Comic Commentary

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While the use of the jury within the common law system can be traced back to a "time whereof the memory of man runneth not to the contrary"[1], its central importance as the trier of fact only arose in the 13th Century. Up to that point, the entity that would eventually evolve into the modern jury was not a fact finding body at all; rather it was what can best be characterized as a group of centrally-organized neighborhood tattletales. Divided up into what were termed vills and hundreds, neighbors were depended upon to testify under oath as to the good character of their fellow neighbors, or, if there was trouble, to point fingers when commanded by the king's officials. Though essential to keeping the king's peace at the time, this feudal "neighborhood watch program" was not called upon to pass ultimate judgment as to the guilt or innocence of the accused. Rather, for the ultimate determination of guilt or innocence, another system was used, namely, "the ordeal." The ordeal, which took various forms, was a physical test (in the broadest ecclesiastical meaning of that word "test") carried out by priests to determine the guilt or innocence of those accused of crimes. Therefore, it was the ordeal, not the jury, that determined if the accused was to be punished or not.

That was all to change though in 1215 A.D. For in that year, the Fourth Lateran Council convened and, between burning heretics I can only assume, decided that priests were no longer to take part in "the ordeal." This decision would forever change the role of the jury within the common law system.

You see, up until that point in history, practicing law must have really made you want to get out of bed on a Monday morning![2] "Hmmm, let's look at my schedule for today, 9:00 a cauldron with Mr. Smith,[3] 10:30 cold water with Mr. Jones,[4] 12:00 a two Mead lunch with The Earl of Essex, 2:00 hot iron with Mr. Thompson,[5] 4:00 sacred morsel with Friar John,[6] 6:00 Ye Old GYM, 7:30 Invade France."

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1 William Blackstone, English Jurist (1723 – 1780). One of the most famous and quotable quotes in all of common law jurisprudence!

2 The ordeal was actually used both in England and on the Continent during this period. However, in England it was limited to males in criminal cases; whereas on the Continent, women subjected themselves to it to disprove accusations of infidelity. It was also generally used on the Continent for disputes over title and political claims of right; and I assume on a slow day, against the neighborhood witch.

3 Also known as the "ordeal by hot water". The accused had to plunge his hand into a cauldron of hot water, the more serious the offence, the deeper he would have to insert his appendage into the boiling water, retrieving a stone suspended on a rope. British B&Bs continue the tradition by using taps with boiling hot water and wash basin stops suspended on little steel chains. Therefore, even today shaving in Britain is an ordeal in every sense of the word.

4 The "ordeal of cold water" required the accused to be tied up into little human ball, resembling a Peruvian mummy, then dropped on a rope into a pool of water. If the accused sank, "the water accepted him" and he was, obviously, innocent. If he floated "the water rejected him" and thus he was, obviously, guilty as sin! (If you were innocent, you certainly did not want an indecisive priest with a profound stutter). There was a famous case of an individual who, knowing of test to come, practiced in a tub of water in order to sink convincingly; however, on the actual day of the ordeal he floated none the less – divine intervention, or stage fright?

5 The "ordeal of hot iron" required the accused to hold a red-hot piece of metal in his hand and carry it 9 feet, the more serious the crime, the heavier the piece of metal. Afterwards, the hand was bandaged. If after 3 days the wound was "clean" the person was, obviously, innocent, if the wound "festered" the person was, obviously, guilty as sin! In the latter case, guilty or not, the wound would probably turn gangrenous and fall off, thus a sort of natural death penalty would be applied regardless.

6 The "ordeal of the morsel" required the accused to swear an oath and then swallow a rather large piece of bread or cheese, sometimes with a feather embedded in it for good measure. If the accused could swallow it in one go, the accused was, obviously, innocent; if the accused gagged he was, obviously, guilty as sin! This was the only ordeal to which the clergy could be subjected; you can draw your own conclusions as to why. Modern scholars now think that there may have been some "method to the madness", as a person who was guilty and facing eternal damnation might very well have a dry mouth and thus would be more likely not able to swallow the morsel.

However, that was all to come to screeching halt when the church decided that, even though the answers in the ordeal unquestionably came from God, the ordeal itself did not necessarily give the correct answer as to the accused's guilt or innocence in any particular case. What? The logical argument from the church (if that is not an oxymoron in and of itself) was this: In an ordeal by cold water, for example, God may very well have allowed the accused to sink this time, but who knows, maybe the accused actually committed the crime he was accused of, just God exercised His infinite, though admittedly intermittent, mercy. If the accused floated, well, still a conundrum, was God really saying the accused was guilty of this crime? Maybe the accused actually didn't commit this crime, yet God wanted him punished for some other crime that only He knew about, as God is omnivorous, I mean, omnipotent.[7] So it stands to reason (in the broadest ecclesiastical meaning of the word "reason") that the accused might be innocent of the crime he was accused of in this instance but still being punished for a crime known only to him and his Maker. So it was all very complicated, as theology is prone to be, and if the priest failed to fathom the unfathomable will of God correctly in any particular ordeal he conducted, he was facing eternal damnation himself. No wonder the priests decided to punt!

Once the priests were taken out of the picture, who was left? The judge? No! Impossible! The judge would be replacing God.[8] Anyway, what if the judge got it wrong? Being a civil servant is a good gig and the pension is great, but all that for eternal damnation? No way; so the judges of the day gave it a pass. Punt!

Who was left to run with the ball? It is theorized that the rise of the jury has less to do with a yearning for some form of direct democracy within the judicial system, a characteristic that it has historically been championed for over the centuries, and much more to do with "someone has to do it, and the great and good are not going to – God forbid, literally!" So when in doubt, as throughout human history, place the burden on the "great unwashed".[9] If they happen to misinterpret the will of God, well, more room in heaven for the "great and good" - in that order. Anyway, the living conditions in hell would surely make the transition for a 13th Century English peasants less traumatic, as most of their short miserable lives were hell on earth as it was; so perhaps the priests and judges were really doing them a favor by putting them in God's crosshairs.

Thus, the jury as the decider of the accused ultimate fate was born. Drawing on the existing system of vills and hundreds, a jury of as many as 48 would be asked if the accused was innocent or guilty. Their decision was not based on evidence or testimony, as is the case today, but rather on the basis of their own knowledge of what they could discover of their own accord.

Since the use of the jury in this manner was so novel, the accused had to voluntarily submit to its judgment, and if not, since the ordeal was not available and the judges were whistling, shuffling their feet and trying to avoid eye contact like modern law students, this conundrum created the mother of all legal loopholes, allowing the accused to walk free.[10] In order to "encourage" the accused to avail themselves to the new-improved jury, the Statute of Westminster I was passed by Parliament in 1275. Liberal for the age, the Statute of Westminster I gave the accused an option, either submit to a jury or prison *forte et dure*. While literally translated from Law French to "put in prison strong and fast", a bit of perhaps intentional pronunciation problems ensued, quickly transforming the penalty into *peine forte et dure* ("hard and forceful punishment"), a form of torture, I mean, 'enhanced legal education technique'. Rather than being placed in prison, any person unwilling take advantage of the new and improved jury system would be laid on the ground and his chest covered with ever increasingly heavy weights until he submitted to a jury - or died. Nothing like having options, I mean, you didn't have to use a jury did you, your choice, it's a (somewhat) free country!

Even stranger perhaps, a fair number of individuals actually chose to die by this procedure rather than submit to a jury. The reason was not that they were ordeal devotees; rather, one must remember that at this point in history if the accused was in fact guilty of anything this side of stealing a loaf of bread, it was a felony, and the penalty was probably death anyway. While being crushed to death makes getting your head chopped off, for example, seem the better option - relative deprivation being what it is - if one were found guilty of a felony, one's lands would be forfeited to the king for a year and a day, and then the land would revert back to the lord from whom the accused held feudal tenure. In addition, all of the felon's personal property would also be forfeited to the Crown. Therefore, despite the obvious gruesome and anguished death they would face, in order to protect their families from destitution, many chose death rather than submit themselves to a jury.

Thankfully, in the modern common law system, the only "gruesome," "anguish," and "torture" inflicted by the legal system is being chosen to be a member of a jury, not being forced to appear before one!

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[7] Homer Simpson, Nuclear Plant Technician (1956-present)

[8] Historians have established that judges did not start thinking of themselves as God until at least the latter part of the 14th Century.

[9] Edward George Earl Bulwer-Lytton, English Politician, Playright, Poet and Novelist (1803 – 1873) coined the term in his 1830 novel Paul Clifford, and has been used ever since to refer to the lower classes. Interestingly, according to English scholars at San Jose State University, Bulwer-Lytton not only coined "great unwashed," but also came up with "The pen is mightier than the sword" and the classic opening line, "It was a dark and stormy night." Snoopy is forever grateful for the latter.

[10] This period from 1215 to 1275 has historically been known as the "Good Old Days" among English criminals.