

The Bar and the Old Bailey, 1750–1850

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The second half of the eighteenth century saw a revolution in the character of the English criminal trial. What we observe, Allyson May informs us, is 'the transformation of the criminal trial from a private altercation between victim and accused into a contest between paid advocates' (p. 1). Within a matter of decades, the feature that most distinguishes the Anglo-American judicial regime, the adversarial trial, emerged. The work of John Beattie and John Langbein has helped us to see the importance of this transformation and to chart its rough chronological limits. May's volume adds a vital dimension to this earlier scholarship. She fills in the flesh and bones of the story by giving us a greater sense of the identity of the men who were largely responsible for bringing about this change.

Her subject is the Old Bailey Bar, the barristers who defended the accused who appeared at the major criminal court in London. May seeks to carry us beyond the crude caricatures and sweeping generalisations that have passed for historical comment on this collection of men. She provides us with a more concrete sense of who appeared at the Old Bailey and how often. The more precise delineation of the chronology of changing practice alone would have established the value of her book. In this well-crafted, gracefully written volume, she makes a substantial contribution not only to legal history, but to the social history of England as well. Yet the implications of her work extend beyond filling in a significant lacuna in the existing scholarship. Her account demonstrates that the principal actors in the drama were largely unconscious of the momentous change they were helping to bring about. Although she does not trumpet her revisionism, this is a book that challenges how we think about the evolution of legal practice. As such, it is a substantial contribution to the ongoing controversy over how we evaluate the merits of the adversarial system as a whole.

May faced considerable challenges as she undertook her project. The barristers who worked at the Old Bailey were not leaders of the legal profession. The occupation might have provided an adequate income for the more successful practitioners, but it was scarcely the path to the heights of the profession. Aside from the careers of a few celebrities, criminal business was confined to the low end of legal world. There was something ungentlemanly about the trade. Worse still, an unpleasant taint clung to those who sought criminal business. 'As a blanket description,' May informs us, "'Old Bailey barrister" quickly acquired negative associations, and the posthumous reputation of most practitioners is ambiguous' (p. 133). The stereotype offered a portrait of a half ignorant lawyer who grubbed for loose change. In sum, the Old Bailey Bar was composed of obscure men whose biographies were seldom written and whose papers were rarely preserved. They were, by and large, journeymen advocates who were not much noticed in their own time and were little remembered after their deaths. May has had to cut through the layers of anecdote and slander to get at the truth of the occupation. She has patiently and exhaustively combed through the available sources to produce a collective portrait of the bar during this pivotal period. Her appendix offers a nice summary of this evidence. What immediately becomes apparent from her discussion of this material is what a curious and largely undistinguished group of men helped to produce one of the most significant legal changes of the last two centuries. They did not contribute much to the legal literature of the day. The public never held them in much esteem. They were often the butt of jokes and the target of scorn. They were not viewed as the champions of the rights of the accused, and they did not see themselves in that light. Mostly they struggled to make what appeared to be an inadequate living from a nasty trade. Yet the consequences of their activity were immense.

Although much of her explanation for this transformation in the conduct of legal defense is implicit, it is clear that May has thought long and hard about the paradox of such rough material bringing it about. The extension of rights to the accused was not the goal of a political or legal campaign, not on the part of the bar, and scarcely on the part of the public. It came about more indirectly, the result of decisions made by figures who had no intention of making a legal revolution. The crucial moment in this story developed not out of newly emerging ideas surrounding the rights of the accused, but rather from a desire to secure them greater fairness in courtroom proceedings.

Judges were the crucial factor behind the shifting balance between defense and prosecution. They came to accept a wider scope for the activities of lawyers, first in prosecution, and then, in reaction, in defence. There were two aspects to this change. A small but growing number of victims of crime turned to lawyers to undertake the prosecution of offenders. Even more important, the increasing role of rewards and of crown witness protection in aiding eighteenth-century policing raised doubts in the minds of some legal authorities about their ability to maintain the purity of justice. The danger here, as several celebrated cases made clear, was perjury on the part of those who sought rewards or to escape the consequences of their actions by helping to convict another. The spectacle of unsavory thief-takers appearing as witnesses created considerable anxiety in juries. Judges saw a need for innocence to be protected by a more aggressive defense, one that could expose the operation of motives to lie on the part of some shady characters. May tells us that

'Judicial tolerance of the presence of defense counsel (and occasionally of their unruly behavior) must owe in large part to recognition of the fact that counsel, through cross-examination, were much more likely than an unrepresented layman to expose the perjured testimony and deliberate perversions of the truth that plagued the eighteenth-century justice system' (p. 29).

Given this opening, ambitious counsel like William Garrow set a pattern for how to examine unreliable witnesses. A combative style produced results. Garrow chose this path because it led to success in trial and judges tolerated the conduct. Here, again, is the paradox: even as they were innovators, the Old Bailey barristers remained overwhelmingly practical men. A few outstanding personalities set the pace, but no profound agenda or ideological preference guided their actions.

May develops this point in greater detail when she considers the major piece of legislation that touched upon

the role of defense counsel, the Prisoners' Counsel Act of 1836. One might have expected the Old Bailey Bar to have played a major role in the decade-long campaign to secure the passage of this measure, if only because its passage would be bound to have an impact on their practice. On the contrary, the members of the Bar had no part in promoting the act. It was the pet project of 'a small group of Whig politicians' (p. 200). While the debate was raging, and a few members of Parliament staked out radical positions, the members of the Bar were silent. Some even expressed doubts about the wisdom of the change. Again, like the practical men they were, they had reservations about a move that would transform the institutional rules under which they had learned to operate. Even those among them who took more advanced political positions when it came to other causes doubted that the grant would benefit their clients or improve the operation of justice.

One example of the complexity of May's vision of the story is that she does not terminate her study with 1836. Rather she examines how a measure that might be seen as marking the triumph of the new position in fact disguises a more contradictory situation. She reminds us, for instance, that throughout this longer period only a minority of the accused had defense counsel. Trials continued to be short, with little attention to legal niceties. Still more interesting is her presentation of how the arrival of the lawyers raised practical and moral problems for the practitioners of a sort that they were ill-equipped to handle. In 1840, the Courvoisier trial exposed an unanticipated dilemma for defense counsel. In this case a servant was on trial for having murdered his employer, Lord William Russell. Half way through the trial, Courvoisier confessed his guilt to his lawyer, the celebrated Charles Phillips. Still, he asked Phillips to defend him to the best of his abilities. After some hesitation, Phillips determined that he was obliged to continue. While his decision angered some, when it later became known, it was even more the intensity of his defence that alarmed others. He cast aspersions on how the police had handled the case, and he raised doubts about the veracity of prosecution witnesses. His conduct angered much of the public. The papers and journals debated the question of how far a barrister should go in defending such a client. As May suggests, two opposing views of the purpose of the trial surfaced during the controversy. One held that the point of the trial was to discover the truth about a case. In some sense this was the understanding that governed eighteenth-century judicial process. The other emphasised that the goal was to see that justice was done. This position implied that the process was more important than the outcome. The choice of one principle over the other carried profound consequences for how defense counsel should behave. Parliament, when it passed the Prisoners' Counsel Act, did not foresee that this question would become one of the most troubling a lawyer would face. 'The nature of the duty owed by counsel to a guilty client did not form part of the politicians' discussion' (p. 202–3). Here is a further illustration of May's central thesis, that the entrenched arguments that swirl around the adversarial system today played little role in the rise of that system.

One of the most intriguing aspects of May's work is her suspension of judgment about the outcome of this fascinating and convoluted history. She is an agnostic on the question of whether this transformation was 'for good or ill' (p. 6). Some scholars have raised the adversarial system into one of the pillars of criminal justice, while others have questioned whether it works in anybody's interest. May unsettles the debate by showing us how unexpected was the course of this story, and how little the intentions of the actors dictated the result. It is a sobering tale, one that highlights the place of unintended consequences in the history of a profession that often claims to be in control of its own development.

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