Correspondence

To the Editor:

I write regarding the review of my book *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Oxford: Clarendon Press; New York: Oxford University Press, 1998) that recently appeared in your journal (*Law and History Review* 19.3 [Fall 2001]: 675–77). Reviewers properly enjoy considerable discretion to express their own opinions, but not at the expense of balance, accuracy, and judgment. Regrettably, the reviewer does not display these qualities in this review. I will confine my response to just four points.

First, the book describes in detail the debate over the Prisoners' Counsel Act of 1836, including the political and professional opposition to any extension of the rights of defense counsel and how this was overcome, the practical problems of the implementation of the Prisoners' Counsel Act, the virulent public controversy over excessively adversarial advocacy in the 1840s and 1850s (with particular reference to the trials of *Courvoisier* and *Palmer*), and the response to this controversy in professional literature. It beggars belief that your reviewer could in good faith interpret this extensive discussion of public disquiet with developments in the role of defense counsel as an "unsubstantiated assertion of public confidence in adversarial process." Only after considering how the Prisoners' Counsel Act was complemented by other procedural reforms, the duties of defense counsel were clarified, and the new form of trial was rationalized and accepted in the profession (matters described in chapters 6 and 7) did I suggest that public confidence had been achieved.

Second, any study of nineteenth-century advocacy requires an understanding of the culture of the Bar, including professional organization, circuit etiquette and practices, and life in London. Professional practices did not develop in a uniform way throughout all courts and circuits. Historians of advocacy must also squarely face the significant limitations in their source material. This brings me to the paragraph of the review that contains the following statement: "Neglect of the eighteenth-century *Old Bailey Sessions Papers*—a source he considers overrated and overused—and other pamphlet sources results in the mistaken attribution of 'the emergence of a duty on prosecution counsel in addressing the jury to restrain his advocacy within narrow limits' to 'the first half of the nineteenth century' (8). The unwritten etiquette of the criminal bar in this respect is quite clear by the 1780s and can almost certainly be traced back to an even earlier date."

The description of the *Old Bailey Sessions Papers* as "overrated and overused" is a typical characterization of your reviewer. In fact my work discusses the deficiencies of the *Old Bailey Sessions Papers* as a historical source and the methodological risks from an over-reliance on this one primary source. It observes that

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transcript accounts of trials, including the *Old Bailey Sessions Papers,* are often of questionable accuracy and discusses other possible sources to verify their accuracy or to provide more accurate information (see particularly 10 and 32). The book consciously addresses the reliability and usefulness of this source and decides that it must be used with discretion.

As to the alleged mistaken attribution of the emergence of a duty on prosecution counsel to the first half of the nineteenth century, "emergence," I suppose, is capable of different interpretations; the first full written statement of the duty in a legal text appeared in Dickenson and Talfourd's *A Practical Guide to Quarter Sessions and other Sessions of the Peace* in 1829 (discussed in my book at 44). My study was careful to note the relationship between this duty and the level of use of counsel and circuit practice, which, as noted above, were far from uniform throughout England (38 and 44). It may be that such a duty was recognized in some parts of England as early as the 1780s; it was certainly not "quite clear by the 1780s" throughout England and, to the best of my knowledge, there is no published work that establishes its existence at this time. If it is "quite clear" to your reviewer, I suggest she publish her evidence for it.

The third matter is your reviewer's statement that "Cairns is also incorrect in claiming that the 'history of advocacy . . . has never been a subject for scholarly consideration' (5). Interest in advocacy lies at the heart of Beattie's 1991 article, "Scales of Justice," which places the PCA in the context of earlier developments, while the implications of the *Courvoisier* case for advocacy attracted sustained and thoughtful attention in David Mellinkoff's 1975 *The Conscience of a Lawyer.*"

The quotation from page 5 of my book contains an omission. The full statement is "The history of advocacy, *as explained below,* has never been a subject for scholarly consideration." The explanation on the very next page (and the same point is made elsewhere, and as early as the preface) makes clear that while there is considerable writing on advocacy and trial practice, there is no systematic or theoretical treatment that deserves the description of scholarship: "There is, of course, considerable literature on various aspects of trial practice but a systematic treatment of English advocacy, and especially its historical development, is wanting. Advocacy manuals command the field, a genre aimed at junior practitioners and largely composed of basic precepts, practical advice, and illustrations from the cases and careers of great advocates. They are usually for digestion by rote and have not, in William Twining's phrase, 'evolved much beyond the cookbook stage.' The common law still awaits a scholarly and comprehensive explanation of its advocacy. Its Aristotle or Quintilian is long overdue" (6).

The reviewer's contradiction of my appeal for a scholarship of advocacy by reference to two works with an "interest in advocacy" is disingenuous. Of course there is considerable literature with an "interest in advocacy"! It is acknowledged in the above quotation and permeates the analysis of my book (which fully recognizes both the historical—particularly nineteenth-century—literature on advocacy and the work of modern scholars on aspects of the history of advocacy). In fact, reference to advocacy appears in many legal and interdisciplinary contexts, such as procedure, evidence, ethics, criminology, law and literature, the history of the

philosophy of science, as well as legal history. It is the subject of trial practice courses and workshops organized by universities and bar associations throughout the common law world. There is a literature of advocacy manuals, famous trials, forensic speeches, "great advocate" biographies, and sensational cross-examinations (which are referred to and discussed in my book). My concern, as the above quotation makes clear, is with "a systematic treatment" and "a scholarly and comprehensive explanation" of common law advocacy. This project might, for example, begin with a description and categorization of the subject and the identification of source materials and appropriate methodologies. It might include analysis of the principles of advocacy, exploration of the relationships of advocacy with other legal doctrines, the adversarial form of trial, other forms of rhetorical expression and literary criticism, as well as investigation of its epistemological underpinnings. Sensitivity to the culture and self-perception of practicing advocates is, as I have already said, indispensable. The rights to counsel and to due process mean that advocacy has constitutional and human rights implications, and the possible influence of advocacy on substantive legal development (a matter discussed in the final section of my book at 177–80) gives it jurisprudential significance. William Forsyth in his *Hortensius* (1849) sought a historical context for English advocacy within the classical and French traditions (see my book at 151), but this comparativist approach has not been pursued by modern legal historians. There is an important historical relationship between advocacy and pleading (recognized by Milsom in his introduction to *Novae Narrationes,* Selden Society, vol. 80; a matter outside the period of my study but referred to at 27–28) that awaits proper investigation. What has been required, and is still required, at a scholarly level is a synthesis of the fragmented research with an "interest in advocacy" to form a self-conscious scholarship of advocacy. A proper history of advocacy would be part of this scholarship.

The final matter against which I must strongly protest is the suggestions that my explanation of the development of the adversary system makes "few references to a rich literature on the history of criminal justice" and involves a "blanket dismissal, of the work of established scholars in the field." This is simply nonsense: my book refers to, comments upon, and in many respects builds upon the work of established scholars of legal history, and particularly Foucault, Maitland, Milsom, Twining, Radzinowicz, Cornish, Baker, Cocks, Duman, Hay, Linebaugh, Langbein, Beattie, Gatrell, Finer, King, Landsman, Lacquer, and McGowen—to name simply some of the more prominent. I did not accept all of their work uncritically. I both acknowledged the work of other scholars in the field and engaged with it, and your reviewer is wrong to suggest the contrary.

I regret the necessity to respond to this careless review. I suggest that your readers disregard the review, read my book themselves, and form their own judgments.

Yours sincerely,
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Allyson May replies

I regret that Dr. Cairns feels I have misunderstood his book but cannot accept his accusation of carelessness. My review of *Advocacy and the Making of the Adversarial Criminal Trial* was informed by my own long-term engagement with the history of trial, advocacy, and the criminal bar. My primary concerns are that Cairns discounts the significance of developments pre-1800 and fails properly to acknowledge or incorporate the ground-breaking work of previous historians of the English criminal trial. Using 1800 as a starting point for a history of advocacy and adversarialism poses a number of problems to establishing an accurate chronology of change, for the roots of the adversarial trial lie in the eighteenth century.

With respect to the points raised in Dr. Cairns's response, I remain unconvinced that public (as opposed to professional) confidence in adversarial process had been established by 1865. Proving such confidence would require a broad survey of representations of advocacy and advocates in the lay and popular press. On the issue of the *Old Bailey Sessions Papers,* for all their imperfections, the eighteenth-century reports allow us to identify developments in professional practice—such as the duty on prosecuting counsel to exercise restraint in opening speeches—before those developments are recorded in legal treatises. Third, in drawing particular attention to the work of Beattie and Mellinkoff my intention was simply to indicate that Cairns is not alone in engaging with the history of advocacy. I have no difficulty accepting that his text differs from those identified in his response.

Finally, with respect to Cairns's citation of legal historians, it seemed to me that in surveying the criminal justice system in chapter 1 he relies too heavily on primary sources. But I also found the discussion of Beattie, Landsman, and Langbein in chapter 2 wrongheaded. It was Cairns's engagement with the work of these particular historians that I found wanting. On page 32 he suggests that their work "distorts" as well as "advances" our understanding of the eighteenth-century criminal trial; on page 36 he concludes that collectively previous scholarship simplifies the history of the modern trial. The alleged distortions he attributes to an "over-reliance" on the *Old Bailey Sessions Papers* and to "presentism." None of the historians in question have argued that the OBSP are "a self-contained and complete source" (32). Nor would they. The accusation of presentism is also misleading. Cairns argues for instance that "the origins of today's rules of evidence and procedure dominate [Langbein's] analysis, at the expense of historical perceptions of the trial" (36). The origins of modern rules of evidence and procedure are a perfectly legitimate line of enquiry; more importantly, in pursuing them Langbein has revolutionized our understanding of the eighteenth-century trial. Cairns himself, moreover, is not always sensitive to "historical perceptions." The Prisoners' Counsel Act was resisted by the majority of the bar; while that resistance is acknowledged in his book it is not explored in sufficient detail. It is Cairns rather than Beattie or Langbein who has simplified the history of advocacy and the criminal trial and introduced distortions to that history.

Allyson N. May
Toronto, 2002