

Prosecuting Crime in the Renaissance: England, Germany, France. JOHN H. LANGBEIN. Harvard University Press, Cambridge, Mass., 1974. Pp. ix, 313. \$14.95.

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I

At a time when Britain's increasing involvement with "Europe" is causing many to fear that the English legal system is being "contaminated" or "eroded" by Continental influences, Continental criminal procedure continues to amuse, when it does not alarm, the tourist and the television viewer. Even the increase in violent crime (including international crime), which provokes repeated calls for improved methods of detection, apprehension, and obtaining conviction, fails to induce in the British, or in their overseas daughter nations, any want of faith in their inherited system, under which the guilty frequently escape punishment but the innocent rarely suffer. Moreover, the English have done nothing deliberate to impose their own methods upon the Scots, or the Channel Islanders. Secure in the thought that their own traditions will endure, whatever the cost in efficiency, they have no wish to disturb the traditions of others.¹ Their celebrated insularity may help to explain why the British have scarcely bothered to investigate the history of their prosecutorial methods in a comparative perspective.

An American scholar has recently taken a long, hard look at the early phases of the English method of prosecuting serious crime and has questioned a theory that attributed two statutes of Philip and Mary to Continental influence.² The first of these statutes³ severely restricted the right of a justice of the peace (JP) to grant bail to an individual accused of a felony. The second statute⁴ covered cases in which the accused felon did not qualify for bail and in which the JPs committed him to custody to await the next gaol delivery. The statute required the JPs to make an inquiry into the circumstances of the crime; to bind over witnesses to appear for the Crown at the trial; and to pass the documentation of these acts to the court

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1. In the realm of family law, on the other hand, it is certain that England has learned something from her daughter nations, and she has learned something from Scandinavia about machinery for redress of public grievances.

2. See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 131-34 (2d ed. 1903).

3. 1 & 2 Phil. & M., c. 13 (1554-1555).

4. 2 & 3 Phil. & M., c. 10 (1555).

duly assembled for the gaol delivery. The most notable English legal historian explained these novelties with the theory that the government of Mary (who had a Spanish husband and coruler) must have been aware of recent statutory developments in France and the Holy Roman Empire and taken some light from those quarters.⁵

Professor John H. Langbein decided to inquire into this rather casual attribution, sensing that it did not accord with England's general record. His study⁶ is a masterly treatment of the subject. It is important not only for what it shows, with deep learning and with a careful, steady, and readable presentation, but also for what it does not say. With scholarly restraint, the author conveys overtones the more powerfully for his not allowing them to dominate anywhere. His findings, which strike even a skeptical reader as conclusive, are reminiscent of the results that emerged from the controversy over whether the Statute of Distribution⁷ was based on the civil (Continental) law of reserved shares,⁸ or was rather the development of a native custom, such as York's,⁹ at the expense of the common law of descent. In both cases, indigenous developments were ultimately recognized as the most influential.

The book should be especially impressive to those who, like the present writer, tend to be interested in broad social alternatives and the slow upward climb of man, but are less conversant with the intricacies of Tudor legislation and Continental legal history. Many readers with these tastes might have hoped for research like Langbein's, but would have been hard put to find a candidate for it. It required a combination of vision, optimism, pertinacity, linguistic flexibility, and, most of all, sufficient distance from the two competing methods of criminal trial, namely, folk conviction and official persecution. Distance without disinvolvement was needed—sympathy with the "folk" (in particular, the amateur fact-finders), yet suspicion of their irregularities; awareness of a cultural debt to England, without contempt for the Continental alternatives, however repugnantly phrased; readiness to take up, for instance,

5. 4 W. HOLDSWORTH, *supra* note 2, at 528-29 (1924).

6. J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: England, Germany, France* (1974) [hereinafter cited as J. LANGBEIN].

7. 22 & 23 Car. 2, c. 10 (1670).

8. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 300 (5th ed. 1956) (discussing the opinion of Sir Joseph Jekyll, M.R.), *citing* Winder, *Sir Joseph Jekyll, Master of the Rolls*, 57 L.Q. REV. 512, 535 (1941). In fact, the scheme took account of current ecclesiastical practice and was quite distinct from any scheme based on a *legitima portio*.

9. On York customs, see *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES* pt. 3, § 16 (2d ed. 1611).

Tudor paleography, without the normally accompanying elitist-specialist complex that would reject Frühneuhochdeutsch, the contemporary German language. No pains that could be taken were avoided by Langbein; no specialist in the field whose direct knowledge of the highly disparate materials could be exploited was left unapproached; and where two surviving copies of a single edition of a contemporary book could be compared (whether in Cambridge, England, or Cambridge, Massachusetts), no opportunity to do so was passed up.

The result, a revision of a Cambridge Ph.D. thesis written under the supervision of Peter Stein, has none of the derivative and slightly naive air that too many American thesis writers manifest before their claim to scholarly distinction is achieved. Langbein avoided that trap by severely disciplining detail to the basic argument, testing that argument in every possible way, and presenting the relevant material in a mode at once exhaustive and precise. The reader never loses track of the thesis, and yet, at any point where oversimplification could be suspected, the evidence to sustain the conclusion is adduced.¹⁰

II

Although it may be unfair to summarize so condensed a book, one could state Langbein's findings in this way: the Marian statutes were intended to prevent the escape and secure the conviction of serious offenders. As an unintended by-product, the function of JPs in pretrial procedure expanded to the point where the JPs became prosecuting officials; correspondingly, the role of the grand jury declined, and the petty jury became more passive. Documentation of testimony was preserved, and the system of binding over witnesses enabled the assize judges to manage prosecutions more efficiently, thus placing a greater responsibility (and therefore power) in the hands of the JPs.

Meanwhile, both the German code of 1532, the "Carolina", and the French statute of 1539, the "Ordonnance of Villers-Cotterets," attempted to direct and develop *Inquisitionsprozess*, in which the judiciary (overshadowing the civil complainant, if any) directly or indirectly managed inquiries into alleged crimes and provided a

10. The success of this research can perhaps be attributed as much to the economical scope of the contentions as to the wealth of effort put into making them. The Marian statutes were casually attributed to Continental influence because Holdsworth did not bother to check a guess. "Brilliance," that ambivalent quality of astute scholarship, has its dud sparks; it would hardly have been worthwhile for anyone to pursue this attribution if there had not been a greater issue at stake.

dossier that led, in different ways, to eventual conviction and sentence.¹¹ When analyzed carefully, however, neither statute shows the remotest similarity to the English scheme. Mary's government would have found them useless as models and rejected them as inappropriate to England's situation.¹²

In Germany, the popular court had become a feeble vestige; in France, it had long since disappeared. But Blackstone termed the jury "the principal criterion of truth in the law of England."¹³ Thus, as Langbein proves, statutory arrangements facilitating the collection and presentation of evidence to the jury, far from producing an *Inquisitionsprozess*, confirmed the reverse. His apt quotations from Sir Thomas Smith (1565) point up the contrasts between Continental and English procedure (in the latter, practically nothing was put in writing).¹⁴ Mary's statutes emphasized, rather than diminished, the distinctiveness of the native methods.

Fortunate in the rich printed material bearing upon his subject, Langbein supports his contentions with a survey of statutes and records lying in the background, as it were, of his scene. Statutes were not necessarily obeyed. They were intended to be little more than blueprints, assertions of government policy; when events required their precise implementation, they figured prominently, but they did not necessarily do so earlier. The author has searched out archival sources showing that *before* 1554 JPs had already begun the practices that the Marian statutes codified. Thus, the statutes were not revolutionary in principle—or else their innovative effects were, as usual in England, unforeseen.

The exact relation between the statutes and actual practice is shown here in sufficient clarity by virtue of a broad research of satisfying dimensions. Modern scholars are sometimes chary of dwelling on archaic features; Langbein's deft touches avoid the Scylla of patronizing the reader and the Charybdis of overhasty allusion.

11. Neither of these statutes worked a total departure from prior practices. Thus it would have been particularly surprising if their enactment had resulted in an introduction of their ideas into English procedure.

12. J. LANGBEIN 204.

13. 3 W. BLACKSTONE, COMMENTARIES *348. The English jury, which was a curiosity to contemporary foreigners, has been attributed by some to French custom, in keeping with theories that the customs of Normandy are a clue to post-1066 English law (although the jury was supposed to have been a custom of Paris). In reality, however, the jury system organized by the English kings was a Germanic institution, which, by virtue of geography (*see text at notes 15-16 infra*), survived into our own times virtually untouched.

14. J. LANGBEIN 29-31.

Langbein could have bolstered his thesis by drawing attention to Britain's geographical isolation, which enabled the English grand jury and petty jury to retain their active roles for so long, with the latter remaining triers of fact to this day. Even the eventual confining of the petty jury to the testimony put before it¹⁵ did not substitute an official's judgment for the people's, and it was a long time before jurors came to be chosen from outside the hundred, and the maxim *vicini vicinorum facta praesumuntur scire* (neighbors are presumed to know the facts) ceased to have effect.¹⁶ The English jury's role stands in contrast to the Continental situation, in which the identity and homogeneity of the folk—and therefore the utility of "people's courts"—were bound to break down as social organization became more complex.

The community court; the assessment of ad hoc punishments without regard for consistent principle; the perpetual adjustment to the needs of the time and place; the refusal to surrender a neighbor unless he deserved to die; the integration of prestigious amateurs into the peacekeeping role at all levels, without depriving the community at large of its final say; the introduction of sophisticated theories of proof and conceptions of law (called "maxims of law" in Tudor times) that were to be applied by ordinary, unskilled people, who could barely understand them—this peculiar balance was exported to all the daughter nations and survives there unimpaired. The continued uniqueness of the jury system is further evidence that the Continent was scarcely able to affect British prosecutorial methods.

III

In the course of his discussion, Langbein develops sidelights that illuminate what would otherwise be a difficult story for us to visualize. Torture, for example, was widely used in Germany and France, because official inquisition had available none of the means of detection that we now take for granted, and the demise of jury presentation, "folk" knowledge, left no practical alternative. The Carolina sought to contain, but also to make more efficient, this archaic system. The English, however, had not abandoned the folk ascertainment of guilt—neither in the church (with the churchwardens' presentments) nor in secular life—and thus the introduc-

15. For instances from the period 1557-1601, see J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 89 n.3 (1971).

16. C. SAINT GERMAN, DOCTOR AND STUDENT 24 n.† (17th ed. 1787).

tion of torture there would have been irrelevant or embarrassing. The only exceptions were political and quasi-political contexts and (until the end of Mary's reign) the surviving Romano-canonical proceedings in which torture in England had originated.

If we are to understand the connections between torture and superstitious concepts about confession, we must not forget the influence of the Judaeo-Christian insistence upon confession as a mercy to the condemned man, whose survival in this life was much less important than his share in the World to Come.¹⁷ The book says enough to hint at this background, by comparing, at the grass roots level, the two extreme methods of ascertaining guilt.¹⁸

Langbein also considers the extremely important and relevant question of technical proof. With an air of near incredulity, Langbein reports that if the prosecution's witnesses produced plausible and congruent testimony, and if the accused could not prove an alibi, the incompetence of the witnesses, or the invalidity of the law under which he was accused, then no amount of testimony in his favor could exculpate him, deflect judgment, or postpone execution.¹⁹ The same phenomenon can be observed up to modern times in Islamic and Hindu law and was, most significantly, found in Jewish law in the time of Christ and indefinitely thereafter. It is a simple confirmation of these roots to point to the book of Mark: if the false witnesses against Christ had agreed among themselves, the remainder of the trial would have been superfluous.²⁰ The impact of "learning", the scholarly mind, upon an illiterate peasant population seems nowhere more pathetic; and in the period of Queen Mary, the Continental bureaucracies must have pitied the English for their naiveté, a naiveté that would allow such an outstanding patriot as Sir Thomas More to be condemned to death in 1535 on the possibly perjured testimony of one man.

Langbein could have dilated upon the responsibilities of the JPs, and in particular their growing duties in the protection of the state religion,²¹ which at the time was in a delicate and precarious position. While hesitating to depart from the principle of folk courts,

17. See James 5:16; 1 John 1:9.

18. Langbein neither overemphasizes nor underplays the ecclesiastical sources of the *Inquisitionsprozess*.

19. J. LANGBEIN 238.

20. Mark 14:56, 59.

21. See 23 Eliz. 1, c. 1, § 4 (1581), reprinted in G. ELTON, *THE TUDOR CONSTITUTION* 422 (1960); 5 & 6 Edw. 6, c. 1, § 5 (1552), reprinted in G. ELTON, *supra* at 396; 31 Hen. 8, c. 14, § 8 (1539), reprinted in G. ELTON, *supra* at 389; R. MARCHANT, *THE CHURCH UNDER THE LAW*

the state apparently sought to turn its amateur peacekeepers into agents of central policy. Their religious functions, especially their activities concerning witchcraft,²² are known to have supported the church courts,²³ which characteristically were passing through a severe phase of inhibition of jurisdiction. Langbein does not enter into this aspect of the balance of adjudicative power. He appositely notices that admiralty procedure (for dealing with piracy) was reformed to accommodate it to common law methods.²⁴ But it is equally significant that, while church courts kept their own creaking procedure for suppressing heresy and otherwise attempting to control the moral life of the nation, the functions of the jury as triers of fact did not diminish relative to the role of the clergy. Indeed, the more writs of prohibition the ecclesiastical courts issued, the more likely were the "folk" to control the physical supports of the religion at the grass roots level.²⁵

The study likewise touches upon ordeals. The "judgment of God,"²⁶ which the law teacher of today would pass over with an indulgent or embarrassed smile, has been an international and pervasive notion. Langbein, like others, tends to assume that incompetence and corruption allowed such methods of deciding criminal cases (and even civil cases) to survive as long as they did. But a study of the use of ordeals in some Asian jurisdictions confirms that even today they have a legitimate function in a concrete, homogeneous society. There the justice of a situation is, not at all naively, understood to be too deep for human judgment. Behind all disputes lie factors too numerous and too ambivalent for even the most subtle mind to summarize. Our determined selection of "relevant" factors by intellectual principles of evidence and procedure produces, as often as not, injustices as grave as any that could result from tossing a coin.²⁷ The ordeal (while testing God's judgment, and thus ab-

223-25, 235 (1969); R. MARCHANT, *THE PURITANS AND THE CHURCH COURTS IN THE DIOCESE OF YORK 1560-1642*, at 154, 172-73, 181 (1960).

22. See generally A. MACFARLANE, *WITCHCRAFT IN TUDOR AND STUART ENGLAND* (1970).

23. In fact, clerics were often JPs.

24. J. LANGBEIN 55.

25. Cf. W. FULBECKE, *Introduction to THE SECOND PART OF THE PARALLELE OR CONFERENCE OF THE CIVILL LAW, THE CANON LAW, AND THE COMMON LAW OF THIS REALME OF ENGLAND* sig. B^r (1602).

26. See generally 1 W. HOLDSWORTH, *supra* note 2, at 142-43; F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* (2d ed. 1898) (items listed in index under "ordeals"); J. LANGBEIN 134 nn.19-20 (the author cites to more recent authorities). For a fuller treatment, see Y. BONGERT, *RECHERCHES SUR LES COURS LAIQUES DU X^e AU XIII^e SIÈCLE* 211-51 (1949).

27. Rabelais's old joke about dice as part of the equipment of a court was double-edged—dice were needed. 25 *BIBLIOTHÈQUE D'HUMANISME ET RENAISSANCE* 117 (1963).

horrent to clerics of a certain sophistication) tests primarily *sincerity*. And in a tightly-knit society, a sincere persistence in error entitles an accused to be trusted and thus (at a minimum) to be permitted to survive. Such a society takes knock for knock, and a sincere but mistaken belief is of more value in adjudication than the crafty pursuit of an argument based upon an accurate, but too logical, selection of materials!

IV

We come, finally, to the two other principal achievements of the book:²⁸ first, Langbein clarifies in the necessary detail the character and causes of the two contrasting methods of prosecuting crime; second, he projects the JPs for what they were in their most vigorous and fruitful period, thus placing a valuable figure of English life in a new, comparative perspective.

Custom once dictated not only what acts were crimes, but also how they should be detected and punished. Constant fluctuation in the definitions of offenses, the criteria of guilt, and the balance between deterrent and protective functions in the little society was necessary and harmless, although subject to the stabilizing influence of religion (by way of penitentials and so forth). Human wastage of lives was tolerated, for human existence was in any case short and insecure.

But when ministates merged through the forces of progress, discrepancies became glaring and inefficiencies intolerable (as professional criminals moved from one jurisdiction to another). Since religious sanctions had become strained and unable to keep order, society, through its kings, had to define which standards were merely moral-religious and which were legal. Literatures, especially religious literatures, sometimes turned into *ad hoc* sources of law (as Langbein's hero, Lambarde, revealed in his charges to ju-

28. The minor blemishes in Langbein's highly technical presentation serve only to highlight the expertise evidenced throughout the book. Contrary to J. LANGBEIN 123, there is no reference to a "concession" in M. DALTON, *COUNTRY JUSTICE* 261 (1618). DALTON, *supra* at 266 (J. LANGBEIN 43) seems to contain an error—"bleede" strikes one as a mistake for "flee." Also, it would have been altogether desirable to expand on Dalton's curious "*f. Cor. 24.*" The citation is to A. FITZHERBERT, *CORONE ET PLEZ DEL CORONE folio cclviii*¹, no. 24 (Grand Abr. 1516): "silence in treason: to be hanged."

Langbein describes the fashionable and effective Sir Thomas Smith as "self-taught in Roman law." J. LANGBEIN 96 n.88. In 18 *DICTIONARY OF NATIONAL BIOGRAPHY* 532 (1937-1939) he is shown as a D.C.L. of Padua. But, as Langbein has noticed from M. DEWAR, *SIR THOMAS SMITH* 22 n.2 (1964), no trace of such a doctorate can be found at Padua, and we have only presumptive proof of it in his "incorporation" as a doctor at Cambridge (one incorporates a doctor of another university). Possibly the Padua degree was an honorary one!

ries). The spiritual authorities and the laity did not cease to cooperate, but they acquired strength independently. Officials were appointed to administer noncustomary, "peace" law, sometimes alongside the customary courts²⁹ and sometimes manipulating those courts. The king's duty to give justice was needed, not merely to help with definition of the jurisdictions and clarifications of rights, but also to perform for the minisocieties what they could no longer perform for themselves.

In England, the main need was not to provide expert investigators and interrogators with inquisitorial powers, but to ensure that accused persons would be effectively brought to trial before the people, not trained intellectuals. The "people" (except in Parliament) were no longer in charge of defining crime—that was left to experts—but this fact was unimportant, because they were ultimately in charge of the issue of guilt. Whether a popular court should be an ultimate source of law, and the extent to which its functions can really be assumed by experts and delegated tribunals, are still open questions; the growth of nations leaves the ultimate division of functions uncertain, and it cannot be assumed that the Anglo-Saxon method most nearly approaches the ideal. But as the world shrinks, the confrontations among methods and experiences become more marked.

Meanwhile, English literature has found plenty of room for the JP. He was (or could be) a pompous and self-important busybody. In the Tudor period, he could be impudent even to a diocesan bishop until the latter threatened him with his powerful friends' resentment.³⁰ He was taken so much for granted as an integral part of the dual machinery of government that learning and fun march easily together in the incomparable opening to *The Merry Wives of Windsor*:³¹

Justice Shallow: Sir Hugh, persuade me not: I will make a Star-chamber matter of it; if he were twenty Sir John Falstaffs he shall not abuse Robert Shallow, esquire.

Slender: In the county of Gloucester, justice of peace, and *coram*.
Shal. Ay, cousin Slender, and *custalorum*.

For "assignanimus" (J. LANGBEIN 117), read "assignavimus." And "salt in the wound" (*id.* at 206) is a common misconception—salt is a healer.

29. Here I call attention to the parable of the unjust judge. *Luke* 18:1-8; see Derrett, *Law in the New Testament: The Parable of the Unjust Judge*, 18 *NEW TEST. STUD.* 178 (1972).

30. See Letter from Bishop Latimer to "a certain Gentleman," July 15, 1555 in 7 J. FOXE, *THE ACTS & MONUMENTS* 512 (1563).

31. W. SHAKESPEARE, *THE MERRY WIVES OF WINDSOR*, act I, scene 1, lines 1-11 (1601) (van Santvoord ed. 1922).

Slen. Ay, and ratolorum^[32] too; and a gentleman born, Master Parson; who writes himself *armigero*, in any bill, warrant, quit-tance, or obligation,—*armigero*.

Langbein enables us to see³³ that JPs did indeed report matters like a riot to the Star Chamber, as *Merry Wives* goes on to suggest.³⁴ The JPs' powers of investigation and coercion were limited in practice as well as in their commission, and the long-drawn-out process of common law prosecution was no universal prophylactic. Men also went to the Star Chamber to bypass the normal process and prosecute feuds with notables.³⁵

Shallow's comical confusion of *coram* with *quorum*³⁶ fitted the times well enough: the number of justices commissioned to be part of a quorum had undergone an absurd inflation, so that the class included a high proportion of notables without the legal training that originally entitled men to membership in the essential learned nucleus of any given bench. The title had become merely ornamental.³⁷ And yet that much-recited passage about the Ages of Man in *As You Like It*³⁸ assumed the public's faith that the well-to-do elements of society had their share not merely of that Tudor virtue, gravity, but also of legal learning, which Lambarde, himself a JP, so wonderfully manifested. It does not appear that the Continental systems for all their corps of officials and their exaggerated faith in university law faculties, could have presented an attractive alternative.

32. The term that these characters are fumbling for is *custos rotulorum*, i.e., the leading justice of the county as keeper of local judicial records. On this topic, see G. ELTON, *supra* note 21, at 453, 458-59 (quoting Lambarde).

33. J. LANGBEIN 79-80. See also I W. HOLDSWORTH, *supra* note 2, at 135.

34. W. SHAKESPEARE, *supra* note 31, act I, scene 1, line 35.

35. R. MARCHANT, *THE CHURCH UNDER THE LAW 177-78* (1969).

36. "*Quorum* was the first word of a clause in the commission which named justices, and so came to be a title of certain justices. *Coram* was the first word Shallow would use as justice, in attestation of the legal documents he speaks of in lines 10 and 11: '*Coram me Roberto Shallow, armigero*,' i.e., 'before me Robert Shallow, Esquire.'" W. SHAKESPEARE, *supra* note 31, at 109 (editor's note to the passage quoted in text).

37. J. LANGBEIN 112-16.

38. W. SHAKESPEARE, *AS YOU LIKE IT*, act II, scene 7, lines 153-56 (1599): "And then the justice,/ In fair round belly with good capon lin'd,/ With eyes severe and beard of formal cut,/ Full of wise saws and modern instances; . . ."

