

HISTORICAL FOUNDATIONS OF THE LAW OF EVIDENCE: A VIEW FROM THE RYDER SOURCES

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The main work of a legal system is deciding matters of past fact. Blackstone remarked that “experience will abundantly show, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of.”¹ Was the traffic light red or green? Was it O.J. Simpson or somebody else who wielded the dagger? Find the facts and the law is usually easy.

The great chasm that separates the modern Continental legal systems from the Anglo-American systems is largely about the conduct of fact-finding. On the Continent, professional judges take the main responsibility for investigating and adjudicating, although the lawyers for the parties guide and limit the judicial inquiry in important ways. In the Anglo-American legal tradition, by contrast, we parcel out this work of fact-finding among three sets of actors: the lawyers for the parties, the professional judge, and the laypersons who serve as jurors. We leave to the lawyers the responsibility for gathering, sifting, and presenting evidence of the facts. Prototypically, our trial judge sits with a jury. Although many cases fall outside the jury entitlement, and in many others the parties waive it, jury trial remains the presumptive norm in American civil and criminal procedure.² The judge who presides over this jury

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In this Article I adhere to conventions that I have followed in prior scholarship when using English and antiquarian sources. I modernize and Americanize the spellings, but not in the titles of books or pamphlets. I write out words that appear abbreviated in the originals, I supply missing apostrophes, and I correct obvious misspellings without disclosure.

1. 3 William Blackstone, *Commentaries on the Laws of England* 330 (Oxford, 1765–69).

2. The use of jury trial has declined materially in American civil practice. The English have effectively abolished civil jury trial. See J.R. Spencer, *Jackson’s Machinery of Justice* 72–73 (8th ed. 1989). Jury trial remains a theoretical entitlement in cases of serious crime throughout the common law world, but plea bargaining and other evasions have rendered criminal jury trial ever more exceptional. I have discussed this phenomenon in John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 *Harv. J.L. & Pub. Pol’y* 119 (1992). In the nineteenth century several European legal systems experimented with Anglo-American jury models for certain offenses. Although most European legal systems abandoned the jury court, a number of them retained so-called mixed courts that combine professional judges and juror-like lay judges

court mediates between the lawyers and the jurors. The judge superintends the lawyers as they adduce their competing versions of the facts and the law for the jurors, and the judge instructs the jurors on the standards they should apply to determine the dispute.

A fundamental consequence of these radically different arrangements for the conduct of fact-finding has been the difference in attitude toward what Anglo-American lawyers call the law of evidence. Sit in one of our trial courtrooms, civil or criminal, and you hear counsel interrupting incessantly to raise objections founded upon the rules of evidence. These incantations are so familiar that they have passed into the popular culture. Close your eyes and you can hear Perry Mason or the protagonists of "L.A. Law" or similar television fare bound to their feet, objecting fiercely: "Immaterial!" "Hearsay!" "Opinion!" "Leading question!"

Cross the Channel, enter a French or an Italian or a Swedish courtroom, and you hear none of this. Over the past two decades I have had frequent occasion to observe German civil and criminal proceedings. I have heard much hearsay testimony, but never a hearsay objection. No one complains of leading questions, and opinion evidence pours in without objection.³

I. THE FUNCTION AND THE TIMING OF THE LAW OF EVIDENCE

The striking contrast between legal systems that do and do not undertake to police the receipt of evidence has given rise to a familiar explanation, which centers on the jury. In a famous dictum in the *Berkeley Peerage Case* in 1816, the Chief Justice of Common Pleas remarked on the institutional logic of the hearsay rule:

[In] most of the Continental States, the Judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds.⁴

Alas, from the historical standpoint, this effort to account for the law of evidence as a response to the shortcomings of the jury system is awkward,

in a single panel that deliberates and decides together on all issues of law, guilt, and sentence. I have described the German version in John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 *Am. B. Found. Res. J.* 195.

3. Although Continental systems do not purport to exclude hearsay evidence, they have a variety of doctrines that direct the courts to prefer first-hand evidence. See the admirable discussion in Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 *Minn. L. Rev.* 425, 444-49 (1992) [hereinafter *Damaska, Analogues*].

4. 4 *Camp.* 401, 415, 171 *Eng. Rep.* 128, 135 (H.L. 1811) (Mansfield, C.J.C.P.) (advisory opinion).

because the jury system originated in the twelfth century, whereas the law of evidence is much more recent. How recent? Wigmore, our pioneering scholar of the history of the law of evidence, thought he could trace the modern law of evidence back to the sixteenth and seventeenth centuries. In this Article I point to sources that indicate that even into the middle of the eighteenth century, the modern law of evidence was not yet in operation.

The medieval system of self-informing juries, said Maitland, "hardly had any place for a law of evidence."⁵ In an age of tiny, intensely interdependent agricultural communities, jurors were drawn from the neighborhood of the contested events. The hope was that a jury of the locality would contain witness-like persons who would know the facts, or if not, that these jurors would be well positioned to investigate the facts on their own. The early jury was self-informing.⁶ No instructional trial was held to inform its verdict. If the jurors thought they needed more information, they obtained it "by consulting informed persons not called into court."⁷ The medieval jury came to court not to listen but to speak, not to hear evidence but to deliver a verdict formulated in advance. The court accepted this "rough verdict," as Maitland described it, "without caring to investigate the logical processes, if logical they were, of which that verdict was the outcome."⁸

Toward the end of the Middle Ages the trial jury underwent its epochal transformation from active neighborhood investigators to passive

5. 2 Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I*, at 660 (2d ed. Cambridge 1898) [hereinafter Maitland, H.E.L.].

6. It has recently been shown that some early fifteenth-century jury panels were drawn from a geographical area broader than the neighborhood of the crime, hence that some of the jurors may not have been as "self-informed" about the events as medieval jurors of the vicinage were thought to be. See Edward Powell, *Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400-1429*, in *Twelve Good Men and True: The Criminal Trial Jury in England: 1200-1800*, at 78, 97 (J.S. Cockburn & T.A. Green eds., 1988). This data bears on the question of when, how, and why the jury ceased to be self-informing toward the end of the Middle Ages. I see no support for the author's conjecture, see *id.* at 78, 97, that the medieval jury of the hundred may never have been self-informing.

7. 5 John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 1364, at 11 (3d ed. 1940) [hereinafter Wigmore, *Treatise*]. Wigmore died in 1943. The treatise has been updated by various revisers, who have not been much interested in the historical sections. Accordingly, I prefer the 1940 edition of the treatise as the definitive source for Wigmore's historical work.

8. 2 Maitland, H.E.L., *supra* note 5, at 660-61. Further: "Some of the verdicts that are given must be founded on hearsay and floating tradition." *Id.* at 624.

Had this ancient system of self-informing juries continued, Thayer wrote, "if, instead of hearing witnesses publicly, under the eye of the judge, [the trial jury had continued to hear] them privately and without any judicial supervision, it is easy to see that our law of evidence never would have taken shape . . ." James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law 180-81* (Boston 1898) [hereinafter Thayer, *Preliminary Treatise*].

triers.⁹ The jury came to resemble the panel that we recognize in modern practice, a group of citizens no longer chosen for their knowledge of the events, but rather chosen in the expectation that they would be ignorant of the events.¹⁰ This passive jury required a courtroom instructional proceeding at which outside witnesses could inform them. "By the 1500s," thought Wigmore, "the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system."¹¹

Instructional jury trial made the law of evidence possible. Once witnesses routinely testified in open court, the jurors' practical monopoly over knowledge of the facts was broken. Once the trial judge heard the same testimony as the jurors, he was able to comment on the evidence and advise the jury on how to apply the law. And the opportunity arose for the judge to regulate the trial testimony of witnesses. Wigmore saw the dawning of the instructional trial as the watershed of the law of evidence. He detected the outline of the modern law of evidence already in the years 1500–1700,¹² although not until the years 1790–1830 could he document "[t]he full spring-tide of the system . . ."¹³

Wigmore knew that most of the sources for the law of evidence were no older than the late eighteenth or early nineteenth century. However, Wigmore treated this chronology as an accident of the history of the sources rather than an insight about the underlying history of the law of evidence. He thought that the appearance in the 1790s of the so-called *nisi prius* reports, professional law reports that documented selected aspects of trial proceedings, was particularly consequential. These reports contain "more rulings upon evidence than in all the prior reports of two centuries."¹⁴ Wigmore thought that the law of evidence arose in Tudor-Stuart times along with the instructional mode of jury trial, but that for want of reporting the rules remained undocumented until the late eighteenth and early nineteenth centuries. The "increase of printed reports" was the "dominant influence" that made possible "the development of the rules" in the period after 1790. Earlier, the law of evidence "had

9. See the summary account in John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 *Am. J. Legal Hist.* 313, 314–15 (1973).

10. "A juror should be as white paper," Lord Mansfield remarked in 1764, "and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him." *Mylock v. Saladine*, 1 *Black. W.* 480, 481, 96 *Eng. Rep.* 278, 278 (K.B. 1764), quoted in William W. Blume, *Origin and Development of the Directed Verdict*, 48 *Mich. L. Rev.* 555, 558 (1950) [hereinafter Blume, *Directed Verdict*].

11. John H. Wigmore, *A General Survey of the History of the Rules of Evidence*, in 2 *Select Essays in Anglo-American Legal History* 691, 692 (1908) [essay hereinafter Wigmore, *General Survey*].

12. See *id.* at 691, 692–94. This theme turns up in the historical sections of Wigmore's treatise, e.g., on hearsay. See 5 Wigmore, *Treatise*, supra note 7, § 1364 at 26, discussed *infra* note 96 and accompanying text.

13. Wigmore, *General Survey*, supra note 11, at 695.

14. *Id.* at 696.

rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges." The activity of the period after 1790 "was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution."¹⁵

In this Article I take the view that the concentration of authorities on the law of evidence at the end of the eighteenth century and into the nineteenth century bespeaks an event of recency to the law, and not a mere illusion of the historical record. I shall emphasize a novel historical source, the judge's notes of Sir Dudley Ryder, Chief Justice of King's Bench during the years 1754–1756. Ryder's notes supply an exceptionally detailed narrative of the trials over which he presided. They cast a shaft of light into the mid-eighteenth-century courtroom, allowing us to glimpse what actually transpired in the conduct of civil and criminal trials.

The Ryder notes suggest that the law of evidence as we understand the term was largely nonexistent as late as the middle decades of the eighteenth century. The essential attribute of the modern law of evidence is the effort to exclude probative but problematic oral testimony, such as hearsay, for fear of the jurors' inability to evaluate the information properly. This system hardened only in the last decades of the eighteenth century. The precipitating event could not have been the jury, which dominated English civil and criminal procedure from the Middle Ages, nor the instructional mode of jury trial, which was firmly in place by the sixteenth century. I explain, in Part V of this Article, why I have come to suspect that the central event in the formation of the modern law of evidence was the rapid development of adversary criminal procedure in the last quarter of the eighteenth century, an event which thereafter came to influence the conduct of civil trials as well.

II. GILBERT'S TREATISE

We can better appreciate what we find in Ryder's trial notes by pausing in advance to turn the pages of Gilbert's treatise on *The Law of Evidence*.¹⁶ Written sometime before the author's death in 1726, and probably in the first decade of the eighteenth century,¹⁷ Gilbert's *Evidence* was not published until 1754, the year Dudley Ryder began his short-lived judicial career. Gilbert's became the most influential eighteenth-century book on evidence, going through seven editions in the hands of revis-

15. *Id.*

16. See Anon. [Geoffrey Gilbert], *The Law of Evidence* (Dublin 1754) [hereinafter Gilbert, *Evidence*]. The title page of the first edition ascribes the work to "a Late Learned Judge."

17. Macnair has traced Gilbert's *Evidence* to the underlying manuscript sources, some of them now held in the Columbia Law Library. Macnair infers that the book was written early in the 1700s, because "[a]ll citations after 1710 in the printed book are absent from the [manuscripts]." Michael Macnair, *Sir Jeffrey Gilbert and His Treatises*, 15 *J. Legal Hist.* 252, 259 & n.107 (1994) [hereinafter Macnair, *Gilbert*].

ers.¹⁸ Although prefaced with some analytic discussion, Gilbert's book was essentially an abridgment¹⁹—a law-finder that collected precedents, mostly from published yearbooks and law reports, but also from the juristic literature, including Coke, Hale, and Hawkins.

A. *Written Evidence; Best Evidence Rule*

Gilbert arranged his treatise on the distinction between written and unwritten evidence,²⁰ but written evidence occupied virtually all the book. As Twining has observed, "Gilbert tried to subsume all the rules of evidence under a single principle, the 'best evidence rule,'"²¹ a notion that is oriented to documentary authenticity. Among the topics concerning written evidence that Gilbert reviews are record versus nonrecord evidence, statutes, sealed versus unsealed instruments, proving copies when originals are lost, proving prior verdicts, proving chancery proceedings and depositions, evidencing wills, and the receipt of manorial court rolls. He continues with the complex rules governing proof of deeds, then bills of exchange and negotiable instruments.

The later eighteenth-century writers on evidence, Bathurst²² and Buller,²³ followed Gilbert's emphasis on the best evidence rule as the organizing principle of the law of evidence. As late as 1806, a North Carolina court still proclaimed the view: "There is but one decided rule

18. Following the 1754 Dublin edition, see *supra* note 16, four London editions appeared (in 1756, 1760, 1769, and 1777) before Capel Lofft's four volume London revision dated 1791–96. The sixth edition by James Sedgwick in 1801 was the last in England. An American edition, published in Philadelphia in 1805, was based on Sedgwick's 1801 London edition. Listings appear in 1 Sweet & Maxwell's Legal Bibliography 379 (2d ed. 1955).

Blackstone admired Gilbert's *Evidence* as "a work which it is impossible to abstract or abridge without losing some beauty, and destroying the chain of the whole." 3 Blackstone, *supra* note 1, at 367 n.q, noted in Macnair, Gilbert, *supra* note 17, at 252.

19. I have suggested that Gilbert's several so-called treatises may have been extracted from a larger manuscript, in the style of a general abridgment of the law or legal encyclopedia, which was unpublished and perhaps incomplete at the author's death. See John H. Langbein, "Gilbert, Geoffrey," in *Biographical Dictionary of the Common Law* 206 (A.W.B. Simpson ed., 1984). On the abridgments, see generally John D. Cowley, *A Bibliography of Abridgments, Digests, Dictionaries and Indexes of English Law to the Year 1800 at xviii–lxviii* (1932) (Selden Society) (supplying history of the genre). More recently, Macnair, who has examined surviving manuscripts of the Gilbert treatises, has argued that Gilbert's work was less an abridgment than "a general analytical treatise on the law, in a sense a precursor to Blackstone." Macnair, Gilbert, *supra* note 17, at 259.

20. See Gilbert, *Evidence*, *supra* note 16, at 4.

21. William Twining, What is the Law of Evidence?, in *Rethinking Evidence: Exploratory Essays* 178, 188 (1990) [volume hereinafter Twining, *Rethinking*]. "Gilbert conceived of the judicial process as, first and foremost, a search for the determinative piece of written evidence." Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 *Wayne L. Rev.* 1149, 1154 (1990).

22. See Anon. [Henry Bathurst], *The Theory of Evidence* 110 (London 1761); *id.* at 1–2, 30, 45.

23. See Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 293–94 (London, 4th ed. 1785) (1st ed. 1772).

in relation to evidence, and that is, that the law requires the best evidence."²⁴

B. *Oral Evidence; Disqualification and Hearsay*

Gilbert purports "to consider the unwritten Evidence" midway into his book,²⁵ but the exposition would be unrecognizable to the modern lawyer expecting an account of the various rules about hearsay, opinion evidence, and the like. The main topic of Gilbert's treatment of unwritten evidence is his account of the rules that disqualify from testifying those persons who were deemed to be interested in the outcome of the litigation,²⁶ another subject that figures centrally in the Ryder notes.

The rest of Gilbert's book concerns the sufficiency of evidence,²⁷ a topic that actually sounds in substantive law: What facts support what causes of action?²⁸ Much of this law arose in the setting of pleading, or on post-trial proceedings. Accordingly, these cases are not much concerned with the central task of the modern law of evidence, which is to control the fact-adducing process at oral jury trial. Gilbert prefaced this discussion with a slight account of burdens of proof and presumptions,²⁹ from which he digressed for his two-paragraph treatment of hearsay.

"[A] mere Hearsay is no Evidence," Gilbert writes, because although the courtroom witness is on oath, "yet the Person who spoke it was not upon Oath . . ." ³⁰ This want of oath renders the testimony "of no Value in a Court of Justice, where all Things [require] . . . the Solemnities of an

24. Cited without attribution by case name or court in William D. Evans, "On the Law of Evidence" 141, 148, in 2 Robert J. Pothier, *A Treatise on the Law of Obligations or Contracts* (William D. Evans trans., London 1806) [essay hereinafter Evans, Evidence]. I have been unable to locate the case in published North Carolina reports for the period. On the importance of Evans see William Twining, *The Rationalist Tradition of Evidence Scholarship*, in Twining, *Rethinking*, supra note 21, at 32, 42-45 [essay hereinafter Twining, *Rationalist Tradition*]. The passage from Evans that I quote in the text is emphasized in Twining, *Rationalist Tradition*, supra, at 44.

25. See Gilbert, *Evidence*, supra note 16, at 86.

26. See id. at 87-104.

27. See id. at 113-99.

28. This conception of the law of evidence may also be seen in the summaries of reported case law collected and arranged in Charles Viner, *A General Abridgment of Law and Equity* (23 vols., 1741-1757). Viner devoted his entire Volume 12 to the heading "Evidence." I have not seen the first edition of Viner; I have used the 1792 edition, which republishes the first edition. See 12 Charles Viner, *A General Abridgment of Law and Equity* (Dublin 1792). Viner's two main topics are the competency of witnesses, see id. at *1-*42, and the sufficiency of various items of evidence to sustain particular causes of action, see id. at *81-*266 *passim*. Viner collects a few entries labelled "hearsay," most of which bear on sufficiency and are remote from modern hearsay conceptions. See id. at *118-*19. (Viner's Volume 12, featuring "Evidence," was the last of the twenty-three volumes to be published, and Holdsworth reckons that it actually appeared in 1757, the year after Viner died. See 12 William Holdsworth, *A History of English Law* 165 n.3 (1938) (16 vols., 1922-66) [hereinafter Holdsworth, *H.E.L.*]).

29. See Gilbert, *Evidence*, supra note 16, at 104-13.

30. Id. at 107.

Oath . . . ”³¹ Unlike the modern rationale for excluding hearsay, which emphasizes as the critical deficiency that the hearsay declarant cannot be cross-examined,³² Gilbert focuses entirely³³ on the cautionary effect of “the Solemnities of an Oath.” Gilbert also favored admitting hearsay when other evidence corroborated it,³⁴ a notion that is impossible to rec-

31. *Id.* at 108.

32. See, e.g., 5 Wigmore, *Treatise*, supra note 7, §§ 1365–66, at 27–33, where there appears the celebrated boast that cross-examination “is beyond any doubt the greatest legal engine ever invented for the discovery of truth.” See infra text accompanying note 154, for a mid-nineteenth-century forerunner of this language. This article of faith left Wigmore not much inclined to confront the reality that cross-examination in the hands of a skilled and determined advocate is often an engine of oppression and obfuscation, deliberately employed to defeat the truth.

33. Gilbert does mention want of the opportunity to cross-examine when explaining why affidavits and depositions should be excluded. See Gilbert, *Evidence*, supra note 16, at 44, 47–49, 51.

A Deposition can't be given in Evidence against any Person that was not Party to the Suit, and the Reason is, because he had not Liberty to cross-examine the Witnesses, and 'tis against natural Justice that a Man should be concluded in a Cause to which he never was a Party.

Id. at 47.

The evidence scholar Edmund Morgan pointed to a couple of sources that antedate Gilbert, in which the exclusion of hearsay rested on the cross-examination policy. Gilbert “overlooked the case noted in *Rolle's Abridgement* in 1668 in which sworn hearsay was rejected because ‘the other party could not cross-examine the party sworn, which is the common course.’” Edmund M. Morgan, *Some Problems of Proof under the Anglo-American System of Litigation* 110 (1956), citing 2 Roll. Abr. 679, pl. 9 (1668). Morgan also pointed to the rationale in *R. v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696), in which Kings Bench rejected sworn deposition evidence after consulting with the judges of Common Pleas. “[I]t was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken . . . , and so had lost the benefit of cross-examination.” Morgan, supra, at 110, citing 5 Mod. at 165, 87 Eng. Rep. at 585.

34. Gilbert says that although

Hearsay be not allowed as direct Evidence, yet it may be in Corroboration of a Witness['] Testimony to show that he affirmed the same thing before on other Occasions, and that the Witness is still confident with himself; for such Evidence is only in Support of the Witness that gives in his Testimony upon Oath.

Gilbert, *Evidence*, supra note 16, at 108.

Wigmore noticed that a corroboration-type standard was employed as early as the trial of Sir Walter Raleigh, in 1603, to help satisfy the requirement of contemporary treason law that there must be two accusing witnesses. Chief Justice Popham ruled that one of Raleigh's accusers could testify by deposition rather than in person when “‘many circumstances agree[] and confirm[] the accusation’” 5 Wigmore, *Treatise*, supra note 7, § 1364, at 14 (quoting *R. v. Raleigh*). The notion must have been, says Wigmore, that “a hearsay statement was sufficient if otherwise corroborated.” *Id.* Wigmore collects a variety of later examples, drawn from *State Trials* reports for the period 1679–1725, instancing “a doctrine, clearly recognized, that a hearsay statement may be used as confirmatory or corroboratory of other testimony.” *Id.* at 17 & n.33.

Damaska has observed that the Roman-canon juristic writers of the sixteenth century knew a similar doctrine, accepting non-first-hand evidence to corroborate other evidence in their system of numerical proofs. See Mirjan Damaska, *Hearsay in Cinquecento Italy*, in 1 *Studi in onore di Vittorio Denti* 59, 71–73 (1994) [hereinafter Damaska, Italy].

oncile either with Gilbert's oath-based account of what is wrong with hearsay, or with the emphasis in nineteenth-century hearsay doctrine on the importance of cross-examining the declarant. Thus hearsay, that centerpiece of the modern law of evidence, was for Gilbert, as for his followers Bathurst and Buller,³⁵ a curio that rated only a passing mention.³⁶ We shall see that the Ryder notes and other evidence from contemporaneous practice strongly confirm the impression that we derive from Gilbert, that the hearsay rule was not yet in place in a recognizably modern form.

In sum, as Gilbert envisioned the law of evidence, it dealt with three broad topics: the proof of writings, the disqualification of witnesses for interest, and the sufficiency of evidence according to the criteria of substantive law. Gilbert was not alone in focusing on these topics. Bathurst's treatise of 1761, titled *The Theory of Evidence*, follows Gilbert closely.³⁷ In Dudley Ryder's judicial notes, which I am about to explore, we find a courtroom world whose law of evidence appears quite consonant with what a reader of Gilbert and the lesser eighteenth-century treatise writers might expect.

III. THE RYDER NOTEBOOKS

In an article published a dozen years ago³⁸ I directed attention to a unique historical source, the judge's notes of Sir Dudley Ryder, which date from the years 1754–1756. Although Ryder served as Chief Justice of King's Bench, he is little known because he died only two years into the office.³⁹

35. Gilbert's rationale for deeming hearsay to be "no Evidence" is continued in Bathurst, *supra* note 22, at 111; in Buller, *supra* note 23, at 294.

36. Wigmore, by contrast, treats the hearsay rule as having been settled in the period 1675–1690. See 5 Wigmore, *Treatise*, *supra* note 7, § 1364, at 16. He finds "by the beginning of the 1700s, a general and settled acceptance of this rule . . ." *Id.* at 26. I return to the tension between Wigmore's account of the history of the hearsay rule and contradictory evidence from Gilbert, Ryder, Mansfield, and other sources, *infra* notes 88–102 and accompanying text.

37. The endpapers of Bathurst's book contain a striking tabular "Analysis," unpaginated, which arrays the varieties of written evidence and shows the minute importance of "unwritten evidence." It conveys in graphic form the notion that endured so long into the eighteenth century, that the only subject of serious interest in the law of evidence was the hierarchy of writings. See Bathurst, *supra* note 22, at 123 app.

38. See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1 (1983) [hereinafter Langbein, *Ryder Article* I].

39. Oldham has taken an interest in Ryder as a byproduct of his study of the Mansfield sources, because the legal careers of the two were closely intertwined from 1742, when Mansfield became Solicitor General, until Ryder's death in 1756. Ryder served as Attorney General from 1737 to 1754, when he was promoted to King's Bench. See 1 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 16–22 (1992) [hereinafter Oldham, *Mansfield Manuscripts*]; James Oldham, *The Work of Ryder and Murray as Law Officers of the Crown*, in *Legal Record and Historical*

Royal court judges such as Ryder routinely served as trial judges on provincial assizes and in the London criminal and civil trial courts. When presiding over a jury trial, the judge customarily took handwritten notes of the evidence and the arguments he heard at the trial. The judge used his notes primarily for the purpose of summing up and instructing the jury at the end of the trial. The judge retained his trial notes to aid his recollection in the event that post-verdict proceedings⁴⁰ resulted in questions being put to him about matters that had transpired at the trial. Many sets of judges' notes survive in the principal repositories: the British Library, Lincoln's Inn, Harvard, Yale, and elsewhere. Alas, judges' notes have not proved very useful as legal historical sources.⁴¹ Because the judge could capture only a few essentials of what was transpiring in front of him, the notes are cryptic, and they omit far more than they record. Scribbled in haste, the handwriting is too often painful or illegible.

What makes the judge's notes of Dudley Ryder so valuable is that Ryder wrote shorthand. In the decades after World War II, a cipher expert, K.L. Perrin, transcribed the judge's notes (along with many other Ryder manuscripts) for the Earls of Harrowby, Ryder's descendants.⁴² Ryder's judge's notes are vastly more detailed than any other set so far unearthed. In the prior article I made extensive use of a single volume of the Ryder notes, in which Ryder recorded his handling of the felony trials over which he presided during four sessions of the Old Bailey held between October 1754 and April 1756. Because these felony jury trials were the subject of a set of independently produced pamphlet accounts, commonly called the *Old Bailey Sessions Papers*, I was able to compare the two sources and to confirm the reliability of each.⁴³ Comparable parallel sources are not available for Ryder's civil trials.

The five volumes of Ryder's notes that record his conduct of civil trials in the London area have not, to my knowledge, been used in previous scholarship.⁴⁴ These civil notes are the centerpiece of the present

Reality: Proceedings of the Eighth British Legal History Conference 157 (Thomas G. Watkin ed., 1989).

40. See J.M. Beattie, *Crime and the Courts in England: 1660-1800*, at 430-49 (1986) [hereinafter *Beattie, Crime*]; Langbein, *Ryder Article I*, supra note 38, at 19-21.

41. Apart from my earlier work with the Ryder sources, see Langbein, *Ryder Article I*, supra note 38, the only other sustained effort to mine judges' notes is Oldham's magisterial study of Lord Mansfield. Oldham employs an array of manuscript and published sources in addition to the judge's notes. See Oldham, *Mansfield Manuscripts*, supra note 39. He discusses the genre in James Oldham, *Eighteenth-Century Judges' Notes: How They Explain, Correct and Enhance the Reports*, 31 *Am. J. Legal Hist.* 9 (1987).

42. Copies of the typescript judge's notes have been placed on deposit at Lincoln's Inn, at the University of Chicago Law Library, and at the Georgetown University Law Library in Washington.

43. See Langbein, *Ryder Article I*, supra note 38, at 3-26.

44. Oldham published two civil cases from the Ryder notes in an appendix to his volumes on the Mansfield manuscripts, for the purpose of contrasting Mansfield's more

Article. I have also returned to the single volume of Ryder's criminal trial notes, which have not proved to be very revealing for this Article. Most of the law of evidence in this period concerned writings, and written evidence was always relatively unimportant in criminal prosecutions for felony. More than four centuries ago, Sir Thomas Smith contrasted the striking orality of English criminal jury trial with the written criminal procedure then common on the Continent. "[I]t will seem strange to all nations that do use the civil Law of the Roman Emperors, that for life and death there is nothing put in writing but the indictment only."⁴⁵

A. *Ryder's Civil Caseload*

Ryder's civil trial caseload dealt heavily with contract matters, which counsel had previously pleaded in debt, covenant, and assumpsit in one of the common law courts (Common Pleas, Exchequer, King's Bench). We see issues of formation, claims of defective performance, and problems of measuring damages. The caseload included property cases brought in trespass or ejection, actions for rent, commercial transactions, issues referred from Chancery for common law trial, and dribbles of other civil business.

By contrast with Ryder's criminal caseload, in which the appearance of counsel was exceptional,⁴⁶ in the civil cases counsel for both sides was the norm, and in many of the thickly-reported cases, we see two or more counsel appearing for each side.

Some of the cases in Ryder's civil notes are misdemeanor prosecutions, mostly for assault and battery, and hence technically criminal, but these cases were mostly treated as though they were civil matters. They were assigned to the civil trial calendar, and the restrictions upon the scope of representation by defense counsel in felony cases did not pertain to misdemeanors.⁴⁷ These prosecutions were sometimes brought with a view to laying the basis for a subsequent civil damages action.

B. *The Absence of Tort*

The modern lawyer will find it surprising that Ryder's caseload exhibited little in the way of tort actions. We find a few intentional torts

restricted note taking. See 2 Oldham, *Mansfield Manuscripts*, supra note 39, at 1529–35. Thomas P. Gallanis, Jr., a Cambridge University doctoral student, is consulting Ryder's civil notes for his Ph.D. thesis, still in progress, on the historical development of the law of evidence from the Ryder years into the 1820s.

45. Thomas Smith, *De Republica Anglorum* 114–15 (Mary Dewar ed., 1982) (written circa 1565, 1st ed. 1583).

46. See Langbein, *Ryder Article I*, supra note 38, at 124–26; accord, J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 *Law & Hist. Rev.* 221, 226–30 (1991) [hereinafter *Beattie, Scales*]; Beattie, *Crime*, supra note 40, at 360.

47. See Beattie, *Crime*, supra note 40, at 339 & n.62; John H. Langbein, *The Criminal Trial before the Lawyers*, 45 *U. Chi. L. Rev.* 263, 308 (1978) [hereinafter *Langbein, Lawyers*].

(malicious prosecution and trespass), but the law of negligence is not to be found in Ryder's civil cases. In Ryder's day negligence as a cause of action was still entangled with assumpsit, bailment, and the special duties of common carriers and innkeepers.⁴⁸

The law of vicarious responsibility was primitive, and it excused the employer from liability for wrongdoing employees.⁴⁹ Furthermore, casualty insurance for negligence was virtually unknown in Ryder's day.⁵⁰ Thus, the familiar modern deep pockets—employers and insurers—were not at hand.

Disqualification of the civil parties for interest⁵¹ prevented the testimony of the victim and injurer, testimony that would often have been indispensable to prove the case. Furthermore, in an age of crude medicine, injuries often led to deaths, but the rule requiring the plaintiff to survive in order to pursue a personal action (*actio personalis moritur cum persona*)⁵² extinguished many claims. The survival statutes that saved such claims from extinction⁵³ and the wrongful death statutes that created civil liability for causing death⁵⁴ were the work of the nineteenth-century reformers. "[T]he law of torts was totally insignificant before 1900," writes Lawrence Friedman, "a twig on the great tree of law."⁵⁵

48. See C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 164 (1949) [hereinafter *Fifoot, History and Sources*]; Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 *Law Q. Rev.* 184, 185–90 (1926).

49. "What we call *respondeat superior* came into English law mainly by virtue of a series of decisions . . . [in] Kings Bench, between 1692 and 1709. Though the new rule was flatly denied in the Exchequer in 1721, it was accepted in a 1738 decision and was restated by Blackstone in his . . . Commentaries." Gary T. Schwartz, *The Character of Early American Tort Law*, 36 *UCLA L. Rev.* 641, 695 (1989) (footnotes omitted). Even after the general acceptance of *respondeat superior*, "the 'unholy trinity' of common law defenses—contributory negligence, assumption of risk, and the fellow servant rule"—largely immunized employers against suits for work-related accidents into the nineteenth century. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 80, at 569 (5th ed. 1984) [hereinafter *Prosser & Keeton, Torts*].

50. "Until around 1830, the view generally prevailed that there could be no insurance for injury caused by negligence." Morton J. Horwitz, *The Transformation of American Law, 1780–1860*, at 202 (1977). Horwitz reviews American authority, *id.* at 202–03.

51. See *infra* notes 76–87 and accompanying text.

52. See, e.g., 3 Blackstone, *supra* note 1, at 302. For discussion, see 3 Holdsworth, *H.E.L.*, *supra* note 28, at 333–35, 576–83 (3d ed. 1923); Percy H. Winfield, *Death as Affecting Liability in Tort*, 29 *Colum. L. Rev.* 239 (1929).

53. On survival legislation, see *Prosser & Keeton, Torts, supra* note 49, § 126, at 942–44.

54. The landmark English wrongful death legislation is Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93. The American legislation is discussed in *Prosser & Keeton, Torts, supra* note 49, § 127, at 945–60.

55. Lawrence M. Friedman, *A History of American Law* 467 (2d ed. 1985). Data from the New York City trial court, called the supreme court, indicates that as late as 1870 torts comprised only 1% of the cases filed, increasing to 11.3% by 1910. Of contested cases, torts accounted for 4.2% in 1870, 40.9% in 1910. See Randolph E. Bergstrom, *Courting Danger: Injury and Law in New York City, 1870–1910*, at 16–18 & tbls. 1–2 (1992).

C. *Reliability of the Sources*

The five Ryder civil notebooks⁵⁶ report upwards of 250 cases over which he presided. A third or so of these cases receive barely a mention—only the names of the parties, with a line or two about the outcome. Some of these skimpily reported cases were defaults. Others settled or were referred to arbitration. Some were decided on motion of counsel without evidence being taken. Perhaps some were cases in which the pleadings or other indicia allowed Ryder to sense that they would be easy for the juries to decide, and he did not trouble to record the proceedings.

The two-thirds or so of the civil cases that Ryder reported in greater detail are what interest us. In these cases, Ryder typically recorded something of the submissions of the opposing counsel, and he recounted the evidence of many or all witnesses. Even Ryder's most detailed case notes are incomplete—these are not the stenographic verbatim narratives that a court reporter produces for modern litigation. Ryder was trying to capture the gist of the testimony and arguments before him. By compressing what was said, Ryder doubtless bleached out some of the particulars that would interest a scholar of the history of the law of evidence. Because, however, Ryder's notes preserve mention of a variety of objections from counsel concerning documentary evidence, we can be sure that he was not systematically neglecting to record evidentiary matters.

Problematic as Ryder's notes are, they represent a considerable advance over the published law reports that Wigmore had to rely upon for his pioneering effort to understand the origins of the law of evidence.⁵⁷ The printed reports are skewed in many ways. The criminal cases reported in the *State Trials* were selected mostly for notoriety.⁵⁸ The civil cases that found their way into the published law reports of the day (the so-called nominate reports) were cases that the reporter selected for their interest to the bar. Accordingly, these were mostly cases that presented

56. The five are identified as Document Nos. 12–13, 15–17 in Perrin's transcription of the Ryder notes [hereinafter Ryder N.B.], each Document newly paginated from page 1. Document 14 is the Old Bailey notebook, discussed in Langbein, Ryder Article 1, *supra* note 38. For citation purposes in this Article, I render, for example, a case appearing in Document 12 at page 1 as *Fish v. Chappel*, 12 Ryder N.B. 1 (1754).

I have described the shorthand transcriber's conventions in Langbein, Ryder Article I, *supra* note 38, at 134–35. Ryder underscored many phrases and sentences in the notebooks. As in the former article, I have not preserved those underscorings "when quoting the source, on the ground that readers would be distracted by the incessant and relatively pointless italicization." *Id.* at 135. My conjecture is that Ryder's purpose in underscoring these passages was to highlight matters likely to be useful when summing up to the jury.

57. Wigmore drew heavily upon the *State Trials* for criminal matters and on the nominate law reports for civil cases. See, e.g., 5 Wigmore, *Treatise*, *supra* note 7, § 1364, at 12–25 & nn. 28–60 (treating the history of the hearsay rule). For discussion of the character and the defects of the *State Trials*, see Langbein, *Lawyers*, *supra* note 47, at 264–67.

58. See *id.* at 265–66.

some legal novelty or caused some difficulty, usually on matters of substantive law or pleading. The published eighteenth-century law reports simply did not have the mission of supplying narrative accounts of the evidence adduced in ordinary trials.⁵⁹

IV. THE LAW OF EVIDENCE IN THE RYDER NOTES

Four notable themes emerge from Ryder's civil notes. First, evidentiary objections relating to writings figured prominently. Second, as regards witness testimony, the recurrent evidentiary concern was competency—enforcing the rule that parties to civil litigation and their privies were disqualified for interest. Third, the modern law of evidence, which polices the oral testimony of witnesses at trial, and which is exemplified in the hearsay rule, was scarcely detectable in Ryder's courtroom. Fourth, Ryder exercised astonishing powers of judicial comment and instruction, a dimension of the mid-eighteenth-century trial that helps explain why the modern law of evidence could remain as yet so primitive.

A. *Evidentiary Practice Concerning Writings*

The law of evidence in its infancy was concerned almost entirely with rules about the authenticity and the sufficiency of writings. What evidentiary practice there was in the civil trials that occurred before Dudley Ryder was mainly concerned with problems of written evidence. Consider some examples:

(1) How is the genuineness of a deed proved when the witnesses are dead? In a case before Ryder involving ownership of fixtures incident to a leasehold, a witness for the plaintiff "proves the death of both the witnesses to the deed, and the handwriting of both the witnesses. It was objected [by counsel for defendant that] the handwriting of the guarantor or grantee should be proved, but I said not."⁶⁰

(2) In a misdemeanor prosecution for assault and battery, had a certain person been added to the original sureties for bail? "Mr. Hume [counsel for the prosecuting plaintiff] objected to parol evidence of this. Mr. Davy [for the defendant] answered." Case law was cited. Ryder records: "I gave my opinion clearly that . . . to give parol evidence would be to vary the record."⁶¹

(3) In an action of ejectment to try title to a manor, a Chancery officer testified for the plaintiff to the provenance of a copy of a deed found in a book located in the Chancery. Counsel for the defendant objected that a copy "cannot be read unless reasons [are] given why the original cannot be had." Ryder records wrangling by counsel on both

59. See, e.g., 12 Holdsworth, *supra* note 28, at 111 (noting that James Burrow, the King's Bench reporter whose volumes cover the Ryder years, made it a practice not to "report cases which turned upon facts and evidence only . . .").

60. *Fisher v. Perrit*, 13 Ryder N.B. 19, 20 (1754).

61. *R. v. Pearse*, 13 Ryder N.B. 23, 25 (1754).

sides. He admitted the copy: "I gave my opinion that there was reasonable evidence that the original could not be had, considering . . . the great length of time [and other factors evidencing a good faith search], it was a reasonable evidence that the original could not be had now."⁶²

(4) In an action of trespass q.c.f., that is trespass to land, which turned on a plea of entitlement, counsel for the plaintiff objected to admitting into evidence an ancient lease, arguing: "On trial of boundaries of manors it is [a] settled rule of evidence that no surveys made by the Lord of the Manor, though ever so old, can be read as evidence because it is making evidence for himself to affect another's right."⁶³ Co-counsel for the plaintiff invoked the policy of disqualification for interest, reasoning: "This would be to make a man's own self evidence for himself."⁶⁴ Counsel for the defendant replied that the lease "is evidence which is the best the nature of the thing will admit."⁶⁵ This was the standard phrase of the day for invoking the concept of the best evidence rule.⁶⁶ Ryder initially put off ruling on the lease, took other proofs, then returned to rule on the question: "I thought defendant had not made out a case sufficient to entitle defendant to read that lease."⁶⁷

(5) Can the defendant's deposition be read in common law proceedings when the deposition had originally been taken in an ecclesiastical court before the defendant became, for common law purposes, an interested party whose testimony in the present litigation would be disqualified for interest? Counsel for the defendant objected to the reading, on the ground that "we cannot cross-examine him." Ryder rejected the argument but disclosed no rationale: "I admitted the evidence . . ."⁶⁸

62. Doe dem. Cary v. Conyers, 13 Ryder N.B. 38, 39, 40 (1754).

63. Perry v. Gorham, 16 Ryder N.B. 1, 2 (1755).

64. Id.

65. Id.

66. On the primacy of the best evidence rule, see *supra* note 21 and accompanying text.

67. Perry v. Gorham, 16 Ryder N.B. 1, 5 (1755).

68. Birchal & Brook v. Kelly, 16 Ryder N.B. 77, 86 (1756). Ryder reports that one counsel cited page 454 of Gilbert's *Law of Evidence* in support of the argument that a deposition ought not to be admitted because "we cannot cross-examine" the declarant. See Birchal & Brook v. Kelly, 16 Ryder N.B. 77, 86 (1756). Neither of the two editions of Gilbert's *Evidence* published in Ryder's lifetime (1754 or 1756), discussed *supra* note 18, was long enough to reach page 454. Counsel's reference was probably to page 47 of the 1754 edition, where Gilbert explains that certain deposition evidence is excluded because the adverse party did not have the opportunity to cross-examine the declarant. See *supra* note 33.

Ryder's trial practice⁶⁹ reflects the preoccupation with written evidence that we find in Gilbert and the other eighteenth-century writers.⁷⁰ The preference for written evidence⁷¹ extended back to the Middle Ages, and was particularly apparent in contract and conveyancing. The judges determined by the fourteenth century that only contracts written and sealed would be actionable under the writ of covenant.⁷² Although seal was not required to found an action upon the writ of debt, oral evidence was inadmissible to controvert seal, even if the defense was that the obligor had already paid the debt. Francis Bacon put the point as a maxim: "The law will not couple and mingle matter of specialty [i.e., a sealed instrument], which is of higher account, with matter of averment, which is of inferior account in law."⁷³

The message of such rules was that prudent persons channel their transactions into seal, because seal trumped contrary claims that would require proof of fact. When the jurisdictional competition between King's Bench and Common Pleas resulted in a significant expansion in the scope of cases exposed to jury trial under the writ of assumpsit in the seventeenth century, the judges responded by procuring the enactment of the Statute of Frauds of 1677, which imposed fresh writing requirements for serious transactions (testation, land transfers, contracts involving more than ten pounds).⁷⁴ The legal system that endured into Dudley Ryder's day had exhibited a centuries-long proclivity for suppressing resort to oral evidence at jury trial in civil matters.

Preferring written evidence has been an enduring characteristic of European law. Damaska remarks upon the "heavy dependence" in modern Continental legal systems "on public documents attesting the existence of sales, loans and similar transactions."⁷⁵ It was well after Dudley

69. Ryder's judicial notes contain further examples of the contemporary concern about the admissibility of written evidence. Counsel object to and defend the use of writings; Ryder rules on the matter and records it in his notes. See, e.g., *Power v. Burke*, 16 Ryder N.B. 31, 32 (1756); *Morrow v. Jalabert & Belcher*, 15 Ryder N.B. 56, 57-58 (1755); *Bourke v. Henry*, 13 Ryder N.B. 25, 26 (1754); *Fletcher v. Cargill*, 12 Ryder N.B. 62, 63 (1754); *Roberts v. Clifton*, 15 Ryder N.B. 19, 20 (1755).

70. See *supra* text accompanying notes 20-24.

71. For valuable detail on the preference for written evidence in English law, see Michael R.T. Macnair, *The Law of Proof in Early Modern Equity 87-92* (1991) (unpublished D. Phil. thesis, University of Oxford) (discussing estoppel by record and estoppel by deed) (on file with the Columbia Law Review) [hereinafter Macnair, Thesis]. Holdsworth addresses those topics in 9 Holdsworth, H.E.L., *supra* note 28, at 147-59.

72. See Fifoot, *History and Sources*, *supra* note 48, at 257-58.

73. Quoted in W.T. Barbour, *The History of Contract in Early English Equity*, in 4 *Oxford Studies in Social and Legal History* 1, 25 (Paul Vinogradoff ed., 1914) (quoting Francis Bacon, *Maxims of the Law*). A yearbook case from 1404 reasons that "harm . . . would ensue . . . [if a litigant] were received to avoid an obligation . . . by mere oral evidence . . ." 5 Henry IV. 2, pl. 6 (1404).

74. See A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit 599-605* (1975) [hereinafter Simpson, *Contract*].

75. Damaska, *Analogues*, *supra* note 3, at 437. He continues: "Roman-canon law prodded parties to use public documents because they discouraged litigation over certain

Ryder's time that Anglo-American law began to diverge from this preference for written evidence, towards the distinctive emphasis on oral evidence that characterizes today's practice.

B. *Disqualification for Interest*

The parties to civil litigation were incompetent to testify at common law until the nineteenth century, ostensibly for fear of perjury.⁷⁶ Objections to witnesses on the ground of interest figure prominently in Ryder's civil notes. Examples have just been described in which disqualification for interest was the basis for challenging written evidence. Questions of competency also arose in connection with witnesses who were offered to present oral testimony.

A recurrent pattern in the Ryder notes is the appearance of servants as trial witnesses to prove transactions involving a disqualified master.⁷⁷ Sometimes the question arose whether the purported servant was in fact a principal. For example, in a case involving a wagering contract at the Enfield races, when the plaintiff's witness recounted the transaction, counsel for the defendant "objected to his evidence because [the witness]

civil transactions (or, at least, reduced evidentiary difficulties in the event of a dispute)." *Id.* Macnair has argued that the preference for written evidence in English law traces to the Roman-canon tradition. See Macnair, Thesis, *supra* note 71. I am unpersuaded. I think that the peculiar problems of the English legal system, discussed *supra* text accompanying notes 71-74, explain the medieval and early-modern English emphasis on written proof. To be sure, the English law sometimes reveals similarities to the Continental tradition, similarities that have tempted others to "wonder whether English judges, in developing their fine-webbed admissibility rules for use in jury trials, were always as innocent of the available literature on the Roman-canon law of proof as many would have us believe." Damaska, Italy, *supra* note 34, at 60. Rabel, for example, claimed to trace the Statute of Frauds to a French model. See E. Rabel, *The Statute of Frauds and Comparative Legal History*, 63 *Law Q. Rev.* 174 (1947).

In an insightful article, the late James Beardsley pointed to the enduring influence on French procedure of this European tradition preferring written proof. "French civil procedure is marked by a strong preference for written proof and by the tendency of French judges to avoid factual determinations that must be based on evidence which is complex or otherwise difficult to evaluate." James Beardsley, *Proof of Fact in French Civil Procedure*, 34 *Am. J. Comp. L.* 459, 459 (1986). See *id.* at 459 on "[t]he distrust of oral evidence" in French practice, and *id.* at 469-74 on the tendency to "fact avoidance."

76. Gilbert's emphasis on disqualification for interest is noted *supra* text accompanying note 26. The historical background to the rule of testimonial disqualification of the parties, civil and criminal, is discussed in 2 Wigmore, *Treatise*, *supra* note 7, §§ 575-76. The rule was abolished in England for civil parties by Lord Brougham's Act, *An Act to Amend the Law of Evidence (The Evidence Act)*, 1851, 14 & 15 *Vict.*, ch. 99, and for criminal defendants in *An Act to Amend the Law of Evidence (Criminal Evidence Act)*, 1898, 61 & 62 *Vict.*, ch. 36. Some American state legislation was in advance of both English acts. On the movement to abolish the disqualification rule, see *Ferguson v. Georgia*, 365 U.S. 570, 575-86 (1961); Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 *Ky. L.J.* 91 (1981) [hereinafter *Bodansky, Disqualification*].

77. See, e.g., *Redhead v. Scott*, 12 *Ryder N.B.* 47 (1754); *Tetlow v. Simes*, 13 *Ryder N.B.* 3, 11 (1754).

was commissioned to enter the horse for that day” Plaintiff’s counsel replied that “[t]he witness is indifferent, not interested in the races,” and Ryder agreed. “I over-ruled the objection, because [the witness] was only in nature of a servant to give an account of what he did in pursuance of his master; so a porter employed to pay money is used as witness to the payment.”⁷⁸

Much of what a civil lawsuit is about in modern circumstances is forcing the defendant to testify—in pretrial proceedings, and if necessary, at trial. In Ryder’s day, the rule of disqualification for interest was a grievous shortcoming in common law civil procedure. The common law rule contributed mightily to the rise of Chancery, where the parties could be made to answer questions under oath.⁷⁹ Disqualification greatly narrowed the range of potential witness testimony at common law trial. The most valuable witnesses (the parties and their privies) were routinely unavailable.

The testimonial disqualification of parties powerfully reinforced the common law’s preference for written evidence.⁸⁰ Especially in a transactional setting, such as contract or conveyancing, the knowledge that the parties would not be allowed to testify about the transaction if it fell into contention⁸¹ must have encouraged prudent transaction planners to attempt to channel significant matters in writing. Sam Thorne put the matter bluntly: “[P]rior to the late eighteenth century the informal contract was not the form commercial agreements took”⁸²

Cases involving the testimonial disqualification of parties and others on the ground of interest figured prominently in Lord Mansfield’s trial

78. *Southcote v. Hamilton*, 13 *Ryder N.B.* 29, 29 (1754).

79. Alas, Chancery was too understaffed to be able to conduct routine oral examination of the parties, and thus the irony sketched by Dicey:

[T]he Court of Chancery allowed a plaintiff to search the conscience of the defendants, and the defendants, by a cross bill, to perform a similar operation upon their antagonist, but only permitted the inquiry to be on paper. In other words, whilst the common law courts took the right method for ascertaining the truth [that is, by examining and cross-examining witnesses orally], they excluded the evidence of the persons to whom alone the truth was likely to be known, whilst the Court of Chancery admitted the evidence of the persons most likely to know the truth, but would receive it only in the form of written answers, which give little or no security that the witnesses who know the truth should tell it

A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* 90–91 (1914) (citations omitted).

80. To be sure, the disqualification policy also resulted in the exclusion of some writings. See, e.g., *Ryder’s case*, *Perry v. Gorham*, 16 *Ryder N.B.* 1, 2 (1755), discussed *supra* text accompanying notes 63–67.

81. See *Simpson*, *Contract*, *supra* note 74, at 88–101, 126–35 (discussing rules that prevented oral proof from contradicting sealed instruments and recognizances).

82. Samuel E. Thorne, *Tudor Social Transformation and Legal Change*, 26 *N.Y.U. L. Rev.* 10, 21 (1951).

caseload in the decades immediately following Ryder's trials,⁸³ but Oldham has also discovered in Mansfield's practice a remarkable evasion of the disqualification rule. Mansfield referred a considerable fraction of his civil cases for determination by arbitrators,⁸⁴ and when he did, the order commonly "include[d] a provision calling for the sworn testimony of the plaintiff and defendant, despite their incompetence to testify in court."⁸⁵ Mansfield's willingness to dispense with disqualification for interest when sending civil cases for arbitration reveals his low regard for the disqualification rule and its conclusive presumption that any interested litigant would necessarily perjure himself.⁸⁶ Nearly a century before Parliament abolished disqualification for interest,⁸⁷ the preeminent jurist of the age was actively evading this senseless rule.

C. *Oral Evidence; Hearsay*

Apart from challenges to competency, the pithy, first-person narratives that Ryder attributes to each witness in his well-reported cases show little trace of evidentiary rules impinging upon the oral testimony of witnesses.

The Ryder notes preserve several instances of seeming hearsay. A witness testifies to negotiations between plaintiff and defendant about the amount of rent, then says: "But 13 September afterwards I heard they came to an agreement."⁸⁸ In an action for wages, a servant, cross-examined, testifies, "I heard but don't know that Sharp was bankrupt."⁸⁹ In a collection suit against a deadbeat, a former landlord testifies that "I did not hear till after he lodged at my house that his father was a poor clergyman's son," hence that the defendant was not the man of fortune he had represented himself to be.⁹⁰

Ryder also records having elicited opinion evidence in one case. A Mr. Letch, who had been pursuing the defendant for payment of debts, is allowed to testify, "I am satisfied he got into the rolls of Fleet [Prison] only to hinder his creditors from getting their debts."⁹¹

In more than 250 cases, virtually all of them involving counsel for plaintiff and defendant, I noticed only one mention of a seeming objec-

83. See James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 *Law & Hist. Rev.* 95, 107–13, 114 (1994) [hereinafter Oldham, *Truth-Telling*]; 1 Oldham, *Mansfield Manuscripts*, *supra* note 39, at 144.

84. See 1 Oldham, *Mansfield Manuscripts*, *supra* note 39, at 151–52, 153–56.

85. *Id.* at 154; see Oldham, *Truth-Telling*, *supra* note 83, at 112–13.

86. In the next century, Bentham denounced the disqualification rule for presupposing that "[f]or a farthing . . . [there is] no man upon earth, no Englishman at least, that would not perjure himself." Oldham, *Truth-Telling*, *supra* note 83, at 110 & n.76 (quoting Jeremy Bentham, *Rationale of Judicial Evidence* (1827)).

87. See *supra* note 76.

88. *Fleming v. Needham*, 13 *Ryder N.B.* 14, 14 (1754).

89. *Parsons & Woods v. Sharp*, 13 *Ryder N.B.* 62, 62 (1754).

90. *Buckenam v. Garden*, 13 *Ryder N.B.* 64 (1754).

91. *Tetlow v. Simes*, 13 *Ryder N.B.* 3, 8 (1754).

tion to the receipt of oral evidence. The case involved heirship to realty, and Ryder writes: "Note: Mr. Norton objected to the hearsay evidence from a servant of the family. I let her go on."⁹² Ryder supplies no rationale for his ruling. Thus, the Ryder notes give scant indication that anything resembling the modern hearsay rule was in force in the 1750s.

Some years ago I drew attention to examples of hearsay appearing in the *Old Bailey Sessions Papers* from 1678 into the 1730s.⁹³ Goebel and Naughton report similar findings from manuscript and pamphlet sources in criminal cases in colonial New York: "[A] good deal of testimony which would today be excluded as hearsay was regarded as admissible in the eighteenth century."⁹⁴ Oldham has now documented instances of hearsay in Lord Mansfield's judicial notes from the 1780s.⁹⁵

Yet judges and jurists in the later seventeenth and eighteenth centuries understood that something was wrong with hearsay. There are cases in the *State Trials* and in the nominate reports disapproving of hearsay, cases that led Wigmore to the mistaken view that the hearsay rule received "a complete development and final precision [in] the early 1700s."⁹⁶ We recall the case in which counsel raised the hearsay objec-

92. *James v. Reeve*, 15 Ryder N.B. 27, 28 (1755).

93. See Langbein, *Lawyers*, supra note 47, at 301–02. Landsman reports other examples from these sources during the 1710s and 1720s. See Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *Cornell L. Rev.* 497, 565–67 (1990).

A pamphlet trial report from the Ryder years supplies a further instance. In an August 1753 rape prosecution, Joseph Law, a surgeon, testifies to having examined the sixteen-year-old victim and finding "that there had been a penetration; I examined the Girl concerning it, and she said, her Father had lain with her by Force, and she farther owned to me, that she felt something come from her father warm into her." Anon., *The Trial of Job Wells of Redburn in the County of Hertford* 6 (London, 1753) (exemplar in Guildhall Library, London).

94. Julius Goebel, Jr., & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776)*, at 642 (1944). The authors set forth instances of hearsay in prominent eighteenth-century trials. See *id.* at 642–44. Nelson found that in eighteenth-century Massachusetts, the hearsay rule was honored "more in breach than in the observance . . ." William E. Nelson, *Americanization of the Common Law* 25, 192 n.121 (1975).

95. See Oldham, *Truth-Telling*, supra note 83, at 104–05 & nn.46–47, with references to cases discussed in Oldham, *Mansfield Manuscripts*, supra note 39. Another of Oldham's examples of hearsay, *Howe v. Dive* (Croyden Assizes, 1781), cited in Oldham, *Truth-Telling*, supra note 83, at 99 n.20, and discussed *id.* at 113–17, seems less cogent, because the adverse party appears to have stipulated to the main use of hearsay. See *id.* at 116.

96. 5 Wigmore, *Treatise*, supra note 7, § 1364, at 9. Wigmore observed "hearsay statements [being] constantly received, even against opposition," in the *State Trials* across the century from the 1570s. *Id.* § 1364, at 15 & n.28. He thought that "the fixing of the doctrine takes place" in the *State Trials* of the period 1675–90. *Id.* § 1364, at 16 & n.32. "[B]y the beginning of the 1700s, [there was] a general and settled acceptance of this rule as a fundamental part of the law." *Id.* § 1364, at 26. "By the middle of the 1700s the rule is no longer to be struggled against . . ." *Id.* § 1364, at 18 & sources cited n.37.

tion that Ryder dismissed, and we have noticed Gilbert's peculiar two-paragraph account ("Hearsay is no Evidence").⁹⁷

The puzzle is to reconcile the seeming want of the hearsay rule with these episodic indications of official disquiet about hearsay. Ryder's judicial notes are skimpy enough on the details of witness testimony at trial that we should in principle be reluctant to draw negative inferences from such an incomplete source. Conceivably, Ryder simply neglected to record a Perry Mason-like cascade of objections from counsel complaining of hearsay, materiality, opinion, and the rest. However, Ryder's insistent attention to recording evidentiary objections concerning writings and issues of competency points the other way. It seems unlikely that Ryder would preserve so much discussion of his evidentiary rulings concerning writings while suppressing mention of evidentiary rulings about oral testimony. Accordingly, I think that the Ryder notes reflect reality. The practice of the nineteenth and twentieth centuries—in which counsel persistently prompt the judge to rule on the admission or exclusion of oral evidence on grounds balancing probative value against potential prejudiciality—was not yet in force. Decades later, in 1794, Edmund Burke remarked in the House of Commons that the rules of "the law of evidence . . . [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes."⁹⁸

Indeed, in the Ryder years the very concept of deciding to "admit" or "exclude" oral evidence appears to have had a meaning radically different from what we now understand when we use those terms. According to Sylvester Douglas, later Lord Glenbervie, the compiler of two well-known sets of late-eighteenth-century law reports,⁹⁹ when judges determined questions of admissibility, they did so in the presence of the jury. "Perhaps it would be an improvement," Douglas mused in 1776, "when questions of admissibility are raised, that the jury, as well as the witnesses, should withdraw, till the point was argued and decided."¹⁰⁰

97. See *supra* text accompanying note 30.

98. 12 Holdsworth, H.E.L., *supra* note 28, at 509 n.7.

99. Wallace records Hargrave's praise for Douglas's "collection of excellent Reports on the law of parliamentary elections." John W. Wallace, *The Reporters* 453 (4th ed. 1882); see also *id.* at 529 n.1 (regarding Douglas's *King's Bench reports*).

100. Sylvester Douglas [Lord Glenbervie], "Notes on the Case of Cardigan," in 3 *The History of the Cases of Controverted Elections* 171, 232, n.B (2d ed. 1802) (1st ed. 1775-76). Remarkably, Wigmore knew this source and extracted it in part in his treatise. See 6 Wigmore, *Treatise*, *supra* note 7, § 1808, at 275. (I wish to acknowledge the kindness of a former student, Daniel Edelman, Chicago '76, who brought this arresting source to my attention some years ago.) Douglas was explaining why a parliamentary election committee should not address questions of the admissibility of evidence with "the same strictness" as the common law trial courts that sit with juries. In fuller text the passage reads:

It has often occurred to me, that, in trials at *nisi prius*, when evidence is objected to, there is an impropriety in allowing the counsel who offers it, to state what he means to prove in the hearing of the jury, and this for the reason already

Douglas' observation calls into question the fundamental distinction between evidentiary objections that affect admissibility, and those that affect only weight or credit. What is distinctive about the modern Anglo-American hearsay rule is precisely this effort to deal with the infirmities of hearsay by excluding it from the jury, rather than allowing its weaknesses to affect credit as in modern Continental law.¹⁰¹ If, however, the eighteenth-century jury was routinely in the courtroom when the judge purported to rule on admissibility, then there was in truth little difference between excluding hearsay and admitting it with diminished credit. Indeed, the idea that hearsay objections should affect credit rather than admissibility had been propounded as doctrine in Lilly's Abridgment, published in 1719. Lilly attributes to the King's Bench in an anonymous opinion decided in the year 1670 the position that a trial witness may testify to an out-of-court declarant's "Words in Evidence," because "it is but matter of Evidence, and is left to the Jury how far they will give credit to them"¹⁰²

To conclude: On the state of the sources, it is hard to believe that the courts of the mid-eighteenth century enforced the hearsay rule or any of the other modern exclusionary rules that balance the potential prejudiciality of witness testimony against the supposed probative value. Counsel seem not to have objected to hearsay often, and the courts seem

mentioned; especially as jurymen are too apt to infer, that evidence so offered must be both true, and fatal to the party who objects to it, merely because it is objected to. Perhaps it would be an improvement, when questions of admissibility are raised, that the jury, as well as the witnesses, should withdraw, till the point was argued and decided.

Douglas, *supra*, at 232 (1802 edition) (I have not seen the 1776 edition).

101. Compare Damaska's discussion of a 1987 decision of the German Supreme Court for nonconstitutional matters, the *Bundesgerichtshof*, in which the court held that the trial court had placed too much weight on hearsay witnesses. See Damaska, *Analogues*, *supra* note 3, at 455-56.

Damaska also reminds us of the insight from comparative law that the bifurcation of the Anglo-American trial court into separate spheres for judge and jury is what enables the exclusionary mechanism of the modern rules of evidence such as hearsay to function. By contrast, in the "unitary" courts of the European continent, "a judge cannot keep inadmissible hearsay from the factfinder by a preliminary ruling; the same persons decide the admissibility of evidence and the weight it deserves." *Id.* at 427. "Continental lawyers often discuss the difficulty in their procedural system of identifying hearsay before it has reached the factfinder." *Id.* at 427 n.2 (citation omitted).

102. 1 John Lilly, *General Abridgment of the Law* 549 (1719). The passage from Lilly continues: "and it is lawful for one that is admitted as a Witness to give any thing in Evidence which may concern the Matter in Question." *Id.* I owe this reference to Kenneth Obel, Yale '95, who extracts it in an unpublished paper, "Historical Origins of the Hearsay Rule," 8 (1995) (on file with author).

Another example of irresolution about the workings of exclusion occurs in *R. v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (O.B. 1789), a dying declarations case tried before Chief Baron Eyre, who left it to the jury to decide whether or not "the declarations were admissible." 1 Leach at 504, 168 Eng. Rep. at 354. The reporter, Leach, collects contrary authority from the years 1790-92, in a note. See 1 Leach at 504 & n.a., 168 Eng. Rep. at 354. (I owe this reference to Richard Friedman.)

to have received it aplenty. I am inclined to think that the question of excluding hearsay and other suspect types of testimony may still have been remitted to judicial discretion, rather than being subject to firm rules of exclusion.

D. *Comment and Instruction*

An astonishing aspect of the civil practice depicted in Ryder's notebooks is the extent of his power to comment on the evidence and to instruct the jury.

I have had occasion elsewhere to draw attention to the phenomenon of intrusive judicial direction in criminal trials. Reporting on pamphlet sources for the period 1670–1730, I pointed to the informal communication between judge and jury that occurred during the trial. This chatter allowed the trial judge to “get some insight into jurors’ thinking before they left for deliberations;” further, “the judge could also discover the reasons for a proffered verdict when the jury returned from deliberations, because in many cases the jury either volunteered the information or supplied it under questioning by the judge.”¹⁰³

The trial judge could “reject a proffered verdict, probe its basis, argue with the jury, give further instruction, and require redeliberation.”¹⁰⁴ For example, according to the exceptionally detailed pamphlet account of a case of alleged statutory rape, *Arrowsmith*, which occurred in 1678, the jury twice deliberated and attempted to acquit. The trial judge rejected both verdicts and succeeded on the third try in obtaining from the jury the conviction that he thought appropriate to the facts.¹⁰⁵ “The tradition that the jury would lightly disclose the reasoning for a verdict became especially important in this situation, because it enabled the court to probe the basis of the proffered verdict, [and] hence to identify the jury’s mistake and correct it.”¹⁰⁶

103. Langbein, *Lawyers*, supra note 47, at 289.

104. *Id.* at 291.

105. The *Arrowsmith* case is extracted, see *id.* at 291–93.

106. *Id.* at 294–95. The celebration of *Busbell’s Case*, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670), in the English constitutional tradition (on which, see, e.g., Blume, *Directed Verdict*, supra note 10, at 555–58) has helped conceal the point that judges routinely participated in shaping jury verdicts through dialogue and instruction. The holding in *Busbell’s Case* was that the trial judge could not impose fines upon jurors for returning a verdict with which the judge disagreed. But part of the rationale voiced in *Busbell’s Case* was that the routine dialogue between judge and jurors would usually suffice to iron out differences. Said Vaughan:

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the Judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or é contrario, and thereupon they rectify their verdict.

Vaughan at 144, 124 Eng. Rep. at 1010. I have elsewhere observed that the pattern of collaborative relations between judge and jury in the formulation of verdicts illumines the main holding in *Busbell’s Case*. “[T]he judges had so many other channels of influence and control over the work of the criminal jury that the power to fine jurors for acquittal-against-

In *Ash v. Ash*,¹⁰⁷ decided in 1697, Chief Justice Holt explained that jurors were expected to disclose their thinking to the court in order that the court could assist them to amend their verdict. He reversed what he deemed to be a grossly excessive award of damages (£2000 for an incident of false imprisonment involving the detention of a youth for a couple of hours), saying:

The jury were very shy of giving a reason for their verdict, thinking that they have an absolute, despotic power, but I did rectify that mistake, for the jury are to try cases with the assistance of the judges, and ought to give reasons when required, that, if they go upon any mistake, they may be set right¹⁰⁸

This practice of vigorous judicial comment and instruction is much in view in Dudley Ryder's judicial notes. Sitting in felony cases at the Old Bailey, Ryder had no hesitation about trenching on the merits. In one instance, he records: "The case was so plain that I told the jury I supposed they could not have any doubt; and without my summing up they found her not guilty."¹⁰⁹ Examples from Ryder's civil cases abound:

(1) In a tort action for assault, Ryder records directing a verdict on the merits. "I directed the jury that they must find for the plaintiff, but could not find too small damages as the defendant was the cause of the whole."¹¹⁰

(2) In an action for money had and received arising from the sale of leasehold, Ryder records: "I summed up for plaintiff and directed the jury to find for plaintiff. Verdict for [plaintiff]¹¹¹ £30."¹¹²

(3) In a malicious prosecution case, Ryder records a two-stage informing process.

I did sum up, but only hinted my opinion for defendant, principally by reason of the last witness. But when the jury were going out not being clear in their opinion, I then did sum up not fully, but took notice of the circumstances which made me think they

direction was simply not worth fighting for when it became a subject of political controversy in the 1660s." Langbein, *Lawyers*, supra note 47, at 298. The evidence of Dudley Ryder's civil notes, reviewed infra, justifies extending that observation to civil jury verdicts as well. For extensive discussion of the background and significance of *Bushell's Case* see Thomas A. Green, *Verdict According to Conscience* 200-64 (1985).

107. Comb. 357, 90 Eng. Rep. 526 (K.B. 1697).

108. Comb. 357-58, 90 Eng. Rep. at 526, discussed in David Graham, 1 A *Treatise on the Law of New Trials* 445 (2d ed. 1855); and in *M'Connell v. Hampton*, 12 Johns. 234, 237 (N.Y. Sup. Ct. 1815). (I owe these references to Daniel Klarman and Renée Lettow.)

109. *R. v. Elizabeth Woodcock*, 14 Ryder N.B. 4, 6 (1754). I have discussed other examples in Langbein, *Ryder Article I*, supra note 38, at 23 & n.79.

110. *Fish v. Chappel*, 12 Ryder N.B. 1, 3 (1754).

111. In the original the word is "defendant." The transposition was either Ryder's or the shorthand transcriber's. The correct word must be "plaintiff," because the award of damages could only have been to the plaintiff.

112. *Fisher v. Perrit*, 13 Ryder N.B. 19, 21 (1754).

should find for the defendant Then they did not go out, but found for defendant.¹¹³

We observe in this case not only Ryder's influence with the jury, but his ability to discern that the jurors were uncertain and needed further guidance. Informal conversation between judge and jury allowed the judge to calibrate the level of his intervention.¹¹⁴

(4) In another of Ryder's civil cases, which involved asserted breach of a contract of marriage, Ryder records that "I summed up very fairly."¹¹⁵ The jury found for the defendant. "And I think rightly," observes Ryder. "They thought plaintiff's first witness was not to be believed."¹¹⁶ Ryder knew why the jury decided as it did, presumably because the jurors told him.

In numerous cases in the civil notebooks, Ryder records that he voiced his views on the merits, and the trial jury followed. For example: "I intimated my opinion to the jury . . . [t]hat the evidence did not sufficiently prove the specialty [sealed instrument],"¹¹⁷ and the jury found accordingly. "I summed up strongly for plaintiff, but on the law and fact. Verdict for plaintiff £14.17, and clearly right."¹¹⁸ "I summed up very strongly for defendant on all the issues. The jury found all issues for defendant"¹¹⁹ Even in misdemeanor cases Ryder pressed his views on the jury firmly. In an assault case, "Verdict against defendant according to my directions"¹²⁰ In another assault case, "I summed up strongly in favor of the prosecution The jury found the defendant guilty."¹²¹

113. *Goodhall v. Leader*, 16 Ryder N.B. 34, 36 (1756). This case is one of two from Ryder's civil notes that Oldham publishes in full text, for the purpose of contrasting Mansfield's note taking technique. See 2 Oldham, *Mansfield Manuscripts*, supra note 39, at 1533-35.

114. Oldham reports a 1765 case from Lord Mansfield's judicial notes in which Mansfield recites the gist of the evaluation of certain letters that Mansfield gave when summing up, as well as what "one of the Jury" volunteered as his view of the matter before the jury proceeded to the verdict. 1 Oldham, *Mansfield Manuscripts*, supra note 39, at 139 (quoting Mansfield).

115. *Knutton v. Smith*, 13 Ryder N.B. 40, 44 (1754).

116. *Id.*

117. *Martin v. Weeden*, 12 Ryder N.B. 6, 8 (1754).

118. *Dunton v. Scot*, 12 Ryder N.B. 56, 58 (1754).

119. *Bennet v. Gibson*, 13 Ryder N.B. 1, 3 (1754).

120. *R. v. Fame*, 16 Ryder N.B. 62, 64 (1756).

121. *R. v. Payne*, 13 Ryder N.B. 34, 37 (1754).

The juries did not invariably heed Ryder's view.¹²² He records one case in which the jury refused to follow him,¹²³ and another in which he thought the damages inadequate.¹²⁴ But these were exceptional outcomes.¹²⁵ The impression that one derives from studying Ryder's civil practice is that the judge routinely dominated jury verdicts. He guided the jurors to his views on the facts and the law, and he seems to have had an informal, conversational relationship with the jurors that allowed him to "turn up the heat" if he thought the jury was inclining against his views.¹²⁶

122. Regarding the power relationships, Oldham observes that the "directed verdict" of these decades

differ[ed] from the modern concept of the directed verdict as a final determination. The eighteenth-century jury was considered to have a moral obligation to follow the direction of the judge and his construction of applicable laws, but there was no legal obligation to do so. Nevertheless, trial judges did frequently direct juries to find for one party or the other, and juries ordinarily complied.

1 Oldham, *Mansfield Manuscripts*, supra note 39, at 150. The modern American directed verdict, in which the court effectively enters the verdict, emerged only in the second half of the nineteenth century. See Blume, *Directed Verdict*, supra note 10 at 565-76; Frank W. Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict?*, 24 *Yale L.J.* 127, 137-41 (1914).

An English trial judge in the eighteenth century could also exercise the power to order a new trial as a corrective for a verdict that the judge perceived to be against the weight of the evidence. This power must have deterred juries from attempting to return a decision that the court told the jury would be thrown out and sent for retrial to another jury. On the recognition of the power to award a new trial, see George T. Washington, *Damages in Contract at Common Law: Part I*, 47 *Law Q. Rev.* 345, 358-66 (1931); the development is summarized in John M. Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 *Am. J. Legal Hist.* 201, 212-18 (1988).

123. See *Plank v. Shaw*, 12 *Ryder N.B.* 28, 29 (1754) (Ryder "summed up rather in favor of the plaintiff. . . . The jury found for defendant. Note: though [I] incline to think for plaintiff, yet [I] think no grounds for new trial").

124. *Easthead v. Shelton & Faulkner*, 13 *Ryder N.B.* 14, 14 (1754) ("Verdict for £15. I recommended strongly to the jury to give more."). By Ryder's day the common law courts, especially King's Bench, could reject a jury's award of damages and order a new trial if persuaded that the award was against the weight of the evidence. See Washington, supra note 122, at 362-66.

125. Oldham found half a dozen such cases in Lord Mansfield's trial notes from the 1770s and 1780s. See 1 Oldham, *Mansfield Manuscripts*, supra note 39, at 90-91.

126. A version of this practice survived in Connecticut into the 1820s, as recounted in Swift's authoritative manual. If the court disagrees with a proffered verdict, the court may return the jury to a second, and third consideration, and may state to them the ground of their difference of opinion, and their reasons to induce them to bring in a different verdict. This gives them an opportunity to enter into a full discussion of the testimony, and to express to [the jury] their opinion, how the case ought to be decided: but if the jury adhere to their verdict on the third consideration, it must be recorded.

Zephaniah Swift, 1 *A Digest of the Laws of the State of Connecticut* 773 (New Haven, Sherman Converse 1822). I take this reference from Renée B. Lettow, *New Trial for Verdict Against Law: Jury Control in Early Nineteenth-Century America*, 3 *Notre Dame L. Rev.* 505, 523 (1996). Lettow also cites earlier opinions from Vermont and Massachusetts

V. UNDERSTANDING THE HISTORY OF THE LAW OF EVIDENCE

The Ryder sources leave us to ask: Why was the law of evidence not apparent in the trials of the mid-eighteenth century? The immediate answer is that there was a law of evidence in the Ryder sources, but it was not the law that came to typify modern practice. Ryder's trial notebooks depict the pre-modern law, the law found in Gilbert and the lesser eighteenth-century treatises, which was preoccupied with the authenticity of writings and the competency of witnesses.

The modern law of evidence, centered on the oral testimony of witnesses at trial, supplanted the older law at the end of the eighteenth century and across the nineteenth century. The modern law abandoned¹²⁷ the effort to treat the document-preferring best evidence rule as the organizing principle of the law of evidence.¹²⁸ Cross-examination replaced oath¹²⁹ as the fundamental safeguard for the receipt of oral evidence, defeating the competency regime that had disqualified the parties for interest,¹³⁰ and allowing the hearsay rule to assume its ultimate character.

From the Middle Ages to our own day, the driving concern animating the Anglo-American law of evidence has been to protect against the shortcomings of trial by jury. Despite its merits, jury trial has always been fraught with danger. Jurors are untrained in the law, they decide without giving reasons, they have no continuing responsibility for the consequences of their decisions, and their verdicts are quite difficult to review. The risks of error and partiality in this system of adjudication are ineradicable. The law of evidence has changed mightily since the Middle Ages, along with the jury itself, but the primary mission of our law of evidence—to guard against the inherent weaknesses of jury trial—has remained constant.

Already in the Middle Ages, common law civil procedure used the writ system and the pleading process to prevent many disputes from reaching jury trial, and to narrow the scope of cases that were tried. The rules favoring documentary proof reinforced this system. As the instructional trial took hold in early modern times, the preference for written evidence endured, reinforced by the competency rules that disqualified parties from testifying at trial. The implicit message of this system was to encourage transacting parties to channel their dealings into writing. This writing-centered system is the formal law of evidence that comes down to

supporting comparable practice: *Robbins v. Windover*, 2 Tyl. 11, 14 (Vt. 1802), and *Hagar v. Weston*, 7 Mass. 110, 111 (1810).

127. Noticed in Thayer, *Preliminary Treatise*, *supra* note 8, at 497.

128. See discussion *supra* note 21 and accompanying text.

129. Regarding oath in Gilbert's rationale for excluding hearsay rule, see *supra* text accompanying notes 30–31. The testimonial disqualification for interest, whose importance has been discussed, see *supra* text accompanying notes 26, 76–87, was also oath-centered, ostensibly to spare interested parties from the temptation to perjure themselves.

130. See *infra* text accompanying note 154.

us in the eighteenth-century treatises. Ryder's notebooks show this system in operation in the mid-1750s. Ryder's evidentiary practice was mostly about writings, and about the testimonial disqualification of parties.

Ryder's notebooks also show us an informal system of jury control, in the judge's searching powers of comment and instruction. This informal system is invisible in Gilbert and the other treatises. It operated alongside the writing-centered formal law. As a practical matter, it allowed the trial judge to dominate civil jury trial virtually as he wished.

The exclusionary system of the modern Anglo-American law of evidence, exemplified in the hearsay rule, has an essentially prophylactic purpose. In modern practice it is quite difficult for the trial judge to correct error in a jury verdict once error has occurred.¹³¹ Accordingly, our law of evidence strives to prevent error by excluding from jurors information that might mislead them.¹³² The judge-operated calculus of admission and exclusion is designed to prevent error from infecting adjudication. Prophylaxis substitutes for cure.

In Dudley Ryder's courtroom, however, there was far less need for prophylaxis. As I have emphasized in reviewing Ryder's civil and criminal trials, the judge could influence and correct jury verdicts in advance of accepting them. Into the Ryder years we see routine informal communication between judge and jury, the judge's awesome power of comment and instruction, and the jurors' enthusiasm for following the judge's professional guidance. Jury verdicts were collaborative products, impounding deep judicial involvement on the merits.

131. From the standpoint of comparative law, there is no more striking contrast between modern Continental and Anglo-American practice than the difference in attitude toward the question of subjecting determinations of fact to review. In Continental legal systems it is regarded as a fundamental requirement of due process that the court disclose the grounds of its decision (*jugement motivé, Begründung*). The German maxim resounds: "Ohne Begründung kein Urteil," that is, without a statement of reasons there can be no valid judgment. The requirement that the fact-finder disclose its reasons is designed both to deter abuse and to facilitate review for error. In Continental systems the standard of appellate review at the first level is typically review de novo, meaning that no presumption of correctness attaches to the first-instance decision. For detail see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 855-57 (1985). In the modern Anglo-American systems, the jury verdict is formulated without disclosure of reasons. Appellate review of so opaque a finding is awkward. The standard of review is for manifest error ("no reasonable jury could have reached this result"), which accords a strong presumption of correctness to the jury's fact-finding. Damaska speaks of "the absence of regular mechanisms for reviewing factual findings" in modern Anglo-American practice. Damaska, *Analogues*, supra note 3, at 429. "Since the quality of verdicts could not be checked ex post, the English system was driven to exercise great caution in admitting" suspect types of evidence. *Id.*

132. In 1838 the object was said to be to exclude evidence that might "produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose." *Wright v. Doe. d. Tatham*, 7 Adolphus & Ellis 313, 375, 112 Eng. Rep. 488, 512 (Ex. Ch. 1837), remarked in Morgan, supra note 33, at 116-17.

Over the course of the next century or so—from the mid-eighteenth century when Dudley Ryder was sitting, to the mid-nineteenth century when the modern law of evidence was unmistakably in place—the degree of judicial collaboration in the formulation of the jury's verdict at trial declined materially, especially in American practice.¹³³ The modern law of evidence is part of a new and formal system of jury control that replaced the older informal system that we have seen still functioning robustly in Ryder's courtroom in the 1750s. The "chief ingredients were tightened control over the proof (the law of evidence), increased stress on precision in legal guidelines (the law of jury instructions), and increased control over the relationship between evidence and verdicts (directed verdicts and new trial orders)."¹³⁴

The linkage between the development of the modern law of evidence and the burgeoning influence of formal jury instructions reminds us how little we know about the history of jury instructions, although prominent scholars have sensed the importance of the subject. Brian Simpson has spoken of "the progressive dethronement of the jury" in the course of the nineteenth century as the courts produced legal rules in spheres of substantive law such as contract "where before there was little or none."¹³⁵ John Baker has remarked in a similar vein that "[i]n truth there was very little law of contract at all before the last century, because there was no machinery for producing it and most of the questions were left to juries as questions of fact."¹³⁶ Formal jury instruction was the main mechanism that recast matters of fact into questions of law.¹³⁷

133. On the American movement to restrict the power of the trial judge to comment on the facts, see the detailed account in Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. Det. L. Rev. 595 (1985). Wigmore blamed "[t]his unfortunate departure from the orthodox common-law rule [for having] done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice." 9 Wigmore, *Treatise*, supra note 7, § 2551, at 504–05. Thayer was equally aghast at the American departure. See Thayer, *Preliminary Treatise*, supra note 8, at 188.

134. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 642 (footnote omitted).

135. A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. Chi. L. Rev. 533, 600 (1979), remarked in 1 Oldham, *Mansfield Manuscripts*, supra note 39, at 223.

136. J.H. Baker, Book Review, 43 Mod. L. Rev. 467, 469 (1980) (reviewing Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979)), remarked in 1 Oldham, *Mansfield Manuscripts*, supra note 39, at 222–23. Baker has made a similar point about criminal jury practice:

[T]he law of evidence and the substantive criminal law . . . were aspects of decision-making which the judges managed to keep from the laymen. . . . [B]y enlarging the scope of the substantive law the judges were able to tell the jurors what conclusion followed if they found certain facts to be true.

J.H. Baker, *The Refinement of English Criminal Jurisprudence, 1500–1848*, in *Crime and Criminal Justice in Europe and Canada* 17, 19 (Louis A. Knafla ed., 1981).

137. This theme is discussed in Florian Faust, *Hadley v. Baxendale—An Understandable Miscarriage of Justice*, 15 J. Legal Hist. 41, 54–65 (1994).

Precisely when and how the older style of informal jury control declined, we cannot yet say. Ryder-period sources cannot answer these questions, and accordingly, I am left to conclude with some suggestions for future research.

If the task were to explain the breakup of the old working relationship between judge and jury in criminal trials alone, we could point to a reasonably likely cause: the rise of adversary criminal procedure, that is, counsel's capture of the previously lawyer-free criminal trial. We can date the development of adversary procedure in criminal trials at the Old Bailey reasonably well. A trickle of defense counsel began to appear in felony cases in the 1730s;¹³⁸ prosecution and defense counsel were still uncommon in Dudley Ryder's trials.¹³⁹ By the 1780s, however, counsel appeared more regularly, both to examine and to cross-examine.¹⁴⁰

Beattie has observed that defense counsel in the 1780s conducted particularly vigorous and effective cross-examinations in cases involving potentially tainted witnesses: the prosecuting witness who stood to receive a substantial reward for convicting the defendant,¹⁴¹ and the accomplice who had turned crown witness on the promise of impunity. I have elsewhere explained¹⁴² how these incentives to false witnessing gave rise in the eighteenth century to shifting attempts at a corroboration requirement for accomplice testimony; and, in 1783, to the so-called confession rule in *R. v. Warickshall*, the rule that undertook to exclude evidence "forced from the mind by the flattery of hope, or by the torture of fear."¹⁴³

138. See Langbein, *Lawyers*, supra note 47, at 311–13.

139. See Langbein, *Ryder Article I*, supra note 38, at 124–25.

140. Beattie shows a sustained increase in the use of prosecution and defense counsel in the Old Bailey from the 1780s onward. See Beattie, *Scales*, supra note 46, at 227 tbl. 1. "By the end of the [eighteenth] century, between a quarter and a third of defendants at the Old Bailey had the benefit of counsel, and a substantial proportion of prosecutors." *Id.* at 228. There is some suggestion that the levels of representation by counsel were higher at provincial assizes than in Old Bailey trials, perhaps because the circuit bar that travelled with the assize judge represented indigent defendants. Lord Mansfield wrote to Justice Wilnot from the Lancaster summer assizes in 1758 that he "had an enormous" criminal calendar, and that "I think I had not a single Trial without counsel on both Sides." 1 Oldham, *Mansfield Manuscripts*, supra note 39, at 137. In the first decades of the nineteenth century, the levels of representation at the Old Bailey appear to have remained roughly constant with the levels attained at the end of the eighteenth century. See Beattie, *Scales*, supra note 46, at 260 n.20. The French commentator, Cottu, who observed English criminal justice for his government about 1820, reported that employing defense counsel was "the general case in the country, but very rare in London . . ." M. Cottu, *On the Administration of Criminal Justice in England* 88 (London 1822 transl.) [hereinafter Cottu, *Administration*]. "The prosecutor has commonly two and sometimes three counsel," Cottu says, again thinking of practice at the provincial assizes rather than at the Old Bailey. *Id.*

141. See Beattie, *Scales*, supra note 46, at 232–35, 241–45.

142. See Langbein, *Ryder Article I*, supra note 38, at 84–104.

143. *R. v. Warickshall*, 1 Leach 263, 263–64, 168 Eng. Rep. 234, 235 (1783).

Beattie attributes some of the "clarification of the rules of evidence in criminal cases in the eighteenth century"¹⁴⁴ to the growing influence of defense counsel. For a before-and-after contrast, consider the handling of potentially involuntary confessions early and late in the century. Beattie extracts from a pamphlet report of Surrey assize proceedings held in 1738 a case in which a master had induced his female servant to confess to a felony upon the promise of impunity;¹⁴⁵ the master then used the confession to prosecute her. Willes, C.J., presiding at the trial, denounced the master's behavior. He told the jury, "I hope what [the master] . . . said will have no Weight with the Jury . . ."¹⁴⁶ Thus, in 1738 the defect still affected credit, or "Weight with the Jury," as Willes put it. By 1783, the confession rule in *Warickshall* had cast the matter as a rule of exclusion.¹⁴⁷

Adversary procedure pressured the judge toward passivity and broke up the older working relationship of judge and jury. In a system of "trial that was coming to be more commonly conducted by lawyers," Beattie observes, "the judge came to play a much less active role in producing the evidence."¹⁴⁸ In the seventeenth and early eighteenth centuries, "it was

144. Beattie, Scales, *supra* note 46, at 232.

145. See Beattie, Crime, *supra* note 40, at 346-47.

146. *Id.*, citing *R. v. Wilcox*, The Proceedings of the Assizer for the County of Surr[e]y, [Summer] 1738, at 6.

147. Actually, the rule excluding confession evidence elicited by fear or promise of favor predates the *Warickshall* case. The rule is customarily ascribed to *Warickshall* because the doctrinal formulation in Leach's report of that case, *supra* note 143, became authoritative.

I have noticed the rule being applied in the 1770s in the Old Bailey and at York assizes. For example, in the April 1771 sessions of the Old Bailey, Ann Baker, a prostitute, was prosecuted for stealing a watch and money from her client, William Foreman. Foreman testified that Baker confessed the crime when Foreman and a watchman apprehended her. Foreman was cross-examined, probably by defense counsel, and asked, "Did you say anything to her to induce her to make that acknowledgment? Did you promise her any favor?" Foreman admitted that he had "told her I did not want to prosecute her; then she confessed it." The trial judge promptly ruled: "The whole of the evidence depends upon her confession, made under a promise of favor, which cannot be allowed," and she was acquitted. Ann Baker, Old Bailey Sessions Papers (Apr. 1771, # 237), at 164.

A few pamphlet reports detailing the sessions of the York Assizes were published in the 1770s, and copies survive in York Minster Library. In 11 of the 26 cases reported in the pamphlet for the Lent 1777 Assizes, the court explored confession-rule issues. The Trials at Large of the Felons in the Castle of York, at the Lent Assizes, 1777, before the Hon. Edward Willes (York 1777) (William Hudson, #2, at 5, 6; Thomas Buttrey, #3, at 7, 8; Mary Kay, #4, at 8, 9; George Holdsworth, #7, at 13; William Marwood, #8, at 14; Samuel Almon, #9, at 15; William Rudsdale, #11, at 17, 18; Thomas Graves, #12, at 18, 19; Michael Armin, #18, at 25, 26; Squire Butterwith, #19, at 27; John Hebbershon, #22, at 28). (I wish to acknowledge the kindness of John Styles, who referred me to the York pamphlets.)

148. Beattie, Scales, *supra* note 46, at 249. On the source of counsel's advantage: "Judges were only occasionally moved to engage in vigorous cross-examinations," they intervened more to clarify than to discredit, and they "certainly did not prepare in detail for examination and cross-examination; they were not briefed." *Id.* at 233.

the trial judge who examined the witnesses and the accused, and . . . like the modern Continental presiding judge, dominated the proceedings."¹⁴⁹ By the early nineteenth century a visiting French observer reported that the judge "remains almost a stranger to what is going on,"¹⁵⁰ while counsel for prosecution and defense examined and cross-examined the witnesses. Other hallmarks of lawyer-driven criminal procedure fell into place in these years, including the privilege against self-incrimination¹⁵¹ and the articulation of the beyond-a-reasonable-doubt standard of proof.¹⁵²

Two themes emerge in the nineteenth-century celebration of cross-examination as the organizing principle of trial, one epistemological, the other institutional. There was both a naive faith in the truth-serving efficacy of cross-examination and a growing deference to that lawyer's domination of trial that the system of partisan examination and cross-examination of witnesses would require. Even Bentham, the most caustic contemporary critic of the early-nineteenth-century English law of evidence, accepted cross-examination uncritically as the assumed pathway to truth in fact-finding. "Against erroneous or mendacious testimony, the

149. Langbein, *Lawyers*, supra note 47, at 315.

150. Cottu, *Administration*, supra note 140, at 88, discussed in Langbein, *Lawyers*, supra note 47, at 307.

151. I have explained elsewhere why it is appropriate to see the recognition of the privilege "as a consequence of the revolutionary reconstruction of the criminal trial worked by the advent of defense counsel and adversary criminal procedure" in these years. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1084 (1994).

152. The concept that the application of horrific criminal sanctions merited special caution was centuries old. Continental authority extends back to the classical Roman sources. See Peter Holtappels, *Die Entwicklungsgeschichte des Grundsatzes "in dubio pro reo"* (1965). That tradition was known, for example, to Coke in his *Third Institute*. See Thayer, *Preliminary Treatise*, supra note 8, at 558–59. However, the precise doctrinal formulation of the beyond-reasonable-doubt standard of proof in Anglo-American criminal procedure occurred at the end of the eighteenth century as part of the elaboration of the adversary system of criminal procedure. Beattie points to formulations of the standard of proof used in jury instructions of the 1780s that were still well short of beyond-reasonable-doubt. See Beattie, *Scales*, supra note 46, at 248–49. The authorities establishing beyond-reasonable-doubt in English law from the 1790s are cited in Langbein, *Privilege*, supra note 151, at 1056–57. The beyond-reasonable-doubt formula seems to have been used in Massachusetts in the 1770s. See Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507, 516–19 (1975).

Barbara Shapiro has collected considerable evidence of growing sensitivity to a "satisfied conscience" standard in the seventeenth- and early eighteenth-century sources, which she associates with Locke and other seventeenth-century philosophical writers. Barbara J. Shapiro, "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence 1–41 (1991). I do not find in her account a basis for thinking that the writers on moral philosophy and probability had a decisive influence on the timing of the acceptance of the beyond-reasonable-doubt standard at the end of the eighteenth century.

grand security is cross-examination"¹⁵³ Belief in cross-examination as "the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of mortals"¹⁵⁴ became a central argument for abolishing that pillar of the older law, the testimonial disqualification of parties for interest. Underlying the movement from oath-based to cross-examination-based theories of safeguard in the law of evidence was a changed view of what promoted veracity. The oath-based system presupposed the witness's fear that God would damn a perjurer. In place of the former reliance upon the vengeance of God, the new order substituted its faith in the truth-detecting efficacy of cross-examining lawyers.

Basing the trial upon lawyer-conducted examination and cross-examination of witnesses had profound consequences for the responsibilities and the relations of counsel, judge, and jury. As Edmund Morgan observed, the new cross-examination-based system of trial required "rules governing the respective functions of judge and jury" to be articulated, rules that

would obviously have been unnecessary in a trial before a judge alone. But they would have been equally unnecessary had the adversary not gained such a large measure of control over the sources of available evidence and the right to cross-examine, a right unknown to systems of trial other than the common-law system.¹⁵⁵

Writing in 1806 in what was at that time the most sophisticated account of the Anglo-American law of evidence yet produced, W.D. Evans commented on the changed dynamic of the adversary trial, which required the judge to become passive while counsel conducted the trial. "The benefits of cross-examination are sometimes defeated by the interposition of the Court, to require an explanation of the motive and object of the questions proposed, or to pronounce a judgment upon their immateriality."¹⁵⁶ The trial "judge, acting only upon the impressions of

153. 5 Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice* 212 n.* (John S. Mill ed., London 1827). Bentham is thought to have written the *Rationale* circa 1802–12. See, e.g., A.D.E. Lewis, *The Background to Bentham on Evidence*, 2 *Utilitas* 195, 203–09 (1990). Further instances of Bentham's reliance on counsel-conducted examination and cross-examination are noticed in *Landsman*, *supra* note 21, at 1180–82.

154. The language of an anonymous American commentator in the *American Law Register* for 1857, quoted in Bodansky, *Disqualification*, *supra* note 76, at 96. See also *id.* at 121 (quoting Lord Chancellor Halsbury on the virtues of cross-examination as the justification for removing the testimonial disqualification of the criminal defendant). This point is developed by Obel, *supra* note 102, at 28–30.

155. Morgan, *supra* note 33, at 113.

156. 2 Evans, *Evidence*, *supra* note 24, at 234. Beattie reprints a striking passage from a 1786 pamphlet report in which the noted defense counsel, William Garrow, struggles with the trial judge over Garrow's mode of examining a witness. See Beattie, *Scales*, *supra* note 46, at 245–47. Garrow was insisting upon that autonomy in adducing evidence that the trial lawyer now takes for granted.

what has already been disclosed, cannot by any possibility anticipate"¹⁵⁷ what counsel is attempting to show.¹⁵⁸

The informal system of jury control that we see in the Ryder sources was incompatible with the lawyer-dominated trial that took hold a generation after Ryder. Evidentiary concerns such as hearsay that had remained within judicial discretion when the judge still dominated the trial were reformulated at the end of the eighteenth century and across the nineteenth century into rules of admissibility and exclusion.¹⁵⁹

I have been trying to explain the rise of the modern law of evidence at the end of the eighteenth century and across the nineteenth century. In attributing so much weight to the rise of adversary criminal procedure, I am left with the difficulty of accounting for the comparable phenomenon in civil procedure. Ultimately, the common law produced a largely unitary law of evidence, which applied indifferently to both civil and criminal cases. The presence of opposing counsel was a novelty in criminal cases in the second half of the eighteenth century, but it was routine in civil cases. Counsel for plaintiff and defense appear steadily in the civil cases reported in Ryder's notebooks. If indeed adversary procedure was responsible for breaking up the old structures of jury control and for leading to new devices that included the law of evidence—a thesis that appears so inviting for criminal procedure—the puzzle is to understand why the modern law of evidence did not manifest itself much earlier in civil procedure.

It has generally been assumed that the law of evidence must have developed in the early-lawyerized civil trial and then spread to the later-lawyerized criminal trial.¹⁶⁰ The Ryder sources suggest that the event did not happen in this way. The modern law of evidence was not yet in force in the civil practice of the 1750s. Oral evidence was everything in crimi-

157. 2 Evans, *Evidence*, supra note 24, at 234.

158. Compare Judge Frankel's account of the limitations that the mature adversary system places on judicial intervention.

[O]ur system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. . . .

The ignorance and unpreparedness of the judge are intended axioms of the system. The "facts" are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial. . . . Without an investigative file, the American trial judge is a blind and blundering intruder. . . .

Marvin E. Frankel, *The Search for Truth: An Unempirical View*, 123 U. Pa. L. Rev. 1031, 1042 (1975).

159. Recall Damaska's observation, discussed supra note 101, that the bifurcation of the Anglo-American trial court into judge and jury enables the exclusionary mechanism of the modern rules of evidence, such as hearsay, to function.

160. See Macnair, *Thesis*, supra note 71, at 4.

nal procedure,¹⁶¹ but not in civil procedure, where so many requirements of pleading and proof (including seal, disqualification for interest, and the Statute of Frauds) made writing central and oral testimony peripheral. By contrast, contemporaries were taken aback in the 1780s by the intensity and the efficacy of the cross-examination that came to characterize adversary criminal procedure.¹⁶² My suggestion, therefore, is that the example of aggressive adversary procedure in the criminal courts toward the end of the eighteenth century may have set the tone for civil practice as well.

I cannot, in a paper centered on sources of the 1750s, resolve issues that require research in the sources for later decades. I can, however, suggest the importance of such an inquiry. For the sources of the 1750s give us strong ground for questioning the received account of the history of the law of evidence, an account that projects the events back into the sixteenth and seventeenth centuries. Our sources allow us to see that as late as the middle of the eighteenth century, the decisive steps had yet to be taken toward that astonishing and problematic invention, the modern Anglo-American law of evidence.

161. See *supra* text accompanying note 45, reproducing Sir Thomas Smith's boast from circa 1565.

162. Beattie remarks on the awe that defense counsel William Garrow, who dominated the Old Bailey bar in the 1780s, inspired in contemporaries. See Beattie, Scales, *supra* note 46, at 237-39, 247. See also Landsman, *supra* note 93, at 562 (discussing the increasing attention to virtuoso cross-examination in the *Old Bailey Sessions Papers* of the later 1780s and the 1790s).