non-Benthamite elements existed which facilitated the reforms that were achieved.

(1) Lord Denman's Act

As the name given to the 1843 legislation indicates, the man chiefly responsible for the reforms which it enacted was Lord Denman, and some history of his opinions must be given in an attempt to determine the extent to which he was guided by Bentham's critique in his support for reform.

In 1824 Denman, then aged 45, had shown support for some of Bentham's ideas on evidence reform in an article in which he reviewed the recently published Traité des preuves judiciaires.51 In particular, Denman recommended that the rule excluding the evidence of an interested
witness should be abolished. His principal argument in favour of this reform was based on the inconsistency of the law which excluded some evidence where the witness's interest was only slight, but included other evidence where the witness had a more potent interest, but one not recognised by the law.

Denman stated that he was "nearly prepared" to go further than this and recommend that the parties in civil actions should be able to give evidence. He was deterred only by his "inexperience as to the practice". He did not, however, fully accept the inclusionary principle which had been at the root of Bentham's recommended abolition of the rule excluding evidence on grounds of interest. If the danger of deception was sufficiently great, Denman was prepared to exclude evidence rather than adopt the course recommended by Bentham of admitting it, but with a warning to the jury as to its use. This appears from Denman's recommendation that married persons should be disqualified as witnesses either for or against each other. The reason was not wholly the "dread entertained by the English law, of conjugal feuds", though he thought that these were "frequently of the most deadly character". His main reason was that,

the passions must be too much alive, where the husband and wife contend in a Court of Justice, to give any chance of fair play to the truth. It must be expected, as an unavoidable consequence of the connexion by which they are bound, that their feelings, either of affection or hatred, must be strong enough to bear down the abstract regard for veracity, even
in judicial depositions. 53

In a pamphlet published in 1828 Denman repeated his call for the abolition of the rule excluding evidence on account of interest. But by then his opinion seemed to have hardened against the competency of parties in civil cases.

The opinion professed by many enlightened men, that the contending parties ought themselves to be examined in open court, seems much more open to objection, since the very character of a party is inconsistent with the knowledge of any important fact adverse to his interest in the cause. His deposition in his own favour would not be thought to carry his assertion farther than his commencing or defending the action: while an acknowledgment to his prejudice could hardly be expected from human virtue. For, in most cases, he would be placed in the dilemma of either committing perjury, or of publicly confessing an attempt to commit injustice; and the necessity for this torturing probation would be done away by such appeals as are already supposed to have been made to his conscience and personal knowledge, in the stages anterior to the trial ... 54

However, it was not until 1842 that Denman took steps to achieve even the limited reform that he had recommended. Why did he wait so long? Three reasons may be suggested. (i) Although between 1819 and 1826 Denman had been a member of the House of Commons and had supported the proposals of other members for law reform, he made, according to Holdsworth, "no very great figure in the House" and put his work at the Bar first. 55 (ii) When he entered Parliament again in 1830, and on the formation of Grey's ministry in November of that year was appointed Attorney General and later a member of the House of Lords, he supported a number of proposals for law reform

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of which the reform of evidence law was only a part and may not have seemed to him the most pressing. Among other proposals, for example, he supported legislation to abolish the death penalty for forgery and other offences, to allow the courts to sit in banc outside legal terms, and to allow mothers separated from their husbands to have access to their children. Denman may have wished to wait until he was sure of a measure of support from the legal profession, in particular from the judiciary. This is suggested by the fact that in the debate on 8 March 1842 he made a point of stating that he was authorised to say that his proposal had the direct sanction of several of his brethren on the bench, and that he had received no objection to it from any of them. Confirmation of this lack of opposition was later provided by the Lord Chancellor, Lord Lyndhurst, who said that so far as he had been able to obtain the opinion of Westminster Hall, it corresponded to a considerable extent to that of Lord Denman. He himself had conversed with some of the judges of the highest rank, and they had entirely concurred in the principle of Lord Denman's bill.

In arguing the case for reform Denman relied on the anomalies of the existing law. He pointed out, for example, that persons convicted of certain crimes had their lips closed in a court of justice to the end of their days if their evidence was objected to in formal manner by producing the record of conviction. But the mere
commission of crime did not exclude the criminal from the
witness box. Often, where an accomplice gave evidence
against his former partner, it was the sole reason for
placing him there. Denman described the law as "whimsi-
cal" in this matter. If the convict should have obtained
a pardon, which might be done without much difficulty,
the effect of the conviction was removed and he became
again an admissible witness. Whether the evidence of a
man formerly convicted was to be received or not there-
fore depended on chance, or probably on the pecuniary
means of those who had an interest in the admission or
rejection of his testimony. Only in one case could exclu-
sion be plausibly defended: where there had been a previ-
ous conviction for perjury. But here the law was equally
anomalous, for unless the record of the conviction could
be proved in court, the evidence could not be rejected.

Denman expected to receive more opposition to his
proposals concerning convictions than to those concerning
interest. But there was a widespread feeling that the
law concerning convictions could not be supported. The
same line of argument was adopted in the following year
by the Attorney General, Sir Frederick Pollock. And
Starkie, in the third edition of his Treatise published
in 1842, commented on the unsatisfactory state of the
law, arguing that a confession of turpitude on the part
of a witness might just as reasonably excite doubts of
his veracity as a recorded conviction, which itself might
have been based only on the witness's confession. On the other hand, he argued in the same edition in justification of the existing law concerning interest.\(^6\)

In relation to exclusion for interest, Denman's argument was essentially that the best judges had always realised the evils of exclusion on this ground. Those persons, he declared, who had the best right to form a judgement had been strongly impressed with the propriety of the change. Lord Mansfield, and many other learned judges since his time, had felt the inconvenience of the law which prevented the admission of witnesses on the ground of interest. Their opinion had been that all persons, whether interested or not, should be allowed to give their evidence and that it should be left to the jury to estimate its value. From a sense of the evil of exclusion, the judges had been led to evade the operation of the existing law; doubts had thereby been raised, and difficulties created, which had increased litigation to an incredible extent. There was hardly a book of reports which did not contain cases of the kind, in which the expenses of the suitors must have been enormous, quite apart from the delay.\(^1\) A similar argument was used by the Attorney General in the following year. He said that the bill only followed up many changes made many years ago. The rule that no man could be heard in a suit in which he had an interest had been altered in many cases, and this bill would only remove an additional case of the
During its passage Denman's bill was the subject of a critical pamphlet by John Lowndes, a barrister of the Inner Temple. Lowndes's pamphlet is interesting because it is an early example of an argument that was heard with increasing frequency as many of the barriers raised against competency were broken down. Lowndes argued that persons with an interest in the outcome of the proceedings ought not to be allowed to give evidence as this would lead to an increase in perjury. This argument was most frequently used in connection with the extension of competency to those charged with criminal offences, and I shall consider its wider implications in the next chapter. But something needs to be said at this stage about the extent to which it was adopted in relation to the proposals which became law in 1843 and 1851.

Lowndes admitted that the existing law gave rise to inconsistencies in admitting many witnesses who had strong interest to bias their testimony, though not a direct one. However, "the necessity of some general and defined limit to the exclusion of witnesses fully justifies the apparent inconsistency; and if the rule of exclusion is good in the case of direct interest in the event of the suit, it cannot fairly be attributed as a defect to it, that it does not embrace every possible case of interest whatever". Lowndes pointed out that the reason for the general
rule was that if the law were to allow such evidence to be given, it would tacitly invite a witness to distort and disguise the truth. Those who favoured a change argued that in everyday situations where a question of fact arose, the evidence of interested persons was not excluded; it would be heard, but with a due allowance for bias. Thereafter, the reformers' arguments developed in three ways. Firstly, it was said that there was an analogy between the trial of a matter by a jury and investigations made in everyday life. Secondly, it was argued that a hardship was inflicted on the parties who stood to benefit by the rejected evidence. Thirdly, it was urged that an injustice was done to mankind by the supposition of such an extremely low standard of moral integrity. Lowndes rejected the second argument at once. If the rule in question tended to further the elucidation of truth, "there can be no hardship on the parties, except in individual cases, which must ever submit to general rules for the public welfare".

As to the first argument, Lowndes argued that the analogy was inappropriate. A private person rarely decided any matter without a personal knowledge of the parties between whom he was to adjudicate. If he had to pronounce in a matter where the only witness was one previously unknown to him and also deeply interested in the matter, he would no doubt decline any interference, unless he could make some private inquiry into the
character of the man. A jury, however, almost invariably pronounced between parties with whom its members were unacquainted. Cross-examination could not satisfactorily show "what degree of pounds-sterling-pressure a man's conscience can bear without being strained".

If a witness was competent he could in most cases be compelled to give evidence. But would it be right to compel an interested witness to give evidence, where, if he gave it truly, he would lose a large sum of money? It was not in the best interests of society that a man should be forced into a position where he would be so exposed to temptation. It was said that to argue in this way assumed a false estimate of the standard of public morality. But the frailty of human nature had to be regarded; the struggle between moral principle and self-interest should be carefully avoided, and these antagonistic powers not awakened to strife by the active interposition of the law.

Lowndes recognised that until the parties to a suit were allowed to give evidence, the aim of the bill stated in the preamble would be frustrated. He added, "If such a chimera should ever assume a tangible form in the shape of a Legislative project, it will be then time enough to show its utter folly and inexpediency." 65

But Lowndes's protest appears to have been a solitary one. The ease with which the 1843 legislation was passed shows that the legal profession and members of
Parliament alike discounted the danger of increased perjury when the benefits of extending competency were considered. It is clear that by the early 1840s professional and Parliamentary opinion favoured the position on interest which Bentham had earlier adopted. Further, the 1843 legislation was passed as a result of the direct efforts of Lord Denman, whose thinking on law reform had clearly been influenced, as his earlier review article showed, by what he had read of Bentham's work.

However, before too much significance is attached to the part played by Bentham's critique it should be remembered that at this stage Denman was proposing a much watered-down version of Bentham's proposals. In particular, he had not yet himself been converted to the idea that competency should be extended to the parties to litigation. Furthermore, the lapse of time between Denman's 1824 article and his proposals for reform in 1842 and 1843 suggests that he may have waited for a time when his recommendations would fall on receptive ears, particularly within the legal profession. But it seems most improbable that the judges and other members of the legal profession had suddenly come to see the force of Bentham's arguments. As will appear, a few years later many lawyers and nearly all the common law judges were united in opposition to proposals to extend competency to parties.

How, then, is one to account for the attitude of
the profession in 1842-43? There seems little doubt that
the restriction was felt to be an inconvenience: the
speeches of Denman and the Attorney General show this. At
the same time, it was one that could be remedied without
too great a reversal of existing practice. In this, of
course, it was unlike the later proposal to make parties
competent. Perhaps these factors, combined with the
pragmatic approach that had favoured exceptions in cases
that were particularly inconvenient for commerce, created a professional opinion that was favourable to
Denman's proposals.

(2) The Law of Evidence Amendment Act, 1851

If the influence of Bentham on evidence law is to
be found anywhere among the legislative reforms of the
nineteenth century, it is tempting to see it at work in
relation to the 1851 Act. Three reasons for this stand
out: (a) The contributions of Denman and Brougham. (b)
The contribution of the Law Amendment Society. (c) Oppo­
sition on the part of the legal profession, particularly
the common law judges, to the proposed reform, which may
well have served as a reminder of Bentham's critique to
thoughtful observers. In this section I shall deal with
these topics and shall conclude with some reservations
about the extent of Bentham's contribution to the 1851
legislation.
(a) The contributions of Denman and Brougham

Although Denman was unable through ill health to take charge of the bill prepared by J. Pitt Taylor in 1851, he expressed his approval of it in a letter published in the Law Review, thereby departing from the opinion which he had expressed in 1828 against extension of competency to parties. Denman now stated that he had come to "a clear and decided opinion that that change will be beneficial, or rather, that it is necessary for the discovery of truth, and the promotion of justice, and will greatly tend to prevent the crime of perjury, and ultimately to extinguish unjust litigation".

Later, in a private letter to Brougham, Denman showed again the firmness of conversion to the cause of reform when he wrote:

Only conceive a legislature creating a Court, with special proviso that those who know the facts shall never be heard, or, never unless the adversary makes him a witness. And this is to be the Law for those of our Courts which ought to assume pre-eminence, while others of inferior pretensions are coming at the Truth by simple means & a natural process.

A month later Denman wrote again to Brougham:

In truth our bill is not reform in the ordinary sense, it is the introduction into our practice of a great principle plainly necessary for discovering truth though long unaccountably excluded from English judicature. It has been unexpectedly [?] at once brought to light & tested by [the] County Courts. The arguments a priori & a posteriori are both complete. What would be thought of a legislator who, framing [a] code for a new state, should begin his chapter of justice "Article 1. The parties to a suit shall never be examined as to what they know"? Is it wiser to say in an old State "In our superior Courts parties are never [heard], these Courts are deserted for some...."
inferior Courts lately erected in which parties may be examined, a practice undeniably giving to those Courts however inferior in other respects, an advantage in the attainment of truth. It is proposed to give the Superior Courts the same advantage. They seem unwilling to accept it. Why?

Exceptional cases are imagined, in which the disparity of parties in talents & dexterity may possibly work injustice.

But this may be said with equal truth of all conceivable systems, & not only the present ...

Brougham appears from 1828 to have been in favour of a wider competency for witnesses. In his speech in that year on the state of the law he expressed the opinion that all persons should be admitted to give evidence, leaving it to the jury to determine what dependence ought to be placed on their testimony. In the debate on the bill introduced by Lord Denman in 1842 Brougham objected only to the exception which it contained, saying that in all cases the parties to a suit should be permitted to be examined. He had himself introduced a bill to achieve this reform in 1845, and he had been the guiding force behind the setting up of the new county court system in 1846 which had provided the opportunity for widespread testing of this reform. It is true that in an earlier local courts bill he had limited the rights of the parties to examination of each other in the presence of the judge before trial, but in the light of Brougham's earlier opinions it is likely that this was put forward as a compromise in an attempt to draw the sting of any opposition.

Brougham delivered the principal speech in the
debate on the second reading of the Law of Evidence Amendment Bill on 11 April 1851.  

He reminded the House that although there may have been a time when parties had been excluded from giving evidence simply because they were parties, the current justification was that it was their interest alone that made their evidence inadmissible. But since Lord Denman's Act had enabled interested persons to give evidence, it followed that the prohibition on evidence should now be removed.

The existing law, he argued, was inconsistent in other ways. In cases decided by judges rather than juries, evidence was given on affidavit. Many affidavits were sworn by parties to the suit, but,

these depositions are given without any check whatever upon the parties, any guard whatever against falsehood, except what is afforded by their own consciences. The affidavit is prepared in secret; it is sworn in private. It is prepared by professional skill, and carefully framed to prove the case of him who is to swear it.

In these circumstances,

Ordinary men, parties of an average candour, with advisers of a medium honesty, will just tell such parts of the story as may suit their purpose.... They will not tell the whole truth, even should they tell nothing but the truth, while not a few will defy the dread of perjury, and yield to the motive for falsely swearing, because there is neither the watchful eye of the Judge and jury, and public upon them; nor the risk of detection by being cross-examined...

Brougham also pointed to the fact that in criminal cases the person who had suffered injury was allowed to give evidence; he was in effect a party to the proceedings,
although the Crown was the nominal party.

Several harmful consequences of shutting out the testimony of parties were relied on by Brougham: (i) It excluded the evidence of those who knew most about the matters in dispute, which must often lead to failure of justice. (ii) It put some parties at a disadvantage because their opponents were likely to have witnesses while they themselves had none. Thus tradesmen, with people in their service, would be more likely than their customers to have witnesses to support them. (iii) A defendant's potential witnesses could be silenced by making them co-defendants. (iv) The rule encouraged unmeritorious litigation: there were thousands of cases which would have been settled out of court had the parties been able to give evidence.

Brougham dealt briefly with the objection that examination of parties would give advantage to the able over the dull and to the self-possessed over the nervous, pointing out that the same objection applied to witnesses currently allowed to give evidence. The judge would always be able to redress the balance.

But the major part of his speech was devoted to what he clearly saw as the major objection to the extension of competency to parties - the risk of increased perjury. The arguments that he deployed to deal with this were entirely pragmatic. He did not attempt to tackle the paternalistic point, made by Lowndes and later to be made
more frequently by opponents of the extension of competency to accused persons, that it was against the interests of society to force a man into a position where he would be so exposed to temptation.

Brougham conceded that the main objection to the proposed reform was that it would lead to an increase in perjury. But, he argued, perjury was in fact more likely under the existing law. Objectors failed to take into account the possibility of subornation of perjury, an offence more likely to occur than perjury by a party giving evidence because "men will set on others to swear falsely who may shrink from perjuring themselves". The exclusion of the parties made it necessary to examine a number of other persons, and the chances of perjury were increased with the number of such witnesses. Moreover, men who would not swear falsely for their own benefit might colour their evidence to help a friend or employer, and the falsity of their evidence would be less easily detected than in a case of clear perjury. Public opinion was completely against the man who gave false evidence for his own benefit, but it was more lenient where a witness swore falsely for the benefit of someone else.

It is very far from being practically true, that the great bulk of perjury is owing to direct interest operating on the mind of the witness. Zeal, favour and affection, hatred and spite, partisanship, perverted notions of obligation, notions yet more perverted of duty towards an employer, or kindness towards a connexion, or honour towards an associate - these mainly work upon men's minds, and form the armoury from which the suborner fits forth his agents - and against those agents thus provided the public
reprobation operates far less potently than against
the party who avows himself moved by self-interest
alone, and who swears in the presence of a most
suspicious audience, disposed severely to condemn, as
well as scrupulously to sift.

Brougham argued further that the false tale of a
party was easier to detect than that of an ordinary
witness because the party had to tell the whole story and
to particularise fully, thereby increasing the scope for
contradiction by another witness or for the detection of
falsity in cross-examination. Other witnesses, however,
swore to only a part of the story, and the opportunity to
contradict them or detect falsity in cross-examination
was correspondingly reduced.

The experience of the county courts, he contended,
showed that the results of the reform would be benefi-
cial, and he referred to a survey of judicial opinion
conducted by the Law Amendment Society. 79 But perjury
would be even less frequently committed in the higher
courts than in the county courts because in the former,
"The parties are likely to be of a higher station, and
more under the influence of honourable feelings." Also,
he thought, "The presence of the Judges is more awful." 80

At the conclusion of the debate Lord Brougham said
that the only feeling which interfered to damp his grati-
fication was "that the most illustrious teacher of
jurisprudence who ever lived, either in ancient or modern
times, Mr. Bentham, had not lived to see this day - there
being no one of his doctrines on which he set a higher
value, or insisted more strenuously, than this of admitting the testimony of parties". 81 We are conscious, in a way we were not when the reforms in connection with testimony on oath were going forward, of weight being attached to Bentham's appraisal of the law. Another direct reference was made by Lord Cranworth when he said that he concurred in Bentham's opinion that if the law allowed parties to be examined, in five cases out of six they would not want to examine any other persons. 82

A similar reference can perhaps also be seen in a leading article which appeared in The Times shortly after the Act had come into force. Reporters had been observing cases to see how the new law was working. The article summarised their observations, which were mainly favourable. However, the writer added that it could not be doubted that the amount of perjury already committed had been considerable. But the writer's opinion was as pragmatic as the arguments that had been used in Parliament. These perjuries, he commented, were not surprising, nor were they to be regarded as impeaching the policy of the Act. He went on, almost as if he had in mind criticism of the kind made by Lowndes, to assert that it was no part of the duty of the court to avoid leading people into temptation. Then he produced an argument that Bentham had often used. The prevalence of perjury was to be attributed to the fact that a party could file a pleading which might be utterly false without suffering any
punishment or disgrace, and by virtue of which he might even succeed in the action if his opponent made a mistake in his own pleading. "It is hardly to be expected that Courts which tolerate pleadings utterly false should be able all at once to obtain from the parties to whom this scandalous licence of mendacity has been granted evidence entirely true." 83

(b) The Contribution of the Law Amendment Society

Shortly after the setting up of the new county court system the Society for Promoting the Amendment of the Law turned its attention to removing the bar on testimony from parties in the superior courts. This society, founded by Brougham in 1844 and often referred to as the "Law Amendment Society", produced a quarterly journal called the Law Review and stimulated a number of mid-century reforms in the law.

In a report published in 1848 the Common Law Committee of the Society concluded in favour of the reform.

When a matter is submitted to the decision of any persons, be they judges or jurors, it is obviously of the last importance that those persons should be made acquainted with the real circumstances of the case before them; and it is equally obvious that the real circumstances are usually best known, and are often only known, to the litigating parties themselves. The argument that the reform would lead to an increase in perjury had been greatly overrated.

So long as parties, like other witnesses, are liable to a rigid cross-examination, it matters comparatively little what amount of interest they may have in withholding or perverting the truth. The dread of detection and of consequent punishment, even in the
absence of every moral sentiment, will in the great majority of instances check the commission of perjury.

The Committee pointed out that the prospect of an increase in perjury had been loudly urged when Lord Denman's bill had been going through Parliament in 1842 and 1843, but the practical working of the 1843 Act had amply shown the invalidity of the objection. Besides, if admitting parties would sometimes occasion perjury, on other occasions it would prevent it. One of the most frequent forms of perjury involved alleged admissions, but if the defendant were able to give his own account, the false witness would hesitate before telling a tale which he knew would be flatly contradicted. Even if such a witness did venture into the witness box, "the mere knowledge of the fact that he was uttering falsehoods, and that another witness could and would be called to make an opposite statement, would often have the effect of rendering his story incoherent and his manner suspicious, and would thus prevent any credit from being given to his testimony".

Yet even if perjury were to be increased, the Committee was not prepared to resist a change in the law on that ground alone.

The folding of sheep by night on lands at a distance from the homestead, no doubt affords facilities for sheep-stealing; the exposure of goods in front of shops leads to larceny; nocturnal travelling may tempt to the commission of highway robbery; but no one thinks of prohibiting these innocent acts on the ground that they hold out temptations to crime. Why is this? Because the inconveniences that would result
from such a prohibition would be felt far more by the public than those engendered by a partial increase in the number of offences.

In this case, the advantages of examining persons best conversant with the facts "would far more than counterbalance any evils which the cause of morality would be likely to sustain, from the crime of perjury becoming somewhat more frequent". 84

In a further attempt to encourage the case for reform the Law Amendment Society conducted an opinion survey of all the county court judges which invited their answers to the question, "In your judgment has the law which enables parties to be examined as witnesses in the County Courts worked well or ill?"

The survey showed that the great majority of judges were in favour of admitting such evidence, the benefits of which in their opinion outweighed any increase that there might have been in perjury. Some examples will give the flavour of their replies.

George Wilkinson thought that in a large proportion of contested cases there would be failure of justice but for this practice. The additional temptation to perjury and the occasional commission of it were greatly outweighed by the increased facility for doing justice. Henry Stapylton said that at first there had been much perjury, but that this had afterwards decreased.

Some judges thought that there had been no increase
in perjury. This was William Walker's conclusion, though the picture he painted had its traces of gloom.

That the amount of perjury in the County Courts is very great cannot, I fear, be doubted, though it should be observed that the misstatements made arise more frequently from the extremely careless, hasty, and inconsiderate habits of answering of the lower orders, and from their slowness in understanding questions put to them, than from a deliberate intention to deceive.

But he noted that the children, servants and other connections of the party were just as ready to swear falsely as the party himself and doubted whether, in proportion to the number of witnesses sworn, there was a greater amount of wilful perjury committed in county courts than in those where the testimony of parties was excluded. On the other hand, J.M. Herbert thought that suborned perjury was much rarer in the county court than in superior courts.

T.J. Birch had no doubt that "a frightful amount of perjury" was committed in the courts over which he presided, "but quite as much by witnesses who are not parties as by parties". Nevertheless, he thought that if the judge took pains he need very seldom be misled. J.D. Burnaby took the same view of the danger that perjury would lead to misdecision: "I certainly observe many very fearful cases of perjury which are occasioned by the examination of parties, but they are generally easy of detection."

John Wing took a more favourable view of those
appearing as witnesses in his court and thought that "contradictions in evidence proceed more often from the witnesses representing their suppositions and imperfect recollections as certainties, than from a wilful and corrupt determination, on the one side or on the other, to state absolute falsehoods".

Arthur Palmer, the sole judge to disapprove completely of allowing parties to give evidence, was less optimistic. "I beg to state," he wrote, "not merely as a matter of opinion, but as a fact, that there is scarcely a week in which the law does not produce, in the Bristol County Court, the most gross perjury." If the parties were not allowed to give evidence, the commission of crime would be prevented and there would not often be a failure of justice.⁸⁵

(c) Professional Opposition

One of the obstacles to reform which Bentham had recognised was the sinister interests of "Judge & Co", and the history of the progress of this particular reform may have reminded some reformers of Bentham's critique. Before the bill became law it was noted that the superior common law judges were unenthusiastic at the prospect of reform.

Denman referred to what he perceived as a general judicial characteristic in the letter which he published in the Law Review in support of the bill introduced in 1851.
Besides the constant occupation of their minds in their important functions, and the necessity for the undisturbed enjoyment of their hard-earned leisure, there are feelings in the Judges which must ever strengthen the reluctance to assent to alteration. They have administered the law as they found it, with implicit confidence, and even veneration, which unite in them with all the obvious and instinctive motives for abhorring change. It is painful to condemn the past and present. Even if they concur in the projected improvement, they had rather that others should be the persons to counsel it.

According to Denman, some judges believed the fallacy that the system of justice which they had to administer had been established "on full deliberation by the wisdom of former ages". Hence they imputed to all innovators the arrogance of reversing an earlier decision. But, he argued, the existing system was mainly "the neglected growth of time and accident", and defects were left uncured because they had not previously been considered. 87

Lord Campbell's diary confirms the existence of judicial opposition. Before the bill became law he wrote:

The great controversy now is upon the Evidence Bill, allowing the parties to be examined against and for themselves. The Bill is opposed, as might be expected, by the Lord Chancellor. If it passes it will create a new era in the administration of justice in this country. I support it, and I think it will be carried, although the Common Law judges, with one exception, are hostile to it.

The writer of a leading article which appeared a few months later in The Times claimed that there was no doubt that the most numerous and efficient body of persons opposing law reform was to be found in the legal profession. "A lawyer having acquired, by labour, at a
wonderful expense of mental exertion and down-right money outlay, a knowledge of a curiously intricate science so called, on a sudden finds that this mystery, to him so costly, is about to be rendered utterly valueless." It may be a benefit to the community, but to him it is an unmixed evil - "it puts an end to his craft, his power, and his profit." A judge had risen to legal eminence by a craft:

His mind is engrossed by what BENTHAM called an interest-begotten prejudice. He looks back with complacency to the triumphs of his forensic career, and dwells with lingering fondness upon the many points successfully raised by his ingenuity and peculiar knowledge. To abolish at one fell stroke all that gave importance to his past career is to him a most distasteful proceeding.

The writer of a leading article in the Law Times supported the bill but acknowledged that many lawyers, if not a majority of them, were hostile to the proposed reform. Two reasons were suggested for this. The first was that the influence of mere habit was enormous. "Bred to a system, never having questioned it, we assume it to be right, and that which is really only assent is mistaken for conviction." The second reason was that,

from the very nature of our training it is extremely difficult for us to divest our minds of the notion that a suit is a conflict of skill, in which the victory is due to something besides right. We cannot readily realise to ourselves that while our business is to do the best we can, and make the best case, for one side only, the duty and object of the tribunal is to learn the very truth.

At the same time, there seems little doubt that a substantial body of legal opinion regarded the reform as
a great benefit to litigants. The Law Times noticed an "extraordinary diminution of civil business" on the circuits in the period before the bill became law because impending trials were being delayed to await its passage.91

In October a writer in The Times took the view that, "Amid the general impatience of almost all classes in this country for a speedy and sweeping reform of the law, the judges alone regard its progress with dislike and distrust." In particular, they seemed to look upon a new Act of Parliament reforming the law "as a challenge rather than a mandate, and address themselves to its interpretation with the view of neutralizing rather than carrying out its provisions".92

On 20 November 1851, and subsequently on 10, 12 and 20 December 1851, letters appeared in The Times, signed only with the Greek letter delta, which implied that the judges of the superior courts disliked the 1851 Act and, in deciding questions arising under it, had resolved to defeat its operation.93 Denman may well have been the author of these letters. He had used this form of signature in his private correspondence94 and in a private letter to Brougham dated 13 December 1851 he referred to "the outrageous mutiny among the judges on subject of new law of evidence".95

It is likely that this publicity had a chastening effect; after 1851 there were no more complaints of
judicial perversity in interpreting the Act. In their Second Report the Common Law Commissioners wrote:

It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into Court and there wrongly decided in consequence of the exclusion of evidence, but in numberless cases in which parties silently submitted to wrongs from inability to avail themselves of proof, which, though morally conclusive, was in law inadmissible. From the time, however, when the late Mr. Bentham first turned the attention of the public to the defects of the English law of evidence, the system of exclusion has been crumbling away before the power of discussion and improved legislation.

As for the results of the 1851 Act, the Commissioners observed:

The new law has now been in practical operation for eighteen months; and, according to the concurrent testimony of the bench, the profession, and the public, is found to work admirably, and to contribute in an eminent degree to the administration of justice.96

The contributions of Denman and Brougham and of the Law Amendment Society suggest Benthamite influence on the 1851 reform; the opposition from the majority of the common law judges and from other members of the legal profession may have revived memories of Bentham's critique. But it was possible to reach the conclusion that parties should be competent by a progression of ideas that did not include reference to Bentham. This possibility is suggested by the development of Denman's own ideas of reform. His earlier hesitation about extending competency to parties has already been noted.97 Another who was prepared to remove the general bar on interested
witnesses but not the bar on parties was Lord Campbell. Experience had taught him the evils of examining the parties. As an arbitrator he had sometimes examined the parties, but never without repenting that he had done so, because persons swearing for themselves too often forgot what was right and wrong, their passions were inflamed, and they stated that which would best serve themselves.

But there were other reasons also:

What if a man of bad character were allowed to be a witness against any woman he might choose to accuse, and she were put into the box, and it should go to the jury as to which should be believed! It was the same objection as applied to the French system of examining prisoners; the astute and sharp man, though guilty, might manage his answers so as to get off; whereas, if an innocent man were interrogated, he might be so much confounded with his situation, that he would not be able to explain things which told against him.

Furthermore, it was not necessary to have recourse to Bentham to see that abolition of the rule which prevented witnesses with an interest from giving evidence effectively undermined the restriction on the parties. In 1831 Tindal CJ had held that the reason for excluding a party was his interest in the outcome of the suit. Thus where one of the defendants to a suit had ceased to have an interest because he had suffered judgement by default, and had agreed to be examined, there was no ground for rejecting him. Tindal CJ observed, "No case has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit ...".

In the Commons debate in 1843 Bickham Escott, member for Winchester, said that if the bill were passed,
they must go a step further and admit the plaintiff and
defendant to give evidence.\textsuperscript{100} The \textit{Law Times} commented on
the 1843 proposals:

\begin{quote}
We regret only that Lord Denman, having courageously
proceeded so far in amending the Law of Evidence, did
not go one step further, and remove all incapacities
whatever, even those of a party to the suit. We can
discover no sufficient reason why a jury should not
hear what the parties have to say about it; nor why
those who must know most of the matter under investi-
gation should be the only persons whose narrative is
not to be listened to.\textsuperscript{101}
\end{quote}

The first edition of Taylor's \textit{Treatise}, published in
1848, stated that "every argument that can be urged in
favour of admitting the evidence of interested witnesses
in general, applies to that of parties".\textsuperscript{102}

Nor was testimony from the parties a complete
novelty. As early as 1830 a writer in the \textit{Legal Observer}
observed that the law should be reformed to allow evid-
ence to be given by the parties to an action, for in many
instances they were the most important witnesses, if not
the only ones, and "from the commercial character of our
country at the present day, the rejection of the testi-
mony of an interested party must be most unwise".\textsuperscript{103} But
these commercial pressures had already given rise to
examination of the parties in litigation taking place
outside the sphere of the superior courts of common law,
namely, in arbitrations and in actions brought in the
various Courts of Requests.

The writer in the \textit{Law Times} who commended Lord Den-
man's reforms also stated that there was rarely an
arbitration in which it was not expressly provided that the parties should be examined. 104

Other tribunals where the parties were heard were the Courts of Requests, or Conscience, which had been established in many places by special Acts of Parliament during the eighteenth and early nineteenth centuries. 105 Their constitution and jurisdiction varied. A typical Court of Requests had as judges a body of non-professional persons called commissioners who had jurisdiction to try actions for debt in accordance with equity and good conscience (terms broadly interpreted) where the sum in dispute did not exceed 40 shillings or £5. Proceedings were informal and the parties were able to testify. 106

Similar arrangements prevailed in the old county court of Middlesex. A statute of 1750 gave authority to the suitors of the Middlesex county court and the county clerk to determine by summary procedure suits where the debt or damages amounted to less than 40 shillings. They were given power to make such orders or decrees as should seem "just and agreeable to equity and good conscience", and "for the better discovery of the truth, and more speedy obtaining the end of such suits" it was provided that the suitors and the county clerk could examine the parties on oath. 107

There is controversy over whether the 1846 Act which established the new county court system created a
new court or revived an old one. The commission under Sir John Romilly appointed to inquire into the state of county courts showed in its first report in 1855 that it regarded the new county courts as a distinct creation. However, as its view was that the old county court continued to function alongside the new it seemed that for practical purposes the courts had been fused. In Owens v Breese Patteson J referred to the new county courts as "but an extension of the courts of request and original county courts". However the succession from one system to another was viewed, there was nothing controversial about section 83 of the 1846 Act which merely preserved for the parties rights to testify which had already been widely exercised. What the Act did do was to provide, through the new and more efficient system of courts, wider opportunities for such testimony to be given, thereby emphasising still more the disadvantage of the superior courts of common law.

This was not ignored by professional opinion. In 1849 the writer of a leading article in the Law Times stated that the new courts had "taught some lessons by which, if the Superior Courts do not speedily profit, they will find their business continuing to decline, and if an optional jurisdiction be given to the former, that of the latter will, ere long, be reduced to the smallest span". The exclusion of the parties and their spouses from giving evidence in the superior courts was marked
out for particular disapproval: "The consequence of this absurd and irrational exclusion is the continual failure of justice." In the writer's opinion, it was the power to examine parties which, more than anything else, had given satisfaction in the county courts. In the following year the writer of a leading article in The Times commented that "if upon all occasions the Common Law courts had the power of examining the parties to the suit, a most important advantage in the general administration of justice would be thereby obtained".

The reform of 1851 is therefore as likely to have developed by analogy from the position of interested non-parties in the superior courts of common law, and from traditions of competency operating outside those courts, as from Bentham's radical critique.

5. Summary of Conclusions

This chapter has considered the statutory reforms that took place in 1843 and 1851. Lord Denman's Act of 1843 abolished the remaining rules of incompetency by reason of criminal conviction, and also those rules which affected the competency of non-parties by reason of their interest in the outcome of litigation. These were reforms that Bentham had advocated which came about as a direct result of the efforts of Lord Denman, whose thinking on law reform had clearly been influenced by Bentham's work. However, Denman's position was not that of a convinced
Benthamite. At this stage there was no question of his supporting even the extension of competency to parties in civil actions. The abolition of incompetency both for criminal convictions and for interest may very well have been triggered by Denman's interest in reform, but the success of the legislation depended on its acceptance by the profession - particularly by the common law judges and the Attorney General - as a logical extension of previous common law developments.

The Law of Evidence Amendment Act of 1851 is probably the most likely product of Benthamite influence among nineteenth-century statutes dealing with evidence. The contributions of Denman and Brougham and of the Law Amendment Society suggest this, and the nature of the opposition to this legislation may have given wider currency to Bentham's critique. But support for the reform is equally consistent with a gradualist approach based on application of the principle embodied in the 1843 Act, and on the extension of existing practices in litigation outside the sphere of the superior common law courts.
NOTES TO CHAPTER 3

1. Starkie, Treatise, 2nd ed. (1833), vol.1, 94.

2. R v Crosby (1694) 5 Mod 15, 87 ER 491, per Holt CJ.

3. Pendock v Mackender (1755) 2 Wils KB 18, 95 ER 662.


5. R v Crosby, (n.2 above), per Holt CJ.


7. R v Friddle (1787) 1 Leach 442, 168 ER 323.

8. Cooke v Maxwell (1817) 2 Stark 183, 171 ER 614.


10. R v Teal (1809) 11 East 307, 103 ER 1022; R v Inhabitants of Castell Careinion (1806) 8 East 77, 103 ER 273.

11. I have made no attempt to set out in detail the law on this subject, which was complicated. A summary can be found in Starkie, Treatise, 3rd ed. (1842), vol.1, 97-100.

12. Cuddington v Wilkins (1615) Hob 81, 80 ER 231; R v Crosby (1694) 1 Ld Raym 39, 91 ER 923.


23. Mant v Mainwaring (1818) 8 Taunt 139, 129 ER 335.
24. 7 Bing 395, 131 ER 153.
27. Ibid., 335-36, 343-44, 362-63.
28. Ibid., 344-45.
29. Ibid., 368.
30. Ibid., 599.
31. Ibid., 427.
32. Ibid., 386-87.
33. Works, vol.1, 486.
35. Rationale of Judicial Evidence in Works, vol.6, 262.
37. Parl. Deb., 3rd series, lxiii, 1142 (3 June 1842); lxvi, 196-97 (6 February 1843); The Times, 7 February 1843. There appears to have been some confusion on the part of reporters between Denman's bill to deal with incompetency for interest and for criminal convictions, and his other bill to extend the right to affirm.
38. 6 & 7 Vict c 85; otherwise known as the Law of
Evidence Act 1843, or Lord Denman's Act.

39. *House of Lords Sessional Papers* (165) 1845. The bill provided that, in limited cases and after giving notice, one party should have the right to call the other as a witness. In return, the party exercising the right was obliged to tender himself for examination by his opponent.


41. Ibid., lxxxviii, 705-6 (14 August 1846).

42. Sir John E. Eardley Wilmot, *Lord Brougham's Acts and Bills, from 1811 to the present time, now first collected and arranged, with an analytical review shewing their results upon the amendment of the law* (London, 1857), 574-604.

43. 9 & 10 Vict c 95.

44. Taylor had drawn up the report of the Common Law Committee of the Law Amendment Society which had recommended the reform. (*Law Review* 14 (1851): 137.) He had also drawn up a bill, introduced in 1849 by Brougham, to enable parties and their husbands or wives to give evidence in civil cases. (*Sir Joseph Arnould, Memoir of Thomas First Lord Denman* (London, 1873), vol.2, 318; *Parl. Deb.*, 3rd series, cxvi, 1.) The 1849 bill is printed in *House of Lords Sessional Papers* (89) 1849.


46. Ibid., cxviii, 838-49 (16 June 1851).

47. Ibid., 1893-95, 1927.

48. Compare the text of clause 3 as it left the Lords: "But nothing herein contained shall render any Person, who in any Criminal Proceeding is charged with the Commission of any indictable Offence, or any Offence punishable on summary Conviction, competent or compellable to give Evidence for or against himself or herself, or shall in any Proceeding, civil or criminal, render any Husband competent or compellable to give Evidence for or against his Wife, or any Wife competent or compellable to give Evidence for or against her Husband." (*House of Lords Sessional Papers* (179) 1851.) Emphasis mine here and in accompanying text.


50. The Evidence Further Amendment Act 1869 removed the exception in relation to proceedings instituted in
consequence of adultery.


52. Ibid., 177.

53. Ibid., 179.

54. [Thomas Denman] Considerations respectfully submitted to the Commissioners now sitting to inquire into the Proceedings in Actions at Law, quoted in The Times, 8 October 1828, 3-4. See also Arnould, Lord Denman, vol.1, 256-57.


56. Ibid., 398-99.


58. Ibid., 209.


60. Starkie, Treatise 3rd ed. (1842), vol.1, 95, n.(h). On disqualification for interest he wrote that the rule was

founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. There are, no doubt, many whom no interested motive could seduce from a sense of duty, and by their exclusion this rule may, in particular cases, operate to shut out the truth. But the law must prescribe general rules; and experience renders it probable that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion.

But he added:

The necessity for defining and limiting the extent of the operation of this principle is an immediate consequence of its adoption, for the sake of certainty in its application, and also to prevent its operating too largely to the exclusion of evidence, which would be productive of great inconvenience.

(Ibid., 17.)

62. Ibid., lxxi, 910 (17 August 1843).


64. Ibid., 7.

65. Ibid., 13-14.

66. See n.54 above and accompanying text, and section (2) below.

67. See n.57 above and accompanying text.

68. See section (2) below.

69. See n.21 above and accompanying text.

70. See n.54 above and accompanying text.


72. UCL Brougham MSS No. 39382, 12 June 1851. Brougham's 1845 bill had a provision for one party to call the other as a witness. (*House of Lords Sessional Papers* (165) 1845.) In a leading article in *The Times* on 18 July 1851 the writer recommended that either party to a suit should be able to obtain leave, without the delay and expense of a bill of discovery, to examine his adversary viva voce before a judge or any proper officer of the court on the matters in dispute between them.

73. UCL Brougham MSS No. 39383, 13 July 1851. Abbreviations in the original have been expanded in this transcription and in that from MS No. 39382.


76. See n.39 above and accompanying text.


79. See section (b) below.
80. Arguments of a similarly pragmatic kind were used by the Attorney General, Sir Alexander Cockburn, at the committee stage of the bill in the Commons. He observed that witnesses with an interest had been allowed to give evidence under Lord Denman's Act without any of the baneful effects that had been expected. Moreover, various secondary checks would operate to exclude perjury. With "the virtuous portion of mankind", the very fact that a man was called upon to depose in his own cause would lead him "to weigh most cautiously every word he uttered, and to view the facts in a light rather unfavourable than otherwise to his own interest". Even if the witness were not virtuous, when he came to give evidence in his own favour he would realise how closely what he had to say would be scrutinised, and so would speak with the utmost caution. Tribunals would be more on their guard where there was obvious bias, as would be the case with one of the parties, though not perhaps with a witness called on his behalf.


82. Ibid.


84. Law Review 8 (1848): 353-58. It is likely that this closely argued presentation of the case for reform was influential not only in England but also in the state of New York. The legislature of that state had appointed a commission to revise the system of practice and pleading in its courts. The commissioners had reported in 1848 and had published with their report that of the Common Law Committee. A proposed code of civil procedure for the State of New York followed in 1850. The rules of evidence which it comprised were for the most part those followed in England. But two important alterations were proposed. The first involved a wide extension of the admissibility of evidence; in particular, it was proposed to allow parties and others with an interest in the outcome of litigation to give evidence. The second alteration was designed to enable any witness who desired to give evidence on affirmation instead of oath to do so. (Law Review 12 (1850): 366-67; 13 (1850-51): 395-418.)


86. Bentham's term for judges and lawyers viewed as a partnership in substance if not in form, pursuing self-interest at the expense of others. The term occurs throughout the Rationale of Judicial Evidence and the

87. Law Review 14 (1851): 210, 211. See also a leading article in The Times, 7 May 1851. The writer believed that the judges, having reached the pinnacle of their professional ambition, had everything to fear and nothing to hope from a change of system. English law protected them from much labour and responsibility and raised questions for their decision in so abstract a form as to shield them almost entirely from criticism. It achieved this by its highly technical system of pleadings, its strict and unbending rules of practice and evidence, and its careful separation of law and fact.

88. Quoted in a debate on the Evidence in Criminal Cases Bill by Lord James of Hereford on 1 August 1898. (Parl. Deb., 4th series, lxiii, 663.) Lord James also observed that in 1856 Campbell had added a note to this entry: "The Act has been made to work most admirably. All mankind praise it."

89. The Times, 1 September 1851.

90. Law Times 17 (1851): 38. The Law Times encouraged its readers to petition the House of Lords in support of the bill and provided a precedent which could be used for that purpose. Its great fear was the opposition of the Lord Chancellor, Lord Truro. It may also have been felt that something should be done to counter the influence of the Incorporated Law Society, which had petitioned against the bill. (Ibid., 98, 106, 121.)

91. Ibid., 157-58. A clause was later introduced providing that the new legislation should not apply to pending actions. The Law Times thereupon "lost no time in communicating upon the matter with some of the authorities" and the clause was dropped. The Act when passed applied to all pending actions and proceedings in which evidence would be taken on and after 1 November 1851. (Ibid., 165; 18 (1851-52): 9.)

92. The Times, 8 October 1851. This complaint was repeated in a leading article on 18 October 1851:

Judicial vanity is easily excited; a judge and a bishop's wife being about equally sensitive on the score of their dignity. We may indeed smile at the anger and the folly of the helpmates of the episcopal bench, but the abilities of Westminster-hall are to the public serious calamities.

93. See particularly the letter published on
20 December.


95. UCL Brougham MSS No. 10941.


97. See n.70 above and accompanying text.


100. Parl. Deb., 3rd series, lxxi, 910 (17 August 1843).


102. Law Review 8 (1848): 207, 214. The reviewer questioned Taylor's opinion, though on what basis was left unclear, observing that the matter was "still an open question among the most unprejudiced and enlightened reasoners on such subjects".


104. Law Times 1 (1843): 564-65. See, e.g., Sidney Billing, A Practical Treatise on the Law of Awards and Arbitrations, with forms of pleadings, submissions, and awards (London, 1845). The first precedent in the "Append­ix of Forms" is for a simple agreement between two persons to submit their differences to arbitration. It provides, inter alia, "that the said arbitrator shall, for the purpose of enabling him to make the said award, be at liberty to go into parol, as well as written evi­dence, and to examine the said parties in difference, or either of them, and such other witnesses as he shall think proper, on oath". As this precedent shows, it was the practice to make examination of the parties a matter for the arbitrator's discretion. Not all were willing to hear parties, as the attitude of Lord Campbell showed. (See n.98 above and accompanying text.) But enough seem to have been willing to make such a provision a standard one in arbitration agreements.

105. See the lists set out in schedules (A) and (B) of the 1846 Act which established the County Courts.
(9 & 10 Vict c 95).


107. 23 George 2 c 33 s 1. By s 3 the suitors were those qualified to serve on juries at nisi prius trials in the King's Bench, Common Pleas and Exchequer at Westminster. By s 13 the county clerks were to be barristers of at least three years standing.


109. (1851) 6 Exch 916, 920; 155 ER 820.


111. The Times, 21 November 1850.
CHAPTER 4
THE INCOMPETENCY OF THE ACCUSED

This chapter deals with the third, and last, stage of the removal of witness disqualifications which were based on interest. Although the incompetency of the accused was challenged in Parliament as early as 1858, it was not until forty years later that the reform was finally achieved. The aim of this chapter is to describe how and why this reform came about.

The first section examines the extent to which accused persons had a right to silence in the early nineteenth century. The second section provides a summary of Bentham's critique of any right to silence for the accused, and of the law which made the accused incompetent as a witness. This is followed by an overview of the various attempts at reform made during the period 1858-98. The fourth section analyses the influences on the reform, and the final section is a summary of conclusions.

1. The Right to Silence in the Early Nineteenth Century

Bentham's critique of the accused's right to silence was developed against a background which had two principal features. The first of these was the detachment
of the accused, for reasons described below in section 3, from the proceedings at his own trial by jury. Although in the eighteenth century it had been customary for the trial judge to question the accused informally, without administering an oath, that practice had virtually disappeared by 1820— at least in those increasingly frequent cases where the accused was defended by counsel. In summary trials the procedure is likely to have been more informal, but the scarcity of records makes generalisation difficult.

The second feature was the increasing official encouragement to persons accused of felony to remain silent during the pre-trial investigation before a magistrate. Magistrates had in principle a duty to examine a prisoner suspected of felony, but this was a creature of statute and seems to have been regarded as contrary to the spirit of the common law.

The point was made in the revised edition, published in 1614, of Lambarde's Eirenarcha, a work dealing with the duties of justices of the peace. The writer referred to the statute of Philip and Mary which had provided that where a person arrested for felony was brought before a justice of the peace, the justice should take the examination of the prisoner and the information of those bringing him, and put the same in writing. The writer added:

Here you may see (if I be not deceived) when the examination of a Felon began first to be warranted
amongst us. For at the common Law, Nemo tenebatur prodere seipsum, and then his fault was not to be wrong [sic] out of himself but rather to be discovered by other means and men.  

Blackstone made the same point, quoting Eirenarcha, in his Commentaries. A statutory provision similar to that of the statute of Philip and Mary was enacted in a consolidating Act of 1826 which dealt with criminal law. This provision was varied in 1848, but the variation was made in order to recognise what had come to be existing practice; it was not an attempt by Parliament to introduce a new practice. The 1848 statute provided that after the examination of all the prosecution witnesses, the justice should read the depositions to the accused and should then say to him these words, or words to the like effect:

Having heard the Evidence, do you wish to say anything in answer to the Charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial.

It was clear that while the witnesses were to be examined on oath, the accused was not to be sworn. One reason for this was probably to ensure the voluntariness of any statement made by the accused. So strong was the prohibition against administering an oath to the accused, that even where an examination appeared from its preliminary form of words to have been taken on oath, it was held to be inadmissible at trial, and no evidence was permitted to prove that an oath had not in fact been
administered. The fact that voluntariness was thought important enough to be preserved in this way suggests a corresponding belief in a right to remain silent.

The decision of Richards LCB in *R v Wilson* (1817)\textsuperscript{10} carried the protection of the accused farther. In this case the prisoner had been indicted for uttering forged notes, knowing them to have been forged. The crucial question was the accused's knowledge. An accomplice was the principal witness for the Crown. To confirm his evidence, prosecuting counsel wished to produce the examination of the prisoner by the magistrate who had committed him for trial. He argued that the examination was not tendered as a confession, "but as containing facts which appeared upon the prisoner's examination, confirmatory of the testimony of the accomplice". The magistrate was questioned and said that he had held out no hopes or inducements and had employed no threats, but that he had examined the prisoner at a considerable extent, in the same manner as he was accustomed to examine a witness. No oath had been administered. Richards LCB held that the examination could not be read.

An examination of itself imposes an obligation to speak the truth. If a prisoner will confess, let him do so voluntarily. Ask him what he has to say[...]. But it is irregular in a magistrate to examine a prisoner in the same manner as a witness is examined.

Other judges did not go so far as this. In *R v Ellis* (1826) counsel for the accused cited the decision of Richards LCB in support of an argument to exclude an
examination which had been conducted in similar circum-
stances. Littledale J referred to a decision of Holroyd J
to the contrary and held the evidence to be admissible in
principle. But he then suggested to prosecuting counsel
that as the prisoner had been refused professional assis-
tance before the magistrate, the case should not be
further pressed. Prosecuting counsel assented and the
prisoner was acquitted.

R v Green & Others (1832)\textsuperscript{13} shows clearly that well
before the 1848 statute the accused had in practice a
right to silence before the magistrate. The case con-
cerned an indictment for burglary. Two of the prisoners
had made statements before the committing magistrates.
The magistrates' clerk stated at trial that before the
prisoners had said anything, they had not only been told
that they must not expect any favour from confessing, but
that the magistrates had actually dissuaded them from
confessing. Gurney B said that they should not have been
dissuaded "because that is shutting up one of the sources
of justice", but he also made the point that "it ought to
be left entirely" to a prisoner "whether he will make any
statement or not".

The fixed practice before the 1848 Act is shown in
the first edition of Archbold's Justice of the Peace,
published in 1840, where the author wrote as follows:

When the magistrate asks a prisoner whether he has
any thing to say in his defence, he should in fair-
ness, at the same time, state to him that he is not
to expect any favour from confessing, but that all he
says will be taken down, and read in evidence against him at his trial; also, if any threat have previously been holden out to him, the magistrate ought to caution him not to be influenced by it, after which, it should be left entirely to the prisoner's own discretion, whether he will make any statement or not; he should not be pressed to do so, nor dissuaded from doing it.

In his comment on the decision in *R v Ellis*, the author wrote that in strictness, a confession obtained by means of questions from the magistrate could be used against a prisoner at his trial but, he added, "such a mode of obtaining it is not very commendable, and should be avoided".

Thus the magistrate's original statutory obligation to take an examination of the accused had been substantially weakened. For some decades before the 1840s, the practice surrounding the examination of a suspected felon by the justices had been reflecting a tension felt to exist between the words of the statute and the common law principle referred to by Lambarde and Blackstone. While it could not be said that a right to silence in these circumstances existed by virtue of the strict law, such a right was recognised in practice. Bentham therefore probably had in mind both the silence of the accused at trial and the judicial encouragement to silence during the pre-trial investigation before the magistrate when he developed his critique of the accused's right to silence.

2. Bentham's Critique

Bentham's primary concern when criticising the law
governing the position of accused persons at trial was to secure the abolition of the rule that made them incompetent to testify. It is clear from his writings that, once given a competent accused, there would have been no further right to avoid questioning. Bentham allowed for the possibility (i) that evidence might be excluded if the principle of utility required it, and (ii) that this might be so if the admission of the evidence in question would be likely to lead to misdecision.\textsuperscript{16} It does not appear, however, that Bentham regarded these as anything more than theoretical possibilities. In this section I shall deal firstly with Bentham's arguments in favour of making the accused competent and compellable. I shall then deal with the way in which Bentham approached the possibility of exclusion on the ground of utility.

(1) The Case for Competency and Compellability

The primary argument which supported Bentham's contention that the accused should be competent and compellable was based on his view of the function of procedural law. This was assisted by an argument that the existing law gave rise to various mischiefs, and by a refutation of the arguments employed by supporters of the existing law.

(a) The Procedural Law Argument

Bentham divided law into two main classes: (i) substantive law; (ii) adjective, or procedural, law.
Adjective law was sub-divided into punitory laws, which gave directions to an official to apply sanctions, and rules of adjudication. The latter included "means of coming to the truth", of which the law of evidence was a part. The particular function of evidence law was the achieving of "rectitude of decision", that is to say, getting at the facts so that the substantive law could be accurately applied.\(^\text{17}\)

In order to get at the facts, a system of judicial procedure needed two aims: (i) To make it possible that the whole stock of evidence that existed should, if demanded for a judicial purpose, be actually presented. (ii) To ensure that such evidence should be presented in the most trustworthy shape possible.

In connection with the first of these aims Bentham argued that,

Non-compulsion is negative exclusion. To refuse to take, at the instance of the party having need of the evidence, the steps necessary to cause its being forthcoming, is to exclude it.\(^\text{18}\)

The implication was that an accused should be not only competent, but compellable. This appears elsewhere. For example, Bentham insisted that the advantage of interrogation was its propensity to clear up all doubts produced or left by other evidence.

On both sides, its property is to clear up all doubts - all doubts produced or left by other evidence - doubts which without its aid can never be cleared up. Possessing this property, it is not less favourable to innocence than adverse to delinquency. All suspected persons who are not guilty, court it; none
but the guilty shrink from it.\textsuperscript{19}

Interrogation could, for example, be used to supply the deficiencies of real evidence. Thus it could be the case that an apparently incriminating article had been placed by someone other than the accused in the place where it was found.

On this, as on all other occasions, the way to know is to inquire: a proposition that from the beginning of the world to the present day has never been a secret to any human being, unless it be to English lawyers. And of whom to inquire? Of whom, but of the one person in the world, who, if the fact be in existence, cannot fail to know of it? - the one person in the world, in comparison with whose evidence, every other imaginable species of evidence, direct or circumstantial (except in so far as this naturally best evidence happens, by the force of sinister motives, to be driven into mendacity,) is a miserable makeshift ...\textsuperscript{20}

An obvious inference could be made from a refusal to submit to interrogation.

From the known principles of human nature, according to a course of observation common to all mankind - according to the result of a set of observations, which it can scarce happen to a man to have arrived at man's estate without having had frequent occasion to make - between delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable.\textsuperscript{21}

\textbf{(b) Mischiefs of the Existing Law}

Bentham thought that the exclusion of the self-disserving evidence that would often have been produced as a result of interrogating the accused gave rise to a number of mischiefs.

\textbf{(i) It led to the exclusion of the best possible evidence and made misdecision more likely.}

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(ii) It encouraged recourse to bad evidence of various sorts to take the place of the good evidence that had been excluded. An example was the supposed confession of the accused, delivered through the medium of hearsay and without the opportunity of explanation, completion or correction.

(iii) It led to the increase of delay, vexation and expense, because it was likely to be necessary to look to a variety of sources for supplementary evidence.

(iv) The rule had a pernicious effect on "the moral branch of the public mind". For example, in order to punish one member of a group of malefactors it became necessary to nourish and encourage another in order to obtain his testimony against his former partner in crime.22

(c) Refutation of Arguments for Exclusion

Bentham thought that the arguments used to support exclusion were "groundless and utterly indefensible prejudices - conceits, founded not on the principle of utility, but solely on the principle of caprice".23 He identified five of them.

(i) **Petitio principii.** This consisted in assuming the propriety of the rule. "[Y]ou represent
all men, or (what comes to the same thing) all men whose opinions are worth regarding, as joining in the opinion: and by this means, besides the argument you present to the intellectual part of their frame, you present to its neighbour the volitional part another sort of argument, constituted by the fear of incurring the indignation or contempt of all reasonable men, by presuming to disbelieve or doubt what all such reasonable men are assured of.

(ii) The old woman's reason. "The essence of this reason is contained in the word hard: 'tis hard upon a man to be obliged to criminate himself." But, Bentham retorted, it was hard for a man to do anything he did not like, especially if it led to his being punished. He also pointed out that the punishment itself could be reduced if its incidence were to be made more certain by making the accused liable to examination.

(iii) The fox-hunter's reason. "This consists in introducing upon the carpet of legal procedure the idea of fairness, in the sense in which the word is used by sportsmen." Thus a fox had to have an opportunity to run a certain distance in order to provide a chance
of escape, nor was it permissible to destroy the fox by the more certain method of shooting. Bentham conceded that in the sporting code these rules were rational because they were appropriate to the object of sport, namely, amusement. But as things stood, the same principle was applied to the administration of justice. "Every villain let loose one term, that he may bring custom the next, is a sort of bag-fox, nursed by the common hunt at Westminster.... To different persons, both a fox and a criminal have their use: the use of a fox is to be hunted; the use of a criminal is to be tried."

(iv) **Arguments which confounded interrogation with torture.** Bentham pointed out that putting a question to a defendant was no more an act of torture than if he were an ordinary witness.

(v) **Arguments which referred to unpopular institutions.** These depended for their force on establishing a link between the proposed reform and earlier unpopular institutions, such as the Court of Star Chamber or the Court of High Commission. Bentham replied that it might as well be argued that no court should ever sit in a room which had stars painted on the ceiling, or that judges ought
not to be appointed by a commission. Because some things done by these courts were bad, it did not follow that everything had been.\footnote{24}

These arguments have to be assessed in their context. Arguments about a right to silence today must distinguish between its exercise in court and its exercise during pre-trial investigations by the police. But pre-trial investigations in the 1820s were carried out by justices of the peace\footnote{25} and Bentham's concern was therefore entirely with the exercise of a right to silence in proceedings that may have been informal but were always controlled by a judicial officer. In this connection it is important to remember the reliance which Bentham placed on publicity as a protection against official abuse of power. In particular, he believed that if judicial work was done in public, the judges' care for their own reputations would operate as a perpetual check on their actions.\footnote{26} The risk to an innocent person from compulsory interrogation would therefore be small, for methods of questioning that were bullying or otherwise unfair would be eliminated by exposure to publicity. Nevertheless, Bentham appears to have been willing that the right to silence should be abolished before the provisions that he had devised for the protection of suspected or accused persons were put in place. He took the view that a balance had to be struck between the interests of innocent suspects and those of other
innocents who would suffer if the legal system continued to provide ineffective remedies against crime.  

(2) Exclusion of Evidence on the Ground of Utility

Bentham allowed for the possibility (i) that evidence might be excluded if the principle of utility required it, and (ii) that this might be the case if the admission of the evidence in question would be likely to lead to misdecision.

Because Bentham claimed that the only defensible end of adjective law was to maximise the execution and effect of substantive law, it might appear that he held a simple efficiency view about the function of adjective law.  But Bentham drew a distinction between the primary and collateral ends of such law. Its primary end was the execution of substantive law, but that was not its only end. There were two basic kinds of hardship involved in executing the law: (i) vexation, expense and delay; (ii) misdecisions. The first, though not the second, kind was inevitable. The collateral ends of adjective law were to minimise both kinds of hardship. The particular end of the law of evidence, rectitude of decision, served both the primary end of procedure (executing the law) and the second collateral end (minimising the risk of misdecision).

Bentham foresaw inevitable conflict between the primary and collateral ends of adjective law. In such a conflict, the principle of utility was to be applied to
strike a balance. Thus the law was to be executed except where this would involve preponderant vexation, expense, delay or risk of misdecision. For example, if the only available evidence for a minor offence was testimony which would be very time-consuming and expensive to obtain, the accused should go unpunished. Bentham left it to the judge to apply the principle of utility in individual cases, without creating a system of precedents.

Because Bentham attached great importance to rectitude of decision, the law of evidence could, on his view, include devices which would protect the innocent accused. In principle, there was no reason why evidence should not be excluded in pursuit of this particular utility. Although the arguments in Book IX of the *Rationale of Judicial Evidence* leave the reader with the impression that Bentham regarded the protection of silence as never justifiable, his overall theory suggests that he thought that silence ought not to be protected except where collateral hardships would otherwise be preponderant.

It does not appear, however, that Bentham thought of the exclusion of evidence to avoid misdecision as a realistic possibility. Even when writing about false confessions he could not come to terms completely with his subject. "To a first view, nothing can be more paradoxical than the case of a man's having recourse to falsehood for the purpose of subjecting himself, perhaps
to the punishment, at least to the disrepute, attached to a supposed act of delinquency which in fact he has not committed.\textsuperscript{31}

In any case, he stated, false confessions were most rare; at least, he hoped they were. "The case of false confession is a case which, in the present state of jurisprudence among civilized nations ... has seldom been exemplified: so at least one wishes and hopes to be able to believe, for the honour of governments and of human nature." The only instance in which it had been in any degree frequent was in cases of witchcraft.\textsuperscript{32}

Bentham does not appear to have looked for any safeguard beyond a more careful interrogation. To guard against false confessions, every confession should be as particular as interrogation would allow. Thus in respect of all material facts, especially the act constituting the physical part of the offence, time and place ought to be specified so that any falsity might appear when the details of the confession were set beside other inconsistent evidence.

The idea that a confession based on hope or fear should be rejected was thought by Bentham to be absurd. Accused or suspected of a crime, guilty or innocent, - what but hope or fear should induce a man to speak? Guilty, in particular, what but hope or fear should induce a man to confess? Confession without hope or fear, is an action without a motive, an effect without a cause.

Bentham emphasised that what there was of reason in the...
principle amounted simply to the need for a judge examining an accused to be on his guard against "the sinister inducements, to the action of which a man in such a situation is exposed". 33

3. An Overview of the Attempts at Reform

The story of how accused persons became competent witnesses in their own defence may be divided into three periods. The first, from 1858 to 1878, saw unsuccessful attempts to achieve this reform by Lord Brougham and a few private members of the House of Commons, all of whom had connections with the law. These were Vincent Scully, Sir Fitzroy Kelly and Evelyn Ashley. 34 The second period, from 1879 to 1883, saw government attempts to introduce this reform as part of a wider attempt at codification. It soon became clear that the size of the task was too great, and in the third period, from 1884 to 1898, individual government measures were introduced. These were for some time unsuccessful. At first this was because of the opposition of Irish Nationalist members; later failure resulted simply from the pressure of parliamentary time.

(1) Private Members' Bills: 1858-78

(a) Lord Brougham

Neither the removal of interest as a bar to testifying in civil cases, nor the extension of competency to
the parties in them, gave rise immediately to calls for parallel reforms in criminal procedure. The question of accused persons' competency was not raised in Parliament until 1858. In March of that year Lord Brougham referred to the subject in a debate on the county courts. He observed that the great objection which had originally been made to the 1851 Act had been that it would lead to endless perjury. Brougham reminded the House that he had denied this at the time, and he claimed that subsequent experience had proved him right.

That Act was now confined to civil suits, but he was prepared to extend it to criminal suits. He did not lay this down as a proposition to which it was impossible to make any objection, but still he contended that the expediency of the extension was such as to overbalance all objections.

He proposed that the defendant in a criminal suit should have the right, if he chose, of being examined on oath, though if he did so he should be subject to cross-examination by the prosecution.^^

In the same parliamentary session Brougham introduced a bill to allow any person on trial for treason, felony or misdemeanour to give evidence on his own behalf. The spouse of the accused was also to be permitted to give evidence for the defence if desirous of doing so. Evidence was to be given on oath, and the accused was to be subject to cross-examination in the same way as any other witness. Clause 5, which extended to civil cases, provided that no witness should be able
to refuse to answer a question "on the ground that his
Answer may degrade him, or may show or tend to show that
he has been guilty of any Offence or Misconduct, or that
he has done anything which may render him liable to any
Penalty, Forfeiture, or Ecclesiastical Censure". The
answer to such a question was not, however, to be admiss­
able against the witness in any other proceedings, except
in a prosecution for perjury brought in respect of that
answer, and the Court's power to stop a question or
answer on the ground of irrelevance was expressly
stated. 36

In the event, the bill was postponed in deference
to the opinion of Lord Campbell, Chief Justice of the
Queen's Bench, that the subject ought to be fully dis­
cussed by the profession and the public during the
recess. 37 Another bill to achieve this purpose was pre­

tented by Brougham in 1859. 38 It was given a first
reading but proceeded no further for lack of time. 39

Some judges were thought to favour the adoption of
Brougham's measure in a limited form which would have
allowed the accused to give evidence in all cases of
misdemeanour where the real prosecutor was called as a
witness. 40 In the following year Brougham introduced a
bill which granted a right to testify in cases of mis­
demeanour only, but it failed for lack of time. 41
(b) Vincent Scully and Sir Fitzroy Kelly

In 1865 separate bills to extend competency to accused persons were introduced in the House of Commons by Vincent Scully and Sir Fitzroy Kelly.

Scully's bill contained two clauses only. It provided that the accused and his or her spouse should be competent, but not compellable, in all criminal proceedings. It also provided that such a witness should be subject to cross-examination and then compellable to answer any question, notwithstanding that it might tend to criminate the accused. Kelly's bill had similar provisions and also contained clauses affecting evidence in actions for breach of promise of marriage and in actions instituted in consequence of adultery.

In the debate on the second reading of Kelly's bill, its author accepted that the provision to make accused persons competent would produce "a very great difference of opinion". He asked that the bill be read a second time without opposition, inasmuch as it would be necessary to discuss every clause in Committee. He also asked if Scully would be willing to postpone the second reading of his bill, since it dealt with the same subject. Scully agreed to this and Kelly's bill was read without opposition, though Sir Roundell Palmer, the Attorney General, indicated that at present the Government was opposed to the change in the law that had been put forward. Neither bill made any further progress.
(c) Evelyn Ashley

On 11 February 1876 Evelyn Ashley introduced a bill in the House of Commons to extend competency to accused persons. This was effected by clauses 3 and 4; by clause 5 such persons were made competent, though not compellable, for a co-accused. Clause 6 provided that evidence was to be on oath, or, where permitted, on affirmation, and was to be subject to cross-examination in the same way as any other evidence. The accused was not to be allowed to refuse to answer a question on the ground that the answer would tend to incriminate him. By clause 10, accused persons were made liable to prosecution for perjury, notwithstanding that they might have been acquitted on the principal charge.45

The bill was fully debated on the motion for a second reading on 24 May and 26 July 1876. By the second occasion, however, it was clear that too little remained of the parliamentary session for the bill to have time to become law. At the end of the debate Ashley therefore withdrew his motion for a second reading.

In 1877 Ashley introduced another bill to make defendants competent in criminal cases, but it proceeded no further than a first reading. The provisions were the same as those contained in the bill of the previous year, with the exception of an additional clause (clause 10) which provided that the neglect or refusal of an accused person to give evidence should not create any
presumption against him, nor should any comment be made upon any such neglect or refusal during trial.\textsuperscript{46}

In 1878 Ashley made another attempt at this reform with an identical bill.\textsuperscript{47} At the debate on its second reading the Attorney General, Sir John Holker, announced that the Law Officers intended to introduce a measure on the subject of criminal law, with a code of criminal procedure for indictable offences as part of it. It was proposed that this should contain some clauses whose exact nature was as yet unsettled, but which would have the effect of carrying out to a great extent the desires of those favouring Ashley's bill. He hoped that this latter bill could be referred to a select committee, which might be able to make an extremely valuable report which could be used by the Government when they brought in their measure.

Ashley, perhaps unfortunately for the cause of reform, accepted this offer. The House by a majority of 109 voted that the bill be read a second time and it was then sent to a select committee.\textsuperscript{48} It proceeded no farther.

(2) Reform within a Code: 1879-83

(a) Stephen's Proposals

Cairns and Holker, Disraeli's Lord Chancellor and Attorney General, had been impressed by Stephen's work on a Homicide Bill (1874) and by his \textit{Digest of Criminal Law}
(1877). It was therefore to Stephen that they turned when they wished a draft code of criminal law to be prepared. It was intended that his completed code should subsequently be revised by a Royal Commission, of which Stephen himself was to be a member, the others being Lord Blackburn, Lord Justice Lush, and an Irish judge, Mr Justice Barry.

Section 368 of Stephen's unrevised Code attempted to deal with the problem of the accused as witness. It provided as follows:

When the case for the prosecution is ended, the court shall inform the defendant, whether he is defended by counsel or not, that he may make any statement he pleases as to the charge against him, and that if he does so he will after he has made it be questioned by the counsel for the prosecution, or, if there is no counsel for the prosecution, as the court may direct. The defendant may either make a statement, or if he is defended by counsel he may be examined by his counsel as a witness is examined in chief.

After he has been so examined, or after he has made a statement, the counsel for the prosecution may ask him questions in the same manner as if he were a witness under cross-examination, provided that such questions shall be confined to the matter in issue and matters relevant thereto, and shall not be directed to matters affecting the defendant's credit or character. Both the court and the jury (with the permission of the court) may ask the defendant any questions which they might ask of a witness.

After the examination of the defendant is ended, his counsel, if he is defended by counsel, may ask him any questions by way of re-examination. If he is not defended by counsel he shall be allowed to make any explanation he pleases of the statement made or answers given by him, and the court and the jury (with the permission of the court), but not the counsel for the prosecution, may ask him questions thereon.

The defendant shall not be sworn as a witness, nor be liable to any punishment for making false statements, either before or during or after his examination.
(b) Report of the Royal Commission

The Royal commission appointed to revise Stephen's code reported in 1879. Section 523 of the draft code which formed an appendix to the Report made the accused and the accused's spouse competent witnesses for the defence. But the Commissioners had come to no firm conclusion about enacting it. They reported:

As regards the policy of a change in the law so important, we are divided in opinion. The considerations in favour of and against the change have been frequently discussed and are well known. On the whole we are of opinion that, if the accused is to be admitted to give evidence on his own behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination.

Section 523 of the draft code, which departed significantly from the corresponding provision in Stephen's original code, appeared as clause 523 of the Criminal Code (Indictable Offences) Bill 1879 and was as follows:

Every one accused of any indictable offence shall be a competent witness upon his trial for such offence, and the wife or husband, as the case may be, of every such accused person shall be a competent witness upon such trial: Provided that no such person shall be liable to be called as a witness by the prosecutor, but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any matter though not arising out of his examination-in-chief: Provided that so far as cross-examination relates to the credit of the accused, the Court may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness.

Thus the Commission favoured making the accused much more like an ordinary witness. He was to be sworn,
and open to cross-examination on a wider basis than that provided by Stephen, who had ruled out any cross-examination on credit or character and had provided that the accused should not be sworn, or liable to any penalty for falsehood.

(c) Attempts to Enact a Code

On 3 April 1879 the Attorney General, Sir John Holker, moved for leave to bring in the bill prepared by the Commission. On the subject of clause 523, he said that his own mind was almost evenly balanced. He asked for full discussion and said that he would consent to the withdrawal of the provision if feeling was adverse to its introduction.

There followed for upwards of four hours what Sir Henry James called "a rambling discussion", which may have been caused by the size of the legislative task and the realisation that it was unlikely to be accomplished. A bill which not only consolidated but also attempted to improve a large branch of the law could not hope to get by without much debate; yet, like any ordinary bill, it had to be passed by the end of the session in which it was introduced. If it failed in this it was lost, and the whole legislative process had to be begun again in the next session. This was the fate of the 1879 bill. It was given a second reading on 5 May 1879, the general feeling being in favour of codification and of passing the bill, subject to discussion of controversial changes in
committee. But in answer to a question on 30 June, the Attorney General said that owing to the condition of public business it might not be possible to proceed with the code in that session, and this was confirmed in his answer to another question on 3 July.  

Another bill to provide a criminal code was introduced by the Attorney General on 6 February 1880. Clause 471 contained in substance the same provisions for making the accused competent as had clause 523 of the bill introduced in the previous session. In accordance with the government's wish, the new bill was read a second time on 23 February 1880 with only a short debate, the intention being that full consideration would be given to it by a select committee with power to divide the measure into a number of bills, so that if time ran out at least some of the provisions might become law. Despite these intentions, however, no further progress was made. Parliament had dealt successfully with bulky legislation before; the Merchant Shipping Bill of 1854 was an example. But, as Sir Henry James pointed out, that bill had dealt with only one subject, while this bill dealt with many subjects of great political and social importance.

As well as the government bill, the session also saw a bill for a criminal code introduced by private members. Brought in by William Wheelhouse, Mr Serjeant Spinks and Captain Pim, the bill contained provisions as
to the accused's competency which differed substantially from those in the government bill.\textsuperscript{57} Clause 337 of this Criminal Code (No. 2) Bill provided that:

> Upon every trial under the provisions of this Code, every accused person shall be competent to be examined in the same manner (subject as hereinafter provided) as any ordinary person, either by or on behalf of the prosecution, or on his own behalf, or on behalf of any person jointly accused with him.

Thus the accused was to be a compellable witness for the prosecution, and perhaps also for a co-accused. Clause 338 provided that when an accused person was examined by the prosecution, the examination might be taken at any time before the close of the evidence for the prosecution. By clause 341, the accused was not in any circumstances to take the oath or affirm before being examined. The clause also gave him some measure of protection by providing that he should not be asked any question with a view to impeaching his credit generally. Further, the questions put were in any case to be "such only as are reasonably calculated to elicit the whole knowledge of the accused in relation to the particular offence then being tried". Unfortunately, there is no indication of the amount of support which the bill might have had, as it was dropped before a second reading.\textsuperscript{58}

The next legislative move was in 1882, when several private members brought in a Criminal Law Amendment Bill which embodied in great part the recommendations of the Royal Commission.\textsuperscript{59} Among its provisions was clause 106,
which provided as follows:

Everyone proceeded against by indictment for any offence shall be a competent witness for himself or herself upon his or her trial for such offence, and the wife or husband, as the case may be, of every such accused person shall be a competent witness for him or her, or with his or her consent, for any other jointly indicted with him or her upon such trial: Provided that no such person shall be liable to be called as a witness by the prosecutor, but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any matter though not arising out of his examination-in-chief: Provided that so far as the cross-examination relates to the credit of the accused, the Court may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness.

At the debate on the second reading, Charles Hopwood, Liberal member for Stockport and one of those who had introduced the bill, noted that in the speech from the throne at the start of the session a bill to give effect to the recommendations of the Royal Commission had been promised, but he hoped that the Attorney General would not attribute want of respect in his proceeding with a measure which, so to speak, had been "on the stocks" for some time before that announcement.

The Attorney General, Sir Henry James, said that he did not wish to oppose the second reading, but he emphasised that the responsibility of altering the law to such an extent must rest with the government. He said that he hoped to present a government measure before long, observing that the House had already, by a majority of considerably more than two to one, voted in favour of
Evelyn Ashley's bill to allow prisoners to give evidence. He reminded the House that the Law Officers of the late government had voted in support, as he himself had done. Since that time he had not heard anything to alter his opinion. He thought it a proposition which would receive the acquiescence of a great majority of the House, and one which would be in accord with public opinion.

The bill received a second reading but was dropped at the committee stage. It is not clear whether this was because a government bill had been promised or because time ran out. In The Times a leading article supported the reform but concluded pessimistically:

Except that England is not as other countries, it might be supposed that, with judgments and parties thus united in recommending a change in the rules of evidence, the change would be at once made. In reality, it may be years before it is accomplished.

In the following year the government introduced what became known as the Criminal Code (Indictable Offences Procedure), 1883, Bill. Clause 100 provided for the competency of accused persons and their spouses in trials on indictment and was in virtually the same terms as clause 106 of the 1882 bill, save that clause 100 made no reference to the spouse as witness for someone jointly indicted with the accused.

By now, the many failures to achieve a reform for which there had been substantial support seem to have produced apathy. Thus Edward Clarke, Conservative member
for Plymouth, said that he wished he could think that the almost absolute indifference with which the House had treated the question of law reform was an augury that these measures were likely soon to pass into law. But he was afraid it simply meant that there would be a resolution of the House to delegate to committee the consideration of all questions, not only of detail but of principle, connected with the bill.

The speech of Sir Henry James, the Attorney General, showed that by then government ministers recognised that it was useless to try to introduce the Code as a whole because it contained far too much material to have any chance of being passed in one session. There was general agreement that it should be introduced in parts, and since the part on procedure was relatively independent from the rest, the government decided that it should be dealt with first.64

However, although this bill achieved a second reading, it soon became clear that very little progress could be made in committee. On 26 June 1883 the standing committee reported that it had begun consideration of the bill on 5 June. Since then, the first eleven clauses had been considered. Notice had already been given of 390 amendments to be moved on the remaining 120 clauses. The committee reported its opinion that there was no prospect of its being able to consider the remaining clauses, or any substantial proportion of them, so as to allow the
bill to be reported to the House at such period of the session as would afford the opportunity of due consideration. The committee therefore resolved not to proceed further with consideration of the bill.65

The report of the debate on the second reading shows that when the debate was about two thirds under way, Irish members began to intervene and cause delays. Even after the vote that the bill be read a second time it was necessary for there to be an adjourned debate on the motion to commit the bill to the standing committee.66

It seems likely that Irish members, supported perhaps by die-hard opponents of reform, were responsible for adopting delaying tactics in committee. The opposition of Irish Nationalist MPs at Westminster, who wished to exclude Ireland from the scope of legislation extending competency to the accused, began in 1883 and continued for about ten years. By the end of that period it had become clear to both Liberal and Conservative governments that unless Nationalist demands were met, the reform might be put off indefinitely. Attempts to extend such legislation to Ireland then ceased. The opposition of Nationalist MPs arose because they thought that the reform would expose accused persons to an even greater extent than was already the case to a prejudiced judiciary. Nationalist MPs also saw the Westminster debates as an opportunity to attack the entire administration of
justice in Ireland. In addition, the proposed reforms had to face the obstructive tactics of the wider campaign by Nationalist MPs to secure home rule for Ireland.\textsuperscript{67}

But apart from the Irish difficulties, there may well have been more general opposition to the proposed legislation. The Times observed that even with complete freedom from obstruction things could not have moved very fast; what some saw as obstruction might have been "caution and deliberation which were well warranted by the magnitude and importance of the subject".\textsuperscript{68}

(3) Individual Government Measures: 1884-98

(a) 1884 - 1888

In 1884 Lord Bramwell presented a short bill to extend competency to the accused.\textsuperscript{69} It was passed in the House of Lords but made no further progress. Perhaps prompted by this, a government bill was introduced for this purpose in the House of Commons in 1885, but it too failed to make any progress.\textsuperscript{70}

The subject also arose in that year when the Commons were considering the Criminal Law Amendment Bill, which dealt with certain sexual offences. At the committee stage James Picton, Liberal member for Leicester, introduced a provision which extended competence to persons charged under the proposed legislation and to their husbands or wives. In this respect Picton was following a pattern already set by earlier legislation which, in
creating new offences, had provided that persons charged with those offences should be competent to give evidence in their own defence.\textsuperscript{71}

The Attorney General, Sir Richard Webster, said that it was right in some cases to allow the accused to give evidence; of all classes of cases, that dealt with in this bill was one in which the defendant should be able to do so. The clause was agreed to after a short debate.\textsuperscript{72}

Another government bill was introduced in the Commons in 1888.\textsuperscript{73} Based on the bill introduced in the Lords in 1884, clause 1 provided as follows:

Where a person is charged with an offence, whether solely or with others, the person charged and his wife or her husband, as the case may be, may be called as a witness at any stage of the proceedings at which witnesses may be called, other than an inquiry before a grand jury.

Provided as follows:

(1) The person charged shall not be called as a witness without his consent:

(2) The wife or husband of the person charged shall not be called as a witness without the consent of that person, except in any case in which such wife or husband might have been compelled to give evidence before the passing of this Act:

(3) A person called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that any person charged has committed or been convicted of any offence other than that wherewith he is then charged, unless either -

(a) the proof that the person charged has committed or been convicted of that other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or,

(b) the person charged has given evidence of good character.
The bill was presented and read for a first time on 21 February 1888. On 22 March the Attorney General, Sir Richard Webster, moved that it be read a second time. The report of the debate shows that the only major difficulty was the objection of Irish members to the extension of the proposed legislation to their country. In the end their objections proved fatal: although the bill was read a second time, its progress in committee came to a halt as the result of Irish members' amendments and it was withdrawn on 15 November 1888.74

(b) 1892 - 1898

In 1892 a further bill passed the House of Lords and obtained a first and second reading in the Commons. On 6 May it was committed to the standing committee on law, but the session ended before any progress could be made.75

Another bill was introduced in the Lords in 1893. It passed in that House, but the difficulties it was likely to encounter in the Commons were indicated by Lord Ashbourne, who informed the Lords that there were now some Irish members in the Commons who thought that the reform should not extend to Ireland and would block any bill which contained such a provision, while other Irish members said that they would not permit a bill to pass if Ireland were omitted from it.76 These objectors between them brought progress to a halt, and the bill was withdrawn before its second reading in the Commons.
Another bill was introduced by Lord Herschell in the following year. It received a second reading in the Lords on 23 July 1894 but proceeded no farther. During the short debate Lord Halsbury referred to the "persistent obstruction" which prevented the change in the law. 77

A further bill was brought from the Lords in April 1895, but made no progress in the Commons. 78 A similar bill was brought from the Lords in February 1896. 79 Pressure of time caused it to be withdrawn before its second reading in the Commons. 80

In 1897 the Attorney General, Sir Richard Webster, presented a Law of Evidence (Criminal Cases) Bill which made provision for the accused to give evidence. 81 The House voted by 210 to 41 that it should be read a second time. 82 Once more, however, time ran out, and on 15 July the bill was withdrawn owing to pressure of business.

The bill containing the reform which was at last to become law was introduced in the House of Lords by the Lord Chancellor, the Earl of Halsbury, in February 1898. It received its second reading there on 10 March without a division. 83 It went through the remaining stages in the Lords without opposition and received its first reading in the Commons on 14 March. The debate on the second reading took place on 25 April. On a division, 230 voted in favour of a second reading and 80 against. 84 The bill received the royal assent on 12 August 1898.
4. Influences on the Reform

In this section I shall argue that the extension of competency to all accused persons modified a tradition of adversary criminal procedure which was becoming established in the late eighteenth and early nineteenth centuries, and which minimised the part played by the accused at his trial. There were several reasons for this modification.

(1) Adversary procedure, in the sense defined below, came to be established in criminal trials mainly as the result of a population explosion at the Bar which led to pressure for increased participation by counsel in criminal trials. This development was timely because it accompanied a growing realisation of the need to provide a fairer, more efficient, and so more generally acceptable system of criminal justice. One of the features of the new adversary system was the withdrawal of the accused from the active participation in the proceedings that had been common for much of the eighteenth century and the requirement that the prosecution prove their case without the assistance of the accused. At first sight, extension of competency to the accused was at odds with this development, and it was able to take place only when it had become clear to a large proportion of the legal profession, and also to the government of the day, either that the roles of judge, counsel and accused in criminal proceedings would not be
significantly affected by the change, or that the change was necessary for the continued maintenance of a broadly acceptable system of justice. This might be the case, for example, if the reform was thought necessary to ensure that all appropriate measures appeared to be being taken in the search for truth, or in order to safeguard innocent persons who were accused of crime, or to ensure that the system of criminal justice should not display obvious anomalies. In the acceptance of this reform the perception of the legal profession, particularly of the Bar and the Bench, was vital. The debates that took place outside Parliament on the proposals were largely conducted by members of the legal profession, and in the parliamentary debates it was practising members of the legal profession, or members of Parliament who had at least some connection with the profession, who provided the largest contribution. Because of this, it is inevitable that the story of the extension of competency to the accused should appear to be a story about lawyers. They were the persons who were interested; outside the legal profession very little attention appears to have been paid to the question.

(2) The old argument based on an assumed increase in perjury if interested persons were allowed to testify had lost a good deal of its force by the time proposals to extend competency to the accused were first made, and it lost more force as that debate proceeded.
(3) The proposals for reform that were ultimately successful contained sufficient compromises with the perceived requirements of adversary procedure to convince a majority in Parliament, and significant numbers in the legal profession, that no radical alterations to the criminal process were involved and that the reform was simply an extension of previous developments.

(4) The reform may have been facilitated because it was consistent with an increased emphasis on individual responsibility which was for much of the nineteenth century a feature of political theory and an underlying theme in legislation affecting criminal law.

(5) Some of the principal arguments employed in favour of the reform had affinities with arguments that Bentham had used, and Benthamite influences can be found in the work of Brougham and of the Law Amendment Society. It is also possible that Bentham's work may have had an indirect part to play through the examples set by American reforms. But any Benthamite influence that there might have been was exerted in a much diluted form. The legislation ultimately passed in 1898 did nothing to further Bentham's ideal of "domestic" or "summary" procedure, and the accused's right to silence, which Bentham had notoriously criticised, was not only preserved but emphasised.
The Adversary Tradition

A fully-fledged model of adversary procedure has been described by Stephan Landsman as one which contains the following features: (i) The decision-maker remains neutral and passive during the trial of the case. (ii) The litigants are responsible for the production and quality of the proof on which the case is to be decided. This makes likely the development of a class of skilled advocates because the difficulties in finding, organising and presenting persuasive proofs make it likely that inexperienced litigants will need assistance. (iii) There will be an elaborate set of rules to govern the trial and the behaviour of the advocates. These will guard the integrity of the process and ensure that cases are resolved expeditiously. In the context of English criminal trials at the beginning of the nineteenth century, the procedural features most closely corresponding to this model were the shift of the task of adducing evidence from the judge to counsel, with the consequent relegation of the judge to a more passive role, and the elaboration of rules to govern procedure and the admissibility of evidence.

In this sub-section I shall (a) outline the development of the adversary tradition in the English criminal trial, (b) describe the perceived impact of the proposed reform on that tradition, and (c) outline the arguments that were used to show that the proposed reform was
necessary in order to maintain an acceptable system of criminal justice.

(a) The Development of the Tradition

The background to the development of criminal evidence law in the early decades of the nineteenth century was the increasing use of adversary procedure, in the sense indicated above, in criminal trials. The beginnings of this development can be seen in the early decades of the eighteenth century; thereafter there was a gradual increase, with a heightened momentum during the final decades of the eighteenth century and the early decades of the nineteenth. Although the details of how this came about are not wholly clear, what does seem clear is that, in relation to criminal trials,

adversary procedure cannot be defended as part of our historic common law bequest. The criminal lawyer and the complex procedures that have grown up to serve him and to contain him are historical upstarts.

In the early part of the eighteenth century the accused, though unsworn, took an active role in his own defence in response to judicial questioning. What later came to be accepted as exclusionary rules of evidence were virtually non-existent. The only exceptions were rules concerning competency and certain privileges, which did not include a privilege against self-incrimination. Appearances by lawyers for either the prosecution or the defence were rare, and this continued to be the case well after the mid-century.
Gradually, however, from about the mid-1730s, counsel began to appear on behalf of accused persons. They were permitted at first merely to examine and cross-examine witnesses. The accused still had a prominent part; indeed, counsel began by adding strength to the defence rather than by taking it over completely, and persons accused of felony had to wait until 1836 for statute to abolish the rule which prevented counsel from addressing the jury on their behalf in a concluding speech. Until that date, the degree of participation allowed to defence counsel in felony cases depended on the discretion of the trial judge, which used to be exercised in a variety of ways from circuit to circuit.

Nevertheless, defendants were increasingly taking a back seat in proceedings, and so, compared with their position during much of the eighteenth century, were judges. A visitor to this country in about 1820 noted that during the examination and cross-examination of witnesses the judge remained almost a stranger to what was going on, while the accused did so little in his own defence that, the visitor concluded, "his hat stuck on a pole might without inconvenience be his substitute at the trial".

This development of counsel's role in criminal trials was reflected in the parallel development of law reporting, which was extended to ordinary criminal trials.
only with the Nisi Prius reports of the late eighteenth century. "Law reports are lawyers' literature; it ought not to surprise us that during an epoch when lawyers were not engaged in criminal litigation, compilers and publishers were not engaged in producing precedent books for a nonexistent market." 91

The initial impetus towards this development may have been judicial awareness of flaws in criminal procedure, especially those associated with the use of accomplices who had volunteered evidence for the Crown in hope of a pardon. 92 But adversary procedure probably came to be established in criminal trials chiefly as the result of a population explosion at the Bar which led to pressure for increased participation by counsel in criminal trials.

The population explosion that took place at the Bar during the late eighteenth and early nineteenth centuries can be seen clearly from the Law List in the period 1785-1840 when the figures for practising barristers were as follows: 93

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1785</td>
<td>379</td>
</tr>
<tr>
<td>1790</td>
<td>424</td>
</tr>
<tr>
<td>1800</td>
<td>577</td>
</tr>
<tr>
<td>1810</td>
<td>708</td>
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<tr>
<td>1820</td>
<td>840</td>
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<tr>
<td>1830</td>
<td>1129</td>
</tr>
<tr>
<td>1840</td>
<td>1835</td>
</tr>
</tbody>
</table>

This had a corresponding impact on the circuits. In 1785 a total of 133 barristers belonged to the six English circuits; by 1820 there were 319, and by 1860 there were
626. In the 1850s those attempting to practise at the Bar had increased to such an extent that there was a sharp fall in the numbers of new entrants.\textsuperscript{94}

The expansion of the practising Bar was observed by John Payne Collier, who published under a pseudonym a series of articles about the Bench and Bar which were re-published in collected form in 1819.\textsuperscript{95} He noted that "the Barristers in Westminster Hall appear to have multiplied so rapidly within the last ten or fifteen years, that in none of the Courts are the seats assigned to them sufficient for the purpose".\textsuperscript{96}

He also wrote of the way in which a young barrister might develop a practice on circuit, even though he had "hardly had the opportunity of hearing the sound of his own voice in the metropolis". On circuit relatives and friends could exert influence, and this was "one of the modern modes by which men creep into business". He had not known one instance in recent years of a man of talent making his name in a single case. Instead,

\begin{quote}
individuals have slowly worked their way upwards, first by holding briefs as juniors to a silk gown or a coif, and subsequently by inducing an attorney, with whom they are connected, or with whom they have scraped an acquaintance, to entrust them with a leading brief ...\textsuperscript{97}
\end{quote}

In this atmosphere young barristers would have been eager to break into work wherever they could, and criminal work is likely to have appeared as an attractive developing market.\textsuperscript{98}
The common law judges who allowed members of the Bar to take an increasing part in criminal trials cannot have done so in ignorance of what the result was likely to be, for they were already familiar with adversary procedure from the regular appearance of counsel before them in civil proceedings. The extent to which it was possible for counsel to control such proceedings by the early decades of the nineteenth century can be seen from Collier's account. He complained that there were "few abuses at the Bar more crying at the present moment than the mode in which the examination of witnesses is sometimes conducted", and he referred to "the manner in which Counsel are permitted to overstep all the bounds of decorum and propriety in their interrogatories". Female delicacy, he alleged, had been outraged with unfeeling wantonness; innocent witnesses had been bewildered by rapid and purposely complicated questions and trapped into falsehood.

A clear example of the way in which counsel were taking over the conduct of trials can be found in the career of Sir William Garrow before his appointment to the Bench. Collier referred to Garrow's "penetrating sagacity" in cross-examination, adding,

and though true it is that he was seldom very scrupulous as to the mode in which he extracted or confounded truth, and though he had as much coarseness and as little feeling as any man who ever practised, yet he seldom without some cause or other broke through the ordinary rules of decorum and politeness ...
According to Collier, during the time when Garrow had been in practice at the Bar,

he was justly considered unrivalled in this respect, and few men, not even those of the highest rank, ventured to put themselves in competition; but since his elevation to the Bench there is scarcely a single Counsel, however young and inexperienced, who does not think himself warranted in going all lengths, and this frequently without any instructions to warrant an attack upon the character and demeanour of the witness: all flatter themselves that they are peculiarly gifted, and take every opportunity of shewing how much they are deceived in their self-conceited estimate.

This development of adversary procedure in criminal trials accorded with a need that was increasingly perceived for a fairer, more efficient, and so more generally acceptable system of criminal justice. The realisation of this need can be seen in the parliamentary debates during the early decades of the century on the punishment for felony and on whether persons accused of felony should be allowed to make their defence by counsel.

Evidence given before Sir James Mackintosh's committee, set up in 1819 to consider the punishment for felony, showed the existence of concern, especially in the legal and commercial worlds, at the unfairness and inefficiency of existing laws in failing to maintain proportionality between offences and punishment.

The perceived unfairness and inefficiency of the criminal law in relation to procedure can be seen in the debate in 1826 on a motion for leave to bring in a bill...
to allow persons prosecuted for felony to make their
defence by counsel. James Scarlett remarked that the vast
number of acquittals was one of the greatest defects of
the law, and that they were frequently caused by the
prosecutor's feeling for the unprotected state of the
criminal, as a result of which he allowed the accused to
escape. Another cause, he said, was the disproportion of
punishment to crime. He thought that the introduction of
counsel for the defence "would have a tendency to produce
more convictions, and more just and satisfactory convic­tions, than the present system". Thomas Denman said, in
answer to Peel's objection that the reform was not pub­licly called for, that it was to avoid popular discontent
that the measure was suggested. 101

The evidence to Mackintosh's committee and the
speeches in the 1826 debate had highlighted the unfair­ness of the existing system of criminal law and
procedure, its inefficiency, and the need to make the
system more generally acceptable so as to secure property
and avoid popular discontent. The evidence and the debate
also showed the existence of some legal professional
support for making the criminal system fairer and more
efficient, and these attitudes may well have been found
in judges who had the conduct of criminal trials. They,
after all, had been responsible in the eighteenth century
for allowing counsel some part in criminal trials to
ensure a fairer basis for dealing with the evidence of
informers. Even where they were not prepared to support statutory provisions which would have authorised the intervention of counsel in criminal trials, they may well have been prepared to use their own discretion to do so.

(b) The Impact of the Proposed Reform

What was needed for extension of competency to become acceptable was a conviction that it would involve no essential change in the balance of power struck between judge, counsel and the accused in a criminal trial. For this reason the roles of all three were the subject of considerable debate from the 1850s onwards.

(i) The roles of judge and counsel. Initially the strong opposition which the proposal for reform encountered was based on the fear that it would lead to oppressive conduct on the part of prosecuting counsel and, worse still, to increased participation by the judge which could also be oppressive. The latter fear was made more vivid by the example of what were regarded throughout the nineteenth century as the oppressive judicial practices in continental systems of criminal justice, particularly in the French system.

In 1802 Romilly observed on a visit to France that the judges often endeavour to show their ability and to gain the admiration of the audience by their mode of cross-examining the prisoners. This necessarily makes them, as it were, parties, and gives them an interest to convict. They become advocates against the prisoners; a prisoner who should foil the judge by his mode of answering his questions, particularly
if by that means he should raise a laugh from the audience, would have little chance of obtaining a judgment from him in his favour.  

Romilly had already noted that if the great object of all trials was to discover truth, the examination of the accused was an indispensable part of the proceedings; his reference to the behaviour of French judges had been no more than a caveat. In 1848 a broader disapproval was shown in a leading article in the *Law Review*. "We have more than once or twice had occasion to remark," the editor wrote, "upon the singular want of sound views on the all-important subject of evidence which the proceedings of the French courts hardly ever fail to exhibit."  

What that "want of sound views" might lead to was described in a leading article in *The Times* in 1856 which commented on the conduct of English criminal trials at quarter sessions and assizes. The writer stated:

There is none of that unseemly and passionate invective which is so copiously displayed on the part of foreign tribunals - none of that unfair and injudicial bullying which betrays an innocent prisoner into self-accusation - none of that boisterous and arrogant inquisition which prides itself on assuming that the imputation and the verification of guilt are the same thing.

In the debate on the bill introduced by Brougham in 1859 Lord Campbell said that what was proposed was "an utter subversion of the mode in which criminal justice had hitherto been administered in this country". It would introduce into England a system which worked lamentably
in a neighbouring country. He added that he had read of trials in France "in which the accused parties had been put to a species of moral torture, and had been driven to tell lies in their own defence", although they were innocent of the crimes with which they had been charged. 106

In 1862 a leading article in The Times referred to the feeling that the old maxim that no one was bound to criminate himself was in spirit opposed to the examination and cross-examination of the accused. The writer continued:

[T]here is often in the settled usages of England a wisdom which, though it may be foolishness to logicians and theorists, seldom fails to recommend itself to society at large. While the deficiencies of our English system are probably overrated, it is impossible to overrate the evils that might arise from transplanting the French criminal procedure to our own country.

He described how the French judge

often passes bounds which the most unscrupulous English barrister would respect in cross-examining a hostile witness. He browbeats the prisoner, he taunts him, he sneers at him, he reproaches him in a voice trembling with suppressed anger, he distorts his answers, he insinuates motives, he glances at the jury and addresses stage 'asides' to them; he makes claptrap moral observations; in short, he does everything that is least in accordance with our ideal of the English Judge. 107

The oppression argument could also be employed without any reference to continental practices. For example, when Francis Worsley published a pamphlet in 1861 in response to a paper by J. Pitt Taylor advocating the reform, he said nothing of France but argued that the
principle of excluding nothing that could aid the discovery of truth was one which his readers' own ancestors would have used to justify the infliction of torture. He added that Taylor proposed to substitute mental for physical torture. Cross-examination of the prisoner was "the pressing of a man expressly to confound and convict him when you have him in a dock, a prisoner under charge, and in peril, in such a situation of body and mind that it is a wrong to your fellow man to examine him adversely at all".108

As late as 1879 the writer of an essay in the Edinburgh Review which commented on clause 523 of the Criminal Code (Indictable Offences) Bill of that year, argued that the simplest of all questions that could be put in cross-examination would be one going directly to the guilt of the prisoner. If he denied what was put to him by counsel for the Crown and was later convicted, he could, the writer presumed, be tried for perjury. It was argued that the result of this would be to apply a species of terrorism to the accused to extort a confession.

He continued:

But, even without putting so crucial a question, counsel in cross-examining will certainly try to entrap the prisoner into difficulties. Sir James Stephen himself somewhere speaks of cross-examination as being almost necessarily unfair, and when applied to such ignorant and terrified persons as most prisoners on their trial prove themselves, though it will perhaps be effective in ensuring convictions, it will be at a sacrifice of that appearance of fair play which has so maintained the public estimation of our criminal courts.
Fears of increased judicial intervention were implicit in criticism of continental practices and were also the subject of explicit discussion.

In 1862 the writer of a leading article in *The Times* thought that if competency were extended to the accused, "we should soon find a great change in the temper of our judicial functionaries, not excepting even the highest". Mr Serjeant Simon in a parliamentary debate in 1876 expressed the fear that scenes of wrangling would develop between judges and prisoners which would become a public scandal, leading to a lessening of the dignity of the Bench and of public confidence in judicial impartiality. 110

In the same debate the Attorney General, Sir John Holker, said that confidence in the criminal law could be shaken because a prisoner giving evidence might be examined by the judge. But,

\[t\]he moment a Judge descended from the calm, serene atmosphere with which he ought to be surrounded, to the region of turmoil and advocacy, that moment he would lose the fairness and impartiality which ought to distinguish all who held the high office of a Judge. It might be that he would do so unconsciously; but, even without desiring to do so, he could not help entering into a contest with the prisoner which would, at least, have the effect of shaking confidence in his perfect impartiality. 111

There was a fear that some judges might be all too ready to descend into the arena. The bulk of criminal business was not conducted at assizes, and Alfred Wills QC wondered if the public in general realised the
atmosphere of many courts of quarter sessions. The sub-
ject, he said, was a delicate one, and he did not mean to
say that there were not such courts where justice was
fairly and temperately administered. He continued:

But I am very sure that there are such courts, of
which nothing of the kind can honestly be said; where
the prevailing tone is that of a sturdy conviction,
perhaps unconsciously but none the less vigorously
entertained and acted upon, that the man who appears
in the dock must be guilty of the offence charged;
where an unhesitating credence is given to all
policemen in general and to certain 'active and
intelligent' sergeants or inspectors in particular;
and where an undefended man, against whom anything
like a prima facie case is made, has no more chance
of escape than a blown fox has with the hounds in
full cry at his heels, and all the earth stopped for
miles around.112

Another fear was that if the law were changed,
judges would have to cross-examine prisoners in number-
less cases. The reason was that most prosecutions were
conducted by inexperienced counsel, in many cases by
young men just called to the Bar, while the defence was
almost invariably conducted by able and experienced
counsel. In a case where prosecuting counsel was at a
disadvantage for this reason, a judge would feel bound to
intervene in the interests of justice and take over
cross-examination where it was being inefficiently
carried out.113

The difficulties already experienced by some judges
in cases where the prisoner could give evidence were
emphasised by Sir Herbert Stephen, the Clerk of Assize
for the Northern Circuit. In the 1890s he wrote that one
judge of high eminence in the criminal courts had confessed to him that he was absolutely unable to retain impartiality where he "cross-examined" a prisoner and received answers which were evasive, indirect, or seemingly untruthful. Another judicial opponent was the Chairman of Middlesex Quarter Sessions who wrote that a change in the law which allowed the accused to give evidence would "throttle and imperil the impartial and even friendly attitude of the English Bench to prisoners".

While fears of this kind can be found even in the debates immediately preceding the passing of the Criminal Evidence Act, there can also be found from the 1850s onwards a conviction that the English "tradition" of fairness to the accused was too firmly entrenched to be upset by the proposed change.

For example, in 1865 the writer of a leading article in the Law Times thought it unlikely that an innocent man would get entangled under cross-examination, as occurred sometimes under the French system of interrogation, because examination by counsel according to English rules of evidence, enforced by the prisoner's counsel under the eye of an English judge, was a very different thing from "the judicial vivisection by which the Bench displays its cleverness and zeal in France". Immediately after the passing of the Criminal Evidence Act a writer in the Edinburgh Review considered the
possibility of excessive judicial questioning but concluded that, "the traditions of English justice are so contrary to anything like the continental systems, and the sense of the country is so pronounced on the point, that we are confident that these two factors will prevent any injustice being done to prisoners".117

(ii) The role of the accused. The main fears were that the balance of power in the criminal trial would be shifted to the detriment of the accused by effectively forcing him to testify, and that this would somehow lead to an alteration in the standard, or even the burden, of proof. Like the fears concerning the roles of prosecuting counsel and judge, this was never wholly dispelled before the 1898 legislation. The arguments based on it merely became less convincing, either because it was thought that sufficient safeguards could be developed, or because the fear was felt to be outweighed by the need for change in order to remove anomalies and encourage rectitude of decision.

Forcing the accused to testify. There were some proposals that the accused should be compelled by statute to testify. Brougham suggested this in 1859.118 In 1872 the Attorney General, Sir John Coleridge, said that if a defendant was to be competent, he had to be compellable also. Coleridge asserted that he "could never be a party to a half-hearted change of the law, which should allow a clever, unscrupulous, cool and practised man to call
himself as a witness and tell his story, while in another
case a person would not be called whose examination would
probably tend to the real investigation of truth. J.F. Stephen expressed the view in 1877 that the prisoner
ought in every case to be called upon to tell his own
story and to be questioned as to its truth, and the
private members' bill presented in 1880 provided for the
compulsory examination of the accused.

There was never any chance that these proposals
would be acceptable. But there were fears that if accused
persons were to be made competent, the practical effect
would be to compel them to give evidence because adverse
inferences would be drawn from their silence.

Quite often the drawing of an adverse inference was
regarded as a reasonable thing to do. Thus in 1858
Brougham said that in the majority of cases where a
prisoner chose not to give evidence, the reason for
silence would be the consciousness of his inability to
withstand cross-examination, and in such a case he could
see no very great hardship in drawing the inference.

J. Pitt Taylor was prepared to have silence inter­
preted as evidence of guilt on the basis that the law did
not favour the prisoner as a criminal, but as a person
who might not be a criminal. Robert Lowe thought that
the object of a trial was the ascertainment of truth, and
stated that he could see no reason why a culprit should
not be called on to explain those circumstances which
seemed to bear most hardly on him, "subject, if he refuse to do so, to the unfavourable inference which silence under such circumstances must create". The opinion of the Law Times on Vincent Scully's bill was that, "If it be said that prisoners would be open to a presumption of guilt if they did not [testify], the answer is that the presumption is fair." Evelyn Ashley in 1876 said that such an inference would be just, and in 1898 William Ambrose, Conservative member for the Harrow division of Middlesex, thought that people might be deterred from committing crime by the knowledge that they might be called upon to explain their actions, and that if they failed to respond an inference of guilt could be made against them.

By contrast, there were no doubt many others who felt, as did Lord Campbell in 1859, that what was proposed was "an utter subversion of the mode in which criminal justice had hitherto been administered in this country", and that if competency were to be extended, prisoners who chose not to give evidence would unjustly be held to "afford the strongest presumption of their guilt".

Others thought that a compromise might be possible. A judicial warning to the jury was discussed as early as 1862. But the writer of the leading article in The Times which discussed this device was not sure that it would remove the danger. "A very great experience of criminal
trials and of the motives which influence juries in their verdicts could alone justify a confident judgment on the probable effects of such a change, for that they would be very great is certain."

In 1876 Russell Gurney, the Recorder of London, allowed that the objection based on inferences which could be drawn from a failure to give evidence was "a somewhat strong point", but thought that it might to some extent be obviated by obliging the judge to follow the American practice of warning the jury not to draw any inference from an accused's failure to testify.

Altering the Standard or Burden of Proof. Any of the suggestions that the accused should be put under a statutory obligation to testify must have aroused fears of some alteration in either the standard or burden of proof, and sometimes the language used in argument would have added to such fears. J.F. Stephen, for example, wrote in an essay in Nineteenth Century that the accused should not be examined as a witness, but in order, if he should be innocent, to give him an opportunity of proving his innocence by explaining matters apparently suspicious; and, if guilty, in order to prove his guilt by showing that he was unable to provide such explanations.

One of the most persuasive presentations of the argument that extending competency would involve a change in the burden of proof appeared in a leading article in

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the Solicitor's Journal which commented on Sir Fitzroy Kelly's bill.\textsuperscript{132} The writer stated that at present an accused person could put before the jury, either through his counsel or in his own unsworn statement, any story he pleased. Unless the sworn evidence contradicted that story, or the story was in itself so absurd as to be unworthy of belief, the judge would direct an acquittal, for it was the duty of the prosecution to negative by evidence every hypothesis consistent with the innocence of the accused.\textsuperscript{133} If the accused stated the truth, the prosecution evidence, unless perjured, would not be inconsistent with what he stated. This put the accused in a better position than if he had been allowed to give evidence without cross-examination. An accused person or his counsel might suggest half a dozen inconsistent stories; if any one of them was consistent with the prosecution evidence, the accused would have to be acquitted. However, "if he were bound to select and swear to any of them, and was to fail in his proof of that, he would be, practically if not theoretically, bound to stand or fall by his own story, and might be convicted ... not because it was proved that he had committed the offence, but because he had been shown to have told a lie about it".\textsuperscript{134}

\textbf{(c) Maintaining Acceptable Criminal Justice}

In this connection three arguments were generally relied on. It was said that the change was necessary, (i) for
the discovery of truth; (ii) to safeguard the innocent; (iii) to remove obvious anomalies.

(i) **A means of discovering truth.** When Brougham introduced his bill in 1858 the preamble recited its purpose as being, "For the better Administration of Justice in Criminal Matters, both as regards the Conviction of Offenders and the Acquittal of Persons not Guilty ..." In this way he emphasised the function of the reform as a means of discovering truth. This object was supported by the *Solicitors' Journal* which commented that, "our ordinary practice in criminal cases evinces a somewhat puerile timidity, and an almost morbid tendency to strain technicalities to the exclusion of truth, for the protection of delinquents". Ashley's bill in 1876 had a very similar preamble, and the value of the reform as a means of discovering truth was a common theme of debates inside and outside Parliament between 1858 and 1898.

An argument closely allied to that of truth discovery was that the extension of competency to the accused would lead to more open justice. Thus in 1858 the Dublin correspondent of the *Solicitors' Journal* pointed out that frequently, the defence which our law will not allow to be put forward during the trial, is afterwards in effect transmitted in writing by the friends of the prisoner to the Home Secretary - or rather to one of his subordinates, who in private, irresponsibly, without any personal knowledge or observation of the matter, in point of fact reviews the decisions of judge and jury. Not the least of the arguments for the change
is, that, could all sources of testimony be resorted to, the criminal justice of the country would be dispensed more in open courts of justice, and less in the Home Secretary's office.\textsuperscript{139}

A similar account was given in 1876 by Russell Gurney, Conservative member for Southampton and Recorder of London. His experience was that very often the only person who could prove a man's innocence was his wife, especially as to events alleged to have occurred at night. But under existing law the prisoner's wife could not be heard in his defence although, paradoxically, his mistress could. From the account given by Gurney of cases that he had tried, it appears that in practice a wife, after her husband's conviction, might swear an affidavit establishing an alibi for him. An application, supported by the affidavit, would then be made to the Home Office for the prisoner's release. Usually the trial judge would be asked for his opinion and in due course a pardon might be granted. Gurney observed that it was very difficult to decide against granting a pardon if the wife could not be examined in court.\textsuperscript{140}

(ii) A safeguard for the innocent. It was sometimes said that the fullest examination of the evidence would always be of advantage to an innocent accused.\textsuperscript{141} But other more particular arguments were often urged. One of these was that the unsworn statement which the accused was allowed to make did not have the weight of evidence on oath. Thus in 1858 Brougham argued that because the
statement which the accused could make was not on oath and not subject to cross-examination, it had no more weight than the speech of his counsel or his plea of "not guilty".\textsuperscript{142} And in March 1859 it was argued in a leading article in the Solicitors' Journal that the accused, though allowed to make an unsworn statement from the dock, was not permitted to speak in the only way in which his speaking could be recognised as effectual.\textsuperscript{143}

The argument most frequently used was that without the opportunity to give evidence, an accused stood in danger of wrongful conviction. For example, J. Pitt Taylor argued in 1861 that the existing law failed to show sufficient forbearance towards prisoners, for it closed their mouths and permitted them to be convicted on evidence which they might be able to disprove, or at least explain, if they were to give evidence. He asked whether it was just or wise that the innocent should be exposed to the danger of a wrongful conviction in order that the guilty should have no temptation to utter falsehood.\textsuperscript{144}

On several occasions it was argued that the reform would enable an undefended prisoner to present his case more effectively, because he could readily have his attention drawn to the relevant prosecution evidence and would not have to rely solely on his own inexpert cross-examination of prosecution witnesses. Robert Lowe, for instance, said in 1865 that he could see no reason why
a culprit should not be called on to explain those cir-
cumstances which seemed to bear most hardly on him. He
thought that such a rule might be of advantage to prison-
ers, many of whom were poor and uneducated, bewildered
and confused, and, if innocent, would benefit from having
their attention drawn to the most incriminating parts of
the evidence.\textsuperscript{145}

In 1875 similar arguments were used by the writer
of an article in the \textit{Law Magazine and Review}, L.A. Good-
eve, who proposed examination of the accused by the court
on the lines permitted in India. The attention of the
accused would be directed by the examination to the
points bearing against him, so that he would have an
opportunity of answering and explaining them. If he was
undefended he would "learn on what matters to cross-
examine or to call witnesses, instead of blundering in
confusion, and so bringing about his own conviction".\textsuperscript{146}

In 1878 Ashley argued that the reform was particu-
larly necessary for the protection of a prisoner who was
undefended. He pointed out that such a man was forbidden
to deal with the prosecution evidence

\begin{quote}
in the only way which his low education usually
permitted; but was perplexed and baffled by being
called upon to lay the foundation for a skilled
address to the jury by questions which he was told to
put to the witness, but which invariably took the
form of statements in which he was constantly being
checked by the Court.\textsuperscript{147}
\end{quote}

There were also suggestions that the reform was
desirable because only if a prisoner were allowed to give
evidence could he hope to deal effectively with testimony given by the police. Goodeve, in his article in the Law Magazine & Review, accepted that evidence of what a defendant had said in answer to police questions was often admitted. But this, he argued, was insufficient to put the defence case properly before the jury. Police testimony, "unconsciously perhaps", was not altogether independent, and the court was more likely to arrive at the truth by examining the accused himself than by hearing what he had said at second-hand from the police.\(^{148}\)

The problem of police evidence was raised in 1876 by George Whalley, Liberal member for Peterborough, who contended that the existing system left accused persons almost entirely at the mercy of the police, "who frequently perjured themselves and conspired together to secure convictions". He declared that there was a great and growing dissatisfaction in many places against the conduct of the police; in some cases policemen were continued in their office who ought to have been removed. His speech brought cries of protest and his arguments were not adopted by other speakers in the debate, but Goodeve's earlier comment indicates that the objection might have been to Whalley's extreme language rather than to the suggestion of police bias.\(^{149}\)

Whatever the reasons, it was recognised in 1882 by a member of the government that innocent persons had been and were at risk as a result of the existing state of the
law. In a parliamentary debate in that year the Home Secretary, Sir William Harcourt, said that he did not believe it possible for anyone to occupy the position which he himself held without being satisfied that in those cases where a miscarriage of justice had occurred and innocent men had been convicted, the miscarriage might have been prevented if the accused had been able to tell his own story.  

Supporters of the reform naturally believed that innocent defendants would themselves wish to be able to testify, even if this meant that they would have to undergo cross-examination. Brougham, for example, thought that "if the prisoner were innocent, surely he would desire above all things to submit to this examination, while, if guilty, it would be that which he would most fear". According to the Law Times, nothing could be more welcome to an innocent prisoner than the opportunity of giving evidence and being cross-examined.

It was not difficult to move from talk about the wishes of innocent defendants to talk about their rights. J. Pitt Taylor wrote of the innocent man's "natural right of asserting his innocence in the most solemn manner". Evelyn Ashley, on the motion for the second reading of his bill in 1876, declared that he took for his motto the words of Bentham: "Innocence claims the right of speaking, as guilt invokes the privilege of silence." He said that he based his appeal for reform not on the ground
that it would make the conviction of the guilty more certain, "but on the right that every innocent person had to state his own case and tell his own story under all the sanctions which law and custom made necessary, if the Court and jury were to pay proper attention to the statements - namely, under oath and subject to cross-examination". 154

(iii) Removal of anomalies. When Brougham raised the question of the accused's competence in 1858, one of his main arguments in favour of reform was that it would remove anomalies. He pointed out that in ninety-nine cases out of a hundred there was a private prosecutor who could be examined on oath and cross-examined, while the mouth of the accused was stopped. Moreover, conspiracies, frauds and acts of violence could be the subject of civil actions, and then the defendant was able to give evidence. In bankruptcy cases, he added, persons were examined whether they wished it or not, despite the fact that they might incriminate themselves. 155

J. Pitt Taylor emphasised even more the difference between civil and criminal proceedings when he drew attention to the fact that if a conspiracy or riot were the subject of criminal proceedings, not only could the accused not be heard, but the different rules of evidence could be exploited to his further disadvantage:

In prosecutions for conspiracy, riot, and other cognate offences, in the commission of which several persons may have been more or less engaged, the present law has a tendency to promote a very
mischievous and oppressive practice, that is, the practice of including in the indictment more persons than the ends of justice require. As no defendant can make a statement on oath, the net is spread as wide as possible, so as to shut the mouths of the greatest number of witnesses. The prosecutor by these means is saved from the danger of contradiction, the real defendants are deprived of valuable testimony, and men, who perhaps have slightly transgressed the law, but who ought never to have been exposed to any criminal proceedings, are involved with their more guilty comrades in one common ruin.  

Another anomaly was that the rule excluding the accused from testifying was an example of exclusion on the ground of interest, a principle already largely discredited by the time Brougham raised the question in 1858.  

When Evelyn Ashley proposed his bill in 1876 the argument based on anomalies had become considerably stronger. Several Acts had recently been passed which created new criminal offences and allowed those charged in connection with them to give evidence in their defence. Ashley also argued by analogy from bankruptcy law, as Brougham had done, and from divorce law. Respondents and co-respondents were by then allowed to give evidence, and Ashley argued that these proceedings were of a quasi-penal character.  

The Criminal Law Amendment Act 1885 produced particularly blatant anomalies. The Act created a number of sexual offences, mainly against women. A person who was charged with any of these was allowed by the statute to give evidence in his own defence. But a person charged
with rape, a common law offence, was incompetent to testify. 160

As a result of these various changes in the law, in 1888 the Attorney General, Sir Richard Webster, acknowledged that the first great reason for reforming the law was the creation in the previous twenty years of some ten or fifteen new offences where the accused or his wife could give evidence. 161

Few opponents of the proposed reform attempted to meet the challenge presented by arguments based on anomalies. Two who did were Edward Pickersgill, Liberal member for South West Bethnal Green, and Sir Herbert Stephen, the Clerk of Assize for the Northern Circuit. Pickersgill in effect denied that there were any anomalies, and argued that the Acts that allowed the accused to testify were, with one or two exceptions, concerned with offences far more analogous to torts than to crime. 162 In some cases this may have been true. But one of the exceptions was the Criminal Law Amendment Act, and as this accounted for many of the prosecutions where the accused was able to testify, Pickersgill's argument cannot have seemed convincing. Sir Herbert Stephen accepted that anomalies had been allowed to develop, but he regarded them as the sole reason why innocent men were convicted, and his proposed solution was to abolish most, if not all, of them. 163
In this sub-section I shall argue that truth was a virtue that was publicly reinforced for much of the nineteenth century, just as falsehood and perjury were as publicly condemned, but that when it came to a choice between an increase in perjury and a more acceptable system of criminal justice, it was the latter that was chosen.

Bentham himself provides a clear example of the importance which educated opinion in the early nineteenth century attached to truth. In The Rationale of Reward, printed in 1825, he wrote:

Veracity is one of the most important bases of human society. The due administration of justice absolutely depends upon it; whatever tends to weaken it, saps the foundations of morality, security, and happiness.\[164\]

In the Rationale of Judicial Evidence, printed in 1827, he again emphasised the need for veracity in attaining security, or the non-disappointment of expectations.

All the confidence we can ever have, or hope to have, in mankind, either under the law or without the law, - all the reliance we can place on the expectation we entertain of any of the innumerable and daily services, obligatory or free, which we stand in need of for the sustention and comfort of our existence, - all depends, by a connexion more or less close and immediate, on the preponderance of men's disposition towards the side of veracity and truth.\[165\]

The importance of truth was also emphasised by Christians, especially by those supporters of "godliness and good learning", such as Thomas Arnold, who were leaders of the movement for educational reform in the
public schools which began in the 1830s and 1840s. David Newsome has described their position in this way:

It was in defence of truthfulness, then, that the advocates of 'godliness and good learning' most delighted to stand. It was the link which bound the two principles together. Truthfulness was as essential an attribute of godliness as the quest for truth was the object of good learning. To inculcate a love of truth was, then, the primary duty of the teacher. In their passionate conviction of the duty to extirpate falsehood, and the inclination towards falsehood, the Victorian moralists may seem at times brutal. Innumerable cautionary tales were manufactured for the edification of the young. For the liar no fate was too terrible.

An indication of the extent to which truthfulness was honoured may be seen in a sermon on "The Sin of Lying", preached by C.J. Vaughan, a disciple of Thomas Arnold and Head Master of Harrow, which was published in 1847. In his view,

any approach to direct falsehood, however it might veil itself, would be spoken of in just terms of reprobation by a large majority of the higher classes of society. There are multitudes of persons who, even without any strong feeling of religion, would forfeit anything, or suffer anything rather than sully the truthfulness of their word.

By contrast, it has been shown that although the perjury argument was used against the legislation proposed in 1843 to extend competency to interested non-parties to a suit, the legal profession and members of Parliament alike discounted the dangers and the bill became law with very little opposition. The perjury argument was unsuccessful when it was used again in 1851 to oppose the extension of competency to parties. It is significant that on that occasion the survey of county
court judges conducted by the Law Amendment Society showed that although some thought that there had been an increase in perjury, they also thought that this was outweighed by the benefits of admitting such evidence. Nevertheless, in 1861 the perjury argument was one of the most important contained in a pamphlet written by Francis Worsley, a barrister of the Middle Temple, to oppose a paper in favour of extending competency to the accused which had been published earlier that year by J. Pitt Taylor. Taylor had been dismissive of the perjury argument, pointing out that it had been used in 1851 but that Lord Brougham's Act had nevertheless been passed. While conceding that the reform might have led to a slight increase in perjury, Taylor had claimed that the evil could not be regarded as very alarming, and that it sank into insignificance when contrasted with the benefits that had resulted from the 1851 Act. In this, as has been shown, his opinion matched that of the county court judges on the effects of extending competency to parties in their courts.

But Worsley thought that Taylor had not taken the risk of perjury seriously enough.
This was not merely the idiosyncratic view of a private member of the Bar. In 1876 the perjury argument was relied on in Parliament by the Common Serjeant, Sir Thomas Chambers, and the Attorney General, Sir John Holker. The former argued that it would be immoral in the highest degree for the House to legislate for the admission of witnesses who would get into the witness-box under influences which would make it impossible for them to tell the truth. The latter emphasised the gravity of perjury, saying that it was a crime far more serious than most of those with which prisoners were charged, because through its commission men might lose their estates, reputation and liberty.\textsuperscript{171}

But by 1897 the significance given to the argument had declined, and it played at best only a minor part in the speeches of those opposed to reform.\textsuperscript{172} Two matters probably led to its reduced significance. The first was the government's apparently rapid change of view. In 1876 the Attorney General, Sir John Holker, was insisting on the gravity of perjury in his opposition to Ashley's bill. Two years later he was promising a government bill that would put into effect much of what Ashley had wanted. To many it must then have seemed, if it had not done so before, that the perjury argument was useful only to the extent that it was able to support a decision already reached on pragmatic grounds. When the government was in doubt about the expediency of reform, it was
content to use the fear of perjury as a weapon traditionally employed to defeat this sort of proposal. When the government decided that it was more expedient to take up the reformers' line, it tacitly acknowledged the obsolescence of the weapon which it had used only a short while before.

The second matter that finally brought about the decline of the perjury argument was the unacceptable nature of any compromise which would allow the accused to give evidence without being sworn.

This was a device which had been recommended from time to time almost since the proposals to extend competency in the 1850s. Charles Dickens, for example, argued that any force to be derived from a prisoner's statement would have to be derived from its own natural probability and from any supporting evidence that there might be. No force could be derived from the credit of the prisoner, "which would be sadly impeached by his situation", so that it would be inappropriate to administer the oath to him. A similar argument was used in the Solicitors' Journal in a discussion of Evelyn Ashley's 1878 bill. The writer thought that a prisoner giving evidence should not do so on oath because, "[i]t is not in reason to be expected of criminal human nature that the truth will be spoken by a criminal on his trial". J.F. Stephen proposed that only ordinary witnesses
should testify on oath in a criminal trial, because a man who was on trial had so much to lose that his testimony, considered merely as testimony, was valueless. Belief in what he stated ought, therefore, to depend only upon such matters as its inherent probability, and the way in which it fitted into and explained matters stated by others.175

The Royal Commission which revised Stephen's code made the accused much more like an ordinary witness. In particular, it rejected Stephen's provision that the accused should not be sworn as a witness.176 It is likely that the reason for this was the realisation that such a distinction between the testimony of prosecution witnesses and that of the accused would place the latter at a permanent disadvantage. The distinction would also be likely to have an adverse effect on any presumption of innocence in favour of the accused. This had been shown by Charles Dickens who, in writing for a popular readership, had made plain his view that in most cases if the prisoner was not guilty he would not be in the dock.

[S]o perfect are the arrangements, so accurate the investigations, which precede a trial, that, practically speaking, an innocent person is very rarely placed in the dock.177

(3) An Image of Continuity

For competency to be extended to the accused it was important that the reform should not be seen to involve a radical change in the balance of power in criminal trials. It is likely that from the late 1870s a majority
in Parliament, and perhaps in the legal profession, judged most of the proposals to have passed this test. Ashley's bill in 1878 might well have been passed if the government had not promised its own bill. Any of the government proposals after 1878 could probably have been passed had they not been linked to a criminal code or become the subject of Irish Nationalist obstruction.\(^\text{178}\)

The significance of continuity can be seen from the importance attached to arguments based on analogies with existing law in the debates on this reform.

No doubt a little breathing space was required after the extension of competency to parties in civil actions before it seemed appropriate to point out the implications of that reform. Thus on 19 December 1851 there was a leading article in \textit{The Times} on the subject of evidence in criminal cases, which was prompted not by the Law of Evidence Amendment Act but by a recent case of mistaken identity in which a wrongful conviction had only by chance been avoided. The writer, after some general reflections on the nature of evidence, concluded, "How easy it is, despite of all our administrative machinery, all our scientific rules, and with no evil intent, to swear away the life or liberty of an innocent person!" Nowhere did he make the point that if the accused person in a criminal case were able to testify, the risk of wrongful convictions might be reduced.

The subject of criminal law and procedure was
considered again in a leading article in 1853. The writer argued for a number of procedural reforms, including improved methods of reviewing decisions.

A criminal case is, after all, only an investigation of law and fact, and differs from a civil case rather in the sentence awarded than the peculiar conditions of procedure. The same state of facts may require to be proved in a civil as in a criminal case. Why should the means of ascertaining truth and guarding against error which are found efficient for civil cases be wholly unfit for criminal?

Despite these reflections, no direct reference was made to the incompetency of the accused. But when Brougham raised the question in Parliament in 1858 the writer of a leading article in the Solicitors' Journal argued that what seemed at first sight "a startling innovation" was "but a logical carrying out of the principle originally applied, with some timidity and hesitation, in Lord Denman's Evidence Act, and afterwards more boldly developed in the County Courts Acts".  

In 1861 J. Pitt Taylor, arguing in support of the reform, stated that, so far as was practicable, the rules of evidence ought to be the same in civil and criminal proceedings. And in The Times on 4 November 1862 the writer of a leading article asserted that any arguments there might have been against allowing the accused to give evidence foundered on the fact that the law had been changed to allow the parties in civil actions to do so.

Further, once Parliament began to pass statutes allowing the accused to give evidence when charged with
certain offences, it became possible to argue that a more general extension would only be carrying existing criminal law to its logical conclusions. Here the argument based on analogy was simply another way of presenting the argument based on anomaly. ¹⁸²

(4) Competency and Individual Responsibility

The extension of competency to all accused persons may have been more readily achieved because this reform was consistent with an emphasis on individual responsibility which for much of the nineteenth century was a feature of political theory.

In the nineteenth century, control by the state of its members on the basis of individualism, free choice and free market economics - individualism as a social mechanism - was a relatively short-lived form of social organisation that bridged the gap between the paternalistic relationships of the eighteenth-century state, and the administrative state, based on controls, regulations, licensing and institutional arrangements, that was largely in place by the 1870s. But individualism as a value persisted a good deal longer. It continued to be asserted as a highly desirable moral principle to be observed in social and political reform, and was not to be mistaken for egoism. There was to be free choice, but people must be taught to choose wisely. There could be no approval of a society in which everyone pursued his own
Supporters of individualism tended to believe that citizens should be treated as if they were more rational and responsible than they probably were, because this was regarded as the best way of making them so in fact. Crime had to be seen as the result of the refusal or inability to deny wayward impulses, or to make proper long-term calculations about self-interest. But this understanding could come to a person only with the appreciation of his own responsibility, and the realisation that he would inexorably be held responsible for the consequences of his actions. Eighteenth-century criminal justice was, however, an inappropriate instrument to achieve this because it was too unsystematic and flexible.

Atiyah has suggested that individualism as a value, in the sense of a social or intellectual force, may have reached its apogee with the publication of John Stuart Mill's *On Liberty* in 1859. But even if this is true, there was certainly no rapid decline from that point. The dominant philosopher in late-Victorian England was T.H. Green, and individualism was central to his philosophy also.

Green's emphasis on the development of individual character appeared in discussions of what he called "freedom in the positive sense", by which he meant not merely "freedom to do as we like irrespectively of what it is that we like", but rather, "the greater power on
the part of the citizens as a body to make the most and best of themselves.\textsuperscript{186} Self-realisation was at the basis of political obligation.

[T]he claim or right of the individual to have certain powers secured to him by society, and the counter-claim of society to exercise certain powers over the individual, alike rest on the fact that these powers are necessary to the fulfilment of man's vocation as a moral being, to an effectual self-devotion to the work of developing the perfect character in himself and others.\textsuperscript{187}

A doctrine of self-realisation was also involved in Green's ethics. He argued that man realised himself, firstly, by being conscious of having a "higher" (or "better", or "possible") self; secondly, by the effort to make that self real, or, in other words, by trying to make his actual character identical with the idea that he has of his "higher" self.\textsuperscript{188}

Such theories of self-realisation placed a strong emphasis on individual responsibility.

No-one can convey a good character to another. Every one must make his own character for himself. All that one man can do to make another better is to remove obstacles, and supply conditions favourable to the formation of a good character.\textsuperscript{189}

Extension of competency to the accused accorded well with political theory that emphasised individual responsibility. A legal system that values individual responsibility will have as its central purpose a process of argument and communication with the defendant, and in this respect will be closely related to moral criticism. Both express a proper respect for the accused as a
rational and responsible agent. If the criminal trial is seen in this way, rather than as a purely instrumental process for achieving a correct decision about facts, it follows that an accused will have a right to be heard, because the absence of that right would entail a refusal by the court to recognise the accused's status as a participant in the trial.

But this calls in question an accused's right of silence at trial, for if the accused is to be treated as a rational and responsible agent, he cannot deny that status by refusing to participate in his trial. In short, his status carries duties as well as rights, and these include the duty to give evidence himself and submit to questioning by counsel for the prosecution.¹⁹⁰ I have shown that the right to silence at trial was a constantly recurring theme in proposals for legislation and in debates inside and outside Parliament, from Brougham's proposals of 1858 to the passing of the Criminal Evidence Act 1898. Frequently there were suggestions that it would be unobjectionable to infer guilt from silence, and there were even proposals which would have obliged the accused to submit to questioning. It is true that the latter were rejected, and that the comment that could be made on the silence of an accused at trial was substantially limited, both in the wording of the 1898 Act and in subsequent interpretation. But the suggestions that preceded the Act may have been prompted by the emphasis which political
theory placed on individualism, with its implications for individual responsibility.

(5) The Question of Bentham's Influence

Any influence that Bentham had on the general extension of competency to accused persons was almost certainly indirect and slight. It has to be remembered that Bentham had advocated a compulsory examination of the accused, possibly by the judge, and ideally without a jury. The jury was a feature of what he called "regular" or "technical" procedure", which was rule-based and to be contrasted with "natural", "domestic" or "summary" procedure. The main features of the latter were to:

- admit all relevant evidence; minimize vexation, expense and delay; hear all parties and witnesses viva voce in public; subject them to counter-interrogation; weigh evidence solely on the merits of the individual case without reference to rigid rules; place the sole responsibility for the design of the system and for changes in it in the hands of the legislator; place responsibility for rectitude of decision in individual cases squarely on the single judge; rely on publicity, underwritten by simplicity, as the main security against midsdecision and non-decision; above all, seek truth unremittingly, subject only to preponderant vexation, expense or delay.

When reform ultimately came, it was within the framework of an adversary system that was becoming more, rather than less, rule-based, and in which the right to silence had become more firmly established than at the time when Bentham was developing his critique.

With this substantial reservation it is possible, however, to see three ways in which Bentham's critique
may have had a part in preparing the way for the extension of competency to the accused. First, in some of the main arguments used to support the reform affinities can be seen with arguments which Bentham had employed. Secondly, Bentham's ideas may have been mediated through Brougham and the Law Amendment Society. Thirdly, similar reforms in the United States of America appear to have been stimulated to some degree by Bentham's work, and the American experience may have done something to make the reform more acceptable in England.

(a) Affinities with Arguments Used by Bentham

I have earlier referred to three arguments which were relied on by those who supported a general extension of competency to the accused, the overall aim of which I have described as being the maintenance of an acceptable system of criminal justice. These arguments were that the reform was necessary for the discovery of truth, for the safeguarding of the innocent, and for the removal of anomalies.

Bentham frequently argued that extension of competency would aid the discovery of truth and safeguard the innocent. In addition, the argument that the reform would do away with the need to do justice in the Home Secretary's office rather than in open court may have been influenced by the importance attached by Bentham to publicity and accountability in the administration of justice.
But these were hardly original arguments, and the fact that a member of Parliament used an argument that Bentham had used does not show necessarily that he followed Bentham in his own use of it. The "double standard of truth" argument used against the requirement that testimony be on oath shows this.\textsuperscript{194}

(b) Brougham and the Law Amendment Society

We are on firmer ground in suggesting that the influence of Bentham may have been mediated through the efforts of Brougham and the Law Amendment Society, and thereby have made some contribution to the reform that was finally achieved. Brougham initiated legislation in 1858, 1859 and 1860. In 1844 he had formed the Law Amendment Society\textsuperscript{195} and that society, with its quarterly journal, the \textit{Law Review}, kept the issue before the eyes of the legal profession for several decades. For example, it had been at the invitation of the Law Amendment Society that J. Pitt Taylor, the evidence scholar, read a paper in 1861 in support of the reform. The Society itself campaigned for the reform, and as part of its activities sent questionnaires to the Chief Justice and Attorney General of each of the United States of America and of the provinces of the Dominion of Canada in the hope of getting the most recent information on the subject from the most experienced sources.\textsuperscript{196}

In 1857 Brougham formed a committee to establish a National Association for the Promotion of Social Science,
and until 1865 he was its president. That organisation also discussed the question from time to time.

(c) The American Example

In 1866, the year after Vincent Scully and Sir Fitzroy Kelly had introduced legislation to make the accused competent, the Law Times and the Law Magazine and Law Review drew attention to the way in which the law concerning the competency of the accused was developing in America. In Maine a law had been passed in March 1864 to allow the accused to testify in criminal cases. This development had been largely due to the efforts of Chief Justice Appleton who, in his own writings, had acknowledged his debt to Bentham. Similar legislation had followed in other states. The writer in the Law Times referred to these developments and suggested that such reforms were more readily made in a country where all was comparatively new than in one where all had "grown and hung together undisturbed during the progress of many centuries of national existence".

The writer in the Law Magazine and Law Review had more polemical aims. He noted that a bill to enable accused persons to give evidence was currently likely to pass in Massachusetts, and stated that the subject was of sufficient interest to English readers to reproduce in full the report which had been made on the Massachusetts bill by the Committee on the Judiciary of that state.

That report supported the reform with a number of
arguments which, without acknowledging Bentham as their source, clearly had affinities with arguments which he had employed. The writers of the report acknowledged the contribution which the reform would make to the discovery of truth by pointing out the accused's position as "the most important witness". They also alleged that no innocent man would wish to be excluded: "It is the interest and the wish of every innocent man suspected of crime to explain at once inculpating circumstances, and from no source can such satisfactory explanations be obtained." 202

The writers of the report also argued that if the rule of exclusion had been designed to save culprits from a fancied hardship of seeing themselves condemned out of their own mouths, it had failed to achieve this, because any writing or speech of the defendant could be given in evidence against him. Such second-hand evidence, however, was almost certain to be deceptively incomplete because the witness might have misheard, misunderstood, or have wilfully or negligently misreported. 203 Yet the only person who could complete the incompleteness or explain the incorrectness had to suffer in silence. "In daily life we follow no such rule. What father so inquires into the alleged misconduct of his children, or what employer thus verifies suspicions of his agents?"

This argument based on an analogy with daily life was one of the fundamental arguments used by Bentham to
advocate a "natural" rather than a "technical" system of procedure. For example, he wrote in the *Rationale of Judicial Evidence*:

Before states existed, at least in any of the forms now in existence in civilized nations, families existed. Justice is not less necessary to the existence of families than of states. The mode in which, in those domestic tribunals, created by nature at the instance of necessity, justice was administered, and, for that purpose, facts were inquired into, may for distinction's sake be termed the *natural* or domestic mode of judicature.

The writers of the report also considered two of the principal objections to the reform: the problem of the inferences that would be drawn from silence, and the perjury argument.

The Massachusetts report gave a Benthamite response to the "inference from silence" argument.

May you not now show every act of the prisoner, from the time of the alleged crime and before it, and urge that the natural inference from each or any is the guilt of the man who under the circumstances would act as he acted? And can the deduction which you would urge have any other ultimate foundation than the collective experience of human nature in all time, teaching every man of common sense that under given circumstances, in a vast majority of cases, an innocent man acts in one way and a guilty man in quite a different way?

Why is the voluntary silence of a man labouring under a grievous suspicion assumed by all men to be evidence of guilt? Simply, because the invariable experience of mankind has demonstrated that the innocent hastens to tell his story, conscious that in full disclosure is his defence. Why should not this necessary inference of universal experience, springing from the very nature of man, be used against the guilty who dares not trust to a tissue of lies, and will not tell the truth? Does it bear hard upon the guilty? In what way? Nay, even if it did so, wherefore not? Is criminal law intended to relieve the guilty? Is it not the sure conviction of crime desired?
In reply to the objection that such a change would encourage perjury, the report argued that this applied equally to allowing parties in civil actions to give evidence. It had not been thought a sufficient argument when that reform had been under consideration, nor should it be thought so now.

The Committee appended to the report a letter from Chief Justice Appleton which dealt with the practical workings of the proposed reform, and which the Law Magazine and Law Review also published.

Appleton stated that he had had no doubt that the change should be made in his own state of Maine, and that nothing had since occurred to weaken his opinion. "I have tried criminal cases in which the accused being innocent owed his honourable acquittal in no slight degree to his own testimony, and the clear and frank manner in which it was delivered." Erroneous verdicts would occasionally be rendered, whether the accused was admitted to testify or not, so long as juries were composed of fallible men. But he emphasised the benefits that would flow from the reform: increased openness in the administration of justice and a reduced danger of misdecision.

All the evidence attainable and needed for a full understanding of the case should be forthcoming, unless the evils of delay, vexation and expense consequent upon its procurement should exceed those arising from possible misdecision.

The exclusion of evidence is the exclusion of the means of correct decision. The greater the mass of evidence excluded, the less the chances of such decision, until, if all evidence be excluded, resort
must be had only to lot. 207

Appleton's debt must have been obvious to anyone familiar with Bentham's writings. For the benefit of those who were not, he concluded by referring to the more elaborate examination of the question "in the masterly work of Bentham on the law of evidence, where the reasons for the proposed change are stated with a cogency of argumentation unanswered and unanswerable".

5. Summary of Conclusions

This chapter has shown that at the time when Bentham was developing his critique of the incompetency of the accused, the judges, relying on what they perceived as an old common law tradition, were encouraging the recognition of a right to silence at the pre-trial hearing before the magistrate. At the same time, the accused was becoming increasingly detached from the proceedings during the trial by jury. The days when a judge might informally question an accused were over, at least where the accused was represented by counsel, and this was increasingly the case during the nineteenth century.

Bentham was concerned to remove the prohibition on testimony from the accused at trial. But he also wanted to compel the accused to submit to questioning, and would have allowed the court to infer guilt if the accused were to refuse co-operation. At the root of his desire for these reforms was an understanding of procedural law
which saw the whole system as a device for getting at the truth by adducing all relevant evidence in its most reliable form, subject to a theoretical power to exclude evidence on the ground of utility.

The extension of competency to the accused came about primarily to provide accused persons with more immediate participation in criminal trials than the recently developed adversary process allowed them. This opportunity could favour either the prosecution or the defence, and the piecemeal incorporation of this reform in legislation creating new offences showed that it could be a valuable instrument in the search for truth. What was needed before the reform could be applied generally was that a majority in Parliament, and a significant number of the legal profession, should be persuaded that the change involved no radical alteration in the recently developed balance of power in criminal trials between judge, counsel and the accused. Hence the concern that is to be found in the debates, which took place largely between practising lawyers or persons who had some legal connections, that a change in the law would lead to more direct judicial intervention in the proceedings, or that the position of the accused would be weakened, either by his being forced to testify or because the burden or standard of proof would be affected. Although these fears persisted in some minds until the passing of the 1898 Act, the more entrenched the existing adversary system
became, the less likely it seemed that there could be any significant change in the balance of power. One reason why this came to seem particularly improbable was the feeling of chauvinism which led people to believe that the injustices of the French system, where the accused was not only permitted but compelled to testify, could not possibly gain a foothold in England.

The reform may have been regarded as more acceptable by being seen to accord with the increased emphasis on individual responsibility which was for much of the nineteenth century a feature of political theory and of legislation affecting criminal law.

As the proposed reform became more acceptable, the old argument that an extension of competency would lead to an increase in perjury lost whatever power it might once have had. A compromise solution, which would have permitted the accused to give evidence but which would have forbidden him to testify under oath, was not fully debated, but it seems probable that it was regarded as unacceptable because it would have upset the balance of the criminal trial by putting the accused at a disadvantage in relation to the prosecution witnesses. The growing acceptability of allowing the accused to give evidence was confirmed when the government produced a volte-face in its attitude in the short time between 1876 and 1878.

Some of the principal arguments employed in favour
of reform had affinities with arguments that Bentham had used, and Benthamite ideas can be found in the work of Brougham and of the Law Amendment Society. It is also possible that Bentham's critique played an indirect part in the reform through the examples set in America, where reforms can be traced more directly to Bentham through the exertions of Chief Justice Appleton. But any Benthamite influence that there might have been on reform in England was exerted in a much diluted form. The legislation passed in 1898 protected the accused to a large extent from a comprehensive cross-examination, and thus limited the search for truth which Bentham had declared to be the object of extending competency to the accused. The accused's right to silence, which Bentham had notoriously criticised, was developed by the judges in relation to pre-trial proceedings during the early decades of the century, and was recognised by statute as early as 1848. The accused's right to silence at trial remained unaffected by the 1898 legislation, and the right to comment on its exercise was limited.
NOTES TO CHAPTER 4


5. 7 George IV c 64 s 1.

6. 11 & 12 Vict c 42 s 18. See the speech of Sir John Jervis AG: *Parl. Deb.*, 3rd series, xcvi, 4-7 (3 February 1848).


8. See the discussion below of R v Wilson (1817) 1 Holt 597, 171 ER 353. See also Langbein, "Privilege against Self-Incrimination," 1079, n.142.

9. R v Smith & Hornage (1816) 1 Stark 242; 171 ER 460.

10. 1 Holt 597, 171 ER 353.

11. Ibid.

12. Ry & Mood 432, 171 ER 1073.

13. 5 Car & P 312, 172 ER 990.

14. J.F. Archbold, *The Justice of the Peace*, and
15. See n.12 above.


19. Ibid., 39.

20. Ibid., 14.


22. Ibid., 446-49.

23. Ibid., 24.

24. Ibid., 451-55.

25. See section 1 above.


30. Ibid., 344-45.

31. Ibid., 34.

32. Ibid., 37.

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33. Ibid., 36-37.

34. **Vincent Scully** (1810-1871) Called to the Irish Bar, 1833; QC 1849. Liberal member for Cork. **Sir Fitzroy Kelly** (1796-1880) A strong tory who took an early part in politics. He sat for a number of constituencies and ultimately for the eastern division of Suffolk (1852) which he represented until raised to the Bench. Before that he held office as Solicitor General and Attorney General. He was an ardent law reformer. Amongst other reforms, he was an early supporter of codification and of a court of criminal appeal. **Evelyn Ashley** (1836-1907) Called to the Bar, 1863. Member of the Oxford circuit. Magistrate for Dorset. Liberal MP for Poole (1874-1880) and the Isle of Wight (1880-1885).


38. *House of Lords Sessional Papers* 1859, Session 1, (34) II 395.


42. *House of Commons Parliamentary Papers* 1865 (8) I 471.

43. *House of Commons Parliamentary Papers* 1865 (20) II 469.


45. *House of Commons Parliamentary Papers* 1876 (61) I 511.

46. *House of Commons Parliamentary Papers* 1877 (76) I 481.

47. *House of Commons Parliamentary Papers* 1878 (23) II 243.


50. Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences (1879) [C. 2345].

51. Ibid., 37.

52. House of Commons Parliamentary Papers 1878-79 (117) II 175.

53. (1828-1911) Called to the Bar, 1852. Entered Parliament as a liberal in 1869; QC 1869; Solicitor General, October 1873; Attorney General, November 1873 – February 1874, April 1880–June 1885. From 1895 to 1902 he was Chancellor of the Duchy of Lancaster, having been created 1st Baron James of Hereford.

54. Parl. Deb., 3rd series, ccxlv, 310-47 (3 April 1879); 1750-53 (5 May 1879); ccxlvi, 953 (30 June 1879); 1281 (3 July 1879).

55. House of Commons Parliamentary Papers 1880 (2) II 1.

56. Parl. Deb., 3rd series, ccl, 244; 1236-48.

57. House of Commons Parliamentary Papers 1880 (47) II 223. Frederick Lowton Spinks (1816-1899) was called to the Bar in 1843. He became a serjeant-at-law in 1862 and was a magistrate for Kent from 1866. A conservative, he sat for Oldham 1874-1880. William Wheelhouse (1821-1886) was called to the Bar in 1844. He subsequently joined the Northern circuit and the West Riding and Leeds sessions. Appointed QC in 1877. A conservative, he sat for Leeds 1868-1880. Bedford Clapperton Trevelyan Pim (1826-1886) After a naval career he was called to the Bar in 1873 and became a magistrate for Middlesex. A conservative, he sat for Gravesend 1874-1880.

58. See under "Criminal Code (No.2) Bill" in Parl. Deb., 3rd series, ccli, general index.


60. Disraeli's second cabinet, formed in February 1874. It had been succeeded by Gladstone's second cabinet, formed in April 1880.

62. The Times, 10 March 1882.

63. House of Commons Parliamentary Papers 1883 (8) II 249.

64. Parl. Deb., 3rd series, cclxxviii, 90-166 (12 April 1883).


68. The Times, 23 June 1883.

69. House of Lords Sessional Papers 1884 (9) IV 39.

70. House of Commons Parliamentary Papers 1884-85 (65) II 363.

71. Thus by the Master and Servant Act 1867, parties to a contract of service and their spouses were competent witnesses on the hearing of an information or complaint. The Licensing Act 1872 provided by s 51 that offences under the Act could be prosecuted in the manner provided by the Summary Jurisdiction Act 1848, s 14 of which allowed the defendant to give evidence on the hearing of an information or complaint. By s 11 of the Conspiracy and Protection of Property Act 1875, on the hearing of any indictment or information for offences involving breach of contract contained in ss. 4, 5 and 6 the parties to the contract and their spouses were made competent to give evidence. The Explosives Act 1875 in certain circumstances placed the onus of establishing a defence on the occupier of a factory, and in such cases the defendant by s 87 was made a competent witness. By s 4 of the Merchant Shipping Act 1876 the onus of proving a defence on a charge of sending a ship to sea in an unseaworthy state was placed on the defendant, and in such a case he also was made a competent witness.


74. Parl. Deb., 3rd series, cccxxiv, 68-148 (22 March 1888); cccxxv, 1564-91 (7 May 1888); 1929-32 (10 May 1888); cccxxx, 1220 (15 November 1888).

75. Parl. Deb., 4th series, i, 665-69 (18 February 1892).

76. Parl. Deb., 4th series, x, 188 (16 March 1893).

77. Parl. Deb., 4th series, xxvii, 646.

78. House of Commons Parliamentary Papers 1895 (236) III 87.


81. House of Commons Parliamentary Papers 1897 (101) IV 199.

82. Parl. Deb., 4th series, xlvi, 780-826 (8 April 1897).


87. Langbein, "Criminal Trial before the Lawyers,"
316.

88. 6 & 7 Will IV c 114. Counsel had been allowed in treason cases since 1695 and had always been allowed in cases of misdemeanour. (J.H. Baker, An Introduction to English Legal History, 3rd ed. (London, 1990), 583 n.50.)


90. M. Cottu, On the Administration of Criminal Justice in England; and the Spirit of the English Government, trans. from the French, (London, 1822), 88. Cottu described what he had seen on a tour of the northern circuit as the guest of Bench and Bar in the early 1820s. His observations show an adversary system to have become established by that period. The judge, "who remains almost a stranger to what is going on", takes notes of examination-in-chief and cross-examination. Sometimes he asks questions of a witness, but his object "is more to obtain an explanation of the witness's depositions, than to establish any additional circumstances against the prisoner". At the end of each deposition the prisoner is told to put to the witness whatever questions he pleases. Neither counsel for the prosecution nor for the defence has a right to comment on the evidence. According to Cottu, prisoners were generally represented by counsel in the country, but very rarely in London. Some support for this is suggested by recent research. J.M. Beattie found that at the Old Bailey in 1800 something like seven out of ten defendants, including many on capital charges, had no counsel to assist them, and that for the whole of the eighteenth century the vast majority of prisoners at Surrey assizes made their own defence. (Beattie, Crime and the Courts, 375.) Cottu described the judge in summing up as simply reading the notes he had made during the trial, "without attempting to disguise their dryness by pompous reflexions, applicable or not to the subject: sometimes, when the case requires it, he remarks on the testimony adduced: but in general he confines himself to a naked statement of the affair to the jury..." Of the position of the accused he wrote:

Public interest is not excited by the countenance of the prisoner, who is placed with his back to the spectators; nor by the unfolding of the proofs, nor
by the prisoner's resistance, nor by the judge's exertions to discover the truth. There is no contest between the plaintiff and defendant; and the latter never offers anything more than the spectacle of a man who seems careless about the issue of the trial, and leaves his life to be disputed between the prosecutor's counsel and his own. Neither the sound of his voice becoming more faint and tremulous with the accumulating mass of proofs against him; nor the still increasing ghastliness of his countenance, nor the sweat which stands upon his forehead, nor the convincing silence of guilt, laid bare and forced to yield, call forth the passions of the by-standers, and summon from their hearts pity, horror, vengeance, and all those vehement feelings produced by our trials. In England, all is calm and tranquil: counsel, jury, judges, the public, nay the prisoner himself, whom no one apprizes of his danger, and the overwhelming strength of the evidence.

(Ibid., 88-90, 105-6.)

91. Langbein, "Criminal Trial before the Lawyers," 264.


93. Daniel Duman, "Pathway to Professionalism: the English Bar in the Eighteenth and Nineteenth Centuries," Journal of Social History (1980): 615-28. From 1841 the figures are less easy to interpret; in that year the Law List began to include the names of most newly-called barristers, whether or not practising. (Ibid., 627 n.21.)

94. Ibid., 619-21.

95. Amicus Curiae, Criticisms on the Bar; including Strictures on the Principal Counsel practising in the courts of King's Bench, Common Pleas, Chancery and Exchequer (London, 1819). J.P.Collier (1789-1883) became a student of the Middle Temple in 1811 and for a time earned a living as a reporter of legal and parliamentary affairs, as a dramatic and literary critic, and as a writer of leading articles. He was not called to the Bar until 1829, and he soon gave up the law in favour of journalism and literature. At a later stage in his life he became involved in the production of literary forgeries, but there seems no reason to doubt the veracity of his much earlier account of life in the courts. See his entry in the DNB.

96. Amicus Curiae, Criticisms on the Bar, 297.
97. Ibid., 136.

98. Cf. the debates on extending competency to the accused which took place later in the century. On several occasions it was remarked that criminal work, and prosecution work in particular, was often entrusted to young and inexperienced counsel.


102. See n.91 above.


105. The Times, 23 August 1856. Cf. the comments of Cottu: n.90 above.


107. The Times, 29 November 1862. A week earlier The Times had published a report from its Paris correspondent of a judicial scandal which had arisen because a young Belgian woman had been forced to confess to having murdered her father, although in fact she had been innocent. In the investigation which led to the conviction of those who had committed the crime, it was revealed that the woman had been confined for six months before the juge d'instruction examined her. She had been kept in a small cell without air or light and with only a mattress, a coverlet and a bucket as furniture. During that period she had been let out for exercise on only two occasions. She spoke only Flemish and her interpreter, following the words of the juge d'instruction, had warned her that detention in these conditions would continue unless she confessed. (The Times, 22 November 1862, p.10.) For further criticism of continental oppression see a leading article in the Solicitors' Journal and Reporter 9 (25 March 1865): 427-28, and the speech of Morgan Lloyd in the debate on the Criminal Code (Indictable Offences Procedure) Bill of 1883. (Parl. Deb., 3rd series, cclxxviii, 93-94: 12 April 1883.) It is likely that
English criticism was justified. A historian of criminal justice in France recently concluded that "there is substantial evidence that the meaning and process of criminal justice were debased in nineteenth- and twentieth-century France". (Benjamin F. Martin, Crime and Criminal Justice under the Third Republic: The Shame of Marianne (Baton Rouge and London, 1990), 273.) The defects that were generally perceived in both English and French criminal procedure at about the middle of the century appear vividly in the comic sketch reproduced in the Appendix to this thesis.

108. Francis Worsley, An Examination of Mr. Pitt Taylor's Thesis 'On the Expediency of passing an Act to permit Defendants in Criminal Courts and their Wives or Husbands to Testify on Oath', (London, 1861), 3, 7. (Emphasis original.)


110. The Times, 29 November 1862; Parl. Deb., 3rd series, ccxxx, 1929 (26 July 1876).


113. Parl. Deb., 4th series, xlviii, 791-92 (8 April 1897). The experience of Collins LJ in prosecutions under the Criminal Law Amendment Act 1885 had shown him that they were frequently conducted by inexperienced young counsel, and that a crucial question had often to be put by the judge to a prisoner who was giving evidence. See the speech of Alfred Lyttelton: Parl. Deb., 4th series, lvi, 1015 (25 April 1898).

114. Sir Herbert Stephen, Prisoners on Oath: Present and Future (London, 1898), 24-26. Stephen also confirmed that criminal business was often entrusted to inexperienced counsel who omitted to put questions that clearly ought to have been put.

115. See the speech of Llewellyn Atherley-Jones, quoting the Chairman: Parl. Deb., 4th series, lvi, 1034 (25 April 1898).


"the adoption of the foreign mode of proceeding might open the door to practices revolting to our wholesome, though perhaps crude, English notions of justice and fair play". But he added that he saw no danger of prejudice to a defendant from any cross-examination that would be permitted in an ordinary English tribunal. (Solicitors' Journal 2 (1857-58): 430-31.) Brougham himself, in his answer to Lord Campbell, was at pains to point out that the differences that existed between the French and English systems would remain if his bill became law. (Parl. Deb., 3rd series, clii, 763: 24 February 1859.) No one did more to emphasise "the traditions of English justice" and "the sense of the country" than J.F. Stephen. His sense of their significance appears to have grown with time. In 1863 the first edition of his General View of the Criminal Law emphasised the procedural differences between the English and French systems:

In an English trial, the ultimate object aimed at throughout is to convince the jury. In a French trial, the jury is an excrescence. The object, for which the whole machinery of inquiry is really adapted, is that of satisfying the minds of the persons who conduct it, and it is substantially the same machinery as that which existed before trial by jury was introduced into France. The judges and public prosecutors satisfy themselves by continually working upon the mind of the person whom they suspect, till they have forced him to confess his guilt or prove his innocence to their satisfaction. The interrogation of the accused is not one amongst many items of evidence submitted to a jury, but it is the very gist and essence of the whole process, to which all the other evidence is subsidiary. It is not a free and public examination, performed once for all in the face of day, but a prolonged moral torture enforced by physical torture in the strict sense of the word, namely solitary confinement.

(J.F. Stephen, A General View of the Criminal Law of England (London, 1863), 199-200.) In 1877 Stephen returned to this subject in an essay in Nineteenth Century. At that stage he emphasised not so much differences in procedure, but what he perceived to be essential differences in the natures of the two peoples.

It is not the power of asking questions of prisoners, but the power of extorting answers to those questions, which makes the French system so oppressive. Much, too, must be allowed for the temperament of the people. The mobile, excitable, passionate nature of the French is not favourable to fair play as we understand it. Judges and public prosecutors get to look on accused persons as enemies to society to be
crushed and hunted down. They do not seem to appreciate the immeasurable superiority of force which is on the side of society, or to feel that deep considerate pity which I think comes over most English people, and not a few English lawyers, however fierce they may look, when they have before them a poor wretch who, whatever his crimes may be, is fighting for his life - sometimes literally - against terrible odds. Judges or counsel who are harsh to prisoners, however vile, or cunning, or impudent, are as much in the wrong as a strong man who strikes a little child or a sick woman, and I think it may fairly be said that in this country as it is there is not much more reason to fear the one scandal than the other. I do not think there would be much, if any, real danger that any arrangement which might be made for questioning prisoners would seriously affect this noble characteristic of English courts of justice.


119. Coleridge was speaking at the annual congress of the National Association for the Promotion of Social Science. Law Magazine and Review (New Series) 1 (1872): 823. This society resulted from the convergence in the mid-1850s of a number of reform movements, one of which was the Law Amendment Society. See generally Lawrence Goldman, "The Social Science Association, 1857-1886: a Context for Mid-Victorian Liberalism," English Historical Review 101 (1986): 95-134.


122. The Times, 19 March 1858, p.6. Brougham was not the only person to dismiss the objection as a minor difficulty. The Dublin correspondent of the Solicitors' Journal acknowledged that there was some weight in the objection, but added:

[I]t is to be remembered that prosecutions are generally managed in a somewhat perfunctory manner.
Counsel (in crown cases) very humanely and properly forego the use of those minor tricks of advocacy which their professional zeal induces them to make use of so constantly at nisi prius.

(Solicitors' Journal and Reporter 2 (1857-58): 564-65.) A leading article in the Solicitors' Journal at about the same time said that the accused need not give evidence if he did not wish to do so, but that there was "no principle of law or of justice which would entitle him to protection from the natural consequences of a pregnant silence". (Solicitors' Journal and Reporter 4 (1859-60): 696-97.)

123. J. Pitt Taylor, "On the Expediency of passing an Act to permit Defendants in Criminal Courts, and their Wives or Husbands, to testify on Oath," Solicitors' Journal and Reporter 5 (1860-61): 363-64. The paper had originally been read at a meeting of the Society for Promoting the Amendment of the Law.

128. Parl. Deb., 3rd series, clii, 762 (24 February 1859). See also Francis Worsley (n.108 above and accompanying text); The Times 11 May 1863 (leading article); the speech of Morgan Lloyd (Parl. Deb., 3rd series, ccixxxviii, 93-94: 12 April 1883).
129. The Times 4 November 1862.
133. The writer may have had in mind the direction of Baron Alderson to the jury in R v Hodge (1838) 2 Lew CC 227, 228; 168 ER 1136. For a modern discussion of this way of expressing the standard of proof see A.A.S. Zuckerman, The Principles of Criminal Evidence (Oxford, 1989), 134-40.
134. Thirty years later Sir Herbert Stephen argued that in cases where the accused could not give evidence the jury asked the correct question: "Has the Crown proved that he did it?" But where the accused could give evidence they asked instead: "Did he do it?" (Stephen, Prisoners on Oath, 16-17.) See also the speech of John Lloyd Morgan: Parl. Deb., 4th series, xlviii, 785-87 (8 April 1897).

135. House of Lords Sessional Papers 1857-58 (49) IV 373.


137. The preamble recited that, "it is expedient for the better administration of justice in criminal proceedings, both as regards the conviction of offenders and the acquittal of innocent persons, to make prisoners or defendants and their wives or husbands competent to give evidence". (House of Commons Parliamentary Papers 1876 (61) I 511.)

138. For example, in 1861 J. Pitt Taylor, denying that the admission of the accused's testimony would mislead juries, argued that: "In investigating questions of fact, 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." In the following year Charles Dickens, in an editorial article in the magazine All the Year Round, said that examining the prisoner would increase the likelihood that the guilty would be convicted and the innocent acquitted. In the same year the writer of a leading article in The Times noted that according to many practical lawyers, ordinary criminal proceedings were "clumsy and ill-calculated to elicit proofs either of guilt or innocence", and he insisted that the most efficient method possible ought to be employed to ascertain whether persons charged with offences were guilty or not. A similar argument was used in 1878 by Sir George Bowyer, liberal member for Wexford, when he said that the real principle in both civil and criminal law was that the judge and jury should have before them all the evidence bearing on the question they had to decide. Any law which prevented that was objectionable, inasmuch as it placed a barrier in the way of the ascertainment of truth. (Solicitors' Journal and Reporter 5 (1860-61): 363; "Examine the Prisoner," All the Year Round 7 (7 June 1862): 306-8; The Times, 29 November 1862; Parl. Deb., 3rd series, ccxxvii, 668: 30 January 1878.)


142. The Times, 19 March 1858, p.6.


144. Solicitors' Journal and Reporter 5 (1860-61), 384. In 1869 Richard Amphlett, member for Worcestershire East, said that he had never been able to see why the evidence of accused persons should be excluded. He acknowledged that a guilty man might commit perjury in order to save himself, but he did not think that for that reason an innocent man should be deprived of the advantage of giving evidence that might lead to his acquittal. In a comment on Sir Fitzroy Kelly's bill, the writer of a leading article in The Times said that there had to be set against the risk of innocent persons damaging themselves by giving evidence the interest of those who were innocent, but who were forced to hear their acts and words misconstrued for want of an explanation which only they could supply. According to the Law Times, however, there were grave objections to the admission of prisoners as witnesses. In the majority of cases, the writer said, the privilege would be no boon to them if they were examined, and if they did not tender themselves it would be still more damaging. (Parl. Deb., 3rd series, cxcv, 1813: 28 April 1869; The Times, 17 February 1865; Law Times 40 (4 March 1865): 573.)


150. Parl. Deb., 3rd series, cclxvii, 431 (8 March 1882). In 1896 the editor of the Solicitors' Journal gave his opinion in favour of changing the law, saying, "every month which Parliament delays to bring about this reform
sees many an innocent man running a grave risk which he
ought not to be compelled to run". (Solicitors' Journal
and Reporter 40 (1895-96): 561-62.)

151. Parl. Deb., 3rd series, clii, 763 (24 February
1859).


364.

154. Parl. Deb., 3rd series, ccxxix, 1182 (24 May
1876). In 1878 Farrer Herschell, liberal member for
Durham City, doubted whether there was any right to deny
something of advantage to the truthful man because it
might be of disadvantage to a man who yielded to the
temptation to speak falsely. In 1892 the Lord Chancellor,
Lord Halsbury, expressed the hope that "that right should
be given which the universal sense of justice assents to,
I think, as being the right of every person who is now
accused". In 1897 Sir Edward Clarke declared that since
the time more than thirty years before, when his prac­
tice at the Bar had begun, "there had been borne in upon
him year after year the absolute, gross, and wicked
injustice of forbidding the person against whom the
charge was made from going into the witness-box, to face
his fellow-countrymen who had to try him, and to tell in
his own words the story and the circumstances out of
which the accusation had grown". (Parl. Deb., 3rd series,
ccxxvii, 669: 30 January 1878; 4th series, i, 667: 18
February 1892; xlvii, 812: 8 April 1897.)

155. The Times, 19 March 1858, p.6. From the reign
of Elizabeth I, successive statutes had been passed to
prevent frauds in bankruptcy. They had provided that the
bankrupt, when called upon to answer any questions con­
cerning his estate and effects, should not be allowed to
avail himself of the common law maxim, "Nemo tenetur
seipsum accusare". If he refused to answer he would be
liable to committal for contempt, as upon a refusal to
answer any other lawful question. (See the judgement of
Lord Campbell CJ in R v Scott (1856) 25 LJMC 128.)

156. Solicitors' Journal and Reporter 5 (1860-61):
384.

157. See chap.3, sec.1 above.

158. See n.71 above and accompanying text.

159. Parl. Deb., 3rd series, ccxxix, 1183 (24 May
1876).
160. See the speech of Mr Serjeant Simon: Parl. Deb., 3rd series, ccc, 911 (3 August 1885).

161. Parl. Deb., 3rd series, cccxxiv, 68 (22 March 1888). In 1896 the highly experienced criminal practitioner Sir Harry Poland wrote:

The two opposite systems of trial now in force, under which some accused persons can give evidence and some cannot, cannot both be right. The anomalous state of the law is absolutely grotesque in some cases. If an accused person is charged with an indecent assault he is a competent witness, but if he is charged with a common assault he is not, so that his competency as a witness depends upon what part of the body he is charged with assaulting.

(The Times, 12 November 1896, p.4.) Poland had been Treasury Counsel at the Central Criminal Court and adviser to the Home Office in criminal matters for an unequalled period of twenty-three years.


163. Stephen, Prisoners on Oath, 64.


165. Works, vol.6, 264.


167. Charles John Vaughan, Sermons Preached in the Chapel of Harrow School (London, 1847), 244. Later he gave a clearer idea of what might be involved in "any approach to direct falsehood, however it might veil itself". He explained that,

lying is wherever deceit is: wherever there is a purpose to deceive another, whoever that other may be, and by whatever means the deception may be practised; whether by dishonest concealment, or by taking unfair advantages, or by equivocation,... or by doing that behind another's back which we know that he will give us credit for not doing; or whether it be by more positive or deliberate falsehood ...

(Ibid., 249.)


170. Worsley, Examination of Mr. Pitt Taylor's Thesis, 5-6.

171. Parl. Deb., 3rd series, ccxxx, 1933-34, 1938 (26 July 1876). In 1883 Morgan Lloyd, liberal member for Beaumaris, emphasised the public significance of perjury when he said that where a prisoner had given evidence in his own defence but had been convicted, the choice would have to be made between trying and punishing him for perjury also, and publicly allowing his perjury to go unpunished. (Parl. Deb., 3rd series, cclxxviii, 93: 12 April 1883.)


173. [Charles Dickens] "Examine the Prisoner," All the Year Round 7 (7 June 1862): 307.


175. Stephen, "Reform of the Criminal Law," 753-54. See also n.49 above and accompanying text.

176. See n.52 above and accompanying text.

177. [Dickens] "Examine the Prisoner," 306. Dickens took the robust view that if an innocent man did find himself in the dock, it was likely to be a result of his own fault.

There is never any fear, in an English trial, of the process of the court pressing too severely on an accused. It deals with him too tenderly. After all, even in the case of an innocent man finding himself in the dock, there must be present, if not guilt, a certain laches or carelessness, or indirect culpability of some sort, which has brought him there; and for this he must pay a little penalty. Thus if he complain of severe cross-examination, it is his own act in some degree that has brought it on him.

(Ibid., 307-8.)

178. See nn.56 and 67 above and accompanying text.

179. The Times, 3 June 1853.


182. See nn.71 and 161 above and accompanying text.

183. P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford, 1979), 256-60. But Atiyah acknowledged the dangers of over-simplification; in particular, of failing to appreciate the diversity of views that existed in the nineteenth century and of assuming that changes in intellectual or moral movements occurred cleanly at given moments of time. He saw clear signs, for example, that the waging of what he referred to as the older pre-nineteenth-century type of paternalism was a protracted affair, especially in the law. (Ibid., 262-63.) It is hardly surprising that in such an essentially conservative profession pockets of paternalism should survive, or that they should manifest themselves in opposition to extending competency to the accused.


185. Atiyah, Rise and Fall, 260.


193. See, e.g., Draught of a new plan for the
organisation of the Judicial Establishment in France, in Works, vol.4, 316; Principles of Judicial Procedure in Works, vol.2, 32. See also Postema, Bentham and the Common Law Tradition, 364-73. For justice in the Home Secretary's office see nn.139 and 140 above and accompanying text.

194. See n.31 in chap.1 above and accompanying text.


197. Stewart, Brougham, 358-59.

198. For example, in 1868 a paper was read during the Association's annual congress at Belfast by a Mr Edward Gardner on the subject of the abolition of oaths, in the course of which he remarked that the day was not far distant when the mouth of a prisoner could no longer be kept closed. Another paper on evidence was read by a Mr Falkiner QC in which he pointed out that the principle of exclusion on the ground of interest still existed in a number of cases, including criminal trials, and in which he showed reasons for the abrogation of the general rule. It was suggested in the discussion which followed that accused persons should be examined on oath, but should not be cross-examined as to general credit. (Law Magazine and Law Review 24 (1868): 167, 274.)

199. See chap.1 above.

200. Law Times 41 (1865-66): 843-44. In the United States disqualification of witnesses for interest was generally abolished within a shorter period of time than in England. Statutes to establish competency were first adopted for non-party interested witnesses in Michigan in 1846, for civil parties in Connecticut in 1849, and for criminal defendants in Maine in 1864. At the federal level, civil parties in federal courts were rendered competent by an 1864 Act of Congress, and criminal defendants by an 1878 Act. By 1885 the common law disqualification remained only in Alabama, Alaska, Delaware, Florida, Georgia, Kentucky, Louisiana, Oklahoma, Tennessee, Texas and Virginia. By 1900 only Georgia retained the common law rule, and then only for criminal defendants. In 1962 the Georgia Legislature made criminal defendants competent in response to the opinion of the Supreme Court in Ferguson v Georgia 365 U.S. 570 (1961). Joel Bodansky has suggested that two factors may have contributed to the delay in England in removing all
disqualifications based on interest. (1) The arguments of English opponents of reform were coloured by class consciousness to an extent not present in the United States. This led in England to the conclusion that criminal defendants would be likely to perjure themselves if they were guilty, or to present an incoherent defence if innocent. (2) The anxiety in England that inexperienced prosecutors would draw the judge into the examination of the accused reflected the fact that the development of a professional, public system of prosecution occurred later in England than in the United States. In the United States a public prosecution system was well in place by the time of the debates over extending competency to the accused. But the British colonies preceded England in allowing the accused the right to give evidence on oath, and this suggests that Bodansky may have been overingenious. This impression is reinforced by the fact that Bodansky failed to take into account the effect of making the extension of competency to the accused part of a much larger set of provisions affecting criminal law or procedure, and the special problems created by the Irish Nationalists. (Joel N. Bodansky, "The Abolition of the Party-Witness Disqualification: An Historical Survey," Kentucky Law Journal 70 (1981-82): 129; 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 British Legal History Conference, 14-17 July 1981, ed. J.A. Guy and H.G. Beale, Royal Historical Society Studies in History Series no. 40, (London & New Jersey, 1984), 161-62. For the problems of codification and the Irish Nationalists see section 3 (2) above.)

201. Law Magazine and Law Review 21 (1866): 339-47. The report stated that the views contained in it were not fully concurred in by every member of the Committee, and that the bill was not a measure that had the unanimous support of the Committee.

202. See nn. 19 and 20 above and accompanying text.

203. See n.22 above and accompanying text.


206. Law Magazine and Law Review 21 (1866): 343. Appleton did not deal directly with the problem presented by the innocent defendant who gave evidence badly. And his opinion that, "[b]eing innocent, he would not resort to falsehood to establish such innocence" (ibid., 344) is
at variance with the experience of English judges and barristers recorded throughout the century in debates on this subject. Perhaps Appleton was naive, but see the suggestion of Bodansky referred to in n.201 above.

CHAPTER 5

A CREATIVE COMMON LAW?

The function of this chapter is to show that any common law developments during the period covered by this thesis were largely independent of Bentham. The method adopted will be to examine first the work of treatise writers, law reporters and judges; secondly, the development of selected topics in the law of evidence. It will be argued that insofar as development took place, it was in a direction which Bentham would unhesitatingly have rejected, for it led to the emergence of a judge-made, rule-based system which excluded whole classes of testimony because of their supposed lack of weight. Judges, law reporters and treatise writers all had a part to play in this development which is, however, far more clearly seen in civil than in criminal cases. In the latter, rules were slow to develop and cases tended to be argued and decided on broad principles of relevancy, with considerable discretion as to admissibility allowed to the trial judge. Almost certainly the reason for this disparity was the fact that no effective system of criminal appeals existed before the formation of the Court of Criminal Appeal in 1907. Once that Court was established,
criminal evidence rapidly assumed many of the same features as its civil counterpart.¹

In the first section I outline features of the common law which in the period before the nineteenth century made it appear a more flexible system, with greater potential as an instrument of reform, than was the case by the end of that century. In the second section I summarise Bentham's critique of the common law as it affected evidence. The third section deals with the common law developments which took place during the period 1828-1898. A fourth section contains a summary of conclusions.

1. Creativity and Common Law before the Nineteenth Century

Before the sixteenth century decisions of the judges appear to have been regarded not as sources of law, but simply as evidence of what the law was. Recognition of a "common learning" was built up, in part at least through readings and moots in the Inns of Court. If the judges could not agree on the law, there was no accepted learning on the point and a mere majority decision could not remedy this. Increased emphasis on the judicial decision developed in early Tudor times; there was a further increase when certainty in the law came to be seen as a remedy for political confusion in the seventeenth century.²

There are indications that in the seventeenth and
eighteenth centuries lawyers and others preferred common law to statute as an instrument of reform. This was usually because it was thought that statutes gave rise to greater uncertainty than the common law and were unable to deal as efficiently as the latter with the variety of situations giving rise to legal disputes.³

One explanation for according an entrenched position to the common law was the belief that it was based on principles of nature and reason. Thus Bacon had suggested that the more subtle and abstruse rules of law should be "gathered from the harmony of laws and decided cases ... and are in fact the general dictates of reason, which run through the different matters of law, and act as its ballast".⁴

The idea of underlying reason in the common law can also be seen in the idea of the law as custom. Sir John Davies in the introduction to his Irish Reports said that common law was "nothing else but the common custom of the realm", and he described its growth in this way:

> When a reasonable act once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a Custome; and being continued without interruption time out of mind, it obtaineth the force of a Law.⁵

Similarly, Coke praised judge-made law as the accumulation and refinement of experience, and referred to this process as the "artificial reason" of the law.⁶

Blackstone gave an account of reason and
development in the common law which was in the tradition of the seventeenth century writers. He recognised that the common law had undergone a continuous process of change. Not all customs had been received as part of the common law. The decisions of the courts provided the chief evidence of those which had, but the judges' opinions were not the same thing as the law itself, and judges might discover a previous judicial opinion to be contrary to reason and so not law. The courts were thus able to decide new cases where no previous decisions were directly in point; such cases were determined according to "reason and convenience, adapted to the circumstances of the times."\(^7\)

Problems arose where the common law appeared to be settled. Mansfield recognised that the desirability of certainty in the law militated against too free an exercise of judicial creativity.\(^8\) But there could often be considerable room for manoeuvre because of the structure of the courts and the inadequacies of law reporting. The parallel development of three common law courts, each with four judges, operating independently of each other inhibited the growth of a notion of binding precedent. In addition, the uncertainties of reporting often required the court to evaluate the accuracy of a report after it had been produced.\(^9\) But where a line of authority was strong enough for judges to think that they were bound by it, the common law could be seen in the image

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which so dominated the mind of Bentham as a body of technicalities understood only by the profession that created it. Decisions of the courts would then appear to be the substance of the law rather than illustrations of its guiding principles.\textsuperscript{10}

2. Bentham's Critique

Two familiar aspects of Bentham's thought are relevant to a study of the way in which common law was instrumental in developing the law of evidence. The first is his criticism of judge-made law; the second, his criticism of exclusionary rules of evidence.\textsuperscript{11}

Bentham's concern to keep the judge from usurping the function of the legislator was based on the belief that any resulting short-term gain would be outweighed by the threat to expectations in legal contexts which such a power would present.\textsuperscript{12} Admittedly, such expectations could also be defeated by the legislature. But what made judicial intervention so undesirable was the fact that only the legislature could take the wide view of both law and human activities that was needed for intervention to be effective. The radical reform of the law which Bentham advocated could be achieved only as a result of long-term planning. Judicial reform was inappropriate because of its piecemeal, blinkered nature. A further objection was that judges who made new common law rules were in effect legislating retrospectively, while attempting to conceal
what they were doing by the fiction that their new rules were implicit in existing law. But governing Bentham's criticism of judge-made law was his belief in the need to distinguish carefully between the functions of the legislature and those of the judiciary, and to avoid usurpation by judges of the legislative function, not least because of his deep distrust of the "sinister interest" of "Judge & Co".13

Bentham was particularly critical of the use of precedent as a source of law. Even if the original decision had been right, to make it a precedent did injustice because it meant following something designed to meet the different needs of an earlier time. Worse still, the practice of following precedents substituted "mechanical judicature" for "mental judicature": reasoning was displaced by imitation.

Thus the common law suffered, on Bentham's analysis, from a deep internal contradiction. It could not satisfactorily reconcile the conflicting demands of general security and the need for flexibility in adjudication, and so was compelled to swing between arbitrariness and rigidity, condemned alike for judicial manipulation and mindless imitation. The judge became a prestidigitator, able by sleight of hand and without any public accountability to draw from the same fountain both bitter and sweet waters.14

For Bentham the immediate aim of legal procedure
was to achieve rectitude of decision. Facts had to be reliably determined so that the substantive law could be correctly applied. The system of procedure best adapted to achieve rectitude of decision was the "Natural System", the main features of which have been summarised in this way:

[A]dmit all relevant evidence; minimise vexation, expense and delay; hear all parties and witnesses viva voce in public; subject them to counter-interrogation; weigh evidence solely on the merits of the individual case without reference to rigid rules; place the sole responsibility for the design of the system and for changes in it in the hands of the legislator; place responsibility for rectitude of decision in individual cases squarely on the single judge; rely on publicity, underwritten by simplicity, as the main security against misdecision and non-decision; above all, seek truth unremittingly, subject only to preponderant vexation, expense or delay.15

There was no place for rules of evidence in the Natural System. In the chapter in the Rationale of Judicial Evidence entitled, "On the Probative Force of Circumstantial Evidence" Bentham wrote:

What ought to be done, and what avoided, in estimating the probative force of circumstantial evidence?

On this as on every other part of the field of evidence, rules capable of rendering right decisions secure, are what the nature of things denies. To the establishment of rules by which misdecision is rendered more probable than it would otherwise be, the nature of man is prone. To put the legislator and the judge upon their guard against such rashness, is all that the industry of the free inquirer can do in favour of the ends of justice.16

This idea that it is not possible to make artificial, binding rules of evidence that will result in greater rectitude of decision is a commonplace in
Bentham's writings. He wished to do away not only with obviously exclusionary rules of evidence such as those affecting competency, but with all mandatory rules of evidence. In their place there should be substituted a set of instructions to judges to help them in the task of weighing evidence. Guidelines were to replace rules.17


The problem here is to account for the exclusionary, rule-based system of evidence law that developed, largely in relation to civil evidence, during this period. In this development judges, law reporters and treatise writers all had a part to play. To some extent it is artificial to consider their contributions separately; each group in this trio affected and was in turn affected by the others. But for purposes of exposition it is convenient to deal with treatise writers separately from law reporters and judges, and they are so dealt with in the first part of this section. The second part contains three case studies which are intended to display in microcosm some of the features described in the first, more general, part.

(1) Three Contributors to the Development

   (a) Treatise Writers For much of this period treatises were written solely for practitioners; there was no formal system of legal education to call into being a practice of writing for students.18 But the
arguments adduced by A.W.B. Simpson and David Sugarman for the significance of later writers operating within a tradition of writing textbooks for students seem to apply equally well to those writing from the 1820s onwards. Their method of organisation was dominated as much as that of later writers by attempts to find coherence and unity grounded in a set of general principles, from which could be deduced a body of particular rules.¹⁹

The attempts of treatise writers to rationalise their subject must be treated with caution. Judges did not usually give general expositions of law in their judgements because they regarded such displays of learning as outside their task of reaching a decision on the particular issues in dispute. The commercial success of the treatises shows that they were bought by the profession, but this tells us nothing that is clear about the use made of their contents. Then as now, books may have been purchased more from a sense of duty or desire for display than from any other motive.²⁰

Nevertheless, it is probable that treatise writers did help to form evidence law. Treatises, even if not directly cited to a court, were an obvious source of material for legal argument, and occasional references in law reports suggest that they were used in this way. For example, in Nelson v Whittall (1817)²¹ Bayley J referred critically to Phillipps's Treatise and its treatment of proof in an action on a promissory note. In Batthwes v
Galindo (1828) Best CJ stated that he regarded Phillipps's Treatise as "proof of the understanding of Westminster Hall" on the question whether the evidence of a mistress was on the same footing as that of a wife with regard to admissibility. He added, though, that the general understanding was wrong and that the true principle to follow was that stated by Starkie, namely, that a witness was not to be excluded unless the de jure wife of a party. In Chapple v Durston (1830) Vaughan B referred to a suggestion in Starkie's "valuable, practical treatise on the law of evidence" on a point concerning the statute of limitations. A review of the first edition of Best's Treatise referred to the fact that his earlier work on presumptions had been "favorably noticed by the Bench".

Treatise writers may well have influenced ways of thinking about the law because their methods of organisation encouraged practitioners to think of law as a system of rules rather than in the older way, described by Michael Lobban, as a tradition of reasoning based on remedies. This earlier way of thinking explains why Coke never wrote a systematic treatise on the common law and why, when he did attempt to describe this subject, he identified a plurality of sources which were not sources of rules but forms of reasoning. On this view, the common law contained as many non-legal as legal sources, such as principles of logic or morality which might be summarised
This approach was reflected in the way in which legal texts were written at the beginning of the eighteenth century. Many were written with no other organising device than the alphabet. The common law was seen as based on the procedures made available by the various forms of writs; it was not thought of as a self-contained whole, but as something developing in response to the problems which were thrown up by social relations. It was for this reason that within the profession there was widespread criticism of Blackstone's work; he was thought to have distorted the law by attempting to reduce it to a system of generalised rules.25

By contrast, nineteenth-century treatises showed an increasing tendency to present law as a system of rules, derived by the writer from judicial decisions.

The beginnings of a move in this direction can be seen in the appendix devoted to evidence in W.D. Evans's translation, published in 1806, of Pothier's treatise on the law of obligations.26 Evans saw the manifestation of truth and the exclusion of falsehood as the two aims of any system of evidence. But he thought that full attainment of these aims was often impossible because "the latitude which is requisite for the one is inconsistent with the caution which is too often necessary for securing the other".27

Evans acknowledged that whatever rule might be
established in general for the purpose of securing these respective advantages would frequently be defective or erroneous in its particular application. Nevertheless, he believed that to avoid deception and error it was necessary to accept evidence with some caution, in particular, by adopting rules of authenticity which would wholly exclude the admission of less authentic testimony such as that of interested persons. "By this exclusion truth is often frustrated, as in the general reception of evidence it is often disguised and perverted; but in both cases, the general principle of conduct is to provide for the greatest promotion and preservation of it upon the whole." For example, in private conversation a hearsay might carry full conviction. But to admit it in the administration of justice "would be productive of very considerable error and inconvenience". 28

Evans's choice of subject matter and emphasis were very much in the tradition reflected in Gilbert's earlier work. Like Gilbert, he saw the "best evidence rule" as the foundation on which all evidence law rested. Evans, too, thought written evidence more significant as being less likely than oral evidence to be misconceived or misrepresented. Indeed, Evans criticised English courts for tending to receive a mass of testimony at considerable expense when the proceedings might have been curtailed by concentrating on those facts which were likely to be decisive of the cause. 29
The increasing emphasis on exclusionary rules of evidence which appears in treatises published in the second quarter of the nineteenth century has to be seen against the background of Bentham's writings on evidence, of which three main works were published in the 1820s. In 1823 the *Traité des preuves judiciaires* was published in Paris. An English translation was published in serial form in the *Law Journal* in the following year, and as a complete work in 1825. In 1827 there appeared the *Rationale of Judicial Evidence*.30

In 1824 there appeared the first edition of Starkie's *Treatise*. The preface to this work showed awareness that exclusionary rules might be a problem, but that there were arguments capable of supporting them. Starkie stated that it was essential in practice to guard and limit the reception of evidence by certain definite and positive rules. Nature has no limits; but every system of positive law must, on grounds of policy, prescribe artificial boundaries, even in its application to a subject which from its independent nature least of all admits of such restraint. These, however, are necessarily for the most part of a negative description, the effect of which is to exclude evidence in particular cases, and under special circumstances, on general grounds of utility and convenience; yet even here so difficult is it to prescribe limits on such a subject, without the hazard of committing injustice, that rules, the general policy of which is obvious, are by no means favoured.

In a justification of evidential presumptions of law, Starkie described them as "nothing more than technical and positive rules, which are wholly independent of the principles of evidence, and whose only foundation is
their general utility and convenience". He continued:

To go farther, and by any positive and arbitrary rules to annex to particular evidence any technical and artificial force which it does not naturally possess, or to abridge and limit its proper and natural efficacy, must in all cases, where the object is simply the attainment of truth, not only be inconsistent and absurd in a scientific view, but what is worse would frequently be productive of absolute injustice. To admit every light which reason and experience can supply for the discovery of truth, and to reject that only which serves not to guide, but to bewilder and mislead, are the great principles which ought to pervade every system of evidence. It may safely be laid down as an universal position, that the less the process of inquiry is fettered by rules and restraints, founded on extraneous and collateral considerations of policy and convenience, the more certain and efficacious will it be in its operation.

It is possible that Starkie had read a copy of the Traité which had been published in Paris in the previous year. If he had not read that work, he might have read the serialised translation in 1824 or Denman's review of the Traité which appeared in the Edinburgh Review in the same year. Thus what he wrote in his preface could have been intended as an answer to Bentham's criticisms of rules of exclusion. On the other hand, Starkie did not refer to Bentham, and his justification of exclusionary rules may have been intended as no more than appropriate comment, just as some justification had seemed appropriate to Evans when he published his appendix to Pothier in 1806. Why there should be such rules, rather than a general discretion, did not appear in Starkie's preface, which referred only to evidence which "serves not to guide, but to bewilder and mislead".
Later in the Treatise, however, there appeared a justification for rules of exclusion and an elaboration of the classes of evidence that ought to be excluded. The main discussion is to be found in Starkie's treatment of the rule against hearsay.

Three points were made in favour of a rule which excluded hearsay. First, hearsay was obviously inferior as a source of information, even for the common purposes of daily intercourse in society. Secondly, it could not be subjected to the ordinary tests of oath and cross-examination which the law had provided to ascertain truth. Thirdly, Starkie argued that although in the common course of life such evidence was frequently acted on, those circumstances generally lacked any considerable temptation to deceive. It was otherwise in a legal investigation, which involved the highest and dearest interests of the parties concerned.

But Starkie had not as yet come to grips with the main criticism of the rule excluding hearsay. Even assuming the truth of the propositions already set out, why was hearsay evidence not at least admissible? The answer that he gave was that "the law must proceed by general and by certain rules". If hearsay were to be admitted in cases where it was likely to be reliable, it would have to be admitted in all cases. "The consequence would be to let in numberless wanton, careless, and unfounded assertions, unworthy of the least regard." And although:
one who had been long enured to judicial habits might be able to assign to such evidence just so much, and no greater credit than it deserved, yet, upon the minds of a jury unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression.  

There are thus two main ideas in Starkie's argument. The first is that the law of evidence, as much as any other part of the law, is a system of rules. Certainty requires that the rules should be adhered to, without any judicial discretion to dispense with them. The second idea is that juries need to be protected from hearing evidence that is particularly difficult to assess or that is otherwise misleading.

Shortly after the appearance of the first edition of Starkie's Treatise Bentham's arguments were given renewed publicity, first by the publication of the English translation of Traité des preuves judiciaires in 1825 and then by the publication of the Rationale of Judicial Evidence in 1827.  

It may therefore have been in response to Bentham's criticisms, though again Bentham was not referred to, that the second edition of Starkie's work, published in 1833, provided a fuller discussion of exclusionary rules. Starkie began with the observation that "[t]he means which the law employs for investigating the truth of a past transaction are those which are resorted to by mankind for similar, but extrajudicial purposes". The law, however, can interfere with the ordinary processes
of inquiry "in order to provide more certain tests of truth than can be provided, or indeed than are necessary, in the ordinary course of affairs, and thereby to exclude all weaker evidence to which such tests are inapplicable, and which, if generally admitted, would be more likely to mislead than to answer the purposes of truth".36

There are two arguments here, and Starkie proceeded to spell them out. One is the argument familiar from the preface to the first edition and from the later discussion about hearsay: evidence is excluded which would injure the cause of truth by its tendency to distract or mislead the jury. The other argument is hinted at in the discussion on hearsay in the first edition. There Starkie had made the point that although in everyday life hearsay was frequently acted upon, circumstances were different in court where the temptation to deceive was greater because of the interests at stake. In the second edition Starkie elaborated this point by arguing that the law adopted principles of exclusion to aid the natural powers of decision by adding to the weight and cogency of the evidence on which a jury was to act. Superior tests of truth were required because the evidence on which an individual in everyday transactions might safely rely could not, without such further security, be safely relied on, or even admitted, in judicial investigations. In the ordinary business of life there were not so many
temptations or opportunities to practise deceit as in legal investigations, where property, reputation, liberty and even life were frequently at stake. In everyday life, each individual was able to use his own discretion to decide whom to deal with and trust.

[H]e has not only the sanction of general reputation and character for the confidence which he reposes, but slight circumstances, and even vague reports, are sufficient to awaken his suspicion and distrust, and place him on his guard; and where doubt has been excited, he may suspend his judgment till by extended and repeated inquiries doubt is removed. In judicial inquiries it is far otherwise; the character of a witness cannot easily be subjected to minute investigation, the nature of the proceeding usually excludes the benefit which might result from an extended and protracted inquiry, and a jury are under the necessity of forming their conclusions on a very limited and imperfect knowledge of the real characters of the witnesses on whose testimony they are called on to decide.37

The picture of the law of evidence as a system of rules developed by judicial creativity was emphasised in 1838 when Phillipps and Amos stated that the law of evidence currently in operation had been almost entirely created since the time of Salkeld, Lord Raymond and Strange.38 Best, in the first edition of his Treatise in 1849, referred to Lord Kenyon's observation39 that "the rules of evidence have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded"; but Best added that this was "not the general opinion of the present day, in which our system of judicial evidence is commonly spoken of as something altogether modern".
Nevertheless, he was careful to observe that while the "law of evidence" was the creation of comparatively modern times, most of the leading principles on which it was founded had been known and admitted from earliest times. The "germs of our law of evidence" were traceable in the proceedings of our ancestors who had not, however, "reduced its principles into a system, or vested them with the obligatory force essential to the steady and impartial administration of justice". In most cases, Best stated, these principles had been merely discretionary. Thus ancient lawyers had been aware of the weakness of hearsay evidence but had not thought themselves bound to reject it absolutely, and had quite often used it to introduce, explain or corroborate more regular proof.

Increasing systematisation of the law of evidence can be seen in the preface to the second edition of Taylor's Treatise, published in 1855. The author noted that the table of cases referred to at least thirteen hundred more decisions than had been noticed in the first edition, and that "a vast number of decisions, which either overrule, qualify, illustrate, or confirm the fluctuating doctrines of the common law" had been embodied in the text.

(b) Law Reporters and Judges  Wigmore described how in the period after 1830 "the established principles began to be developed into rules and precedents of minutaie relatively innumerable in comparison with what had
gone before". He attributed this to the increase of printed reports of nisi prius rulings, which he described as the cause "and afterwards the self-multiplying effect of the detailed development of the rules of evidence". Before this, practice had varied from circuit to circuit and had "rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges". Until the multiplication of nisi prius reports there had been neither fixity nor tangible authority. Later, there was "a sudden precipitation of all that had hitherto been suspended in solution", assisted and emphasised by the appearance of treatises such as those of Starkie and Phillipps. \(^42\)

But Wigmore may have mistaken the effect for the cause. Why should writers have bothered to produce law reports and treatises unless they thought that a market existed for them? And why should they have thought that a market existed unless there had been a change in the conception of case law? Three factors suggest that there was such a change.

Judges and lawyers came to see case law simply as rules made by the courts. For example, Lord Westbury stated in 1863 on the first reading of a bill for the revision of statute law:

But a judicial opinion is also a legislative enactment. It decides a particular case, and it sets a precedent for all future cases. Therefore the Judges become legislators - legislators \textit{ex arbitrio}; ... \(^43\)
Once lawyers had begun to think of case law as a set of rules of this sort, it became natural to want to define the rules with as much clarity as possible, and thus a strict conception of binding authority was encouraged.  

Both Bentham and Austin attacked the fiction that the common law was common custom, and was not made but declared from time to time by the judges. By the 1860s Bentham's expression "judge-made-law" had become a popular term used in newspaper discussions.

Institutional changes in the 1830s helped to develop a setting in which "judge-made-law" could flourish. In the late 1820s professional judges came to dominate judicial decisions of the House of Lords. In 1830 the existing system of civil appeals was simplified by the creation of a single court of Exchequer Chamber, uniformly superior to each of the common law courts and intermediate between them and the House of Lords.

It is tempting to suggest that the spread of adversary procedure to criminal trials encouraged the growth of a rule-based system of criminal evidence because it led to the taking of technical points at trial about admissibility. But the two criminal evidence case studies below show that the development of rules of evidence in this field did not proceed very far during the nineteenth century, and certainly not to the same extent as rules of civil evidence during that period.

This was almost certainly because the criminal
courts lacked an effective appellate structure such as that gained by the civil courts in the 1830s. The judges appear to have recognised the lack of such a system. Cases show that they tried to use the system of informal consultation to establish uniformity. For example, in R v Phillips (1848) the question arose in a trial before Rolfe B whether evidence of similar behaviour by the accused on an earlier occasion was admissible. Counsel for the accused objected and referred to a decision of Platt B at another assize a week before in which similar evidence had been excluded. Rolfe B said that he thought the evidence admissible, but that because of the report of what Platt B had decided he would mention the case to him. He retired to confer with Platt B who was sitting at nisi prius in the same building. On his return he announced that the evidence would be admitted against the accused, but because Platt B adhered to the opinion he had earlier expressed, Rolfe B said that he would reserve the question for consideration by all the judges. He added, "I yield to the authority, and not to the reasoning."

Even in the 1870s, when greater institutional reforms took place, the failure to provide a satisfactory system of criminal appeals continued, and it was not until the establishment of the Court of Criminal Appeal in 1907 that the law of criminal evidence reached a stage at which it could become fully developed as a system of
A change in the conception of case law took place all the more readily because of the perception that, as W.T.S. Daniel QC put it, "The want of Certainty in the unwritten law of this country is the great defect in our Jurisprudence". It was this conviction that led to attempts to codify the law. Some miscellaneous reforms did manage to simplify the sources of law in a piecemeal way; for example, the seven Criminal Law Consolidation Acts which were passed in 1861. By the end of the century, however, only three strictly codifying Acts had been passed: the Bills of Exchange Act 1882, the Partnership Act 1890, and the Sale of Goods Act 1893.

In 1872 J.F. Stephen was instructed by Sir John Coleridge, the Attorney-General, to draw up a code of the law of evidence on the lines of the Indian Evidence Act, which had been largely drafted by Stephen. But because of pressure of parliamentary time the bill could not be introduced until the end of the session in August 1873, and it was not revived in the following session. In both the Indian Evidence Act and the 1872 Evidence Bill the underlying principle on which Stephen attempted to base the law of evidence was that of relevancy. This principle could have led to the anti-nomianism favoured by Bentham, but in Stephen's hands it was used instead to support a rule-based legal structure which was to a considerable degree exclusionary.
Unlike the iconoclastic Bentham, Stephen had a respect for the way in which the judges had developed evidence law. It possessed in the highest degree the characteristic merits of English case law. English case law, as it is, is to what it ought to be, and might be if it were properly arranged, what the ordinary conversation of a very clever man on all sorts of subjects written down as he uttered it, and as passing circumstances furnished him with a text, would be to the matured and systematic statement of his deliberate opinions. It is full of the most vigorous sense, and is the result of great sagacity applied to vast and varied experience.

Although Stephen stipulated a few circumstances in which, under strict conditions, hearsay evidence might be admitted, he defended the general rule of exclusion on the ground that hearsay evidence was irrelevant. It was, he said, a matter of common experience that conversational statements were made so lightly and were so liable to be misunderstood or misrepresented that they could not generally be depended on for any important purpose. He allowed that there was some degree of truth in the criticism that this was an objection to weight and not to relevancy. But he justified the rule on the grounds that to allow reliance on hearsay would "present a great temptation to indolent judges to be satisfied with second-hand reports" and would "open a wide door to fraud".

It is not possible to tell how much support would have been given to Stephen's bill had it been presented again. What can be said is that even if his proposals for
codification had been accepted, evidence law would have retained many of the exclusionary features condemned by Bentham. Nor would there have been anything to prevent the growth of judge-made-law in the interpretation of the code.

(2) Three Case Studies

In this section I consider development of the common law of evidence in three areas. The first concerns an exception to the rule against hearsay in favour of declarations made in the course of business. The second deals with the law relating to the corroboration of accomplices, and the third with what has come to be known as "similar fact" evidence. While the first of these studies shows the development of an increasingly rule-based system of evidence in civil cases, the other two show that in criminal trials rules of evidence developed much more slowly.

(a) Declarations in the Course of Business The history of this exception shows initially a difference of judicial opinion. This was partly because some judges thought that the common law should adapt to new circumstances while others favoured the virtues of stability and certainty. But another reason was lack of agreement about what sort of evidence was in principle caught by the rule against hearsay. By the 1840s the approach which favoured stability and certainty was in the ascendant,
and this trend continued for the rest of the century. At the same time, the definition of the scope of the rule against hearsay became clearer. The question came to be not whether the principle that held hearsay in disfavour should be given more or less weight in a particular case, but whether the facts of that case were covered by the rules which applied in this area of law. The definition of the exception in favour of declarations in the course of business was clarified by the courts and the conditions in which it could operate were restricted by enforcing requirements that the declaration should have been contemporaneous with the matters referred to, and that the declarant should have had a duty to make the declaration.

Before the 1840s The case which was later commonly accepted by writers to have been the foundation of the exception was a decision of Holt CJ at nisi prius in Price v The Earl of Torrington (1703).

In this case the plaintiff, who was a brewer, brought an action against the Earl of Torrington for the price of beer allegedly sold and delivered. A difficulty arose in proving delivery, for the drayman who made this particular delivery had since died. Evidence was given of the plaintiff's usual course of business, in accordance with which his draymen used to come every night to the clerk of the brewhouse, to whom they would give an account of the beer which they had delivered. The clerk
used to record this in a book kept for the purpose and the draymen would set their hands to their respective entries. Holt CJ held that the entry in the book to which the deceased drayman had set his hand was good evidence that the beer in question had been delivered to the defendant.

The report of the judgement gives no reasons for this decision. The headnote in 2 Ld Raym reads: "If a tradesman uniformly obliges his servants to subscribe in his books an account of the goods they deliver, proof of the subscription of a servant who is dead is evidence of the delivery of the goods contained in the account subscribed." This emphasises the requirement that the entry be made in accordance with the servant's duty to his employer, but otherwise takes the matter little further.

Some time appears to have passed before this decision was referred to in the reports. In Calvert v The Archbishop of Canterbury (1798) the only evidence of a contract was an entry of the terms made in the plaintiff's book by his deceased servant. Counsel for the plaintiff argued that this was admissible on the basis of the decision in Price v Torrington. Lord Kenyon CJ took the view that the evidence was inadmissible because the entry was not contrary to the servant's interest. By excluding the evidence on that ground he provided a rationale for the exception.

This rationale, however, was not available in Pritt
v Fairclough (1812)\textsuperscript{56} where the disputed evidence was nevertheless admitted. At the trial of the action before Lord Ellenborough CJ it became necessary to prove the contents of a letter sent by the plaintiff to the defendants. The plaintiff produced an entry which had been made in a letter-book by his deceased clerk. This professed to be a copy of a letter sent on the same date from the plaintiff to the defendants. It was also proved that according to the plaintiff's course of business the letters which he wrote were copied by this clerk, then sent by post, and that in other instances copies made by the clerk had been compared with the originals and had always been found to be accurate. Lord Ellenborough CJ held that this evidence was admissible to prove the contents of the letter and observed, "The rules of evidence must expand according to the exigencies of society."\textsuperscript{57}

Lord Ellenborough CJ also displayed this approach in \textit{Doe d Reece v Robson} (1812),\textsuperscript{58} where he admitted as evidence entries in the books of a deceased attorney to prove the date of execution of a lease. In the course of his judgement he stated, "The ground upon which this evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact and at the same time a competency in them to know it."

\textit{In Barker v Ray} (1826)\textsuperscript{59} Lord Eldon expressed doubt
about the way in which the law appeared to be developing:

The cases satisfy me, that evidence is admissible of declarations made by persons who have a complete knowledge of the subject to which such declarations refer, and where their interest is concerned; and the only doubt I have entertained was as to the position - that you are to receive evidence of declarations, where there is no interest. At a certain period of my professional life, I should have said, that that doctrine was quite new to me. I do not mean to say more than that I still doubt concerning it. When I have occasion to express my opinion judicially upon it I will do so; but I desire not to be considered as bound by that as a rule of evidence.

Little had been done to clarify the basis of the decision in Price v Torrington. There was a suggestion in the argument in Goss v Watlington (1822) that such entries were admissible to prove not the truth of the entries themselves, but some other fact with which they were connected. In modern terms, the evidence of the entry was not covered by the rule against hearsay because it was admitted merely to show the fact that it had been made, and not the truth of its contents.

This way of looking at the problem emerged clearly in another case frequently cited as an authority in favour of the admissibility of declarations in the course of business. In Doe d Patteshall v Turford (1832) the Court of King's Bench had to consider whether to make absolute a rule nisi for a nonsuit in a case where the trial judge had admitted evidence in the following circumstances. It had been the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants and to indorse on duplicates of such
notices the fact and the time of service. One day, the attorney himself prepared a notice to quit for service on a tenant. He took it out with him, together with two others prepared at the same time, and served the various tenants. On returning to his office he indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant. There was independent proof that he had served two of the notices, but none in relation to the third. The attorney had since died. The question therefore arose whether the indorsement was admissible to prove service of the third notice.

The Court found no difficulty in overcoming the fact that the indorsement had been made by the principal and not his servant. The indorsement was treated as tantamount to that of a clerk on the assumption that the principal would do what he required his clerk to do, and that there was therefore a duty on the principal to make out the indorsement. On those rather dubious assumptions the question then arose whether the evidence was admissible. Lord Tenterden CJ was content to rely on the authorities cited in favour of admissibility without any further examination. Littledale J dealt with the duty of the attorney but went no further than Lord Tenterden CJ in considering the basis of admissibility. Taunton J was in favour of admissibility provided there were other circumstances which corroborated the fact recorded - a reversion to an earlier, more flexible approach to
hearsay. Only Parke J gave any real consideration to the grounds of admissibility.

In his judgement, the entry was admissible "because the fact that such an entry was made at the time of his return from his journey, was one of the chain of facts ... from which the delivery of the notice to quit might lawfully be inferred". Delivery might be proved either by direct evidence from the person who made the delivery, or by circumstantial evidence.

In this point of view, it is not the matter contained in the written entry simply which is admissible, but the fact that an entry containing such matter was made at the time it purports to bear date, and when in the ordinary course of business such an entry would be made if the principal fact to be proved had really taken place. The learned counsel for the defendant has contended that an entry is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it, and, secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place: but it is contended that the facts here do not fall within the latter branch of the rule, because [the attorney] who served the notice was not shewn to have been in the habit of serving notices. I agree in the rule as laid down, but I think that, in the second case, a necessary and invariable connection of facts is not required; it is enough if one fact is ordinarily and usually connected with the other: and it appears to me that the present case is not, in its circumstances, an exception to that part of the rule.

Parke J thus appears to have taken the view that a statement would not be caught by the rule against hearsay if its probative force did not come solely from the words uttered, but also from the statement itself as a piece of original evidence.

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Turford's case was followed by the Court of Common Pleas in Poole v Dicas (1835). In this case it was held that an entry of dishonour of a bill of exchange, made at the time of dishonour in a book by a notary's clerk acting in the usual course of his business, was admissible in an action on the bill. But the decision seems likely to have been the result of pragmatism as much as anything else. Tindal CJ stated, "The rejection of the evidence which has been received would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange."

These cases show that prior to the 1840s there was no single foundation upon which an exception for declarations in the course of business rested, and that indeed the scope of any such exception had yet to be clearly defined.

The way in which treatise writers dealt with the subject confirms this state of affairs. In the seventh edition of Phillipps's Treatise, published in 1829, the author first referred to the rule against hearsay as having been recognised and approved from the earliest times as a fundamental principle of the law of evidence that was always to be strictly observed. There were, he added, certain exceptions to the general rule, but they were perhaps as ancient as the rule itself and had been allowed either because the usual inconvenience and danger of such evidence was absent, or because greater
inconvenience would result from exclusion than from admission.\textsuperscript{68} He described one of these exceptions as follows:

Entries in the books of a tradesman by his deceased shopman, who therein supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of goods, or of other matter there stated within his own knowledge.\textsuperscript{69}

We see here an early stage in the development of the exception which afterwards came to be identified as applying to declarations made in the course of business. The cases to which Phillipps referred as authority for his proposition were later to be cited as authority for the exception in its fully developed form.\textsuperscript{70} What distinguished the exception in this form from its later expressions was chiefly the reference to the shopman's having by his entry supplied "proof of a charge against himself".

Phillipps realised that this justification of the exception presented a difficulty. The declaration by a tradesman's servant that he had delivered certain goods was an implied admission that he had received them for that purpose, and such a declaration would have been evidence against the servant in an action brought against him for failure to deliver the goods in accordance with his instructions. But in any other proceedings, such as an action for the price against the person to whom the goods were alleged to have been delivered, the declaration of the servant as to delivery would not be contrary
to the interest of the maker. The probability of the truth of the declaration would then be "neither greater nor less than the probability of [the maker's] being honest or dishonest, which is nothing more than may be said in any case of hearsay". Phillipps concluded that such declarations by shopmen should be only cautiously admitted in evidence to charge third persons with the receipt of goods, especially as tradesmen could easily be given evidence of delivery by taking a memorandum from the purchaser, or by requiring some other security. 71

In 1838 Phillipps brought out the eighth edition of his treatise jointly with Andrew Amos. By then the narrow reference in the seventh edition to "entries in the books of a tradesman by his deceased shopman" had given way to the more general "declarations and entries made in the course of duty or employment". More importantly, the exception had by then lost its previous link with declarations against interest. The authors explained the matter in this way:

According to the observations of several Judges on different occasions, it might seem that where there was a competency of knowledge, or at least peculiar means of knowledge in an individual making a declaration, and a total absence of interest to pervert the facts to which he has spoken, his declarations would be admissible evidence after his death, even though the declarations did not operate against his interest.

Phillipps and Amos made it clear, however, that such judicial observations were too loose, and perhaps contradictory to established principles. What the authors
needed to do to rationalise the law was to reject the intellectually embarrassing requirement that such a declaration should have been against the interest of the maker. At the same time, it was necessary to tie down the scope of the exception as closely as possible. It was also necessary to provide reasons for permitting this exception to the general exclusionary rule. This is what Phillipps and Amos proceeded to do.

After recognising the need for some departure from the requirement that the declaration be against the maker's interest, they continued:

There appears, however, more reason for considering that a rule exists, which allows of declarations of deceased persons being received in evidence, even though not made against their interest, provided that in addition to a peculiar knowledge of the facts, and the absence of all interest to pervert them, the declarations appear also to have been made in the ordinary course of official, professional, or other business or duty, and been immediately connected with the transacting or discharging of it, and contemporaneously, or nearly so, with the transaction to which they relate.

Justification was based on reliability and necessity. With regard to the former, there could be no temptation to deceive because the declaration would not be available to the maker during his lifetime. Ordinary error was made less likely by the requirements that the declaration be made in the ordinary course of business and contemporaneously. As business transactions were frequently confined to the knowledge of a few persons, "there is some reason, on the ground of necessity,
arising out of the subject matter of the declarations, which may be thought to warrant, under proper safeguards, some relaxation of the strict rules of evidence." Even for this there were precedents. Similar reasons of necessity, it was pointed out, were the foundation of the admissibility of hearsay in cases of pedigree and matters of general interest and also, to some extent, in dying declarations.

There was also a suggestion that such declarations might operate outside the hearsay rule because they could be regarded rather as the ordinary incidents of the transactions to which they related than as narratives of them. 72

Such clear and reasoned lines of development were not, however, perceived by the other leading treatise writer of the time. Starkie, in the 1833 edition of his Treatise dealt with the exception in favour of declarations against interest. He then stated that there were also "several instances to be found where the declaration of a party as to a fact, where he possessed peculiar means of knowing the fact, and laboured under no temptation, bias, or influence, to misrepresent it" had been admitted in evidence after his death. But he added that as the rules by which the reception of this class of evidence did not appear to be very distinctly defined, the decisions on the subject would be detailed at a future opportunity. Those cautious words were merely
repeated in the 1842 edition.  

In the first edition of Best's Treatise in 1849, however, the law was stated on the lines laid down by Phillipps and Amos. The exception was said to cover declarations by deceased persons in the regular course of a business, office or employment, where the declarant had had personal knowledge of the facts, and no interest in stating an untruth. Such declarations were said to differ from declarations against interest in that they must have been made contemporaneously with the acts to which they related.

From the 1840s During and after the 1840s the judges developed a more restrictive approach to hearsay exceptions generally, and in doing so built up a body of case-law rules that sometimes threatened to become unmanageable. Phillipps noted this for the first time in 1843 when he observed that several of the exceptions had been much narrowed within very modern times. He acknowledged that the existence of exceptions might be thought "to obviate many objections which would exist if the rule [against hearsay] were unlimited in its operation". But he recognised that the exceptions had also "occasioned a substantive mischief by that mass of legal decisions which has arisen out of them, - decisions, which contain many subtle distinctions and not unfrequently conflicting opinions". 

Initially, exceptions in favour of declarations in
the course of business had rested not on a single foundation, but on a shifting combination of pragmatism in the face of necessity, of a feeling that such declarations were more likely to be reliable than those usually falling within the hearsay category, and an idea that hearsay was not really involved at all - that all the court was doing was admitting one fact from which others might be inferred. The reports during and after the 1840s bear out Phillipps's observation that this situational approach was giving way to one that was far more closely regulated. In regard to declarations in the course of business, development was confined to restricting the availability of the exception by applying strictly the requirements of duty and contemporaneity.

The cases on duty These established two important restrictions. The first was that the existence of a duty had to be clearly proved; it would not be inferred. The second was that even where it was clear that the declarant had a duty to make a declaration, it still had to be proved that the particular declaration in question had been made pursuant to that duty.

The first of these restrictions appears from Poore v Ambler (1843).77 A barrel of stout had been delivered by a brewery at the house where the defendant lived. The delivery was allegedly upon the credit of the plaintiff, who had paid the brewery. The question arose at trial whether the stout had in fact been supplied on the
plaintiff's credit, and whether it had been supplied to the defendant or to another person living at the same house. The plaintiff tendered in evidence a memorandum in the handwriting of a deceased clerk of the brewery. This was produced from the custody of the brewery and purported to show both that the stout had been supplied on the plaintiff's credit, and that it was the defendant to whom it had been supplied. The trial judge rejected this evidence and the Court of Queen's Bench upheld his decision on a motion for a new trial. No evidence had been given that it was the duty of the clerk to make the memorandum, and the Court could not infer that it was his duty to do so.

A similar decision was Bright v Legerton (No 1) (1860). In this case the question arose whether a solicitor had acted for the plaintiff on an occasion some twenty years earlier. The solicitor being dead, Sir John Romilly MR admitted in evidence a letter formerly written by the solicitor, in which he had professed to be acting on behalf of the plaintiff in making an offer of settlement of a claim which the plaintiff then had. In admitting this evidence Sir John Romilly observed:

I must say it would have been a great surprise to me if I had found, on an examination of the authorities, that such a letter was not receivable in evidence, as it clearly would have been contrary to all common-sense; for if a respectable solicitor comes to a person against whom A.B. has claims, and says, 'I am the solicitor of A.B., and I am authorized to make you this proposition,' there are certainly very few persons who would not believe that he was authorized by A.B. to act for him accordingly; and it is every
day's practice. 79

On appeal, however, Lord Campbell LC held that in order to make the letter admissible it had to be proved independently that the writer had been duly authorised by the individual for whom he professed to act as solicitor. 80

It might be clear that a record had been kept in the ordinary course of business by an employee. But it had still to be proved that the keeping of the record was done in accordance with a duty. In Massey v Allen (1879) 81 the plaintiff claimed to be indemnified by the defendants in respect of two hundred shares transferred into the plaintiff's name as trustee for the defendants. The plaintiff wished to prove that the shares had been bought on the Stock Exchange for one of the defendants through his brokers, Griffiths & Druitt. Griffiths, who had transacted the greater part of the firm's business was dead. But the plaintiff tendered in evidence an entry in the firm's day-book showing a purchase of two hundred shares by Griffiths for one of the defendants. The plaintiff proved that the entry was in the handwriting of Griffiths, and that it had been made by him in the ordinary course of business at the time of purchase as a memorandum of the transaction.

It was argued that it was admissible as a declaration in the ordinary course of business. Hall VC held that the entry had not been made in the performance of
duty. It had not been established that it had been the duty of Griffiths as between himself and his client, the defendant, to keep the day-book. The Vice Chancellor distinguished Doe d Patteshall v Turford (1832) by saying that in that case the entry had been made in discharge of the clerk's duty.83

The second restriction, which required a duty to make the particular declaration in question, appears to have first appeared in Chambers v Bernasconi (1834).84 This was an action brought by a person who had been declared bankrupt against his assignees in bankruptcy. It became necessary at trial to inquire whether the plaintiff had been arrested in a particular place on 9 November 1825 by a sheriff's officer who had died before trial, but who had left a record of the circumstances of the arrest.

In the Court of Exchequer Chamber counsel for the plaintiff in error relied principally on the broad rule "that an entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry and of every circumstance therein described, which would naturally accompany the fact itself". But all the judges were of the opinion that:

whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting, then, for the sake of
argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made, (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done.

This approach was confirmed in Smith v Blakey (1867), an action to recover the balance alleged to be due on an advance made by the plaintiffs to the defendant on a consignment of boots and shoes. The plaintiffs' business in Liverpool had been carried on by a confidential clerk named Barker, whose duty and practice it had been to keep his principals constantly advised of all the business that he transacted for them. Barker had had dealings with the defendant, but had since died.

In order to prove the transaction between the plaintiffs and the defendant, a letter describing it, written by Barker to the plaintiffs, was admitted in evidence. The question subsequently arose whether it had been rightly admitted. It was argued amongst other things that it was admissible as a declaration by a deceased person in the performance of his duty to his employers in the ordinary course of business.

The Court of Queen's Bench rejected this argument.

Blackburn J said:

I think all the cases shew that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it.
Mellor J showed the feeling of constraint which a strict system of rules could produce when he said that it was with some reluctance that he had come to the conclusion that the letter was not admissible, because there could be no doubt in anybody's mind on reading it that the contract had been as the plaintiffs alleged. But when they considered that the law jealously guarded against statements made behind the back of a party being admissible against him, they had to take care how they enlarged the exceptions to the general rule against hearsay evidence.

The present case does not fall within the exception. It was the duty of Barker to communicate all transactions to his principals, and keep them advised of all that he had done; and the letter was written in the performance of that general duty; but it is not a record of having done a particular duty within the cases which have established the exception. If we were to hold this letter admissible, I do not know where the limit is to be put; but all letters and correspondence between principals and their agents might become admissible against third persons.

The requirement of contemporaneity In the context of declarations made in the course of business contemporaneity was originally a feature which marked the declaration as part of an action, and so outside the scope of the rule against hearsay. Later, when it had become settled that such declarations were in principle caught by the hearsay rule, contemporaneity remained a necessary condition of admissibility but for a different reason. At that stage it was a security against inaccuracy. Two cases, separated from each other by a little
under thirty years, illustrate this development.

In *Doe d Kinglake v Beviss* (1849) Maule J stated his opinion that the declaration in question should have been so contemporaneous that the recording of it was part of the action in question. After the cases of *Torrington* and *Turford* had been cited in argument he said:

In all those cases, the entry was part of the transaction it purported to record. Of the same order is the presumption that a letter has been posted, where the ordinary course of business in an office would be to do so.

By contrast, contemporaneity was relied on as a security against inaccuracy in *The Henry Coxon* (1878). Two vessels, the *Gange* and the *Henry Coxon*, had come into collision on a Saturday. On the following Monday the mate of the *Henry Coxon* made an entry in the ship's log concerning the circumstances of the collision. In a subsequent action for damages between the owners of the two vessels the question arose whether this log entry was admissible in evidence. Testimony was given that the entry was in the mate's handwriting, that he had signed it, and that he had been lost at sea on a subsequent voyage.

One of the reasons given by Sir Robert Phillimore for refusing to admit the entry as evidence was that he was not satisfied as to its contemporaneity, the collision having occurred on Saturday and the entry having been made only on the following Monday.

In summary, it can be said that the law relating to
the admissibility of declarations in the course of business began to emerge in the period before the 1840s. At that stage there were differences of judicial opinion as to whether such evidence came within the scope of the rule against hearsay at all and, if it did, whether and on what basis an exception should be allowed to develop in favour of admissibility. Among the treatise writers, Phillipps and Amos were the most creative, suggesting a future line of development and a rationale. In this they were followed by Best, but ignored by the editors of Starkie. During and after the 1840s the judges adopted a more restrictive approach to the operation of hearsay exceptions generally. This was shown in the particular example by their emphasis on the requirements of duty and contemporaneity as conditions governing the admissibility of declarations in the course of business.

(b) Corroboration of Accomplices By contrast with the hearsay exception described above, the development of case law on corroboration of accomplices proceeded in a haphazard way throughout the period under consideration. Two major questions had to be decided. The first was whether it was possible to convict on the uncorroborated evidence of an accomplice. The second question concerned the nature of corroboration. To neither question were the courts able to give a satisfactory answer; in this area of law at least a system of rules was slow to emerge. Almost certainly the reason for this was the lack of an
effective appellate system.

Was corroboration essential for a conviction? In the eighteenth century where clear evidence was lacking and the crime had been committed with others, the Crown's best hope of securing a conviction lay in persuading one of those accused to give evidence against his companions in return for an undertaking that he himself would not be prosecuted.\(^{93}\) The disadvantages of evidence obtained in this way were obvious. A popular saying was that such witnesses "fished for prey, like tame cormorants, with ropes round their necks".\(^{94}\) The dangers inherent in the Crown witness system led to the development of a rule by the 1750s that required corroboration of an accomplice's testimony before it could be admitted as evidence against the accused. Leach's edition of Hawkins's *Pleas of the Crown*, published in 1787, supported the view that "the bare, uncorroborated testimony of an accomplice is not thought of sufficient credit to put a prisoner upon his defence".\(^{95}\) But by that time it was felt that the rule was too favourable to accused persons. In the following year the opinion of the Twelve Judges in *R v Atwood & Robbins* was that since it had long been settled that accomplices were competent to testify, any objection to uncorroborated accomplice testimony could go only to weight. Such testimony was therefore to be left to the jury "under such directions and observations from the Court as the circumstances of the case may require".\(^{96}\)
But might a court still direct a jury to acquit in the absence of corroboration? In R v Durham & Crowder the decision in Atwood & Robbins was referred to in argument and Perryn B observed, presumably on the strength of it, that "the practice of rejecting an unsupported accomplice, is rather a matter of discretion with the Court than a rule of law". There was now a period of uncertainty about the extent to which a court might intervene to keep uncorroborated accomplice evidence from a jury.

In R v Jones (1809) counsel for the accused apparently felt able to contend that as the Crown case rested solely on the uncorroborated evidence of an accomplice, his client could not be legally convicted. Lord Ellenborough said:

No one can seriously doubt that a conviction is legal, though it proceeded upon the evidence of an accomplice only. Judges in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness.... Strange notions upon this subject have lately got abroad; and I thought it necessary to say so much for the purpose of correcting them.

Perhaps the writers of treatises had had something to do with this state of uncertainty. In R v Hastings & Graves (1835) Lord Denman CJ reiterated that a jury might act on the unconfirmed evidence of an accomplice. The editors of the report of the case observed in a note:
"In the Text Books it does not clearly appear that it is not necessary to have any confirmation of an accomplice; this case, therefore, seems to us important as a distinct decision to that extent."

But there was still little uniformity of approach. In *R v Keats* (1843) Coleridge J directed an acquittal where there was no evidence to corroborate an accomplice. A contrary approach was adopted by Erle J two years later in *R v Avery* (1845). After counsel had submitted that there was no case to go to the jury because the evidence of an accomplice was uncorroborated, Erle J declared that he had no right to withdraw any case from the jury where there was one competent witness for the prosecution, even though that witness was an uncorroborated accomplice. In the same year Coleridge J appeared to have revised his opinion when in *R v Andrews & Payne* he said that even the entirely unconfirmed evidence of an accomplice must go to the jury. Also in the same year Erle J decided in another case that though he could not withdraw the case from the jury where the only evidence was that of an uncorroborated accomplice, he could tell them that such evidence was very unsatisfactory and advise them not to act on it.

Despite all this, when Dr Lushington attempted to describe the common law practice two years later, he stated:

[I]t is usual with the Judge, where the evidence of an accomplice stands uncorroborated in material circumstances, to direct an acquittal.... The result,
then, is that, though the law in theory is satisfied with a conviction founded upon the evidence of an accomplice alone, in practice the Judge modifies that law.

In 1855 the corroboration of accomplices was considered by the Court for Crown Cases Reserved in *R v Stubbs*. Four prisoners had been variously indicted for stealing or receiving a quantity of metal. The sole evidence against Stubbs was that of accomplices. At the conclusion of the prosecution case, counsel for Stubbs asked the chairman of quarter sessions to direct the jury that the evidence of the accomplices in respect of his client was not corroborated, and that it ought to have been corroborated as to each prisoner individually, whereas it was corroborated as to two only of the four prisoners. The chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner, and that their being corroborated as to material facts tending to show that two of the prisoners were connected with the crime was enough. He added, though, that the jury should look with more suspicion at the evidence in Stubbs's case than in the cases of the prisoners against whom the prosecution evidence was corroborated.

As well as considering what constituted corroboration, the Court for Crown Cases Reserved also considered the effect of the lack of corroborative evidence against Stubbs. Jervis CJ said that although they might regret
the result which had followed from the chairman's departure from usual practice, they could not interfere because it was not a rule of law that an accomplice must be confirmed. "In point of law the judge is bound to tell the jury that they may find a verdict of guilty upon unconfirmed testimony of an accomplice; but the usual course is to advise them not to do so." 106

In 1861 the Court of Queen's Bench, sitting in banc, affirmed that although it was "a rule of general and usual practice to advise juries not to convict on the evidence of an accomplice alone", the application of that rule was a matter for the discretion of the judge by whom the case was tried. It followed that failure to give the warning could not lead to any action by a court of review. 107 This was recognised to be the law as late as 1894; the present law was not established until R v Baskerville 108 in the next century.

The existence of a discretion of this kind was a source of some embarrassment to treatise writers. Star-kie, after stating that a prisoner could be convicted on the unconfirmed testimony of an accomplice, added that "as a rule of discretion and in practice, it is said, that he ought not to be convicted unless the testimony of the accomplice receive material confirmation". 109 In an attempt to explain this, he continued:

Regarding the rule as one of discretion and not of strict law, it can scarcely be understood that it is a rule which the Judge may enforce or disregard at his option, but rather that it belongs to the court
to decide, under the circumstances of each particular case, whether they supply a material confirmation of the accomplice's testimony.

But this was to confuse two separate matters. The state of the law was that in a case where the sole evidence against a prisoner was that of an uncorroborated accomplice, a judge did have an unreviewable discretion to withdraw the case from the jury, leave it to them with a warning, or leave it to them with no warning at all. The "discretion" that Starkie described was something quite different: what he referred to was the judgement exercised by the judge in deciding whether certain matters given in evidence were capable of amounting to confirmation of the accomplice's testimony.

In another passage, in which Starkie discussed the case of Durham & Crowder, he assessed the situation more accurately when he wrote:

[T]he decision seems to go the full length of wholly dispensing with the necessity for confirmation, even as a discretionary rule, for there was no confirmation whatsoever of the witness as far as appears, not even as to the corpus delicti: and though it is reported to have been said in that case, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the court than a rule of law, yet it is difficult to understand how it can be looked upon as any rule at all, if it may be utterly dispensed with and disregarded.

The truth of the matter was that in this respect at least the judges resolutely refused to establish any rule at all and persisted in giving carte blanche to the trial judge in his conduct of the proceedings.

The Nature of Corroboration This was another
problem left unresolved during the nineteenth century. In the first two decades it appeared to be generally accepted that if an accomplice's evidence was confirmed in any respect, that sufficed to establish the credibility of the witness; it was not necessary that the confirmatory evidence should implicate the accused.\footnote{113}

The first sign of a different approach appeared in \textit{R v Webb} (1834).\footnote{114} This was a trial before Williams J and a jury in which the prisoners were charged with breaking into a warehouse and stealing a large quantity of cheese. An accomplice was called to prove the case. He stated that when the offence had been committed, the thieves had taken a ladder from the premises of a Mr Player. To confirm the accomplice, Player's servant was called to prove that his master's ladder had been taken away on the night when the offence had been committed. Greaves, for the prosecution, then said that he proposed to call other witnesses to confirm the accomplice's account of the way in which the offence had been committed. At this, Williams J intervened:

\begin{quote}
Mr Greaves, you must shew something that goes to bring the matter home to the prisoners. Proving by other witnesses that the robbery [sic] was committed in the way described by the accomplice is not such confirmation of him as will entitle his evidence to credit so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon for at least knowing how the felony was committed. It has been always my opinion that confirmation of this kind is of no use whatsoever.\footnote{115}
\end{quote}

Two years later, Alderson B in summing up a case to
a jury said, "The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged."\textsuperscript{116} Thereafter, most reported cases in which the problem arose showed support for this view.\textsuperscript{117}

In \textit{R v Jordan & Others} (1836)\textsuperscript{118} Gurney B held it unnecessary that an accomplice should be confirmed in relation to each particular prisoner. But the same judge in \textit{R v Dyke} (1838)\textsuperscript{119} observed that in the majority of cases it had been laid down that confirmation should be as to some matter which connected the prisoner with the commission of the offence. He added that he thought it would be "highly dangerous" to convict any person of such a crime as that charged - stealing a lamb - on the evidence of an accomplice which was unconfirmed with respect to the party accused. The only exception to this approach appears to have been taken in \textit{R v Andrews & Payne} (1845),\textsuperscript{120} where Coleridge J said that he did not think it necessary that there should be confirmation as to each of the two prisoners indicted; confirmation as to one would be sufficient.

All these were decisions of trial judges. It appears that the only case in which the Court for Crown Cases Reserved considered the matter was \textit{R v Stubbs} (1855).\textsuperscript{121} Of the judges who dealt with this point, Parke B and Cresswell J required confirmation of the accused's involvement in the offence. A third judge,
Wightman J, contented himself with the observation that there had "certainly been some diversity of practice upon this subject".¹²²

As with the question whether any warning should be given at all, there seems throughout this period to have been no willingness either to say that a rule existed, or to create one. The matter remained one that was the subject of customary practice, but no more. Thus in R v Gallagher & Others (1883) in a trial at the Central Criminal Court before Lord Coleridge CJ, the Master of the Rolls, and Grove J, Lord Coleridge's summing-up to the jury contained a reference to the practice of requiring corroboration of an accomplice, but made no reference to any requirement that it should implicate the accused, saying only that "there must be a certain amount of corroboration sufficient to satisfy the jury".¹²³

(c) Similar Fact Evidence For much of the twentieth century, until the decision in DPP v Boardman,¹²⁴ this was an area of law governed by an increasingly intricate system of rules which purported to determine questions of inclusion or exclusion of evidence on the basis of categories of relevancy. At the root of this system was the late nineteenth-century decision of the Privy Council in Makin v Attorney-General for New South Wales.¹²⁵ In itself, this was an unexceptionable decision. It was its subsequent treatment at the hands of the Court of Criminal Appeal that created a system both
complex and irrational. Here, if anywhere in criminal evidence, was to be found a classic example of judge-made, rule-based law. But it was the product of the twentieth, not the nineteenth, century. An examination of cases and treatises which belong to the period covered by this thesis shows clearly that here, just as with the law of corroboration, a system of rules scarcely emerged.

It is clear even from the pre-Boardman decisions that relevancy was at the basis of the similar fact problem. We find the problem dealt with as part of a discussion of relevancy at the beginning of the nineteenth century when Thomas Peake published the third edition of his Compendium of the Law of Evidence in 1808. The first chapter was entitled "Of the General Rules of Evidence". Among them was the rule:

that the evidence must be applied to the particular fact in dispute; and therefore no evidence not relating to the issue, or in some manner connected with it, can be received; nor can the character of either party to a civil cause be called in question, unless put in issue by the very proceeding itself, for every cause is to be decided on its own circumstances, and not to be prejudiced by any matter foreign to it.

Peake added that in criminal cases, where the defendant's character was inevitably put in issue, counsel for the prosecution could examine his witnesses as to the particular facts relied upon in support of the charge. But generally the prosecution could not enter into the defendant's character unless the defence enabled them to do so by first calling witnesses in support of the defendant's
character. 126

In 1824 Starkie made a similar point in the first edition of his treatise but gave a rather fuller explanation of reasons:

[F]acts remote from, and irrelevant to, the issue between the parties, are inadmissible, for no presumption can safely be drawn from them; and if such evidence does not tend to prejudice and mislead the Jury, at least it unnecessarily consumes the time of the court.

[A]ll facts and circumstances are admissible in evidence which are in their nature capable of affording a reasonable presumption or inference as to the disputed fact; ... on the other hand, remote and collateral facts, from which no fair and reasonable inference can be drawn, are inadmissible, for they are at best useless, and may be mischievous because they tend to abstract the attention of the Jury, and frequently to prejudice and mislead them.127

It was, however, established that there was one exception to the principle that all relevant evidence was admissible. Even where it would have been reasonable for a jury to infer guilt from the mere disposition of an accused to commit a particular sort of offence, they were not permitted to do so. In R v Cole (1810),128 a prosecution for what is referred to in the report as "an unnatural offence", the court approved an established practice whereby an admission by a prisoner that he had committed such an offence on another occasion with someone else, and that his natural inclination was towards such practices, was not to be received in evidence.

This principle was stated in the first edition of Best's Treatise (1849) as part of a discussion on
relevancy. After making the point that there must be an "open and visible connection" between the principal and evidentiary facts, he continued: "In dealing with natural evidence the connection between the principal and evidentiary facts must be left to instinct, or legal sense, acquired by practice." Thus in a criminal trial the confession of a third party, who had not been produced as a witness, that he was the real criminal and that the accused was innocent, "although, certainly, not destitute of natural weight, would be rejected, from its remoteness and want of connexity with him, and the manifest danger of collusion and fabrication". He added:

Again, the bad character or reputation of an accused person, although strong moral, is not legal evidence against him, unless he sets up his character as a defence to the charge, when, of course, his evidence may be met by counter evidence. The sound policy which requires that even the worst criminals receive a fair and unprejudiced trial renders this rule indispensable.\(^{129}\)

Arguments about the admissibility of what today we would call similar fact evidence centred not on rules of inclusion or exclusion, but on relevancy. It is true that the cases show that the sort of evidence being admitted was that which later would be regarded as falling within one of the exceptional categories outside the basic rule of exclusion. But to explain these decisions in those terms would be anachronistic. The arguments and judgements show that evidence was regarded as admissible simply if it was relevant to an issue in the case.
There are many cases that show this, but three may be taken by way of example.

In *R v Dossett* (1846) the prisoner was indicted for having on 29 March 1846 feloniously set fire to a rick of wheat-straw, the property of William Cox. It appeared that the rick had been set on fire by the prisoner's firing a gun very near to it. The prosecution proposed to call evidence to show that the rick had been on fire on the previous day, and that the prisoner had then been found close to it with a gun in his hand.

Counsel for the defence submitted that this evidence was inadmissible. "It is seeking to prove one felony by another; and it is in effect asking the jury to infer that the prisoner set fire to the rick on the 29th, because he did so on the 28th."

Maule J rejected this argument. Although the evidence offered might be proof of another felony, that did not render it inadmissible if the evidence was otherwise receivable. He pointed out that in many cases it was an important question whether a thing was done accidentally or wilfully. He gave examples. Where a person was charged with having wilfully poisoned another, and the question arose whether he knew a certain white powder to be poison, evidence would be admissible to show that he had that knowledge because he had administered it earlier to another person who had afterwards died. In cases of uttering forged bank notes knowing them to be forged, the
proofs of other utterings were admissible to prove knowledge, despite the fact that such evidence also proved the commission of separate felonies.\textsuperscript{132}

In \textit{R v Geering} (1849)\textsuperscript{133} the accused was indicted for the murder of her husband by administration of arsenic in September 1848. The defence was a complete denial. The prosecution proved the death and the accompanying symptoms. They then wished to call evidence that arsenic had been taken by the prisoner's two sons, one of whom had died in December 1848 and the other in March 1849, and that a third son had taken arsenic in April 1849 but had not died. There was evidence that the husband and the sons all lived together with the prisoner, and that she prepared their meals.

The prosecution argued that evidence relating to the sons was admissible to show that the husband's death had been caused by the intentional administration of arsenic. Defence counsel conceded that had the other deaths occurred before that of the husband, evidence relating to them would have been admissible. But he argued that evidence relating to subsequent deaths was inadmissible.

Pollock CB, with whom Alderson B concurred, held the evidence admissible. It was relevant for two reasons. First, "[t]he tendency of such evidence is to prove and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by
arsenic. "On this view, it was immaterial that the deaths of the sons took place before or after that of the husband. Secondly, "[t]he domestic history of the family during the period that the four [sic] deaths occurred is also receivable in evidence, to shew that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not."

The centrality of relevancy to the question of admissibility can be seen in R v Oddy (1851). The prisoner had been convicted at Leeds Borough Sessions on an indictment containing three counts. On the first count he had been charged with breaking into a warehouse and stealing a quantity of cloth held there. The second count charged a simple larceny of the same property on the same date. The third count charged him with receiving the same property on the same date. The Recorder had admitted evidence in relation to the third count only to show that the prisoner had been in possession of other property stolen from other persons some months before.

In the course of argument Alderson B asked counsel for the prosecution, "May you not as well contend that on an indictment for burglary, which necessarily avers an intent to steal (or to do some felonious act), you may shew that the prisoner committed another burglary, in order to shew his intention to steal &c?"

Counsel for the prosecution distinguished the two
cases. In burglary the question was one of intention to steal which could be inferred from the act of breaking and entering at night. Here the question was one of knowledge, "which you cannot infer from the act of receiving alone, but must gather it from other and independent circumstances."

In delivering the judgement of the Court, Lord Campbell CJ held that the evidence should not have been admitted. Even in relation to the third count, it showed only that the prisoner was a bad man. It was not direct evidence of the particular fact in issue, namely, that at the time of receiving the cloth he knew it to be stolen. The cases of uttering forged notes could be explained on the basis that the prisoner might be supposed from previous utterings to have acquired a knowledge of what was and was not forged.135

In 1860 the beginnings of an attempt can be found to lay down a list of exceptions to a general rule excluding evidence of similar facts. In R v Richardson136 counsel for the defence argued that the only exceptions were those of a recognised kind, namely, on indictments for conspiracy, for uttering, or for receiving stolen goods.

In R v Winslow (1860)137 counsel for the defence submitted that the cases in which other felonies prior or subsequent to the particular act charged have been admitted in evidence range themselves under one of the following heads:-
1. Where the several felonies are all parts of one entire transaction.
2. In an exceptional class of cases where guilty knowledge must be proved.
3. Where the other felonies are the direct acts of the accused, and tend to show malice in the particular act itself, and as against the individual prosecuting.

But there is no indication that the judges were prepared to accept such a formulation, and cases continued to be argued on the basic point of relevancy, though after about 1850 there was an increasing tendency to cite precedents for the admissibility of evidence in particular cases and for judges to make decisions on analogies.138

The general reluctance to become involved in rule-based law on this subject can be seen from the arguments that were presented in Makin's case.

For the appellants it was argued that the general rule was to confine the evidence strictly to direct evidence of the commission of the particular act charged. Evidence of similar acts committed, or supposed to have been committed, by the same prisoner on other occasions was to be excluded, not because it was wholly irrelevant, but because it was "inconvenient and dangerous". To admit such evidence would be likely to take the prisoner by surprise, and to confuse and unduly prejudice the jury. Such arguments might have been addressed to the court at any time during the nineteenth century.

The respondents did indeed argue that it was "the
general and not the exceptional rule of law to admit such evidence to rebut defence of accident, and to shew existence of motive and a systematic course of conduct". But it was made clear that this was only part of a general principle that any evidence was admissible of any acts or doings of the person accused "if such acts or doings are so connected with the transaction under charge or are of a character so similar thereto as to lead to a reasonable inference that the prisoner committed the act charged, or at the least that such act if committed was wilful and not accidental". 139

4. Summary of Conclusions
Before the nineteenth century the common law was generally regarded as being in continuous process of change, flexible enough to operate as an instrument of reform, and better suited to that task than Parliament. But these views depended on belief that the common law was essentially a system of reasoning, which might be partially expressed by way of maxims and of which the decisions of the judges were only evidence. The problem of binding authority arose only infrequently because of the separate development of the three common law courts and the inadequacies of law reporting. But where a line of authority was strong enough to be considered binding there was room for the idea to develop that decisions of the courts formed the substance of the law and were not merely
illustrative of it.

Bentham criticised the idea of judge-made law as well as the idea that there should be any rules of law which excluded evidence. In place of all mandatory rules of evidence he wished to substitute sets of guidelines with the assistance of which judges would weigh all relevant evidence.

But during the period 1828-1898 an exclusionary, rule-based system of evidence began to emerge. In this development judges, law reporters and treatise writers all played a part.

Treatise writers attempted to rationalise the law as a rule-based system derived from case law. It is likely that their writings were used as a source of material for legal argument, and there is some evidence that judges paid attention to them. Passages in the treatises of Best and other writers show that the authors regarded their subject as being recently developed by the judges, though based on older principles. The treatise writers' increasingly rule-based approach left less room for judicial discretion in the admission of testimony. Probably realising that this was a novel development, several writers argued a case for the adoption of exclusionary rules based on the supposed lack of weight possessed by certain classes of testimony, the difficulties experienced by jurors in assessing evidence, and the need for clear, general rules in the interests of
certainty.

Wigmore suggested that evidence law came to be more rule-based because of the expansion in the period after 1830, assisted and emphasised by the treatise writers, of printed reports of nisi prius rulings. But this may be to mistake the effect for the cause and to ignore underlying change in the conception of case law. Three factors suggest that there was such a change.

There is evidence that judges and lawyers came to see case law simply as rules made by the courts. Both Bentham and Austin attacked the fiction that the common law was common custom, and by the 1860s Bentham's expression "judge-made-law" had become a common term in newspaper discussions. In addition, there was a perception that uncertainty was a great defect in English law, but for various reasons codification was unable to remedy this. Not least of these reasons was the fact that in the area of criminal evidence in particular the case law was underdeveloped, and it remained so throughout the nineteenth century because of the absence of an effective appellate system. Further problems for codification were presented by the unwillingness of members of Parliament to allow significant changes in the law without thorough examination, the lack of parliamentary time, the lack of judicial support, and the feeling that codification was politically inappropriate.140

Any increase in the certainty of common law had
therefore to be produced by the judges, and in the law of civil evidence they tried to achieve this by means of an increasingly rule-based system. They were assisted by institutional changes which made for a more uniform approach to civil appeals, and the development of the hearsay exception in favour of declarations in the course of business is an example of what they were able to do. However, because the criminal courts lacked an effective appellate structure until 1907, the judges were unable to develop rules of criminal evidence to anything like the same extent. There might have been an informal common practice, but no more. This restriction on judicial ability is well illustrated by the stunted development of the law relating to the corroboration of accomplices and by the extent to which similar fact problems were argued and decided on broad principles of relevancy rather than on the basis of a detailed system of rules such as later developed under the aegis of the Court of Criminal Appeal. The conclusion must be that in criminal evidence the common law had little creative effect. In civil evidence it had more, but the result was an exclusionary, rule-based system about as remote as any system could have been from that advocated by Bentham.


6. Pocock concluded that in course of time the term "custom" came to mean "time and experience" or "time and reason". (Ibid., 272.) This emphasis on the refinement of experience suggests a law in constant change and adaptation. In fact, common lawyers came to believe that the law, and constitutional law in particular, had always been the same. The idea of custom was ambiguous: it could suggest something in a process of constant adaptation or something which had survived unchanged from time immemorial. (Ibid., 35-37.)

7. William Blackstone, *Commentaries on the Laws of England*, ed. Edward Christian, 15th ed. (London, 1809), vol.2, 385; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, 1989), 43-46, 84-86. Mansfield was another judge who emphasised the ability of the common law to respond to changing social conditions. In his view, "... quicquid agunt homines is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind." He observed that "precedent, though it be evidence of law, is not law in itself; much less the whole of the law." The law did not consist in particular cases, but in general principles which ran through the cases and governed the decision of them. (Barwell v Brooks (1784) 3 Doug 371, 373; 99 ER 702, 703; Jones v Randall (1774) Lofft 383, 385; 98 ER 706, 707; Rust v Cooper (1774) 2 Cowp 629, 632; 98 ER 1277, 1279.)

8. For example, in *R v Inhabitants of Underbarrow and Bradley-Field* (1766) Burr Sett Cas 545, 548 he stated: "For several reasons ... we should not depart from these adjudged cases; but chiefly, from the inconvenience of altering and overturning settled determinations. It is best, *stare decisis.* The overturning settled determinations would be of very bad consequence: they ought not to be shaken." See also *R v Pedley* (1782) Cald 218, 227. But he could also attack a rule that precedent made applicable to the case he was trying if he thought that it would lead to injustice; e.g., *Pillans v Van Mierop* (1765) 3 Burr 1663, 97 ER 1035; *Perrin v Blake* (1770) 4 Burr 2579, 98 ER 355.

9. When arguing *Chesterfield v Janssen* (1750) 1 Atk 301, 333; 26 ER 191, 212 Mansfield had observed that it was a misfortune attending a court of equity that the cases were generally taken in loose notes, sometimes by persons who did not understand business and who very
often drew general principles from a case without attending to the particular circumstances which had weighed with the court in determining a particular case. In Tinkler v Poole (1770) 5 Burr 2657, 2658; 98 ER 396 Mansfield said of Bunbury's reports, "Mr. Bunbury never meant that those cases should have been published: they are very loose notes." Similar criticisms can be found in R v Atkinson (1784) (PRO/TS 11/927/fol 11, quoted in James Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century (Chapel Hill and London, 1992), 202-3.) See also Devon v Watts (1779) 1 Doug1 86, 93; 99 ER 59, 64; Jones v Maunsell (1779) 1 Doug1 302, 305; 99 ER 195, 197; Quantock v England (1770) 5 Burr 2628, 2629-30; 98 ER 382, 383; Cooper v Chitty (1756) 1 Burr 20, 26; 97 ER 166, 170. For similar criticisms made by other judges see The Hon. Sir Robert Megarry, A Second Miscellany-at-Law: A Further Diversion for Lawyers and Others (London, 1973), 117-133.

10. Lieberman, Province of Legislation, 137-42.


13. In some of his early writings Bentham tried to set out principles to which the existing common law system should conform, but by 1774-75 he had concluded that the common law system could not stand. (Postema, ibid., 197 et seq.)


15. Twining, Theories of Evidence, 48.


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20. For what appears to have been an initially unfavourable professional reaction to Blackstone's Commentaries, see Michael Lobban, The Common Law and English Jurisprudence 1760-1850 (Oxford, 1991), 44, 47-49, 57-59. But there was nothing like such opposition in principle to the work of the treatise writer in the nineteenth century. For example, in J.S. Mill's opinion:

Whatever definiteness in detail, and whatever order or consistency as a whole, has been attained by any established system, has in almost all countries been given by private writers on law. All the generalizations of legal ideas, and all explicit statements of the meaning of the principal legal terms, have, speaking generally, been the work of these unauthorized persons - have passed from their writings into professional usage, and have ended by being either expressly, or oftener by implication, adopted by governments and legislatures.

He added, however:

So far as any great body of law has been systematized, this is the mode in which the work has been done; and being done piecemeal, by persons often ill-prepared for the task, and who had seldom any other object in view than the convenience of professional practice, it has been, as a general rule, done very ill.


21. 1 B & Ald 19, 21; 106 ER 8.

22. 4 Bing 610, 614; 130 ER 904, 905.

23. 1 C & J 10; 148 ER 1314.


25. Lobban, Common Law and English Jurisprudence, 2-15, 47-79. See also Postema, Bentham and the Common Law Tradition, chap.1; Lieberman, Province of Legislation, 71-74, 89-93, 96-98, 123.
tions, or Contracts. Translated from the French, with an
introduction, appendix, and notes, illustrative of the
English law on the subject by William David Evans, Esq.
Barrister at Law. (London, 1806).


28. Ibid., 239, 283. The "error and inconvenience"
in admitting hearsay would arise because "[i]t would
import a full reliance upon the veracity, the accuracy,
and the fullness of the information that had been commu­
nicated by every person through whom the information had
been transmitted, and would want the sanction of an oath
which could not be applied to the occurrence itself, but
only to the fact of the communication. It would also be
subject to the perhaps stronger objection, of not
admitting those inquiries which conduce to a full and
satisfactory explanation of what is related." (Ibid.,
283-84.)

29. Ibid., 147-48; 223-25. William Twining's dis­
cussion of Evans suggests that he differed significantly
from Gilbert in his treatment of the "best evidence
rule". (William Twining, "The Rationalist Tradition of
Evidence Scholarship," in id., Rethinking Evidence:
Exploratory Essays (Oxford, 1990), 44.) In fact, Evans
stated that "[t]he greater part of the particular system
which is established respecting the law of evidence, may
be regarded as an amplification and exposition of this
general rule". (Pothier, Treatise, trans. Evans, vol.2,
148.) And, like Evans, Gilbert recognised that there
could be flexibility in the operation of the rule, so
that if a party offered the best evidence that he could,
that might be enough. If, e.g., a witness fell sick by
the way, his deposition might be used, "for in this Case,
the Deposition is the best Evidence that possibly can be
had, and that answers what the Law requires." A similar
principle applied where a witness had died, or after a
search could not be found. (Gilbert, Law of Evidence, 3rd
ed. (London, 1769), 61-62. See also J.B. Thayer, A Pre-
liminary Treatise on Evidence at the Common Law (Boston,
1898), 490-91; Dale A. Nance, "The Best Evidence

30. Traite des preuves judiciaires, Ouvrage extrait
des MSS. de M. Jeremie Bentham, jurisconsulte anglais,
par Et. Dumont. 2 vols. (Paris, 1823); A Treatise on
Judicial Evidence, extracted from the MSS. of Jeremy
Bentham by M. Dumont, translated into English. (London,
1825); Rationale of Judicial Evidence, specially applied
to English practice, from the MSS. of Jeremy Bentham.
has written: "Although based exclusively on Bentham's

31. Starkie, Treatise, (1824), vol.1, iii-iv.


33. See nn. 26-28 and accompanying text.

34. Starkie, Treatise, (1824), vol.1, 43-46.

35. See n.30 above.


37. Ibid. Phillipps paid less attention than Starkie to justifying the law, but another writer who shared Starkie's concern was Best. For him, judicial evidence was "for the most part nothing more than natural evidence restrained or modified by rules of positive law". He accepted that a general rule of exclusion might in particular instances exclude the truth, and so work injustice; but he thought that "the mischief is immeasurably compensated by a stability which the general operation of the rule confers on the rights of men, and the feeling of security generated in their minds by the conviction that they can be divested of them only by the authority of the law, and not at the pleasure of a tribunal". (Best, Treatise, (1849), 31.)

38. Phillipps and Amos, Treatise, (1838), vol.1, 335. The period referred to began shortly after 1688 and ended during the reign of George II.

39. In R v Inhabitants of Eriswell (1790) 3 T.R 707, 721; 100 ER 815, 823.

40. Best, Treatise, (1849), 117-18, 125-29.

41. Taylor, Treatise, (1858), vol.1, xi-xii.


43. Parl. Deb. 3rd. series, clxxi, 782.


47. 3 Cox CC 88.


49. Leon Radzinowicz, Sir James Fitzjames Stephen (1829-1894) and his Contribution to the Development of Criminal Law, Selden Society Lecture, (London, 1957), 19; K.J.M. Smith, James Fitzjames Stephen: Portrait of a Victorian Rationalist (Cambridge, 1988), 76. Coleridge had employed Stephen on this task in autumn 1872. He may have been prompted to do so by the presentation of a private members' bill earlier that year. It set out to amend the law of evidence and had as its short title, "The Code of Evidence, 1872". The members who brought in this bill were Denis Caulfield Heron and Jonathan Pim. Both were members for Irish constituencies, and it seems likely that the bill was drafted by Heron, who was an Irish Q.C. and had been Professor of Jurisprudence at Queen's College, Galway between 1849 and 1859, and, for a few months in 1866, law adviser to the Crown in Ireland. (Pim had no legal connections.) The general effect of the bill was to relax the existing rules of evidence, but privilege was extended to cover communications made to clergymen of any religious denomination, and there were provisions making it less easy to convict on the evidence of accomplices or on an alleged confession. The bill was an example of Heron's cautious approach to codification, which favoured selecting individual portions of the law from time to time in order to digest and arrange them in scientific order. He accepted that the conversion of common law into statute law would not render the law absolutely certain, but by arrangement and classification the disadvantages of the accumulations of books and the judgements of the courts might be diminished. (House of Commons Parliamentary Papers 1872 (69) I 685; D.C. Heron, The Principles of Jurisprudence (London, 1873), 95-96, 99.) This bill had been read for the first time on 28 February 1872 but dropped at the second reading. Coleridge's interest in evidence codification seems to have been genuine; Stephen describes how he and Coleridge
"settled it [i.e., the bill] in frequent consultations". Stephen stated that the bill was ready to be introduced early in the session of 1873, and that Coleridge made various attempts to bring it forward but was unable to succeed until the very last day of the session. In fact, on that day (5 August 1873), Coleridge said that he had never proposed to do more with the bill that session than introduce it and print it for the consideration of members, adding that if he had the opportunity, he would endeavour to pass it into law in a future session. On 2 July, however, he had written to his father: "I have my speech on evidence to make, and, then, my work for the Session is fairly over", which suggests that he had hoped to achieve something more substantial in that session. In the event, however, the bill was never printed. Stephen described it as "drawn on the model of the Indian Evidence Act" and as containing "a complete system of law upon the subject of Evidence". In the latter part of 1873 Coleridge was promoted to the Bench and Stephen's bill was not proceeded with by his successors as Attorney General. (House of Commons Parliamentary Papers 1873 II 355; Ernest Hartley Coleridge, Life & Correspondence of John Duke Lord Coleridge Lord Chief Justice of England (London, 1904), vol.2, 217; James Fitzjames Stephen, A Digest of the Law of Evidence (London, 1876), iii-iv; Parl. Deb. 3rd series, ccxvii, 1559.)

50. James Fitzjames Stephen, The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence (Calcutta, 1872), 7. Cf. id., Digest of the Law of Evidence, xviii, where he described Bentham as "too keen and bitter a critic to recognise the substantial merits of the system which he attacked".

51. Stephen, Indian Evidence Act, 123-24. A similarly pragmatic approach can be seen in his justification of the exclusion of evidence as to transactions similar to, but not specifically connected with, the facts in issue. Stephen believed that to admit such evidence would lead to an undesirable inquiry into the whole life and character of the parties concerned. "A very slight acquaintance with French procedure is enough to show the evils of not keeping people close to the point in judicial proceedings." (Ibid., 125.)

52. 1 Salk 285, 91 ER 252.

53. 2 Esp 646, 170 ER 484.

54. See n.52.

55. Similar reasoning may have been applied in Rowcroft v Basset (1802) Peake Add Cas 199, 170 ER 243. In this case an action was brought against the owner of a
ship for goods supplied. Two porters in the plaintiff's house at the time when provisions were alleged to have been delivered had since died. But it was proved that they had been in the habit of delivering goods to ships and entering a record of the delivery in a book at the time. Le Blanc J held that their entries were good evidence of the delivery of the provisions. However, the grounds for the decision do not appear in the report.

56. 3 Camp 305, 170 ER 1391.

57. 3 Camp 307, 170 ER 1392. Similar evidence was held admissible by the same judge in Hagedorn v Reid (1813) 3 Camp 377, 170 ER 1416, and in Champneys v Peck (1816) 1 Stark 404, 171 ER 511.

58. 15 East 32, 34; 104 ER 756, 757.

59. 2 Russ 63, 38 ER 259.

60. 2 Russ 76, 38 ER 264.

61. See n.52.

62. 2 Brod & B 132, 136; 129 ER 1233, 1234. The decision itself throws no light on the problem.

63. 3 B & Ad 890, 110 ER 327.

64. 3 B & Ad 896-97, 110 ER 329-30. See also R v Inhabitants of Dukinfield (1848) 11 QB 678, 116 ER 627, where Erle J, after referring to Doe d Patteshall v Turford, said, "If the indorsement usually followed the fact in question, it is admissible as evidence of that fact, on the general principle that an antecedent may be inferred from a consequent as soon as the usual sequence of facts is proved." (11 QB 687, 116 ER 631.)

65. For discussion of this distinction see Stephen Guest, "The Scope of the Hearsay Rule," Law Quarterly Review 101 (1985): 385-404. In 1834 Parke was moved from the Court of King's Bench and began twenty-two years of office as a baron of the Exchequer. By 1837 he had so revised his views in favour of a strict application of the rule against hearsay that he was able in that year to deliver his memorable judgement as a member of the Court of Exchequer Chamber in Wright v Doe d Tatham (1837) 7 A & E 313, 112 ER 488. His judgement in this case was heavily relied on by a majority in the House of Lords when the strict application of the rule against hearsay was reaffirmed in R v Kearley [1992] 2 All ER 345.

66. 1 Bing NC 649, 131 ER 1267.
67. 1 Bing NC 654, 131 ER 1269.

68. Phillipps, Treatise (1829), vol.1, 229-34. Earlier editions had contained shorter statements of the rule, without any reference to antiquity to support either the rule or its exceptions.

69. Ibid., 263.

70. They were Price v Torrington (1703) 1 Salk 285, 91 ER 252; Pitman v Madox (1700) 2 Salk 690, 91 ER 585; Calvert v Archbishop of Canterbury (1798) 2 Esp 646, 170 ER 484; Hagedorn v Reid (1813) 3 Camp 377, 170 ER 1416.

71. Phillipps, Treatise (1829), vol.1, 263-64.

72. Phillipps and Amos, Treatise (1838), vol.1, 332-34, 341. Taylor elaborated further the reasons for the exception. According to this writer, the principal considerations inducing the courts to recognise the exception were: (1) In the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct since, the process of invention requiring trouble, it is easier to state what is true than what is false. (2) Such entries usually form a link in a chain of circumstances which mutually corroborate each other. (3) False entries would be likely to bring clerks into disgrace with their employers. (4) Most entries made in the course of business are subject to the inspection of several persons, so that an error would be speedily discovered. (5) As the facts to which they relate are generally known only to a few persons, relaxation of strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth. For this writer, the need for justification had moved away from the exclusionary rule and fastened onto the exceptions to it. (Taylor, Treatise, 4th ed. (1864), vol.1, 605.)

73. Starkie, Treatise (1842), vol.1, 45. In 1833 Starkie, after dealing with declarations against interest, had written that there were also "several instances to be found where the declaration of a party as to a fact, where he possessed peculiar means of knowing the fact, and laboured under no temptation, bias, or influence, to misrepresent it, have been admitted in evidence after his death." He had added: "As the rules by which the reception of this class of evidence is governed do not appear to be very distinctly defined, the decisions on the subject will be detailed at a future opportunity ..." (Starkie, Treatise (1833), vol.1, 46.)

74. Best, Treatise (1849), 376.
75. Phillipps, Treatise, (1843), vol.1, 208. This comment had been absent from the previous edition of the work in 1838.

76. Ibid., 211.
77. 1 LTOS 253.
78. 29 Beav 60, 54 ER 548.
79. 29 Beav 65-66, 54 ER 550.

80. Bright v Legerton (1861) 2 De G F & J 606, 45 ER 755.
81. 13 Ch D 558.
82. See n.63.

83. But the clerk's duty to serve the notice to quit and make out the indorsement had in that case been to his employer. This point eluded Coleridge J in R v Inhabitants of Worth (1843) 4 QB 132, 114 ER 847. For a similarly restrictive approach see the decision of the Court of Appeal in Hope v Hope [1893] WN 20. Cf. the robust approach of Lord Coleridge CJ in Esch v Nelson (1885) 1 TLR 610.

84. 1 Cr M & R 347, 149 ER 1114.
85. 1 Cr M & R 368, 149 ER 1122.
86. LR 2 QB 326.
87. Ibid., 332-33.

88. Ibid., 334. Lush J expressed a similar fear that if this letter were admissible, "it would follow that every commercial traveller, who writes to his principals that he has received orders from different customers, might enable his principals, in the event of his death, to charge every one mentioned in his letters". (Ibid., 335.) See also Trotter v Maclean (1879) 13 Ch D 574.

89. 7 CB 456, 137 ER 181.
90. See nn. 52 and 63.
91. 7 CB 503, 137 ER 200.
92. 3 PD 156.


96. (1788) 1 Leach 464, 168 ER 334.

97. Durham & Crowder, though heard after Atwood & Robbins, was reported before the latter case in (1787) 1 Leach 478 168 ER 335. The judges in Atwood & Robbins did not come to a completely novel decision. In R v Smith & Davis (1784) at the Old Bailey the court stated that there was an established rule of law that the uncorroborated testimony of an accomplice was legal evidence, but thought it too dangerous to allow a conviction to take place on such testimony. The accused was acquitted. See the note to the report of Durham & Crowder.

98. 2 Camp 131, 170 ER 1105.

99. 7 Car & P 152, 173 ER 67.

100. 1 LTOS 552.

101. 1 Cox CC 206.

102. 1 Cox CC 183.


104. Simmons v Simmons (1847) 1 Rob Ecc 566, 574; 163 ER 1137.

105. 7 Cox CC 48.

106. Ibid., 49.

107. R v Boyes (1861) 1 B & S 311, 121 ER 730.


109. Original emphases.


111. See n.97.
112. Starkie, ibid., 15, n.(d) continued.

113. R v Birkett & Brady (1813) Russ & Ry 251, 168 ER 787; R v Dawber & Others (1821) 3 Stark 34, 171 ER 758; R v Barnard (1823) 1 Car & P 87, 171 ER 1113. All were decisions by trial judges.

114. 6 Car & P 595, 172 ER 1380.

115. 6 Car & P 595-96, 172 ER 1380.

116. R v Wilkes & Edwards (1836) 7 Car & P 272, 173 ER 120.

117. R v Moores & Spindlo (1836) 7 Car & P 270, 173 ER 119; R v Parler (1837) 8 Car & P 106, 173 ER 418; R v Kelsey (1838) 2 Lewin 45, 168 ER 1074; R v Fletcher & Others (1838) 2 Lewin 45n, 168 ER 1074; R v Birkett (1839) 8 Car & P 732, 173 ER 694; R v Keats (1843) 1 LTOS 552; R v Jenkins & Another (1845) 1 Cox CC 177; R v Mullins (1848) 3 Cox CC 526.

118. 7 Car & P 432, 173 ER 192.

119. 8 Car & P 261, 173 ER 486.

120. 1 Cox CC 183.

121. 7 Cox CC 48.

122. Ibid., 50-51.

123. 15 Cox CC 291, 318.


125. [1894] AC 57.


127. Starkie, Treatise (1824), vol.1, 40; vol.2, 380-81.

128. Sir William Oldnall Russell, A Treatise on Crimes and Misdemeanours, ed. J.W. Cecil Turner, (London, 1964), vol.2, 737. The case was never reported, but a note of it appears in the Judges' Note Books on Crown cases. See R v Sims [1946] KB 531, 541, 544. There is a suggestion that another argument against the proof of other offences may have been that to allow this would "confound and perplex prisoners in their defence" by introducing issues for which they might be unprepared. See the argument in R v Whiley & Haines (1804) 2 Leach
983, 984; 168 ER 589. See also the exchanges between Lord Campbell CJ and counsel for the prosecution in R v Oddy (1851) 2 Den 264, 169 ER 499.

129. Best, Treatise (1849), 95-96. Cf. the less satisfactory explanation in J.F. Archbold, Archbold's Summary of the Law Relative to Pleading and Evidence in Criminal Cases, 16th ed., (London, 1867), 200, where it was said that the rule against proving a general disposition was an example of the principle that nothing should be given in evidence which did not directly tend to the proof or disproof of the matter in issue. Had such a principle existed, it would have ruled out all proof by circumstantial evidence.


131. 2 Car & K 306, 175 ER 126.

132. That evidence might be admitted simply to show that a particular event was no accident is shown by R v Bailey (1847) 2 Cox CC 311. Under an indictment for arson where the prisoner was charged with wilfully setting fire to her master's house, evidence of two recent abortive attempts by someone from inside the house to set fire to different parts of the premises was held admissible although there was no evidence to connect the prisoner with either of them. Pollock CB held that this was evidence which could be used to show that the fire with which the court was concerned had not been the result of accident.

133. 18 LJNS 215.

134. 2 Den 264, 169 ER 499.

135. 2 Den 272-73, 169 ER 502.

136. (1860) 2 F & F 343, 175 ER 1088.

137. 8 Cox CC 397, 399.

138. Stone, "Similar Fact Evidence", 970. The practice has continued. In R v Butler (1987) 84 Cr App R 12, a decision of the Court of Appeal, Sir Ralph Kilner Brown observed:

"At trial and to some extent before us there was an unnecessary citation of lengthy extracts from numerous authorities, one or two of which go back nearly a hundred years. Encouraged by the very full and detailed treatment of the subject in Archbold (42nd
ed.), chapter 13 and chapter 14, paragraph 12, application to call the evidence took a long time and went into a second day. The argument before the judge occupied no less than fifteen pages of transcript, and the ruling by the judge another thirteen pages of the transcript."

139. [1894] AC 57, 60-63. As Zuckerman has observed, it seems that pre-Makin law was not very different from Boardman law. (A.A.S. Zuckerman, The Principles of Criminal Evidence (Oxford, 1989), 226, n.16.)

CHAPTER 6
CONCLUSION

At the beginning of this thesis I suggested that the traditional story, which had been supported amongst others by Brougham, Maine, Dicey, Holdsworth and Hart, and which had assigned to Bentham a leading place in the nineteenth-century development of evidence law, was in need of revision. I suggested two main lines of inquiry for this exercise: first, as to what other factors should be taken into account in considering the statutory reforms; secondly, as to the part played by rival traditions of reform, particularly by that tradition which regarded the common law as a more flexible and effective instrument of reform than Parliament.¹

Writers who accorded Bentham his leading position invariably did so because of the influence that he was supposed to have had on the statutory reforms of the period under consideration. But the influence which Bentham might have had on common law development was rarely, if at all, considered. This in itself suggests that Bentham's part in the development of evidence law may have been overrated, because if one looks at the law reports and at the text books on evidence that were
published during this period one can observe, at least in civil as opposed to criminal evidence, increasing activity on the part of judges, writers and law reporters.²

Those who accorded Bentham his position of authority tended to neglect his radical critique of the common law, which condemned alike judge-made law and rules of evidence of all kinds, and, in particular, exclusionary rules.³ None of this was reflected in what was going on in the courts during the nineteenth century. But if Bentham was supposed to have exercised so considerable an influence, was it not curious that his influence should have been wholly confined to statutory reforms? Was there such a division between what went on in Parliament and what went on within the legal profession that this was likely?

An examination of what went on in Parliament often shows strong lines of communication between the legal profession and those advocating statutory reforms, not least because a significant number of lawyers or others with legal connections sat in Parliament, and because governments that supported reforming legislation took good care to ensure that their measures were broadly supported within the profession.⁴ In the light of this it becomes clear that we need to look for factors other than Bentham's work in the history of these legislative reforms. What emerges is a more complex story than that traditionally told, in which Bentham had indeed a part to
play, but not the only or even the main part.

At each of the two stages when a general extension of the right to affirm instead of taking the oath was being considered - first when the proposal was to extend such a right to all who had religious scruples against taking an oath, and afterwards when the proposal was to extend the right further to include those who had no religious beliefs - the movement for reform was assisted to a very large extent by two lines of development. One was the growth of religious scepticism; the other, an increasing sense of social stability. Of the two, the latter was almost certainly the more important. Increasing social stability made religion less necessary as a social cement. This led to more open scepticism and to a decrease in the significance of those religious rituals, such as the oath in courts of law, which had hitherto reinforced the links between church and state. The significance of social stability in the debates about compulsory oath-taking emerges from the contributions in Parliament of both opponents and proponents of reform, and it was by far the weightiest consideration on each side.

In these debates - and they were debates that took place mainly in Parliament - the figure of Bentham is remote. His critique of the law that made witnesses incompetent by reason of their opinions on religion had received its most extensive publicity two decades before
the first general extension of the right to affirm in 1854, and over forty years before the final removal of restrictions in 1869. In the decades after Bentham's death in 1832 supporters of his opinions had been able to organise effectively in many instances so as to influence administrative reforms. But this sort of organisation was far less easy to achieve where statutory reforms were concerned. There were two main reasons for this. The first was that the membership of the House of Commons and of the House of Lords was too large to be susceptible to the sort of manoeuvres that worked well in the much smaller units of administrative responsibility. The second reason was that government support was crucial to the success of reforming legislation because the requirement that legislation be passed in a single parliamentary session placed a strict limit on the period of time during which persuasion or manipulation could be effective.

It is not, of course, surprising to find that some proponents of reform used arguments that had been used earlier by Bentham. But it does not follow from this that they took their arguments from him. Bentham's own arguments had not always been original. More important is the fact that underlying Bentham's proposals for reform was his radical critique which saw oaths as the instruments of sinister interest, not only of "Judge & Co" but of the established Church. This highly idiosyncratic
feature was adopted only rarely by writers supporting reform outside Parliament and never by supporters of reform in Parliament. The latter's concern was, as much as that of their opponents, with the need for stability and security; in the circumstances it would have been amazing to find the reforms supported by reference to anything so radical.

Of the statutes that removed incompetency by reason of infamy or interest, the first of significance in this period was Lord Denman's Act of 1843. This abolished the last instances of incompetency by reason of criminal conviction, and also those rules which affected the competency of non-parties who had an interest in the outcome of litigation. These were reforms which Bentham had advocated and which came about as a result of the efforts of Lord Denman. But though Denman's thinking on law reform had been influenced by Bentham's work, he was far from being a convinced Benthamite. At this stage, for example, he was unprepared to extend competency to the parties themselves in civil actions. Further, Denman could not have been successful without the support of the profession, particularly that of the common law judges and the Attorney General.10

The Law of Evidence Amendment Act 1851, which made competent the parties to civil litigation, is probably the most likely product of Benthamite influence among nineteenth-century statutes dealing with evidence. But
while the contributions of Denman, Brougham and the Law Amendment Society suggest that this was so, support for the reform can also be explained on the basis of an extension of the principle embodied in the 1843 Act, and the experience of existing practices of dispute resolution in the old courts of requests, the new county courts and in arbitrations.

Incompetency based on interest was not completely abolished until the passing of the Criminal Evidence Act 1898. Bentham had been concerned to remove the prohibition on testimony from the accused at trial. But he had also wanted to compel the accused to submit to questioning and would have allowed a court to infer guilt from failure to respond. By contrast, at the time when he was developing this critique the judges, relying on what they regarded as an old common law tradition, were encouraging the recognition of a right to silence at the pre-trial hearing before a magistrate. They were also allowing the accused to adopt a far more passive role at trial than had been usual during much of the eighteenth century, when accused persons had been expected to respond to judicial questioning.11

This isolation of the accused was brought about as counsel began to be increasingly involved in the conduct of criminal trials. But the very pressures that had made the incursion of counsel an acceptable development - the need to provide a fairer, more efficient, and so more
acceptable system of criminal justice — led in time to an increasing demand that all appropriate measures should be taken in the search for truth, including the reception of testimony from the accused. Such a measure might benefit the prosecution, because it would expose the accused to cross-examination, or the defence, because it would allow the person often best qualified to do so to explain what had happened and to have his explanation put on the same level as the testimony of other witnesses. The move to allow accused persons to testify is best seen as the final stage in the working out of the adversary process which in the early decades of the nineteenth century had removed the accused from the arena where less formal eighteenth-century procedure had placed him.

Such a development might have appeared to conflict with the principle that innocent persons accused of crime should be safeguarded. However, with accused persons increasingly represented, the view might have developed that they were on more even terms with their accusers than before, and so less likely to do themselves injustice by testifying in their own defence. Although I have not been able to find this suggestion expressly made, such a consideration may have influenced the piecemeal granting of the right to testify under particular criminal provisions such as those contained in the Criminal Law Amendment Act 1885. In turn, these piecemeal grants supported an argument that the right to testify should be
made general so as to avoid anomalies.\textsuperscript{12}

The debates on this reform, though they appear to have interested a wider public than those concerning earlier reforms, were still largely conducted in Parliament and by members who had some connection with the legal profession.\textsuperscript{13} The key to success was to persuade a majority in the profession, and then in the government of the day, that change would involve no radical alteration in the existing balance of power in criminal trials between judge, counsel and the accused. This is shown by the importance attached in debates to the fear that a change in the law would lead to more direct judicial intervention in the proceedings, or that the position of the accused would be weakened, either by his being forced to testify or because the burden or standard of proof would be affected.\textsuperscript{14} Although such fears can be found until 1898, the more entrenched the existing adversary system became, the less the dangers appeared to be.

As on earlier occasions, some of the arguments urged in favour of reform had affinities with arguments that Bentham had deployed, and Benthamite ideas can be found in the work of Brougham and of the Law Amendment Society. It is also possible that Bentham's critique played an indirect part in the reform through examples set in America, where similar reforms can be traced more directly to Bentham through the endeavours of Chief Justice Appleton.\textsuperscript{15}
But the legislation passed in 1898 protected the accused to a large extent from a comprehensive cross-examination, and thereby limited the search for truth which had been the declared aim of Bentham's recommendation to extend competency to the accused. The accused's right to silence, which Bentham had notoriously criticised, was recognised by statute in 1848 in relation to pre-trial proceedings. It was preserved by the 1898 legislation and the right to comment on its exercise was limited.

Because of the lack of an effective criminal appellate system before 1907, such development of the common law of evidence as took place tended to be in the civil courts. But that development was diametrically opposed to the line which Bentham had proposed. What emerged was a system of law which became increasingly rule-based, whereas Bentham had denied the possibility of making effective rules to govern the reception of evidence. Evidence law also became increasingly exclusionary, whereas Bentham had advocated freedom of proof, insisting that matters affecting weight should not be allowed to affect admissibility. Far from operating as a more flexible and effective system of reform, as developments in the eighteenth century had suggested might be the case, the common law now operated to fix the law of evidence with increasing rigidity.16 This was to prove particularly unfortunate when, after the creation of the Court
of Criminal Appeal in 1907, this approach was adopted
towards criminal evidence.

The story which I have suggested should replace
that of what Maine called "Bentham's immense signifi-
cance" is more complex than its predecessor. For example,
it shows at all stages of legislation the power of a
legal profession which had to be largely convinced before
a reform could succeed. The power of that profession
emerges again when we consider the part played in legal
development by the working out of a new adversarial way
of conducting criminal trials, which seems to have begun
on an ad hoc basis, perhaps stimulated by nothing more
than overcrowding at the Bar with the consequent need for
young barristers to extend the scope of their practices.
The new story shows a more flexible approach to oaths
when a society that seemed to be more stable decided that
religion was not as necessary as it had been as a social
cement, and that a certain amount of scepticism could be
afforded. We see a new, less balanced, way of looking at
the common law which set much more store on rule-based
certainty than on flexibility and discretion.17

What has emerged is a far more interesting, as well
as a more complex, story about evidence law than the
one formerly presented. In particular, evidence no longer
appears as something free-standing, capable of being
influenced by the work of a great jurisprudent but invul-
nerable to social pressures.
NOTES TO CHAPTER 6


2. See pp. 298-356.


4. See particularly the contributors to the debates in Parliament during the attempts to secure a general competency for accused persons in criminal cases. Private members who attempted to secure this reform almost invariably had legal connections of some kind: see, e.g., the notes on Vincent Scully, Sir Fitzroy Kelly and Evelyn Ashley (p.271), and on F.L. Spinks, William Wheelhouse and B.C.T. Pim (p.272). It was the attempts of private members that began the parliamentary movement for reform; for an example of government willingness to adopt a measure once it was believed to have wide support, see the volte-face of Sir John Holker AG over the argument that such a reform would encourage perjury (pp. 249-50).

5. See pp. 68-80, 106-7.


10. See pp. 137-47.


12. This "incremental approach ... served not only the tactical function of gradually eroding the resistance to change where a frontal assault might have failed, but also provided the advocates of further change with a ready arsenal of precedents". (Joel N. Bodansky, "The Abolition of the Party-Witness Disqualification: An Historical Survey," Kentucky Law Journal 70 (1981-82): 97.)

13. It has already been noticed that issues involving criminal procedure that arose during the nineteenth
century were mostly discussed in legal circles: see W.R. Cornish, "Criminal Justice and Punishment," in Crime and Law in Nineteenth Century Britain, ed. W.R. Cornish & others (Dublin, 1978), 57. However, in relation at least to the competency of accused persons, there was more division and less conservatism within the legal profession than this essay suggests. It certainly appears to be an over-simplification to state (ibid., 58) that it was with a view to breaking down a guilty defendant's shield, rather than providing an innocent defendant with better weapons, that the right to give evidence was finally conceded.


16. See chap.5.

17. By contrast, one of the distinguishing features of evidence law over approximately the last twenty years has been a move away from rigid rules to the exercise of discretion in questions of admissibility. The law of similar fact evidence after DPP v Boardman [1975] AC 421, and especially since DPP v P [1991] 2 AC 447, is an obvious example. There is clearly room for a history of the effect of the Court of Criminal Appeal, and later of the Criminal Division of the Court of Appeal, on the way in which evidence law has developed during the twentieth century. An analysis of judicial styles on the lines recommended by Karl Llewellyn would form a useful basis for such an inquiry. (See William Twining, Karl Llewellyn and the Realist Movement (London, 1973; repr. 1985), 264-65.) Of particular interest would be an examination of the way in which cases on evidence were used as precedents at various stages during this century. A discretion-based approach to admissibility can also be found in statute, for example, in s 78 of the Police and Criminal Evidence Act 1984 and in the provisions concerning documentary hearsay in the Criminal Justice Act 1988. Another line of inquiry would be an attempt to discover what connections there may have been between a more flexible Court of Appeal and the enactment of recent legislation affecting evidence law.

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APPENDIX

The following comic sketch, described as coming from "an old number of a well-known periodical", was reproduced by a correspondent on the subject of a bill to make accused persons competent witnesses in 1865. (Solicitors' Journal and Reporter 9 (1864-65) 500-501.)

TWO CRIMINAL TRIALS

SCENE - An English Court of Justice

The Law. Prisoner, don't plead guilty. How do you know whether a case can be made out against you?
Prisoner. Thank you, my lord, but as I did it -
The Law. Be silent, my good man. How do you know you did it - did what your offence is said to be?
Witness. My lord, he did take -
The Law. Be very careful, sir. Remember your oath. How do you know that it was this man?
Witness. I have known him, I should think, for -
The Law. Never mind what you think. Did you see him take the thing?
Witness. I was walking -
The Law. Who asked whether you were walking, or riding, or flying, or crawling on your stomach? Answer the question. Did you see him?
Witness. Yes, my lord.
The Law. Was it at night or in the day?
Witness. At night.
The Law. Can you see in the dark?
Witness. There was a moon, my lord.
The Law. Of course there was; but did it shine?
Witness. Very brightly.
The Law. You can swear that it was he, and no one else?
Witness. Yes, my lord.
The Law. Do you know that he has a brother very like him?
Witness. It wasn't his brother, my lord.
The Law. Answer the question, or you'll get into trouble.
Do you know the fact that his brother is very like him?
Witness. He is not so very like, my lord.
The Law. How dare you say that? It is only your opinion.
Will you swear that there was light enough to enable you
to be certain that this was the man?
Witness. I know the fellow well enough, my lord.
The Law. How dare you call him names? You dislike him
evidently, and the jury will be cautious in accepting
your evidence. Be careful, sir!
Prisoner. He tells the truth, my lord. I did -
The Law. Hold your tongue, my poor man.
Prisoner. But it is true that I took -
The Law. Keep him silent, gaoler. Go down, you sir, and
feel ashamed of having shown animosity in that sacred
box. Gentlemen of the jury - Such charges are easily
made, but disproved with difficulty. The witness had
evidently an animus. The prisoner has borne a good
character, at least nothing has been proved against him,
and his readiness to admit everything is creditable to
him. Still, it is for you to say guilty or not guilty.
Jury. Guilty, my lord!
The Law. As the jury has found you guilty of stealing
these sovereigns, prisoner, I have only to pass sentence,
which I shall make very light. You will be imprisoned,
without hard labour, for a month.
Prisoner. I can do that on my head, my lord.

[Flings his nailed shoe at the foreman, and exit
shouting.]
SCENE- A French Court of Justice.

The Law. Prisoner, I am afraid you are an awful scoundrel. Why don't you confess, and make reparation to society?

Prisoner. Because I am innocent.

The Law. You say that with a certain impudence which proves you hardened in crime. How came you to rob your master?

Prisoner. I never did.

The Law. This reiteration of a plea which is clearly false is disrespectful to the Court, and will aggravate your punishment. Are you fond of the theatre?

Prisoner. Yes.

The Law. That denotes a love of pleasure which is frequently found united with dishonesty. Do you smoke?

Prisoner. A good deal.

The Law. Doubtless, to stupify the reproaches of a menacing conscience. Do you go to mass?

Prisoner. At regular times.

The Law. That shows you to be a hypocrite. Now, witness, is he not guilty?

Witness. No, my lord.

The Law. How dare you say that? Did you commit the crime yourself?

Witness. Certainly not.

The Law. Don't answer in that petulant way. What is your character? Are you fond of the theatre?

Witness. No.

The Law. Just so. A dark and gloomy nature cannot enjoy innocent recreation. Do you smoke?

Witness. Very little.

The Law. You fear to be traced by the smell of your clothes. You know that tobacco increases our revenue, and you wilfully abstain in order to injure your country. Do you go to mass?
Witness. Seldom.
The Law. You feel your evil character unfits you for the solemnities of the Church. Go down. The next. Now, what have you to say, woman?
Witness. The accused is an excellent husband -
The Law. Are you his wife?
Witness. No, my lord, but his wife's friend, and I know -
The Law. Then the less you have to say in the future to the wife of an accused person the better. Perhaps you are in love with him?
Witness. My lord, I have a husband whom I love, and children whom I adore, and because any of them might be charged falsely, as the prisoner is, I came to say what I can for justice.
The Law. That theatrical sentiment you have learned from some play, and your reciting it here is most indecent. Go down. Gentlemen of the jury, - It is quite clear that this scoundrel is guilty. His insolent denials, the class of witnesses, atheists, profligates, frequenters of theatres, gloomy conspirators, and the like make his guilt evident; besides which a gaoler heard him say Mon Dieu in sleep, which showed temporary remorse. Finally, I happen to know that he is guilty, for I knew his father in his youth, and he was a vile assassin. Gentlemen, you have only to say Guilty.
The Jury. Not guilty.
The Law. You are a contumacious set of rebellious and illogical pigs, and I shall see whether the Procureur of his Majesty cannot deal with you as conspirators. Meanwhile, abandon the box you have disgraced.

[Exeunt the jurymen, confirmed in Imperialism.]
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