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The Development of the Role of the Prosecuting Lawyer in the Criminal Process: 'Partisan Persecutor' or 'Minister of Justice'?

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[**Abstract:** The role of the prosecuting lawyer in the criminal process has traditionally been regarded with suspicion and distrust, if not outright hostility. This unfavourable view extends to both the popular and the historical perception. The prosecutor has been regarded widely as a zealous and partisan advocate, a so-called persecutor, whose single purpose is to secure the conviction of the accused. This Article considers the development of the prosecutor's role to the present day. It will explore the changing perception of the prosecutor from that of the zealous persecutor during the State Trials of the 16th and 17th centuries to that of the early 1800s when there seems to have been a fundamental shift in what was regarded as the proper role of the prosecutor. It became emphasised increasingly in a series of landmark cases from the early 1800s onwards that the prosecutor was not to regard himself or herself purely as a partisan advocate whose role was confined to seeking the conviction of the accused. Rather, the prosecutor owed a wider duty, that of a quasi-judicial "minister of justice" whose lofty purpose was to seek the truth of the case and to promote the cause of justice. This role has continued to the present day. It is my argument that to understand this dramatic transformation in the prosecutor's role one must have close regard to the legal and social climate of the time in which it evolved. The development of the prosecutor's role as a "minister of justice" was in response to both the major changes in the format of the criminal trial and belated appreciation as to the unenviable position of the accused in the criminal process of the time.

In the 1700s the typical criminal trial in England had been an almost inquisitorial affair consisting of an informal dialogue between the private prosecutor, the accused, the judge and the witnesses. Lawyers, whether prosecuting or defending, were largely conspicuous by their absence. In the late 1700s and early 1800s the presence and involvement of lawyers in the criminal trial increased and the criminal process shifted sharply in form to an adversarial process. Furthermore the odds were stacked heavily against the typical accused in the early 1800s. Rights that would today be regarded as fundamental aspects of the right of an accused to a fair trial were sorely lacking. It is my argument that to alleviate the unequal status of the accused in the criminal process the notion gained acceptance that the prosecuting lawyer was to act, albeit within an emergent adversarial framework, as a "minister of justice" and not as a "normal" advocate. This Article will ask whether it is appropriate to accept the generally unchallenged assumption that the role of the modern prosecutor in Australia and England should remain that which evolved in the particular and very different circumstances of early nineteenth century England.]

Part 1: The Prosecutor's General Role: Persecutor or Not?

> World-wide, the Prosecutor has been both, historically and in fiction, portrayed as a figure of some suspicion and of doubtful merit. There is also little by way of appealing **role** models for any aspiring **Prosecutor** to turn to for inspiration from literature and fiction. Biblical portrayals of various Prosecutors in scripture describe Prosecutors consistently as unloved agents of the state, ranking marginally below the despised tax collectors of that time…

> More generally, literature and fiction also fail to deal a kind hand to those of us who follow this career. From the Merchant of Venice to Rumpole of the Bailey, prosecutors are portrayed as a pretty grim bunch. More recently, in Hollywood and American televised fiction, they appear as somewhat hapless and straight-laced opponents (usually in ill-fitting suits) who stand against the flamboyant and talented defence lawyers of Hollywood legend. Such works as Harper Lee's magnificent; 'To Kill a Mocking Bird' and the play and film 'Twelve Angry Men' have laid a very poor foundation for any prospect of securing public empathy for Prosecutors generally. In short, popular culture has always loved the criminal defence lawyer or attorney. They are the underdog, the plucky defenders of innocent accused. In contrast, Prosecutors have long been depicted as over zealous, ambitious and hell bent on framing some poor, marginalised client. [1]

This was the insightful comment that was offered in 2005 by Elish Angiolini QC, the Solicitor General of Scotland, who pondered what might prompt any young lawyer to aspire to be a prosecutor. As the Solicitor General thoughtfully noted, the prosecutor, especially when portrayed against the noble role of the defence lawyer, has enjoyed a decidedly unflattering reputation throughout both history[2] and popular fiction.[3] It is fair to say that the role of the prosecutor in the criminal process is regarded, especially when viewed against the role of the defence lawyer, with some considerable degree of public indifference and misapprehension, if not outright suspicion and even downright hostility. As the Solicitor General indicated, the role of the prosecuting lawyer in the criminal process is commonly perceived as that of a partisan agent of the state, a persecutor, whose single purpose is the zealous pursuit of securing the conviction of an accused person at all costs. Considerations of fairness and justice or a desire to arrive at the truth would not necessarily be expected to feature prominently, if at all, in such a prosecutorial role.

However, such a perception of the proper role of the prosecuting lawyer in the criminal process is fundamentally flawed. As was observed in 1926 by Sir John Simon KC:

> Take for instance the true position of an advocate who has the duty of prosecuting in charge of crime. There are a great many people-you see it in magazines and story books constantly- who really believe that a barrister who has a brief to prosecute a criminal is aiming at securing his conviction at all costs. That is a libel and a travesty upon the whole profession of the law. The business of an advocate who is prosecuting a criminal is to be in the strictest sense a Minister of Justice. His duty is to see that every piece of evidence relevant and admissible is presented in due order, and without fear and favour; and unless

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[1] Angiolini, A, "Public Prosecutor: Hero or Villain", 25 Jan 2005, The Edinburgh Lectures, available at http://download.edinburgh.gov.uk/lectures/4_SG39s_speech.doc

[2] Such an unflattering historical perception of the prosecutor's role strongly emerges from the damning appraisal offered by contemporary observers as to the performance of many of the public prosecutors in England during the seventeenth and eighteenth centuries (see Edwards, J, 'The Law Officers of the Crown" (London, Sweet & Maxwell, 1960) p 54-57). This theme will be explored further in this Article.

[3] This is readily apparent, as the Solicitor-General observes, from the celebrated fictional legal drama, "Perry Mason". In this long running series the redoubtable defence lawyer, Perry Mason, was able to secure in succession some 250 odd acquittals of persons wrongly accused of murder. His long suffering prosecutorial opponent, the hapless Hamilton Burger, was somehow able to remain District Attorney of Los Angeles despite seemingly never winning a case. His electors must have been singularly forgiving!

> there be some other advocate to assist the accused, it is his duty to present the evidence which is in favour of the accused with exactly the same force and fullness with which he calls attention to the circumstances tending to make a suspicion against him. [4]

This altruistic view of the prosecutor as a quasi-judicial "Minister of Justice", who is entrusted with the obtaining of justice and whose function is definitely not the single minded pursuit of a conviction, may not accord with either the popular or historical perception of the prosecutorial role but it is, nevertheless, a role that commands a remarkable degree of support across the common law world. It is almost universally and uncritically accepted that the role of the prosecuting lawyer in the criminal process is fundamentally different to both that of an advocate in civil proceedings and that of the lawyer acting for an accused person. While the defence lawyer or advocate in civil proceedings is entitled, if not positively expected, to fearlessly take all legitimate steps to advance the cause of his or her client, the prosecutor is in a quite different position. He or she is not a mere partisan advocate and owes a far wider duty than simply to act for their "side" or "client". The prosecutor is entreated to assist the court in arriving at the truth of the matter in dispute and in securing justice. As Christopher Humphreys, the eminent English barrister and renowned prosecutor,[5] famously declared in 1955, "Always the principle holds, that Crown counsel is concerned with justice first, justice second and conviction a very bad third." [6] This duty is said to apply at every stage of the criminal process from start to finish.[7] And nor is this lofty duty confined to the prosecution advocate at trial. It extends to all those involved in the preparation of the prosecution case for trial. As was explained in *R v Lucas*[8] in 1972 by Newton J and Norris AJ:

> It is very well established that prosecuting counsel are ministers of justice, who ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry, and that it is their duty to assist the court in the attainment of the purposes of criminal prosecutions, namely to make certain that justice is done as between the subject and the State…We may add that these obligations which attach to prosecuting counsel apply, in our opinion, to officers in the service of the Crown whose function is to prepare the Crown case in criminal proceedings. [9]

Part 2 Development of the Role of the Prosecuting Lawyer: Something More than a Persecutor?

The lofty ideal of the prosecuting lawyer as a "minister of justice" as described by Sir John Simon, Humphreys and Newton J and Norris AJ is not a recent legal invention or development. Indeed, it dates back to the early part of the nineteenth century, if not far earlier. As early as the sixteenth century Queen Elizabeth I suggested that the prosecuting lawyer was not just a servant of the Crown whose role was purely to secure the conviction of an accused and famously declared that her Attorney-General was "counsel not so much *pro domina Regina* as *pro domina Veritae*." [10] However, there is

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[4] Sir John Simon KC, "The Vocation of an Advocate" [1922] Can LN 228 at 231.
[5] Humphreys held the prestigious position of senior Treasury counsel at the Central Criminal Court and as such prosecuted with considerable effect some of the most celebrated English criminal trials of the era such as Ruth Ellis and the 10 Rillington Place murders.
[6] Humphreys, C, "The Roles and Responsibilities of Prosecuting Counsel" [1955] Crim LR 739 at 746.
[7] May, J Sir, "The Responsibility of the prosecutor to the court" in Williams, J (ed), "The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in Jan 1987" (Avebury, Aldershot, 1988) p 90.
[8] [1973] VR 693.
[9] [1973] VR 705.
[10] See Rogers, S, "The Ethics of Advocacy" (1897) 59 LQR 259 at 260 (for those who share the author's ignorance of Latin, Queen Elizabeth was stating that her Attorney-General was not a minister of the monarch but was rather to be viewed as a minister of truth.

ample indication that Queen Elizabeth's exhortation does seem to have fallen on singularly deaf ears in the decades that followed. It would appear that many prosecuting lawyers of the period, notwithstanding the earlier stricture of Queen Elizabeth, saw their role within the criminal process as simply one of a partisan advocate and demonstrated a "win at all costs" attitude. There is considerable evidence to indicate that the conduct of the prosecuting lawyers of the 1600s and 1700s justifies the unappealing historical light in which they are cast.

Edwards notes that a scrutiny of the "public" or "State" trials[11] of the seventeenth century reveals how the perception of the public prosecutor reached its "nadir".[12] Contemporary accounts bear out this unflattering perception of the prosecutor. Mallet in 1760 offered the following extraordinary opinion as to the character and role of the eminent individuals who had previously held the principal positions of public prosecutors in England:

> The offices of Attorney and Solicitor-general have been rocks upon which many aspiring Lawyers have made shipwreck of their virtue and human nature. Some of these Gentlemen have acted at the bar as if they thought themselves, by duty of their places, absolved from all the obligations of truth, honour and decency. But their names are upon record, and will be transmitted to after-ages with those characters of reproach and abhorrence that are due to the worst sort of murders, those that murder under the sanction of justice. [13]

Mallet was not alone in holding such a view. A similar unappealing portrait of the law officers of the period was drawn by Emelyn in his preface in 1730 to the State Trials. Emelyn referred in strongly disapproving terms to those prosecutors who had disregarded the maxim of Queen Elizabeth and:

> …who with rude and boisterous language abuse and revile the unfortunate Prisoner; who stick not to take all advantages of him, however hard and unjust, which either his ignorance, or the strict rigour of Law may give them, who by force or stratagem endeavour to disable him from making his Defence: who browbeat his witnesses as soon as they appear, tho' ever so willing to declare the whole truth; and do all they can to put them out of countenance, and confound them in delivering their evidence; as if it were their duty to convict all who are brought to trial, right or wrong, guilty or not guilty; and as if they, above all others, had a peculiar dispensation from the obligations of Truth and Justice. Such methods as these should be below men of honour, not to say men of conscience: yet in the perusal of this Work, such persons will too often arise to view; and I could wish for the credit of the Law, that that great oracle of it, the Lord Chief Justice Coke, had given less reason to be numbered among this sort.[14]

Emelyn's singling out of Sir Edward Coke for particular censure is significant. It is notable that during the course of the celebrated trial of Sir Walter Raleigh for treason in 1619 Coke, when Attorney General, subjected Raleigh to the most extraordinary and vitriolic tirade of abuse. Coke proclaimed his intention to Raleigh "to make it appear to the world that there never lived a viler viper upon the face of

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[11] The State Reports chronicle the trials brought for such "public" offences as treason and sedition. As will be discussed in this article these were the rare type of offences that were inevitably prosecuted by and on behalf of the State. Though such trials may not be typical of the period they are still instructive, as Edwards notes, in showing the approach of the prosecuting lawyers of the time (Edwards, *op cit*).

[12] Edwards, *op cit*, p 54.

[13] Mallett, "The Life of Francis Bacon" (1760), p xix quoted by Edwards, *op cit*, at 56. This was during a period, as will be discussed further in this article when the bulk of prosecutions were brought by private individuals and the Attorney-General and Solicitor-General were the only "public" prosecutors.

[14] Emelyn, "Preface to State Trials (2nd ed)", p 3: quoted by Edwards, *op cit*, p 54.

the world than thou." Coke proceeded to denounce Raleigh as a "monster" with "an English face, but a Spanish heart"; "the most vile and execrable traitor that ever lived" and "the absolutest traitor that ever was." [15] Even by the standards of the time Coke's conduct at Raleigh's trial was thoroughly deplorable. It was though that, to compensate for the utter weakness of the prosecution case, Coke felt compelled to resort to such pure invective as a substitute for any real evidence.[16] It is, perhaps, no coincidence that Coke is still singled out to this day as the example of the vindictive and zealous prosecutor subordinating everything else to the desire to secure the conviction of the accused.[17]

The unfortunate legacy of Raleigh's "trial" and the malicious prosecutorial role of Sir Edward Coke in that trial have probably done more than anything, or anyone, else, to contribute to the dubious and almost sinister perception with which the role of the prosecutor in the criminal process is traditionally viewed. As the Solicitor-General of Scotland alluded to, in her previously quoted observations, this mistrust and unease with which the prosecutor is widely viewed has persisted to this day. The unedifying example set by Coke and his historical prosecutorial counterparts, as described in such frank terms by Mallet, Edwards and Emelyn, explains in no small measure, I would suggest, the misapprehension and distrust as to the role of the prosecuting lawyer and the tendency to equate his or her role with one of a persecutor and not one of a minister of justice.

However, I would suggest that it is important not to overstate the influence in the criminal process of the 1600s and 1700s of the prosecuting counsel who conducted himself as a persecutor. Firstly, it is necessary to bear in mind that the zealous and intemperate approach followed by Coke during Raleigh's trial was by no means universal during this period. Emelyn acknowledges that there were those Attorneys-General who did pay more than lip service to Queen Elizabeth's maxim and who did seriously regard themselves as retained "*pro Domina Veritae*", rather than "*pro Domina Regina*" and were intent, not so much on convicting the accused, but as upon discovering the truth.[18] Edwards makes a similar point.[19] A scrutiny of the Old Bailey Session Papers[20] for the eighteenth century also provides instances of the prosecuting counsel conducting the prosecution case with scrupulous fairness and expressly disavowing any notion that their role at trial was simply to obtain the conviction of the accused[21] (though it must be noted, as will be discussed further in this Article, this trend was far from universal at the Old Bailey[22]).

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[15] *R v Raleigh* (1623-1627) 2 How St Tr 5. See the discussion at Grossman, B, "Disclosure by the Prosecution: Reconciling Duty and Discretion" (1987-88) 30 Crim LQ 346 at 347 at FN 5 and Edwards, *op cit*, p 55.

[16] The only "evidence" against Raleigh was vague and manifestly unreliable hearsay from a witness who did not give evidence at the trial. It is no coincidence that Raleigh's trial is still frequently cited in support of the proposition that an accused is entitled to confront and cross-examine his or her accusers.

[17] See Grossman, *op cit*. Though, not far beyond Coke one should also look at the role of prosecution counsel in the trial in 1681 of Stephen College for treason (*R v College* (1681) 8 St Tr 549). The accused had been permitted to prepare certain papers to aid his defence. These were seized and viewed by prosecution counsel who used their contents to manage their case and to avoid calling certain witnesses who College could have cross-examined or contradicted. It is not for nothing that Stephen pronounces this as "one of the most wholly inexcusable transactions that ever occurred in an English court" (Stephen, Sir J, "A History of the Criminal Law of England" (Vol 1) (London, Macmillan and Co, 1883) p 406).

[18] Emelyn, 8 How St Tr 731; quoted by Edwards, *op cit*, p 58.

[19] Edwards, *op cit*, p 57-58.

[20] These are an extensive series of contemporary pamphlets describing criminal trials at the Central Criminal Court in London (better known as the "Old Bailey") from the late 1600s to the early 1830s. Though not without their imperfections, they are a valuable source of historical reference (see Langein, J, "The Origins of Adversary Criminal Trial" (Oxford, OUP, 2003), Ch 4 for a discussion of the strengths and weaknesses of the Old Bailey Session Papers).

[21] See *R v Brice*, Central Criminal Court, 25 June 1761, *R v Elliott,* Central Criminal Court, 11 July 1787, No T17870711-41 and *R v Dorrington*, Central Criminal Court, 10 Sep 1788, No T17880910-46)

[22] There are various cases throughout the 1700s when prosecution counsel continued to act in an overly partisan manner and appear to have been predominantly concerned with securing the conviction of the accused (see *R v Thomas and Elizabeth Bates*, Central Criminal Court, 15 Oct 1740, *R v May*, Central Criminal Court, 15 Oct 1740, No 174001015-20, *R v Carter,* Central Criminal Court, 16 Jan 1748 and *R v Priddle,* 18 April 1787, No T17870418-118.

Secondly, it must also be borne in mind (as will be discussed further in this Article) that the bulk of the criminal trials in the 1600s and 1700s were brought by private individuals and that lawyers, whether prosecuting or defending, were conspicuous by their absence. The typical criminal trial had progressed little beyond the oft quoted account given by Sir Thomas Smith in the mid-1500s describing a seemingly typical criminal trial of the period in the form of a lawyer free "altercation" between citizen accuser and citizen accused.[23] It was only with the emergence of an adversarial, as opposed to an inquisitorial, criminal process in the late 1700s and early 1800s and the growing presence and involvement of both prosecution and defence counsel in the criminal trial that the issue of what should be the appropriate role for prosecution counsel would have assumed real practical significance.

It is not entirely clear when the transformation in the role of the prosecuting lawyer from a partisan advocate and potential persecutor to a restrained minister of justice took place. Indeed, the precise origin of the proposition that the prosecutor should function as a "minister of justice" is somewhat unclear and is the subject of some debate.[24] Cairns highlights that the earliest written statement setting out the prosecutor's duty of restraint appears in a legal text in 1829[25] and asserts that the "duty on prosecution counsel in addressing the jury to restrain his advocacy within narrow limits" emerged in "the first half of the nineteenth century".[26] May disagrees and suggests that the duty of prosecutorial restraint emerged well before 1829. She contends that, "The unwritten etiquette of the criminal bar in this respect is quite clear by the 1780s and can almost certainly be traced back to an even earlier date." [27] It is instructive that prosecution counsel in the later part of the 1700s at the Old Bailey can be found opening their case to the jury in a tone of studied restraint and with conspicuous emphasis on the need for fair play. One only need look at the following eloquent, if somewhat loquacious, comments of Mr Fielding when appearing as prosecution counsel, alongside the celebrated Mr Garrow,[28] in a theft trial in 1785:

> Gentlemen of the jury, when I get up after my young friend, Mr Garrow, it must necessarily surprise you to see two of us to support this prosecution, and two of my learned friends appearing as Council [sic] for the prisoner, but Gentlemen, as you have already collected that the parties here are both foreigners,[29] you will expect from us a particular regard to our duty, you will expect from us a regulated conduct, that we on the part of the prosecution should be careful not even to enflame your passions, nor to aggravated the conduct of the prisoner at the bar: you will expect likewise from my learned friends on the other side, a regulated decorum in the cross-examination of the witnesses: in this Country Justice is always administered to the admiration of the world, in such a way to extort approbation from even the prisoners themselves. [30]

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[23] Smith, T, "*De Republica Anglorum*" (Book 2), p 114 quoted by Langbein, J, "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors" (1999) 58 Cam L Jour 314 at 315.
[24] See the somewhat barbed exchange between Alson May (May, A, "Book Review" (2001) 19 Law & His Rev 676 and "Reply" (2002) 20 Law & His Rev 448) and David Cairns (Cairns, D, "Correspondence" (2002) 20 Law & Rev Rev 445).
[25] Cairns (2002), *op cit*, 446; quoting Dickenson, W, and Talfourd, T, "A Practical Guide to Quarter Sessions and other Sessions of the Peace" (3rd ed) (London, 1829), p 350.
[26] Cairns, D, "Advocacy and the Making of the Adversarial Criminal Trial: 1800-1865" (Oxford, OUP, 1998) p 8.
[27] May (2001), *op cit*, 677.
[28] Mr Garrow was one of the most renowned advocates of the period at the English Bar (see further Landsman, S, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75 Cor L Rev 497 at 563-565.
[29] The defendant and the complainant were both Frenchmen. The defendant was said to have stolen items from his employer, the Compte de Mirabeau.
[30] *R v Hardy,* Central Criminal Court, 23 February 1785, No T17850223-15.

However, it is notable that such expressions of judicious restraint on the part of prosecution counsel were by no means universally echoed by other prosecutors.[31] Other prosecutors continued to act in a highly partisan and zealous manner that might have conformed to the prosecutorial model of Sir Edward Coke but certainly did not conform to the notion of the prosecutor as a minister of justice.[32]

It is, fortunately, unnecessary to resolve the somewhat heated debate between Cairns and May as to precisely when the duty of the prosecutor to act as a minister of justice emerged. Cairns comments that it is not possible to arrive at an exact date when the minister of justice role evolved. He observes that there was never an "authoritative expression" of the duty of prosecutorial restraint and that it "remained a matter of circuit etiquette, judicial discretion and the 'good taste' and right feeling' of counsel in individual cases." [33] What is clear, however, to Cairns is that by the 1820s and 1830s, "The existence of such a duty of restraint was not doubted, though some remarked upon its recent origin." [34] What I would suggest is highly significant, at least for the purposes of this Article, is not so much when the duty of the prosecutorial restraint and fairness emerged but rather the crucial fact that the emergence, or at least the confirmation, of the role of the prosecutor as a "minister of justice" and not as a mere advocate happened at about the same time as there was a gradual but fundamental shift in the operation of the criminal trial in England from an informal and largely lawyer free inquisitorial hearing to a lawyer dominated adversarial contest. I will suggest in this Article that these two developments are not coincidental and that as the criminal trial shifted dramatically in format from an almost casual inquisitorial affair where lawyers where generally conspicuous by their absence to something that would eventually resemble the lawyer driven adversarial model of today there was an increasing perceived need for the prosecuting lawyer to act as a minister of justice in the criminal process. It is my contention that the development of the role of the prosecuting lawyer as a minister of justice does need to be viewed against this backdrop. It is only by looking at the dramatic transformation in the format of the criminal trial in the late 1700s and early 1800s and the situation of the wider criminal justice system in this period that one can understand properly why the notion of the prosecutor as a minister of justice evolved when it did. Simply before then it was not a "live" issue.

Part 3 The Prosecutor's Role: Minister of Justice Confirmed

By the early part of the nineteenth century the fact that the prosecuting lawyer was not striving at all costs to secure the conviction of the accused was apparent to contemporary observers. The French author, Cottu, in his scholarly review of the English legal process, was impressed in 1820 by the reserved character, especially when compared with France, of the English criminal trial. Cottu was especially struck by the restrained nature of the prosecutor's address at trial:

> The plaintiff's counsel then lays before the jury a summary of the case, which is nothing but a more detailed and circumstantial repetition of the indictment: guarding himself, however, from every sort of invective against the prisoner, and making no reflections on his depravity. Facts must speak, and the counsel is forbidden to excite feelings which must be called forth by them alone… We do not hear the prosecutor's counsel paint the prisoner as a monster of whom the earth ought to be that instant rid, and compare him to all the villains who have astonished the world by their enormities. [35]

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[31] Also, as will be discussed further at p 18-36, Mr Fielding's fulsome assurance that justice was administered in England in such an exemplary manner as to even attract the admiration of the accused is highly questionable.
[32] See further discussion at p 8-9 and FN 43.
[33] Cairns (1998), *op cit*, p 44.
[34] *Ibid*.
[35] Cottu, M, "On the Administration of Criminal Justice in England; and the Spirit of the English Government" (London, 1822) p 87-89.

However, it is apparent that any rules of etiquette as to the need for prosecutorial restraint did, still on occasion, go unheeded. The celebrated opening speech of Mr Garrow as prosecution counsel in the murder trial of *R v Patch* in 1806 was marred in its undoubted effectiveness in the eyes of contemporary commentators by its partisan and melodramatic character.[36] Only a few years earlier in the trial of *R v Knowles*[37] the jury had been treated to a display by Mr Garrow, as prosecution counsel, that can hardly be described as restrained. Knowles had faced a charge of obtaining money under false pretences through fraudulent claims of being able to obtain official pardons for convicted prisoners.[38] As this was only a misdemeanour, Knowles could not have faced the death penalty if convicted. Undeterred by this, Mr Garrow opened the prosecution case in the following forceful terms:

> The prosecution which you are now called upon, as Jurymen, to decide, appears to me…to be one of the highest importance that can possibly come for consideration in the shape of a misdemeanour. It has been thought by those entrusted with some of the highest departments of the administration, to be their duty to submit to your protection a class of persons who can in no other way be protected, who are unable to protect themselves, and who appear to have been the objects of the most abandoned and profligate plunder that I think I have ever seen stated in any Court of Justice. You have collected…that the charge against the prisoner (and probably you will agree with me in thinking, if I prove the facts to you, and which can only subject him to the punishment of a misdemeanour, I own for one, I wish it was a higher offence against him)…and I am sure, when the charge is proved, you will be happy to protect those unhappy person who are too often the prey of men in this situation. [39]

The defence counsel, Mr Knapp, subsequently stated that he had been "very much surprised" to hear Mr Garrow, "as prosecutor for the public" outline his opinion as to what should be the sentence in the case.[40] At this point Mr Garrow, dispelling any lingering doubt as to the strength of his views in relation to the case, interrupted Mr Knapp's address to confirm that he had meant to say, "I wish it was such a case that he [the accused] could be hung for it." Not only was such an outburst unseemly but the rhetoric of Mr Garrow hardly accords with the noble role of prosecution counsel described in such resounding terms only a decade earlier by Mr Fielding in *Hardy* (incidentally when the same Mr Garrow had also been acting for the prosecution).

Even as late as the 1820s one can still find clear instances of prosecuting counsel at trial blithely ignoring any newfound conventions to curb their prosecutorial enthusiasm. In *R v Vaughan*[41] in 1828 the accused faced the peculiar charge of that period of bodysnatching for medical experiments. The prosecutor addressed the jury in mawkish and prejudiced terms of the decent dead awaiting resurrection in peace and, anticipating a defence based on French scientific practice, thanked heaven

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[36] Indeed, Cairns comments that this speech was still cited in the parliamentary debates on the *Prisoners Counsel Act* over a quarter of a century later as an "anomaly requiring explanation" (Cairns (1998), *op cit*, p 44). See also Langbein, *op cit*, p 289 and May, A, "The Bar and the Old Bailey" (London, University of North Carolina Press, 2003) p 100-101.

[37] Central Criminal Court, 11 Jan 1797, T17970111-4.

[38] Given the severity of the criminal justice system and of sentences in particular official pardons were a valuable means of sparing many prisoners from either lengthy sentences or even the death penalty.

[39] *R v Knowles,* Central Criminal Court, 11 Jan 1797, T17970111-4.

[40] Indeed, a convention in England until very recent times was that the prosecutor, as a "minister of justice", played no role whatsoever in sentence and it certainly was not appropriate for the prosecutor to urge a harsh or punitive sentence (see Zellick, G, "The Role of Prosecuting Counsel in Sentencing" [1979] Crim LR 493).

[41] *The Times,* 14 August 1829. See also *R v Matthews* [1824] TASSupC 26 (*Hobart Town Gazette*, 3 Dec 1824) *R v Burgess* [1824] TASSupC 28 (*Hobart Town Gazette*, 10 Dec 1824), *R v Oxley* [1832] TasSupC 32 (*Tasmanian*, 7 Dec1832), *R v Shea* [1841] NSWSupC 7 (*Sydney Herald,* 25 Feb 1841) and *R v Silvester* [1841] NSWSupC 15 (*Sydney Herald*, 8 Feb 1841) for similar unrestrained prosecutorial addresses.

that the practice in Paris did not accord with the practice followed in England![42] It is, however, significant that prosecuting counsel in *Vaughan* was roundly rebuked for his enthusiasm. The *Lancet* castigated the prosecutor for his "grovelling submissions to the vulgar prejudices of a jury of Norfolk yeoman" [43] and the *Examiner* accused the prosecutor of "sycophancy to the rabble".[44] It would seem that, by in 1828, the notion of "anything goes" in prosecution advocacy was frowned upon.

The earliest comments in a reported case to directly address the appropriate role of the prosecutor appear in 1838 in *R v Thursfield.*[45] The accused was charged with the murder of her "male bastard child" [46] by suffocating it.[47] The prosecution counsel, a Mr Corbett, in his opening address declared his intention to present to the jury the whole of the facts of the case as they appeared to him from the depositions, whether those facts favoured the accused or went against her.[48] Mr Corbett stated he did not consider "himself as counsel for any particular side or party".[49] He then opened and adduced in evidence the whole of the facts, from which it appeared that the child had not met a violent end but had rather been overlaid by accident.[50] The trial judge, Gurney B, expressed his approval of the prosecutor's conduct: "The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party." [51] The jury, perhaps, influenced by the eminently fair example set by Mr Corbett, found the accused not guilty. It is from this humble beginning that the development of the law as to the role of the prosecutor can be seen clearly to commence. *Thursfield* can be regarded as the starting point of the doctrine that the prosecuting lawyer was more than a mere advocate and that he or she owed a far wider duty than simply to advance the cause of their client.[52]

A similar theme was memorably advanced by Crampton J in 1844 in the politically charged Irish case of *R v O'Connell.*[53] Crampton J, adamantly rejecting the notion that any advocate should regard themselves as a "mere mouthpiece" [54] of their client, offered the following impassioned exhortation as to what should be the over-riding objective of all the players[55] in the criminal process:

> The learned Counsel said the Advocate's first duty was to his client, the second to himself, and the third to the public. His client was entitled to all that Counsel's zeal and ability could effect. He was bound to maintain his own independence with all due respect to the Bench, and he was bound to assert the rights and liberties of the public…Now, I do not quarrel with the learned Counsel that he casts all these duties upon Counsel; but I do say that the British advocate has till higher duties to regard; his duties as a man and as a christian are paramount to all other considerations.

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[42] *Ibid*; discussed at Cairns (1998) *op cit*. p 40.
[43] *Lancet,* 23 August 1829, p 659 and 661; quoted by Cairns (2003), *op cit*, p 40 at FN 72.
[44] *Examiner*, 17 August 1829; quoted by Cairns (2003), *op cit*, p 40 at FN 72.
[45] (1838) 8 Car & P 269
[46] To use the somewhat unsympathetic description of the report.
[47] (1838) 8 Car & P 269. This was an unfortunately common crime in the 1800s.
[48] The exact role of the prosecutor in the presentment of the prosecution case and in the calling of witnesses and the potential "minister of justice" dimensions of that role have continued to be a significant issue to the present day.
[49] (1838) 8 Car & P 269
[50] This does rather raise the question of why the accused had even been charged. But *Thursfield* was before the emergence of a modern style public prosecutor or effective committal proceedings to act as a filter on such unmeritorious cases.
[51] (1838) 8 Car & P 269-270
[52] Sutherland, J, "Role of the prosecutor: A Brief History" Criminal Layers Association Newsletter, June 1998 (available at www.criminallawyers.ca.newslett/19-2/sutherland.htm)
[53] (1844) 7 Ir LR 260
[54] (1844) 7 Ir LR 313.
[55] Except, perhaps, the accused person. It might be stretching human nature to expect him or her to strive for such a noble goal as described by Crampton J. But the defence lawyer was specifically not exempt from inclusion in this noble pursuit.

> This Court in which we sit is a temple of justice, and the Advocate at the Bar, as well as the Judge upon the Bench, are equally ministers in that temple. The object of all equally should be the attainment of justice; now justice should be reached through the ascertainment of the truth, and the instrument which our law presents to us for the ascertainment of the truth or falsehood of a criminal charge is the trial by Jury; the trial is the process by which we endeavour to find out the truth. Slow and laborious, and perplexed and doubtful in its issue that pursuit often proves; but we are all- Judges, Jurors, Advocates and Attorneys-together concerned in this search for truth: the pursuit is a noble one, and those are honoured who are the instruments engaged in it. The infirmity of human nature, and the strength of human passion, may lead us to take false views, and sometimes to embarrass and retard rather than to assist in attaining that great object; the temperament the imagination and the feelings may all mislead us in the chase,-but never let us forget our high vocation as ministers of justice and interpreters of the law; let us never forget that the advancement of justice and the ascertainment of truth are higher objects and nobler results than any which in this place we can propose to ourselves. [56]

The lofty sentiments expressed by Crampton J as to the duties of the various actors in a criminal trial may well strike a modern audience as a rhetorical judicial flourish redolent of a past and bye-gone age. However, the florid nature of these observations does not diminish their underlying force or persuasive value. It will be noted that Crampton J was emphatically of the opinion that all the lawyers in a criminal trial are subject to far wider duties than simply any allegiances they may owe to their respective clients.[57] Their over-riding obligation was to assist in the administration of justice and the pursuit of the truth. As will be seen this remains a sound premise to this day. [58] It is against this backdrop that one must consider the role of the prosecutor as a "minister of justice" and the development of that role to the present day.

The next reported case to consider the role of the prosecutor was at the Central Criminal Court in the Easter session of 1865 in *R v Berens.*[59] The facts of this case are largely immaterial for present purposes; suffice to say it was a somewhat involved counterfeiting case and at the close of the case prosecution counsel intimated he wished to exercise the power recently conferred by *"Denman's Act"* [60] to make a closing speech. The trial judge, Blackburn J, queried whether it was automatic that the prosecutor should make such a speech. The prosecutor assured the judge that "in conducting this case on the part of the Crown, the object to be attained by counsel ought to be nothing except justice, and as far as possible to perform their duty temperately" and he would sum up the present case in that spirit.[61] The prosecutor duly addressed the jury. Blackburn J agreed that the prosecutor had been entitled to make such an address in the present case but he was concerned that the routine exercise of this new right by the prosecutor might inject an unwelcome adversarial tone into the role of the prosecutor at trial and might seriously injure the course of criminal justice. His Lordship observed:

> It had always hitherto been the supposition in the administration of criminal justice, as a general rule, that the prosecuting counsel was in a kind of judicial position; that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility-not as if trying to obtain a verdict, but to assist the Judge in fairly putting the

[56] (1844) 7 Ir LR. 260 at 312
[57] (1844) 7 Ir LR 313.
[58] See Lord Denning MR in *Rondel v Worsley* [1967] 1 QB 443 at 502 for a modern reaffirmation of this proposition.
[59] (1865) 4 F & F 842
[60] The *Criminal Procedure Act* 1865 is still widely known as *"Denman's Act"* to reflect Lord Denman's role in its passage.
[61] (1865) 4 F & F 848.

> case before the jury, and nothing more. At Nisi Prius, the counsel was at liberty to get his client a verdict by fair and proper means. In a court of criminal judicature, the counsel for the prosecution was in a different position. [62]

Blackburn J commented that if prosecutors employed the power granted by *Lord Denman's Act* sparingly, and not as a rule, then:

> … the course of criminal justice would go on as it ought to, the prosecuting counsel regarding himself really as part of the Court and acting in a quasi-judicial capacity. But if the practice was, as he understands it had become in this Court, to regard the summing up by the prosecuting counsel as a duty, the course that obtained at Nisi Prius, which was a contest between party and party, might creep in, and the prosecuting counsel in a criminal case, forgetting that he himself was a kind of minister of justice might at the end of the case address an urgent appeal to the jury, and make himself a mere partisan. [63]

It will be seen that Blackburn J resoundingly echoed the observation of Gurney B in *Thursfield* that the prosecutor was not to regard himself or herself as a mere advocate beholden to the cause of his or her "side". Indeed, I would suggest that Blackburn J in *R v Berens* went even further than the learned Baron in *Thursfield* and specifically cast the role of the prosecutor in the criminal trial as that of a "minister of justice". It is significant that the author of the report of *R v Berens* offered a lengthy commentary to the issues raised by that case. The author of the report cited the view that had been expressed by Gurney B in *R v Thursfield* as to the prosecutor's duty at trial and remarked that:

> …it is quite clear that that most eminent and experienced Judge would have concurred with the view taken in the present case by Blackburn J and expressed in other cases by Crompton J, Mellor J, and other Judges,[64] and that it is not becoming in counsel for the prosecution to struggle for a verdict as in a civil case, but to act rather as the minister of justice. And every one who has long watched the administration of criminal justice in this country, knows how honourably the Bar carry out the principle. [65]

This notion of the prosecutor as a minister of justice received eminent and authoritative reaffirmation in the Summer Assizes of 1865 at Lewes Crown Court in *R v Puddick*.[66] The accused was charged with the rape of a fifteen year old girl in an orchard. There were seemingly no other witnesses present at the time of the alleged offence bar the accused and the complainant. At trial the accused had called no witnesses.[67] The prosecutor in his summing up under *Lord Denman's Act* commented as to the fact the accused had called no witnesses and asserted that to acquit the accused "would virtually convict the girl of perjury".[68] The prosecutor was rebuked by Crompton J for these comments. The judge pointed out that the prosecutor in a criminal case was required by clear evidence to establish the guilt

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[62] (1865) 4 F & F 852-855.
[63] (1865) 4 F & F 856-857.
[64] No clue is provided by the report writer as to the citation or the source of the views expressed by the various judges.
[65] (1865) 4 F & F 843 at Note (b). Despite the fulsome confidence of the report writer that prosecution counsel faithfully adhered to the notion that they should act as a "minister of justice", this confidence may be misplaced (see the further discussion at p 12-14 and specifically at FN 79, 80 and 90 which notes that criminal trials could still, on occasion, be marked with zealous prosecutors and bitter partisan conflict).
[66] (1865) 4 F & F 497
[67] It will be borne in mind that during this period an accused was prevented from giving evidence in his or her defence. This and other features of the criminal justice system of the 1800s, and the potential significance of these factors in explaining the development of the role of the prosecutor as a "minister of justice", will be discussed later in this Article.
[68] (1865) 4 F & F 498

of an accused person beyond reasonable doubt.[69] The defence were entitled, without calling witnesses, to contend that this burden had not been met by the prosecution.[70] Crompton J considered that it had been unfair and improper in a case of this nature, where there had been no-one else in the orchard but the accused and the girl, for the prosecutor to have commented on the absence of any defence witnesses [71] and to have suggested an acquittal would convict the complainant of perjury. Rather, as Crompton J explained, all that a verdict of not guilty would signify was that the jury were not satisfied beyond all reasonable doubt of the guilt of the accused.[72] Crompton J concluded:

> I hope…that in the exercise of the privilege granted by the new Act to counsel for the prosecution of summing up the evidence, they will not cease to remember that counsel for the prosecution in such cases are to regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at Nisi Prius-nor to be betrayed by feelings of professional rivalry-to regard the question at issue as one of professional superiority, and as a contest for skill and pre-eminence. [73]

These eloquent comments of Crompton J have proved highly persuasive in the subsequent development of the law. Indeed, they are regarded as "the *locus classicus* on the role and approach of the prosecuting counsel".[74] The transformation of the prosecutor's role from that of a partisan persecutor seemingly hell bent on securing convictions as described in such unflattering terms by Mallet, Edwards and Emlyn (and so vividly demonstrated by the unedifying example of Coke in the infamous prosecution of Sir Walter Raleigh) to that of a quasi-judicial "minister of justice" would seem complete by 1865 when one notes the cumulative effect of cases such as *Thursfield*, *O'Connell*, *Berens* and *Puddick*.

Part 4 The Prosecutor as a Minister of Justice: Rhetoric or Reality?

The extent to which prosecuting counsel adhered to the elevated notions of professional duty as stated in the various cases was considered by Sir Showell Rogers in 1897 in his influential article. Rogers, echoing the now accepted wisdom of the century, defined the role of the prosecuting lawyer as anything other than as a mere advocate and as "a kind of minister of justice filling a quasi-judicial position".[75] Rogers was fulsome in his confidence that this lofty duty was strictly adhered to:

> Any one who has watched the administration of criminal law in this country knows how loyally-one might almost say religiously-this principle is observed in practice. Counsel for the Crown appears to be anything rather than the advocate of the particular private prosecutor who happens to be proceeding in the name of the Crown. When there is no private prosecutor, and the proceedings are in the most literal sense instituted by the Crown itself, the duty of prosecuting counsel in this respect is even more strictly to be

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[69] This is an early and explicit acknowledgement of the famed "golden thread" of English criminal law, later made clear by the well known observations of Viscount Starkey in *Woolmington v. DPP* [1935] AC 462 at 481-482.
[70] This is a legitimate tactic in an adversarial system where the Crown must prove the guilt of the accused. *Puddick* demonstrates that by 1865 this central pillar of an adversarial process was explicitly accepted.
[71] (1865) 4 F & F 498. Crompton J did accept that there would be cases where it would be legitimate to draw an adverse inference though the failure of the accused to call a witness when "he fairly might be expected to do so" ((1865) 4 F & F 498). This case may be regarded as an early illustration of the circumstances in which a so called *Jones v Dunkel* (1958) 101 CLR 298 adverse inference might be drawn. This is an issue that has continued to trouble the Australian courts (see cases such as *R v Dyers* (2002) 210 CLR 285)
[72] (1865) 4 F & F 499
[73] (1865) 4 F & F 499. See also *R v Holchester* (1865) 10 Cox CC 227-228 to similar effect.
[74] Murphy, P (ed.), "Blackstone's Criminal Practice 2005" (Oxford, Oxford University Press, 2005), para.D13.3, p 1484.
[75] Rogers, S, "The Ethics of Advocacy" (1899) 15 LQR 259.

> performed. [76]

However, any such stricture as to the role of prosecutor does seem to have fallen on deaf ears on the part of prosecution counsel in a number of cases in both England[77] and Australia.[78] For instance, in the well known case of *R v Banks*[79] in 1916 the accused had been convicted at trial of the unlawful carnal knowledge of a fourteen year old girl. The accused had contended he had thought that she was over sixteen. In his closing address the prosecutor had exhorted the jury "to protect young girls from men like the prisoner".[80] On appeal against conviction defence counsel, a Mr Bosanquet, complained:

> Counsel for the prosecution ought not to have given the exhortation to the jury. There is a growing tendency for counsel for the prosecution to conduct cases as advocates rather than as ministers of justice. Counsel ought not to struggle to obtain a conviction. [81]

The Court of Appeal thought Mr Bosanquet's complaint was well-founded. Though the prosecutor's remark was not as prejudicial as to lead to the quashing of the conviction, the prosecutor should not have made the appeal he had to the jury. Avory J quoted *Puddick* with evident approval:

> It is true that prosecuting counsel ought not to press for a conviction… they should 'regard themselves as ministers of justice assisting in its administration than as advocates. [82]

A far more glaring example of a blatant appeal to prejudice by the prosecutor to the jury is to be found in 1921 in the case of *R v House.*[83] The accused was a Russian Jew who had lived in England for 23 years and had been given an "excellent character" by the police.[84] He had been convicted at trial at the Central Criminal Court of the theft of £116 from a seaman who had been boarding with him at his London address. During his closing address to the jury the prosecutor had advanced a gratuitous litany of manifestly inappropriate comments directed at the accused. These had included such frankly offensive remarks as: "This is a clear case of the despoiling of the Egyptians by the Israelites; "our British seamen falling into the hands of these sharks; "now they have got Palestine or Mesopotamia they are not satisfied"; "these brutes, these people coming from nowhere, robbing our British subjects" and "this man living between Palestine and Leicester Square." [85] Surprisingly, the trial judge had failed to intervene to halt this extraordinary tirade. On appeal the defence complained, with considerable justification I would suggest, that the prosecution case had been conducted "unfairly" and that the prosecutor had sought to "appeal to religious prejudice" on the part of the jury and he had "attempted to inflame their minds".[86] The prosecuting counsel (incidentally not the one who had

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[76] *Ibid*, 259-260.
[77] The famous trial of *R v Courvoisier* in 1845 is often cited in this context (see further Cairns, D, "Advocacy and the Making of the Adversarial Criminal Trial 1800-1865" (Clarendon Press, Oxford, 1998)).
[78] See the highly prejudicial rhetoric employed by prosecution counsel in the trial of an Aboriginal defendant for murder in the West Australian case of *R v We-War* [1842] NSWSupC 1 (*Inquirer*, 9 Jan 1842), the much criticised conduct of the Attorney-General of Victoria in 1855 in the famous State Trials for high treason arising from the Eureka Stockade (see *The Age*, 24 Feb, 21 and 22 March 1855) and the belligerent closing address of prosecution counsel in the celebrated murder trial of the notorious outlaw Edward "Ned" Kelly (see *R v Kelly*, *The Age*, 30 Oct 1880).
[79] [1916] 2 KB 621
[80] [1916] 2 KB 621.
[81] [1916] 2 KB 622
[82] [1916] 2 KB 623.
[83] (1921) 16 Cr App R 49.
[84] (1921) 16 Cr App R 49.
[85] (1921) 16 Cr App R 50.
[86] (1921) 16 Cr App R 50-51.

conducted the trial) sought, somewhat faintly I would suspect, to uphold the conviction and asserted that any prejudice arising from the prosecutor's closing address had been overcome by the judge's summing up.[87] The Court of Appeal was unable to agree with this contention. Lord Trevithin CJ observed: "The language of counsel complained of was highly improper and ought to have been checked at the time. It is impossible to say that it could not have influenced the jury." [88]

Therefore the appeal was allowed and House's conviction was quashed. It will be noted that even a judicial effort at ameliorating the prejudicial effects of counsel's address was deemed to be insufficient to allow the conviction to be upheld. Such a conclusion should come as no surprise. Even by the standards of 1921, if not even earlier, the language of prosecution counsel in *House* was plainly unacceptable and owed far more to role of the prosecutor as a zealous persecutor as typified by Coke rather than by any adherence to the role of the prosecutor as a minister of justice.[89]

The notion that the prosecutor was a "minister of justice" and not a mere partisan or adversarial advocate continued to command firm judicial support. In the 1935 case of *R v Sugarman*[90] the accused had been convicted of handling stolen goods. At trial the prosecutor had cross-examined the accused during his trial by suggesting he had received other stolen property than that charged in the indictment. This "remarkable proposition" [91] was the subject of strong comment by the Court of Appeal as it was seemingly calculated to lead the jury to believe the accused was the sort of person who was more likely to commit that kind of offence. Lord Hewart CJ admonished the prosecutor for his "improper" line of questioning and reiterated that:

> It cannot be too often be made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. [92]

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[87] The judge had commented, "The real question is, whom do you believe" ((1921) 16 Cr App R 51).

[88] (1921) 16 Cr App R 51. This case can be intriguingly compared with the modern decisions in England of *R v Gonez* (unreported, Court of Appeal, 24 June 1999) and *R v Benedetto and Labrador* [2003] 2 Cr App R 25 (Privy Council) where similar objectionable references of a potentially religious or national nature were also made by prosecution counsel.

[91] However, the intemperate comments by the prosecutors in both *Banks* and *House*, and the complaint of the defence in *Banks* that prosecutors were acting more as advocates than as ministers of justice, does raise the intriguing question as to what extent in practice did prosecutors strictly conform to the elevated notions of professional responsibility as stated in the various cases? This not a simple issue but there are clear indications, at least in respect of the earlier historical period during the 1840s and 1850s, that despite the resounding confidence expressed by contemporary observers such as the report writer in *Berens* and Stephens on this issue, prosecuting lawyers in practice did not always adhere loyally to their role as a minister of justice. Contemporary accounts in England comment as to the fact that criminal trials during this period could be marked by an excessive adversarial approach and bitter partisan confrontation on the part of both the prosecution and defence advocates. The famous trial of *R v Courvoisier* is often cited in this context (see further Cairns (1998), *op cit* and Langbein, J, "The Origins of Adversary Criminal Trial" (Oxford, OUP, 2003), p 287-292). There are similar cases of prosecutorial partisan enthusiasm in Australia (see the cases referred to at FN 79).

[92] (1935) 25 Cr App R 109.

[93] (1935) 25 Cr App R.114. It is perhaps ironic that such a reasoning based on the propensity of an accused to commit a similar kind of offence to that charged is now specifically allowed in England following the *Criminal Justice Act* 2003.

[94] (1935) 25 Cr App R 114-115.

If the prosecutor were to depart from this lofty duty then he or she risked any conviction that had been obtained at trial being quashed on appeal.[93] The Lord Chief Justice, drawing on earlier authority,[94] pointed out that it was crucial that any accused person should receive a fair trial. This view was also emphasised in Australia in 1946 in *R v Bathgate.*[95] This case is also highly significant in Australia as being the first decision in an Australian jurisdiction, reported at least, to consider the appropriate role in the criminal process of the prosecutor.[96] In *Bathgate* the New South Court of Appeal was critical of various actions taken by prosecution counsel during the course of a murder trial. The fact that defence counsel had played a part in these actions afforded no excuse. Maxwell J quoted *Puddick* with evident approval and adopted the now familiar formulation of the prosecutor's role as that of a "minister of justice" and emphasised that "it cannot too strongly impressed" that those obligations arose independently of any attitude adopted by the defence.[97]

It is noteworthy that from the early 1800s right through to the present day the notion that the prosecutor's role in the criminal process should be that of a quasi-judicial "minister of justice" and not of a partisan advocate bent on securing convictions acting on behalf of his or her "side" (whether in the form of a client, government or constituency) has not been not confined to the English judiciary. A similar lofty view of the prosecutor's function has also received eminent and virtually unanimous judicial approval across the common law world.[98] In Canada the appropriate role of the prosecutor was famously expressed by Rand J of the Supreme Court in 1954 in *R v Boucher*[99] in the following eloquent, and oft-quoted, terms:

> It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and fairly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.[100]

It is important to appreciate that this exalted view as to the role of the prosecutor has not been restricted to members of the judiciary. This view has also commanded widespread support on the part of both academic commentators[101] and practising lawyers.[102] Sir M Hilberry reminded prosecutors that

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[95] Indeed, that was the result in the instant case.
[94] See *Maxwell v DPP* (1934) 24 Cr App R 176 and *Woolmington v DPP* [1935] 2 AC 462.
[95] See *R v Bathgate* (1946) 46 SR (NSW) 281 at 284-85
[96] It is unclear why this is so. The issue does not seem to have arisen in the nineteenth century or early 1900s in any reported case. It is perhaps telling that in Australia, unlike England, public prosecutors were prominent from the early days of British settlement and private prosecutors did not assume the same leading role in the criminal process that they assumed in Britain in the same period. It is significant that despite the absence of any judicial pronouncement on the prosecutor's role in Australia, local prosecutors can be found at trial expressing their appropriate role in strong minister of justice terms (see *R v Lord* [1834] TASSupC 8 (*The Colonist,* 10 June 1834), *R v Anderson, Davis and Ors* [1832] NSWSupC 8 (*Sydney Herald*, 17 April 1832) and *R v Davidson* [1841] NSWSupC 43 (*The Herald*, 1 May 1841)).
[97] (1946) 46 SR (NSW) 284.
[98] See *United States v Berger* (1935) 295 US 78 at 83 per Sutherland J for the position in the United States.
[99] (1954) 110 CCC 263.
[100] (1954) 110 CCC 270. This influential passage was quoted with approval by the Privy Council in both *R v Randall* [2002] 2 Cr App R 17 and *R v Bendetto and Labrador* [2003] 2 Cr App R 25.
[101] See Ashworth, A, "Prosecution and Criminal Practice" [1979] Crim LR 480 at 482.
[102] See the Report of the Farquharson Committee in England quoted in *Counsel,* Trinity 1986.

they were an "officer of justice" and that they should not regard their task as one of "winning the case".[103] Indeed, the idealised concept of the role of the prosecutor as a minister of justice has been echoed by many eminent prosecutors,[104] including at least one Director of Public Prosecutions.[105] The role is also widely reflected in the professional guidelines of many public prosecuting agencies.[106] The concept of the prosecutor as a minister of justice as formulated, or at least reaffirmed, in the early part of nineteenth century has continued to command a remarkable, and virtually unanimous, degree of support across the common law world throughout the twentieth century. This notion of the prosecutor as a minister of justice has continued to the present day in both Australia[107] and England.[108] It has been applied in a wide range of situations and repeatedly reaffirmed,[109] most notably and adamantly by the New South Wales Court of Appeal in the recent case of *R v Livermore*.[110] There seem to have been few, if any, dissenting voices to the proposition that the proper role of the prosecutor was as a minister of justice. It is no surprise therefore that Lord Devlin was able in 1966 to confidently declare that:

> It is now well established that prosecuting counsel is to act as a minister of justice rather than as an advocate, he is not to press for a conviction but is to lay all the facts, those that tell for the prisoner as well as those that tell against him, before the jury. [111]

These comments remain valid to the present day. The duty of a prosecutor to act as a minister of justice cannot be dismissed as mere rhetoric. The transformation in the role of the prosecutor from partisan advocate and potential persecutor to impartial minister of justice appears not only complete, but also immutable and irreversible. This change in prosecutorial roles is viewed, almost universally, as a welcome and overdue development. Bennion, for instance, commented, "This makes a great change from past practice, when many prosecutors browbeat the prisoner, the jury, the witnesses and sometimes even the court itself." [112] The unhappy prosecutorial example set by Coke and his partisan contemporaries is clearly to be treated as a discredited model from less enlightened times unsuitable in the modern age.

Part 5 The Prosecutor's Modern Role: Is the Minister of Justice Role Still Appropriate?

A comparative handful of commentators such as Zellick have questioned the assumption that the prosecutor should act as a minister of justice.[113] Zellick was unimpressed of the predictions of dire consequences should the prosecutor depart from this role:

> These dangers, however, are much exaggerated. Much nonsense is apt to be talked about prosecuting counsel's being a minister of justice. The fact remains that he is there to secure a conviction, even if there are limits on the lengths to which he may go to obtain it…No

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[103] Sir M Hilbery, "Duty and Art in Advocacy" (London, Stevens and Son, 1946), p13.
[104] See Humphreys, *op cit* and Kidston, P, QC, 'The Office of Crown Prosecutor (More Particularly in New South Wales)" (1958) 32 ALJ 148.
[105] Skelhorn, N, Sir, 'The Memoirs of Sir Norman Skelhorn: Public Prosecutor" (London, Harrap Ltd, 1981) p 39 and 72. Skelhorn was the first "modern" DPP in England from 1964 to 1977.
[106] See the professional guidelines of the Commonwealth and NSW DPP's Offices available at their respective websites.
[107] See *R v Hay and Lindsay* [1968] Qd R 459, *R v McCullough* [1982] Tas R 46, *R v Whitehorn* (1983) 152 CLR 657 at 663 and *R v M* [1991] 2 Qd R 68.
[108] See *Mohammed v State* [1999] 2 WLR 552 and *R v Randall* [2002] 2 Cr App R 17, [2002] UKPC 19.
[109] See *Ramdhanie v State* [2005] UKPC 47 (England) and *R v Subramaniam* (2004) 79 ALJR 116 at 127-128 (Australia).
[110] [2006] NSWCCA 334.
[111] Devlin, P, Lord, "The Criminal Prosecution in England" (New Haven, Yale University Press 1958), p 23 (or 112?).
[112] Bennion, F, "The New Prosecution Arrangements: The Crown Prosecution Service" [1986] Crim LR 3 at 7.
[113] Zellick, G, "The Role of Prosecuting Counsel in Sentencing" [1979] Crim LR 493.

> accused is likely to regard counsel for the Crown as an impartial administrator of justice, and of course he is not. [114]

However, such criticisms have proved rare and any suggestion[115] that it may be opportune in the modern age to reconsider the role of the prosecution lawyer as anything other than as a minister of justice has fallen on consistently deaf ears. But the steadfast adherence to the present day of the notion that the role of the prosecutor remains one of a minister of justice does, I would contend, obscure certain important questions. Perhaps the most vital of these questions,[116] is the continued application in a contemporary context of the concept that the prosecutor acts as a minister of justice.

It is clear that during the nineteenth century the fundamental proposition emerged that the prosecutor should function as a "minister of justice" in the criminal process and not as a partisan advocate. The crucial development in the 1800s of the concept that the prosecutor should function as a minister of justice; whatever may have the practice and role of prosecuting lawyers in the period before, and even during, the 1800's, may seem clear enough. However, what is less clear is just what factors prompted the development of this concept at this time. There can be a tendency to view the transformation in the role of the prosecutor from partisan persecutor to minister of justice in something of a vacuum. As Grossman notes:

> Some time before the trial of Sir Walter Raleigh and the unfolding of the 19th century, the modern view of the 'ideal' prosecutor was immaculately conceived by a criminal justice system which, by today's standards, represents the very epitome of inhumanity and injustice.[117]

Clearly, as Grossman implies, the development of the role of the prosecutor as a minister of justice did not emerge suddenly in some legal and historical vacuum. It "did not come out of a clear blue sky".[118] So what are the factors that explain the development in the early 1800s of this concept? As, will be discussed, the development of the prosecutor's role as a detached figure of restraint must be viewed closely against the legal process in which it evolved in the early 1800s. I would suggest that this is both in relation to the emerging adversarial nature of the criminal process in the late 1700s and early 1800s and the fact that the typical defendant enjoyed a heavily disadvantaged position within that process when compared with the prosecution. It is my argument that the development of the concept that the role of the prosecuting lawyer was one of a minister of justice as opposed to a simple partisan advocate was one means that was devised and employed to alleviate this unequal position of the accused within the emerging adversarial process of the early 1800s. The development of the

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[114] *Ibid* at 499. Though Zellick's comments were in relation to the prosecutor's contribution to the sentencing process, I would suggest that, in the present context, they are of general application.

[115] See *ibid*. Grossman, *op cit*, is one of the few scholars to question the minister of justice formulation.

[116] A fundamental issue that does emerge from casting the prosecutor as a minister of justice is how is this role performed within the context of an adversarial criminal process? I would suggest that this issue gives rise to an acute potential tension that lies at the heart of the prosecutor's role within an adversarial system. If the rationale of an adversarial system of criminal justice is that the truth is best calculated to emerge from the fray of a vigorous partisan contest between two opposing and equally matched sides, then how is the adversarial system supposed to function on the basis it designed to when one side, the prosecutor, is required to assume the lesser role of a minister of justice and plays a lesser role in the proceedings than that of the defence lawyer? How can the adversarial system work when one party, the prosecutor, effectively enters the fray with one arm tied behind his or her back? How can the prosecutor act as an active advocate within an adversarial process who is entitled, if not expected, to seek the conviction of the accused while at the same time he or she is required to assume the mantle of the impartial minister of justice whose only interest is the resolutely non-partisan pursuit of the truth? I would suggest that this potential tension in the prosecutorial roles has never been entirely or satisfactorily reconciled but it is beyond the province of this Article to address. See the discussion in Sutherland, *op cit*.

[117] Grossman, *op cit*, 347.

[118] *R v Central Criminal Court*, *ex p Director of Revenue and Customs Prosecutions* [2006] EWHC Admin 3064 at [37].

prosecutor as a minister of justice can only be understood in the particular climate of the English criminal justice system of the early nineteenth century.

I would suggest that is pertinent to ask whether a prosecutorial role that emerged within the particular, if not unique, framework of nineteenth century English criminal practice and procedure still retains resonance and relevance in the vastly changed circumstances of contemporary criminal procedure in both Australia and England. I would argue that it may be appropriate to question the largely unchallenged assumption that the role of the modern prosecutor should remain that of a minister of justice. Might it not be timely and opportune to re-evaluate the role of the modern prosecutor?

Part 6: The Legal System of the Nineteenth Century: The Loaded Dice

> A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted.[119]

This apt analogy was offered by Stephen to describe the typical criminal trial of the late 1600s but I would submit that Stephen's assessment continued to remain equally apposite to describe the criminal process through until, at least, the end of the nineteenth century. There can be little doubt that the accused enjoyed an unenviable position in the criminal process of the nineteenth century, and the odds were heavily, though not completely, stacked against him or her. As Bentley notes of the legal system of the 1800s, "Rights regarded today as lying at the heart of the fair trial were denied to the accused as either unnecessary or actually obstructive of justice." [120] The charge to the jury of Marshall J at a trial in 1847 that "we cannot have any doubts as to the prisoner's guilt; his very countenance would hang him" [121] may be an uncharacteristically frank expression of Victorian judicial sentiment,[122] but such a declaration was by no means unique during the period[123] and serves vividly to illustrate the loaded dice that typically confronted the defendant of the nineteenth century.

There is little doubt that the criminal trial of the first part of the 1800s would have been profoundly unsatisfactory and patently unfair to the accused when viewed through a modern eye. Many of the unsatisfactory features of the criminal process from the eighteenth century, despite the increasingly adversarial nature of the proceedings, remained. The prosecution would still have enjoyed a long head start on the accused at trial. For offences that would today be viewed as trifling the sentences were, in theory at least, excessive and included transportation to the other side of the world and even the death penalty.[124] The accused was prosecuted, not by a dispassionate and objective Director of Public Prosecutions, but on a strictly private basis by the victim or complainant who could well have a partisan and partial agenda to pursue. The magistrate was far from the judicial figure of today and acted in an inquisitorial role in the investigation and even in the prosecution of the alleged offence. The accused was likely to find him or herself remanded in custody prior to their trial with little ability to prepare any defence and with no means of securing the attendance at trial of any witnesses who might assist his or her defence. Many defendants were poor and illiterate and notwithstanding the punitive nature of the potential sentence if convicted, the state provided no means of legal aid or

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[119] Stephen, *op cit*, p 397.
[120] Bentley, D, 'English Criminal Justice in the Nineteenth Century" (London, Hambledon Press, 1998) p 297.
[121] Lewis, J, "The Victorian Bar" (London, Robert Hale, 1982) p 29.
[122] Taylor, *op cit*, p 114.
[123] See the trial of two minutes and 49 seconds of the 1840s as recited by Stephen J with his terse comment to the jury that he had no doubt as to the guilt of the accused (as described by Lord Bingham in *R v H* [2004] 1 All ER 1269 at 1275).
[124] There were over 200 offences in England that carried the death penalty in 1800. This was gradually reduced. It may be that such sentences were, in practice, rarely carried out for offences other than murder but it still remained the case that an offender spared the death penalty could, even for a crime that would today seem trifling, be transported to Australia.

assistance.[125] Most defendants were tried without any form of legal representation.[126] Even if the accused were fortunate enough to be able to afford or secure the services of counsel there was no right, as such, to legal representation and defence counsel were restricted in their role at trial and were unable to address the jury on behalf of the accused. The accused was left ignorant of both the identities of the prosecution witnesses and their intended evidence till the very moment of trial.[127] The accused was even denied a copy of the indictment outlining the charges that he or she would face.[128] Despite having enjoyed no sight of the prosecution evidence prior to trial the accused was expected nonetheless spontaneously to make good his or her defence and challenge the prosecution case as confronted by the live testimony of the prosecution witnesses at trial. How the accused was supposed to do that when he or she was prevented from giving sworn evidence was never made completely clear.[129] Trials on indictment were rushed and perfunctory affairs with the typical trial taking little more than a few minutes.[130] Summary trials were even worse and were "little short of scandalous".[131] Finally, if an accused were convicted he or she enjoyed virtually no rights of appeal.[132]

It is my argument that the development, or at least the reaffirmation, in the first part of the 1800s of the concept that the proper role of the prosecutor in the criminal process was one of a minister of justice as opposed to a partisan advocate is closely and intricately connected with the legal process of the period and, in particular, to the disadvantageous position of the accused in that process. It is impossible, I would suggest, to understand the development of the prosecutor's role as one of a minister of justice without paying close regard to both the increasing involvement of counsel in the emerging adversarial process of the period and to wider developments in criminal justice. One cannot understand the development of the prosecutor's role in a vacuum. It is simply not possible to consider the development of the prosecutor's role, as discussed previously, from a partisan advocate to a minister of justice without having close regard to the wider legal and social framework of the time.

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[125] This was not to be remedied until the *Poor Persons Defence Act* 1903 and, arguably, was not completely rectified in England till the 1960s when a comprehensive legal aid scheme was finally established.

[126] The injustice of such a situation was highlighted by Stephen in 1886. He commented that, "It must be remembered that most persons accused of crime are poor, stupid and helpless…When a prisoner is undefended his position is often pitiable, even if he has a good case. An ignorant uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged." (Stephen, *op cit*, p 442). This comment remains pertinent to the present day.

[127] See *R v Thurtel* discussed further at p 27.

[128] Though as will be discussed at FN 250 there was some explanation for this seemingly harsh rule of practice as it was to avoid defendants securing unmeritorious acquittals by raising arcane, but often effective, points as to the wording or particulars of the indictment (see the frank comments of Erle J in *R v Lacey and Ors* (1848) 3 Cox CC 517 at 518).

[129] The accused was only given the right in England to give sworn evidence by the *Criminal Evidence Act 1898*.

[130] See the trial of two minutes and 49 seconds of the 1840s recited by Stephen J as described by Lord Bingham in *R v H* [2004] 1 All ER 1269 at 1275. Such rushed trials, far from being unusual, were the norm (see Langbein (1978), *op cit*, 277-280 and Bentley, *op cit*, p 76).

[131] Bentley, *op cit*, p 297. In this context many scholars cite the notorious case of a farmer who was prosecuted and fined under the *Game Laws* for an alleged offence committed on the land of the Duke of Buckingham. The prosecution was brought by two gamekeepers employed by the Duke, the witness was another gamekeeper employed by the Duke and the Duke himself as a Justice of the Peace conducted the trial in his private residence. This unfortunate example of summary justice brings to the author's mind a prosecution he observed in England brought by an employee of the television licensing authority against a defendant charged with the dastardly crime of not having a television license. The employee opened the prosecution case and then proceeded to call himself as a witness. He was examined in chief by the second prosecution witness. After the evidence of the first witness, he swapped roles with the second witness and proceeded to call and examine the second witness. Oddly, this bizarre procedure raised no eyebrows! As Darbyshire has lucidly argued, to this day there remain, in England at least, major reservations as to both the quality and nature of the justice administered in the summary courts (Darbyshire, *op cit*). It should be noted that it is argued that the fierce criticisms of the summary courts of the 1800s have been exaggerated (see Emsley, *op cit*, p 199-201 and Bentley, *op cit*, p 26-8).

[132] This was not to be remedied until a comprehensive right of appeal was introduced by the *Criminal Appeal Act* 1907.

Part 7 The Emergence of the Adversarial Criminal Trial

There is a common apprehension that the adversarial criminal trial, so familiar to all modern common law jurisdictions, enjoys a long and venerable historical legacy. However, as Langbein and other scholars have demonstrated, such a view is misplaced. Rather, as Langbein notes; "The criminal lawyer and the complex procedures that have grown up to serve him and to contain him are historical upstarts." [133] The typical criminal trial of the 1600s and 1700s bore little similarity to the modern trial. Not only was the accused at a position of grievous disadvantage when compared with his or her modern counterpart in terms of the rights that they (or rather did not) enjoyed but furthermore the trial of the seventeenth and eighteenth centuries betrayed few of the adversarial trademarks that distinguish the modern common law criminal trial. With the notable exception of "political" offences,[134] most prosecutions were brought, not by the Attorney-General or other public figure or agency, but rather by the victim or complainant in a purely private capacity.[135] Most litigants in the criminal trial, whether the prosecutor or the defendant, were legally unrepresented and lawyers were conspicuous by their absence.[136] Indeed, the very right of the accused in cases of felony to be represented by counsel was severely restricted, if not denied.[137] The magistrate or justice of the peace was not the dispassionate judicial figure of modern times but played an active, if not prominent, role in the investigation of the case and the assembling of the evidence. The presiding judge dominated the trial and dictated both the course of proceedings and the examination of the witnesses. Langbein, in his studies[138] of eighteenth century criminal trials at the Old Bailey, concludes that until well into the 1700s, the procedures at the Old Bailey resembled the modern civil inquisitorial system far more than the modern adversarial Anglo-American procedure.[139] McHugh J in 2001 in *R v Azzopardi*[140] observed that until the appearance of counsel towards the close of the eighteenth century, "The common law system of criminal justice, at least so far as it concerned felonies, was in substance an inquisitorial system." [141] His Honour, drawing on the work of Langbein and other scholars, offered the following description of the typical criminal trial of the eighteenth century:

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[133] Langbein, J, "The Criminal Trial before the Lawyers" (1978) 45 Uni Chi L Rev 263 at 316.

[134] As a scrutiny of the State Trials for the period will indicate, the State typically prosecuted offences such as treason or sedition that might directly bear upon the person of the monarch or the security of the realm but, even here, the State was not always willing to prosecute. Emsley notes that even during the so called English "reign of terror" in the 1790s the Crown Law Officers regularly refused to finance prosecutions for sedition and exhorted magistrates to prosecute these locally (Emsley, C, "Crime and Society in England 1759-1900" (2nd ed) (London, Longman, 1996) p 178).

[135] The bulk of offences were prosecuted on a "private" basis by the victim. The State, to encourage such prosecutions, increasingly offered rewards for the successful prosecution of certain offences. This was to cause in both the 1700s and 1800s serious abuses. See the further discussion at p 28-31.

[136] McHugh J notes that in only 2% of felony trials in the 1770s at the Old Bailey was the accused represented by counsel ((2001) 205 CLR 99). It might be unduly cynical to suggest that the criminal jury trials of the period functioned better and were more conducive to the discovery of the truth in the absence of any lawyers! As Derbyshire has pertinently noted, 'The laws and lawyers have contrived to make jury trial so expensive and lengthy, compared with the very speedy affair it was in Blackstone's day that it is a luxury we cannot afford" (Darbyshire, P, "An Essay on the Importance and Neglect of the Magistracy" [1997] Crim LR 627)

[137] Though the accused did enjoy the right to be legally represented in cases of misdemeanour. The logic that an accused might be on trial for his or her life on a felony and denied any right to legal representation and yet he or she would be entitled if they faced a comparatively minor misdemeanour charge does seem bizarre. Langbein explains this incongruity on the basis that as many misdemeanours had a strong "civil" or "regulatory" character they were treated as similar to civil litigation in which the parties did enjoy the right to be legally represented at trial (Langbein, J, "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors" (1999) 58 Cam Law J 314 at 318). It should also be noted that most crimes at the time were classified as felonies.

[138] See Langbein (1999), *op cit*, Langbein, J, (1978) *op cit*, Langbein, J, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources" (1983) 50 Uni Chi L Rev 1.

[139] Langbein (1978), *op cit*, 314-315.

[140] (2001) 205 CLR 56

[141] (2001) 205 CLR

> Given the course of procedure at the committal stage, it is scarcely surprising that the criminal trial itself was also basically inquisitorial. Criminal defendants were regarded as interested parties. Like parties in civil actions and witnesses with an interest in the proceedings, defendants in criminal proceedings were not allowed to testify on oath …Moreover, not until 1836 with the passing of the *Prisoners' Counsel Act* could criminal defendants be represented by counsel in trials for felony, and until the 19th century most serious offences were felonies. This had a profound effect on the manner in which trials were conducted. Until the late 18th century, trials were effectively dialogues between judges, witnesses and accused persons. They were short, the average at the Old Bailey being half an hour. Counsel rarely appeared for the prosecution, and the judge conducted the trial. Although the accused could not give evidence on oath, he or she was permitted - indeed virtually required - to speak, often replying to each witness after the witness gave evidence.[142]

This civil or inquisitorial shape of the criminal trial underwent a gradual but fundamental transformation in the later part of the eighteenth century and the first part of the nineteenth century.[143] As Langbein states, "Over the course of the eighteenth century our criminal procedure underwent its epochal transformation from a predominantly nonadversarial system to an identifiable adversarial one." [144] The presence at the trial of lawyers, from been a comparative novelty, steadily became a routine, though not universal, feature of the criminal process.[145] It is clear that during the later part of the 18th century and the earlier part of the 19th century that the private prosecutors of the period increasingly chose to employ both the services of a solicitor to prepare the prosecution case for trial[146] and, crucially, to be represented by counsel at trial. Similarly, despite the ostensible restrictions, if not outright prohibition, on their representation and advocacy, defence counsel both increasingly appeared at trial on behalf of the accused and took an ever more active and prominent role in the proceedings. As Stephen notes:

> The most remarkable change introduced into the practice of the courts was the process by which the old rule which deprived prisoners of the assistance of counsel in trials for felony was gradually relaxed. A practice sprung up, the growth of which cannot not be traced, by which counsel were allowed to do everything [for persons] accused of felony except addressing the jury for them.[147]

The consequences of this development were ultimately to prove profound. What started, seemingly in the 1730s,[148] as an act of indulgence on the part of the trial judges in England, was to lead to the

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[142] (2001) 205 CLR 97-98.

[143] A simple measure is that from 2% in the 1770s the rate of defendants represented by counsel in felony trials at the Old Bailey had increased to 36% by 1795 (2001) 205 CLR 99 per McHugh J). It is not entirely clear when this transformation took place. The traditional view is that the pronounced trend away from the inquisitorial type of hearing took part towards the end of the 1700s, as McHugh J notes, and in the first half of the 1800s. However, more recent research (Langbein (1978) and (1999), *op cit* and Landsman, *op cit*) indicates that this trend may have started as early as the 1730s.

[144] Langbein, J, "Shaping the Eighteenth-Century Trial: A View from the Ryder Sources" (1983) 50 Uni Chi L Rev 1 at 123.

[145] McHugh J notes that by 1795 36.6% of defendants at the Old Bailey were represented by counsel. Even as late as the 1840s in the Black Country in England 46% of criminal cases were still tried without either prosecution or defence counsel (see Taylor, *op cit*, p 114). This trend continued into the 1900s (Bentley, *op cit*, p 137).

[146] See Langbein, J, "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors" (1999) 58 Cam Law J 314 for an exhaustive analysis.

[149] Stephen, *op cit*, p 424.

[150] Though Stephen was unable to trace the origin of the relaxation in the prohibition on defence counsel, modern scholars such as Landsman and Langbein now tend to trace it back to as early as the 1730s.

[151] See *R v Azzopardi* (2001) 205 CLR 98-99.

gradual but fundamental transformation of the nature of the criminal trial from an inquisitorial and lawyer free "accused speaks" proceeding as described by McHugh J to an adversarial and lawyer dominated "testing the prosecution" contest that would be instantly recognisable to the modern criminal lawyer in either England or Australia.[149] By 1845, as Hostetter has noted, "The lawyer had captured the courtroom and made the trial accusatorial." [150] It is clear that the gradual emergence of this adversarial system of criminal justice was both unforeseen and unintended. As Landsman explains:

> No one set out to build the adversary system. It was neither part of a grand government design nor the scheme of an ingenious legal philosopher. The judges, lawyers and litigants of eighteenth century England went about their business unaware that they were the instruments of any historical 'purpose' or that the product of their labours would be a new system of adjudication.[151]

There is, as, Langbein notes, a "special irony" in the fact that that such a great change in the criminal process was brought about almost by accident as a result of what had started as an "act of grace" from an hitherto all dominant judge.[152] I would suggest that the evolution of the adversarial criminal process, unintended and unforeseen that it may have been, is a major factor to explain the development of the role of the prosecuting lawyer as the impartial minister of justice. I would submit that it was no coincidence that at about the same time that the modern adversarial system of criminal justice was emerging in England in the later part of the 1700s and the early part of the 1800s that there should also emerge the doctrine that the role of the prosecuting lawyer in that newly adversarial criminal process was that of a minister of justice and not that of a partisan advocate. It is only with the increasing presence and involvement of prosecution counsel in felony cases in the increasingly adversarial process that the practical issue would have arose as to what should be the role of prosecution counsel.

I would contend that the legal system would have been alive to the potential for injustice to an unrepresented accused facing a legally represented prosecutor in the emerging adversarial process of the late 1700s and early 1800s. The stark inequality in a criminal trial between the positions of a prosecutor represented by counsel and a legally unrepresented accused had long since been appreciated.[153] The lack of any right to be represented by counsel to a defendant when facing a prosecution represented by counsel was a familiar complaint of defendants during the State trials, especially for treason.[154] The unfortunate Mr Love, when on trial for his life for treason in 1651, argued in vain and with dogged persistence that he should be entitled to be represented by counsel. But what struck Love as galling and especially unfair was the fact that he would have to confront at trial the Attorney-General representing the Crown:

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[152] Hostetter, J, "The Politics of Criminal law: Reform in the 19th Century" (Chichester, Barry Rose Publishing, 1992) p 43. For a full discussion of the development of the adversarial system of criminal justice in England see further Landsman, *op cit*. It should be noted that it has been argued that the adversarial trend has been overstated as during the 1800s, and even beyond, a large proportion of criminal trials were still without lawyers (see May (2001), *op cit*).

[151] Landsman, S, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75 Cor L Rev 497 at 502.

[152] Langbein, *op cit*, 314.

[153] Indeed, scholars such as Langbein and Landsman speculate that the growing use by private prosecutors of counsel to prosecute unrepresented defendants prompted the initial efforts by the trial judges of the 1700s to allow defendants to be represented by counsel in trials for felonies. It was to "level the playing field".

[154] See *R v Lilburn* (1649) 4 St Tr 1269 at 1294-96 and 1317, *R v Love* (1651) 5 St Tr 43 at 52-55 and 61, *R v College* (1681) 8 St Tr 549 at 570 and 570

> I now see Mr Attorney's words to be true. When he came to me to me in the Tower, and examined me, on the 16th of this month, he said, That seeing I would not acknowledge (as he called them) my Treasons, I was judged preemptory and obstinate: and I remember he said these words to me; Mr Love, though you are too hard for me in the Pulpit, yet I will be too hard for you at the Bar. And now truly now I find it so, and it is an easy matter for a Lawyer armed with Law and Power, to be too hard for a poor naked scholar, that hath neither Law nor Power.[155]

Contemporary scholars have confirmed the substance of this plaintive complaint from Love. Hawles[156] and Foster[157] both commented on the injustice of the unrepresented accused charged with treason confronting at trial the formidable array of unmistakably partisan counsel retained by the Crown. Hawkins commented that "Experience" had shown that there were "great Disadvantages from the want of [defence] Counsel in Prosecutions of High treason against the King's Person which are generally managed by the Crown with greater Skill and Zeal than ordinary Prosecutions." [158] Langbein suggests that Hawkins' reference to "Skill and Zeal" must be understood in terms of code language. "By 'Skill' Hawkins was referring to the crown's use of lawyer prosecutions in treason cases. 'Zeal' signalled the prosecutorial abuses that had occurred in the Stuart trials." [159]

The lawyers and judges, if not the general populace, of the eighteenth century and beyond had long memories of such travesties of justice as that accorded to the hapless Mr Love and his fellow defendants of the seventeenth century. These cases would have continued to resonate beyond the "Glorious Revolution" of 1688.[160] Though the criminal justice system of the late 1700s may seem punitive and draconian by the comparatively enlightened standards of today, it is crucial to bear in mind that the courts of the period were not unsympathetic to the plight of the accused and were prepared on occasion to try and reduce the odds in favour of the prosecution at trial. As early as 1732 the trial judge in *R v Patrick*[161] emphasised the importance in adhering to due process at trial so "that the publick may be satisfied that no unfair Practices have been made use of".[162] In 1799 another trial judge can be found declaring in *R v Hardy* that it was his duty to tend towards justice rather than injustice.[163] This judicial solicitude for the position of the accused was forcefully highlighted by the renowned eighteenth century advocate, Thomas Erskine, who contrasted the judges of the late 1700s with their politically supine predecessors of the Tudor and Stuart periods: "There were no judges as there are now, to hold firm the balance of justice amidst the storms of state; men could not then, as the prisoner can today, look up for protection from magistrates independent of the crown, and awfully accountable in character to an enlightened world." [164]

There were a number of legal developments of the 1700s that improved the situation of the accused.[165] As Landsman notes, "All these developments suggest that the legal community of the day saw its task

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[155] *R v Love* (1651) 5 St Tr 52-55.
[156] Hawles, J, "Remarks upon the Tryals of Edwards Fitzharris" (London, 1689) p 32, 37 and 43.
[157] Foster, M, "A Report of Some Proceedings… for the Trial of the Rebels in the Year 1746 …To Which are Added Discourses upon a Few Branches of Crown Law" (Oxford, 1762), p 231.
[158] Hawkins, W, "A Treatise of Pleas of the Crown (Vol 2)" (London, 1721), p 402.
[159] Langbein (2003), *op cit*, p 98.
[160] Many of the leading families, legal and otherwise, in England had ancestors who would have suffered in the various political "show trials" of the seventeenth century.
[161] Central Criminal Court, 6 September 1732, No T 17320906-26.
[162] *Ibid*.
[163] Central Criminal Court, 8 May 1799, No T17990508-50. The judge was critical of the evidence of an accomplice.
[164] Macnally, L, "The Rules of Evidence on Pleas of the Crown" (1802), p 7 quoted at Landsman, *op cit*, 499 at FN 8.
[165] Though Landsman (*op cit*) does not refer to the notion of the prosecuting lawyer as a minister of justice he does include such developments as the curbs on the use of out of court confessions, the introduction and use of defence counsel and the

not simply as convicting the guilty, but as satisfying a profound social desire for fair play." [166] This theme of somehow levelling the odds between the prosecution and accused in the criminal process was a theme that was to continue throughout the nineteenth century and beyond. The development of the prosecutor as a minister of justice needs to be viewed in such a light.

The disparity between the positions of a legally represented prosecutor and an unrepresented defendant was both obvious and telling and a potential recipe for injustice. Even in the late 1700s and early 1800s there would have been appreciation of the injustice that could have resulted from the partisan and zealous prosecution of an accused, especially if the accused were unrepresented and the prosecution were represented by counsel. The legacy of both Coke[167] and the unrepresented defendants in the State trials such as Love convicted of treason in the face of legally represented prosecutors would have loomed large. In the largely inquisitorial legal process of the first half of the 1700s where the prosecution were seldom, if ever, legally represented the issue may well have been largely academic and theoretical. However, with the increasing presence of prosecution counsel in the emergent adversarial process of the early 1800s the issue would have no longer been so theoretical and would have assumed considerable practical significance. The situation that had confronted and so vexed the unfortunate Mr Love, far from being an isolated anomaly, would have become an increasing regular occurrence. Langbein notes that it is "possible" that the increased use of counsel by private prosecutors in the 1700s directly led to the courts relaxing the prohibition on the use of counsel at trial by the accused.[168] However, the discretionary introduction of defence counsel was only an incomplete and limited, albeit welcome, means of seeking to protect the position of the accused in the increasingly adversarial criminal process of the time. It is plain that "grievous shortcomings" [169] in criminal procedure would have remained.[170] Rather, as another, and perhaps more effective, means of seeking to strike a more reasonable balance between the prosecution and accused, the doctrine emerged that the prosecuting lawyer, regardless of whether the accused was legally represented or not and whether the prosecutor was the Crown or a private litigant, should act in the impartial and restrained role of a minister of justice. I would suggest that such a doctrine would only have emerged with the evolution of an adversarial criminal process.
So that the public "may be satisfied that no unfair Practices have been made use of" [171] or to achieve justice rather than injustice[172] it was unsurprising, perhaps almost inevitable, as the criminal process changed into an adversarial model that the concept should emerge that if the prosecutor at trial made use of counsel, then prosecuting counsel should temper his newly acquired prominence in the criminal trial by recognising, as had been famously suggested by Queen Elizabeth over two centuries earlier,

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rigour with which the evidence of accomplices and so-called "thief catchers" (these were prosecutors motivated by the generous rewards that were offered for the successful prosecution of certain offences) was viewed at trial. Historians have noted the serious abuses and corruption that accompanied such prosecutions and both Langbein and Landsman stress the significance of the "thief catchers" in leading the courts to allowing the use of defence counsel.

[166] Landsman, *op cit*, 604. See *R v Hardy*, Central Criminal Court, 8 May 1799 No T17990508-50.

[167] Indeed, it is remarkable how often Coke is still cited as an example of the atypical vindictive and partisan prosecutor. As discussed already Coke has probably contributed as much as anyone to the disfavour, as noted at the outset of this Article by the Solicitor-General of Scotland, with which the role of the prosecuting lawyer is still commonly perceived.

[168] Langbein (1978), *op cit*, 312-313.

[169] *Ibid*, p 314.

[170] The accused may well, as was still most often the case, have been legally unrepresented and there were still (as would remain well into the 20th century) a whole raft of aspects of the criminal justice system (as will be discussed subsequently in this Article) that had a most deleterious impact on the position of the accused in the criminal process.

[171] *R v Patrick*, Central Criminal Court, 6 September 1732, No T 17320906-26.

[172] *R v Hardy*, Central Criminal Court, 8 May 1799 No T17990508-50.

that prosecuting counsel is retained "*pro dominae veritae*" as opposed to simply acting as the partisan mouthpiece of his or her client.[173] It was a means of seeking to protect the position of the accused.

Part 7: Specific Features of the Criminal Process of the Nineteenth Century

Important though the transformation of the criminal trial to an adversarial model undoubtedly was, I would suggest that it does not provide the sole answer as to why the notion developed when it did that the prosecutor 's role was as a minister of justice. I would argue that it is necessary to also look at the specific features of the criminal process in England of the early 1800s to help explain the development of the concept that the role of the prosecutor was as a minister of justice.

The legal system of the early nineteenth century bore scant resemblance to the modern process in relation to the rights accorded to the accused. When viewed against the comprehensive plethora of protections rightly enjoyed by the modern defendant, the accused was certainly in a highly disadvantageous position. I have described how the prosecution enjoyed a considerable head start on the accused in the criminal trial of the early 1800s.[174] However, as noted, the criminal courts in the 1700s, did not regard their role purely as to procure the conviction of the accused. Rather, the courts were, on occasion,[175] sensitive to the injustices of the period and, albeit to a limited extent and within the framework of the criminal justice system of the day, sought to compensate for those injustices. I would suggest that to appreciate properly why the concept emerged of the prosecutor as a minister of justice it is necessary to look beyond the transformation of the criminal trial to an adversarial model. One must also look at the specific features of the criminal process of the late 1700s and early 1800s to also explain just why the doctrine of the prosecutor as a minister of justice emerged at this time.

I would suggest that it is only against this both this bleak backdrop of the defendant's position in the criminal justice system and the increasingly adversarial nature of the criminal process that one can understand the development in the early 1800s of the notion of the prosecution as a minister of justice. Not only was an unrepresented accused increasingly likely to confront a legally represented prosecutor, but the accused had been tried in a process where the presence of prosecution counsel would have exacerbated the defendant's already pronounced disadvantaged position within that process. Though all the specific factors noted previously[176] are significant in explaining the development of the role of the prosecuting lawyer as a minister of justice, I would suggest that several specific aspects of the criminal process of the early 1800s are especially notable and warrant particular consideration in explaining just why the concept of the prosecuting lawyer as a minister of justice was to emerge during this period.

Part 8: The Role of the Magistrate or Justice of the Peace: Public Prosecutor and Detective

Ever since the statutes of Queen Mary in the 1550s, the Justice of the Peace had been required to commit an accused for trial only after taking the depositions of the witnesses to the alleged offence.[177] But the Justice of the Peace had no formal role in assessing the strength of the evidence with a view to

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[173] Though it is notable that the tension of the prosecutor acting as a minister of justice in an adversarial process has often escaped close scrutiny. This issue was raised at FN 118. This potential tension has not gone totally unnoticed (see Sutherland, *op cit* and Turner, K, "The Role of Crown Counsel in Canadian Prosecutions" (1962) xi Can Bar rev 458-459).

[174] See the discussion at p18-19.

[175] Recalling *R v Patrick* and *R v Hardy* noted at FN 173 and 174.

[176] Again, see the discussion at p 18-19.

[177] Section 2 of the 1555 Act required the Justice to take "the Examination of such prisoner, and Information of those that bring him, of the Facts and Circumstance thereof, and the same, or as much thereof as shall be material to prove the Felony."

discharging the accused in a weak case.[178] Though the magistrate later could,[179] and from the mid 1700s sometimes did,[180] refuse to commit an accused for trial if there was inadequate evidence to support the charge, in practice the protection that was afforded to the accused by the Justice of the Peace was scant. The Justice of the Peace acted in the criminal process as a combination of detective and public prosecutor. The magistrate from the 1550s until well into the 1800s was patently not the neutral and detached judicial figure that he or she occupies in the modern adversarial legal system. Rather the role of the magistrate in the criminal process was as one that would befit a civil inquisitorial system. As was explained in 1989 in *R v Grassby*[181] by Dawson J:

> A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organized police force in the apprehension and arrest of suspected offenders. Following the statutes of Philip and Mary of 1554 and 1555… they were required to act upon information and examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was this inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial. [182]

In the long period before the introduction of a modern police force and the later statutory reforms of 1836 and 1848 the Justice played an active and critical role in the enforcement of the law and in the investigation of crime and the gathering of evidence and even in the prosecution of offences. It was not unknown for the Magistrate to conduct the investigation, collect the evidence, administer the preliminary hearing himself and commit the accused for trial and then even appear at trial as the principal prosecution witness against the accused. Stephen recites various such cases including that of a particularly persistent magistrate called Gilbert who appeared as the main prosecution witness at the trial in 1681 of a man called Busby who was accused of being a Catholic priest (this being a crime at the time in England). Gilbert had conducted a most determined investigation and paid several visits to the house where he suspected Busby to be. On one occasion Gilbert seized various items that he felt were incriminating; "A crimson damask vestment, wherein was packed a stole, a maniple of the same (as the Papists call them), an altar stone, surplice, and a box of wafers, mass books, and divers other Popish things." [183] Gilbert was eventually able after an exhaustive search to find the elusive alleged priest in a secret hiding-hole and conveyed him to Derby, "where after I had taken his depositions, I made a mittimus[184] and committed him to Derby gaol." [185] Such an inquisitorial approach (albeit to, perhaps, not the same zealous extent as shown by Mr Gilbert) on the part of magistrates was continued throughout the 1700s. Henry Fielding, took an active role in London in the enforcement of the criminal law and in the investigation and prosecution of offences as a magistrate and, to assist him in his duties, even hired his own detectives, the famous Bow Street Runners who are widely regarded as the genesis of a modern police detective force.[186] Such an inquisitorial role persisted, albeit to a lesser degree, into the nineteenth century and only ended with the establishment of a modern police force and the overdue reforms of 1848 brought by *Sir John Jarvis's Act*, the *Indictable Offences Act,* which

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[178] Fielding, H, *Covent Garden Journal,* 25 Feb 1752, quoted in Taylor, *op cit*, p 112.
[179] It would seem that in the second half of the 1700s the Justice of the Peace gradually assumed such a role in contradiction of a strict reading of the 1555 Act (*Ibid*).
[180] *Ibid*.
[181] (1989) 168 CLR 1.
[182] (1989) 168 CLR 11.
[183] Stephen, *op cit*, p 225. I emphasise that the unpleasant terminology is of Mr Gilbert and not of either Stephen or the author.
[184] A warrant from a magistrate directing a sheriff or other officer to hold someone in prison.
[185] *Ibid*. Mr Gilbert as a magistrate conforms to the unflattering stereotype described by Darbyshire (Darbyshire, *op cit*).
[186] Langbein (1983), *op cit*, 60-67.

placed the magistracy on a modern judicial footing. This Act transformed drastically the role of the magistrate in the criminal process. Stephen notes the transformation in "every detail" from the magistrate acting the "part of a public prosecutor" to occupying the role of a preliminary judge in the criminal process.[187] As Brooking J in *Cobh v Police Commissioner of Victoria*[188] observes of the changes brought by *Sir John Jarvis's Act*:

> This was the Act that transformed the preliminary inquiry from a secret, inquisitorial and often informal proceeding, in which the accused was himself to be examined, the magistrate acting as prosecutor, at times as detective and in Elizabethan days at times even as torturer. [189]

Thus until *Sir John Jarvis's Act* it would be a misconception to view the role of the magistrate in the criminal process as that of a neutral judicial figure who could be entrusted, or even expected, to protect the position of the accused and to safeguard his or her rights. Indeed, if anything, the role of the magistrate ran directly counter to the interests of the accused. As late as 1821 in *R v Thurtel*[190] one finds Park J not offering a word of reproach at the decision of the magistrates conducting the preliminary examination in a murder case to exclude the defendants from the room in which the witnesses provided their depositions in order to "keep them ignorant of the entire evidence against them, at least for a short time." [191] Indeed, in *Thurtel* one finds the Magistrates not only conducting a diligent investigation into the offence but continuing with that investigation after the committal proceedings in defiance of the spirited objections of the defence solicitor.[192] The Magistrates even went as far as to prevent the defence solicitor from visiting his client in prison in order to prepare his defence! [193] Taylor comments that the role of the magistrate in the criminal process, far from being of assistance to the accused, was a positive hindrance:

> Under the old laws the defendant had few rights. He or she did not know the precise charge, nor was he or she present when depositions were given…the role of the magistrate was conceived to be that of an assistant to the prosecutor. It was his responsibility to put together as strong a case as possible and., although he could include evidence favourable to the defendant, he was under no obligation to do so. [194]

I would suggest that it is important to consider the central position of the magistrate in the criminal process in explaining the development of the prosecuting lawyer as a minister of justice. The magistrate may have occupied a pivotal position but his role manifestly did not necessarily include the protection of the interests of the accused until the fundamental changes brought about by *Sir John Jarvis's Act* in 1848. The situation that existed prior to 1848 in respect of the role of the magistrate provides additional explanation as to why the role of the prosecutor was formulated as a minister of

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[187] Stephen, *op cit*, p 221.
[188] [1994] 1 VR 41.
[189] [1994] 1 VR 41 at 44
[190] *The Times*, 31 Oct and 5 Dec 1823; quoted by Stephen, *op cit*, p 227-228.
[191] Stephen, *op cit*, p 227. Though it is questionable whether an accused such as Thurtel would ever have secured sight of the prosecution evidence prior to trial. It is significant that in *Thurtel* Park J reserved his ire for the decision of the magistrates to allow the press into the preliminary examination which had the wholly unintended, and wholly undesirable to Park J, effect of the evidence of the prosecution witnesses appearing "very copiously" in the public press and thus potentially alerting the accused to the evidence against him or her (*Ibid*). Park J repeated his ire during the trial.
[194] The Magistrates brought witnesses to the prison after committal in the absence of to view the accused to resolve issues. This was in the absence of the solicitor and after the solicitor had prevented an earlier effort by the Magistrates.
[193] Even by the standards of 1821 this proved controversial and the judges of the Kings Bench ordered the Magistrates to permit Thurtel's solicitor to see him in prison in order to prepare his defence. See *The Times*, 17, 19 and 20 Nov 1823.
[195] Taylor, D, "Crime, Policing and Punishment in England: 1750-1914" (New York, St Martins Press, 1998) p 112.

justice as a means of seeking to compensate the accused for his or her disadvantaged position within the increasingly adversarial criminal process of the late 1700s and early 1800s.

Part 9 Private Prosecutors and the Lack of a Public Prosecutor: A Recipe for Partiality

It may come as a surprise to a modern observer to discover that the prosecution of alleged offenders in the English criminal process of the 1700s and well into the 1800s was crucially dependent upon the role of the victim or complainant.[195] There was no system of public prosecutions, as such, and with the notable exceptions of "political" offences such as treason or sedition and offences relating to coinage and currency, the State was content, in accordance with the *laire faire* philosophy of the period, to leave the enforcement of the criminal law and the prosecution of offenders to private individuals, usually the victim or complainant.[196] As Edwards explains of the absence in England of any organised public body to investigate or prosecute crime: "For many centuries, it must be remembered, the main responsibility rested with the private citizen whose sense of public duty must have been sadly dampened by the realisation that the costs of bringing a criminal to justice had to be met out of his own pocket." [197]

There were undoubtedly many conscientious members of the public who regarded the private prosecution of defendants who had allegedly wronged them as a civic duty and undertook this task with an eminent and commendable sense of fairness.[198] However, the flaws of such a system of private prosecution were to become increasingly apparent in both the 1700s and 1800s. There was a clear danger in allowing a criminal trial to be pursued with a purely private and partisan or even corrupt agenda on the part of the prosecutor. Such a partial prosecutorial agenda could readily clash with the clear view that the private prosecution of offenders should still be undertaken with restraint and detachment.[199] This had been made clear as early as 1727 at the Old Bailey in *R v Margaret Brown.*[200] The accused in this case, who plainly suffered from some form of mental affliction, was charged with theft. The prosecutor evidently strongly believed in the guilt of the alleged offender. The report of the trial, with obvious disapproval, notes that:

> The Prosecutor was very resolute in her Deposition; and charged the Prisoner with more heat than became her in a Court of Justice; it being the Prosecutor's Place only to swear to the best of their knowledge, and that too, with Decorum, caution and a calm undisturbed Disposition of Mind, not forward to give their own opinion, but with Reverence submit their own Judgement to that of the Court, who are not to be dictated by a witness, but informed of the Circumstances with relating to the Affair, that Justice may be executed with ease, and a due Regard shewed to those in Authority.[201]

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[195] Stephen speculates that the abuses of the State Trials before the 1688 Revolution were the historical cause for the discovery and prosecution of crime being entrusted to the individuals who considered that they had been wronged and not to a public prosecutor as in all other jurisdictions including Ireland and Scotland (Stephen, *op cit*, 419).
[196] It is not without irony that while the State could stir itself into action and prosecute on a public basis offences in which it had a direct concern it was blissfully unprepared to prosecute strictly "private" offences such as assault, rape or theft.
[197] Edwards, *op cit*, p 339.
[198] It should be noted that many of the private prosecutors at the Old Bailey indicated at trial their reluctance to have brought the action and proclaimed their intention to be scrupulously fair in the prosecution of the case.
[199] Though one must ask whether it is realistic to expect the victim of a crime, who may well have strong views concerning that crime, to pursue the alleged culprit with restraint and objectivity.
[200] 30 August 1727, Central Criminal Court, Ref: T 17270830-23
[201] *Ibid*.

Notwithstanding the prosecutor's passionate efforts, the accused was acquitted.[202] Nevertheless, *Brown* provides an early illustration of the difficulties in achieving impartiality or restraint on the part of a private prosecutor.[203] The concern expressed in *Brown* does seem to be a recurring theme. In 1783 in *R v Elizabeth Hart*[204] the accused faced a capital charge of theft from a store. The gravity of her situation did not dissuade the private prosecutor, a man called Steel, from asking the accused where the "pretty creature" was who had accompanied her into the store. It would seem that this remark was indicative of a wider lack of dispassion with which Steel was conducting the private prosecution. The Recorder was most unimpressed. He rebuked Steel for his "insult" that was "not proper nor humane" and pointedly commented to the jury:

> I cannot but remark; I think it is my duty to remark upon the conduct of Mr Steel, that it is such that doe shim [sic] no credit, and such as would not give force to his testimony, if the proof of this robbery depended on his single testimony, for there appears to be a degree of inveteracy in him, which is very improper in any prosecutor; for prosecutions ought to be conducted for the sake of Justice alone, with the feelings of humanity.[205]

A scrutiny of both the trial reports in the Old Bailey Session papers and other sources reveals regular incidences of such "inveteracy" or malice during both the eighteenth and nineteenth centuries on the part of the private prosecutors of the period. There are frequent defence assertions that the private prosecution was vindictive and tainted by ulterior or corrupt motives.[206] Some of these complaints are, on any examination, plainly well-founded.[207] Contemporary accounts of the first half of the nineteenth century, especially in official quarters such as the voluminous reports of the Criminal Law Commissioners, record widespread dissatisfaction with the fact that the enforcement of the criminal law depended upon the capricious and far from dispassionate efforts of private prosecutors.[208] In 1845 Lord Campbell, the Chief Justice of the Kings Bench, complained that; "The Criminal Law is often most shamelessly perverted to serve private purposes. Indictments for perjury and conspiracy are in a great majority of cases preferred with a view to extort money; the same for keeping gaming house and brothels." [209]

Indeed, such widespread dissatisfaction with the system of private prosecution prompted various efforts throughout much of the 1800s in England to remove the responsibility from the victim for

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[202] As I will discuss further in this Article, harsh as the criminal process of both the 1700s and 1800s may have been, especially when viewed through modern eyes, it was not wholly stacked against the accused.
[203] This remains a valid theme to this day. See
[204] Central Criminal court, 26 February 1783, T 17830226-15.
[205] *Ibid*. Unfortunately, for the accused, as there was a reliable second witness she was convicted of a non-capital crime.
[206] However, it must be borne in mind that many, perhaps the majority, of private prosecutors were not pursuing a vendetta against the accused. Also a common feature of the period was that many aggrieved parties were simply either unwilling or unable to bring a private action. A humane complainant may well have been dissuaded by the harsh sentences of the day that included execution (see Emsley, *op cit*, p 187). Indeed this reluctance of private prosecutors added to the calls throughout the nineteenth century for a public prosecutor.
[207] See *R v John Burrows*, Central Criminal Court, 15 September 1790, No. T 1790915-109 for a vivid example of a plainly vindictive prosecution brought by a complainant with obviously dishonest motives.
[208] Apart from vindictive or unduly partisan private prosecutions there were other major concerns as to the operation of the private prosecution system. These various concerns included corrupt prosecutions undertaken as either a thinly disguised means of extortion or of securing rewards (as an incentive for private prosecutors it was customary for the State or private interests to offer rewards for the successful prosecution of an offender), the reluctance and even outright inability of victims to undergo the irksome burden and attendant expense of time, labour and money in the prosecution of offences (even with the allowance of official reimbursement for costs), defendants "buying off" either the private prosecutor and /or the evidence of their witnesses, collusion and the mismanagement and general lack of interest in bringing a prosecution (see further Emsley, *op cit*, p 187-190).
[209] Edwards, *op cit*, p 343 and FN 31.

bringing a case to court and to entrusting this task to a public legally qualified prosecutor. As early as 1824 Lord Denman had commented of "a strange anomaly in the English criminal system …the entire want of a responsible public prosecutor." [210] Lord Denman asserted that to leave "the administration of justice in almost every instance to be set in motion by individual feelings of resentment" was "a strange abandonment of the public interest to chance." [211] Over two decades later Lord Denman, now the Chief Justice of the Court of Kings Bench, reaffirmed his views:

> Our procedure for the purpose if the preliminary enquiry is open to great objection. The injured party may be helpless, ignorant, interested, corrupt, he is altogether irresponsible, yet his dealings may effectually defeat justice. On general principles, it would evidently be desirable to appoint a public prosecutor.[212]

John Phillimore QC, in introducing a Bill for the establishment of a public prosecutor,[213] was motivated by similar concerns. He commented:

> The object of the present Bill is to withdraw from a sphere of private animosity, compromise and revenge that ought never to be left to such chances and to see that justice is properly administered. [214]

The desirability for a detached prosecuting lawyer acting in the spirit of a minister of justice to act as a judicious filter at trial on the partial agenda of a private prosecutor was echoed over a century later by Judge David QC in 1980 in *R v George Maxwell Ltd*[215] in the following apposite terms:

> A prosecution in the Crown Court is a very serious matter and may have very serious consequences. It is brought in the public interest to punish an offender and not to, except indirectly, compensate the victim. The Crown Court is not an appropriate forum to ventilate a private grievance or to pursue a personal vendetta. Traditionally Crown counsel owes a duty to the public and to the court to ensure that the proceeding is fair and in the overall public interest. The duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the indictment. By tradition and in accordance with etiquette prosecuting counsel adopts a role of impartiality…These are but some of the constraints on prosecuting counsel which are well understood and which are vital to ensure a fair trial and to protect the public interest. The interests of a private prosecutor will more often than not be inimicable with these duties and constraints. [216]

If the private prosecutor was represented at trial by counsel but the accused was not, then the already stark imbalance in the positions between the prosecution and defence[217] would have been even further distorted. Not only would the already disadvantaged accused have to face the partisan and potentially partial efforts of a private prosecutor, but he or she would confront the daunting prospect that had so perturbed the hapless Mr Love over a century earlier of facing a trained lawyer conducting the private

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[210] Denman, C, "The Edinburgh Review" (1824) Vol xl, 191; quoted in Edwards, *op cit*, p 340.
[211] *Ibid*; quoted in Edwards, *op cit*, p 341.
[212] Quoted in Edwards, *op cit*, p 343.
[213] The Bill was never passed for various reasons. Such a Bill would ultimately not become law in England until 1985!
[214] Quoted in Hostetter, *op cit*, p 166.
[215] [1980] 2 All ER 99
[216] [1980] 2 All ER 101. Accordingly in *George Maxwell Ltd* Judge David QC insisted that the private prosecutor must be represented by counsel if he wished to proceed with his trial at the Crown Court. It was inappropriate for a private prosecutor to present his or her own case at the Crown Court.
[217] See the prior discussion at p 20-25.

prosecution in a newly adversarial climate. How any such trial could begin to be fair, even in the terms understood by the criminal process of the period, is difficult to conceive. It was bad enough for the legally unrepresented accused that he or she might confront a private prosecutor represented by counsel. But when one additionally takes into account the potentially partisan and partial agenda of the private prosecutor, the already manifest inequality between the prosecution and defence becomes not just obvious, but positively dangerous.

In such a climate it is not surprising that the courts in the 1800s, as discussed previously, insisted that the prosecuting counsel, whether acting on behalf of the State or, more typically, acting on behalf of a private client should recognise that there were wider considerations at stake than simply the interests of his or her client. One can see the powerful incentive at this time to require the prosecuting counsel to recognise that he might well owe a broader duty than simply to advance the cause of his client. To cast the prosecutor as a minister of justice rather than simply as the mouthpiece or "hired gun" of a private client was simply one means of seeking to alleviate the disadvantageous position of the accused in the criminal process.

It may have been hoped that the increasing tendency for prosecutions to be brought either directly by, or on behalf of, the various newly established official police forces as opposed to by or on behalf of the victim or complaint might have curbed any untoward partisan fervour in the presentation of a case. After all the whole rationale of the establishment of a modern police force in an increasingly industrial and complex urban society in the first half of the nineteenth century was to remove responsibility for enforcement of the criminal law from the subjective and often capricious and less than effective hands of the victim or complainant and entrust it to a new official body that could be trusted to enforce the criminal law without fear or favour and without any personal or vested interest in its outcome.[218] However, whether the police brought such an objective and dispassionate tone to the investigation and prosecution of a criminal case was to prove an altogether different proposition.[219]

The new police forces in England from the mid 1800s gradually came to dominate both the investigation and the prosecution of offences.[220] The hitherto crucial private prosecutor was relegated, perhaps unintentionally, to a secondary and eventually a minor supporting role. The victim largely surrendered his or her hitherto pivotal role in the prosecution of offences. The victim was increasingly rendered a mere passive spectator to the proceedings or, to use a blunt, but not wholly misplaced, expression, mere "court fodder"; whose role was to provide the initial complaint and to give evidence at trial but otherwise no more.[221] In the absence of a state prosecutor, it was perhaps inevitable, as Edwards suggests, that the new police forces should come to shoulder both the tasks of law

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[218] As already noted there had already been increasing disquiet about relying on the victim to enforce the criminal law and given the continued abuses of private prosecutors such as the notorious "thief catchers" and widespread concerns in the turbulent aftermath of the Napoleonic Wars about the maintenance of law and order and fears of a "crime explosion" (it is perhaps instructive to realise that concerns about crime similar to those expressed today are far from new) the climate was conducive to the establishment of a modern style police force.

[219] Indeed this is a debate that has persisted to the present day and has continued to bedevil the administration of the criminal law. It featured heavily in the arguments prior to the establishment of the CPS in England in the 1980s.

[220] See Rozenberg, Rozenberg, J, "The Case for the Crown: The Inside Story of the Director of the Public Prosecutions" (Wellingborough, Equation, 1987) p 79 and Emsley, *op cit*, p 190-193.

[221] With the growth of victim's rights over the last generation this view has come under increasing challenge. Indeed, it is perhaps ironic, that the system is now returning in some respects to the practice of the 18th century. As noted by Fenwick, "The emergence of procedural rights for victims may be said to herald a move back towards the position which victims originally occupied within the system. A discernable movement towards a 'private' as opposed to a public ordering of the criminal process may currently be occurring." (Fenwick, H, "Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process" (1997) 60 Mod L Rev 317 at 319)

enforcement and the management of the prosecution of any offenders.[222] However, from the outset there still continued to be clear disquiet with the conspicuous lack of dispassion with which the police were seen to bring to their new role in the prosecution of offences, whether appearing as advocates or being concerned with the conduct of the prosecution. In *Webb v Catchlove*[223] there was firm judicial opposition to the notion of police officers acting as advocates in criminal proceedings. Denman J declared it to be "a most unfortunate practice".[224] Hawkins J, concurring, thought it was "a very bad practice to allow a policeman to act as an advocate before any tribunal, so that he would have to bring forward only such evidence as he might think fit and keep back any that he might consider likely to tell in favour of any person placed upon his trial." [225] Sir Alexander Cockburn, the Attorney-General, pronounced, as early as 1845, that it was "a great scandal" and "not consistent with the proper administration of public justice …that you should have a subordinate officer, who is merely the keeper of the prisoner, clothing himself with the functions of a public prosecutor." [226] Cockburn considered, foreshadowing a debate that, as Edwards has noted, has persisted to the present day, "that policemen should be kept strictly to their functions as policemen, as persons to apprehend and to have custody of prisoners". [227] By involving themselves in the conduct of a prosecution police officers would "acquire a bias infinitely stronger than that which must, under any circumstances naturally attach itself to their evidence." [228] The Attorney-General explained:

> When you get a policeman, you get a minister, though a very subordinate minister of justice and you look upon him as a person upon whom you may therefore rely, and I own that it was not till I became a criminal judge that I saw the necessity of exercising watchfulness over them, without impugning undue motives to them. I see that they take such an interest in the prosecution, by getting credit for the intelligence and energy and skill which they show while getting the witnesses together and bringing them to court and in bringing the prosecution to a successful issue, that I have become very sensibly alive to the necessity of watching their evidence carefully. [229]

Such clear expressions as to the undesirability of the investigators, namely the police, controlling the prosecution process have been often repeated.[230] Over a century after the cautionary words of the Attorney-General the Phillips Royal Commission in England offered the following apt observation:

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[222] Edwards, *op cit*, p 338.
[223] (1886) 3 TLR 169
[224] (1886) 3 TLR 170.
[225] (1886) 3 TLR 170. The arguments in favour of and against the employment of serving police officers as advocates in criminal proceedings were summarised by Glanville Williams (Williams, G, "Advocacy by Police and Justices' Clerks [1956 Crim LR 169 at 170-174). The issue of the appropriateness or otherwise of police officers acting as advocates has proved longstanding and has persisted to the present day in Australia. In England it largely ceased to be a live issue (officious television licensing officers asides!) following the Phillips Royal Commission in 1981 and the establishment of the CPS by the *Prosecution of Offences Act* 1985 which prohibited police officers acting as advocates in public prosecutions. Notwithstanding, occasional judicial expressions of concern as to the police appearing as prosecution advocates (see *Duncan v Toms* (1887) 56 LJMC 81) and regular calls in various official reports denouncing the practice (eg Wood, J The Hon Justice, 'Royal Commission into the NSW Police Service (Vol (3))" (Sydney, Govt Printer, 1997) p 316) it is still customary in Australia, unlike England, for serving police officers to appear in the summary courts as prosecution advocates. Opinion on this practice remains divided. It is beyond the scope of this Article to offer any informed opinion.
[226] Edwards, *op cit*, p 344.
[227] *Ibid*.
[228] *Ibid*.
[229] *Ibid*, p 344 at FN 37.
[230] The Narey Review noted that it was necessary for "the unambiguous separation of the roles of investigator and prosecutor" (Narey, M, "Review of Delay in the Criminal Justice System" (London, Home Office, 1997) p 9). Or, as Lord Bingham more colloquially put it, the prosecutor should not be "in the pocket of the police" (quoted in Baldwin, J and Hunt, A, "Prosecutors Advising in Police Stations" [1999] Crim LR 521 at 522 at FN 8). See also Hunt, *op cit*.

> A police officer who carries out an investigation, inevitably and properly, forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, he may be inclined to shut his mind to other evidence telling against the guilt of the suspect or to overestimate the strength of the evidence he has assembled. [231]

Notwithstanding such expressions of disquiet the domination of public prosecution over private prosecution became apparent during the course of the 19th century and has persisted to the present day. However, the fact that the investigators, namely the police in England, and not a public prosecuting lawyer such as a Director of Public Prosecutions, were to control the bulk of public prosecutions was to cast a shadow over the efficacy and independence of the regime for the prosecution of offenders. As Rozenberg notes, the role of any prosecuting lawyer in the prosecution of offenders was akin to that of a constitutional monarch: "Like a constitutional monarch, [he or she] had the power to advise and the power to warn, he did not have the power to veto his client's [the police] instructions." [232] This unsatisfactory[233] situation was to remain until the later part of the 20th century.[234] I would submit that the control by the investigators of the prosecution process from the mid-1800s may well explain why the doctrine of the prosecuting lawyer as a minister of justice was, far from been questioned with the effective demise of the private prosecutor, regularly reaffirmed in the period after the mid-1800s. The impartial prosecution counsel was deemed as necessary to promote the fairness of the trial and to counterbalance the likely far from dispassionate interest in the outcome of the case of the investigator.

Part 10: Restrictions on Right of Accused to Legal Representation

There is little doubt that the stark situation that confronted the unfortunate Mr Love in 1651 would strike most modern observers as unsatisfactory.[235] The fact that the accused was denied the right to legal representation at trial was bad enough but to be denied legal representation when the prosecution were represented by counsel was grossly unfair. Despite the steady inroads during the eighteenth century on the rule that refused the accused the services of counsel at trial I would submit that this would still have remained a significant factor explaining the increasing insistence that the prosecution counsel should function as a minister of justice in order to try and even the playing field between the prosecution and defence at trial. The lack of entitlement of the accused to counsel at trial would have, as previously discussed, been greatly exacerbated by the shift to an adversarial system of criminal justice.

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[231] Royal Commission on Criminal Procedure, "The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure" (London, HMSO, 1981), quoted at Rozenberg, *op cit*, p 83. This tendency is also known as "tunnel vision". Such "blinkered" investigations have been a recurring problem and a leading cause of many of the miscarriages of justice that have arisen in recent years in both England (see *R v Ward* [1993] 1 WLR 619 and *R v Taylor* (1994) 84 Cr App R 361) and Australia (see *R v Button* (2002) 25 WAR 382 and *R v Mallard* [2005] HCA 68). These cases show that motivation behind such a trait, despite the suggestion of the Royal Commission, is often anything but proper.

[232] Rozenberg, J, *op cit*, p 81.

[233] It is now widely accepted that it is inappropriate to confuse the investigatory and prosecution stages of the criminal process. This theme strongly emerged from the Phillips Royal Commission in England.

[234] Though a Director of Public Prosecutions was established in England in 1879 the functions of that office remained limited for over a century. It wasn't until the 1981 Phillips Royal Commission on Criminal Procedure and the *Prosecution of Offences Act* 1986 and the establishment of the CPS that the distinction between the investigation and prosecution of offences was explicitly recognised and the police finally lost both their control of the prosecution of offences and their rights to appear as advocates in the summary courts. In Australia the problem has been diminished by the establishment in each jurisdiction of Directors of Public Prosecution though the police still generally retain the control of prosecutions at the summary stage and the right to appear as advocates in the summary courts.

[235] I suspect that it may have even struck observers in 1681 as unfair.

There is no doubt that the *Prisoners Counsel Act* 1836 and the removal of the lingering restrictions on the ability of defence counsel to fully defend the accused was a significant and overdue measure in protecting the rights of the accused in the criminal process. However, it is important not to overestimate the effect of the Act. If an accused was unable to afford the services of counsel, as was so often the case, then the accused still went into the trial unrepresented[236] (so maintaining the notion of the prosecuting counsel as a minister of justice notwithstanding the *Prisoners Counsel Act*). In the absence of a comprehensive legal aid scheme the rights nominally afforded by the *Prisoners Counsel Act* were a cruel illusion to many defendants. Bentley's comment that the absence of a system of criminal legal aid in the 1800s "would remain throughout the century one of the most serious shortcomings of the trial system" is telling.[237] In addition it must be remembered that the rule preventing the accused from been legally represented in felonies had already been heavily eroded in practical terms long before the passage of the *Prisoners Counsel Act*. The cumulative effect of the informal and piecemeal reforms over the preceding century, as authors such as Stephen and Langbein have noted, had been that the defence lawyer was already ordinarily able to do everything in a criminal trial on behalf of the accused except directly address the jury[238] (and even this seems to have been sometimes more honoured in the breach than in the observance). Therefore, as Stephen notes of the effect of the *Prisoners Counsel Act*, "The change was less important than it may at first sight seem to have been," [239]

Nevertheless, I would submit that it is still important not to too lightly dismiss the effects of the *Prisoners Counsel Act*. Prior to 1836 the entitlement of the accused at trial to both be legally represented and the extent of counsel's involvement were crucially dependent upon the discretion or whim of the trial judge. Practices differed from one circuit to another and from one judge to another.[240] The variances in the degree of involvement that was permitted to defence counsel in a trial persisted right up until the 1836 Act.[241] Even if the accused was legally represented defence counsel was still prevented from taking a full role in the proceedings. The accused was not entitled to be legally represented at the preliminary examination before the magistrate. It was only with the *Prisoners Counsel Act* in 1836 that the defence lawyer gained the full and unrestricted right at both the preliminary examination and at trial to represent the accused. I would argue that there is an explicit connection between the lack of any formal entitlement to the accused of legal representation prior to the *Prisoners Counsel Act* and the emergence of the idea of prosecuting counsel as a detached minister of justice. Langbein, drawing on the restraint shown in a prosecutorial opening address at a trial as early as 1781, also makes this connection clear:

> The studied tone of concern for the welfare of the accused in the opening address was in keeping with a peculiar notion, the so-called duty of prosecutorial restraint, which

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[236] As Taylor notes (*op cit*, p 114), in the 1840s in the Black Country only 25% of defendants were legally represented. In serious criminal cases this figure only rose to 49%. As late as 1879 a defendant charged with murder might still appear unrepresented (*R v Sherwood*, *The Times*, 5 May 1879). Indeed, it was not uncommon into the 20th century to find defendants, even those accused of serious crimes, to appear legally unrepresented. As late as 1910 the Court of Appeal in *R v Gillingham* (1910) 5 Cr App R 187 deemed it necessary to remind judges to ensure defendants charged with rape should be represented by counsel. See further Bentley, *op cit*, p 113.

[237] Bentley, *op cit*, p 297. This was only remedied, albeit only in part, in 1903 by the *Poor Persons Defence Act*.

[238] Though the precise practice seems to have differed (as had previously the expected role of prosecution counsel) depending on the judicial circuit. The *Prisoners Counsel Act* was significant in removing such regional disparities.

[239] Stephen, *op cit*, p 425.

[240] As early as 1741 prosecution counsel in *R v Goodere* remarked as to the marked inconsistencies in judicial approach to the extent, if any, defence counsel were permitted to take part in the trial ((1741) 17 St Tr 1003 at 1022).

[241] Langbein (1978), *op cit*, 313.

> developed to mitigate the unfairness of the continuing restrictions on the scope of defence counsel's activity in felony cases.[242]

I would, similarly, suggest, that the lack in the English criminal process of any formal right to full legal representation until 1836 is another factor that helps explain why the role of the prosecuting lawyer evolved as a minister of justice in the early 1800s.

Part 11 The Fundamental Defect of Nineteenth Century English Criminal Procedure

Amidst the many flaws in the administration of criminal justice in the nineteenth century one may not instantly stand out. Yet in many ways it could be argued that one flaw was fundamental. This was the lack of any means within the criminal process of the nineteenth century to ensure that any relevant evidence in the case, especially within the possession of the prosecution, was brought to the attention of the court and/or the defence. This flaw was not overcome by the development of an adversarial system of criminal justice and the rights conferred to the accused by the *Prisoners Counsel Act* to be fully represented in cases of felony by counsel. Indeed, if anything, the increasingly adversarial shape of the criminal process aggravated this flaw. As is explained by Hostetter:

> …in the late 18th and early 19th centuries the lawyers took over control of the courtroom in criminal trials and facilitated the development of our accusatorial system. Nonetheless, despite the profound effect this change had, it did nothing to solve the fundamental defect of English criminal procedure that there was no machinery for bringing before the court the whole of the evidence which was really available. Indeed the progress of lawyers in the courts, merely made the position worse. Evidence and witnesses were, and still are, frequently withheld by lawyers for both parties for various reasons and although this might be wise in the interests of their case it is clearly not necessarily in the interests of truth and justice. The appointment of a public prosecutor might have helped, but both this general problem and the growth of the profession were unremarked by the [Criminal Law] Commissioners. [243]

I would assert that Hostetter has identified a fundamental issue that has continued to trouble the criminal justice system to the present day. In an adversarial criminal process there is an obvious need for there to be some procedure or mechanism to ensure that all possible evidence can be brought before the court of trial in the interests of justice. This issue becomes especially crucial and problematic in an adversarial process where there is ordinarily a stark imbalance between the resources and positions of the accused and the prosecution. In such a system it is customary for the prosecution to control the investigation and command a near monopoly on the flow of information,[244] while at the same time bearing the onus of establishing the guilt of the accused. The vital issue in this context is how to ensure that the prosecution presents to the court and /or the accused any relevant material that may bear on the guilt or innocence of the accused. As Hostetter suggests, there is a temptation in an adversarial system for the prosecution to only adduce that material which serves its case and to withhold any material that hinders its case. The need to promote candour on the part of the prosecution is one that has occupied the attention of the criminal justice system for over two centuries.

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[242] Langbein (2003), *op cit*, p 287-288.
[243] Hostetter, *op cit*, p 148.
[244] See *R v McIlkenny* (1991) 93 Cr App R 287 at 291 and the enlightening discussion in Connor, P, "Prosecution Disclosure: Principle, Practice and Justice" [1992] Crim LR 464.

The question of what material the prosecution should adduce or present to the accused and/or the court at trial is one that has continued to trouble the criminal justice system to the present day.[245]

Yet for all its various flaws and patent injustice it is important to bear in mind that the criminal process of the 1800s (as indeed that of the 1700s had been) was not wholly stacked against the accused. The Crown may well have entered the race with a long start, as Stephen noted, and the accused may have been heavily weighed down, but it was by no means impossible for an accused to secure his or her acquittal. For all its imperfections to a modern eye there was, nonetheless, widespread public confidence in the ability of the jury to deliver justice and a typically English belief that trial by jury in an English court was infinitely superior to the alternative forms of justice as practised on the Continent. Though an accused's chances of acquittal were obviously enhanced through effective legal representation at trial, even a legally unrepresented accused, especially if unusually eloquent or fortunate, might end up acquitted at trial.[246] Indeed, a highly significant proportion of defendants throughout both the eighteenth and nineteenth centuries were acquitted at trial. The prosecution case might well collapse on other grounds. The grand juries of the day, especially in London, seemed to have taken a perverse delight in throwing out completely meritorious prosecutions and refusing to issue a true bill.[247] There were technical rules in respect of the capacity of witnesses, notably children, to give sworn evidence at trial that had the practical effect of allowing many offenders who had committed serious offences against children to escape unpunished. The rules governing indictments were convoluted and little short of Byzantine.[248] Even a seemingly minor or inconsequential omission or utterly technical failure to meet the demanding factual and legal requirements of the drafting of an indictment could result in the otherwise wholly unjustified collapse of a sound prosecution case. Stephen notes that the "irrational system" governing indictments was such that "the law relating to indictments was much as if some small proportion of prisoners convicted had been allowed to toss up for their liberty." [249]

However, it is important, I would assert, not to overstate the effect of these compensatory factors. I would submit that the criminal justice system of the nineteenth century in both England and Australia, whilst not wholly unfair to the accused, remained fatally flawed in certain basic and fundamental respects. The accused occupied a singularly disadvantaged position within the criminal process of the

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[245] As the many notorious miscarriages of justice due to non-disclosure of significant material in both England (see *R v Ward* [1993] 1 WLR 619) and Australia (see *R v Mallard* [2005] HCA 68) bear eloquent testimony.

[246] See *R v Redding*, *The Times*, 11 August 1823 and *R v Taylor* [1829] NSWSupC 30 (*Australian*, 26 May 1829) for rare instances of unrepresented but unusually articulate defendants who were able to secure their acquittals at trial.

[247] Bentley, *op cit*, p 132.

[248] It is thankfully beyond the province of this Article to explain the highly technical law governing indictments of the first half of the nineteenth century. There were intricate requirements in respect of both the factual and legal particulars of an indictment. To meet these requirements indictments could either reach an extraordinary length (see *R v Grace* (1846) 2 Cox CC 101 where the indictment would have taken two days to read in full!) or contain an extraordinary number of alternative counts (Stephen notes an indictment that contained almost 70 counts in respect of a single murder as the murderer had burnt the body and it was impossible to establish precisely how she had died so every conceivable scenario as to how she had died was included (Stephen, *op cit*, p 287 at FN 1)). There were such scandalous cases as *R v Sheen* (1827) 2 C & P 634 where even a murderer could escape guilt on the most technical of points relating to the indictment (the infant victim was named as 'Charles William Beadle" on the indictment but was referred to as "William" or "Barry" at trial). Such instances also arose in Australia (see *R v Guyse* [1828] NSWSupC 29, *Australian*, 9 May 1829). Such cases were not unusual and there even existed a specialised class of lawyers to raise such technical defences (Hostetter, *op cit*, p 150).

[249] Stephen, *op cit*, p 284. Yet Stephen notes that the "scandals" resulting from the collapse of prosecutions due to the apparently absurd and technical rules governing indictments were not unpopular. Rather, Stephen had "some doubt whether they were not popular, as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law" (*Ibid*). The criminal law of the early 1800s may well have been harsh and unjust to an accused but for scandals such as that discussed in FN 250 to be somehow 'popular" does seem to defy belief. I suspect it was scandals such as this that contributed to the Westminster Parliament in the second half of the 1800s ridding the law governing indictments of most of its technical absurdities.

period. In this context the development of the role of the prosecutor as a minister of justice must be viewed as a conscious effort of seeking to strike a more reasonable balance in the criminal process between the prosecution and the accused. It was an attempt to lessen both the burden on the accused and the considerable head start enjoyed by the prosecution at trial. It is crucial to understand that the development of the role of the prosecuting lawyer as a minister of justice from that of a partisan advocate did not occur in a legal and historical vacuum. It was not, as Grossman suggests, the product of some immaculate conception. Rather, as this Article has demonstrated, the development of that role should be viewed in the particular climate of the late 1700s and early 1800s, namely the gradual but fundamental transformation of the criminal trial from an informal and essentially inquisitorial process to an adversarial and lawyer dominated contest and additionally to the many specific features of the criminal process of the nineteenth century that rendered that process manifestly unjust to an accused. The development of the role of the prosecutor must be viewed as both a recognition of the increasingly adversarial nature of the criminal trial and as part of an acknowledgment of the injustice of the criminal process of the period and as one avenue of seeking to alleviate the disadvantageous position of the accused in that process. Indeed, it is important to appreciate that the formulation of the role of the prosecutor as a minister of justice was only one of various judicial developments, especially in relation to the law of criminal evidence,[250] within the criminal justice system that were designed to protect or promote the rights of the accused. As Bentley notes, "The 19th Century was the spearhead for many of the reforms which justify the description of our trial system [of today] as fair." [251]

Part 12 Conclusion: The Continued Relevance of the Prosecutor as a Minister of Justice: Time for Change?

Having regard to the wider criminal justice system of the late 1700s and early 1800s one can readily understand why the role of the prosecuting lawyer evolved the way it did in the early part of the nineteenth century. I would suggest that in the climate such a development was entirely unsurprising and maybe even inevitable. However, while the notion and description of the prosecutor as a minister of justice may have been appropriate, and even necessary, in the English legal system of the nineteenth century, one must ask whether a role or a label that evolved in the distinctive, if not unique, circumstances of early nineteenth century England continues to remain applicable in the vastly changed legal process in both Australia and England of the 21st century? It must be acknowledged that the criminal process of today, especially in terms of the rights that are accorded to an accused, represents an immeasurable improvement on the system that existed in the early 1800s and has been described in this Article. The accused of today is not in the same grievously disadvantaged position that he or she would have found themselves in the typical criminal trial of the nineteenth century.[252] The criminal process of today bears only a strictly limited similarity to its counterpart of the early 1800s, despite their shared adversarial hallmarks. I would argue that, despite the widespread, if not almost universal, support to the present day (as shown earlier in this Article) for the concept of the prosecutor as a minister of justice it is opportune and appropriate to ask just how relevant are such a role and a label for the prosecuting lawyer of today.

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[250] Such central rules of evidence as that against hearsay and the requirement for corroboration and the right against self-incrimination (see the enlightening discussion of McHugh J in *R v Azzopardi* (2001) 205 CLR 95-103) were, if not, established, at least refined and reaffirmed during the 1800s.

[251] Bentley, *op cit*, p 301.

[252] Though it is noteworthy that some commentators in England have argued that the many legislative reforms of recent years have led to a steady erosion in the protections accorded to an accused and have the effect of drastically weakening his or her position within the legal process (see Sanders, A, and Young, R, "Criminal Justice" (2nd ed) (Butterworths, London, 2000) p 21; Bentley, *op cit*, 300-301). Indeed, Bentley asserts that the legislative changes of recent years such as the virtual abolition of committal proceedings and the removal of the corroboration rule have so weakened the status of the accused that "if present trends continue we may yet come to look upon it [the 1800s] …as a golden age." (Bentley, *op cit*, p 301).

It must be borne in mind that the common law has never been a rigid and inflexible instrument that remains unchanging from one generation to the next. In particular, it has always been accepted that both the practical requirements and the concept of what is fair and appropriate in the context of a criminal trial can, and indeed should, change in light of changing social standards and circumstances.[253] This point was made clear recently in *R v H*[254] by Lord Bingham:

> Fairness is a constantly evolving concept. Hawkins J (Reminiscences, (1904) vol 1, Chap IV, p 34) recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes 53 seconds, including a terse jury direction: 'Gentlemen, I suppose you have no doubt? I have none.' Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another. [255]

I would argue that neither the doctrine that the appropriate role of the prosecutor is as a minister of justice nor the rationale that such a role is crucial to ensure the rights of the accused are protected within the criminal process are necessarily cast "in tablets of stone". The notion of the prosecutor as a minister of justice emerged clearly, as has been discussed, in the nineteenth century when the criminal justice system was very different to that of today and I would suggest that it is not axiomatic that such a role should remain equally relevant and applicable in the present day.

It should be noted that the concept of the prosecuting lawyer as a minister of justice was not the only doctrine to emerge in the 1700s or 1800s that was designed at improving the plight of the accused in the criminal process of the period. Certain other rules, which at the time were treated as crucial in the criminal trial, also emerged during the period in question and, like the concept of the prosecutor as a minister of justice, were arguably designed at protecting the position of the accused and improving his or her position in the criminal process vis a vis the prosecution. A whole raft of measures evolved during the 1700s and 1800s that were designed so that justice would be done and injustice avoided. Landsman referred to the efforts of judges and lawyers "who sought, through hundreds of incremental reforms, to build up a more equitable court system." [256] This theme was repeated by Auld LJ: "Many aspects of a system developed over the centuries to introduce safeguards against the forensically primitive jury trials and harsh penal regimes of the time may not fit, or be necessary for, modern trials, whether by judge or jury or in some other form." [257]

I would submit that it is crucial to consider the development of the role of the prosecuting lawyer as a minister of justice, not as an isolated development or some kind of immaculate conception, but rather as part of the wider series of measures that evolved to promote the interests of the accused and to lessen the head start enjoyed by the prosecution at trial. These measures include the rule against hearsay,[258] the rule requiring corroboration in respect of the evidence of certain classes of witnesses

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[253] See *State v O'Donoghue* [1976] IR 325 at 350 per O'Higgins CJ.
[254] [2004] 1 All ER 1269.
[255] [2004] 1 All ER 1275.
[256] Landsman, *op cit*, 603.
[257] Auld, R, Sir, "The Review of the Criminal Courts of England and Wales" (London, HMSO, 2001) Ch 11, para 5.
[258] The hearsay rule is an especially apt example of the courts formulating a rule in a conscious effort to promote a fair trial. As Auld LJ has noted, "The rule against hearsay in criminal proceedings, like many other past and present rules of inadmissibility in that jurisdiction, has its origin in the late 18th and early 19th centuries when the cards at trial were so stacked against defendants that judges felt the need to even the odds" (Auld, *op cit*, Ch 11, para 95).

such as accomplices[259] and the victims of sexual offences, the rule against self-incrimination[260] and the restrictions on the use of pre-trial confessions and the intricate requirements in respect of indictments.

It is instructive to note what has become of many of these rules. Some, like the rule against the use at trial of pre-trial confessions and the technical requirements for an indictment, have long since disappeared. Others such as the rule for corroboration in sexual cases have been abolished only comparatively recently after years of trenchant criticism. Others such as the rule against hearsay have been widely questioned and criticised[261] and, if not abolished, have certainly been greatly reformed in recent years.[262]

It is clear that the notion of the prosecuting lawyer as a minister of justice evolved in a criminal process that is vastly different to that which exists today. It is only possible to understand the development of that role against the particular backdrop of the criminal justice system of that period. Other doctrines and once unchallenged rules of evidence and procedure that also emerged in the 1700s and 1800s have been modified or even discarded in the changing circumstances of today. I would assert that it might be opportune in the 21st century to look afresh at the role and label of minister of justice that has for so long been attached to the prosecuting lawyer. It might be argued that the notion of the prosecutor as purely a minister of justice within a modern adversarial legal framework is an outmoded concept. Might it not now be appropriate and opportune to re-evaluate the role of the modern prosecutor to take account to take account of the comprehensive rights and protections enjoyed by modern defendants to ensure that the law does not allow "guilty men to shelter behind rules which look back to an age when the accused regularly took their trials undefended?" [263]

[259] Incidentally, this rule can be directly traced to the notorious scandals of the mid 1700s linked to the "thief catcher" prosecutions of the period when the scandals arising from the corrupt evidence of accomplices became a major issue in the criminal process (see Langbein (2003), *op cit*. and Landsman, *op cit*)..
[260] If one accepts the analysis and conclusion of McHugh J in *R v Azzopardi* (2001) 205 CLR 93-105.
[261] See Auld, *op cit*, Ch 11. para 95-104.
[262] See s 55, 59 65 and 66 of the *Uniform Evidence Act* in Tasmania and NSW and s 114-118 of the *Criminal Justice Act* 1988 in England.
[263] *Ibid*. Bentley quotes this view but does not hold it himself.