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Melissa Bloom Bissonette

St. John Fisher College, mbissonette@sjfc.edu

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“A Right Judgment”: Rape Trial Conventions Revisited in *Joseph Andrews* and *Tom Jones*

Abstract

This article argues that in both *Joseph Andrews* (1742) and *Tom Jones* (1749), Henry Fielding, who practiced law and wrote novels when both were undergoing significant transformations, takes what could have been archetypal scenes of rape and rescue and makes them illuminating explorations of how juries determine the truth. In presenting these attempted rape scenes within the implicit format of a contemporary rape trial, Fielding directs the reader to observe the missteps in the process of judicial decision-making, as well as the steps and missteps in his or her own determination of the trustworthiness of characters and their testimony.

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“A Right Judgment”: Rape Trial Conventions Revisited in *Joseph Andrews* and *Tom Jones*

The attempted rapes in Henry Fielding’s fiction evolve from the slapstick attempts on Mrs. Heartfree in *Jonathan Wild* and Shamela in *Shamela*, to the more complicated attacks on Fanny in *Joseph Andrews* and Mrs. Waters in *Tom Jones*, and through to the very unfunny attempts on Amelia, in *Amelia*. While the comedic trope of the attempt with its associated misogyny and ribald jokes explains the first two very well, it does not account for the attacks on Fanny and Mrs. Waters. These scenes function, instead, to showcase a process of discerning truth through witness, through character, and through testimony. That fictional process mimics the process followed in contemporary rape trials, raising questions both literary and legal about truth, motive, and interpretation. Ironically, though not surprisingly, these questions pertain more to the accuser than to the accused. While reflecting the chauvinism inherent in his own culture, Fielding’s questions go beyond interrogating the victim; they concern the execution of justice itself. How can we know the truth of what happened in secret? What is the relationship between character and fact?

The present essay argues that in both *Joseph Andrews* (1742) and *Tom Jones* (1749), Fielding takes what could have been archetypal scenes of rape and rescue and makes them illuminating explorations of how juries determine the truth. In presenting these attempted rape scenes within the implicit format of a contemporary rape trial, Fielding directs the reader to observe the missteps in the process of judicial decision-making, as well as the steps and missteps in his or her

own determination of the trustworthiness of characters and their testimony. My approach to Fielding's fiction through law bridges two closely related lines of scholarship. Raymond Stephanson shows how Fielding employs law as both metaphor and discourse.¹ Other scholars draw on a more technical knowledge of eighteenth-century English law to explore the interaction of Fielding's literary and legal concerns in the context of contemporary legal concepts. Ian Bell reads the law in Fielding's fiction as addressing "the ways in which ... the dynamic tensions of the courtroom and inefficiency of the institutions of law could disfigure the implementation of justice and create the possibility that great injustices might unwittingly be performed."² In his influential *Strong Representations*, Alexander Welch observes that the action in *Tom Jones*, "construed as a trial, or a series of trials," hinges, like testimony in a trial, on the coherence of narrative.³ This essay expands that exploration by including a greater sense of the layman's understanding of law. Placing the attempted rapes at the center of this essay within the larger analysis shaped by Welch, Bell, and others reveals a forensic structure to the narrative and enlarges our understanding of the range of Fielding's uses of law.

Only a few critics have addressed these attempted rape scenes directly. Simon Dickie demonstrates that scenes of attempted rape and false rape claims throughout Fielding's fiction reflect a misogyny typical of his time, and a skeptical view of women and sexuality. Dickie argues that such scenes perpetuated cultural presumptions about women which cast doubt on any claim of rape; because they are "carnal, irrational and deceitful beings," women are natural liars who secretly desire to be taken by force.⁴ Sandra Macpherson considers the sexist "comedy" of these

scenes less harshly. She and Susan Staves agree that Fielding's attempted rape scenes are comedic because of their perspective on men; they are funny because the men (like Jonathan Wild and Beau Didapper) are failures. Macpherson notes that "in a Fielding novel, there is no harm" no matter how many heads are broken or rapes threatened, and that the reader always knows that the attempts will fail.⁵ Susan Staves alone explores these scenes in the context of their legal significance. In "Fielding and the Comedy of Attempted Rape," Staves credits Fielding with using fiction to explore areas of law, such as attempt and consent, which were only beginning to attract interest in the legal doctrine of the 1740s. Although "assault with intent to ravish" was a misdemeanor occasionally prosecuted in the 1730s and 40s, it was the assault, not the intent (or attempt) that was criminal. Attempt only, as Staves points out, was a legal matter of no harm no foul.⁶

My discussion turns that legal analysis back on the narrative to ask how it informs our reading of those scenes, and does so in terms of the common practices which would have been familiar to a significant portion of Fielding's original readers. The eighteenth-century trial had conventional, recognizable features which would have been broadly accessible to members of the reading public, who read the increasingly popular and detailed Old Bailey *Proceedings* and other trial literature. Moreover, before the 1750s, as John Langbein and J.M. Beattie have shown, English justice was determinedly an affair of the common citizen; neither prosecutor, constable, JP, nor juryman was trained in law. Beattie notes that "In theory, each male householder... would almost certainly have served in ... parish and ward offices [including juryman] and thereby have acquired some familiarity with the

workings of the criminal justice system.”⁷ The victim acted as prosecutor, and both prosecutor and defendant spoke for themselves, unaided by lawyers.⁸ This citizen system strongly suggests that the same population from which readers of the new novels of the 1740s were drawn, the middling and professional classes, were already well versed, in a lay fashion, with the workings of the law.

In what follows, I consider the attempted rapes of Fanny and Mrs. Waters through the lens of the legal conventions of rape trials in the early eighteenth-century courtroom, as understood and misunderstood by JPs and jurymen. The scene with Fanny highlights the importance of speech, struggle, and outcry in rape trial testimony as the only method by which the accuser could establish that the act was “by force and against her will.”⁹ Through his construction of the scene, Fielding illustrates how easily men are led to misjudge Fanny by the same conventions intended to reveal truth. Several years later, after Fielding had completed his own legal training and begun practice as a barrister, he wrote *Tom Jones* at the same time that he was seeking a position as magistrate and drafting his substantial but unpublished treatise on criminal law. His frustration with the actual practice of law enriches the scene with Mrs. Waters, which closely echoes the scene with Fanny, and which foregrounds questions of character and culpability. Throughout these scenes, Fielding dramatizes the processes by which judges, juries, and readers determine truth, and he highlights problems with the legal systems that had evolved to enable them do so.

A

I. “You must explain yourself”: The Narrative of the Struggle and Outcry

Matthew Hale (1609-1676) is cited for the often-repeated caution that rape is a crime “easy to accuse and difficult to defend,” yet, as Gil Geis notes, rape in England (and America) has never been either easy to accuse or difficult to defend.¹⁰ Eighty percent of rape cases tried at the Old Bailey between 1720 and 1750 ended in acquittals, as opposed to 50% for all other sexual crimes and 35% for theft.¹¹ The 94 rape cases that were tried during that period had already passed the skepticism of a grand jury and had almost as much evidence as could be hoped for. Beattie’s study of Surrey during the same period shows that whereas grand juries dismissed approximately 11% of property disputes, they dismissed 44% of rape claims.¹²

Nonetheless, as Hale wrote in his *History of the Pleas of the Crown*—first published in 1736, but widely studied for generations before that in the Inns of Court in manuscript—while rape is so heinous that it “ought severely and impartially to be punished with death,” it raises unique problems of witness testimony. Although conviction of a felony requires two witnesses, “the nature of the offense, which is most times secret,” generally means that “no other testimony can be had of the very doing of the fact, but the party upon whom it is committed” though others might testify to the aftermath.¹³ Because of the amplified importance of the credibility of that single witness to the offense, the trial had developed into a layered structure intended to guide the judgment of the judge and jury through emotional, personally complicated, and evidence-poor situations. Hale looms large in discussions of rape in the eighteenth century, largely because of the “easy to accuse” statement, but also because his formulation of the key points in a rape trial persisted throughout and beyond the eighteenth century. Blackstone quotes Hale

extensively in his section on rape, reasserting the validity and importance of the formula as articulated by Hale.¹⁴

As with other trials of the time, rape trials had three phases: the accuser's narrative, witnesses to her character, and the defendant's counter-narrative. Peculiarly, in a rape trial the accuser's original narrative focused primarily on her own actions, rather than on her attacker's, and the defendant's counter-narrative featured his and his witnesses' denigration of her character, rather than a denial or defense of his own actions (the "fact"). In casting doubt on her virtue, the defendant cast doubt on her credibility, and so her unwillingness, and so on whether a rape had occurred at all.

The accuser needed to prove her unwillingness, or at least the external manifestations of her unwillingness. Struggles, outcries, and observable physical damage testified to "by force" and were indirectly used to measure to what degree the act was really "against her will." The 1730 trial of John Collier provides a vivid example. The accuser, the judge, and the accuser's father all focused on the question of how much, how long, and how loudly she cried out, and to what extent she struggled. I quote it at length, because the amount of printed testimony dedicated to her attempts to cry out and struggle, compared to that about his actual "penetration and emission," shows the overwhelming preoccupation of the court. The accuser testified that,

When they came to the Bridge, he dragged her down Kingston-Lane, and she crying out, he caught her bold by the Throat, and swore, D - n her, if she made any Noise, he had a Knife in his Pocket, and would cut her Throat from Ear to

Ear; that she did endeavour to cry out all she could, but he holding her by the Throat, she could not; that he held her so long till she was almost strangled, and had neither Voice nor Strength; that thus dragging her out of the main Road into Kingston-Lane, he threw her down on a grassy Place, where was a rising, with her Head lying among the Bushes, and punch'd her on the Stomach several times to stop her Breath, and there lay with her, and had carnal Knowledge of her Body - Being ask'd, If she did resist and cry out? she reply'd She did cry out as long as she could, and struggled as long as she was able, but he stopping her Breath, by holding her Throat so long, and so hard, that she had no Power to cry out, nor strive any longer; and the Prisoner with repeated Oaths threatened to cut her Throat from Ear to Ear. - She being ask'd, How it was at last? she reply'd, There was Wet within. ... Robert Jones, her Father, depos'd, That when she came Home at about 8 o'Clock, she complain'd, that the Prisoner had offer'd Violence to her, had almost choak'd her, and lay with her; that she had resisted to the utmost of her Power, but being almost choaked, she could not have the Liberty of her Breath.¹⁵

The insistence on struggle and the repeated explanations for why there was not more struggle are essentially defensive. She must defend herself against the implicit accusation that she was a willing party.

Details about resistance start to sound generic, as conventions that indicate only that the prosecutor or her friends or her lawyer, if she consulted with one, knew what points to make.¹⁶ Mary Hicks, who in 1722 prosecuted John Harris for

raping her in a locked room of her master's house in Grace-church Street, London, provides a fairly standard example:

M.H.: I strove to save myself as much as I was able for half an Hour, but then I was quite spent, and could resist no longer...

Court: And could not they have heard you if you had cried out?

M.H.: Lord! I was quite spent and out of Breath with struggling, so that I could not call loud enough to be heard.¹⁷

The judge's question and Hicks's answer show Hicks defending herself, explaining why she didn't struggle enough to prevent the rape. Indeed, in several other cases where women testified that they were too terrified to cry out, or were frozen with fear, the men were nearly always acquitted, as were Jacob Wykes and John Johnson in 1718 (Ann Cooper testified to "striving and crying and till she was dead almost; that she still resisting and crying out he hit her several Blows an the Face, stopp'd her Mouth, held her by the Throat; and she at last recovering herself upon her Knees, but being quite spent with striving and crying out, he slung her cross a low Table and did lie with her there") and John Pritchard in 1725 (Sarah Tate testified that "I struggled and strove, and did all that a Woman could do, till I was quite spent. I was just ready to die away").¹⁸ Without evidence of sufficient outcry and struggle, juries had no evidence that the women were not willing.

After detailing her own heroic efforts of struggle and outcry, the accuser next needed to "prove" penetration and emission.¹⁹ Testifying to these key elements was humiliating. The demand for details is clear in the reports of the proceedings. Mary Batten testified in 1726 that "they threw me down, and two of them held me while

the Prisoner, - Laud bless me, - what shall I say now, - must I speak plain, - plain English? - and before all these Gentlemen? - I vow I am quite a-sham'd, - I dont know how to speak such a Word, - but if I must, I must, - they held me while the Prisoner ravish'd me.”²⁰ Her hesitation and diction (Laud bless me), rare inclusions in the records this early, serve to demonstrate textually the performance of the necessary unwillingness. Indeed, this interaction appears frequently: either the rape victim tries to skip over the crucial part and has to be asked very direct questions about the penetration and emission, or she uses euphemism and is pushed by the judge to be more explicit. To return to Mary Hicks,

Court: In what Manner did he use ye?

M.H. He forced my Body with what he had.

Court: You must explain yourself.

M.H. -----

Court: What follow'd? Did you perceive -----

M.H. Yes; ----- And the next Day I was so very bad that I could hardly turn myself in my Bed.²¹

Hicks's initial reluctance and euphemism (“He forced my body with what he had”) suggest her hope that she might not have to actually speak the legally required details, to speak what could only be represented by dashes.²² We see some of the consequences of this verbal reluctance in the testimony of Elizabeth Cross, 1740, who, “with the utmost Reluctance, and in a very modest and decent Manner, gave an Account of the Injury she had received, but could not swear to one of the two

Particular Circumstances, which the Law, in such unfortunate Cases, requires to be prov'd.”²³

Composition choices are particularly telling. In Hicks’s testimony, the dashes stand for penetration and emission, yet they also show the accuser speaking that which is not printable. We see this printed coyness in a variety of forms, such as the careful and obvious elisions in Sarah Evans’s testimony (“He then took me up in his Arms, and set me in the Chair again, and then put my legs over his, and - into - half an Hour – Yes”), and this bracketed interruption: “[The Witness express'd herself here in Terms necessary to prove the Fact, and gave such an unparallel'd Account of the Abuse, and of Gibbons's Behaviour, as would be shocking to every chaste Ear.]”²⁴ Although it is legally necessary to speak these unprintables, as Elizabeth Cross found to her detriment, it is also rhetorically necessary to appear as unwilling to speak them as to participate in them. As each accuser tries to maintain her modesty, that modesty starts to look more generic, rhetorically constructed, and inauthentic. The reluctance becomes simply one of the expected elements in the trial and feeds into a jury’s skepticism.

The rhetorical reluctance and modesty of the women cited highlights a key impasse for women who prosecuted for rape. Encountering the systemic suspicion with which men in general and the law in particular approached accusations of rape, they needed to testify to very sexual details and to show their unwillingness to do so. “Fielding’s heroines,” writes Staves, do not initiate proceedings against their attackers because “[a] woman’s willingness to tell the story of her rape threatened of itself to constitute evidence of her immodesty and unchastity, to plunge her into

the category of loose women.”²⁵ Antony Simpson notes that the “natural modesty” of an “overly delicate witness” might easily balk at publicly describing the details of penetration, a reluctance which, as Beattie notes, led many women to prosecute an assault with intent to ravish rather than rape.²⁶ The fictional scenes of assault which we explore here constitute that misdemeanor, not the felony of rape, while still highlighting the strange and speaking silence of sexual assault victims. In *Joseph Andrews* Fanny’s story takes that silence to a parodic extreme, implicitly linking it with the legal need to narrate the assault.

A

II. A “right Judgment of this Affair, on the first Sight”: Witness and Voice

In the primary narrative of the rape trial, then, there is a particular flow of evidence and belief which ends by undermining itself. The accuser needs to have struggled and cried out for rescue, in order to show that she was not willing; she needs to testify to the physicality of the event, with words, so as to prove the “particular Circumstances” required by law, but to avoid sounding as if she is aware of them as a checklist, and she needs to do all this in public, which itself casts a presumptive suspicion upon her. It begins with struggle and outcry, and ends in a socially enforced silence.

In introducing Fanny in Book II of *Joseph Andrews*, Fielding offers a narrative in which the outcries and struggles do elicit rescue. This was the ideal against which a real accuser’s courtroom testimony, with its insufficient cries and missing rescue, was judged. As with the real testimony above, Fanny’s story begins in that first phase, with the necessary struggle and outcry. In starting here, Fielding highlights

the structure of rape testimony. Moreover, this is not Fanny's courthouse narration, but Fielding's omniscient one, so that the reader sits in the posture of eyewitness. This perspective will contrast sharply with that of the characters who come upon the scene afterwards and, as somewhat dispassionate judges, try to determine the truth of the event from testimony only.

Fielding links the outcry and struggle to the dilemma of female voice at the outset. The scene begins with the most "violent Shrieks imaginable in a female Voice," from an unseen "poor Creature" in the night.²⁷ She is on the Downs, away from the main road, in the dark, making a violent outcry. When Abraham Adams, the parson of Joseph's parish and Joseph's companion throughout the novel, comes closer, he sees a "Woman struggling with a Man, who had thrown her on the Ground, and had almost overpowered her." What Adams sees, and the reader sees along with him, establishes Fanny's credibility. It is clearly against her will, as demonstrated by her shrieks and her struggling, and is being accomplished by force ("thrown," "overpowered"). She is remote from habitation, but her outcry triggers her rescue. "The great Abilities of Mr. Adams were not necessary to have formed a right Judgment of this Affair, on the first Sight. He did not therefore want the Entreaties of the poor Wretch to assist her, but ... immediately leveled a Blow at... the Ravisher's Head."²⁸ Adams's "great qualities" are not necessary because seeing the struggle and hearing the outcry he (and the reader) know firsthand that the woman is an "unwilling" party to this assault.

This "right judgment" is atypical in a novel whose subtext is the failure of characters to make right judgments of others. Indeed, the assault almost

immediately becomes one of two competing narratives, with the arrival of a “Set of young Fellows, who came to these Bushes in pursuit of a Diversion which they call *Bird-Batting*.”²⁹ These outsiders hear the testimony of an *alleged* assault, which they treat with skepticism. The reader moves from the position of witness as observer of an event (one who sees), to witness as the person who testifies to a contested truth (one who speaks), and the trial begins.

The subsequent events highlight the difficulty of forming a right judgment. When Adams reports Fanny’s attack to the bird-batters, the defendant counter-accuses Fanny and Adams. “Gentlemen,” he says to the strangers, “you are luckily come to the Assistance of a poor Traveller,” thereby preventing the “barbarous Cruelties” which this “villain,” Adams, and his “wicked Whore,” Fanny, had intended to “exercise” upon him.³⁰ As the bird-batters come upon the scene just when Adams has struck a blow to the attacker’s head with his walking stick, it is not at all clear to them who was led off the main path by deceit, who intended and began to commit an assault, and who was rescued just in time. The passing gentlemen can only weigh the value of competing narratives. Fielding thus draws the reader’s attention directly to the problem of determining the truth, so that the reader pays attention to whom the “young Fellows” determine to be truthful, and why they determine wrongly.

Due to several factors—the need, in Hale’s words, that jurymen in rape trials be vigilant against the “confident testimony of, sometimes false and malicious witnesses,” and the accusers’ need to publicly share unspeakable, unprintable acts of penetration—both judges and jurymen tended to assume that a woman who

brought charges of rape was already somewhat doubtful, if not immodest or malicious.³¹ The bird-batters share this presumptive suspicion, determining that as Fanny's face is dirty, and as she is carrying a purse with some gold in it, "her" version of the attack (which Adams declares) must be a lie.

Fielding keeps Fanny excessively silent throughout this and other similar episodes. Indeed, the men who determine her legal fate do not hear her voice at all. At first, Fanny is a "voice" or a "noise," an inarticulate but emotional expression. She also entreats, testifies, and beseeches, though to Adams's ears only. The reader assumes there are words, but the words are withheld. The closest the reader gets to her speech, with one exception, is when Fanny tells Adams her tale in indirectly reported speech ("She acquainted him, 'she was travelling towards London, and had accidentally met with the person from whom he had delivered her'" and so on).³² She is speaking directly to Adams, but her voice is filtered before it reaches the reader. Otherwise, and to the men to whom she is a stranger, Fanny does not speak. She is silent when the bird-batters approach and Adams tells them her story; she remains silent when her attacker rises and counter-accuses. She does not speak when she and Adams are before the Justice and she is arraigned, verbally abused, and ordered to jail to await trial. She does not speak even when the Justice finally agrees to hear her defense: "*Adams* then began the Narrative, in which, though he was very prolix, he was uninterrupted, unless by several *Hums* and *Ha's* of the Justice, and his Desire to repeat those Parts which seemed to him most material."³³

Giving his heroine such a pronounced silence, Fielding implicitly recognizes the rape victim's dilemma: speaking out against misrepresentations of her character

or lies about her actions might paradoxically confirm those charges. Thus Fielding can defend Fanny only by keeping her silent. As a consequence of the impossibility for women to speak truth in their own defense, all of the bystanders who might assist Fanny not only here but throughout the novel, from the bird-batters and the unnamed Justice of this early scene to the inn-keeper and the passing horseman in Book III, and Justice Frolick in Book IV, presume that the truth about Fanny is what others say of her: she is a thieving whore, an eloping heiress, an adulterous wife, a beggar slut. Her silence is empty and her words would be meaningless because all of these male characters from the respectable middle of society assume that such a woman would of course lie and claim virtue. Nothing she might say could have any effect on a stranger's perception of her truth. Everything Adams says is believed entirely once the Justice knows him to be a gentleman, but Fanny is a virtuous woman only because Adams says she is.³⁴ That the courts themselves might be responsible for impeding a right judgment, that the truth of a situation, the truth of a woman, is an inexpressible dash in the record, exposes a hollowness in the science and art of judgment.

The one time Fanny speaks directly in the series of chapters involving the attempted rape and its aftermath provides Fielding an opportunity to comment on female silence. After the accusation and counter accusation, Fanny suddenly recognizes Adams, who all this time had been hidden by the darkness of the night. The brief dialogue which follows, unheard by any of the others, is entirely about her feelings for Joseph, which she denies. "La! Mr. *Adams*," said she, "what is Mr. *Joseph* to me? I am sure I never had any thing to say to him, but as one Fellow-Servant

might to another.” Fielding quickly assures the reader that “notwithstanding her shyness to the Parson, she loved [Joseph] with inexpressible Violence, though with the purest and most delicate Passion. This Shyness therefore, as we trust it will recommend her Character to all our Female Readers ... we shall not give our selves any trouble to vindicate.”³⁵ Her silence about the inexpressible violence of her passion is undeniable proof of her character and chastity, and need not therefore be defended, or spoken for, even by Fielding himself. This first time the reader hears her voice is only to the effect that she won’t speak, because she is too modest.

Although Fielding offers a resolution for Fanny and rescues her from both rape and misrepresentation, this solution rights no wrongs in the law. Fanny, Adams, and the novelist attribute her close escapes to Providence, to Heaven, and the Deity; the reader attributes those escapes to Fielding’s “authorial privileges.”³⁶ The “trial” of the facts, with its series of elements that can prove a woman virtuous, does nothing of the sort.

A

III. The Credit of the Party Ravished: Character

“The party ravished” writes Hale, “is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury.” This concession to the intuition of the jury comes with guidance: in addition to the elements of struggle and outcry, the accuser must be “of good fame,” and be able to show “signs of the injury, whereof many are of that nature,” observable signs of injury defining, for Hale, “force.” The lack of such “circumstances carry a strong presumption, that her testimony is false or feigned” and again a bit

later, “false and malicious.”³⁷ Only a certain kind of woman in a certain kind of place suffering a certain kind of assault can be considered credible. Her character determines how far her evidence is to be believed, but her evidence also determines her character. Hale’s words dictate a strict narrative, deviations from which suggest that the rape was not rape, but a bad woman acting badly.

The attempted rape scene in *Joseph Andrews* operates within the conditions articulated by Hale, if showing them in an absurd light. The attempted rape of Mrs. Waters in Book IX of *Tom Jones*, which closely echoes that of Fanny but fails to meet some secondary conditions, challenges the conclusion that she is therefore false and malicious. Like Fanny, Mrs. Waters enters as “the most violent Screams of a Woman.” Tom is, like Adams, in the company of a new friend, who declines to assist him in the rescue, as did Adams’s companion. Tom “asked no Questions,” before leaping to the defense. Mrs. Waters, like Fanny, is making an outcry and is struggling. She is far from human habitation, in a place “where it was ... improbable she should find any” relief.³⁸ Like Adams, Tom beats the attacker almost to his death (or he thinks he has), and as with the earlier episode, although the rescuer (not victim) intends to bring the attacker to justice, the attacker escapes. A “trial” of the woman’s character follows, in both novels. The differences between these scenes center on the revelation of character. Where in *Joseph Andrews* Fielding simply reveals Fanny’s true character to the reader, he here leads the reader through a sequence of judgments that mimics the messier discovery of evidence in the course of a trial. Although Mrs. Waters is clearly being forced when Tom rescues her, the revelation of her bad character at first mitigates the guilt of her attacker. Fielding

leads the reader to make that judgment, and then shows why that judgment is wrong.

The scene that Tom interrupts is more explicitly sexual than that in the earlier novel. He “beheld a most shocking sight indeed, a woman stripped half naked, under the hands of a ruffian who had put his garter round her neck, and was endeavouring to draw her up to a tree.”³⁹ The scene as Tom first sees it signals itself as a “rape scenario,” as both Dickie and Staves note, although the retelling in the final chapter of Book IX reveals it as a robbery or murder (depending upon whether he was tying her to the tree or hanging her on it).⁴⁰ In beginning the scene with struggle and outcry in a remote place and foregrounding Mrs. Waters’s half naked state, Fielding leads his reader, both contemporary and modern, to focus on her sexual vulnerability and so to read the scene as an attempted rape.

The scene sexualizes Mrs. Waters, “shocking” though the sight may be. The narrator’s lingering over her exposed bosom and her own halfhearted attempts to cover it after her rescue indicate something of her character, especially in a legal context where whether or not an act was rape depended less on the actions of the attacker than on the character and motives of the woman who accused him.⁴¹ Moreover, although the scene Tom encounters implies her struggle—the attacker is “endeavoring” to draw her to a tree, meeting resistance—it focuses his attention on her state of undress.

The narration continues to guide the reader’s assumptions about Mrs. Waters’s character through her speech. Although like Adams, Tom believes that “Heaven seemed to have designed him as the happy instrument of her protection,” it

is *his* speech that is reported indirectly, not Mrs. Waters's. "Nay," answered she, "I could almost conceive you to be some good angel; and to say the truth, you look more like an angel than a man in my eye." As Fanny's first speech was to deny her violent passion, Mrs. Waters's first direct speech asserts it and transforms her rescue from an act of God to a sexual temptation. The narrator follows Mrs. Waters's eye, describing Tom's angelic resemblance in his "comely set of features, adorned with youth, health, strength, freshness, spirit, and good-nature." If Mrs. Waters sees Tom as a healthy young animal, his first impression of her is equally physical. Mrs. Waters's "well formed and extremely white [breasts] attracted the eyes of her deliverer, and for a few moments they stood silent, and gazing at each other."⁴² Mrs. Waters's quick switch from sexual victim to desiring and willingly desired object calls her modesty and virtue into question.

In rape cases particularly, a woman's character could be central to the jury's verdict, and that character was established in part by her own actions. What the accuser did after the event, in clarifying the picture of her character, could make the event itself, even if she were forced, of no account at all. If she failed to make "fresh discovery" of the offense, "conceal[ing] the injury for any considerable time after she had the opportunity to complain," her testimony could be assumed to be "malicious and feigned"—not hesitant, frightened, confused, or even mentally deficient, but malicious. Her actions revealed her character, and so her credit, and so her truth.⁴³ Several trials where the victim was under twelve seem to have involved a delay of several days, because the girl "was afraid my Mother would beat me," as Susan Marshall was.⁴⁴ In some cases, women did not immediately inform their husbands.

In one case, what can be seen as an attempt to avoid a rape trial is represented as a malicious decision to falsely prosecute. The court found Aaron Bateman not guilty in 1728 when a solicitor testified that prosecutor Elizabeth Boccock and her mother filed rape charges only after failing to negotiate a suitable compensation for the assault. This showed, to the lawyer and apparently to the jury, that they were a “wicked and contentious People.” The question of whether Boccock had been unwillingly forced was no longer asked.

Mr. Tibbalds depos’d, That in July last, the Prosecutor employ’d him against the Prisoners, on the Account of an Assault, she and her Mother saying, they had beat and abus’d her, but not any mention was then made of a Rape, but they not agreeing, for she asked fifty Pounds Damages, the Girl came to him afterwards and said her Mother would indict them for a Rape, and coming another Time, she told him, they had had a Meeting, and the Prisoners agreed to give her three Pounds, and when Acquittances were drawn, Bateman snatch’d the Money again out of her Hand, and she wanted to know in this Case, if she could not indict them for Street-Robbers, upon which he seeing they were a wicked and contentious People told them, he would have nothing to do with them, when the next News he heard, was of this Prosecution, the Jury considering the Matter acquitted them.⁴⁵

The *Proceedings* account moves in a single, loose sentence from Tibbalds’s testimony to the jury’s acquittal, perhaps suggesting that, at least in the compositor’s view, the verdict follows from this evidence. Testimony to “afterwards” also played a role in Mary Hicks’s failed prosecution, when one of the

defendant's friends testified that after Hicks had begun the prosecution, she said she would rather "*marry [Harris] than hang him.*"⁴⁶

The answer, then, to a judge's question of what the woman prosecuting this rape did following the fact supposed to be done overshadows the question of what the accused actually did, in that it tells the jury what kind of woman she is, and therefore how far she is to be believed. Mrs. Waters's actions, from her first desiring examination of Tom, completely demolish her "credit." Although she modestly exclaims that "my Nakedness may well make me ashamed to look you in the Face," she "absolutely refused the most earnest Solicitations" to accept Tom's coat as they walk toward an inn. The narrator relates, in the gently credulous tone characteristic of Fielding, that "tho' I cannot believe that *Jones* was designedly tempted by his Fair One to look behind him, yet as she frequently wanted his Assistance to help her over Stiles, and had besides many Trips and other Accidents, he was often obliged to turn about" and again view her nakedness.⁴⁷ What would have confirmed a jury's dismissal of her claim to have been sexually assaulted, or more importantly, what confirms to the reader that she was no damsel in distress, is the appetite with which she seduces Tom only a few hours later.

Attacks on the woman's reputation or "good fame" were central to the defense. While a defendant's character was relatively protected in trial, the prosecutor's character was fair game. As a consequence, the rape trials are dense with denigrations of the accuser's character and relatively sparing on the defendant's.⁴⁸ Even without her dalliance with Tom, Mrs. Waters could not have successfully prosecuted a rape in 1749. She is not Captain Waters's wife but his

paramour. More damning, Fielding reveals that her attacker, Ensign Northerton, is also her lover. Besides the indication of her moral laxness in general, this fact calls into question her lack of consent in this particular instance. The contemporary understanding of sexual “consent” presumed that consent once given to a particular man implied continued consent, although in legal doctrine that only held true for wives. Hawkins contends that even a “common Strumpet” could prosecute a rape but that remained in theory, and not in the courts.⁴⁹ Mrs. Waters’s lack of a good fame confirms the suspicions earlier aroused by her state of undress, her flirtatious language, and her roving and possessive eye. Fielding leads his contemporaries to understand that Tom judges foolishly and mistakenly in leaping so unquestioningly to the defense of a sexually indefensible woman, and that he is, throughout Book IX, being manipulated by a false, though attractive and friendly, woman.

This pattern replicates the process by which these same truths were discovered in trials. In other words, in Book IX we do not see Fielding exploring what happens in a rape situation, an attempted rape situation, or a falsely reported rape claim. He explores what happens in a rape *trial*, and how truth is determined by people not actually involved. The apparent accusation comes in chapter 2, fully adorned with struggles, outcries, and violence, but once witnesses who know Mrs. Waters, the Sergeant in chapter 6 and the narrator in chapter 7, speak to her reputation, she is shown to have a loose sexual history and to have gone willingly with her attacker, however little she may have anticipated the consequences. The “fact which is supposed to be done” can be dismissed, as “the party ravished” clearly has a bad character. The reader, like the juryman, has presumed (has been led to

presume) that Mrs. Waters is not the kind of woman to be believed. Simon Dickie sees Fielding's own "deep-seated skepticism about believing a woman" in the situation; because she is middle-aged, because she is sexually aggressive, and because she is unchaste, the reader is to disbelieve her cries of rape (though in this scene she does not cry rape, she merely screams for help).⁵⁰ That accurately describes the initial effect these circumstances were likely to have on contemporary readers, but there is nothing untruthful in her words or actions throughout this scene or those surrounding it. In that conventional response we see the limitations of Hale's guidelines rather than their truth.

Having led the reader to dismiss Mrs. Waters's credibility, Fielding steps in as Justice of the Peace, as man of law, to correct this presumption, not to confirm it. The authorial narrator returns to the event to reveal the "real fact" of it. "[W]e have taken uncommon pains to inform ourselves of the real fact, with the relation of which we shall conclude this book."⁵¹ This move, a privilege of the omniscient narrator, also enacts the role of JP, among whose duties was the investigation of the reported crime. This return to the "story" of the event also serves as the third stage of the trial, where the defendant and his witnesses tell a different version of the event. Because in the weird logic of rape trials the victim is suspect, this third phase, in *Tom Jones*, serves to exonerate Mrs. Waters, not her attacker.

In this final chapter of Book IX, Fielding emphasizes the danger Mrs. Waters really did face. Northerton, thinking he had killed a man, desperate and on the run, turned on his companion in order to steal her money. She was alone with him in a remote area, but not for an assignation; he had convinced her first to travel on foot,

to make his escape from authorities less traceable, and then to enter “a large Wood,” again with the purpose of making their flight less public and so less noted. Mrs. Waters absolutely had been tricked into this deserted place. Moreover, in the retelling, she “stood stoutly to her Defence, and ... strongly struggled with her Enemy, screaming all the while for Assistance” until “Mr. *Jones* came to her Relief, at that very Instant when her Strength failed, and she was totally overpowered.”⁵² This version provides the explicit language of resistance that was missing in the first telling and provides the ideal rape trial testimony, even though at this point the reader knows that the attempted crime was not rape (or at any rate, not only rape). The script of the retelling reveals the innocent victim that Mrs. Waters actually is. In reframing the attack, Fielding vacates the chain of judgments dictated by the conventions of the rape trial. The truth is that, seeing an attack and a victim, Tom judged rightly and acted properly. In the failure of conventional and judicial tests, Fielding asserts the primacy of the man of a good heart.

But in leading the reader to misread the scene, Fielding emphasizes the reader’s way of discerning truth. Just as in *Joseph Andrews* the reader notes not simply *that* the Gentlemen judge wrongly but *how* they do so, here it is the reader who is misled by convention and circumstance. Fielding’s use of the trial takes advantage of the very common knowledge that made rape testimonies sound so similar to each other. It is important to remember that the assumptions and structures of the rape trial, of the determination of a woman’s truth, were embedded in the same culture that hosted the novel-reading public. That structure leads the reader-as-jury to dismiss Mrs. Waters’s character, and so Mrs. Waters’s truth. Mrs.

Waters's testimony, at the end of the novel—that she was not guilty of the sexual crimes she was accused of in Book I, about twenty years before the attack in the woods, and that Tom is Squire Allworthy's rightful nephew—provides the novel's happy ending. Presuming that testimony to be “false or feigned” would have had disastrous consequences.

A

IV. “Reduced to certain rules”: Judgment

Joseph Andrews casts significant doubt on the ability of men in general, with no exceptions for men of law, to make right judgments of women because they are either blinded by social constructs or simply lack the unconventional good heart of an Abraham Adams or a Tom Jones. All they have is Hale's test and it is not enough. Fanny is saved only by a romance convention which Fielding overtly ridicules. Everything that is realistic, social or legal, works against her. *Tom Jones* begins with the question of judgment and the good heart, giving us a Tom who misjudges and is misjudged by nearly everyone he meets, misjudgments which drive the plot and drive Tom to despair.

Yet it is worth noting that the guidelines are not entirely discredited. In *Tom Jones*, they do not constitute the oppressively silencing catch-22 that they seem to in *Joseph Andrews*. They are helpful but insufficient, and do not impede the administration of justice. The good justice, the good man, the good reader must combine the guidelines with empathy for a question of law to become rather a question of judgment. “It is the business of the magistrate no less than the literary critic” writes Stephanson of the “lessons” of *Tom Jones*, “to bridge this gap between

code and life, to apply rule, precept, or law to art and life... with intelligence, sensitivity, and humanity.”⁵³ Fielding says much the same thing in the essay which opens Book IX. It is a mistake to see a divide between Fielding’s compassion for his characters and the parodies and criticisms of law and legal structures in his work. The difficulties allow for the act of judgment, which for Fielding outweighs the conclusions of “a” judgment.

Fielding is working through a balance between rules and judgment which had been implicit in the law, but which was shifting. Noting the development of the rules of evidence, John Langbein associates this “substitute regime” of rules “aimed at restricting the potential for the jury to err” with the declining centrality of the judge’s wisdom and discretion across the eighteenth century.⁵⁴ This was noted at the time. The editor of Hale’s *History* writes in his 1736 Preface that Hale’s importance was in deciding that the criminal law, “should be reduced to certain rules, and those rules clearly and plainly understood, that so [sic] there might be as little room left as possible either for erring in or perverting of judgment.”⁵⁵ He promotes the *History* as a template for judges and juries to apply “without erring in or perverting”—or indeed using—their judgment.

The consequence of such an overreliance on the rules, in Fielding’s illustration, is a Fanny falsely accused and a Mrs. Waters too easily dismissed. While Fielding argued against reforms in some areas (such as the limitations of accomplice evidence) and pushed for innovations in others (such as the enlargement of the authority of the magistrate), throughout his career he stoutly defended the JP’s use of discretion. While strict rules might be necessary for the “overgrown Tyrant, who

lords it over his Neighbours and Tenants with despotic Sway, and who is as regardless of the Law as he is ignorant of it," the man like himself, a "Magistrate with less Fortune, and more Knowledge," was so bound up in restrictions that "every Pettifogger" could "make him tremble."⁵⁶ In his 1751 *An Enquiry into the Causes of the Late Increase of Robbers*, Fielding argues for the freedom and discretion of judges to either caution juries about weak evidence or choose to exclude it: the judges, not the rules, should make that determination. "Under the Caution of a good Judge, and the Tenderness of an *English Jury*," he writes, of a situation where the only witness is an accomplice, "it will be the highest Improbability that any Man should be wrongfully convicted; and utterly impossible to convict an honest Man." Perhaps Fielding really believed it impossible. At any rate, he wished the decision to lie with the good judge and the tender jury, not with rules of evidence which he found to be often "full of Confusion and Contradiction, I had almost said of Absurdity."⁵⁷

¹ Stephanson writes that Fielding's legal references lead the reader to explore "the epistemological problems arising from the process of judgement itself" in the minds of characters. "Fielding's 'Courts': The Legal Paradigm in *Tom Jones*," *English Studies in Canada*, 14:2 (1988), 152-169, p.154. In a parallel observation, Hal Gladfelder notes that Fielding is troubled by "the problems inherent in human testimony and witness [which] cannot be overcome by the rules of evidence," primarily but not only in *A Clear State of the Case of Elizabeth Canning. Criminality and Narrative in Eighteenth-Century England: Beyond the Law* (Baltimore, The Johns Hopkins UP, 2001) p. 179.

² Ian Bell, *Literature and Crime in Augustan England* (New York, Routledge, 1991), p.205. Bell discusses the farcical trial which follows the attack on Fanny as a satire on ill-prepared Justices of the Peace, but does not consider the attack in the light of a crime here or in his *Henry Fielding: Authorship and Authority* (NY, Longman, 1994).

³ Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore, The Johns Hopkins UP, 1992) p. 73.

⁴ Simon Dickie, "Fielding's Rape Jokes," *The Review of English Studies*, 61: 251 (2010), 572-590, p.573.

⁵ Sandra Macpherson, *Harm's Way: Tragic Responsibility and the Novel Form* (Baltimore, Johns Hopkins UP, 2010) pp. 98, 99.

⁶ Susan Staves, "Fielding and the Comedy of Attempted Rape," in Beth Fowkes Tobin, ed., *History, Gender, and Eighteenth-Century Literature* (Athens, U of Georgia Press, 1994), 86-112. "In Fielding's day the law was closer to the older view of no harm, no punishment. None [of the fictional attempted rapes] do enough physical damage to attract serious legal attention." p.104.

⁷ J.M. Beattie *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford, Oxford UP, 2001), pp 114, 268. See also John H. Langbein, *The origins of Adversary Criminal Trial* (NY, Oxford UP, 2003) on JPs as "substantial citizens" and "local amateurs" and on jurors as "untrained in law and often inexperienced in adjudication." p.321.

⁸ Langbein outlines the historical development from citizen accusing citizen (what Langbein calls the "Accused Speaks" model) to the more modern lawyer v. lawyer model. Prosecutors did not generally

have representation until defendants began to have representation, which was “relatively uncommon until the 1780s.” *Adversary Criminal Trial*, p. 196. See also Douglas Hay, “Controlling the English Prosecutor,” *Osgoode Hall Law Journal*, 21:2 (1983), 165-186.

⁹ William Hawkins, *A Treatise of the Pleas of the Crown* (London, E Sayer, 1724.) Hawkins is generally regarded with Matthew Hale as one of the “standard authorities of the day” according to Hugh Amory, “A Preliminary Census of Henry Fielding’s Legal Manuscripts,” *Papers of the Bibliographical Society of America*, 62 (1968), 587-601, p.599. Malvin Zirker, in his analysis of Fielding’s legal writings, notes that “Fielding’s most important authorities are Coke, Sir Matthew Hale, and William Hawkins.... Fielding’s firm command of Coke, Hale, and Hawkins reflects his mastery of his subject and his professional awareness of where the law was to be found.” *An Enquiry into the Causes of the Late Increase of Robbers and Related Writings*. Ed. Malvin Zirker (Middletown, Wesleyan UP, 1988), pp. xxxi, xxxii.

¹⁰ Hale writes “It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.” *Historia Placitorum Coronae: The History of the Pleas of the Crown* Vol. I (London 1736) p.635. See G. Geis, “Lord Hale, Witches, and Rape,” *British Journal of Law and Society*, 5.1 (1978), 26-44, p.26. Susan Brownmiller observes much the same thing in *Against Our Will: Men, Women and Rape* (NY, Simon and Schuster, 1975), pp.385-387.

¹¹ *Old Bailey Proceedings Online*, www.oldbaileyonline.org, accessed 15 January 2016.

¹² J.M. Beattie, *Crime and the Courts in England, 166-1800* (Princeton, Princeton UP, 1985), p.402.

¹³ Hale, *History* I, pp.635, 634.

¹⁴ William Blackstone, *Commentary on the Laws of England*. Vol. IV (Oxford, Clarendon Press, 1770), 4th ed., pp. 210-216.

¹⁵ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.0, 22 January 2014), October 1730, trial of John Collier (t17301014-36).

¹⁶A rape victim might employ an attorney to draw up her indictment, but generally neither prosecutor nor defendant was represented by counsel during the trial, which was still widely seen as an “altercation” between “citizen accuser and citizen accused.” Langbein, *Adversary Criminal Trial*, p.47.

¹⁷ *Select Trials at the Sessions-House in the Old-Bailey* Vol. I (London, J. Applebee, 1742), p. 344-5.

¹⁸ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 27 August 2015), July 1718, trial of Jacob Wykes John Johnson (t17180709-37); *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 27 August 2015), August 1725, trial of John Pritchard (t17250827-74).

¹⁹ Hale notes that only penetration actually needed to be proved. “To make a rape there must be actual penetration ... and therefore *emissio seminis* is indeed an evidence of penetration, but singly of itself it makes neither rape nor buggery... But the least penetration maketh it rape or buggery, yea altho there be not *emissio seminis*.” *History* I, p.628. However, courts continued to demand proof or testimony of both, and Hawkins states that “no Assault on a Woman ... if it proceed not to some Degree of Penetration, and also of Emission, can amount to a Rape.” *Treatise*, p.108.

²⁰ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 17 May 2016), March 1726, trial of John Simmons (t17260302-17). Antony Simpson quotes this passage in full in “The ‘Blackmail Myth’ and the Prosecution of Rape and Its Attempt in 18th Century London: The Creation of a Legal Tradition,” *The Journal of Criminal Law and Criminology*, 77.1 (1986), 01-150, p.130.

²¹ *Select Trials* Vol. I, p. 345. *The Old Bailey Proceedings* version is not given in dialogue form. In that text there are no dashes, but instead a parallel parenthesis: “he did at length force her Body, put what he had into her, and - (which though the Exactness of our Law makes necessary to be express'd in Court, I depend upon it, the Modesty of Female Readers will excuse me, if I omit, and leave it to them to supply the Omission).” *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 17 May 2016), May 1723, trial of John Harris (t17230530-26).

²² See Simpson, “The “Blackmail Myth.”

²³ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 27 August 2015), September 1740, trial of William Higgs, alias Haikes (t17400903-30). The two are penetration and emission, but see note 20.

²⁴ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 27 August 2015), December 1735, trial of Edward Jones (t17351210-70); *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 27 August 2015), February 1739, trial of George Haggis Richard Keeble Thomas Gibbons (t17390221-31).

²⁵ Staves, "Comedy," p.105.

²⁶ See Simpson, "The Blackmail Myth," p.130, and Beattie, *Crime and the Courts*, p.129.

²⁷ Henry Fielding, *Joseph Andrews*, Homer Goldberg, ed. (New York, W.W. Norton, 1987), p. 107.

²⁸ *Op. cit.*, p. 108.

²⁹ *Op. cit.*, p.110

³⁰ *Op. cit.*, p. 111.

³¹ Hale, *History*, I, p. 636.

³² *Op. cit.*, p. 109.

³³ *Op. cit.*, p. 117.

³⁴ Of course, Adams is only accepted as a gentleman by the Justice after he is recognized by a squire from Lady Booby's neighborhood. The squire says to the Justice, "I assure you Mr. *Adams* is... a Gentleman of very good Character...I am convinced of his Innocence.' 'Nay,' says the Justice, 'if he is a Gentleman, and you are sure he is innocent, I don't desire to commit him.'" pp. 116-117.

³⁵ *Op. cit.*, p. 113.

³⁶ *Op. cit.*, pp. 109, 210, 238. Bell, *Literature and Crime*, p.207.

³⁷ Hale, *History* I, pp.633, 635.

³⁸ Henry Fielding *Tom Jones*. Ed. Sheridan Baker. (NY, WW Norton &Co., 1995), pp.318, 19.

³⁹ *Op. cit.*, p.319.

⁴⁰ Dickie, "Fielding's Rape Jokes," 585; see Staves, "Fielding and the Comedy of Attempted Rape," pp.94-95.

⁴¹ See Langbein, *Adversary Criminal Trial*, 199. See also Beattie, *Crime*, pp. 440-442.

⁴² *Tom Jones*, p. 319.

⁴³ Hale, *History*, I, pp. 633, 632.

⁴⁴ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.2, 04 June 2016), October 1735, trial of Julian Brown (t17351015-28).

⁴⁵ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 7.0, 16 December 2014), October 1728, trial of Aaron Bateman Charles Cook (t17281016-50).

⁴⁶ *Select Trials* I, p.346.

⁴⁷ *Tom Jones*, pp. 320, 321.

⁴⁸ Langbein, *Adversary Criminal Trial*, pp.198-9.

⁴⁹ Hawkins, *Treatise*, p.108. Hale notes that “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for ... the wife hath given up herself in this kind unto her husband, which she cannot retract.” In earlier times, he notes, the same presumption applied to those in “unlawful cohabitation” but “this is no exception at this day ... for the woman may forsake that unlawful course of life.” p.629.

⁵⁰ Dickie, “Fielding’s Rape Jokes,” p.586.

⁵¹ *Tom Jones*, p. 335.

⁵²Op. cit., pp. 336-7.

⁵³ Stephanson, “Fielding’s ‘Courts,’” p.166.

⁵⁴ Langbein, *Adversary Criminal Trial*, p.330.

⁵⁵ Hale, *History* I, p. xiv.

⁵⁶ Fielding, *Enquiry*, p.72.

⁵⁷ Op. cit., pp. 161, 162.