The Jury of Presentment Before 1215

by ROGER D. GROOT*

When the Fourth Lateran Council in 1215 forbade clerical participation in ordeals,[1] that important mode of proof lost its value as a judgment of God and fell into disuse. The procedural void thus created was filled on the continent by the confession as proof; reliance on the confession as proof led to torture to obtain it.[2] But in England the void was filled by the jury verdict as proof.[3] Thus confessions were relatively unimportant in English procedure, and torture was never a regular part of English jurisprudence.[4] Eventually, the difference in proofs helps explain how the continental systems became inquisitorial while the English-based systems became accusatorial.

That some replacement for the ordeal was required is clear; that the jury replaced the ordeal as proof is equally so. Why the jury was chosen as the replacement is an important question, and is the question explored here. The thesis is that by 1215 presenting juries had developed an adjudicatory power—a power to issue opinions approximating verdicts on guilt or innocence. Although these "verdicts" were not final in the modern sense, they were accorded substantial credence in that they controlled which accused persons were sent to the ordeal and the ultimate disposition of persons who successfully completed the ordeal. Had the pre-1215 jury not developed this power to adjudicate, to issue "verdicts," the loss of the ordeal

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* Professor of Law, Washington and Lee University School of Law.

1. *See generally,* Baldwin, *The Intellectual Preparation for the Canon of 1215 Against Ordeals,* 36 *Speculum* 613 (1961).

2. A confession, in both England and on the continent, was conclusive evidence of guilt so that no other proof was necessary to convict. See note 31, *infra.* A confession extracted by torture attained the same status on the continent. *J. Langbein, Torture and the Law of Proof* 5-8 (1976).

3. *Pleas of the Crown for the County of Gloucester Before the Justices Itinerant 1221* at xxxvii-xliv (F. W. Maitland ed. 1884).

4. *Langbein, supra* note 2, at 73-74.

in 1215 would have caused a procedural gap that might have been filled in some other way. Because the jury had developed as far as it had, only the additional step of recognizing the jury decision as final was necessary for the procedural system to be made whole.

In virtually all medieval litigation judgment preceded proof. Generally, issue was joined when the movant's complaint was met with defendant's denial. Once the issue was joined, a "medial" judgment[5] was entered awarding proof to one of the parties, usually the defendant; the proof might be combat, the unilateral ordeal, or compurgation. The party awarded the proof then gave security to perform it—he waged his law—and if he performed successfully he won his case. But as applied to civil cases and private criminal prosecutions, appeals,[6] these schematics—accusation/complaint, denial, judgment, proof—are generally understood to be far simpler than the actual process.[7]

Conversely, the schematic of the public criminal prosecution—accusation by jury of presentment, denial, judgment, proof by ordeal—is generally understood to reflect reality. I will argue that the reality varied substantially from the schematic. Specifically, I will argue that the presenting jurors performed two functions—they first accused, identified persons about whom there was suspicion, and then opined about the accuracy of the accusation. Thus the suspect was not adjudged the ordeal until there was a jury "verdict" that he was guilty.[8]

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5. The phrase "'medial' judgment" is borrowed from 2 *F. Pollock & F. Maitland, History of English Law* 602 (2nd ed. 1968) [hereafter *Pollock & Maitland*].

6. At this time a criminal prosecution could originate publicly or privately. The private form—the appeal—began with an accusation from the victim or an aggrieved relative. Denial by the appellee joined the issue and the medial judgment awarded proof by combat between appellor and appellee.

7. In civil cases and appeals the movant was required to produce various matters of pre-proof before the defendant was expected to plead; then the defendant could combine his denial with various special pleas and exceptions. Thus the medial judgment awarding proof came only after the accusation/complaint had been subjected to some significant filtering. *See generally,* 2 *Pollock & Maitland* at 598-616.

8. The private prosecution, the appeal, was simultaneously developing a "verdict" jury. An appealed person could purchase a jury either by pre-trial writ or when the justices arrived on eyre. In the former situation the jury was empaneled by the sheriff for the single case; in the latter, the jury was generally the presentment jury. These juries decided a variety of issues, but by far the most frequent and important was the issue raised by the writ *de odio et atia.* This writ directed a jury determination whether the appeal was brought from hate and spite, was a malicious prosecution, or whether it was a true appeal. If the verdict *de odio* was unfavorable to the appellee, a judgment awarding the usual proof was proper. *See* 3 *Curia Regis Rolls* at 62 and 4 *Id.* at 83 [*Select Pleas of the Crown,* Selden Society vol. 1, pl. 91, 93 (F. W. Maitland ed. 1881) [hereafter *Select Pleas*]. But a *de odio* verdict favorable to the appellee tended to be dispositive. *See, e.g., Earliest Lincolnshire Assize Rolls AD 1202-1209,* Lincoln Record Society vol. 22, pl. 607 (D. M. Stenton ed. 1926) [hereafter *Lincoln Rolls*], in

The criminal jury is conventionally dated from 1166. In that year, the Assize of Clarendon ordained the selection and swearing of twelve lawful men of each hundred; four such men were also to be selected from each vill.[9] These jurors were to report, first to the sheriff's court and then to the royal justices on eyre, anyone within their respective jurisdictions who was accused of or reputed to have committed certain serious crimes.[10] Such a person was then to undergo the ordeal.

Hurnard has argued convincingly that communal accusations predate the Assize of Clarendon. As part of her argument she posited that before the Assize one presented upon repute alone made proof by compurgation while one presented upon specific information made proof by ordeal.[11] Part of her evidence came from Glanvill, writing twenty years after the Assize, who drew a distinction between those finders of treasure trove proceeded against from ill fame alone, and those about whom there was additional inculpatory evidence.[12] The former made proof by compurgation; the latter by ordeal. A distinction is also implied in Glanvill in the treatment of an accused homicide—if the jury attested that he was taken in flight the ordeal was necessary; the implication is that without such evidence he was permitted the easier proof, compurgation.[13] Hurnard

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which the appellee paid twenty shillings for an inquest whether he was appealed by just cause or from hate and spite; the jury said he was appealed from hate and spite and unjustly and the appeal was nullified. Finally, the writ and verdict came to be expressed in terms of guilt or innocence. *See, e.g.*, 3 *Curia Regis Rolls* at 180, in which appellees purchased a writ to have an inquest whether the appeal was by just cause and because they were guilty (*eo quod inde culpabiles*) or from hate and spite.

A systematic study of the jury in this context, now being undertaken by the author, is much needed. But at least it can tentatively be asserted that a favorable verdict *de odio*, by forestalling a judgment awarding the usual proof, replaced that usual proof with the jury. That, plus the fact that an unfavorable verdict permitted the usual proof, shows a correspondence to the status of the presentment jury argued in the text.

9. The hundred was a political subdivision of the shire or county; the vill was a yet smaller unit.

10. The Latin is "*rettatus vel publicatus.*" *W. Stubbs, Select Charters* 170 (9th ed. 1921) [hereafter *Stubbs*]. This is translated in I *C. Stephenson & F. Marcham, Sources of English Constitutional History* 76 (rev. ed. 1972) [hereafter *Stephenson & Marcham*] as "accused or publicly known." The Assize of Clarendon was strengthened as to penalty and scope by the Assize of Northampton in 1176. The presentment procedure was, however, left essentially unchanged. The Assize of Northampton can be found in Latin in *Stubbs* at 179, and in English in *Stephenson & Marcham* at 80.

11. Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 Eng. Hist. Rev. 374, 391-92 (1941) [hereafter Hurnard].

12. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* 173 (G.D.G. Hall ed. 1965) [hereafter *Glanvill*].

13. *Id.* at 175.

used these texts in two ways: first, to demonstrate that Glanvill thought the Assize "a temporary measure" [14] imposed on a preexisting presentment practice; second, to conclude that one of the novelties of the Assize lay in its requirement, while it was in effect, of proof by ordeal from those presented upon repute alone.[15] Thus Hurnard believes that the dual system of proof—compurgation and ordeal—continued for some period after the Assize to have general application.[16]

If Hurnard is right that before and after the Assize, except when it was specifically applied, different proofs followed communal accusation depending upon its basis in repute or specifics, there must have been some mechanism for distinguishing one from the other. There are several reasons to think that this mechanism was the jury itself. In the first place the jurors were the obvious source of the desired information; they had accused and presumably would be able to explain why. Second, Glanvill implies that the proof in homicide cases depended upon facts attested by a jury of the locality.[17] Moreover, Glanvill says that one accused "*fama . . . publica*" went to the ordeal only after "*multas et varias inquisitiones et interrogationes*" had been made by the justices to determine the truth of the matter.[18] One end served by this questioning, directed at the jurors, could well have been to determine whether there were specific facts supporting the accusation, or whether the accusation was truly *fama publica*.[19] A procedure can then be pictured in which the jurors accused, and in the absence of volunteered support for the accusation were asked by the justices to disclose the basis for the accusation. If the jurors responded with specific inculpatory facts, the justices adjudged the ordeal. If such facts were not forthcoming, compurgation was awarded.

But by the time we begin to get records of the eyres compurgation in felony cases had disappeared except in certain franchises.[20]

14. Hurnard at 391.

15. *Id.* at 397.

16. *Id.* at 403.

17. *Glanvill* at 175.

18. *Id.* at 171. The cited statements are in Glanvill's discussion of treason. This, however, is his general discussion of the criminal system. For example, the discussion of treasure trove, which immediately follows treason, ends "for the rest, this plea is as above." *Id.* at 174.

19. Bracton tells us that in his time the jurors were questioned concerning the accuracy of their accusations. II *Bracton on the Laws and Customs of England* ff. 143-143b (S. E. Thorne, ed., 1968). By his time the questioning was obviously directed at determining whether there was sufficient evidence to subject the accused to trial.

20. See, *J. Thayer, A Preliminary Treatise on Evidence at the Common Law* 26-29 (1898). The surviving pre-1215 eyre rolls specifically order compurgation only once.

The only choice of proof open to the justices in the run of presentment cases was the ordeal. Thus as to proof, Hurnard is correct in saying that "the stricter procedure laid down by the first clauses of the assize eventually became part of the normal machinery of justice."[21] That, however, is not to say that the Assize, as "part of the normal machinery of justice," had the effect of sending every presented person to the ordeal. Rather, the normal process in presentment cases came to be accusation followed by medial adjudication, a continuation or adaptation of Glanvill's *inquisitiones et interrogationes* and his testimony *per juratam patriae*; only after an unfavorable "verdict" did the accused face the harshness of the Assize—the ordeal.

That the jurors[22] had a duty to report every crime and every suspect is well established.[23] And that they transmitted rumors and community suspicions appears from entries in the rolls. There is an example from Wilts, 1194, in which the jurors reported that they had heard it said that the accused had raped a woman;[24] a Norfolk jury of 1198 reported that rumor of the countryside had it that the accused was involved in a homicide.[25] The jurors reported in Lincoln, 1202,[26] and Middlesex, 1214,[27] that certain things were said of the accused. If all presented persons were sent to the ordeal, the defendants in each of these cases should have gone. In fact, ordeals were awarded only in the Norfolk and Middlesex cases. The Wilts case might be explained by noting that it involves rape, a crime not within the Assize, but the other three involve homicides—specifically covered by the Assize—and yet the Lincoln defendant escaped the ordeal.

A woman who was accused of selling beer by false measure in the borough of Bedford was ordered to defend herself twelve handed (*xij manu*). Roll of the Justices in Eyre at Bedford 1202, *The Publications of the Bedfordshire Historical Record Society*, vol. I. pl. 263 (G. H. Fowler ed. 1913) [hereafter Bedford Roll] [*Select Pleas*, pl. 61].

Several criminal cases from the city of Lincoln involve proof by compurgation, but they are all appeals rather than presentments. See *Lincoln Rolls* pl. 997, 999, 1005, 1505; 1 *Curia Regis Rolls* at 292, 425 [*Select Pleas*, pl. 82] 2 *Id.* at 271. The city of Lincoln held a charter absolving its citizens of proof by combat. 1 *Id.* at 293 [*Select Pleas*, pl. 82].

There is a similar appeal case from the Yorks eyre of 1208. *IV Pleas Before the King or His Justices 1198-1212*, Selden Society vol. 84, pl. 3467 (D. M. Stenton ed. 1967) [hereafter IV *PBKJ*]. See also 6 *Curia Regis Rolls* at 155, 213, 344.

21. Hurnard at 405.

22. "Jurors" here and in the ensuing discussion refers to the twelve jurors of the hundred. When the jurors of the vills are intended they will be specifically identified.

23. See text at notes 125-35, *infra*.

24. *Three Rolls of the King's Court in the Reign of Richard I 1194-5*, Pipe Roll Society vol. XIV, at 96 (1881) [hereafter *Three rolls*].

25. II *Pleas Before the King or His Justices* 1198-1202, Selden Society vol. 68, pl. 43 (D. M. Stenton ed. 1952) [hereafter II *PBKJ*]. See also 1 *Curia Regis Rolls* at 91.

26. *Lincoln Rolls*, pl. 738.

27. 7 *Curia Regis Rolls* at 247 [*Select Pleas*, pl. 116].

The aspect of the cases that explains the difference in outcome is that the jurors in the Wilts case did not know if the accusation was true or not[28] and the Lincoln defendant was not suspected by the jurors.

None of these cases specifically state that the jurors were questioned about their presentments, and perhaps they were not. It is certainly possible that the averments of non-knowledge or non-suspicion were volunteered upon the heels of the presentment. But in the rolls of these same eyres there are specific references to questioning of the jury. In Wilts, 1194, two men were accused of homicide, but the whole jury, questioned about it, did not suspect them;[29] likewise in Lincoln, 1202, four were accused of homicide and the jurors, questioned, said they suspected one but not the other three.[30]

While it is convenient to have cases establishing that there was sometimes inquiry into the foundation of the presentment, it is well to remember that the fact of inquiry is not of primary importance. What is important is that a medial adjudication—an evaluation of the accusation—occurred, whether or not prompted by inquiry.

Reference was earlier made to Glanvill's discussion of homicide in which he prescribes the ordeal for an accused slayer whose capture in flight was attested *per juratam patriae*, and the implication that an accused about whom there was no such evidence made proof by compurgation. Now the jurors might have brought out the additional fact along with the accusation or it might have been discovered by inquiry. In either event its presence or absence was necessary to be determined. Since proof was apparently required in Glanvill's time in either case one might hesitate to call this process adjudication. But by the 1190s if proof was required at all it was by ordeal. Proof was at least required when an inculpatory fact, exemplified in Glanvill by capture in flight, was attested *per juratam patriae* and the jurors thought that the usual implication of guilt should be drawn from it.[31]

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28. This response makes clear that the jurors did not act as compurgators whose task was to swear the truth of their principal's oath.

29. *Three Rolls* at 86 (*tota jurata inde quesita*). But they were sent to the ordeal because the shire had additional evidence.

30. *Lincoln Rolls*, pl. 1004 (*iuratores interrogati*).

31. There were situations in which the implication was conclusive and the defendant denied even the ordeal. Confession is an example. See, *e.g.*, *Three Rolls* at 143; *Earliest Northamptonshire Assize Rolls AD 1202-1203*, Northamptonshire Record Society vol. V, pl. 29 (D. M. Stenton ed. 1930) [hereafter *Northants Rolls*]; 5 *Curia Regis Rolls* at 237; 6 *Id.* at 350 [*Select Pleas*, pl. 111]. There is also a case in which one was hanged, without ordeal, after the hundred attested that he was taken in flight. II *PBKJ*, pl. 618. There must have been more to the case for the result disagrees with Glanville's text and with similar cases. See, *e.g.*, *Three Rolls* at 143; II *PBKJ*, pl. 746. Perhaps it is more like the case in which the dying victim held his attacker until he was captured in the very act of slaying. 6 *Curia Regis Rolls* at 351 [*Select Pleas*, pl. 112].

The cases in which the jurors attested an inculpatory fact and the ordeal resulted do not clearly demonstrate that the jurors also opined as to its effect; that must await examination of cases in which the ordeal was avoided. Nonetheless, there are important clues in the ordeal cases making them worthy of inspection.

In the Wilts Eyre of 1194, one finds four ordeal cases in which inculpatory facts were attested:

> the jurors suspected (*habent . . . in suspectione*) a woman because she had a revenge motive to slay her former suitor;[32]
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> two men were accused (*rectati*) of a death; the jurors did not suspect (*non malecredunt*) them, but the ordeal resulted because the shire knew that they had sold the victim's goods;[33]
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> in another case, three men who had custody of escaped forgers came under suspicion. The jurors of one hundred had heard that one of the three custodians had taken a bribe to release his prisoners; the jurors of another hundred set out the same, but said that the other two custodians were not guilty (*Ricardus . . . nec Walterus habuerunt culpam*). A third hundred said that the custodian who was alleged to have taken the bribe had the key to the cellar where the prisoners were and that a light had been seen there on the night in which the escape occurred;[34]
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> finally, two men were accused (*rectati*) of a death—the jury suspected (*putant*) one who was named by the victim and had been captured in flight.[35]

There is a similar case from the Bucks (and Beds) eyre of 1195: a man accused (*retthatus*) of burglary was taken in flight defending himself and was therefore most evilly accused (*nequissimi rethi*).[36]

Seven ordeals were ordered during the Cornish eyre of 1201. Two of these cases contain a statement of the evidence upon which the jury's suspicion was based:

> the jurors suspected (*malecredunt*) one of a slaying because he had threatened the deceased a day earlier;[37]
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> they suspected (*malecredunt*) another because part of his tunic was found at the scene of the crime.[38]

The Lincoln eyre of 1202 yielded two ordeal cases of this kind:

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32. *Three Rolls* at 83.

33. *Id.* at 86.

34. *Id.* at 104. The evidence brought forth by the third jury was also supported by an individual.

35. *Id.* at 100.

36. *Id.* at 143.

37. II *PBKJ*, pl. 331 [*Select Pleas*, pl. 5].

38. *Id.*, pl. 332.

a defendant was simply suspected (*malecreditus*) by the jury, but the suspicion was explained by his capture at the death;[39]

one was accused (*rettatus*) of a death and the jurors suspected (*malecredunt*) him because the victim named him as the slayer.[40]

During the visit of the justices to Northampton in 1203 one Jordan was sent to the ordeal after he was captured in connection with a purse containing false money.[41] In one of the three Staffordshire cases from 1203 ordering ordeals, there was additional evidence: the accused was suspected (*malecreditur*) by the jurors of a death because he had concealed himself on account of it.[42]

There were fourteen cases awarding ordeals when the justices visited Lincoln in 1206; in two cases the defendants were suspected (*malecreditur, malecrediti*) because they were taken in possession of the stolen goods.[43] Two ordeals occurred in the Yorks eyre of 1208; in one instance the jurors described the evidence by which they suspected (*malecredunt*) the defendant.[44]

In addition to these presentment cases before itinerant justices which resulted in ordeals, there are similar cases from the central courts. The king and his court heard presentments[45] at Wells in 1201 and at Oxford in 1204. At Wells, ordeals were awarded:

to two men who were suspected (*malecrediti*) of a death; they were taken in flight by the hue and cry;[46]

to one who was taken (*captus*) for a death in possession of the fatal knife and the deceased's cap;[47]

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39. *Lincoln Rolls*, pl. 663.

40. *Id.*, pl. 1004.

41. *Northants Rolls*, pl. 797.

42. Staffordshire Suits, *Collections for a History of Staffordshire*, vol. III, at 94 (G. Wrottesley ed. 1882) [hereafter Stafford Suits] [*Select Pleas*, pl. 66].

43. *Lincoln Rolls*, pl. 1488, 1496. There is another case, plea 1495, awarding an ordeal upon possession of stolen goods. However, the names of the defendants are the same in pleas 1495 and 1496; in plea 1495 they were taken seized of four mutton carcasses and in plea 1496 with four mutton carcasses and sixteen sheep. Presumably these are the same case.

44. IV *PBKJ*, pl. 3441.

45. Although there is no specific reference to the jurors in the cases set out below, they must be presentments. There were Somerset hundred jurors present before the king at Wells. See II *PBKJ*, pl. 755 [*Select Pleas*, pl. 120]. In the series of Oxford cases from which the cases below are taken there is one beginning "The jurors say" (*Juratores dicunt*), 3 *Curia Regis Rolls* at 146, and several containing phrases usually associated with the jurors. For example, the phrase "they heard it said" (*audierunt dici*). 3 *Id.* at 145.

46. II *PBKJ*, pl. 746.

47. *Id.*, pl. 751 [*Select Pleas*, pl. 125].

and at Oxford:

> to one who was suspected (*malecreditur*) of a death and other evil deeds in part because one who had abjured had identified the accused as the worst kind of thief;[48]
>
> to one who was suspected (*malecreditur*) of the same death because he had instigated it and of other evil deeds because he had stolen a net.[49]

The same kind of cases appear in other rolls. In a Hereford case, dated 1207, ordeals were awarded; Maitland says the case must be based on the presentment of a Hereford jury before the justices in eyre,[50] but it was heard by the King's itinerant court. The report states that the widow of the victim was suspected by the whole neighborhood (*malecreditur per totum visnetum*) because she was an adulteress, had quarrelled with her husband and had removed all chattels from the house; a servant was suspected (*malecreditur*) because he did not respond to the hue and cry and because he apparently abetted the adultery.[51] Finally, there are two Middlesex cases of 1214, heard at Westminster in which inculpatory evidence appears:

> in one it was said (*dictum fuit*) of the accused that he provided the fatal knife, he was suspected (*malecreditus*) and so sent to the ordeal.[52]
>
> in the other the accused was suspected (*malecreditus*); he was in possession of a basket, apparently the stolen property, and awarded the ordeal.[53]

To cement the point that an adjudicatory process, a selection of the guilty from the accused, was at work here additional reference

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48. 3 *Curia Regis Rolls* at 144. This case is one of a series dealing with the slaying (and robbery) of a Jew and a hermit. In one case the accused was suspected and ordered to the ordeal, but became an approver; another was suspected and ordered to the ordeal, but was appealed by the approver and placed in custody; a third was suspected and awarded an ordeal, but the judgment is followed by the names of twelve pledges—apparently he avoided the judgment.

49. 3 *Id.* at 144.

50. *Select Pleas* at 55 n. 1. Another case in the same series, but concerning a different crime, says that the accused was suspected by the whole city of Hereford (*malecreditur de totam villatam de Hereford*). 5 *Curia Regis Rolls* at 65.

51. 5 *Curia Regis Rolls* at 64 [*Select Pleas*, pl. 101]. The widow apparently survived the ordeal; she reappears four years later suing for her dower. 6 *Id.* at 132, 184, 185, 257, 258.

52. 7 *Id.* at 247 [*Select Pleas*, pl. 116]. The Latin is "*malecreditus inde*," which Maitland translates as "[H]e is suspected thereof by the jurors." Maitland also notes that this is the only case he found in which an accused failed at the ordeal. *Select Pleas* at 75 n. 3. *But see Lincoln Rolls*, pl. 588d, and Stafford Suits at 94.

53. 7 *Id.* at 241.

must be made to two of the cases just discussed. In the first,[54] there were four defendants, one accused (*rettatus*) as the principal in a homicide and the other three accused (*rettati*) as accessories. They were accused because the victim, before his death, had said that if he lived he would appeal the one as principal and the others as accessories. Here is a sufficient incriminatory fact to have sent all four defendants to the ordeal.[55] Yet the jurors suspected (*malecredunt*) only the prinicpal and he was awarded the ordeal. Those accused as accessories were neither guilty nor suspected (*non sunt culpabiles inde nec malecredunt*) and therefore quit.[56]

The other case[57] involved several defendants of whom three were present for trial. Additional incriminatory facts were attested as to two and they went to the ordeal. The third was accused because he had arrived at the hue and cry with the victim's bow—a sufficient incriminatory fact,[58] but he was not suspected (*non malecreditur*) and released under pledges.

These two cases, internally and by comparison with similar cases, demonstrate that a selectivity was functioning to decide which presented persons were required to make proof by ordeal. That is, it was not enough that the jurors report an additional, incriminatory fact; nor was it enough that the jurors believe that fact, for there is no indication that the jurors disbelieved that the victim in the first case would have appealed the three as accessories or that the defendant in the second had possession of the victim's bow. What finally was necessary was that the jurors themselves drew the usual inference from the fact and therefore suspected the accused.

In the two cases just discussed, the inference that the jurors drew as to some defendants and refused to draw as to others went to participation in the criminal conduct. The jurors also drew inferences as to mental state. In an 1199 Stafford case, Adam shot an arrow which struck and killed a child; Adam defended that he had not intended to injure the child and that the slaying was accidental. The jurors attested this.[59] There is a similar Yorkshire case dated

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54. *Lincoln Rolls*, pl. 1004.

55. *Compare Three Rolls* at 100.

56. There are cases in which the finder of a corpse or a person present where a slaying occurred is not suspected and quit. See, *e.g.*, *Lincoln Rolls*, pl. 577, 1483, 1509. The coroner or sheriff was required to attach such persons to appear before the justices without regard to their involvement in the crime. *R. Hunnisett, The Medieval Coroner* 23-24 (1961) [hereafter *Hunnisett*]; Bedford Roll, pl. 222. These persons are generally described as attached (*attachiatus*) and the reason for the attachment stated. *E.g.*, *Lincoln Rolls*, pl. 577, 1509. The three alleged accessories in the instant case are denoted accused (*rettati*) and a reason, beyond presence, for the accusation is stated.

57. 5 *Curia Regis Rolls* at 64 [*Select Pleas*, pl. 101].

58. *Compare Lincoln Rolls*, pl. 1488, 1496.

59. Stafford Suits at 41. There is no judgment expressed, but the case has a note of finalty. Presumably, Adam was required to seek a pardon. See note 60, *infra*. *Com-*

1212 involving a thrown stone in which it was attested that the death was accidental.[60] As there is no question that the defendants in these cases had done the acts causing death, the jurors can only have been opining about mental state. And the jurors' opinion carried sufficient weight that the defendants were not required to prove their innocence by the ordeal.[61]

In most of the cases discussed thus far the jurors' own opinion as to the guilt of the accused is textually distinguished from the accusation. When the fact of accusation is stated in these cases it is usually expressed by a form of *rettare*. The jurors' opinion is usually expressed by a form of *malecredere* or its negative. But even when another term is substituted for *malecredere*, there remains an obvious distinction with *rettare*. Cases in point are that in which the defendant was *retthatus/nequissimi rethi* and that in which two were *rectati* and the jurors *putant* one.[62]

This same pattern, often using forms of *rettare* and *malecredere* is also in another class of cases. These are cases in which there is no mention of an additional inculpatory fact, but the two-step description occurs:

Berkshire (and Bedford), 1195
it is said/not suspected (*dicunt/non malecredunt*)[63]

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pare Lincoln Rolls, pl. 1008, in which a six year old child threw an object that struck and killed a woman. Misadventure was attested and the child was placed under pledges because of his age. Apparently a pardon was unnecessary.

60. 6 *Curia Regis Rolls* at 351 [*Select Pleas*, pl. 114]. The death was pardoned by the king and the defendant released. See also, III *PBKJ*, pl. 736, in which one who had accidently slain another with a stone and fled was not to be outlawed.

61. The jurors sometimes gave a "special verdict":

Herbert was accused of harboring an outlaw; the jurors did not suspect Herbert except that he had in fact received the person (*non malecredunt . . . Herbertum nisi de illa receptione*). Herbert said he didn't know his guest was an outlaw and went quit. *Three Rolls* at 78. This and the next case are interesting early examples of *mens rea*.

A woman was accused of harboring an outlaw; the jurors said that he visited only as a son to his mother (*dicunt quod non fuit cum ea nisi . . . sicut filius ad matrem*). She went quit. *Northants Rolls*, pl. 42.

Walerand and Phillip were accused of homicide; they had fled together after the death. The jurors did not suspect Phillip, except that he had fled with Walerand. (*Nullum suspectum habent de Phillipo nisi ex hoc . . . fugebat . . . cum . . . Walerando*). Phillip was held as an accessory pending the outcome of Walerand's ordeal. *Three Rolls* at 100.

62. The use of the various verbs is not entirely consistent throughout the rolls. For example, *rettare* sometimes has the meaning "to appeal." See, *Three Rolls* at 35; II *PBKJ*, pl. 619 [*Select Pleas*, pl. 19]. In general, however, the distinction between *rettare* and the alternative verb (*malecredere, putare, diffamare*, etc.) is clear. *Contra*, 2 *Pollock & Maitland* at 642 n. 3. Moreover *malecred*—is sometimes found as a synonym for *culpabilis*—guilty. See *Lincoln Rolls*, pl. 555; Stafford Suits at 93 [*Select Pleas*, pl. 64].

Cornwall, 1201
accused/not suspected (*rettati/non malecreduntur*) (two cases)[64]
Lincoln, 1202
accused/not suspected (*rettatus/non malecreditur*) (Two cases)[65]
it is said/not suspected (*dicitur/non malecreditur*)[66]
Shropshire, 1203
captured/not suspected (*capti/non malecreduntur*)[67]
captured/not guilty (*captus/non est inde culpabilis*)[68]
Oxford, 1204
captured/not suspected (*captus est/non malecreditur*)[69]
Hampshire, 1212
arrested/not suspected (*arestatus fuit/non malecrediture*)[70]
imprisoned/not suspected (*detentus in prisona/non malecreditur*)[71]
Worcester, 1212
arrested/not suspected (*arestatus fuit/non malecreditur*)[72]
captured/not suspected (*captus fuit/nullus malecredit*)[73]

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63. *Three Rolls* at 141.

64. II *PBKJ*, pl. 322, 621. Stenton thinks the latter case, and three which precede it, are the record of the delivery of Launceston goal during the eyre of 1201. I *Pleas Before the King or his Justices, 1198-1202*, Selden Society vol. 67, at 130 (D. M. Stenton ed. 1953). Maitland is more doubtful that the case belongs to this eyre. *Select Pleas* at 7 n. 3.

65. *Lincoln Rolls*, pl. 588c, 754a.

66. *Id.*, pl. 738.

67. III *Pleas Before the King or his Justices 1198-1212*, Selden Society vol. 83, pl. 739 (D. M. Stenton ed. 1967) [hereafter III *PBKJ*] [*Select Pleas*, pl. 77].

68. *Id.*, pl. 719. The defendant was incarcerated because one was slain in his house. As he should only have been attached, there must have been some additional circumstance that caused his incarceration.

69. 3 *Curia Regis Rolls* at 145. There are other cases on the rolls of the central courts in which an imprisoned defendant is described as not suspected and is ordered released under pledges. One cannot be sure whether the accusation in these cases was by presentment or appeal; also, the "verdicts" in these cases appear to be returns on inquest writs. *E.g.*, 6 *Id.* at 27.

70. 6 *Id.* at 304. This and the next case were local cases which came before the king's itinerant court.

71. *Id.* at 306. Factually, this case is like the one in note 68, *supra*.

72. *Id.* at 400. This and the next case are almost certainly from a delivery of the Worcester gaol by the king's itinerant court. It is not clear that a jury accused such persons in the usual way. The fact of incarceration, which is often based on a jury accusation made in the shire court, seems to be sufficient to bring the defendants before the gaol delivery court. The "verdict" seems to be given by a jury formed for the occasion. *See also* text at notes 114-18, *infra*.

73. *Id.* at 400. There are several parties in this counterfeiting case. The citation is to Alexander de Estwode, about whom the case is conclusive.

There is also the Wilts case of 1194, discussed earlier, in which the jurors did not know the truth of the matter (*nesciunt si verum sit nec ne*) and in the same eyre one accused (*rettatus*) and incarcerated was freed by the justices—presumably he was not suspected.[74]

One does not know whether these persons were not suspected because there were no inculpatory facts,[75] or whether, because they were not suspected, the clerks thought it unnecessary to enroll those facts. In either event, the defendants were presented, but the presentments did not lead to ordeals because the jurors themselves did not suspect those they had accused. Here again, the jurors are adjudicating.

In addition to those cases not mentioning inculpatory facts, and not resulting in ordeals, there are cases that do not mention those facts but do end in ordeals. Some of these cases carry forward the textual distinction between accusation and suspicion:

Berkshire (and Bedford), 1195
accused/suspected (*rettatur/malecreditur*)[76]
Cornwall, 1201
accused/suspected (*retatus/malecredunt*)[77]
it is said/suspected (*dicunt/malecredunt*)[78]
Lincoln, 1202
accused/suspected (*rettati/malecrediti*)[79]
accused/suspected (*rettati/malecreduntur*)[80]
Stafford, 1203
captured/suspected (*captus/malecreditur*)[81]

That the textual distinction exists is some evidence that the jurors were adjudicating—first accusing and then opining about the accuracy of the accusation. But here, the opinion is essentially a restatement of the accusation. Without the assurance provided by inculpatory facts, one may have adjudication in form but not have an effective filter separating innocent from guilty accused. And it must

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74. *Three Rolls* at 96, 113.

75. Except in the case at note 72, *supra*, which states that the accused had been arrested on simple suspicion (*pro . . . simplice suspicione*).

76. *Id.* at 146.

77. II *PBKJ*, pl. 354 [*Select Pleas*, pl. 10].

78. *Id.*, pl. 355.

79. *Lincoln Rolls*, pl. 554. The jurors were amerced for not prosecuting this plea so the initial accusation must have been based on earlier proceedings before the sheriff. There is a similar case from Northants, 1203, in which the sheriff attested that the hundred suspected (*malecredit*) certain persons; then the twelve knights of the hundred and the four vills suspected (*malecredunt*) them. *Northants Rolls*, pl. 796.

80. *Id.*, pl. 588d.

81. Stafford Suits at 95.

be remembered that these cases are those which earlier would have permitted proof by compurgation—the easier proof on the less trustworthy accusation—and yet these defendants are being subjected to the ordeal. These cases, however, add an element not found in those involving incriminatory facts. In each of these cases awarding ordeals without specific facts, the jurors of the vills[82] are expressly stated to have joined the hundred jurors in suspecting the accused. Conversely, when ordeals were awarded upon specific facts, the vills are explicitly mentioned in only two cases.[83] This degree of mutual exclusion presents a tantalizing prospect: that the vills were consulted in those cases which previously would have been proven by compurgation—those in which there was no specific inculpatory fact attested *per juratam patriae*, by the hundred jury. Whatever role may have been intended for the vills under the Assize of Clarendon, they seem by this period to be used to provide sufficient assurance of guilt that the ordeal could be awarded in the absence of specific facts.

Additional evidence comes from a number of cases scattered across the rolls which simply state that the defendant was suspected (*malecred---*) by the hundred jurors and the vills and the ordeal was awarded.[84] As it must be assumed that the defendant had first been presented by the hundred jury, these cases, not revealing the specific inculpatory facts, but joining the jurors of the vills, are exactly like those in the form *rettare/malecredere* and in which the ordeal was similarly awarded. In total, there are nineteen cases identified herein awarding ordeals after participation of the vills; inculpatory evidence is noted in only two. Stated conversely, there are

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82. The Assize of Clarendon required presentments by the twelve jurors of the hundred and *"per iv legialores homines de qualibet villata"*—"through four of the more lawful men of each vill." *Stubbs* at 170: *Stephenson & Marcham* at 77. The Assize of Northampton required presentment by the twelve and *"per sacramentum quatuor hominum de unaquaque villa hundredi"*—"by the oath of four men of every vill in the hundred." *Id.* at 179; *Stephenson & Marcham* at 80.

It is known that the number of vills necessary for presentment was four and Maitland says that number was fixed "so soon as we get records." *Select Pleas* at xxiii. There are references to the vills in 1194 and 1195, but the numbers are not given. *Three Rolls* at 78, 142, 146. The earliest reference to four vills seems to be from the Norfolk roll of 1198 in which an appeal was put to *"quatuor ville vicine,"* II *PBKJ*, pl. 19. The earliest reference in a presentment case is on the Stafford roll of 1199 which names the *"iiij villatae"* and *"iiij villatae propinquiores."* Stafford Suits at 42.

83. II *PBKJ*, pl. 331 [*Select Pleas*, pl. 5], 332. There are some cases that may make oblique reference to the vills. *Three Rolls* at 86 (*tota jurata*) and 89 (*totum hundredum*); 5 *Curia Regis Rolls* at 64 [*Select Pleas*, pl. 101] (*totum visnetum*); 5 *Id.* at 65 (*totam villatam de Hereford*).

84. Stafford Suits at 42; Bedford Roll, pl. 211 [*Select Pleas*, pl. 57]; II *PBKJ*, pl. 335 [*Select Pleas*, pl. 6], 359 [*Select Pleas*, pl. 12], 363; *Lincoln Rolls*, pl. 1477, 1478; IV *PBKJ*, pl. 3502.

seventeen cases awarding ordeals after attestation of inculpatory facts; the vills participated in two.

An additional illustration of this dichotomy can be found internally to the various rolls. The Lincoln roll of 1202 contains four cases awarding ordeals after presentment. In two cases the vills joined the hundred jury in suspecting the defendants; in the other two cases there were inculpatory facts and the vills are not mentioned.[85] The York roll of 1208 is the same. It contains two presentment/ordeal cases—in one there is inculpatory evidence, but in the other the vills participate.[86] The two presentment/ordeal cases in the 1195 roll from Bucks (and Beds) divide precisely the same way.[87]

Finally, reference must be made to a unique case from the 1199 Stafford roll.[88] Two were suspected (*malecredunt*) by the hundred jurors of receiving a thief. No specific evidence is given. The four vills did not suspect (*iiij villatae non malecredunt*) one of them and he was placed under pledges; but the four nearest vills did suspect (*iiij villatae propinquiores malecredunt*) the other and he went to the water. This case stands not only for the proposition that the vills were consulted when the hundred jury did not develop inculpatory facts, but stands for the additional proposition that when the vills were consulted, agreement among them and the hundred jury was necessary to adjudging the ordeal.

Nonetheless, it must be remembered that the principal point in all of this is the existence of medial adjudication. Whether that process occurred through the hundred jury's attestation of inculpatory facts and its opinion as to the defendant's guilt, or whether it took the form of endorsement of a more generalized suspicion by the hundred jury and the vills, it remained an adjudicatory act.

Having developed that tentative conclusion, it becomes necessary to examine the contrary evidence. This evidence comes from the Norfolk roll of 1198, and 1206 Lincoln roll, and individual cases found in the other rolls.

The Norfolk roll contains seven presentment cases resulting in ordeals; it had no presentment case in which the defendant was present and avoided the ordeal. None of the seven ordeal cases shows any evidence of the two-step process identified in the other rolls. Four of these cases do not even use a verb to describe the defendant's status; for example, "William Sire for stolen cloth, he has waged the law" (*Willelmus Sire pro pannis furatis, Vadiavit legem*).[89] One simply states that the defendants were thieves (*furati*

85. *Compare Lincoln Rolls*, pl. 554, 558d *with Id.*, pl. 663, 1004.

86. *Compare* IV *PBKJ*, pl. 3441 *with Id.*, pl. 3502.

87. *Compare Three Rolls* at 143 *with Id.* at 146.

88. Stafford Suits at 42.

89. II *PBKJ*, pl. 71. Pleas 8, 64, and 68 are similar.

sunt);[90] another identifies the defendant as suspected (*diffamatus*).[91] Finally because someone, presumably the jurors, said (*dicunt*) that Hawisa was cognisant of a death she was sent to the ordeal; and because it was rumored (*fama patrie dicit*) that Hawisa and her lover had frequented the house of William he was sent to the ordeal.[92] None of these seven cases mention the vills.[93]

It is certainly possible to read these cases, particularly the last one, to have awarded ordeals upon community suspicion alone. The only textual response to this is to note that the jurors did not say they had heard Hawisa was cognisant, but that she was cognisant. Likewise, *diffamatus* can be read as the jurors' opinion of guilt rather than their report of suspicion. Obviously, this is reading a good deal into scanty language.

The more realistic approach is to admit that these Norfolk cases do not describe a two-step procedure. But they do not necessarily detract because the roll itself is abberational. The differences between this roll and the usual construction of presentment cases on other rolls have already been noted. Three other items may suffice to demonstrate how different this roll is.

First, all the other extant rolls, except the 1194 Wilts roll, adjudge the ordeal with the phrase *purgare se*;[94] in the Wilts roll the judgment is uniformly phrased *mundare se*.[95] Only three of the Norfolk cases actually verbalize the judgment, and the phrase used is *habere aquam*.[96] Both the partial failure to verbalize the judgment and verbalization are different.

Second, when one is to be seized for some transgression, the language of all the other rolls is either *capiatur* or *custodiatur;* in the Norfolk roll we find "*habeat gaiolam*"[97] or "*capiatur . . . et ponatur in gaiolam*."[98]

Finally, the uniform usage in making the order that one is to be summoned preparatory to outlawry is *interrogetur* in all except the

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90. *Id.*, pl. 63.

91. *Id.*, pl. 55. *Diffamare, rettare,* and *malecredere* are all used in this roll, but in no discernable pattern. *Compare* pleas 53 (*diffamatus*), 60 (*malecreditus*), and 72 (*retatus*).

92. *Id.*, pl. 43.

93. But this is the roll upon which the four vills first appear. II *PBKJ*, pl. 19 (an appeal).

94. With the exception of three cases in the Lincoln roll of 1202 which use *defendere se. Lincoln Rolls*, pl. 663, 843 (an appeal), 851 (an appeal).

95. A woman successful at the ordeal is described in the Norfolk roll as "*munda est.*" II *PBKJ*, pl. 43.

96. *Id.*, pl. 8, 63, 64.

97. *Id.*, pl. 4, 17, 40, 44.

98. *Id.*, pl. 41 "*Capiatur*" alone appears in plea 60, but there seems to have the sense of "to summon"—the step preparatory to outlawry.

1194 Wilts roll and this Norfolk roll. The Wilts roll uses "*quiratur*";[99] the Norfolk roll uses "*demandatur.*"[100]

It can then fairly be said that the Norfolk roll, both because it says so little and because it says things so differently than the other rolls, is neutral.[101]

The Lincoln roll of 1206 is more troubling. The bulk of the ordeal cases on this roll simply say that the defendant was suspected (*malecreditus*) and the ordeal followed. Before examining the cases, however, the structure of the roll needs description. Starting at plea 1477, there are twenty presentment cases; plea 1497 is an appeal and 1498 is a case in respite; plea 1499 is another presentment. Then there is a group of mixed civil cases and appeals until 1507, which is either a presentment or a continuation of the appeal in 1506;[102] plea 1508 is an appeal and 1509 may be a presentment.[103] Of the twenty cases beginning with plea 1477, thirteen result in ordeals;[104] in four the defendants were not present;[105] there is one acquittal;[106] one case involves a minor;[107] and one defendant fined to be in custody.[108]

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99. *Three Rolls* at 108, 110.

100. *Id.*, pl. 52, 53, 59, 61, 62. In one instance "*requiratur*" is found, *Id.*, pl. 9. *See also* note 98, *supra*.

101. The obvious difference in structure and vocabulary which distinguish the Norfolk roll, and to a lesser extent the 1194 Wilts roll, might be accounted for by a difference in judges. All of the eyre rolls discussed herein except those two involved Simon of Pattishall in some way. He was the leading judge at Buckingham (and Bedford) (1195), Cornwall (1201), Lincoln, Bedford, and Northampton (1202), and Lincoln (1206); he was the second leading judge at Shropshire and Stafford (1203), and York (1208), and he was on the bench at Stafford (1199) and Northampton (1203). III *PBKJ* at c, clviii, clxxv, cxciii-cxcv, ccix-ccx, ccxxxix, cclx. He did not participate in the eyres that visited Wiltshire in 1194 or Norfolk in 1198. *Id.* at xcix, cxxxv.

102. In *Lincoln Rolls*, pl. 1505, Augustine was appealed of a death; he and the appellor placed themselves in mercy. In plea 1506 Roger *cocus* was appealed as an accessory in the same death, but the appellor said she had never appealed him. The full text of plea 1507 then is: "*Rogerus de Ailesham malecreditus. Purget se aqua.*" If the two Rogers are not the same, Roger de Ailesham was presented for some crime. If they are the same, Roger came before the justices on the appeal, and upon its failure was "tried" by a jury and awarded the ordeal. This was not uncommon. *E.g.*, II *PBKJ*, pl. 265.

103. The persons "tried" in 1509 are described as *attachiati* for a man found strangled. Probably they were finders rather than suspects, although after a verdict "not suspected" they are placed under pledges.

104. Pleas 1495 and 1496 seem to be the same case. See note 43, *supra*.

105. *Lincoln Rolls*, pl. 1479-82.

106. *Id.*, pl. 1483. These persons were apparently before the justices because they were of the house in which a slaying occurred. Thus they should have been attached, *Hunnisett* at 23-24, but are not so described. The defendants not present in the preceding four cases were also involved in this death.

107. *Id.*, pl. 1489. He was suspected, and was mutilated without being sent to the ordeal. *Compare* 7 *Curia Regis Rolls* at 247 [*Select Pleas*, pl. 116], in which an underage defendant was sent to the ordeal, purged himself, and abjured.

108. *Id.*, pl. 1484.

Stenton thinks that the justices who visited Lincoln in 1206 held a limited commission—limited on the criminal side to goal delivery and appeals. Thus, she says, "[t]here were no solemn verdicts of the jurors of the wapentakes [hundreds] and towns to be recorded."[109] Certainly there are no divisions of the roll by hundred with responses to the articles of an eyre, and yet two cases specifically refer to the jurors and the vills, and several others to the jurors.[110] These references could be to the verdicts of those bodies in a preliminary proceeding brought forward to the justices when they delivered the gaol.[111] In that event it should not surprise that the clerk enrolling the gaol delivery would often record what was said there, that the defendant had earlier been adjudged *malecreditus,* rather than to record the proceedings which reached that conclusion. If that is so, we cannot see behind the *malecreditus* to know the form of the earlier proceeding. But it is clear that the justices formed civil juries on this visitation,[112] and it seems likely that they also formed criminal juries. In particular, the household in plea 1483 and the finders in plea 1509, assuming all of them to have been attached, would have been required to appear before the justices because of the attachment[113] and the verdict "not suspected" in each case should have been an initial decision which required a jury.

We are then left with nine cases from this roll that appear to send an accused to the ordeal upon verdict of the jurors alone, without joinder of the vills or attestation of inculpatory facts. Now it should be noted that six of these cases are non-homicide cases and therefore the defendants were bailable,[114] but if this is a gaol delivery they apparently were still incarcerated. Perhaps some implication of guilt was drawn from the fact that no one bailed them[115] or from the fact of incarceration. If so, and although some incarcerated defend-

109. *Id.* at xli-xlii.

110. *Id.*, pl. 1477-1478 (jurors and vills); pl. 1479, 1480, 1485, 1486, 1488, 1491, 1495 (jurors).

111. Those defendants who were incarcerated had presumably been arrested after unfavorable proceedings in the shire court, the record of which should have been before the justices. *Id.* at xlvii, xlviii.

112. *Id.*, pl. 1452, 1455.

113. *Id.* at xlviii. This may also explain why the cases of four absent persons were handled at a gaol delivery. If the household in plea 1483 was before the justices on attachment because Osbert had been slain in the house, it would then seem natural to ask who killed Osbert, and the answer being given, to proceed against those named. As they had fled, the disposition was the usual one—an order to the shire to proceed to outlawry.

114. *Glanvill* at 174.

115. There are analogies. An appellee who had no frank-pledge or mainpast that would vouch for him was denied the duel and sent to the ordeal. Stafford Suits at 43. But one appealed by an approver was simply placed under pledges if an inquest attested his good character. *Northants Rolls,* pl. 728, 731, 738.

ants went quit or under pledges,[116] it would also help explain some other cases. In the Wilts eyre of 1194 the jurors said (*dicunt*) that Osbert had slain a man and he had been taken (*captus*); Osbert went to the ordeal without further ado.[117] On the same roll persons who were taken (*capti*) and suspected (*habentur suspecti*) of homicides were awarded the ordeal.[118] In Northants, 1203, one held for ill fame (*retentus de mala fama*) was, without more, sent to the ordeal.[119] The same fate befell one at Westminster who was captured (*captus*) in the company of robbers and held in prison (*detentus in prisona*);[120] likewise for two men imprisoned (*imprisonatus*) at Newgate—one for theft and one for homicide.[121]

The only other eyre cases that might have awarded ordeals on accusation alone, without medial adjudication, are one from Wilts, 1194, and another from Stafford, 1203. The Wilts case is made up of two fragments which indicate that one was accused (*rectatus*) of a death and sent to the ordeal.[122] The case is obviously incomplete and provides no basis for conclusion. The Stafford case awarded an ordeal to a woman who was simply suspected by the jurors (*malecreditur a juratoribus*) of having been present at and counseled a death.[123] Finally, there is a Hereford case heard at Westminster which states only that the accused was suspected by the whole city of Hereford (*malecreditur per totam villatam de Hereford*).[124]

If one excludes the Norfolk roll from consideration because it is constructed so differently than all the others, and if the explanation of the 1206 Lincoln roll given herein has any merit, there are only a

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116. *E.g., Three Rolls* at 113; cases at notes 67-73, *supra*. Incarcerated persons nonetheless seem to have received shorter shrift than others. For example, at the delivery of Launceston gaol in 1201, an accused homicide was hanged without ordeal because he had been captured in flight. II *PBKJ*, pl. 618.

117. *Three Rolls* at 93.

118. *Id.* at 89. Ralf de Beggebi was identified by survivors as the principal attacker. This Ralf was imprisoned and suspected (*malecredit*) by the hundred. However, he was bailed and apparently did not appear for trial. Then Ralf Tonsor and others, who had been taken (*capti*), were suspected (*habentur suspecti*) and sent to the ordeal. If the two Ralfs are the same person, there is an attested inculpatory fact.

119. *Northants Rolls*, pl. 935. There was one "*incarceratus . . . pro malo rettho*" in the Bucks (and Beds) roll of 1195, but no judgment is given. *Three Rolls* at 148.

120. 7 *Curia Regis Rolls* at 247 [*Select Pleas*, pl. 116]. Perhaps the circumstances of the capture constituted sufficient inculpation.

121. 7 *Id.* at 241.

122. *Three Rolls* at 80, 114.

123. Stafford Suits at 94 [*Select Pleas*, pl. 65]. The ordeal was respited because the defendant was ill.

124. 5 *Curia Regis Rolls* at 65. Perhaps the city formed only the equivalent of a hundred jury; perhaps "*per totam villatam*" implies twelve jurors plus the representatives of smaller units.

few scattered cases to challenge the thesis that the jurors of the hundreds and vills acted as adjudicators.

And a comparison of the role of the jurors as accusers with their other roles gives further support to the adjudication thesis. In addition to the accusatory role, the hundred jurors were required to answer all the articles of the eyre—an extensive list of matters—many of which had no connection with criminal prosecution.[125] In answering the articles the jurors were frequently called to account for making mistakes. These mistakes were variously denominated silly presentments,[126] false presentments,[127] concealments,[128] or contradictions of other entities;[129] all truly are subsumed in the last category. The point is rather obvious—to determine that the jury had committed error the itinerant justices would have required an alternate source of information standing in opposition to that presented by the jury. Generally this was the coroners' roll,[130] but sometimes was the recollection of the shire[131] or some other source. The conclusion is that the jurors were at risk whenever they contradicted another entity, and sometimes when they contradicted themselves.[132]

But this conclusion must be tempered by close examination of the subject matter involved in each case. Usually jurors were amerced for contradiction when they were reporting a fact within the primary competence of another entity. Thus outlawry was within the special competence of the shire, abjuration and enrolling finders of

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125. For example, the articles for the general eyre of 1194 require answers to questions about escheats, churches, wardships, marriages, and false measures. See *Stephenson & Marcham* at 104-07.

126. *E.g.*, II *PBKJ*, pl. 259, 391 [*Select Pleas*, pl. 15].

127. *E.g.*, *Id.*, pl. 297; *Lincoln Rolls*, pl. 893a; *Northants Rolls*, pl. 4.

128. *E.g.*, *Three Rolls* at 104, 106; II *PBKJ*, pl. 346, 376; *Lincoln Rolls*, pl. 604; *Northants Rolls*, pl. 20; IV *PBKJ*, pl. 3443, 3448.

129. *E.g.*, *Northants Rolls*, pl. 7; Stafford Suits at 91 [*Select Pleas*, pl. 62]; III *PBKJ*, pl. 720 [*Select Pleas*, pl. 75], 725.

130. For example, in II *PBKJ*, pl. 297, the jurors were amerced for a *false statement* when they named the wrong person as the finder of a drowning victim, but in *IV PBKJ*, pl. 3506, the jurors are placed in judgment for *concealment* when they did not name the finder. In each, the alternative information must have come from the coroners rolls. *Hunnisett* at 24.

131. For example, in *Northants Rolls*, pl. 7, the jurors were amerced for *false statement* when they named one as an appellee who, according to the shire, was not; in *III PBKJ*, pl. 720 [*Select Pleas*, pl. 75], the jurors were amerced for contradicting the shire and coroner in reporting the outlawry of one who had not been outlawed. But see, *Lincoln Rolls*, pl. 811 [*Select Pleas*, pl. 38], in which the shire was amerced for contradicting the jurors and coroners *re* the identity of certain appellors. The comparison of the Northampton and Lincoln cases is especially interesting in that the cases are from the same eyre and were before the same justices.

132. See note 135, *infra*.

corpses was within the competence of the coroner, initial hearing of appeals belonged to the coroner and the shire. Here, then, is Langbein's "grim spelling bee"—the jurors' memories set against the records already placed in the hands of the justices.[133] And the "spelling bee" continued even to the extent of amercing jurors for failures within their primary competence—presentment of crimes.[134]

Yet, as many of the presentment cases discussed above demonstrate, the jurors often accused and then negated their own accusation by finding "not suspected." Of course, there is no direct and inherent contradiction here, for it is possible to say "X is suspected, but I do not suspect X" without contradicting oneself. There is, however, sufficient contradiction for a system bent solely on mulcting to impose a penalty. But in no case in which a jury negated its own accusation was the jury called to account.[135]

This immunity must have existed to make the jury effective in its special role, its *raison d'etre*—to report all crimes and persons about whom there were suspicions. To have amerced a jury which would not or could not support its report of rumored suspicion would have tended to stifle that report. Of course, amercing for failure to report, which did occur, would have created a counter tendency. But a system extending immunity to reports of suspicion later negated and combining this with amercement for failure to report is the system most likely to produce those reports.

Of course, the immunity can have been discovered only through jurors risking amercement by negating accusations. But once that step had been taken, and the existence of the immunity realized, the jurors had been granted a significant power to adjudicate—to say that a defendant, although the object of suspicion, was "not guilty."

This power was not that of the modern petit jury for the power exercised by the latter body is truly power—an immunity to decide the case without fear of reprisal in a system that grants finality to the decision. Any jury decision at this time was non-final in that proof by ordeal still remained after a verdict by the jury that the defendant was suspected.[136] But the hundred jury's decision was not com-

133. Langbein, *The Jury of Presentment and the Coroner*, 33 *Colum. L. Rev.* 1329, 1331 (1933) [hereafter Langbein].

134. *Lincoln Rolls*, pl. 604.

135. The immunity did not apply when there was pure contradiction. III *PBKJ*, pl. 712 [*Select Pleas*, pl. 71] (jurors amerced for contradicting their own written return; subject matter not stated). *See also* Stafford Suits at 92. Probably these are like a later case (1221) in which the jurors stated that they had not indicated two persons when the jurors' roll contained the indictment. There the jurors were amerced for self-contradiction; clearly this is a different case than that under discussion. *Rolls of the Justices in Eyre for Gloucestershire, Warwickshire, and Staffordshire*, Selden Society vol. 49, pl. 958 (D. M. Stenton ed. 1940).

136. The analogue in appeals was a *de odio* verdict unfavorable to the appellee. In that event, the appellee was subjected to the usual proof. See note 8, *supra*.

pletely "final" even within this medial context as is evidenced by a Wilts case of 1194 and a Stafford case of 1199. The Wilts case involved two men accused of homicide. The jurors did not suspect (*non male credunt*) them; however, the knights of the shire reported that they did suspect (*male credunt*) them because they had sold goods of the victim and they went to the ordeal.[137] In the Stafford case, the hundred jurors suspected (*malecredunt*) one of receiving a thief; however, the vills did not suspect (*non malecredunt*) him and he was released under pledges.[138] But this lack of "finality" in the decision of the hundred jury should not blind us to the importance of what was occurring. In the first place, an adjudication need not be final to be properly described as an adjudication. The modern grand jury is thought to be an adjudicatory body; yet its decisions have no more finality than those just described. Its refusal to return a true bill does not bar the return of a bill by a later grand jury—a situation analogous to the Wiltshire case above. The Stafford case finds its analogy in the return of a true bill by the grand jury followed by a not guilty verdict from the petit jury. And, of course, if one uses the term "jury" to include both the hundred jurors and the vills, the Stafford case can be cited for the proposition that the "jury" had a power to adjudicate.

Even more can be gleaned from these two cases. As previously noted, whenever two official entities disagreed, one of them was amerced or placed in judgment. The only question was which report was to be given precedence. In both the Wilts and Stafford cases there is a direct and inescapable conflict between the hundred jurors and the other entity and in each case the other entity is given precedence. Yet in neither case is there any evidence that the hundred jurors were called to account. Thus the immunity enjoyed by the hundred jurors was broader than the ability to negate its own accusations—the ability to decide—they also had an immunity to decide erroneously, if not finally.

In another sense, however, a "verdict" adverse to an accused was final. Significant distrust of the ordeal as a mode of proof, noted during the reign of William Rufus in the case of the forest offenders,[139] had carried forward. The Assize of Clarendon provided that one cleared by the ordeal was nonetheless to abjure the realm if he were of the worst reputation and shamefully denounced by many.[140] The Assize of Northampton required a cleared person to find

137. *Three Rolls* at 86.

138. Stafford Suits at 42.

139. *Placito Anglo-Normannica* 72 (M. M. Bigelow ed. 1881). The case is discussed in *R. Van Caenegem, The Birth of the English Common Law* 69 and n. 19 (1973).

140. *Stubbs* at 172; *Stephenson & Marcham* at 78.

sureties to remain unless he had been accused of murder or other evil felony by the community of the county and the knights of the countryside, in which case abjuration was required.[141] There is substantial evidence from the rolls that a similar rule was in force throughout the period under consideration.[142] Since a presented person was sent to the ordeal only after an adverse "verdict," and because there is no hint in the rolls that a post-ordeal inquiry into the defendant's character was made, this abjuration system seems to have depended upon the medial adjudication of defendant's guilt by the vills and/or the hundred jurors. Thus the abjuration system accorded substantial finality to that adjudication, and in fact accorded it greater weight as proof of guilt than was accorded the ordeal.

Hurnard has already developed the point that before and for some period after the Assize of Clarendon, except when it was specifically applied, the law distinguished those accused *fama publica* from those accused upon specific facts. The first class made proof by compurgation and the second by ordeal. It is here suggested that the mechanism for determining into which class a defendant fell was exposing the basis for the jury's accusation. As compurgation disappeared and the ordeal became the only mode of proof, the distinction between accusations *fama publica* and those founded in specifics remained, but the distinction controlled the awarding of the judgment of proof rather than the mode of proof. A defendant accused upon specific facts was sent to the ordeal upon verdict of the hundred jury alone, but concurrence of the hundred jurors and the vills was required upon an accusation *fama publica*. During this development, the jurors and vills gained a power to negate their own accusations and did so either by refusing to draw the usual inference from inculpatory facts or by refusing to endorse a community suspicion.

In effect, the vills and/or the hundred jurors issued a verdict, phrased in terms of suspected or not suspected, that was in many ways the equivalent of guilty or not guilty. Equivalence lies in the identification of the verdict as a collective judgment about the de-

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141. *Id.* at 179; *Stephenson & Marcham* at 80.

142. *Northants Rolls*, pl. 797 (forger; *evasit;* could not find pledges and abjured); *Lincoln Rolls*, pl. 663 (homicide; *liberatus;* paid to be allowed to remain under pledges); IV *PBKJ*, pl. 3441 (homicide, *evasit;* paid to be allowed to remain); 6 *Curia Regis Rolls* at 256 [*Select Pleas*, pl. 107] (homicide, *purgatus;* abjured; offers one mark to return and find pledges); 7 *Id.* at 241 (2 thieves/1 homicide; each *purgavit;* each abjured); 7 *Id.* at 247 (thief; *purgavit;* abjured). A woman was cleared (*munda*) by the iron in Norfolk, 1198; there is no mention of abjuration or pledges. II *PBKJ*, pl. 43. The abjuration rule also was applied in appeal cases that went to the ordeal. *E.g.*, *Lincoln Rolls*, pl. 855; II *PBKJ*, pl. 619 [*Select Pleas*, pl. 19], 620 [*Select Pleas*, pl. 20].

fendant's culpability based on available evidence.[143] This verdict differs from the later verdict of guilty or not guilty principally because it was medial rather than final, and yet it had substantial aspects of finality. If the jurors and vills decided favorably to the accused, he was virtually certain to avoid the making of further proof by ordeal.[144] If the medial decision was unfavorable, the accused made proof by ordeal, but if he cleared himself the verdict was sufficient for him still to be treated as guilty.

Against this background of jury adjudication and substantial credence being accorded jury verdicts, the ordeal was abolished in 1215. It was then an easy matter to coalesce the pre-proof verdict with its post-proof finality and emerge with something very like the verdict of a modern petit jury.[145] Because the English had this ready, developed substitute for the ordeal, they were spared the search for an alternative. One alternative thus avoided was confession, even if produced by torture. To the extent the continental, inquisitorial systems can be traced to a past reliance on confessions and torture, the development of the pre-1215 jury provided the root mechanism for the Anglo-American accusatorial system.

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143. That the jury at this stage was self-informing does not detract from the conclusion. The important fact is that the system defined the relevant evidence (jurors' prior knowledge) and asked for an opinion based on that evidence.

144. The only exception is the Wilts case in which the jurors did not suspect, but the accused was sent to the ordeal on the shire's evidence and suspicion. *Three Rolls* at 86.

145. As explained in notes 8 and 136 *supra*, the simultaneous development of the verdict jury in appeals is another important component of this story.