The Oath System and the Regulation of Witness Testimony in Early Modern English Criminal Proceedings

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B.A., University of Virginia, 2017

A Thesis Presented to the Graduate Faculty of the University of Virginia in Candidacy for the Degree of Master of Arts

Department of History

University of Virginia
May 2021
Abstract

This thesis examines how the practice of swearing oaths regulated witness testimony in English criminal courts from approximately 1670-1800. The central idea is that the practice of swearing oaths so dominated the presentation of witness testimony that we should conceive of there having been a comprehensive “oath system” at work. The oath system had two particular effects. First, the oath system controlled who could testify at trial. It excluded or limited the testimony of children, religious minorities, defendants, defense witnesses, and persons considered of bad character. Second, the oath system governed what witnesses could testify about. It largely limited witnesses to direct, first-hand observations that they were comfortable enough with to swear to—and thus comfortable enough to stake their souls on.

In making those arguments, this thesis comments on the meaning of the oath—its epistemic and metaphysical significance—both in the courtroom and in broader English society. It also reevaluates prior scholarship on early modern English criminal procedure, which has frequently invoked but consistently under-emphasized the significance of the oath. It concludes by briefly tracking the reduced power of the oath system in the late eighteenth century, the factors that precipitated its decline, and what came afterwards to regulate witness testimony: namely, cross-examination.
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Introduction

The practice of swearing oaths dominated early modern English life, especially legal life. English subjects swore oaths of loyalty to the monarch. They swore oaths to the Church of England. They swore oaths whenever they took public office, however significant or insignificant the office. They swore oaths relating to bread prices, land prices, and financial bookkeeping. They especially swore oaths in the course of legal proceedings. At some point in the course of any particular trial, judges, jury members, prosecutors, defendants, witnesses, and even clerks all swore some kind of oath, whether to uphold a duty (a “promissory oath”) or to tell the truth (an “assertory oath”).

In spite of the frequency with which oath-taking occurs in reports of early modern legal proceedings, historians of that period’s law have largely neglected its significance. This neglect has been especially evident in scholarship on the era’s criminal law and procedure. In fact, the practice of oath-taking so thoroughly dominated late seventeenth and eighteenth century criminal proceedings that lawyers and judges could not imagine a legal system but one predicated on oath-taking. Oath-taking was thought to ensure that participants in the criminal trials upheld their duties and told the truth. Because oath-taking invited God’s judgment for swearing a false oath or breaking a promissory oath, participants in criminal trials thought that demanding

4 Shapiro, supra note 1, at 149.
5 Id. at 145, 148.
7 See infra, pp. 7-9.
8 Shapiro, supra note 1, at 148.
witnesses swear to tell the truth would ensure that they did so—because otherwise they would be damned in the afterlife.  

We must understand the practice of oath-taking to make any sense of early modern criminal adjudication. I propose regarding the practice of oath-taking in early modern criminal proceedings as a comprehensive “oath system.” The oath system was a historically particular institution, in place from at least the late seventeenth century to around the late eighteenth century. During this period, there were such widely shared common understandings about the nature and use of oaths—what they meant, what they could be used for, and what they prohibited—that the use of oaths formed a systematized set of principles that structured criminal trials. The oath system had an especially profound impact on witness testimony. It governed who could testify at trial, and what they could testify about. It excluded testimony from witnesses who judges did not trust to swear truthfully because judges retained a concern with protecting trial participants’ souls. At various points, defendants, interested parties, people deemed untrustworthy, children, and religious minorities were prevented from testifying on oath or from testifying altogether. For witnesses who were allowed to give sworn testimony, the oath system largely limited what they could testify about to things that they had directly observed or of which they were basically certain.

The cumulative effect of those two functions of the oath system—regulating who could testify and what about—was profound. The oath system greatly limited the kind and scope of

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9 See George Fisher, *The Jury’s Rise as Lie Detector*, 107 Yale L.J. 575, 580 (1997) (claiming that the evidentiary system of the eighteenth century had a “presumption that all sworn evidence was truthful.”)
10 See infra, Part II.
11 See infra, Part III.
12 See infra, pp. 19-23.
13 See infra, Part II.
14 See infra, Part III.
witness testimony available at trial.\textsuperscript{15} It had an impact on the kind of evidence that juries would consider in rendering verdicts.\textsuperscript{16} It led to many cases ending in summary acquittals for lack of admissible evidence.\textsuperscript{17} And eventually the oath system began to break down under the weight of its own limitations.\textsuperscript{18} A new form of ensuring the veracity of witness testimony, cross-examination, emerged in its wake.\textsuperscript{19}

This thesis unearths the form and function of the oath system in early modern English criminal proceedings. It focuses particularly on the use of oaths in criminal trials at the Old Bailey, London’s central criminal court, owing to the number of accessible case reports surviving from that court. It begins by setting the scene: detailing how oaths functioned in general in early modern English society, what prior scholars have said about their role in the legal system, and what sources we have available to us to learn more about them. It then moves on to specific arguments about the operation of the oath system. First, it details how the oath system regulated who could testify in criminal proceedings. Because judges had the power to forbid or qualify certain witnesses’ testimony based on their competency (or lack thereof) to swear an oath, inability or unwillingness to swear an oath often disqualified a witness from testifying. Second, it details how the oath system regulated what witnesses could testify about. The oath system largely limited witnesses to testifying about things of which they were certain because they did not want to risk damning themselves. Finally, it details some of the impacts of the oath system on criminal proceedings as whole: how it led to a high acquittal rate, frustration with its limitations, and ultimately a new system for regulating witness testimony altogether.

\textsuperscript{15} See infra, pp. 37.
\textsuperscript{16} See infra, pp. 39-40.
\textsuperscript{17} See infra, pp. 38.
\textsuperscript{18} See infra, Part IV.
\textsuperscript{19} Id.
My object is to depict the oath system as it existed in a particular moment in time. For the most part, my claims are not developmental, although the oath system certainly existed in relation to elements of criminal trials that came before and after it. While the use of oaths in criminal proceedings long outlasted the eighteenth century, the late seventeenth and eighteenth centuries were unique in how thoroughly oath-taking structured criminal proceedings. It is my hope here to uncover at least part of that significance.

I. **Oaths in Law and Society in Early Modern England**

A. **Oaths in English Public Life**

Oaths were a central part of early modern English public life. *The Book of Oaths*, an anonymous 1649 publication, lists over 400 standard-form oaths. The oaths of members of every level of English society are represented in the book, from the King himself to the “Scavenger of London,” and holders of every public office in between—clerks, justices of the peace, and members of the privy council, to name a few. Oath-taking was so prolific in the seventeenth and eighteenth centuries that scholars have only begun to map out a typology of the kinds and uses of oaths in the period. For one thing, oaths were part of the ritual for taking public office; upon taking public office, an official would swear a particular oath, the content of which depended on the unique duties and obligations of the office. In other contexts, people swore to their sovereign, God, and all manner of other surrogates—“the stars in the firmament,”

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20 Legal disputes about the witness’s oath continued well into the 20th century. For an American context, see Gordon v. Idaho, 778 F.2d 1397 (1985) (holding that requiring a witness to raise his right hand and swear an oath or affirmation violated his sincerely held religious beliefs under the Free Exercise Clause).
21 The Book of Oaths and the Severall Forms Thereof, Both Antient and Modern (1649).
22 *Id.*
23 *See* e.g., *Shapiro, supra* note 1; *Lee, supra* note 3; Andrew Hadfield, *Lying in Early Modern Culture: From the Oath of Supremacy to the Oath of Allegiance* (2017).
24 *See* Lee, *supra* note 3 (discussing the oath-taking process for holders of public office).
“a lady’s foot,” or “Grimalkin the Rebel Cat.”

Oath-taking regulated even the business of butchers, brewers, and cooks, who were often sworn to sell at particular prices.

The function of the oath was to form a bond between the oath-taker and God. The oath breathed divine power into civil affairs. Per Caleb Fleming, an eighteenth-century polemicist, an oath was both a “solemn appeal to God” and “a judicial thing; designed for the use and service of civil society” that “gives a religious aid to human laws and good government.” The oath was “a religious act, but one necessary for civil society.” The oath-taker made either a promise or an assertion, that if broken or untrue would provoke God’s judgment. To call on God was to wager one’s soul; to break an oath could be to damn oneself to hell.

The extent to which individuals really believed that they jeopardized their souls by swearing false oaths is a matter of some debate. On one hand, oaths were so commonplace and used in such banal circumstances that writers would frequently comment on them with cynicism. The jurist John Selden reportedly claimed that “now Oathes are so frequent, they should be taken like pills swallow’d whole, if you chew them you will find them bitter, if you think of what you swear twill hardly goe down.” Similarly, Justice Twisden of King’s Bench wrote that “the world is divided between those who would swear to nothing and those who would swear to anything.” These comments have led some modern scholars to believe that the oath might not have had the metaphysical importance that other sources might indicate that it did—that is, to

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26 Shapiro, supra note 1 at 149.
27 Caleb Fleming, The Immorality of Prophane Swearing Demonstrated in a New Method and Without the Aid of Revelation 9 (1746).
28 Shapiro, supra note 1 at 151.
29 Compare id. (arguing that juries in criminal cases believed that witnesses could and did commit perjury, and were not absolutely compelled to tell the truth because of their oaths), with Fisher, supra note 9 (arguing that the oath played an important role as a “lie detector” in early modern criminal proceedings).
30 John Selden, Table Talk 113 (1696).
31 Shapiro, supra note 1 at 150.
doubt the reality of the threat of damnation for swearing a false assertory oath or breaking a promissory oath.\textsuperscript{32}

But the overwhelming weight of the evidence from the archives suggests that oaths were taken seriously, and that most individuals did believe that a false or broken oath had divine consequences. Sermons given before the assizes emphasized that perjurers risked damning themselves should they swear a false oath.\textsuperscript{33} During one assize sermon, John Tillotson (later Archbishop of Canterbury) reminded the audience that the oath was “the surest ground of Judicial proceedings and the most firm and sacred bond that can be laid upon all that are concerned in the administration of public Justice.”\textsuperscript{34} Evidence from the trials at Old Bailey suggests that trial participants largely believed in the metaphysical significance of the oath. In the 1743 trial of Amy Blathet for theft from Thomas Fox, a witness revealed that Fox had forced his wife, Mary Fox, into testifying falsely against Blathet.\textsuperscript{35} Mary Fox swore that she had seen Blathet perform the theft, but eventually recanted her testimony. She then despaired that her soul had been damned for her false testimony: “you Rogue,” she directed at her husband, “you have been the Ruin of me, Soul and Body, you have made me take a false Oath against poor Blathet, and I am afraid my Soul is damned for it.”\textsuperscript{36}

While commentators like Selden and Twisden might have noted that anyone would swear an oath for any reason, there is no evidence that anyone really doubted the power of the oath. If anything, comments like those that expressed anxiety about the frequency with which oaths were sworn comported with the lessons of sermons that emphasized the solemnity of the oath. Many

\begin{footnotes}
\item [32] See id. at 145.
\item [34] John Tillotson, The Rule of Faith 98 (3d ed. 1688)
\item [36] Id.
\end{footnotes}
broken oaths meant many damned souls. In short, while the evidence is not decisive, the view from the archives strongly indicates that most people in early modern England really believed themselves to be putting their souls at stake when they swore oaths.

Oaths were especially pervasive in criminal procedure. Legal tracts from the thirteenth century through the early modern period emphasized the importance of oath-taking to the law. Bracton’s *On the Laws and Customs of England*, compiled around the 1220s and 1230s, recounts the specific oaths that individuals charged with specific crimes would swear. Bracton includes, for instance, the standard oath of denial of someone accused of theft prior to a trial by battle:

> **Hear this, O man, whom I hold by the hand and who callest thyself . . . by thy baptismal name, that I am not a thief nor thy confederate in theft (or ‘robbery’ and the like) nor did I steal with thee such a thing at such a place (‘nor did we [together] commit such a robbery’ or whatever it may be) nor did I have such an amount as my share, so help me God etc.**

The third part of Coke’s *Institutes* notes that the word “oath” was derived from the Saxon word *eoth*, which contained several meanings: that it ought to be performed with a sacred and religious mind; that it signified law and right; and that it must be done with a just and rightful mind. Coke defines the oath in full: “[a]n oath is an affirmation or denial, by any Christian of any thing lawful and honest . . . calling Almighty God to witness that his testimony is true,” and that the oath is “sacred” and “deeply concerned with the consciences of Christian men.” In the fourth of his *Institutes*, Coke claims that an oath “ought to be accompanied with the fear of God and service of God, for the advancement of truth.”

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38 Edward Coke, 3 Institutes of the Laws of England 165 (1644).
39 Id.
Oath-taking had long been an important part, if not the keystone, of actual legal processes. From at least the high middle ages, oath-taking was the basis for resolving legal disputes.\footnote{See Stephen Landsman, \textit{A Brief Survey of the Development of the Adversary System}, 44 Ohio St. L.J. 713, 717-719 (1983).} Legal disputes in that period, from about the eleventh century, were resolved through one of several oath-centric procedures: the trial by battle, the wager of law, and the ordeal.\footnote{Id.} In each of those forms of dispute resolution, participants invoked God’s judgment on the dispute by swearing oaths.\footnote{See id.} The trial by battle, the wager of law, and the ordeal were premised on the notions that oaths would channel God’s will, and that God would intervene on behalf of the righteous party.\footnote{See id.}

In the trial by battle, combatants would swear oaths that their side of the dispute was correct, directly invoke the judgment of God on the dispute, and swear not to use sorcery in the course of the battle.\footnote{Id. at 717.} Participants understood that God would intervene on behalf of the just party.\footnote{Id. at 718.} In the wager of law, a party would swear a “precisely prescribed oath” and “produce a certain number of other persons, usually referred to as compurgators, to support his oath by making their own oaths.”\footnote{Id.} If the correct number of people swore oaths in support of the party, usually 11 or 12 witnesses, the party would win.\footnote{Id. at 718.} In the ordeal, a priest would administer an oath to a party, and then the party would undergo some sort of physical challenge (such as being burned with a hot iron) and certain physical signs as revealed by God would indicate whether that party was telling the truth (if, for instance, the party’s burn from the iron did not fester).\footnote{Id.}
In the medieval forms of dispute resolution, the swearing of oaths produced outcomes, not facts. They operated by the idea that God would intervene on behalf of the just party. Fact-finding was beside the point. There was no division between substance and procedure, nor fact and law. The trial by battle, the ordeal, and the wager of law all produced a legal victor—the winner of the battle, the party who produced the adequate number of sworn witnesses, the party who passed the ordeal—by circumventing fact-finding and turning directly to God’s judgment. In all three procedures, the oath was the mechanism through which participants invited God’s participation.

Later in the middle ages, legal dispute resolution grew increasingly sensitive to fact and evidence, but the oath nonetheless continued to be the intermediary between secular disputes and God’s judgment. In the earliest jury trials in the 12th and 13th centuries, juries heard no evidence and decided no facts at trial.\(^50\) Jury panels were assembled from local subjects, first to prepare indictments as grand jurors and later to decide questions of guilt as petit jurors.\(^51\) They were not “neutral and passive fact finders.”\(^52\) Rather, jurors in early jury trials apparently relied on God to guide them to the correct outcome by swearing their own oaths, and measuring their oaths against those of the trial participants.\(^53\) Although jurors may have collected some evidence on their own before trial, no actual evidence was presented at trial.\(^54\) The point of trial was to produce an outcome, not settle disputed facts.\(^55\) The earliest jury trials were “little more than another formal and inscrutable trial like ordeal and wager of law.”\(^56\)

\(^{50}\) Id. at 720-721.  
\(^{51}\) Id.  
\(^{52}\) Id. at 721.  
\(^{53}\) See Shapiro, supra note 1.  
\(^{54}\) Landsman, supra note 41 at 721-723.  
\(^{55}\) Id. at 721.  
\(^{56}\) Id.
Eventually, trials came to focus on fact-finding to settle legal disputes. Juries began to conduct their own investigations, and could present the results of those investigations at trial. Judges began crafting rules of evidence that limited the flow of information to the jury in response to the new introduction of factual evidence at trial. Later, in-court witness testimony began to replace juror investigation as the main source of evidence at trial. By the middle of the 17th century, juries looked entirely to in-court testimony to settle cases.

And yet, even in the late 17th century, the oath retained its dominance over criminal proceedings. Oaths were used in every kind of court—including at least the criminal courts, the common law courts, Chancery, the ecclesiastical courts, and Star Chamber. Virtually every participant in the legal process swore an oath at some point. Judges, lawyers, sheriffs, undersheriffs, grand jurors, trial jurors, and, of course, witnesses, all swore their own oaths. Witness oaths in particular influenced trial outcomes. When a witness was called to testify, the judge would certify that the witness was competent to swear an oath. If they were not, they were usually prohibited from testifying. Of the many oaths in criminal trials, then, the witness’s oath was probably the most significant—it had the power to radically alter case outcomes. Thus, it is ripe for historical examination.

B. Prior Scholarship on Oaths and Early Modern Criminal Courts

While certain legal historians have noted that oath-taking played some role in regulating witness testimony in early modern England, they have consistently neglected the extent to which

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58 Landsman, supra note 41 at 723.
59 Id.
60 Shapiro, supra note 1 at 152.
61 Id. at 148.
62 See infra, Part II.A.
63 Id.
oath-taking was the means of ensuring the veracity of witness testimony at trial. In his book on the Surrey assizes, J.M. Beattie mentions the oath in passing at several points. Discussing how the rules of evidence operated in late 17th and early 18th century proceedings, Beattie notes, for instance, that defendants were not permitted to give their own testimony under oath because, Beattie argues, the risk of the defendant committing criminal perjury was deemed too high.64 John Langbein frequently mentions the oath in his book on early modern criminal procedure, and gives some attention to its metaphysical power, but, like Beattie, does not ascribe much power to the oath itself in regulating witness testimony.65 Rather, Langbein seems to think of the oath as incidental to a set of evidentiary rules that developed from the emergence of defense counsel in criminal proceedings.66 Langbein believes that the rules of evidence in the eighteenth century arose from reasoned responses to particular exigencies posed by new trial circumstances67—not some overriding oath system.

Other scholars have examined the oath’s role in early modern criminal proceedings in more depth than Beattie or Langbein, but have altogether excluded analysis of how it regulated witness testimony, instead focusing on issues of whether trial participants really believed in their oaths and how juries responded to sworn testimony. In the work of legal history that probably gives the most significance to the oath, George Fisher argues that the oath did have real metaphysical power in early modern courts (that trial participants actually acted in response to the threat of swearing falsely), but focuses on how that belief affected jury decision-making in a general manner—not how it regulated testimony itself.68 Fisher notes that the oath posed

65 See Langbein, supra note 57 at 59 (noting that the defendant was not permitted to testify on oath), 73 (listing regulations on Quaker oath-taking), 266 (describing jury apprehension of unsworn testimony).
66 See id. at 178-251 (describing the rise of evidentiary rules and noting the oath’s presence but not emphasizing it).
67 See id.
68 See Fisher, supra note 9.
“legitimacy” concerns because of the risk of competing oaths, and thus that the “system” did not permit sworn conflicts, which “permitted the system to embrace an evidentiary presumption that all sworn evidence was truthful.”69 Fisher, then, shares the presumption that the oath had significant power in early modern criminal courts.70 But he only focuses on how oaths were received by the jury,71 not how oath-taking impacted witness testimony itself.

Similarly, James Oldham has written about the oath as one of two devices (along with the party-witness rule) that was “thought to aid the ascertainment of truth” in eighteenth-century English courtrooms.72 Oldham echoes Fisher’s belief that there were widely shared metaphysical beliefs in the power of the oath.73 Oldham also notes that the oath played some kind of role in limiting certain classes of witnesses from testifying, but does not elaborate on how the oath system regulated witness testimony, only going so far to prove that at some level it did so.74

Barbara Shapiro’s two-part analysis of the oath and legal process in early modern England is a particularly thorough examination of the issue, but occludes most analysis of evidentiary issues, and regardless argues that the oath did not have quite the metaphysical power that Fisher ascribes to it.75 Shapiro responds in particular to Fisher’s examination of the issue of “competing oaths,” arguing that juries were much more sensitive to evidence than Fisher suggests, and that a single sworn oath was not, as Fisher argues, always sufficient to secure a guilty verdict—meaning that there was not such a strong presumption that all sworn evidence was truthful.76 Shapiro notes several eighteenth century writers who questioned the prevalence of

69 Id. at 579-580.
70 See id. at 587-595.
71 See id.
73 See id. at 102 (quoting eighteenth-century sources on the power of the oath).
74 See id. at 102-107.
75 See Shapiro, supra notes 1, 33.
76 Shapiro, supra note 1 at 147.
oaths, quoting, for instance, a 1682 assize sermon that lamented that while oaths were the “only security” of witness and jury honesty, witnesses would nonetheless swear falsely “for gain, or to favour a friend, or to harry a foe.”77 In short, Shapiro argues that there was much less consensus about oaths’ power over the jury than Fisher believes, because juries were aware that oaths were not always truthful, and there were many jurists, writers, and lawyers from the day who were anxious about the overabundance of oaths.78

I think it is clear that Shapiro is correct that there was much anxiety about the frequency with which oaths were sworn, but there is no real evidence in her work to suggest that people did not believe in the divine consequences of swearing false oaths. It is one thing to say that juries believed that witnesses sometimes swore falsely—that is clear. It is another thing entirely to say that people did not believe that swearing falsely might damn them in the afterlife. Shapiro provides evidence of the former,79 but not the latter. The implication of that, and more generally of the exchange between Fisher and Shapiro on the power of the oath in early modern trials, is that while there may have been some doubt about whether everyone actually swore truthfully, there was no real doubt about the consequences of swearing falsely.

No scholar has in any depth called attention to the way that oaths structured who could testify and what about, which is my object here. To the extent that prior legal historians have talked about the regulation of witness testimony in early modern English criminal courts, they have focused on two things: the rules of evidence80 and the threat of prosecution for perjury.81

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77 Thomas Comber, *The Nature and Usefulness of Solemn Judicial Swearing with the Impiety and Mischief of Vain and False-Swearing* (1682), quoted Shapiro, supra note 33 at 42.
78 See Shapiro, supra note 1 at 147.
79 Shapiro, supra note 1 at 162 (“The positive oaths of witnesses were not necessarily to be believed.”)
81 See, e.g., Fisher, supra note 9 at 606 (describing how perjury was not often conceived of as a means of regulating witness testimony).
Only a small number of historians have hinted that the oath itself regulated witness testimony.\textsuperscript{82} Indeed, there were some general principles, if not formal rules, of evidence in early modern England.\textsuperscript{83} Familiar rules like the prohibition against hearsay were already in place in the eighteenth century.\textsuperscript{84} Clearly, those rules had an impact on what witnesses could testify about. But when prior scholars have discussed the rules of evidence in early modern England, they have neglected to examine the extent to which the oath system helped shape them, instead describing rules of evidence as things rationally shaped by judges and lawyers.\textsuperscript{85} As I discuss below in Part III, the oath system influenced the rules of evidence themselves.

As for perjury, it did exist as a criminal offense in early modern England, but had very little power over witnesses.\textsuperscript{86} Prosecutions for perjury were rare, and convictions rarer.\textsuperscript{87} Judges were certainly attuned to the threat of perjury. As a late eighteenth century judge told a defendant as he sentenced him for perjury: “of all crimes, Perjury is the most dangerous to society. It perverts justice—it unhinges the law—it destroys liberty and property—and in the practice of the court, it is a most dangerous evil.”\textsuperscript{88} In fact, at one point in the late eighteenth century a group of judges gathered in Lord Mansfield’s chambers and proposed a bill that would render perjury a capital crime.\textsuperscript{89}

\textsuperscript{82} See, e.g., Fisher, supra note 9 at 580 (“In the early years of the criminal trial jury, the system sought to stake its claim to legitimacy primarily in the oath and in the perceived divine power of the oath to compel truthful testimony.”); Beattie, supra note 64 at 348-349 (discussing the party-witness rule); James Oldham, \textit{Truth-Telling in the Eighteenth Century English Courtroom}, 12 Law & Hist. Rev. 95 (1994)

\textsuperscript{83} See, e.g., Langbein, supra note 57 at 178-251

\textsuperscript{84} See id. at 233-346.

\textsuperscript{85} See id. (stating that the rules of evidence were a “response to the dangers that emerged from prosecutorial practice” in the eighteenth century, and that the individual rules that developed in particular cases “ultimately coalesced into a body of law . . .”); Langbein, supra note 80 at 1172 (“[T]he central event in the formation of the modern law of evidence was the rapid development of adversary criminal procedure . . .”).

\textsuperscript{86} See Oldham, supra note 72 at 103 (“[T]here was no systematized means of dealing with perjury in the courtroom. The ‘threat’ of perjury prosecution was largely impotent as a counterforce to the abuses of witnesses-for-hire and bail-for-hire.”).

\textsuperscript{87} Id. at 99-100.

\textsuperscript{88} Id. at 99.

\textsuperscript{89} Id. at 99-100.
Perjury convictions were rare for the same reason that produced many other acquittals—the oath system demanded direct testimonial evidence that the defendant had lied, and there were few cases where it could be proved that a witness lied under oath without testimony made impossible under the oath system. In many cases, a defendant would be indicted for perjury but no witnesses would appear, and the defendant would be promptly acquitted for lack of evidence.\textsuperscript{90} In other cases, a witness would introduce evidence that the defendant had provided incorrect or internally inconsistent testimony, but the jury would acquit the defendant for lack of evidence or lack of something resembling \textit{mens rea}.\textsuperscript{91} In the 1721 trial of Amey Peasy for submitting contradictory evidence as a witness, Peasy was acquitted in spite of apparently dispositive affidavits that proved she had provided inconsistent testimony.\textsuperscript{92} A 1724 jury acquitted Mary Maddcoks of perjury because, although she submitted an affidavit with minor discrepancies from her testimony at trial, there was no evidence that she had committed “wilful \textsuperscript{sic} and corrupt Perjury.”\textsuperscript{93} In short, perjury prosecution was “far from effective as a deterrent to lying in the courtroom.”\textsuperscript{94}

C. Source Materials

Early modern English courts, lawyers, and judges left behind a rich archive of materials from which historians have been able to reconstruct a remarkable portrait of the law in that

\textsuperscript{92} Id.
\textsuperscript{93} R. v. Maddcoks (1724), https://www.oldbaileyonline.org/browse.jsp?id=t17241204-90&div=t17241204-90
\textsuperscript{94} Oldham, \textit{supra} note 72 at 100.
We have available to us treatises, case reports, judges’ and lawyers’ notes and journals, literary portrayals of trials, and newspaper accounts, among other sources. But these sources have provided us with a relatively thorough view of one kind of law, and an underdeveloped view of another. Our sources allow us to say a lot about law’s black-letter substance and procedure. With respect to the topic of this thesis, we can read treatises, case reports, and statutes about evidence and witness testimony in criminal courts, giving us a good idea about the formal rules governing criminal procedure. We can extract from the archives a clear picture of what the doctrinal “law” was as judges and practitioners understood the law.

Much harder to extract from the archives is an understanding of the unwritten, informal aspects of the law—the customs and social practices surrounding it. This thesis is concerned with how the oath system affected witness testimony: who could testify and what about. For the most part, that is not the stuff of treatises, statutes, or case law. It was not really recognized as “law” by lawyers and judges of the seventeenth and eighteenth centuries. Oaths were widely understood as essential components of the criminal trial, but jurists did not theorize them to be regulating witness testimony in a legal sense.

Legal historians writing about criminal law and procedure in early modern England have tended to focus on that earlier kind of evidence in the archives, the black-letter rules in cases, statutes, and treatises—the formal “law.” But we could only begin to understand how witness testimony actually worked by solely looking to sources that describe the doctrine of the rules of

95 For some of the most important works in early modern criminal law and procedure, see Beattie, supra note 64; Langbein, supra note 57; J.M. Beattie, Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror (2001); Peter Linebaugh, The London Hanged: Crime and Civil Society in the Eighteenth Century (1991).

96 See supra notes 37-40 and accompanying text.

97 See, e.g. Langbein, supra note 57 (focusing on rules of evidence and elements of criminal procedure understood as such); Beattie, supra note 64 (same, with the addition of discussing substantive criminal law). Generally, the literature on early modern English criminal law is enormous. See also J.M. Beattie, Policing and Punishment in
evidence. To that end, this thesis makes extensive use of the best archive available for understanding how oath-taking affected witness testimony: the Old Bailey Sessions Papers.

The Old Bailey Sessions Papers were published accounts of criminal trials held at London’s central criminal court, the Old Bailey. They were first published in 1674 by private London printers that were licensed by the City to report on the court’s proceedings. They were sold as individual pamphlets after each session of trials, once every six weeks or so. They also appeared in most of the city’s leading periodicals alongside news reports, sermons, and literary works from the likes of Jonathan Swift and Alexander Pope. They were intended for literate middle- and upper-class consumption. They were not case reports in the modern sense, nor were they full, verbatim recollections of the trials, at least at first. Because the Sessions Papers were a commercial venture, market pressures impacted their scope and content. They focused heavily on scintillating details of murders, robberies, and thefts. They also often served a function in religious didacticism. The Sessions Papers, along with their sister publication, the Ordinary of Newgate’s Accounts (which recollected the confessions and final speeches of prisoners set to be executed at the Tyburn gallows), were laden with religious overtones meant to discourage readers from committing crimes and sinning.

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99 Shoemaker, supra note 98 at 559.
100 Id.
101 Id. at 563.
102 Id.
103 See Langbein, supra note 57 at 183-189.
104 Shoemaker, supra note 98 at 563.
105 Id.
106 Id. at 577-579. See also James Guthrie, *The Ordinary of Newgate, His Account of the Behaviour, Confession, and Dying Words of the Malefactors, Who Were Executed at Tyburn* (1732); Linebaugh, supra note 95 (discussing the execution practices at Tyburn and the Ordinary’s role).
Nonetheless, historians have gleaned important insights about the criminal law and procedure of the day from the Sessions Papers.\(^{107}\) But historians have also been closely attentive to their limitations.\(^{108}\) Although the Sessions Papers are largely regarded as accurate accounts of what happened at the sessions, they omit much.\(^{109}\) Especially in the early days of their publication towards the end of the 17th century, the case reports were nothing more than a summary description of the charge, verdict, and evidence presented in each case.\(^{110}\) Over the course of the 18th century, the Sessions Papers grew longer and less editorialized.\(^{111}\) They began to report witness testimony verbatim, and lawyers and judges gradually came to regard them as semi-official sources of law.\(^{112}\) By the 1730s, the reports began to narrate full question-and-answer sequences between prosecutors or judges and witnesses.\(^{113}\) By the 1780s, the Sessions Papers had shifted away from “lay literature” and toward “officially sponsored quasi law reports.”\(^{114}\) But there are still significant interpretive problems with reports from the later 18th century. One particular issue with comparing reports from the 17th century with reports from the late 18th century is sorting out what was a change in actual trial procedures and what was simply a change in reporting practice. Did witnesses actually give a greater volume of testimony later in the 18th century, or do the Sessions Papers just report more of it? In Professor Langbein’s words,


\(^{108}\) See Langbein, \textit{supra} note 57 at 183-189.

\(^{109}\) Id.

\(^{110}\) See, e.g., Anonymous Case Report for Infanticide (1676) (recounting barely more than that “A Woman was tried for murthering [sic] her Child” and that “She was found guilty by the Jury according to an Act of Parliament . . .”), https://www.oldbaileyonline.org/browse.jsp?id=t16760405-8&div=t16760405-8; Anonymous Case Report (1674) (saying no more than that a defendant was sentenced to hang for robbing a man on the King’s Highway), https://www.oldbaileyonline.org/browse.jsp?name=16740429.

\(^{111}\) Shoemaker, \textit{supra} note 98 at 561.

\(^{112}\) See \textit{id}.


\(^{114}\) Langbein, \textit{supra} note 57 at 183.
using the Sessions Papers is a “perilous undertaking,” but they are still “probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the later eighteenth century.”

II. How the Oath System Regulated Who Could Testify in Criminal Trials

One of the most prominent functions of the oath system in the late 17th and early 18th centuries was its regulation of who could testify at trial. The amount of space that case reports from the era dedicate to explaining whether and why witnesses were qualified to swear an oath is notable. The Sessions Papers from the late 17th and early 18th centuries are generally quite succinct, usually recounting no more than a third-person summary of each witness’s testimony. Very few direct transcriptions or first-person paraphrases of witness testimony are present in the early reports. However, the certification of witnesses’ ability to swear an oath is an exception to the general brevity of the reports. In many cases from this period, the reports detail what appear to be near-transcriptions of judges’ examinations of witnesses' ability to swear oaths, even when the same reports detail no other specific testimony at length (only providing a brief overview of the substance of the witness’s testimony).

For example, a 1736 report of the trial of one Richard Swift for violent highway robbery suggests that a small handful of witnesses provided testimony at trial. A few of these witnesses’ testimony (from witnesses who provided character evidence for the defense) is altogether excluded, either in verbatim or summarized form (the report only notes that “Several Persons appear’d to his Character.”). The report includes, but only in brief summary,

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115 Id. at 190.
117 See id.
119 Id.
testimony of two witnesses who observed the events in question.\textsuperscript{120} The judge’s voice only appears at one moment, which the report includes in direct-transcription format, to swear in a 14-year old witness, a boy named Thomas Holt:

Thomas Holt. I am 14 Years of Age.
Q. What Notion have you of an Oath?
Holt. If I don’t speak truth, I shall go to Hell.\textsuperscript{121}

The report singling out this one moment from the trial to report in question-and-answer, transcript-like format speaks volumes about the significance of the judge’s determination of who was qualified to take the oath. These moments were important enough to warrant transcription of a different kind. The judge permitted Holt to swear the oath, and the report details his testimony from there in the same manner that it does the other witnesses who directly observed the events in question: in brief summary.\textsuperscript{122}

Holt’s case was far from exceptional. Across the late 17th and throughout the 18th century, the reports routinely transcribe such exchanges between the judge and witnesses on witnesses’ ability to take the oath.\textsuperscript{123} These colloquies were not mere formalities; judges regularly refused to allow witnesses to testify because they could not be allowed to swear an oath.\textsuperscript{124} There were several kinds of witnesses who judges would refuse to allow to testify, or only allow to testify unsworn: children, the defendant, interested parties, people deemed untrustworthy, and religious minorities, at least. The reasons varied that these categories of people were not allowed to swear, or only allowed to swear in certain circumstances.

\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
A. **Children**

As in Holt’s case, judges frequently questioned children’s ability to testify at trial. There are many examples from the *Sessions Papers* of judges questioning proposed child witnesses’ religious education before determining whether they could swear and testify.125 Sometimes, the reports were quite blunt in recollecting these colloquies; after a judge asked a child named Edward Haines whether he knew “the Nature of an Oath,” Haines responded that “Yes; I should not take a false Oath against any Body, if I go, I shall go to Hell; the Devil will have me, and I shall burn in Fire and Brimstone forever.”126 In other cases, the report included a more detailed colloquy. In the 1771 case of Christopher Moreton for stealing some clothes and small bank notes, the judge called as a witness a young man named John Morris, who had allegedly seen Moreton steal the items and who Moreton had paid to keep quiet.127 Before the judge examined Morris on the facts, he questioned him at length about his religious and moral education:

  - Court. How old are you?
  - Morris. Almost thirteen.
  - Court. Can you read?
  - Morris. No.
  - Court. Do you know what religion you are of?
  - Morris. No.
  - Court. Do you know the commandments?
  - Morris. No.

Court. Do you know whether there is any religion in the world?

Morris. No.

Court. Did your mother ever send you to school?

Morris. No; she keeps a green stall and cannot afford it.

Court. Do you know good from evil?

Morris. No.

Court. Do you know what will be done to you if you tell a lie?

Morris. No.

Court. Do you know anything about heaven or hell?

Morris. I have heard people talk about heaven; but I know nothing at all about it.

Court. Consider now, when upon your oath, which is the most solemn engagement between God and your soul, if this young man should be hanged for what you shall say, and you should tell a lie what will become of you?

Morris. I believe I should go to hell . . . .

Court. A very proper answer, tho' I think I never saw so much ignorance in a boy of thirteen years old: but I shall take an opportunity to speak to him. Swear him (he is sworn.).

Cases such as Morris’s indicate one of the reasons judges would first certify whether children were qualified to take the oath: the risk of the child damning their own soul if they were to swear falsely. Although these colloquies on the child’s religious education regularly ended with the judge disallowing their testimony, there were plenty of cases—such as Morris’s—where the judge, even after determining that the child had minimal religious education, allowed the child to

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128 Id.
testify under oath anyway. The existence of such cases where the judge determined that the child had only little understanding of the solemnity of the oath but nonetheless permitted the child to testify might indicate that judges did not always view themselves as gatekeepers for the child’s soul, at least against the countervailing interest of having the prosecution go forward (especially given the number of cases where the entire case rested on the testimony of a single eyewitness).

But when a child witness could not be sworn in because they were unqualified to take an oath, even if that witness was the only witness and would otherwise have dispositive testimony as to the defendant’s guilt, the Old Bailey judges usually did not appear to have been reluctant to let the defendant walk free because no testimony could be presented to the jury. In the case of Elizabeth Bont for petty theft, the only witness, a boy of about twelve named William Bingham, could not be sworn in because he did not know the “Nature of an Oath,” and Bont was promptly acquitted.

Similar cases where the prosecution’s case rested on a child witness’s testimony that was disallowed for insufficient religious education and the defendant was thus acquitted appear with some frequency in the Sessions Papers. This disposition was especially common in prosecutions for sex crimes committed against children.

The problems invoked by child witnesses’ occasional inability to testify on oath ultimately catalyzed explicit judicial and statutory developments in the law. Judges would

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132 These cases have inspired a small literature on the prosecution of sex crimes at Old Bailey. See generally Antony Simpson, Vulnerability and the Age of Female Consent: Legal Innovation and Its Effects on Prosecutions for Rape in Eighteenth-Century London, in Sexual Underworlds of the Enlightenment 181 (1987); Langbein, supra note 57 at 198, n. 102.
133 See cases discussed supra, note 132.
occasionally permit child witnesses to give testimony but not under oath, until a 1775 decision forbid the practice—requiring all witness testimony to be under oath. After that time, judges appear to have permitted child witnesses to swear the witness’s oath more frequently.

B. The Defendant and Defense Witnesses

The oath system also limited the testimony of the defendant. Defendants were forbidden from providing testimony under oath in English criminal trials until the end of the nineteenth century. In the late seventeenth and early eighteenth centuries, defendants were permitted to testify, but they could not swear to what they said. The rationale for prohibiting defendants from testifying was ostensibly to protect the defendant’s soul. Similarly to how children were thought unfit to swear oaths because they had insufficient knowledge of the punishment for swearing a false oath, defendants were thought too likely to swear falsely because of the risk of a conviction to their mortal bodies (that is, they had an incentive to lie to avoid conviction). The rationale was not that defendants were thought simply unreliable, but that their unreliability might threaten their souls. As with regulating child witnesses’ testimony, judges’ exclusion of sworn defendant testimony was a practice in religious paternalism.

Although the oath system did not prohibit defendants from testifying altogether, their inability to give sworn testimony greatly reduced their credibility with the jury. There are many

135 R. v. Powell, 168 Eng. Rep. 157 (1775) (“[I]n criminal cases no testimony can be received except upon oath.”).
137 Langbein, supra note 57 at 52.
138 Id. at 51-53.
140 See id. Langbein, supra note 57 at 51-53.
141 Langbein, supra note 57 at 52 (“After 1702, although defense witnesses testified on oath, the defendant continued to be disqualified from testifying, ostensibly to spare him from being put to the choice of defending himself and damning his soul by committing the sin of perjury.”).
cases in the *Sessions Papers* with a similar structure: the word of one sworn prosecution witness versus the unsworn testimony of the defendant.\(^{142}\) These cases often resulted in guilty verdicts, and the reports regularly attributed the verdict to the fact that the prosecution witness’s testimony was “fully sworn.”\(^{143}\) The prohibition against giving sworn testimony, which was meant to protect defendants’ souls, ended up making convictions more likely.

The oath system also regulated the testimony of defense witnesses. In seventeenth century criminal trials, witnesses called for the defense were forbidden from testifying under oath.\(^{144}\) A manual for justices of the peace from the early seventeenth century says that assize judges “will often hear Witnesses and Evidence which goeth to the clearing and acquittal of the Prisoner, yet will not take [it] upon oath.”\(^{145}\) The Hale Commission of the mid-seventeenth century proposed a statute allowing “credible witnesses produced by the prisoner . . . to deliver their testimonies upon oath,”\(^{146}\) but it was not until the end of the seventeenth century, as part of reforms passed as part of the Treason Trials Act of 1696, that defense witnesses could testify under oath, and not until 1702 in felony cases.\(^{147}\)

The prohibition of defense witnesses in criminal cases has sometimes been discussed as the criminal analog of the party-witness rule in civil cases (in fact, some scholars have referred to the prohibition on defense witnesses itself as the “party-witness rule,” eliminating any distinction between the civil and criminal versions).\(^{148}\) The party-witness rule in the eighteenth century


\(^{143}\) E.g., *R. v. Vaughan* (1690) (where the report’s only recollection of the evidence was that prosecutor’s testimony was “fully sworn against her, so she was found Guilty.”).

\(^{144}\) Langbein, *supra* note 57 at 51-52.


\(^{146}\) Several Draughts of Acts, in 5 Somers’ Tracts. 177 (1653).

\(^{147}\) Langbein, *supra* note 57 at 52.

\(^{148}\) Oldham, *supra* note 72 at 107.
English courtroom prohibited parties interested in the stake of the litigation from testifying at trial. It was first used in civil cases in the sixteenth century, and criminal cases later in the seventeenth. Wigmore believed the rule was the product of the evolution of older modes of dispute resolution, especially the wager of law, while contemporary scholars have mostly understood the party-witness rule to be based on the notion that interested parties were more likely to commit perjury. The evidence from the Sessions Papers suggests that the oath system played at least as significant of a role in justifying and maintaining the party-witness rule in criminal cases as the threat of perjury did. Despite the early eighteenth century statutes allowing defense witnesses to give testimony under oath, judges at Old Bailey continued to occasionally exclude their testimony on a case-by-case basis.

C. Unreliable Witnesses

There was also a category of witnesses whose testimony was excluded because they were thought simply unreliable for personal reasons—especially those who had been accused or convicted of other crimes. In the 1735 case of William Fidzar, for instance, the prosecutor’s sole witness, a prisoner named Richard Moore, was not admitted to be sworn because Moore himself had been charged with illegally returning from transportation, and the jury acquitted Fidzar because no evidence was introduced. As with potential witnesses whose testimony was excluded due to the party-witness rule, Moore’s testimony does not appear to have been excluded because he was simply unreliable, but because his unreliability would threaten his soul if he were sworn in. The Report indicates that Moore could not testify because he was not

149 Id. at 107-113.
150 Id. at 107.
151 Id.
sworn—not that he could not swear because he could not testify.154 A similar issue arose in the 1730 trial of Thomas Hassel, who objected to the testimony of a witness who had been recently indicted for perjury, but had not yet been convicted.155 In that case, the debate again centered around whether the witness was qualified to swear the oath, not whether he could testify per se.156

D. Religious Minorities

The final major group whose testimony was disallowed, qualified, or withheld because of the oath system were religious minorities. The oaths taken at Old Bailey were of an essentially Protestant sort, and the swearing of oaths in English society more generally was a predominantly Protestant practice.157 Although Protestants might have made up a majority of the participants in Old Bailey criminal trials, every community in London participated in the court’s processes. Evidence from the Sessions Papers indicates no less than Catholics, Muslims, Jews, Hindus, Buddhists participated in criminal trials at some point as prosecutors, defendants, or witnesses.158 The various doctrinal perspectives on oath-taking within those religions, and especially the Old

154 Id. (“[T]he Court being inform’d that a Bill was found against More for returning from Transportation, he was not admitted to be sworn: And then there being no Evidence to fix the Fact on the Prisoner, the Jury acquitted him.”).
156 Id.
157 Exemplified most clearly in the post-Reformation Test Act oath against the doctrine of transubstantiation that "there is not any transubstantiation in the sacrament of the Lord's Supper." Test Act of 1673, 25 Car. II. c. 2. See also Andrew Hadfield, The Religious Culture of Lying, in Lying in Early Modern English Culture: From the Oath of Supremacy to the Oath of Allegiance 115-157 (discussing various Catholic and Protestant doctrines on lying and oath-taking).
Bailey judges’ perspectives on the fitness to take the oath of individuals of minority religions, shaped the amount and scope of witness testimony in criminal trials.

i. **Quakers**

Quakers in particular appear regularly in the *Sessions Papers*. Because refusing to swear oaths was a core tenet of Quakers’ belief system, whether and to what extent they were able to participate in the legal process (centered as it was on oath-taking) was constantly in question. Numerous case reports from the *Sessions Papers* recount narratives where a Quaker victim was unable to bring a successful prosecution because they could not swear to what happened to them, and the judge would not allow them to give testimony unsworn. There were also cases where Quakers could not act as witnesses because they could not give sworn testimony. In some cases in the late seventeenth century, Quaker witnesses were prosecuted for refusing to testify. Such was the case in William Brayn’s 1678 trial for theft where the only available witness, Ambros Galloway, refused to take the oath because he was a Quaker. Brayn was acquitted, but Galloway was indicted as a “concealer of Felony, for refusing an Oath to Witness for the King.”

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164 Id.
In response to cases like Galloway’s, Parliament passed a series of acts at the end of the seventeenth century to allow Quakers to give unsworn testimony in courtroom proceedings.\footnote{White, supra note 160 at 420-422.} In a non-courtroom example from 1688, Parliament passed as part of the Act of Toleration a provision “for the relief of the people commonly called Quakers” that allowed them to substitute a “declaration of fidelity” for the usual oath of allegiance sworn to the sovereign.\footnote{Act of Toleration, 1 Wm. & Mary c. 18 (1688).} Eight years later, in 1696, Parliament passed another act that permitted Quakers to testify “on affirmation” rather than on oath in certain courtroom proceedings.\footnote{7 & 8 Wm. & Mary c. 34 (1696).} But testifying “on affirmation” in the 1696 version of the affirmation was still problematic for Quakers because it contained a reference to God, so Parliament passed a revised statute in 1721 removing references to God, which then permitted Quakers to take a purely secular statement “on affirmation” in the courtroom.\footnote{Quakers Act, 8 Geo. I c. 6 (1721).} The exception made for Quakers to testify on affirmation was unprecedented. Jeremy Bentham noted that Quakers were roundly regarded as the “most truthful” inhabitants of England, so they could be trusted to testify without swearing.\footnote{White, supra note 160 at 421.} Bentham’s statement illustrates that the oath was meant to ensure the veracity of witness testimony, and only in the presence of some extraordinary overriding circumstance—Quakers’ apparent inherent truthfulness—could a witness be allowed to give unsworn testimony.

ii. “Infidels”

Relying on oath-taking to regulate the veracity of witness testimony posed a vexing problem in some cases: should the court permit “infidels” and “savages”—i.e., non-Christians—to testify? If the oath was sworn upon the Bible, could non-believers be trusted to tell the truth if
they did not believe that their souls might be damned in the afterlife? Judges and lawyers were keen to the problem; debates about it appeared several times in the reports from the Old Bailey in the eighteenth century.\textsuperscript{171} While there has been some minimal historical examination of non-Christians’ ability to swear oaths in civil cases,\textsuperscript{172} there has been no prior examination of the oath-taking of non-Christians at Old Bailey,

In fact, there were no clearly fixed rules for the admission of non-Christians at Old Bailey, but judges were certainly aware of the issue, and debates about the testimony of non-Christians take up considerable space in several case reports.\textsuperscript{173} What eventually evolved was a system in which non-Christians could give testimony on the condition that they swore an oath under the custom of their own religion, even if oath-taking was not a customary part of their own religion. But questions about the reliability of non-Christians’ sworn testimony remained, and there is evidence in the reports to suggest that jurors heavily scrutinized non-Christians’ testimony when rendering verdicts.\textsuperscript{174}

The late 1786 trial of William Bartlett exemplifies debates about the “infidel” problem. Bartlett was indicted for pickpocketing a silver watch from prosecutor John Williamson.\textsuperscript{175} Williamson called John Rasten, an alleged eyewitness, to testify.\textsuperscript{176} But Rasten had a disability that made him unable to express himself clearly through speech, although he was evidently able to perceive and understand things and communicate them through the interpretation of his

\textsuperscript{171} See, \textit{e.g.}, R. v. Bartlett (1786) (discussed \textit{supra}), https://www.oldbaileyonline.org/browse.jsp?name=17860111; R. v. Ryan (1765) (Muslim prosecutor swearing on the “Alcoran” admitted to testify), https://www.oldbaileyonline.org/browse.jsp?name=17650227; R. v. Rose (1727) (recounting the trial of a prosecution brought by “John Humphreys, a Black” where the defendant pleaded to the Court to discount the prosecutor’s testimony because he “was but an Infidel.”).
\textsuperscript{172} See, \textit{e.g.}, Jonassen, \textit{supra} note 160 at 313-314.
\textsuperscript{173} See cases discussed \textit{supra} note 171.
\textsuperscript{174} \textit{See infra} p. 40.
\textsuperscript{176} \textit{Id.}
sister.\textsuperscript{177} The defense counsel, Mr. Garrow, objected to Rasten giving testimony on the basis that he was an “infidel” and “savage”—unable to understand and communicate Christian ideas of “reward and punishment.”\textsuperscript{178} The problem was not, Mr. Garrow’s objection suggests, that Rasten’s testimony would be unreliable or unclear because of his disability per se, but because he was not “competent” to take the oath.\textsuperscript{179} He was not competent to take the oath, Garrow argued, because he could not be ascertained to understand the metaphysical consequences of swearing a false oath.\textsuperscript{180}

In objecting to Rasten’s testimony, Garrow asked his sister: “you have no doubt you can communicate to him the nature of an oath?”\textsuperscript{181} Yes, she could communicate the nature of the oath to him, she replied.\textsuperscript{182} Nonetheless, Garrow proffered to the court:

[T]here is a certain degree of rationality about him, therefore he does understand some simple ideas; but the evidence does not prove that he has any idea of complex ideas . . . [H]e has an idea of the Christian System [but] it is impossible, my Lord, that he has more ideas of that Complex System than that which a common savage has.\textsuperscript{183}

Garrow continued to explain what separated the religious knowledge of a person fit to be sworn from that of a “common savage”:

[The “common savage”] is taught that there is religion to which he ought to be obedient and that there is a state of rewards and punishments so far as they may communicate to him on the score of natural religion, [but that] this man to can receive no ideas but thro’ these mere Organs should have taken in the vast complicated system of religion, [such] that he should have imbibed the notion of all the happiness [and] all the Punishments that belong to its notaries is not to be credited.”\textsuperscript{184}

\textsuperscript{177} \textit{Id.} \\
\textsuperscript{178} \textit{Id.} \\
\textsuperscript{179} \textit{Id.} \\
\textsuperscript{180} \textit{Id.} \\
\textsuperscript{181} \textit{Id.} \\
\textsuperscript{182} \textit{Id.} \\
\textsuperscript{183} \textit{Id.} \\
\textsuperscript{184} \textit{Id.}
In other words, Garrow argued that Rasten could not be sworn because he had no notion of the “complex” divine consequences of swearing falsely, only a simple notion that there was some punishment for doing so. That ignorance of “complex” ideas of Christianity, Garrow argued, made Rasten no different than a “common savage” or “infidel” in the eyes of the law: “Take an Infidel and bring him here, take somebody who does not believe in a God, [would] your Lordship examine him? By what sanction temporal or eternal could you bind him?”

The judge ultimately admitted Rasten to testify, holding that he agreed with the underlying principle behind Garrow’s argument—that some advanced understanding of “rewards and punishments” was necessary to take the witness’s oath—but that Rasten had met that standard, and was capable of understanding the oath and its consequences via his sister’s interpretation.

Garrow’s argument and the judge’s acceptance of the rule (if not its application in the particular case) echoed general sentiments about non-Christian witness testimony at Old Bailey in the eighteenth century. Non-Christians appear in the Sessions Papers with some frequency, especially later in the eighteenth century as the empire grew and immigrants and foreign sailors ended up in English courts. Historians writing on early modern criminal procedure have occasionally cited the 1744 Chancery case *Omychund v. Barker* as establishing the rules for whether and under what conditions non-Christians could swear oaths admissible in courtroom

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185 *Id.*
186 *Id.*
proceedings.\textsuperscript{188} Omychund held that individuals of any religion that believed in a God and a system of rewards and punishments were eligible to swear oaths, and that the oath could be sworn in a manner consistent with each individual’s custom.\textsuperscript{189}

Omychund, an Indian merchant, entered into a partnership with Barker, an employee of the East India Company, to sell goods.\textsuperscript{190} Omychund funded Barker’s purchase of the goods, and Barker sold them at a profit, but refused to pay Omychund his share.\textsuperscript{191} Omychund sued in the mayor’s court in Calcutta and won a judgment, but Barker fled before the judgment was final—and then died on the voyage back to England.\textsuperscript{192} So, Omychund sued Barker’s estate in Common Pleas, and a commission travelled to India to investigate the claim.\textsuperscript{193} There, the commission deposed several witnesses.\textsuperscript{194} The witnesses were of “Gentoo” (Hindu) faith, and backed Omychund’s claim.\textsuperscript{195} They were sworn according to Hindu custom (or at least what the commission believed to be Hindu custom).\textsuperscript{196} The commission’s report noted:

The several persons being before us, with a bramin or priest of the Gentoo religion, the oath prescribed to be taken by the witnesses was interpreted to each witness respectively; after which they did severally with their hands touch the foot of the bramin or priest of the Gentoo religion, being also before us with another bramin or priest of the same religion, the oath prescribed to be taken by the witnesses was interpreted to him; . . . the same being the usual and most solemn form, in which oaths are most usually administered to witnesses who profess the Gentoo religion, and the same manner in which oaths are usually administered to such witnesses in the courts of justice [in Calcutta].\textsuperscript{197}

\textsuperscript{188} See, e.g., Oldham, supra note 72 at 102; White, supra note 160 at 389-391.
\textsuperscript{189} Omychund v. Barker, 1 Atk. 22, 45-51 (1744).
\textsuperscript{190} Id. at 22.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
Back on review in England, the defense challenged the admissibility of the Hindu witnesses’ testimony on the basis that “as the law of England now stands, no oath can be administered to make a man a competent witness, but the oath upon the Evangelists”—that is, an oath made by a Christian.\textsuperscript{198}

The defense counsel, Tracy Atkyns, meticulously detailed the history of oath-taking in English legal proceedings, and various legal perspectives on non-Christians’ ability to swear the witness’ oath, starting with early legal tracts like Bracton, Britton, and Fleta.\textsuperscript{199} Atykns cited Fleta for the proposition that the oath was “the person’s affirming or denying a thing, with a solemn appeal to the sacred writings for the truth of what he said.”\textsuperscript{200} He cited Coke for the proposition that “[a]n oath is an affirmation or denial, by any Christian, of any thing lawful and honest . . . calling Almighty God to witness that his testimony is true.”\textsuperscript{201} He further channeled Coke: “So as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministered to any [non-Christians] unless the same be allowed by the common law, or by some act of parliament.”\textsuperscript{202} He also cited Coke for the principle that the oath “ought to be accompanied with the fear of God and service of God, for the advancement of truth” and thus that “an alien cannot be a witness, which is to understood of an alien infidel.”\textsuperscript{203} Finally, Atykns cited a number of cases more recent to his time from the common law courts holding that “infidels”—including “Jews” and “Turks” along with all others who did not share the “Christian

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\textsuperscript{198} Id. \\
\textsuperscript{199} Id. at 22-40. \\
\textsuperscript{200} Id. at 23. \\
\textsuperscript{201} Id., quoting Edward Coke, 2 Institutes of the Laws of England 165 (1681). \\
\textsuperscript{202} Id. \\
\textsuperscript{203} Id. 
\end{flushleft}
“religion”—could not swear oaths except perhaps pursuant to an express act of Parliament,\textsuperscript{204} referencing the act of Parliament allowing Quakers to testify discussed above.\textsuperscript{205}

The court, led by Chief Justice Willes, disagreed with Atkyns’ assessment of the case.\textsuperscript{206} The court held that non-Christians “out of necessity . . . must be allowed to swear according to [their] own notion of an oath.”\textsuperscript{207} The court acknowledged that the weight of the precedent, as Atkyns noted, was that oaths could only be taken by Christians.\textsuperscript{208} But the court assessed that the new exigencies of the empire and its commerce demanded a new rule.\textsuperscript{209} The oath, Wiles claimed, was not an exclusively Christian institution, saying that there were analogs in the world’s different religions: “[O]aths are as old as creation; look into sacred history, and you will find a variety of instances . . . .”\textsuperscript{210} All that was required of an oath was that the oath-taker had some idea of the “rewards and punishments” involved with the oath, and Wiles believed that such systems of “rewards and punishments” were widely present in the world’s religions.\textsuperscript{211} In the particular case, the court ordered that “the deposition of witnesses of the Gentoo religion, sworn according to their ceremonies, ought upon the special circumstances of this case to be read as evidence.”\textsuperscript{212} It was decided that the particular oath-taking process for a “Gentoo” would be to touch the foot of a Brahmin priest before testifying.\textsuperscript{213}

The \textit{Omychund} decision had widespread impacts on the administration of justice both in the English mainland and in its colonies. It led to the development of different procedures for

\begin{itemize}
\item \textsuperscript{204} \textit{Id.} at 32.
\item \textsuperscript{205} \textit{Id.} at 26.
\item \textsuperscript{206} \textit{Id.} at 45-51.
\item \textsuperscript{207} \textit{Id.} at 46.
\item \textsuperscript{208} \textit{Id.} at 45.
\item \textsuperscript{209} \textit{Id.} at 45-46.
\item \textsuperscript{210} \textit{Id.} at 45.
\item \textsuperscript{211} \textit{Id.} at 45.
\item \textsuperscript{212} \textit{Id.} at 22.
\item \textsuperscript{213} \textit{Id.}
\end{itemize}
adherents to non-Christian religions to swear oaths, or some analog thereof, therefore permitting them to give courtroom testimony. Nineteenth century statutes would later codify and expand its logic to further permit non-Christians and colonial subjects to testify in courtroom proceedings. But the exact extent to which the principles from Omychund applied in criminal proceedings at Old Bailey is unclear. On one hand, there is evidence of the Old Bailey judges enacting the kind of alternative oath-taking procedures imagined in Omychund. But on the other hand, there is also evidence that judges (and jurors) still retained doubts about non-Christians’ ability to testify truthfully.

There are several cases of witnesses in the Old Bailey reports going through the kind of oath-analogous process described in Omychund. Jewish witnesses swore on the “Pentateuch” (Torah). Muslim witnesses could swear on the Quran (or “alcoran” as it usually appeared in the reports), as in the 1765 prosecution of John Ryan by John Morgan, a Muslim:

The prisoners were committed the 5th of December, 1764, and as the prosecutor Morgan was a Mahametan, they were continued in gaol for the opinion of their Lordships the Judges, as to his being sworn upon the Alcoran, which was delivered in court, by Mr. Justice Gould, in which they were unanimous that he might be sworn.

John Morgan: I am a Mahometan.

Q. In what manner are people of your profession sworn?

214 Jonassen, supra note 30 at 319, n. 95.
215 See, e.g., 6 & 7 Vict., c. 22 (1843) (allowing colonial legislation permitting admissibility of testimony by non-Christian inhabitants); 17 & 18 Vict., c. 125 (1854) (permitting any witness with a religious objection to taking an oath to instead perform an affirmation of the words “I . . . do solemnly, sincerely, and truly affirm and declare, [t]hat the taking of any Oath is against my religious belief; unlawful, and I do also solemnly, sincerely, and truly affirm and declare etc.”); 32 & 33 Vict., c. 68 (1869) (permitting any person called to give evidence in any court of justice to state under penalty of perjury, “I promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.”); 51 & 51 Vict., c. 46 (1888) (extending the right to affirm rather than swear to atheists).
216 E.g., R. v. Jarvis (1788) (colloquy for swearing in a Black witness). See also Proceedings of December 10th, 1788 (including the same process for juror’s oath with respect to the oath-taking procedures of a Scottish juror).
217 Non-Christian prosecutors and defendants very frequently found themselves on the losing side of the proceeding.
218 See, e.g., Proceedings of December 10th, 1679, (“The Prosecutor and his Witnesses were Jews, and so were sworn on the Pentateuch.”), https://www.oldbaileyonline.org/browse.jsp?name=16791210.
Morgan: I touch the book, the Alcoran, with one hand, and put the other hand to my forehead; then I look upon it I am bound to speak the truth. (He is sworn upon the Alcoran).\textsuperscript{220}

Chinese witnesses were allowed to testify by affirming that they would tell the truth and then breaking a round plate. Such is illustrated in an 1804 case report:

( Erpune, the Prosecutor, being a native of China, Mr. John Anthony was sworn as an interpreter.)

Mr. Gurney. (To Anthony.) Q. You are yourself a native of China? - A. Yes.

Q. You have been educated in the Christian religion, and are a Christian? - A. I have been christened in the church of England.

Q. The prosecutor is a Chinese? - A. Yes.

Court. Q. How long have you been in England? - A. Since the American war, backwards and forwards.

Q. At what age did you leave China? - A. At eleven years old.

Q. What do you know, of your own knowledge, of an oath in China - did you ever see an oath administered in a Court of Justice there? - A. Yes.

Q. You have been at China since you were a man? - A. Yes.

Q. You are well acquainted then with the mode of taking an oath in the Courts of Justice there? - A. Yes.

Q. To whom do they make an appeal? - A. To the God they worship in that country; they break a saucer, and then they are told, your body will be cracked as that saucer is cracked, if you do not tell the truth.

Q. What is meant by his body being cracked - does it mean by the God they worship? - A. Yes, that is the meaning of the oath.

Q. You are quite sure that is the way of taking an oath in China? - A. Yes.

Mr. Gurney: Now administer the oath to him in the usual way in his own country.

(The oath was then administered to the prosecutor).\textsuperscript{221}

\textsuperscript{221} R. v. Alsey (1804), https://www.oldbaileyonline.org/browse.jsp?id=t18041205-56&div=t18041205-56.
While witnesses of non-Christian faiths were permitted to testify, juries seemed to have retained doubts about whether their oaths really had the same significance as those made by Christians. Acquittals were common where the prosecutor or a key eyewitness was sworn by a non-Christian oath. And, although their testimony was not given under oath, non-Christian defendants also had a bad run of luck at Old Bailey in the eighteenth century. The oath system might have formally opened the door to non-Christians to testify, but juror skepticism about how much their oaths really bound them seemingly remained.

III. How the Oath System Regulated What Witnesses Could Testify About

A. Oaths and Observational Testimony

The oath system did not just regulate who could testify at trial. It also regulated what witnesses could testify about. In general, the practice of oath-taking encouraged witnesses to carefully circumscribe their testimony around things of which they were absolutely certain, or else risk the penalty of swearing falsely. This typically meant that witnesses would limit themselves to first-hand, direct observations, and refuse to swear to anything of which they were less than certain, even if it was something that could relatively easily be inferred from what they had observed first-hand.

A 1676 trial for burglary of an unnamed defendant is typical. The defendant, only identified as a “young man,” was accused of stealing two flitches of bacon, several pounds of beef, a leg of pork, and some clothes from the prosecutor’s home. At trial, the judge swore in

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225 Id.
the first witness and began examining him. The witness swore that he had been with the defendant on the day of the theft at the very home where the theft occurred. The defendant had looked at the meat and commented how good it looked. The case report also mentions that the defendant had been convicted of similar crimes before, and that the bacon was found near his home, which was about two miles away from the prosecutor’s. But the witness’s testimony only went so far: while he was willing to testify to the circumstances that he had observed, he could not swear that he had actually seen the defendant steal the goods. The defendant was thus acquitted. The case report remarks that the acquittal was the result of the limited nature of that to which the witness could “make Oath”—what he had directly observed. Although the witness had basically observed everything he needed to draw the inference (as the case report makes clear), he could not draw the final inference because he had not directly observed the defendant steal the goods. Without that final inference, the jury found the evidence insufficient to convict the defendant.

Historians have noted the relatively high rate of acquittals in early modern criminal courts. Beattie’s study of the Surrey assizes from 1660-1800 revealed that juries acquitted a considerable number of defendants. Conviction rates at the Surrey assizes ranged from about 15% to 60% depending on the particular offense, with just under 50% of property offenses (by far the most common charge) ending in guilty verdicts. The conviction rate was slightly higher at Old Bailey, but acquittals were nonetheless very common. One study of conviction rates at

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226 Id.
227 Id.
228 Id.
229 Id.
230 Id.
231 Id.
232 Id.
233 Beattie, supra note 6 at 410.
234 Id. at 411.
Old Bailey from 1750-1825 reveals that conviction rates ranged from 51-69% for different kinds of offenses, with an overall conviction rate of 65%. These rates were much higher than conviction rates in later history at Old Bailey—the first half of the 19th century saw conviction rates rise to about 70-80%.

Explanations for the high acquittal rates of the late 17th and early 18th centuries have varied. The extremely limited number of sources on the subject have rendered jury decision-making a historical black box, so existing explanations for conviction rates are unsatisfactory and highly speculative. One explanation is that juries were reluctant to convict in some cases because of how frequently capital punishment was administered, and juries might have felt that death was an incommensurate punishment for the seriousness of some crimes. But that explanation does not account for the high acquittal rates even for offenses that did not carry the potential risk of capital punishment, including most property offenses. There is also some weak evidence that rising conviction rates in the 19th century might have had to do with greater pretrial magistrate scrutiny over whether the evidence was sufficient to bring a case to trial, meaning fewer weak cases were brought to trial. On the whole, however, historians have struggled to account for the number of acquittals in early modern criminal trials, or the jury decision-making that led to them.

We might then look to oath-taking as a partial explanation for the high number of acquittals. Evidence from the *Sessions Papers* strongly indicates that the practice of oath-taking

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236 Id.
238 Beattie, *supra* note 6 at 411.
239 Id. at 412.
240 Id. at 418.
241 See id. at 419; King, *supra* note 42, 394-399.
affected the rate of acquittals because swearing an oath limited the kind and scope of testimony that a witness could provide. Juries tended to convict only when a witness provided first-hand, observational testimony that they had seen the defendant commit the offense. That seems to be because direct, first-hand testimony was all that witnesses could give under oath. This notion of jury decision-making is not unprecedented in the literature—Beattie notes that “[d]irect identification on oath by the victim or an eye-witness,” i.e. “direct and positive proof” was usually necessary for a guilty verdict. But prior explanations have mostly occluded the oath’s role in providing or limiting that kind of evidence.

The evidence from the Sessions Papers underscores just how thoroughly the oath system regulated witness testimony. On one hand, a single eyewitness who could swear that they had directly observed the defendant commit the offense was often sufficient for a guilty verdict. On the other hand, where no witness could give such first-hand testimony, even where they could swear to circumstantial evidence that was highly probative of the defendant’s guilt, acquittals were the norm. Numerous reports note that a witness’s inability to swear an oath was dispositive in producing an acquittal. The 1685 trial of Johanna Lane for pickpocketing notes that she was arraigned for “picking the pocket of James Harvey” of some small change, but he “could not positively swear it,” so the jury “thought fit to acquit her.” The inability of prosecutors and other witnesses to “positively” swear that a defendant had committed an offense probably accounts for a large number of the reports where a defendant was indicted and summarily acquitted at trial because no evidence was admitted. If the prosecutor—often the

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242 Beattie, supra note 6 at 415.
243 See infra notes 267-269 and accompanying text.
244 See infra notes 264-266 and accompanying text.
only available witness—could not affirmatively swear to the defendant’s conduct, then there was no evidence for the jury to consider.

Because the oath system limited what witnesses could testify about to direct observations, juries relied on oath-taking as a requirement for guilty verdicts. The oath acted as a kind of procedural necessity for a guilty verdict. In this way, the early modern trial was not entirely different from the medieval forms of legal dispute resolution, especially the wager of law, that depended on the swearing of oaths to reach legal conclusions in the absence of underlying factfinding. The concepts of the burden of proof and reasonable doubt did not originate until the late 18th century, and historians have occasionally suggested that there were no analogs to those constructs in the late 17th or early 18th century. An explanation for this gap might be that the primacy of the oath system did not only regulate witness testimony per se, but also what was necessary substantively to reach a guilty verdict—i.e., sworn first-hand testimony. Because juries privileged sworn evidence, and because witnesses could not swear to observations of which they were less than certain, convictions often only occurred when witnesses had directly seen a defendant commit an offense. It is thus no wonder that acquittal rates were so high.

Particularly revelatory are the pattern of cases where witnesses could swear to some observation but not another, or to an observation but not a logical inference thereof. Judges occasionally permitted witnesses to testify without first taking the oath, or after swearing the

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248 See, e.g., Beattie, supra note 6 at 340-341 ("The dogma that a prisoner is to be regarded as innocent until he is proven guilty so pervades modern Anglo-American law that it is reasonable to assume that such a presumption has always been the rule at common law. In fact, the notion in its modern form arose as an active principle only toward the end of the period we are concerned with . . . . The idea that men ought actively to be regarded as innocent before being tried was being expressed in the 1780s, and by 1820 it could be confidently asserted that ‘every man is presumed innocent until he has been clearly proved guilty . . . ’").
oath but stepping back from it for a particular statement, allowing the witness to clarify that they could not swear to that piece of testimony. Juries remained extremely skeptical of such unworn statements, even when they were corroborated by other evidence. Consider Stephen Arrowsmith’s 1678 trial. He was indicted for rape. The victim, a ten-year old girl named Elizabeth Hopkins, was the only witness who had first-hand knowledge of what happened, but the judge would not permit her to testify because of her age, presumably for the same reasons discussed in Section II, supra: she might have risked her soul if she swore falsely. But the court made an exception: Hopkins could testify, but not under oath. Her testimony was vivid, and corroborated by a nurse who had examined her after the assault. There seems to have been no real doubt in the courtroom about Arrowsmith’s guilt. The judge “with great detestation and abhorrence of so Horrid and Vile an offence, told [Arrowsmith] that the Matter was plain against him, [and] that he must have as great impudence to deny it as he had wickedness to commit it.”

The judge instructed the jury to begin deliberating, but the jury was concerned that Hopkins’ testimony was not under oath. The jury, “not seeming satisfied with the Evidence,” asked the judge that Hopkins “might give in her Testimony upon Oath.” The judge refused, and ordered the jury to continue deliberating. The jury then returned its verdict: Arrowsmith

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249 E.g., R. v. Stone (1714) (where witnesses swore that the defendant had drunk from a mug that had gone missing and carried it off, but could not “sweat that he took it.”) www.oldbaileyonline.org/browse.jsp?id=t17140908-18&div=t17140908-18; R. v. Cummins (Thomas Cummins was acquitted of highway robbery when the victim, Ann Ross, could swear that Cummins had knocked her down on the street and that after the fact her money was gone, but could “not swear” that he took it.), www.oldbaileyonline.org/browse.jsp?id=t17150602-55&div=t17150602-55.
251 Id.
252 Id.
253 Id.
254 Id.
255 Id.
256 Id.
257 Id.
258 Id.
was not guilty. The judge, however, was unsatisfied with the verdict; “not conceiving it to be according to their Evidence, [he] would not take it from them without further deliberation.” The jury argued that they could not believe the girl’s testimony unless it was sworn. The judge relented, and ordered that Hopkins’ testimony “should be Sworn.” Apparently she did then swear to her testimony, and the jury, satisfied with her first-hand testimony now that it was under oath, returned a guilty verdict, and the judge sentenced Arrowsmith to death.

The structure of Arrowsmith’s case was common: where a witness could only give unsworn testimony—either because the judge would not permit them to swear or because the witness would not swear to something of they they were less than certain—the jury promptly acquitted the defendant, even in cases where there was other evidence probative of the defendant’s guilt. A few late 17th century cases are emblematic:

- John Deale was indicted in 1686 for stealing two smocks, three shirts, and one flaxen napkin from Arthur Jones. Jones’ wife was deposed that she had lost the goods, but “could not swear” that Deale stole them, so he was “immediately acquitted.”

- Hannah Brown was indicted in 1686 for stealing a silver-hilted sword from John Richardson. Richardson testified under oath that he was standing on a street at around eight o’ clock at night and felt his sworn suddenly snatched from his side, but “could not swear positively” that Brown was the one who stole it, so she was acquitted.

- Henry Howel and Mary Harris were indicted in 1688 for murdering Richard Harris (his relationship to Mary, if any, is unclear), “giving him one Mortal Wound in his right Eye,

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259 Id.
260 Id.
261 Id.
262 Id.
263 Id.
of the depth of four inches” in the course of a Brandy-shop fight. Mary was a companion of Howel, and present (and potentially involved with) the fight. Several witnesses swore that they had witnessed Howel strike the fatal blow, but were apparently less than certain of Mary Harris’s involvement in the fight, so they could “not Swear any thing against the Woman.” Howel was convicted; Mary Harris was acquitted.266

Compare these cases to those where a single sworn witness testified to the defendant’s guilt:

- Elizabeth Vaughan was indicted in 1690 for stealing “several small Goods, Lynen, and Wollen” from the home of Edward Powell. The report’s only recollection of the evidence was that prosecutor’s testimony was “fully sworn against her, so she was found Guilty.”267

- Mary Lamb was indicted in 1689 for stealing a silver spoon from William Story. The prosecution’s witness, a servant to Story, said that Lamb “took the spoon, and broke it in pieces,” and then sold it, “which was fully sworn against her.” She was found guilty.268

- Elinor Willowes was indicted for stealing a gold ring from the shop of George Hawson in 1693. Hawson, the sole witness, swore that Willowes had snatched the ring and attempted to replace it with a brass ring, but when she was stopped in the shop she swallowed the gold ring. All of this was “plainly sworn against her” and she was found guilty.269

In all three cases, the report either omits the defendant’s testimony entirely or only briefly mentions that the defendant denied the allegation. In any case, the defendants’ testimony would have been unsworn. When compared with the cases above where witnesses could not swear to the entire set of circumstances necessary to secure a conviction, even where they could swear to

everything logically necessary to make a conclusion about the defendant’s guilt, the cases here illustrate that when a witness could swear that they had observed the full circumstances of the offense a conviction was almost certain—even if the defendant denied the events. The witnesses’ oaths outweighed the defendants’ unsworn testimony. The repeated turn of phrase that the witnesses’ testimony was “fully sworn” is especially telling. Even in extremely brief reports, the reporter frequently included the detail that the testimony was “fully sworn” (as opposed to just partially sworn like in the three acquittal cases noted above). The witnesses’ testimony being “fully sworn” was apparently decisive for the juries to reach guilty verdicts.

In short, the practice of oath-taking limited the kind and scope of observational testimony that witnesses could provide in criminal trials at Old Bailey. A single sworn witness was often enough to convict a defendant, but the absence of any sworn, first-hand testimony—even when there was sworn circumstantial evidence—almost always ended in acquittal.

B. Oaths and the Rules of Evidence

The practice of oath-taking also influenced the development of more formal rules of evidence. Historians have noted that several rules of evidence developed in criminal trials from about the beginning of the eighteenth century or so. Four in particular have gathered attention: the character rule (preventing evidence about the defendant’s bad character), the corroboration rule (requiring evidence beyond the testimony of a single alleged accomplice who turned crown

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271 Beattie, supra note 6 at 363; Langbein, supra note 57 at 180-247.
witness), the confession rule (excluding evidence of some out-of-court confessions), and the hearsay rule (rejecting out-of-court testimony offered for the truth of the matter). 272

Historians have mostly focused on practical explanations for the rise of rules of evidence, arguing that they excluded problematic evidence that was “unreliable.” 273 Historians have identified the new presence of defense counsel in mid-eighteenth century courts as a major impetus for the development of rules of evidence. Beattie notes that rules of evidence “clearly did not owe their elaboration simply to the activities of defense counsel, but it does seem likely that it was their persistent objections . . . [that] gave rise to what amounted to a law of evidence.” 274 Likewise, Langbein attributes much causal weight for the development of rules of evidence to the emergence of defense counsel. 275 Perspectives like Beattie’s and Langbein’s attribute the rules of evidence to eminently practical, everyday concerns of the eighteenth-century courtroom. What evidence did defense counsel object to because it was “unreliable”? The suggestion is that defense counsel took advantage of evidence that worked against their clients’ interests by pleading new evidentiary principles to the judge. These principles over time amounted to the “law” of evidence.

While such practical concerns about the reliability of certain kinds of evidence undoubtedly played a role in the development of rules of evidence, historians’ narrow focus on them has obscured another important developmental factor: epistemic assumptions about testimony made under oath versus testimony not made under oath. All of the rules of evidence that historians have located in the eighteenth century—the character rule, the corroboration rule,

272 Id.
273 See John Langbein, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chi. L. Rev. 1, 102-103 (1983) (discussing the “unreliability” of witness testimony); Langbein, supra note 57 at 3 (describing the introduction of defense counsel an attempt to remedy how “unreliable” prosecution practices of the 1730s had rendered criminal trials).
274 Beattie, supra note 6 at 363.
275 Langbein, supra note 57 at 178.
the confession rule, and the hearsay rule—were predicated on particular understandings of what it meant to swear an oath, and what it meant to present testimony of unsworn statements.

Consider first the character rule (that is, the prohibition on character evidence). Langbein traces the justification for the character rule to concerns about “whether evidence was material and about whether such evidence unfairly surprised the witness.”276 Langbein notes that the prohibition on character evidence at Old Bailey was far from settled—that character-like evidence was introduced with some frequency.277 He notes that it was admissible testimony that a defendant had been previously branded on the hand during a term of imprisonment.278 Even when the defendant had not been branded, witnesses could testify that they had been convicted of prior offenses.279 In select cases, witnesses testified about circumstances of the defendant’s life that looked like character evidence—e.g., that a man on trial for perjury had previously fallen under suspicion for perjury in an unrelated case.280 Langbein interprets these cases as exceptions to the character rule, or as evidence that the character rule was not as fixed as it was understood to be during that period in retrospect.281

But on a close look at the Sessions Papers, those cases do not appear to have been all that inconsistent with the general presentation of witness testimony in the eighteenth century. The influence of the oath system in them is apparent. The cases that Langbein cites as apparent exceptions to the character rule share a common thread: the testimony about the defendant’s character relates to specific events or physical circumstances.282 Uncoincidentally, those were

276 Id. at 191.
277 Id.
278 Id. at 192.
279 Id. at 193-194.
280 Id. at 195.
281 Langbein responds in particular to Wigmore’s discussion of the character rule. See id. at 195; John Henry Wigmore, 1 Evidence in Trials at Common Law 646 (1904).
282 See Langbein, supra note 57 at 192-196.
things that witnesses could swear to. They were directly observable or memorable. Further examination of the Sessions Papers reveals more cases where witnesses swore to apparent character evidence that could be directly observed or recalled, but almost no cases where witnesses swore to general negative impressions of the defendant’s character. Especially telling are cases where extensive nonspecific character evidence apparently did come in: cases where it was presented by the unsworn defendant or unsworn defense witnesses in favor of the defendant. There is a close correspondence between witnesses who were not allowed to testify on oath (defendants and, until the early eighteenth century, defense witnesses) and witnesses who were allowed to present nonspecific character evidence. It is probably no coincidence that Langbein tracks a reduction in frequency in character evidence’s presentation to the same period that defense witnesses began to testify under oath.

The influence of the oath system on the other three prominent rules of evidence at Old Bailey—the corroboration rule, the confession rule, and the hearsay rule—is even more evident. All three rested on a skepticism of presenting certain kinds of witness testimony under oath. The corroboration rule prohibited crown witnesses (i.e., former accomplices turned against the

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283 See supra Part III.A.
284 Witnesses would especially testify that a defendant had been previously charged with or convicted of a criminal offense, especially when they had been branded for doing so. See, e.g., R. v. Briggs (1685) (including testimony that the defendant had previously been imprisoned at Newgate); R. v. Brown (1684) (where defendant had been previously branded on the thumb). For more on the practice of branding, which was meant to signify that a previous offender should be denied the benefit of clergy, see John Baker, Criminal Courts and Procedure at Common Law, 1550-1800, in Crime in England, 1550-1800 at 15, 4102 (1977).
285 There was a common practice in the reports of abridging the specific testimony of witnesses who testified to the good character of the defendant. Typically, the report would state that one or several witnesses testified about the defendant’s good character, but not include the content of that testimony. Basically universally, only the defendant would be permitted character witnesses (to testify about the defendant’s good character) in these cases. See, e.g., R v. Hilliard (1779), https://www.oldbaileyonline.org/browse.jsp?id=t17790404-36&div=t17790404-36; R. v. Humphreys (1784), https://www.oldbaileyonline.org/browse.jsp?id=t17841208-92-defend1009&div=t17841208-92; R. v. Wood (1728), https://www.oldbaileyonline.org/browse.jsp?name=17280605.
286 See Langbein, supra note 57 at 194-196 (discussing the drop in frequency character evidence in the reports after 1714 or so); Part II.B supra (discussing when defendants and defense witnesses could or could not swear and give testimony).
defendant) from testifying under oath unless their testimony was corroborated by the sworn testimony of another witness.\textsuperscript{287} The confession rule prohibited evidence about involuntary confession—that is, it prohibited sworn testimony about unsworn confessions.\textsuperscript{288} The hearsay rule, of course, prohibited out-of-court statements offered for the truth of the matter asserted.\textsuperscript{289} It drew a general distinction between the significance of unsworn out-of-court statements and sworn in-court testimony.\textsuperscript{290}

The usual explanation for these rules of evidence has been that the evidence that they prohibited was “unreliable.”\textsuperscript{291} Crown witnesses were thought to be unreliable because they had a potential incentive to lie—to save their own skin.\textsuperscript{292} Involuntary confessions were considered unreliable for obvious reasons.\textsuperscript{293} Hearsay was considered unreliable because there was no way to ascertain that what the declarant had said was true, or what they said at all, without the declarant available.\textsuperscript{294} But the reliability rationale is just part of the story, and probably reflects a somewhat anachronistic understanding of the rules of evidence, informed by our understanding of how those rules are justified in contemporary legal proceedings. The case reports do not fully support the position that judges excluded evidence because it was simply unreliable. Determining the reliability of evidence was a task put to the jury.\textsuperscript{295} But judges did regularly exclude evidence that was unsworn, even if there was some indication of its reliability.\textsuperscript{296}

\textsuperscript{287} Langbein, \textit{supra} note 57 at 203.
\textsuperscript{288} \textit{Id.} at 218.
\textsuperscript{289} Langbein, \textit{supra} note 57 at 233-235.
\textsuperscript{290} \textit{Id.}
\textsuperscript{291} See note 273 \textit{supra}.
\textsuperscript{292} Langbein, \textit{supra} note 57 at 179.
\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} See Beattie, \textit{supra} note 6 at 395-399 (discussing jury procedures at the Surrey assizes and the Old Bailey).
\textsuperscript{296} See, e.g., Part II.C \textit{supra} (exclusion of unreliable witnesses’ testimony because unreliable individuals could not be trusted to swear); Part II.D \textit{supra} (exclusion of religious minorities testimony because it was unsworn).
Viewed through the prism of the oath system, the rules of evidence in criminal trials in early modern England make much more sense than if we focus simply on the evidence’s “reliability.”

IV. **The Oath System’s Decline and the Development of Cross-Examination**

By the late eighteenth century, the primacy of the oath system had begun to wane. Exceptions to the oath system accumulated over the course of the century, allowing previously ineligible witnesses to testify either on oath or not, and allowing witnesses to testify about things that they would not have been able to swear to earlier in the century.\(^{297}\) As noted above, over the course of the eighteenth century, defense witnesses and certain religious minorities were allowed to present sworn evidence when they were not permitted to testify at all at the end of the previous century.\(^{298}\) Witnesses were also allowed to testify to a wider range of circumstances as judges began to permit some otherwise unqualified witnesses to testify on oath.\(^{299}\) In broader commentary, critics began to lash out at the use of oaths more specifically, deriding how dependent legal processes had become on oath-taking. One critic’s unsubtly titled *Considerations Upon the Use and Abuse of Oaths Judicially Taken* noted that oaths being “so freely taken” had led to the frequent “abuse of them.”\(^{300}\) Another critic wrote that the legal system had become full of “foolish and unnecessary oaths” that were “every day imposed and irreverently administered.”\(^{301}\) These criticisms were often accompanied by calls for higher penalties for perjury,\(^{302}\) but perjury remained difficult to prosecute.\(^{303}\)

\(^{297}\) See Parts II-III *supra*.
\(^{298}\) See Part II *supra*.
\(^{299}\) See pp. 45.
\(^{301}\) Francis Hutcheson, *A Short Introduction to Moral Philosophy* 45 (1747).
\(^{302}\) See Shapiro, *supra* note 300 at 126.
\(^{303}\) See Oldham, *supra* note 72 at 103.
At just about the same time that the oath system was declining in power, a new means of regulating witness testimony was emerging in criminal courts: cross-examination. 304 Historians have largely attributed the development of cross-examination to the simple presence of lawyers—suggesting that cross-examination was a necessary incident to the use of defense counsel. 305 But it is easy to imagine a counterfactual history where defense counsel represented their clients in court—making legal arguments, examining their own witnesses—but did not cross-examine prosecution witnesses. Moreover, it was hardly a necessary concomitant of the use of defense counsel that cross-examination took on the particular importance it did, especially in ensuring the veracity of witness testimony in the way that the oath system had in years prior. Langbein, for one, does note that cross-examination replaced an “oath-based system” with a “new order” that “substituted its faith in the truth-detecting efficacy of cross-examining lawyers.” 306 But he does not elaborate at any length on the point, leaving open the questions of how exactly the truth-detecting processes of the oath and cross-examination worked in practice and how their theoretical foundations differed. 307

Defense counsel were first permitted to cross-examine witnesses in criminal trials at Old Bailey as early as the 1730s, but the practice does not appear with frequency in the reports for a few years after its first inception. By mid-century, defense counsel cross-examined virtually every prosecution witness, and the reports began to recount cross-examinations with more detail.

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304 See Langbein, supra note 57 at 245-247.
306 Langbein, supra note 57 at 246.
307 For the most full-throated connection between the oath system and cross-examination, see T.P. Gallanis, The Rise of Modern Evidence Law, 84 Iowa L. Rev. 499 (1999).
over time. Eventually, cross-examination came to serve the same basic role that the oath system had: regulating witness testimony.

Cross-examination, like the oath system, rested on particular epistemic assumptions about witness testimony. In particular, cross-examination was thought to show whether witnesses were telling the truth by determining whether they could provide consistent testimony on direct- and cross-examination. Consider an illustrative case from the mid-eighteenth century. The case report of John Alford for robbing and threatening the life of a man named Lillwall on the King’s Highway recounts the victim’s testimony in detail. Lillwall testified that one summer night he was travelling the King’s Highway when he came upon Alford, travelling by foot. Alford demanded Lillwall’s money and threatened him with a bayonet, taking, to Lillwall’s recollection, “one guinea, two six-pences and 3 d. in half-pence.” Lillwall further claimed that, “he had on when he robb’d me, a green plush coat and a lac’d hat.” After the exchange was over, Lillwall claims he described the incident to a friend, Samuel Jones, who identified the person who had robbed him as Alford. Lillwall and some friends went to Alford’s home to confirm his friend’s suspicion, and found that the person at the home was, in fact, the same person who had robbed him. The details of the cross-examination, however, are almost entirely omitted from the case report. The case report only states that “[u]pon cross examination he made no mistake.”

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310 Id.
311 Id.
312 Id.
313 Id.
314 Id.
315 Id.
316 Id.
The language of “no mistake” or “no contradiction” in Alford’s case is common among mid- and late-eighteenth century reports of cross-examination; what was important was the internal consistency of the testimony between the direct and cross-examination, not necessarily the correspondence of the facts of the examination to other witnesses’ testimony or to the victim’s allegations.\(^3^1\)\(^7\) When Alford called his own witness, a friend who said that Alford had been drinking with him at the time of the alleged robbery, the report states that there were “contradictions” in the witness’ testimony after he was “examin’d a part.”\(^3^1\)\(^8\) Even more telling of the importance of consistency between examinations was the testimony of Alford’s servant, who apparently alleged in one examination that Alford was wearing a linen shirt and in another examination a calamanco gown.\(^3^1\)\(^9\) The material of Alford’s shirt was, of course, completely irrelevant to the alleged crime, but the report places outsized emphasis on it relative to the other (probative, from a modern perspective) portions of the testimony—presumably because the reporter expected the jury to focus on such inconsistencies to decide on the overall truthfulness of the witnesses’ testimony. Owing to the contradictions of his witnesses, and the consistency of the prosecution’s, Alford was found guilty and sentenced to death.\(^3^2\)\(^0\)

Whether or not a witness contradicted themselves was, then, the means by which early cross-examination determined whether or not the witness was telling the truth. In some cases, where the reports detail the exact questions asked on cross-examination, the defense counsel’s questioning would almost recite the judge’s direct examination verbatim in an attempt to see if

\(^{31}\) See, e.g., R. v. Hatch (1783), Old Bailey Sessions Papers (“there seems to be no contradiction at all in any part of the evidence”), https://www.oldbaileyonline.org/browse.jsp?id=t17830723-24&div=t17830723-24; R. v. Brown (1749), https://www.oldbaileyonline.org/browse.jsp?id=t17490705-81&div=t17490705-81 (“It being fully proved for the Crown, and the prisoner's witnesses in their cross examination contradicting each other he was found guilty.”)


\(^{31}\)\(^9\) Id.

\(^{32}\) Id.
the witness would change their story. As much is evident in the trial of a James Wood for shoplifting no less than 14 ounces of human hair and some other unspecified valuables from William Burcket.\footnote{R. v. Wood (1749), \url{https://www.oldbaileyonline.org/browse.jsp?id=t17491209-37&div=t17491209-37}.} Burcket, a hair merchant, testified that he had seen some hair that had been stolen from him in the shop of a Mr. Clark, and Mr. Clark testified that James Wood had sold him the hair.\footnote{Id.} The case report details the judge’s direct examinations of Burcket and Clark with brief recitations of the narrative of facts as they alleged them, but focuses more extensively on details about the stolen hair itself: its amount, volume, and appearance.\footnote{Id.} When Wood’s defense counsel cross-examined the two witnesses, he focused almost entirely on re-examining them on the amount, value, and appearance of the hair rather than on their allegations that the hair was stolen and that it was Wood who had stolen it.\footnote{Id.} After the witnesses remained consistent on those details, the jury found Wood guilty.\footnote{Id.} As in Alford’s case, the report suggests that the witnesses’ testimony remaining consistent from direct- to cross-examination was decisive; the ability to remain consistent was thought to indicate honesty.

Wood’s case also highlights how the oath system and cross-examination regulated witness testimony in distinct ways—and how cross-examination began to liberalize what witnesses could testify about. In his direct examination by the judge, Burcket said that there are some things he was willing to swear (that some hair was stolen from him, and the kind and amount of that hair), but some things he was unwilling to swear (that some other hair introduced as evidence at trial was also his and was stolen from him).\footnote{Id.} But, even though he would not swear to the other hair, he would still discuss it on cross-examination, without the threat of
damnation or perjury.\textsuperscript{327} Thus, Burcket made an implicit differentiation between the kind of evidence suitable for introduction under the oath system and the kind of evidence admissible under the burgeoning adversary system.

Outside the courtroom, commentators who wrote about cross-examination began to echo a growing faith in cross-examination to elicit the truth, discussing the procedure in grand terms. By the 19th century, cross-examination was regularly extolled for its ability to unearth the truth. Wigmore referred to it as the “greatest legal engine ever invented for the discovery of truth.”\textsuperscript{328} An anonymous American encomium from the same period similarly calls it “the most perfect and effectual system for the unraveling of falsehood ever decided by the ingenuity of mortals.”\textsuperscript{329} Bentham noted that “[a]gainst erroneous or mendacious testimony, the grand security is cross-examination.”\textsuperscript{330} Just as the oath system had been predicated on assumptions about the veracity of witness testimony given under oath, the new adversary trial, with cross-examination at its core, rested on particular epistemic assumptions about the veracity of witness testimony that was or was not consistent from direct- to cross-examination. By the early nineteenth century, cross-examination had supplanted the oath as the primary mechanism for regulating witness testimony.

\textbf{Conclusion}

This thesis has made the argument that there was a comprehensive “oath system” that regulated witness testimony in early modern English criminal proceedings. It has described two particular impacts of the oath system. First, it has shown how the oath system excluded or

\textsuperscript{327} Id.
\textsuperscript{328} John Wigmore, 5 Evidence in Trials at Common Law 32 (1974).
\textsuperscript{329} Anonymous, \textit{Of the Disqualification of Parties as Witnesses}, 5 Am. L. Register 257, 262 (1857), cited Langbein, \textit{supra} note 57 at 246.
qualified the testimony of certain classes of individuals deemed unfit to swear the witness’s oath: children, defendants, defense witnesses, apparently unreliable individuals, and religious minorities. Second, it has shown how the oath system limited what witnesses could testify about, largely to direct, first-hand observations, because witnesses were reluctant to swear about things of which they were less than certain, given the extraordinary stakes of swearing a false oath. The limitations the oath system placed on what witnesses could testify about helped shape the development of the rules of evidence in the eighteenth century—the character rule, corroboration rule, confession rule, and hearsay rule. Finally, this thesis has drawn a connection between the decline of the oath system’s primacy and the development of cross-examination, which, like the oath system, regulated the veracity of witness testimony and rested on highly particular epistemic assumptions.

Although legal historians have given some attention to the importance of the oath in early modern English law, the level of attention dedicated to the oath is nowhere near commensurate with just how significant it was in that period. Here, I have only begun to map out how one particular kind of judicial oath (the witness’s oath) regulated one kind of legal proceeding (criminal trials) in one place (the Old Bailey). But the oath’s power extended far beyond the Old Bailey, criminal trials, and England’s shores. I hope that future legal historians can develop some of the threads that I have left open here. I believe that the epistemic assumptions underlying the transition from an oath-based system to a cross-examination-based system is one such area ripe for deeper analysis than I have performed. I am thoroughly unconvinced, given how deeply late eighteenth and early nineteenth century commentators believed in the unique truth-seeking powers of cross-examination, that the simple new presence of defense counsel is the whole story. I also expect that there is much left to be explored with respect to the reach of the oath in legal
proceedings in England’s colonies; I have briefly mentioned statutes regulating witness testimony in the colonies—where a plurality of epistemes collided—but have not looked into those courts’ archives.