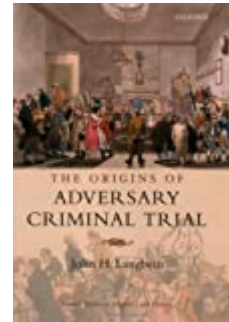


John H. Langbein. *The Origins of Adversary Criminal Trial*. Oxford: Oxford University Press, 2003. xxii + 354 pp. \$50.00 (cloth), ISBN 978-0-19-925888-8.



Reviewed by Allyson May (Toronto)

Published on H-Albion (March, 2004)

The Origins of Adversary Criminal Trial is the culmination of a research project begun some twenty-five years ago, drawing together and elaborating on findings published in a ground-breaking series of journal articles.[1] Dissatisfied with the modern form of the Anglo-American criminal trial, John Langbein set out to uncover the history of its development. In the process he has indeed, as the series editor notes, “entirely transformed our knowledge of what happened, when it happened, and why” (p. v).

“The lawyer-conducted criminal trial,” Langbein writes, “appeared late in English legal history,” and developed “quite rapidly” (p. 2). Before the eighteenth century, the criminal trial did not take the form of a professional adversarial contest. Although criminal prosecutions were carried on in the name of the King, there was no system of public prosecution, and the state’s involvement in prosecution was extremely limited. Law officers of the Crown prosecuted those accused of treason, and from the Middle Ages any violent or suspicious death was investigated by the coroner, who convened a jury to assist him. But in the overwhelming majority of criminal prosecutions, the state played no role at all. Victims of crime bore the chief responsibility for bringing offenders to justice; their pursuit and apprehension of a suspected felon and willingness to take that person before a

local magistrate was crucial. English criminal justice was thus rooted in private prosecution and, while there was no rule forbidding private prosecutors to engage counsel, they did not do so until the opening decades of the eighteenth century.

Just as the victim was ultimately responsible for the prosecution of a felony, the accused was required to conduct his or her defense. Although defendants were not allowed to testify on oath before 1898, their unsworn response to the charges laid was a fundamental determinant of the outcome of a trial. Lawyers could in theory be called upon to argue a point of law, but they were forbidden to speak to the facts for the defense in felony trials. Legal assistance in answering the charges was thought to be unnecessary; worse still, it might tend to obscure rather than promote a true determination of guilt or innocence. In the early modern period the felony trial thus consisted of an amateur “altercation” between the victim of the crime, or another private individual acting on that person’s behalf, and the accused. The “accused speaks” trial, as Langbein has designated it, was a “contest of citizen equals” (p. 109).

The entry of lawyers into criminal proceedings has a highly complex history, but as Langbein has made clear, where the felony trial was concerned it owed above all to new prosecutorial initiatives. Lawyers originally en-

tered criminal proceedings on the side of the prosecution rather than the defense, and the first to be employed came from the lower branch of the legal profession. The main impetus came from institutional prosecutors: the Royal Mint, the Bank of England, the Post Office, and the Treasury all engaged their own solicitors to organize criminal prosecutions on their behalf in the opening decades of the eighteenth century. According to the strict letter of the law, the prohibition against defense counsel in felony trials remained in effect, but by the mid-1730s the bench had taken the “epochal decision” to permit their presence, although their courtroom activities were restricted. Judicial tolerance of defense counsel was an “evening up” exercise intended to correct a new imbalance in the courtroom caused not only by lawyer-driven prosecutions but also by another new development, the government rewards offered for convictions, which had the unwelcome side effect of stimulating false prosecutions. As Langbein points out, however, it is misleading to view this development as the result of any considered “decision” on the part of the English judiciary. The change more likely came about in a piecemeal fashion, the result of individual exercises of judicial discretion rather than a collegiate determination to change the rules. The “lawyerization” of the English criminal trial was the ad hoc result of various developments rather than any one, considered plan.

In Langbein’s view, the results were disastrous: “Adversary criminal procedure,” he writes, “exhibits two striking defects ... the *combat effect* and the *wealth effect*” (p. 1). The job of the advocate is to win, and “[w]inning often entails tactics that distort or suppress the truth” (p. 1). Adversary procedure also bestows an enormous advantage to the wealthier party—and that party is seldom the accused. It is worth noting that the early-nineteenth-century bar, including the most prominent criminal barristers, agreed. When Parliament began to consider the next step in the development of adversary procedure, a prisoners’ counsel act that would allow defense counsel to address the jury, the bar resisted, pointing precisely to the combat and wealth effects cited by Langbein.[2] Asked whether they believed adversarial trial would be the best mode of investigating truth, their answer was a resounding No!

The Origins of Adversary Criminal Trial has its own roots in an engagement with the present. Langbein believes that the common law “took a wrong turn” in the eighteenth century and seeks to convince the reader of this belief. “[L]awyerization of the trial,” he writes, “was a response to the failure to develop a reliable and effective

system of pretrial criminal investigation ... the failure to understand that criminal investigation should be a public good” (p. 333). His preferred alternative was “on display across the English channel”: the Roman-canon procedure used in the European courts, which gave the court both responsibility for seeking truth and the investigative authority and resources required to do so. Whether he will succeed in convincing Anglo-American practitioners of the superiority of the Continental system of criminal justice is open to question. There is no question, however, about the value of this study to legal history. While James Stephen identified the entry of lawyers as the “most remarkable change” in the history of the English criminal trial, he misdated their entry.[3] John Wigmore similarly misdated the development of the character, hearsay, corroboration, and confession rules governing the admission of evidence.[4] That Langbein has corrected these errors is no mean feat in itself. He was able to do so by turning to what are known as the Old Bailey Sessions Papers, commercial, pamphlet accounts of the common or garden variety of criminal trial, rather than relying on the atypical *State Trials*, and drawing historians’ attention to this source—now available online[5]—is another of Langbein’s contributions to the field. But more important still, and regardless of whether one agrees that the criminal trial went astray in the eighteenth century, he has convincingly explained the eighteenth-century developments. Deeply researched, *The Origins of Adversary Criminal Trial* will remain the standard reference work on the history of the English criminal trial for years to come. It is a must-read not only for legal historians but for every practitioner active in the criminal courts.

Notes

[1]. “The Criminal Trial before the Lawyers,” *University of Chicago Law Review* 45 (1978): pp. 263-316; “Shaping the English Criminal Trial: A View from the Ryder Sources,” *University of Chicago Law Review* 50 (1983): pp. 1-136; “Historical Foundations of the Law of Evidence: A View from the Ryder Sources,” *Columbia Law Review* 96, no. 5 (June 1996): pp. 1168-1202; and “The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors,” *Cambridge Law Journal* 58, no. 2 (1999): pp. 314-365.

[2]. See Allyson N. May, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill: University of North Carolina Press, 2003), chap. 7.

[3]. *A History of the Criminal Law of England*, vol. 1 (London, 1883), p. 424. Working from the evidence of the *State Trials*, Stephen mistakenly believed the change did

not occur before the second half of the eighteenth century.

[4]. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed. (1940).

[5]. See H-Albion review of *The Proceedings of the Old Bailey, London, 1674-1834*, <http://www.h-net.org/mmreviews/showrev.cgi?path=397>. A fully searchable on-line edition of the *Proceedings of the Old Bailey* can be viewed at <http://www.oldbaileyonline.org/>.

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Citation: Allyson May. Review of Langbein, John H., *The Origins of Adversary Criminal Trial*. H-Albion, H-Net Reviews. March, 2004.

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