Apart from thanking Randall McGowen for his kind words I would like to comment briefly on the issue raised in the last paragraph of his review: my agnosticism and ‘suspension of judgment’ regarding the effects of the transformation of the criminal trial into an adversarial contest. He is quite right: I am an agnostic in this respect. In other recent work John Langbein has offered a scathing critique of this outcome whereas David Cairns celebrates it. (1) I set out to do neither. I had no agenda in embarking on my research, and at its conclusion would argue that while the introduction of defence counsel in the eighteenth century did much to correct the overriding problem which was then plaguing the justice system – perjury – the eventual triumph of adversarialism in the criminal courts created new problems. These have been identified by Langbein as the ‘combat effect’ and the ‘wealth effect’: the ‘truth-impairing incentives of the adversary system’ and the ‘enormous advantage’ that system affords those who can hire the best. (2) London’s early criminal bar was only too aware of these problems and they were precisely why the Old Bailey’s most famous defence counsel in the 1830s, Charles Phillips, fought implementation of the Prisoner’s Counsel Act.

What often divides critics of adversarialism from those who praise it is the relationship between adversarialism and the truth. Eminent Canadian defence counsel Edward Greenspan confidently asserts that ‘the adversary system is indeed the best way we know to find the truth’. (3) I prefer John Mortimer’s milder assertion that the criminal trial is more of a blunt instrument where the truth is concerned. ‘A criminal trial,’ writes Mortimer,

is not primarily an investigation into the truth, although the truth may sometimes be disinterred by chance. A criminal trial is a test of the prosecution evidence, a procedure to discover if a case against an accused person can be proved beyond reasonable doubt. (4)

David Mellinkoff argued more emphatically that the modern Anglo-American ‘system of justice is just that … it searches not for truth but for justice’. (5) In my book I describe the process by which such categorisations of the purpose of the criminal trial evolved. An ideal system of criminal justice, obviously, would privilege the interests of truth and justice equally. Langbein clearly believes that the continental system more nearly approximates that goal. I know too little about it to agree or disagree, and, at any rate, what form our present-day criminal trial should take was never my subject. Rejecting the view that adversarialism best advances revelation of the truth, I cannot wholeheartedly celebrate the current form of the criminal trial. At the same time, I have a certain sympathy with those who, like Mortimer, emphasise the benefits of a system which privileges justice – especially given the modern level of state involvement in the investigation and prosecution of crimes, a development which lies outside the temporal boundaries of my study. Hence my agnosticism. While I do not believe that the impetus driving Langbein’s investigation into the origins of adversary criminal trial – where did it all go wrong? – in any way compromises his pioneering research into the eighteenth-century trial, nor do I believe that my own lack of agenda detracts from the value of my work.

Notes


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