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Criminal trial procedure in eighteenth-century England: the impact of lawyers

By David Lemmings

John Langbein's work on the English criminal trial, culminating in *The Origins of Adversary Criminal Trial*, has generally transformed our understanding of how the modern Anglo-American 'lawyerised' procedure came about. But for a social historian like me, who is interested in the rise and rise of the lawyers and other quasi-ministerial professionals from the sixteenth century, his work also forms a crucial chapter in the long story of professionalization in law and governance, and the effective marginalization of lay people.

Langbein's extensive studies of Old Bailey trials have helped to identify the eighteenth century as a watershed in this story. The origins of the lawyerised trial lay in the growth of semi-professional policing and official prosecution in Georgian London, then subject to unprecedented public concerns about crime. Under Queen Anne and the first two Georges the central government took an unprecedented interest in the prosecution of notorious crimes. As their business, and their exposure to crime increased from the end of the seventeenth century, several of the departments of state – the Treasury, the Mint, the Post Office and the Bank of England - appointed an officer who took responsibility for the investigation and prosecution of criminal offences, and increasingly they tended to fee counsel too. Similarly, the solicitor for the City of London was prosecuting felony in the 1730s, and it seems these institutional prosecutions progressively influenced private prosecutors, because after mid-century there is evidence

from various parts of the country of solicitors and attorneys prosecuting cases for private individuals.[1] Professional prosecution begot professional defense. Following evidence of a trickle of criminal cases prosecuted by counsel from the beginning of the century, several historians have drawn attention to the relatively sudden appearance of counsel partially representing defendants in felony trials at the Old Bailey and in the Surrey assize proceedings from the mid 1730s, despite the longstanding judicial prohibition against their appearance, other than to speak on issues of law.[2]

But how precisely did this happen? Langbein's astute detective work has now revealed that this important shift in courtroom practice followed hard on the heels of a series of scandals by which innocent defendants were prosecuted on the initiative of unscrupulous thief-takers and 'Newgate solicitors' who invented evidence and coached witnesses with the aim of profiting from rewards for convictions. Also the practice by which London magistrates keen to break up gangs admitted accomplices to give evidence against their fellows in return for immunity from prosecution was probably adding to the anxiety about the dangers of unsafe convictions on perjured evidence. In these circumstances he conjectures that the common law judges who presided at the Old Bailey and in the crown courts on the Home circuit must have come to realize that the intervention of interested quasi-professionals in the preparation of cases had tipped the balance of the criminal trial in favour of the prosecution, to the extent that there was a growing danger of juries being persuaded to convict by an accumulation of unsafe or insufficient evidence. Their response was to facilitate further professionalization. Confronted with such major flaws in the operation of the trial process, it appears that

individual trial judges used their discretion to permit barristers to stand in for defendants by examining and cross-examining witnesses, therefore 'evening up' the balance of justice and enabling more rigorous testing of the prosecution evidence.[3]

However it was taken, such a decision was a momentous one for the future development of the criminal trial, and for the representation of lay voices. Certainly it was the presence of counsel for the defense in a growing number of cases – especially after the 1780s when their numbers expanded considerably – which seems to have been ultimately responsible for the increasing application and full development of exclusionary rules of evidence which became standard by the nineteenth century.[4] Although defence barristers were not permitted to speak directly on behalf of their clients before 1836, and even in 1800 two-thirds of the trials at the Old Bailey had no lawyers, the presence of lawyers in a significant minority of cases facilitated the gradual development of the trial process into a formally-structured and sequenced dialogue between 'cases' for the prosecution and the defense, thereby helping to consolidate modern ideas about the prosecution's burdens of production and proof.[5] Ultimately the trial's purpose was transformed into providing the defense with the opportunity to test the prosecution's case.[6] Already by the 1750s at the Old Bailey the early consequences of this shift were becoming clear. In the case of Elizabeth Woodcock, tried in October 1754 for stealing a few shillings from a drunken man in an alehouse, Lord Chief Justice Ryder stopped the case after the witnesses for the prosecution had been heard, the victim's evidence having been undermined by the counsel for the prisoner.[7] Directed verdicts like this suggested that the burden of adducing sufficient evidence lay with the prosecution, and allowed the

accused to remain silent. The application of the privilege against self-incrimination to criminal defendants followed naturally, and was firmly entrenched in the nineteenth century. But even in 1790 the leading defense counsel William Garrow was confident enough of this principle – and of his powers - to rely upon his own judgment as to when his clients had a case to answer. Defending the coachman William Hayward, who was accused of stealing a chariot harness from his former employer, his questioning of the prosecution's witnesses inferred that the harness was a legitimate perquisite in lieu of unpaid wages, while the employer was mean-spirited and vindictive. He thereupon declared 'I shall call no witnesses in such a case; and I advise the coachman to say nothing', after which the judge directed the jury to return a verdict of not guilty.[8]

Leaving aside arguments about the improved prospects for defendants, under these conditions it appears that lay voices were progressively controlled and partially muted by the presence of the lawyers, both at the committal hearing and the trial. By the 1820s, when the impact of the lawyers' work was becoming apparent to contemporaries, the defendant was often substantially excluded from the proceedings; witnesses were clearly being selected and carefully prepared for what they would prove according to the solicitor's brief; and members of the jury were reduced to interested but passive spectators of the trial: they voted, but had no active voice. In other words, the criminal trial was well on the way to assuming its modern forms.[9] Parliament put the seal on this process in 1836 with the Prisoner's Counsel Act, which established the rights of persons accused of criminal offences to be fully represented by counsel, who in cases of felony could 'make full Answer and Defence'.[10]

It is possible to gain a sense of the transformation in the proceedings which accompanied professionalization by comparing the increasingly formal conduct of early nineteenth-century trials with those of a century earlier. Before 1700 the absence of lawyers was regarded as fundamental because felony trials were organized around the principle that judges and jurors had to make their discretionary decisions about verdict and (especially) sentence on the basis of an unmediated exchange between the defendant and the prosecutors. As Langbein has shown very clearly, pre-trial and trial were structured to force the accused to speak and exculpate himself.[11] Above all, judge and jury needed to decide whether the gravity of the offence and the circumstances and character of the accused deserved death or some lesser sanction, such as transportation or imprisonment. That was usually the main purpose of the trial. Essentially, at a time when the lack of investigative policing meant that most alleged offenders were caught red-handed, little incriminating evidence was excluded, and there was no substantive presumption of innocence, the trial was an opportunity for the accused to respond to the victim's accusation, and for judge and jury to assess his or her explanation for each fact alleged, before making their determinations. So prisoners were required to conduct their own defenses - as cross-examiner, witness and advocate - with the result that the proceedings normally amounted to a 'rambling altercation' between the prosecution witnesses, the defendant, and the judge.[12]

Admittedly, a spirited defense was relatively unusual: when confronted with the usual prosecution evidence, which found them caught in the act of a theft, identified by

accomplices, or found with stolen goods, defendants most frequently had little to say for themselves. But that was probably because they were guilty, at least before the scales were tipped against defendants by professional prosecutors. Indeed, in the context of so many trials where the defendant had been caught virtually red-handed, the unmediated victim versus prisoner contests seemed fair to many contemporaries.[13] Widespread public doubts only clearly appeared when accumulated experience of the arts and partizanship of prosecution lawyers began to be suspected of creating circumstantial cases that would have failed without their efforts.[14] It is important to understand that decision-making on the basis of observing direct altercations between the protagonists genuinely represented the historic participatory tradition of the common law criminal trial. Justifying the common law rule against defense counsel in his *Treatise of the Pleas of the Crown*, published in 1721, William Hawkins insisted:

> It requires no manner of Skill to make a plain and Honest Defence, which in cases of this Kind [i.e. in serious criminal cases] is always the best; the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own. … Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be

> discovered from the artificial Defence of others speaking for them.[15]

Hawkins's apparent faith in the unvarnished transparency of guilt or innocence has mostly been ridiculed by nineteenth and twentieth-century commentators, but without denying the substantive achievements of justice wrought by counsel in criminal practice, such views are somewhat anachronistic.[16] His position clearly had its roots in the origins of the trial by jury as a process for representatives of the community to discover their own knowledge about the crime and the protagonists.[17] Although by the eighteenth century the jury was hardly expected to have eye-witness evidence of the crime itself, the encouragement of an unstructured altercation and relatively unfettered jury access to all kinds of incriminating evidence represented contemporary faith in the jurors' ability to make decisions about the protagonists' characters and community standing on the basis of their immediate impressions and previous (usually extensive) experience of sitting in judgement on similar cases. By contrast with their modern counterparts, who sit on juries for one case and consider prosecution and defense 'cases' passively and inscrutably before rendering their verdicts, these jurors were effectively expert witnesses, as well as lay judges, for they even conveyed their impressions to the court before the case was closed, through extensive informal discussion with the judges.[18]

Given its inquisitorial and subjective character, this kind of interactive vernacular fact-finding by the jurors was still akin to the 'unofficial knowledge' central to the operation of the medieval jury, who were expected to investigate the circumstances of the

crime for themselves.[19] Certainly there were still traces of the more active and participatory roles of medieval juries in the early eighteenth century. For example, jurors would often interject, especially when witnesses were telling their stories.[20] Examination of just one Old Bailey session can produce several instances. In *R. v. Richard Marshall et al*, for burglary and receiving stolen goods, tried in October 1732, the principal witness was John Griffin, alias 'King John', who had turned king's evidence in return for immunity from prosecution. He related how on the night of 27 September he and Marshall had twice burgled the house of Henry Carey in Cold Bath Fields, but after being disturbed on the second occasion by a woman calling out 'Who's there', Marshall went back again by himself to get more booty. One of the jurors was obviously unconvinced, because he asked how the defendant had the nerve to go back a third time, and Griffin thereupon explained that they had left some of the household goods outside the premises, so there was little danger of discovery.[21] And at the same sessions, in the trial of Thomas Headly and Henry Chapman for a highway robbery on George Young, an apothecary, a juror intervened in the trial with a pointed question and challenge to the evidence of a witness who had given the prosecutor a character for honesty and good standing, confidently relating a personal exchange with Young which suggested that he - and the witness - were not trustworthy at all. The judge clearly thought this was a legitimate contribution to the proceedings, for he did not intervene or put the juror on his oath (as his successors did later in the century); and no doubt such an injection of doubt from within their own number assisted in the jury's eventual decision to acquit the prisoners.[22] It is true that judges were normally able to control jury prejudices and apparently wayward decisions by their positive instructions, but there are even a few examples of

late-seventeenth century juries arguing with the bench over issues of fact and law, and not only in cases which were influenced by political partizanship.[23]

So, like the defendants themselves, the jurors were remarkably active participants in criminal trials before the proceedings were colonised by the lawyers. Indeed contemporary sessions charges tended to celebrate the constitutional role of juries, even describing them as 'the Representatives of the People of England'.[24] But although its formal decision-making power was not diminished, and its autonomy increased somewhat, the jury was largely silenced as an active voice by the professionalization of the criminal trial, beginning in the mid-eighteenth century.[25] It was probably no coincidence that in 1738, just as barristers were being allowed to intervene in criminal trials and began to control the jury's access to the evidence and the defendant, a ruling in a civil suit effectively removed the civil jury's theoretical right to decide a case according to their personal knowledge, thereby subjecting them to formal judicial control and an order for a new trial in case of private knowledge being disclosed as an influence on the verdict.[26] Indeed, eighteenth-century judges began the process that Simpson has described as the 'progressive dethronement of the jury' by formulating new rules of law which restricted the scope of jury decision-making.[27] Moreover, there were legislative attempts to ensure that criminal trial juries were socially exclusive, and some civil juries were carefully selected for their elite status.[28] Certainly Lord Mansfield famously relied on special juries of merchants to advise and adjudicate commercial disputes. It is less well known that he also used special juries of 'gentlemen of fortune' in some other cases, especially prosecutions for *criminal conversation*, where jurors were expected to

understand and enforce gentlemanly notions of honour.[29] In fact these events appear to have been symptomatic of a more general process, by which virtually all vernacular forms and expressions of knowledge were progressively devalued. As Malcolm Gaskill has suggested, in the eighteenth century progressive social differentiation meant that 'opinion generated by custom, memory, rumour and local knowledge, and the popular modes of demonstrating that opinion, no longer carried as much weight', and he has shown that this was clearly reflected in several criminal law proceedings. Rational rules about the admissibility of evidence were accompanied by social prejudices about its origins and modes of expression. In cases of murder even 'quasi-professional' medical testimony was preferred to the vernacular observations and beliefs of lay people, and hearsay – the currency of community values – was in the process of being excluded.[30]

Here was a clash between a culture of common sense typical of everyday life among ordinary people, as opposed to more scientific Enlightenment ideas about degrees of probability which attach to various forms of testimony, ideas associated with the discourse of the educated middle classes.[31] Their effects on the jury have been closely observed. As Barbara Shapiro has shown, empirical standards of proof associated with John Locke and other philosophical writers were current among legal thinkers at the end of the seventeenth century, and after 1750 phrases like 'beyond reasonable doubt' and 'to a moral certainty' began to be used by judges in their instructions to jurors about the standards of proof required for conviction. Certainly by the 1820s, when Thomas Starkie's *Practical Treatise on the Law of Evidence* was published and widely assimilated, jurors were expected to apply rational tests of probability, and to avoid

deciding on ‘light, trivial and fanciful suppositions, and remote conjectures’.[32] Moreover, the criminal trial court was well on the way to its modern ‘bifurcation’ into separate spheres for lawyers and jury, with the flow of information strictly regulated by the professionals.[33]

By the later eighteenth century, then, as John Langbein’s splendid book shows so clearly, profound shifts in the administration of the criminal law were underway. I would argue that taken with parallel changes in law enforcement and punishment – centering on policing and the penitentiary, they seem to betoken new attitudes and fresh ambitions for positive governance. It was not just that correcting plebeian culture was regarded as the primary mission of the criminal justice ‘system’, as it was being elaborated in new penal and policing ‘solutions’ to the growing crime ‘problem’. In addition lay people were being marginalized from the administration of justice in favour of professionals and officials, despite its origins and continued ideological associations with the participatory traditions of the common law tradition. This was hardly a coincidence. Certainly some of these shifts were the practical consequences of genuine concerns about what was perceived as a rising tide of criminality, especially in the major urban centres, and in London above all. Indeed in the early years of the century many anti-crime measures were adopted in a piecemeal, ad hoc, fashion that can hardly be characterized as any coherent ‘policy’. But from their beginnings these changes were also connected with the tendency for polite opinion to coalesce around criticism of some principal features of popular culture, such as casual physicality and the legitimacy of violence in interpersonal relations, and social ordering by folklore, intuitive knowledge and gossip.

Moreover, and to return to the subject of John's book, the demise of the 'accused speaks' trial symbolized a profound shift in the institutional forms of government. The old form of lawyer-free trial represented an exchange between citizen prosecutors and citizen defendants, 'representative' partners with jurors, in the sense that ordinary people were expected to participate fully in the trial process and argue their cases for themselves as free subjects. In this sense, besides its fact-finding role, in a broader way the criminal trial was a point of contact and exchange between central government and the common people at a time when the formal institutions of government were hardly democratic. As Lord Hardwicke said (in 1747), 'I look upon the administration of justice, as the principal and essential part of all government. The people know and judge of it by little else'.[34] This was a comment derived from the world of Coke and Hale, where courts, rather than parliaments, were primary institutions of representative governance.[35] But just as eighteenth-century parliaments were becoming law-making machines, and representing themselves as the repositories of the 'will of the people', lawyers were taking over the eighteenth-century criminal trial. Henceforward Everyman and Everywoman tended to experience law and government as something done in their names, rather than with their direct participation.

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[1] J.H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003), esp. 113-27.

[2] Beattie, *Crime and the Courts*, 356-7; id., 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review*, ix (1991), 226-8; J.H. Langbein, 'The Criminal Trial before the Lawyers', *University of Chicago Law Review*, xlv (1978), 311-14.

[3] Langbein, *Adversary Criminal Trial*, 148-77. See also Beattie, *Policing and Punishment*, 395-401.

[4] While some of the crucial rules controlling or excluding evidence detrimental to the accused seem to have originated before significant lawyerisation, the insistence of counsel helped to transform them into law (Langbein, *Adversary Trial*, 196, 242-4).

[5] Langbein, *Adversary Crimina Trial*, esp. 258-66. Also id., 'Shaping', 130-1; Beattie, 'Scales of Justice', 232-6, 248-50.

[6] Langbein, *Adversary Criminal Trial*, 319.

[7] Lincoln's Inn Library, Harrowby MSS, doc. 14, pp. 4-6.

[8] *OBSP*, Jan. 1790, p. 230ff. (*R. v. Hayward*). See generally Langbein, *Adversary Criminal Trial*, 277-84; id., 'The Historical Origins of the Privilege against Self-incrimination at Common Law', *Michigan Law Review*, xcii (1993-4),1066-71.

[9] Langbein, *Adversary Criminal Trial*, ch. 5. See also C. Cottu, *On the Administration of Criminal Justice in England; and the Spirit of the English Government* (1822 [1st edn., 1820]), 33-7, 86-9, 93-4, 105-6; Langbein, 'Criminal Trial before the Lawyers', 273, 307; id., 'Prosecutorial Origins', 328-32.

[10] Beattie, 'Scales of Justice', 250-8; 6&7 Wm. 4, c. 114, s. 1. The committal hearing was regulated –and the accused's right to silence enforced – by legislation of 1848 (Langbein, *Adversary Criminal Trial*, 276).

[11] Langbein, *Adversary Criminal Trial*, 20-21, 35-6, 48-61.

[12] Ibid., chap.1. Also id., 'Shaping', 41, 131; id., 'Criminal Trial before the Lawyers', 282-3; id., 'Privilege against Self-incrimination', 1047-65.

[13] Langbein, *Adversary Criminal Trial*, 33-4.

[14] Beattie, 'Scales of Justice', 254-5.

[15] *Treatise*, ii. 400.

[16] Compare Langbein, 'Criminal Trial', 310-11; id., 'Origins of the Principle Against Self-Incrimination', 1053.

[17] See J.M. Mitnick, 'From Neighbour-witness to Judge of Proofs: the Transformation of the English Civil Juror', *American Journal of Legal History*, xxxii (1988), 201-9.

[18] See Langbein, 'Criminal Trial before the Lawyers', 273-7, 288, 301-306; id., 'Privilege Against Self-incrimination', 1048-66. Also J.Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (1992), i. 138-9. But compare Langbein, *Adversary Criminal Trial*, 64 (emphasizing the early modern trial jury as 'passive triers' compared with their medieval counterparts).

[19] Mitnick, 'Transformation of the English Civil Juror', 203-4.

[20] Langbein, *Adversary Criminal Trial*, 319.

[21] *OBSP*, Oct. 1732, p. 237.

[22] *OBSP*, Oct. 1732, p. 244. See also Langbein, 'Criminal Trial before the Lawyers', 288-9, 298n.

[23] Langbein, 'Criminal Trial' 291-7.

[24] e.g. *Charges to the Grand Jury*, ed. Lamoine, 375-6, 379: charges of 1752 and1767.

[25] Langbein, *Adversary Criminal Trial*, 321-31.

[26] Mitnick, 'From Neighbour-witness to Judge of Proofs', 223-6 (discussing *Dormer v. Pankhurst*).

[27] A.W.B.Simpson, *Legal Theory and Legal History*(1987), 270, 329-30. J.H.Baker, *An Introduction to English Legal History* (3rd edn., 1990), 398-9.

[28] 4 & 5 William and Mary, c. 24; 3 Geo. 2, c.25. See D. Hay, 'The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century', in *Twelve Good Men and True: the Criminal Trial Jury in England, 1200-1800*, ed. J.S.Cockburn and T.A. Green (Princeton, 1988), 310-11, 316-7.

[29] J. Oldham, 'The Origins of the Special Jury', *Univ. of Chicago Law Rev.*, c (1983), esp. 140, n. 13; 3 G2, c. 25, sects. 15-17. See also id., 'Special Juries in England: Nineteenth-century Usage and Reform', *Journal of Legal History*, viii. (1987), esp.148-53; id., *Mansfield Manuscripts*, 93-99, 242-4.

[30] M. Gaskill, *Crime and Mentalities in Early Modern England* (Cambridge, 2000), ch. 7, esp. 269-70, 273-5, 279.

[31] Of course I am aware that eighteenth-century trial jurors were 'middling sorts', and hardly intimate with the lowest sectors of English society. But I would argue, with Thomas Green, that they were liable to be influenced by the attitudes and preoccupations of those below them in the social scale, especially in the peculiar circumstances of the criminal trial (T.A. Green, 'A Retrospective on the Criminal Trial Jury, 1200-1800', in *Twelve Good Men and True*, 389-90, 394, 399).

[32] B. Shapiro, '"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850', *Hastings Law Journal*, xxxviii (1986), 153-93; T. Starkie, *A Practical*

Treatise on the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings (2nd ed., 1824), i. 514.

[33] Langbein, *Adversary Criminal Trial*, 250.

[34] *Parliamentary History*, xiv. 20.

[35] See D.Lemmings, *Professors of the Law: Barristers and English Culture in the Eighteenth Century* (Oxford,2000), 319-29. For what appear to be similar thoughts about the eighteenth-century criminal trial, and specifically the role of the jury 'to effect an accommodation between ruling authorities and a substantial part of English society', see Green, 'Retrospective', esp. 386, 387, 390-1, 399; T.A. Green, *Verdict According to Conscience* (Chicago, 1985), 374-5.