

THE SEARCH FOR TRUTH: A COMPARATIVE LOOK AT CRIMINAL
JURY TRIALS IN THE UNITED STATES AND ENGLAND

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“Truth, when not sought after, rarely comes to light”

-Oliver Wendell Holmes

I. INTRODUCTION

Both England and American legal systems share a similar history. The fundamental common law principles that England and the US share can be traced back to the Magna Carta.¹ Built upon the ideals of freedom,

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¹ Megan Gambino, *Document Deep Dive: What Does the Magna Carta Really Say?*, SMITHSONIAN.COM (Mar. 2012), available at <http://www.smithsonianmag.com/history-archaeology/Document-Deep-Dive-What-Does-the-Magna-Carta-Really-Say.html>.

The Magna Carta, enacted in 1215 was a breakthrough in protecting people’s rights. It consists of a preamble and sixty-three clauses. One particularly important aspect of the charter was that it limited the power of the crown, and sought to protect the liberty and property of an individual. The US Constitution includes many of the basic tenets that the Magna Carta has. For example, the first clause states, “In the first place we grant to God, and by this our present charter for ourselves and our heirs in perpetuity that the English Church is to be free and to have all its rights fully and its liberties entirely. We furthermore grant and give all the freemen of our realm for ourselves and our heirs in perpetuity all the underwritten liberties to have and to hold to them and their heirs from us and our heirs in perpetuity.” This principle is embodied in the US Bill of Rights in the First Amendment, separating church and state. *Id.*

Additionally, the twenty-ninth clause of the Magna Carta states, “no freeman is to be

liberty, and justice, the charter was a revolutionary tool that protected individual rights. To this day, judges and attorneys in both countries strive to uphold Magna Carta ideals in the courtroom. However, the methods used by courts in England and the US to protect these ideals diverge in several respects. The English approach is an inquisitorial one, where the judge plays a larger role and the barristers are more cooperative when representing their respective sides. The American method is an adversarial one: the attorneys oppose each other in representing their clients while the judge oversees that the procedural rules are followed. While the concept of both English and American jury trials developed from the same legal system and share the same history and traditions, the inquisitive procedures used in criminal trials in England provide jurors with a better chance of making a more accurate decision than in adversarial US criminal trials.

This note discusses the major differences between criminal jury trial practices in England and in the United States, particularly the Cook County Criminal Court in Illinois, and the Central Criminal Court of England and Wales, commonly known as the Old Bailey.² Part II of this note will discuss the different methods in jury selection and the role of the jury in both the American and English legal systems. Part III will then address the divergent roles that American and English attorneys have in the courtroom. Next, Part IV will contrast the roles that judges play in English and American trials, arguing that the more active role the judge plays in English trials provides a more accurate approach in reaching a verdict. Finally, Part V will argue that the way evidence is presented and used in English courtrooms provide jurors with a more precise means of analyzing the evidence.

taken or imprisoned...of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no one will we sell or deny of delay right or justice.” This clause refers to the principle of due process, which is part of the Fifth Amendment in the US Bill of Rights. *Id.*

Furthermore, the conclusion of the Magna Carta states, “we, holding these aforesaid gifts and grants to be right and welcome, concede and confirm them for ourselves and our heirs and by the terms of the present (letters) renew them, wishing and granting for ourselves and our heirs that the aforesaid charter is to be firmly and invariably observed in all and each of its articles in perpetuity, including any articles contained in the same charter which by chance” This parallels the preamble to the Declaration of Independence, which states “We hold these truths to be self-evidence, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.” THE DECLARATION OF INDEPENDENCE, Preamble (U.S. 1776).

² While I chose to compare the Cook County Criminal Court in Illinois with the Old Bailey, the comparisons I draw are representative of most criminal courts in the US.

II. THE ROLE OF THE JURY: HISTORY, SELECTION, AND PROCESS

Despite the fact that both the American and English jury systems stem from the same traditions, their current roles differ. While the American legal system spends a large amount of time forming an appropriate jury, the English system, despite its simplicity, provides a better likelihood for an accurate outcome.³ This Part will discuss the history of juries, contrast the jury selection process in both the US and England, and examine the differences that the role of American juries and English juries may have on the outcome of criminal cases.

While the jury system was developed under common law in England as a democratic institution, a primitive concept was used before the Norman conquest of England.⁴ During the Anglo-Saxon era, courts would involve an entire community in a dispute.⁵ While a judge would supervise the proceedings, the community made determinations of fact.⁶ When England was unified in the 11th century, a more formal judiciary was established, referred to as the Inquest.⁷ The Inquest was more an investigatory unit than a jury; members of the Inquest would investigate and report their findings to the court.⁸ The court would then find the facts and resolve the issue.⁹

Throughout the next several centuries, the role of the judge, jury, and lawyer developed into what it is today.¹⁰ The rise in the power of the judge during the fifteenth and sixteenth centuries diminished the need for

³ *Questioning the Questions: How Voir Dire is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process*, 32 J. LEGAL PROF. 317 (2008).

⁴ American Bar Association, *Dialogue on the American Jury: We the People in Action 1*, available at <http://www.americanbar.org/content/dam/aba/migrated/jury/moreinfo/dialoguepart1.authcheckdam.pdf>; Justin C. Barnes, *Lessons from England's "Great Guardian of Liberty": A Comparative Study of English and American Civil Juries*, 3 U. ST. THOMAS L.J. 345, 348-49 (2005-06).

⁵ *Id.* at 348-49 (2005-06). William the Conqueror introduced Norman customs, which include the Inquest. *Id.*

⁶ *Id.* at 348; *Questioning the Questions*, *supra* note 3, at 317.

⁷ Justin C. Barnes, *supra* note 4, at 348-49.

⁸ *Id.* at 349.

⁹ *Id.*

¹⁰ *Id.* at 351. The judge first developed as a "chancellor," who provided injunctive relief on behalf of the crown to litigants who would turn to the king for help. Overtime, the chancellor's position evolved from that of a clergy member to a lawyer. During the Tudor monarchy, the role of the chancellor became a more equitable one. In 1616, it was determined that the chancellor would be bound to precedent. Under the Stuart monarchy in 1621, the Law Lords assumed appellate jurisdiction over the chancellor, which resulted in a unified judicial branch, where professional judges made determinations of fact. *Id.* at 352-54.

the jury to investigate on its own.¹¹ Juries were no longer assigned to conduct their own investigations, and instead were to make decisions based on the information given to them by judges and lawyers.¹² This change created the role of the modern jury.¹³ The American jury system was drawn from the English system. However, justice, due process, and liberty were its motivations, rather than the original incentive of William I, which was the centralization of authority in England.¹⁴

Both American and English jury systems share a common goal: to provide an impartial examination of the given facts and provide a fair decision. However, the processes by which each system comes to its determination are different.¹⁵ Jury selection at the Old Bailey is a quick process.¹⁶ Compared to the US procedure, it omits lengthy questionnaires regarding jurors' backgrounds. While the US system strives to design an impartial jury, the UK model draws names by chance from the citizenry.¹⁷ Often, the only question asked is whether a prospective juror knows the defendant.¹⁸ Jury selection can often take less than an hour, including the immediate swearing-in process.¹⁹

¹¹ *Id.* at 355.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* During the first two weeks of January 2013, I had the opportunity to visit the Central Criminal Court of England and Wales (known as the Old Bailey). I observed several cases during that time, one of them being the murder of Luke Harwood by a gang of youths, which was publicized in the media. My observations included jury selection, opening statements, as well as direct and cross-examinations. The notes I took observing the jury trial process in England are cited as *Nadia's Notes: London Comparative Advocacy Program*, London, England (Dec. 2012).

¹⁶ *Id.*

¹⁷ Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN L. REV. 1321, 1345 (2006-07). The 1965 Report of the Departmental Committee on Jury Service noted, "A jury should represent a cross-examination section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of that community." *Id.*

¹⁸ *Nadia's Notes*, *supra* note 15.

¹⁹ Tyler Marshall, *Speedy Jury Selection: In England, Trials Quick and Efficient*, L.A. TIMES (Dec. 20, 1985), available at http://articles.latimes.com/1985-12-20/news/mn-4933_1_trial-lawyers. In this article, the author writes of how the case against the defendant had taken eight months to come to trial, but moved quickly after that. "There was no preliminary maneuvering. Jury selection took about five minutes. After a seven-hour trial, the jurors in the South London courtroom acquitted the young woman, who had been charged with check fraud." *Id.* The jury selections I witnessed at the Old Bailey all took place under an hour. In one instance, the judge was able to select a jury within twenty minutes. All potential jurors took their seats on the stand. The swearing-in of the jury seemed to have taken more time than the selection itself.

In the US, jury trials are a more complex process. The right to a jury trial is guaranteed in certain cases in Article II of the US Constitution.²⁰ It is also discussed in the Sixth and Seventh Amendments of the Bill of Rights.²¹ Juries are used in both criminal and civil rights, and typically vary between panels of six to twelve people, depending on the jurisdiction.²² They typically begin with a process known as voir dire, where attorneys question members of the jury pool in order to determine their abilities and qualifications to serve on a jury.²³ Voir dire was created in an effort to eliminate bias and prejudice, and ensure that a fair and impartial jury is empaneled.²⁴

Nadia's Notes, supra note 15.

²⁰ *Questioning the Questions, supra note 3, at 317.* Additionally, the Federal Jury Selection and Service Act of 1968 outlines jury selection procedures at the federal level. Under the Act, Congress requires that courts randomly select the jury from a fair selection of the community. Generally, courts obtain lists of potential jurors from objective source lists, such as voter registration records, utility customers, driver's license registration, accounts, property owners, and taxpayers. Potential jurors must then meet certain eligibility requirements for jury service. After obtaining a list of potentially qualified jurors, the court randomly selects the jurors to appear in court and begins the process of seating a jury to try a specific case. Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463 (1998-99).

²¹ *Questioning the Questions, supra note 3, at 317.*

²² *Id.* at 318.

²³ *Id.* at 317; Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363, 364, 368 (2009). One facet of voir dire is the concept of a peremptory challenge. Peremptory challenges allow attorneys to reject a certain number of jurors without providing a reason for dismissal. While it originated in England by prosecutors in the mid-13th century, it was abolished by 1305. Despite the process being abolished, prosecutors had the option to "stand aside" certain jurors. This allowed the prosecutor to direct any number of potential jurors to go to the end of the line without any reason, and thus manipulate those who could serve as jurors. Peremptory challenges cannot be used to purposefully discriminate. In *Batson v. Kentucky*, the US Supreme Court held that peremptory challenges violate the Fourteenth Amendment when the prosecutor used it to strike the only African Americans on the jury panel. 476 U.S. 79 (1986). In *Batson*, the Court created a test that requires the challenger to show a prima facie case of purposeful discrimination. *Id.* Next, the Court shifts the burden onto the prosecution to give a race neutral reason for the challenged juror strikes—an explanation based on something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352 (1991).

²⁴ Sydney Gibbs Ballesteros, *Don't Mess with Texas Voir Dire*, 39 HOUS. L. REV. 201, 204 (2002-03). Voir dire is considered to be an essential part of the adversary process. Voir dire is the only time that attorneys are permitted to speak with the jurors. It allows lawyers to gauge the background and opinions of the juror, learning more about each of them so that the lawyer may better present his or her case in the manner most effective to his client's interests. *Id.* at 205.

The process of voir dire has come with much criticism. Opponents have argued that jury selection is more likely to be subjected to abuse. While England leaves the jury system to chance as it is believed to eventually balance itself out, voir dire has been criticized as a means for lawyers to deliberately place individuals that are sympathetic to their side on the jury.²⁵ Judge C. Clyde Atkins of the federal bench in Florida argued that the attorney conduct of voir dire “injects the adversary process into the selection of the jury, permits counsel to seek commitments to their side by prospective jurors, and interferes with the main object of jury assignment—the rendering of a fair and impartial verdict based solely on the evidence and the law.”²⁶ On the other hand, proponents of voir dire have argued that it is a necessary check on judicial power.²⁷ They have noted that voir dire techniques allow the selection of jurors who are less likely to be prejudiced by personal values not related to the merits of the case, thus allowing for more impartial decisions.²⁸

Another facet of jury selection in the US is the use of jury consultants. Jury consultants are hired to assist attorneys in a variety of services, from jury selection to trial strategy.²⁹ Most consultants are attorneys, psychologists, or sociologists.³⁰ In the past two decades, jury consultants have been common in large criminal and civil trials. Both prosecutors (or plaintiffs) and defendants are willing to pay consultants high fees in the hope of obtaining an ideal jury for their sides.³¹

Attorneys consider jury consultants to be an essential part of the jury selection process.³² Consultants analyze data collected through polls to construct the profile of an ideal juror.³³ Attorneys then use this information to remove jurors possessing characteristics that conflict with

²⁵ *Nadia's Notes*, *supra* note 15; *Questioning the Questions*, *supra* note 3, at 320. One article noted that attorneys who abuse voir dire tend to ask ineffective questions, use their preemptive strikes ineffectively, and waste time. Instead of looking for impartial jurors, they may attempt to inappropriately influence jurors during the process. *Id.*

²⁶ F. Wallace Pope, Jr. and Ronald L. Ginns, eds., *The American Jury System*, 2 LITIGATION 7 (1975-76).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Lane, *supra* note 20, at 463.

³⁰ *Id.* at 474. Although jury consultants come from a variety of backgrounds, the majority of consultants have training in social sciences. Jury consultants do not need a specific education, training, or professional license to practice as a consultant. The American Society of Trial Consultants does not require that its members possess and specific credentials or follow any particular advertising or custom. *Id.*

³¹ *Id.* at 464.

³² *Id.*

³³ *Id.* at 473.

the “ideal juror,” features that may render them unsympathetic to their client’s case.³⁴ Consultants may also analyze handwriting, conduct credit, property, and background checks. They also analyze body language and interaction with other jurors.³⁵

While jury consultants often claim high success rates in predicting the outcome of a trial, no empirical data exists to verify this.³⁶ Studies show that the evidence presented during the case, rather than jury composition, controls the outcome of the case.³⁷ One critic argued that attorneys’ instincts are more effective in many instances since they are more familiar with the case and the evidence at hand.³⁸ In a study conducted by Jeffrey Abramsom, six high profile Watergate-related trials were examined. After reviewing the evidence and post-trial interviews with jurors, Abramsom concluded that the verdicts resulted mainly from the evidence and not from the personal characteristics of the jurors. Furthermore, claims that consultants can control the outcome of a case foster the attorneys’—and the public’s—perception that juries can be manipulated, thus violating the US Constitution’s requirements of an impartial jury.³⁹ Additionally, with expensive jury consultants, such claims further the idea that money can buy a verdict, undermining the goals of the American legal system.⁴⁰

Even though the US has a more complex system in selecting and analyzing a jury, the adversarial reasons for the elaborate process may ultimately prevent its goal of impartiality. Mechanisms like voir dire and the use of jury consultants allow attorneys to control who sits on a jury and decides the facts of the case. While both sides use these resources to provide a better chance of success for their clients, the goal of an impartial jury that examines the evidence to determine the truth falls to the wayside. On the other hand, the English jury system that involves little to no manipulation from either side leaves a truly randomly selected jury to discover the truth.

III. THE ROLE OF LAWYERS

Compared to the American legal system, where attorneys can

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 477 fn. 104 (citing Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Known and Do Not Know*, 73 JUDICATURE 178, 179 and JEFFREY ABRAMSON, WE, THE JURY 145 (1994) (noting that no conclusive data exists to support consultants’ effectiveness)).

³⁷ Lane, *supra* note 20, at 477.

³⁸ *Id.*

³⁹ *Id.* at 478.

⁴⁰ *Id.*

often be antagonistic towards each other in an effort to be “zealous advocates” for their clients, the English inquisitorial system, with a courteous and cooperative environment, may have a greater likelihood of accuracy in its decisions. This Part will examine the types of lawyers in each system, and the different relationships that they have with each other, both in England and the US.

When contrasted to other countries, including those that adopted its legal system, the legal profession in England is rather distinct. One of the most unique features of the legal profession is the division between barristers and solicitors.⁴¹ Barristers are advocates speaking on behalf of his or her client.⁴² They split their time between working in chambers and appearing in court.⁴³ They are self-employed, rather than salaried employees.⁴⁴ Barristers are associated with one of the four Inns of Court.⁴⁵

⁴¹ Peter Goldsmith, *Barristers and Solicitors in England and Wales*, 5 TILBURG FOREIGN L. REV. 111 (1996).

⁴² *Id.* at 112; J.M.D. Hoyle, *Organization and Governance of the British Legal Profession*, 81 LAW LIB. J. 655 (1989); William C. McMahon III, *Declining Professionalism in Court: A Comparative Look at the English Barrister*, 19 GEO. J. LEGAL ETHICS 845, 846 (2006).

⁴³ Peter Goldsmith, *supra* note 41, at 112; J.M.D. Hoyle, *supra* note 42, at 656; Timothy Harper, *Bye, Bye Barrister*, ABA JOURNAL 58 (Mar. 1990).

⁴⁴ Peter Goldsmith, *supra* note 41, at 112; J.M.D. Hoyle, *supra* note 42, at 656; Timothy Harper, *supra* note 43, at 59.

⁴⁵ Arthur E. Wilmarth, Jr., *Lawyers and the Practice of Law in England: An American Visitor's Observations*, 13 INT'L L. 719, 720 (1979); Lord Justice Scott Baker, *Middle Temple, the Inns of Court and the Present Structure of the English Legal System*, 31 OKLA. CITY U. L. REV. 81 (2005). There are four Inns of Court serving England and Wales: Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn. The Inns originally served as hostels and schools for student lawyers in the thirteenth and fourteenth centuries. They are all close to each other in central London. The Middle and Inner Temples stand to the south of the law courts, close to the river Thames. Lincoln's Inn and Gray's Inn are to the north of the law courts. The Middle and Inner Temple, so far as their histories can be traced, have always been separate societies, though they share the same location. The Middle Temple has been on the same site since the 1340s, following the return of the Royal Courts from York to London. The Temple Church has been in the joint occupation of the Middle and Inner Temple for centuries. The pews face each other rather than the altar. Middle Temple takes the northern half and Inner Temple the southern half of the church. At the western end is the Round Church, consecrated in 1185 by Heraclius, the Patriarch of Jerusalem, who was unsuccessfully trying to persuade Henry II to lead a crusade. It is the largest and most complete of the four remaining round churches in England. It is built on the plan of the Church of the Holy Sepulcher in Jerusalem and narrowly escaped the destruction caused by the Great Fire of London in 1666. Arthur E. Wilmarth, *supra* note 45, at 86-87. The Inns have five main functions today. These are: (1) to provide and administer property for barristers and residents; (2) to provide law libraries and common rooms for their members; (3) to provide meals, social and collegiate events for their members; (4) to provide advocacy training for students and

In order to qualify for the bar, barristers must complete their legal education, which consists of academic and vocational stages.⁴⁶

Solicitors are considered to be the “general practitioners.”⁴⁷ They can work as solo practitioners, in firms or as in-house counsel within organizations, though their primary duty involves working one-on-one with clients, providing legal advice.⁴⁸ They deal with a variety of issues including contracts, family law, and property transactions.⁴⁹ Solicitors meet with clients and provide them with direct legal advice, while barristers represent clients in court.⁵⁰ If a client is also in need of a barrister, the solicitor conducts the day-to-day communications, takes discovery, interviews, and depositions. The barrister gives specialized advice, drafts the pleadings, and plans the litigation strategy.⁵¹

The US has a simpler approach. The legal system is unified, and all practicing lawyers are required to attend a law school accredited by the American Bar Association.⁵² They are allowed to practice in a state once they have passed the specific state’s bar examination.⁵³ Once they have passed the bar, lawyers may provide legal advice to clients and represent them in court if necessary.⁵⁴ They typically have more flexibility in their roles as lawyers than their English counterparts. However, in larger law firms, attorneys often have narrower, more specialized duties within specific departments.⁵⁵ For example, one attorney may work in the litigation department, while another will consult clients on wills, trusts, and estates. A greater number of US lawyers also work as in-house counsel for corporations, when compared to English attorneys.⁵⁶

the newer barristers; and (5) to provide scholarships and bursaries for students and young barristers. Lord Justice Scott Baker, *supra* note 45, at 90. Currently, barrister’s associate with one of the four inns. They are required to attend a certain number of qualifying sessions, known as “dinners.” These dinners include a reception, lectures, debates, with both educational and vocational elements. Marilyn J. Berger, *A Comparative Study of British Barristers and American Legal Practice and Education*, 5 NW. J. INT’L L. & BUS. 540, 563 (1983-84); *Nadia’s Notes*, *supra* note 15.

⁴⁶ Marilyn J. Berger, *supra* note 45, at 563.

⁴⁷ Peter Goldsmith, *supra* note 41, at 112; J.M.D. Hoyle, *supra* note 42, at 656.

⁴⁸ Peter Goldsmith, *supra* note 41, at 112; J.M.D. Hoyle, *supra* note 42, at 656; Timothy Harper, *supra* note 43, at 59.

⁴⁹ Peter Goldsmith, *supra* note 41, at 112; J.M.D. Hoyle, *supra* note 42, at 656.

⁵⁰ Peter Goldsmith, *supra* note 41, at 112; J.M.D. Hoyle, *supra* note 42, at 656.

⁵¹ Arthur E. Wilmarth, *supra* note 45, at 720.

⁵² *Nadia’s Notes*, *supra* note 15.

⁵³ Harry Cohen, *Employed Lawyers in England*, 9 J. LEGAL PROF 125 (1984); Peter Goldsmith, *supra* note 41, at 112.

⁵⁴ Harry Cohen, *supra* note 53 at 125; Peter Goldsmith, *supra* note 41, at 112.

⁵⁵ Harry Cohen, *supra* note 53, at 132.

⁵⁶ *Id.* at 144.

Due to the specialized education and experience that barristers receive, they are more comfortable in the courtroom and likely perform more competently than their American equivalents.⁵⁷ Because American lawyers are general practitioners who give clients legal advice, most of them only step into the courtroom when their client's situation requires it. For most attorneys who are not litigators, this can be quite rare.⁵⁸ As a result, they have less experience and may feel less comfortable in the courtroom when compared to English barristers, whose primary role is a courtroom advocate.⁵⁹

In addition to the different education requirements between English and American attorneys, the overall demeanor in the courtroom differs in both countries. In England, courtroom attire reflects the formal atmosphere.⁶⁰ Attorneys and judges both don gowns and wigs in the courtroom.⁶¹ Civility

⁵⁷ Marilyn J. Berger, *supra* note 45, at 542, 554-55. As part of the research study assessing the quality of advocacy in federal courts for the Devitt Committee, two significant results were found. First, there were noticeable differences between those attorneys with a certain amount of trial experience and those without any. Second, they observed that courtroom incompetency was a phenomenon not only of new lawyers, but of any lawyer lacking extensive courtroom experience. This is especially true for federal courts where many lawyers tend to appear infrequently. These research findings suggest that lack of a sufficient volume of work to give an attorney adequate and continuous courtroom experience may perpetuate courtroom incompetency. FINAL REPORT OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, *reprinted in* 83 F.R.D. 215 (1979). The Federal Judicial Center sought to investigate three issues relating to the performance of advocates in the federal courts: (1) to determine systematically, whether in the judgment of judges and lawyers, there is a substantial problem of inadequate performances among advocates in the federal courts; (2) to learn whether any inadequacies were perceived to be more apparent among certain segments of this group of advocates; and (3) to identify components of advocacy in which practitioners are most in need of improvement. A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* (1978).

⁵⁸ Marilyn J. Berger, *supra* note 45, at 553.

⁵⁹ *Id.* at 542. The American legal system has developed few institutional mechanisms for selecting an attorney to perform competently in the courtroom. Unable to determine either the nature or complexity of their cases, clients may hire an attorney without regard to whether that attorney has the ability to handle the case. Formal professional requirements and current information that the public rely on for selecting an attorney do not guarantee that the attorney has the ability to perform competently in a courtroom. *Id.* at 553.

⁶⁰ *Id.*, William C. McMahon III, *supra* note 42, at 847.

⁶¹ Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 8 CHI-KENT L. REV. 537, 549 (2011). Ede & Ravenscroft are the oldest tailors in London, established in 1689. They make, sell, and rent legal gowns and wigs, clerical dress, and ceremonial gowns and robes. Many lawyers in London have bought their wigs and court robes from Ede & Ravenscroft. It has three locations in London. EDE &

and respect are extremely important characteristics within the courtroom in England. Barristers show deference to one another, often referring to each other as “my learned friend” and the judge as “My Lord.”⁶² Strategies in oral advocacy focus on reason rather than emotion; barristers tend to avoid antagonistic behavior in the courtroom, as they view it as unnecessary in effectively representing the interests of a client.⁶³ The community of barristers in England is cordial and tight-knit.⁶⁴ Moreover, while the goal for lawyers and barristers is to win their cases, barristers are much more likely to settle for a fair result than to “press every advantage, object whenever possible, and demand enforcement of each and every rule in the hope of frustrating the opponent.”⁶⁵ The inquisitorial approach allows for a jury to determine the outcome on the arguments, the credibility of the witnesses, and the merits of a case, as opposed to the aggressive techniques of American attorneys.

On the other hand, trial “combat” is prevalent in the United States.⁶⁶ Zealous advocacy for a client overcomes the need for camaraderie and support between opposing attorneys in the courtroom. Clients in the US indirectly support this approach through their choice in lawyers.⁶⁷

RAVENSCROFT, <http://www.edeandravenscroft.co.uk>. Barristers’ wigs and robes serve practical functions in upholding the authority of judicial decisions. In a series of Consultation Papers issued by the Lord Chancellor of England, the House of Lords felt that “traditional judicial garb imbued in laypersons a sense of solemnity and dignity of the law.” This was regarded as particularly useful in criminal trials, where respect for authority may be lacking. Traditional judicial garb sends a powerful professional message to all participants in a proceeding: “By setting a highly authoritative tone, the barristers’ attire commands a high level of professional respect for their skilled advocacy and the proceedings.” The House of Lords’ Consultation Papers also stated that the court dress was useful in protecting judges’ and barristers’ anonymity. It was suggested that wigs and robes supposedly obscured differences of gender, race and age, creating impartiality among all the participants. Under this assertion, the judicial garb makes it more difficult for a criminal defendant to recognize, and possibly seek revenge upon, any barrister or judge involved in prior court proceedings. While this remains unproven, the author notes that judicial wigs and robes help to maintain the conformity of the opposing barristers as officers of the court. William C. McMahon III, *supra* note 42, at 847-849.

⁶² Nancy S. Marder, *supra* note 61, at 548.

⁶³ William C. McMahon III, *supra* note 42, at 854.

⁶⁴ *Id.* at 854. Often, opposing barristers share the same Inn of Court. *Id.*

⁶⁵ *Id.* at 854 (citing Elliot L. Bien, *Toward a Community of Professionalism*, 3 J. APP. PRAC. & PROCESS 475, 478 (2001)). American lawyer William Locke stated, “You never have to watch your back in England . . . No one stoops to foul blows or misleading tactics. They think of themselves as above that.” Jeanna Steele, *Mastering the Queen’s English: How to Make the Grade as a Barrister in London*, 20 CAL. LAW 22 (Aug. 2000).

⁶⁶ William C. McMahon III, *supra* note 42, at 855.

⁶⁷ *Id.* at 855.

Many lawyers think that clients do not associate courtesy and civility with good lawyering; strategic use of the law and even obstructive actions are thought to make good advocates.⁶⁸ Legally, American lawyers have a large amount of professional discretion in working to benefit their client. The American Bar Association's Model Rules of Professional Conduct offer boundaries on the appropriate limits of client representation and courtroom advocacy.⁶⁹ Still, it fails to provide a more definitive explanation when it states, "a lawyer must act with commitment and dedication to the interests of the client and with zeal and advocacy."⁷⁰ As a result, "Rambo litigation," communication and actions on behalf of lawyers that involve deception, intimidation, and a lack of courtesy have become predominant in the US as a successful means to win a client's case.⁷¹

A combative approach, however, is a less effective method in pursuing the truth in a criminal jury trial. With both sides determined to win, attorneys often exploit motions and exhaust resources in an effort to block the other side.⁷² The English inquisitorial system, on the other hand, focuses more on the strength of the evidence and witnesses rather than the passionate representation of the client by the barrister. With the focus on the unaltered and uncorrupted evidence, there is a greater chance for the jury to find an accurate verdict—one that is not tainted by the more zealous attorney.

IV. ROLE OF THE JUDGE

Judges have different functions in both English and American legal systems. The larger role that English judges play in the courtroom increases the likelihood that the jury will make a correct decision. This Part will

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*; PREAMBLE: A LAWYER'S RESPONSIBILITIES, MODEL RULES OF PROFESSIONAL CONDUCT (2000).

⁷¹ Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 *LOY. L.A. REV.* 81 (Nov. 1991).

⁷² *Id.* In California, the prevailing rule is that a lawyer who engages in misconduct in open court is safe, and need not do anything to cure the resulting adverse effects—even when the conduct is outrageous and highly prejudicial. Instead, the victimized counsel, to preserve the record on appeal, must object to every instance of misconduct in the right way, assign the improper remarks as misconduct, and request a jury admonition. An objection without more is insufficient. Misconduct of trial counsel is entitled to no consideration on appeal, unless the record shows timely *and* proper objection by adverse counsel, coupled with a request for jury admonition. *Horn v. Atchison, T. & S.F. Ry.*, 380 U.S. 909 (1965); *Sabella v. Southern Pac. Co.*, 395 U.S. 960 (1969).

first address how the role of the judge developed. It will then discuss how the role differs in both countries.

The history of judges begins before the creation of the Magna Carta. Judges were responsible for upholding justice throughout the kingdom on behalf of the King.⁷³ They traveled to different circuits within England and Wales and managed grievances.⁷⁴ They often advised the King on how to settle disputes.⁷⁵ As their duties evolved throughout the centuries, they continued to play a large role in reviewing law and protecting human rights.⁷⁶

Currently, England and Wales have a unified legal system consisting of civil and criminal courts known as Her Majesty's Courts of Justice of England and Wales. The Supreme Court of the United Kingdom is the court of last resort in all matters under English and Welsh law, Northern Irish law and Scottish civil law.⁷⁷ It is the court of last resort and the highest appellate court in the United Kingdom, although the High Court of Justiciary remains the Supreme Court for criminal cases in Scotland.⁷⁸ The Supreme Court also has jurisdiction to resolve disputes relating to devolution in the United Kingdom and concerning the legal powers of the three governments (in Scotland, Wales, and Northern Ireland) or laws made by the devolved legislatures.⁷⁹

The Senior Courts of England and Wales consist of the following courts: the Court of Appeal, the High Court of Justice, and the Crown Court.⁸⁰ The Court of Appeal deals only with appeals from other courts or tribunals.⁸¹ The Court of Appeal consists of two divisions: the Civil Division hears appeals from the High Court and County Court and certain superior tribunals, while the Criminal Division may only hear appeals from the Crown Court connected with a trial on indictment, for a serious

⁷³ The Rt. Hon. The Lord Woolf of Barnes, *The Judiciary of England and Wales and the Rule of Law*, 39 IND. L. REV 613 (2006).

⁷⁴ *Id.* at 614.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ EUROPEAN LAW INSTITUTE, available at <http://www.europeanlawinstitute.eu/membership/institutional-observers/supreme-court-of-the-united-kingdom/> (last visited Apr. 19, 2016).

⁷⁸ *Id.*; *Court Structure in the UK*, CONTACT LAW (2012), available at <http://www.contactlaw.co.uk/court-structure-in-the-uk.html>.

⁷⁹ THE SUPREME COURT AND THE UNITED KINGDOM'S LEGAL SYSTEM, available at https://www.supremecourt.uk/docs/UKSC_StoryPanel_9_1100hx800w_v6.pdf (last visited Apr. 19, 2016).

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Courts in the United Kingdom, JUSTIS, available at <http://www.justis.com/support/faq-courts.aspx>.

⁸¹ *Id.*

offence.⁸² Its decisions are binding on all courts, including itself, apart from the Supreme Court.⁸³

The High Court of Justice functions both as a civil court of first instance and a criminal and civil appellate court for cases from the subordinate courts. It consists of three divisions: the Queen's Bench, the Chancery and the Family divisions.⁸⁴ The divisions of the High Court have separate procedures and practices adapted to their purposes.⁸⁵ Although particular kinds of cases are assigned to each division depending on their subject matter, each division may exercise the jurisdiction of the High Court.⁸⁶

The Crown Court is a criminal court of both original and appellate jurisdiction.⁸⁷ The Old Bailey is the unofficial name of London's most famous Criminal Court, which is now part of the Crown Court.⁸⁸ The Crown Court also hears appeals from Magistrates' Courts.⁸⁹ The Crown Court is the only court in England and Wales that has the jurisdiction to try cases on indictment.⁹⁰ When exercising this role, it is a superior court, and the Administrative Court of the Queen's Bench Division of the High Court cannot review its judgments.⁹¹ However, the Crown Court is an inferior court in respect to the other work it takes, including appeals from the Magistrates' courts and other tribunals.⁹²

The subordinate courts in England and Wales are the Magistrates' Courts, Family Proceedings Courts, Youth courts, and County Courts. Magistrates' Courts are presided over by a bench of lay magistrates or a legally trained district, sitting in each local justice area.⁹³ There are no juries. They hear minor criminal cases, as well as certain licensing appeals.⁹⁴ Youth courts are run similarly to magistrates' courts but deal

⁸² *Courts in the United Kingdom*, *supra* note 80.

⁸³ *Id.*

⁸⁴ *Court Structure in the UK*, *supra* note 78; *Nadia's Notes*, *supra* note 15.

⁸⁵ *Court Structure in the UK*, *supra* note 78; *Courts in the United Kingdom*, *supra* note 80.

⁸⁶ *Court Structure in the UK*, *supra* note 78; *Courts in the United Kingdom*, *supra* note 80.

⁸⁷ Criminal Courts, available at <https://www.gov.uk/courts/crown-court>; COURTS ACT 1971 § 4 (Eng.)

⁸⁸ Its official name is the "Central Criminal Court". *The Proceedings of the Old Bailey*, THE OLD BAILEY ONLINE, available at <http://www.oldbaileyonline.org/static/The-old-bailey.jsp>.

⁸⁹ *Courts in the United Kingdom*, *supra* note 80.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Courts in the United Kingdom*, *supra* note 80.

⁹⁴ *Id.*

exclusively with offenders aged between the ages of ten to seventeen. Youth courts are presided over by a specially trained subset of experienced adult magistrates or a district judge.⁹⁵ Youth magistrates have a wider catalogue of disposals available to them for dealing with young offenders and often hear more serious cases against youths.⁹⁶ Additionally, some Magistrates' Courts are also Family Proceedings Courts and hear family law cases.⁹⁷

County Courts are statutory courts with civil jurisdiction only.⁹⁸ They are presided over by either a District or Circuit Judge and, except in a small minority of cases such as civil actions against the Police, the judge sits alone as a trier of fact and law without assistance from a jury.⁹⁹ County courts have divorce jurisdiction and undertake private family cases, care proceedings and adoptions.¹⁰⁰ County Courts are local courts, though they may hear any action. County Courts sit in ninety-two different cities in United Kingdom.¹⁰¹ Finally, Tribunals are considered the lowest rung of the court hierarchy in England and Wales.¹⁰² They encompass specialist courts that have limited jurisdiction.¹⁰³

Several different types of judges exist in the courts of England and Wales, similar to the United States. Circuit judges are senior judges who sit in the Crown Court, County Courts, and certain specialized subdivisions of the High Court of Justice.¹⁰⁴ Circuit judges sit below High Court judges, but above district judges. Circuit judges are referred to as "His

⁹⁵ *Criminal Courts*, available at <https://www.gov.uk/courts/youth-courts> (last visited Apr. 16, 2016). Youth courts are not open to the public for observation, only the parties involved in a case being admitted. *Id.*

⁹⁶ *Id.*

⁹⁷ *Courts in the United Kingdom*, *supra* note 80; *County Courts*, available at <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/county-court/>. (last visited Apr. 16, 2016).

⁹⁸ *Courts in the United Kingdom*, *supra* note 80.

⁹⁹ *Id.* Libel and slander cases are also examples of civil cases that involve a jury. *County Courts*, *supra* note 97.

¹⁰⁰ *Courts in the United Kingdom*, *supra* note 80.

¹⁰¹ *Id.*

¹⁰² *Id.*; The Supreme Court and the United Kingdom's legal system, *The Supreme Court (2016)*, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, available at <https://www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf> (last visited Apr. 16, 2016).

¹⁰³ *Court Structure in the UK*, *supra* note 78; *Courts in the United Kingdom*, *supra* note 80. These are often described as "Tribunals" rather than courts. For example, an Employment Tribunal is an inferior court of record for the purposes of the law of contempt of court. *Id.*

¹⁰⁴ *Circuit Judges*, JUDICIARY, available at <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/judicial+roles/judges/circuit-judge> (last visited Apr. 16, 2016).

Honor” or “Her Honor.”¹⁰⁵ In the past, Circuit judges could only be drawn from barristers with at least ten years’ standing.¹⁰⁶ However, in 2008, the eligibility was changed to a seven-year basis.¹⁰⁷ District judges encompass two different categories of judges. One group sits in the County Court, while the other sits in the Magistrates’ Courts.¹⁰⁸ They are referred to as “Sir” or “Madam.” In the past, District Judges could only be drawn from barristers and solicitors with at least seven years’ standing.¹⁰⁹ However, in 2008, the eligibility condition was changed to a five-year basis.¹¹⁰ The senior District Judge is also known as the Chief Magistrate.¹¹¹

On the other hand, the US has a bifurcated court system, consisting of federal and state courts.¹¹² The US Constitution established the US Supreme Court and gave Congress the authority to establish the lower federal courts.¹¹³ Congress has established two levels of federal courts below the Supreme Court, which include the US district courts and the US circuit courts of appeals.¹¹⁴ US district courts are the courts of first instance in the federal system.¹¹⁵ There are ninety-four district courts throughout the nation, with at least one district court located in each state.¹¹⁶ District judges sit individually to hear cases. Bankruptcy judges and magistrate judges are located within the district courts.¹¹⁷ US circuit courts of appeals are on the next level. There are two of these regional

¹⁰⁵ *Id.*

¹⁰⁶ *Circuit Judges, supra* note 104; *Courts in the United Kingdom, supra* note 80.

¹⁰⁷ *Id.*

¹⁰⁸ *District Judges, JUDICIARY, available at* <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/judicial+roles/judges/district-judge-role> (last visited Apr. 16, 2016).

¹⁰⁹ TRIBUNALS, COURTS, AND ENFORCEMENT ACT OF 2007, § 50(6).

¹¹⁰ *Id.*

¹¹¹

Magistrate, COURTS AND TRIBUNAL JUDICIARY, available at <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/chief-magistrate/> (last visited Apr. 16, 2016).

¹¹² *The U.S. Legal System: A Short Description, FEDERAL JUDICIAL CENTER* (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/U.S._Legal_System_English07.pdf/\\$file/U.S._Legal_System_English07.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/U.S._Legal_System_English07.pdf/$file/U.S._Legal_System_English07.pdf).

¹¹³ U.S. CONST. ART. III. SEC. 1; Michelle Borchanian, *A Comparison of the Judicial Systems of England and the United States*, 4 U. OF DET. MERCY INT’L L. F.13 (1993-94).

¹¹⁴ *The U.S. Legal System, supra* note 112.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* Magistrate judges perform many judicial duties under the general supervision of district judges. *Id.*

intermediate appellate courts located in different areas of the country.¹¹⁸ Three-judge panels hear appeals from the district courts.¹¹⁹ A party to a case may appeal to the circuit court of appeals.¹²⁰ These circuit courts also hear appeals from decisions of federal administrative agencies.¹²¹ One non-regional circuit court, the Federal Circuit, hears appeals in specialized cases such as cases involving patent laws and claims against the federal government.¹²² At the top of the federal court system is the US Supreme Court, made up of nine justices who sit together to hear cases.¹²³ The US Supreme Court may hear appeals from the federal circuit courts of appeals as well as the highest state courts if the appeal involves the US Constitution or federal law.¹²⁴

The structure of state court systems varies among states. Most state court systems have common structures, with some distinctive characteristics. They have courts of limited jurisdiction presided over by a single judge who hears minor civil and criminal cases.¹²⁵ States also have general jurisdiction trial courts that are presided over by a single judge.¹²⁶ These trial courts are typically called circuit courts or superior courts and hear major civil and criminal cases.¹²⁷ Some states have specialized courts that hear only certain kinds of cases such as traffic or family law cases.¹²⁸ All states have a highest court, usually a state supreme court that serves as an appellate court.¹²⁹ Many states also have an intermediate appellate court called a court of appeals that hears appeals from the trial court.¹³⁰

All federal judges are appointed by the President of the United States if approved by a majority vote of the US Senate.¹³¹ These justices and judges serve “during good behavior,” which essentially is a life

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* However, the government cannot appeal a criminal case if a “not guilty” verdict is found for the defendant. *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Michelle Borchanian, *supra* note 113, at 18. The appointment process involves the politics of US Senators in addition to the professional and personal opinions of other judges. *Id.*

term.¹³² Appointed judges are usually distinguished lawyers, law professors, or lower federal court or state court judges.¹³³ Federal judges may only be removed from office through an impeachment process in which the House of Representatives file charges and the Senate conducts a trial.¹³⁴ These protections allow federal judges to exercise independent judgment without political or outside interference or influence.

The methods of selecting state judges vary from state to state. The most common selection systems are by commission nomination and by popular election.¹³⁵ Candidates for judicial appointment or election must meet certain qualifications, such as being a practicing lawyer for a certain number of years.¹³⁶ With some exceptions, state judges serve specified, renewable terms.¹³⁷ All states have procedures governing judicial conduct, discipline, and removal.¹³⁸ In both the federal and state systems, judicial candidates are almost always lawyers with many years of experience.¹³⁹

Court dress is also different among English and American judges. English judges wear robes and wigs, although the colors of their robes depend on the type of judge they are. Circuit judges, in County Courts or the Crown Court, wear a violet robe with lilac facings.¹⁴⁰ Judges wear a sash over the left shoulder—lilac when dealing with civil cases and red when dealing with criminal cases.¹⁴¹ Since 2008, circuit judges in County Court have not worn wigs or wing collars, though circuit judges in the Crown Court retain the wig, wing collars, and bands.¹⁴² On occasions where

¹³² *The U.S. Legal System*, *supra* note 112, at 3.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* In the commission nomination system, judges are appointed by the governor (the state's chief executive) who must choose from a list of candidates selected by an independent commission made up of lawyers, legislators, lay citizens, and sometimes judges. In many states judges are selected by popular election. These elections may be partisan or non-partisan. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Court Dress: Examples, JUDICIARY, <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/court-dress/examples> (last visited Apr. 16, 2016). The Crown Court of England and Wales constitutes part of the Senior Courts of England and Wales (the other parts are the High Court of Justice and the Court of Appeal). County courts are statutory courts with civil jurisdiction. They are presided over by either a district or circuit judge. ENCYCLOPÆDIA BRITANNICA, ED., SENIOR COURTS OF ENGLAND AND WALES, ENCYCLOPÆDIA BRITANNICA, available at <http://www.britannica.com/topic/Senior-Courts-of-England-and-Wales>.

¹⁴¹ *Court Dress. Examples supra* note 140

¹⁴² *Id.*

circuit judges are dealing with High Court business or in the Old Bailey, they wear a short wig and black silk gown over a court coat or waistcoat.¹⁴³ District judges in county courts have worn a robe of modern design since 2008, similar to High Court judges who sit in civil proceedings.¹⁴⁴ Blue tabs on the facings of the robe by the collar indicate the rank of district judge; High Court judges have red tabs.¹⁴⁵ District judges in magistrate courts, however, sit without robes.¹⁴⁶

Court dress for American judges is much simpler: black robes are frequently worn.¹⁴⁷ While in the early history of the US, the court dress of judges reflected British court dress of wigs and black robes, this waned in the 19th century. Generally, current federal and state judges are free to select their own courtroom attire. The most common choice is a plain black robe that covers the torso and legs, with sleeves.¹⁴⁸

In both England and America, judges are impartial to either side of a criminal trial. However, their roles largely differ in many of their other duties. One main difference between English and American judges is the role they play in overseeing criminal trials. In England, judges take part in reviewing the evidence and pointing out important factors to the jury.¹⁴⁹ One of the most important parts of a criminal trial in England is a judge's summation of the evidence.¹⁵⁰ Throughout the trial, the judge takes notes on the evidence that has been presented and the facts that both sides raise.¹⁵¹ The judge may ask clarifying questions to the barristers or the witness to maintain accurate notes.¹⁵² An English judge's summarization of the evidence is an attempt to present an objective representation of what each side's arguments have been.¹⁵³ The recap is typically related to the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* Red robes are usually worn only by judges dealing with criminal cases. High Court judges sitting in the criminal division of the Court of Appeal wear a black silk gown and a short wig

¹⁴⁷ *Nadia's Notes, supra* note 15 (pulling from various research on WIKIPEDIA and judicial websites). However, in some states, like California, judges do not always wear robes and instead wear everyday clothing. *Id.*

¹⁴⁸ *Id.* Some Supreme Court justices continue the ancient practice of wearing large black skullcaps when wearing robes outside in cold weather, for example at presidential inaugurations in January. Many state supreme court justices wear unique styles of robes, though this is infrequent. Administrative law judges who preside over informal administrative proceedings typically dress in normal business wear. *Id.*

¹⁴⁹ A. Moresby White, *Murder Trials in England*, 14 *WOMEN LAW. J.* 3, 5-6 (1925-26).

¹⁵⁰ Nancy S. Marder, *supra* note 61, at 561.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 562.

jury instructions, so the instructions are uniquely adapted to the facts.¹⁵⁴ This assessment of the evidence is a great resource for juries that know little about legal terms and processes.¹⁵⁵ It is especially helpful for more complex trials with multiple witnesses.¹⁵⁶ However, it is important for a judge not to go too far in his influence. The jury ultimately decides the verdict, and the judge cannot tell the jury how to decide.¹⁵⁷ While the judge's role is larger in English trials than American trials, it is still limited to a neutral role.

On the contrary, in American trials, judges oversee the legal process in courts. They ensure that each side follows the proper court procedures, and resolve any motions or objections made in court.¹⁵⁸ American judges have court deputies or bailiffs and the power to hold someone in "contempt of court" to maintain propriety in the courtroom.¹⁵⁹ Beyond this, however, they do not examine the evidence and interpret. This role is strictly left to the jury.

Another difference between English and American trials is the instructions that judges draft for the jury.¹⁶⁰ In American courts, judges typically use standard, boilerplate language that is not specifically tailored to the case at hand.¹⁶¹ The instructions do not address the facts of the case and, as a result, are more general and theoretical.¹⁶² Alternatively, judges in England typically have shorter jury instructions that specifically address the issues and facts in the case.¹⁶³ In both countries, however, juries have access to written copies of the instructions to aid members in their deliberations.¹⁶⁴

Despite sharing similar histories and structures, the role of English and American judges in the courtroom greatly influence the precision of the jury's decision. The English system allows an impartial member to have a greater role in questioning the barristers and evaluating the evidence. Rather than relying on the more "persuasive" attorney, whose goals are to aid his or her client, the jury is more likely to see the

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Nadia's Notes*, *supra* note 15.

¹⁶⁰ Nancy S. Marder, *supra* note 61, at 543.

¹⁶¹ *Id.* at 544. Except for Texas and West Virginia, the rest of the states have a model set of jury instructions which provide a basic framework for the jury. C. Barry Montgomery and Bradley C. Nahrstadt, *Juries: What Must Be Proven*, FOR THE DEFENSE 12 (June 2006).

¹⁶² Nancy S. Marder, *supra* note 61, at 544; *Nadia's Notes*, *supra* note 15.

¹⁶³ Nancy S. Marder, *supra* note 61, at 544; *Nadia's Notes*, *supra* note 15.

¹⁶⁴ Nancy S. Marder, *supra* note 61, at 565.

evidence objectively and come to a more accurate conclusion.

V. EVIDENCE

Evidence plays an important role in jury trials throughout the world. It is used differently in both English and American jury trials. The way in which evidence is used in the former category, though, leads to a higher chance of accuracy in the jury's decision. This Part will discuss the primary examples of evidence in jury trials, how English and American jury trials differ in using evidence, and how the English system leads to a greater chance of determining the truth.

Some primary examples of evidence that are unique to the English system include the jury bundle and the common use of video evidence through Closed Circuit Television (CCTV).¹⁶⁵ The "jury bundle" is a common practice used at the Old Bailey.¹⁶⁶ The jury bundle is a binder that is given to jurors before the trial.¹⁶⁷ It contains the exhibits that will be introduced during the trial, though it may be supplemented during the trial with additional documents.¹⁶⁸ It typically includes copies of the indictment, stipulations, cellphone records, and photos often captured by CCTV.¹⁶⁹ The jury bundle is tailored to the evidence in a particular case.¹⁷⁰

¹⁶⁵ *Id.*; *Nadia's Notes*, *supra* note 15.

¹⁶⁶ Nancy S. Marder, *supra* note 61, at 540; *Nadia's Notes*, *supra* note 15.

¹⁶⁷ Nancy S. Marder, *supra* note 61, at 539. In cases with a lot of documentary evidence, the prosecution can provide jurors with highlighters and post-its to emphasize pieces of evidence that they find notable. *Id.*

¹⁶⁸ *Id.* at 540; *Nadia's Notes*, *supra* note 15.

¹⁶⁹ Nancy S. Marder, *supra* note 61, at 541; *Nadia's Notes*, *supra* note 15.

¹⁷⁰ Nancy S. Marder, *supra* note 61, at 540. In her article, the author discusses her first-hand experience of seeing a jury handle the jury bundle. "In *R v. Ilene*, the defendant was charged with six counts of submitting false Value Added Tax (V.A.T.) claims. The jury bundle contained copies of all of the false invoices created by the defendant to look like genuine invoices. The jury bundle also included e-mails that the defendant had sent to various officials asking where his repayment was, forms he had completed and signed in order to claim his repayment, and transcripts of several interviews that he had with various officials who had investigated his claims. The interviews were played in court and jurors were able to listen to the interviews and read the transcripts at the same time. Given the poor quality of the recorded interviews, the transcripts contained in the jury bundle were indispensable. The jury bundle in *R v. Ilene* was an invaluable tool to jurors. The jurors were able to take notes in the margins, to mark documents in any way that was useful to them, and to have all of the documents at their fingertips. The prosecution was able to direct jurors to the appropriate page in the jury bundle any time a document was referenced. The prosecution also directed witnesses (including the defendant) to particular pages in the jury bundle so that they could explain to the jury what the document was. The jury bundle kept jurors focused on the relevant documents; it allowed them to keep all of the documents together; and it allowed them to listen to the testimony and follow it in

It allows jurors to see what they hear in the courtroom.¹⁷¹ It also allows a different way for jury members to collect and analyze the evidence.¹⁷²

In modern American courts, jurors do not receive a jury bundle. They may receive a notebook on which to take notes, depending on the jurisdiction the jury is in.¹⁷³ Evidence in American courtrooms is passed around among the jurors or briefly shown on a screen.¹⁷⁴ As a result, jury members do not have a lot of time to examine the evidence. If an American juror wants to see an exhibit during their deliberations, they must send a note to the judge requesting the exhibit.¹⁷⁵ Most of the time, jurors instead try to remember what they heard throughout the trial, without being able to go back and examine on important pieces of evidence.

Witness preparation is another feature that distinguishes English and American legal systems. Witness preparation is an accepted practice and a prevalent feature in American trials.¹⁷⁶ It is used to help witnesses testify more effectively.¹⁷⁷ It aids witnesses who are nervous about testifying or unfamiliar with the process of being questioned.¹⁷⁸ Witness preparation may include a review of the case facts and themes and instructions on how to best present the information, as well as the interview questions themselves.¹⁷⁹ In the United States, there is no authoritative guideline on the ethics of witness preparation and what its scope should be.¹⁸⁰ The Model Rules do not address the subject.¹⁸¹ As a result, unethical witness tampering, where an attorney encourages a witness to say something that may help his or her case, can be an issue, although it is not considered a major ethical concern in the US.

In England, however, witness preparation is prohibited. The Bar Council's code of conduct states that, "A Barrister must not rehearse,

written or visual form. *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* Whether these tools are allowed is up to the judge. The use of notebooks is usually left for complex, lengthy trials. *Id.*

¹⁷⁴ *Id.*; *Nadia's Notes*, *supra* note 15.

¹⁷⁵ Nancy S. Marder, *supra* note 61, at 542; *Nadia's Notes*, *supra* note 15.

¹⁷⁶ Elaine Lewis, *Witness Preparation: What is Ethical, and What is Not*, 36 LITIGATION 41, 43 (2009-10).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* Witnesses may be intimidated by the questioning format, and often feel more comfortable if they are familiar with the interview questions and manner of the courtroom. *Id.*

¹⁷⁹ *Id.* The American Bar Association's website lists books and articles on how to prepare witnesses. *Id.*

¹⁸⁰ *Id.* at 42.

¹⁸¹ *Id.*; MODEL RULES OF PROF'L CONDUCT (1983).

practice or coach a witness in relation to his evidence.”¹⁸² A supplemental comment provided by the Bar Council’s professional standards committee further discusses witness preparation. “Mock cross-examination or rehearsals of particular lines of questions that counsel proposes to follow are not permitted . . . [A Barrister’s] duty is to extract the facts from the witness, not to pour into them; to learn what the witness does know, not to teach him what he ought to know.”¹⁸³

After examining the different ways that evidence is used and presented, the English system provides a more neutral—and more truthful—portrayal of the evidence so that jurors can more accurately make a decision. The inquisitorial presentation of both sides is more honest: jurors can hear what the witnesses say without the influence of barristers. While the testimony may be unorganized and less cohesive due to lack of preparation, it is a more honest, untainted view of what the witness experienced. Furthermore, the jury bundle provides an even more accurate way of presenting the evidence to the jury. Jurors have more than a fleeting glimpse of the evidence of either side; they have time to scrutinize the evidence. This allows them to form their opinions based on a more complete examination. These materials supplement what jurors hear in court. As a result, they have a better idea of the case as a whole and the tools they need to come to an accurate decision. Because of its more objective and comprehensive approach, the English system allows jurors to make a more informed decision.

VI. CONCLUSION

Despite sharing the same history and evolving from the same legal traditions, both the American and English criminal trials diverge in terms of jury selection, the jury process, roles of the barristers, judges, and defendants, and the use of evidence. While each system has positive

¹⁸² CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES 705a.

¹⁸³ Elaine Lewis, *Witness Preparation: What Is Ethical and What is Not*, 36 LITIGATION 41 (Winter 2010) (citing GUIDANCE ON PREPARATION OF WITNESS STATEMENTS—PREPARING WITNESS STATEMENTS FOR USE IN CIVIL PROCEEDINGS—DEALINGS WITH WITNESSES (Oct. 2005)). The subject of allowing witness preparation was brought before the Trial Chamber of the International Criminal Court at The Hague. The court analyzed the details of the practices found in Europe and North America, noting, “The preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court’s ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings.” Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial No.: ICC-01/04-01/06 (Nov. 30 2007).

and negative aspects, the English inquisitorial process in criminal trials allows for a greater likelihood that a precise decision can be made. In the American legal system, attorneys are allowed to use legal methods to increase their chance of winning a trial. These techniques include placing sympathetic jury members on the panel through voir dire, suppressing detrimental evidence through motions, and fostering an adversarial relationship with the opposing attorney. However, in the English system, where an impartial judge plays a larger role, the jury is selected at random without the control of either side, and the opposing barristers are courteous and considerate, there is a greater chance that the jury will learn more of the truth. While the American system encourages attorneys to zealously advocate for their clients, this “win-at-all-costs” attitude comes with a risk of abandoning the chance for an accurate decision—the chance to find the truth.