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# Trial by Ordeal

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TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL. By *Robert Bartlett.* Oxford: Clarendon Press. 1986. Pp. 182. $34.95.

*Trial by Fire and Water* is a brief overview of the thousand-year history of the European trial by ordeal. Robert Bartlett is primarily concerned with the ending of the ordeal, that is, with the twelfth and thirteenth centuries. His treatment of the European origins of the practice and its workings, as well as the "aftermath" of its abolition, are appendages to that consideration. He maintains that the ordeal made sense as a proof available when other proofs were inadequate, that it spread with Christianity and was not merely a pagan survival, and that it did not wither away of its own accord or by contextual social change, but was eliminated by the church.[1] He argues his theses persuasively, but serious analytical flaws mar this otherwise useful and readable book.

## NATURE

Bartlett rightly comments that "no satisfactory account can be given of the demise of a practice unless it is clear what the practice *is*" (p. 2). Unfortunately, he is none too clear about what the ordeal *was* in practice.

Ordeals came in many varieties. The ordeal of hot iron involved the carrying of red-hot iron for a specified distance. The ordeal of hot water (the ordeal of the cauldron) required the plucking of an object from boiling water. The ordeal of cold water demanded that a bound person sink into a pool of blessed water. There were many other types, but these were the most common. These ordeals were unilateral, undertaken only by one side to a dispute. Trial by battle was distinct in that it was bilateral. Bartlett focuses mostly on the unilateral ordeals, but also briefly examines battle.

Bartlett generalizes about the natural and divine requirements of

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1. Bartlett distills his conclusions very nicely:

> It has been suggested that the ordeal was a form of proof for the hard cases, in which normal judicial procedures were inapplicable, and that it developed from Frankish origins and spread across Europe in conjunction with Christianity and Christian kingship. It was eventually abolished by a reforming clerical élite in the wake of the intellectual and institutional changes of the twelfth century.

P. 153.

the ordeals, noting that "[the unilateral ordeals] all required that the natural elements behave in an unusual way, hot iron or water not burning the innocent, cold water not allowing the guilty to sink."[2] God would intervene to prevent nature from taking its course. Bartlett is not mistaken in this; he cites examples in which the test was indeed whether the accused was burned at all. For example, one woman proved that Duke Robert Curthose of Normandy had fathered her children by carrying the hot iron and escaping "without the slightest burn" (p. 20). Lea long ago noted such examples.[3]

In most situations, though, the proof was neither so immediate nor so clear. In the ordeal of fire (hot iron or hot water), it was normally expected that the accused would be burned; the test was in the healing of the burn. The hand would be bound up and examined after three days, at which time the accused would be adjudged guilty if the burn had (or still) festered.[4] Bartlett at times describes the ordeal of fire in exactly that way (pp. 1, 23, 39). Such proof does not demand that natural elements behave unnaturally, but only that God intervene to sort out correctly events that could naturally fall in either direction depending on the heat of the water or iron, the duration of exposure, and the sensitivity of the skin. Even with the ordeal of cold water there were problems about how deep the person had to sink.[5]

The two tests are clearly related; both are ordeals, both seem to spring from similar notions about spiritual dimensions and physics. Nevertheless, the difference between the two is important. One method clearly demands an overt (with hot iron, perhaps a spectacular) miracle; the other demands divine intervention of a more covert variety. One might well expect that undergoing the ordeal preserved from all harm would be more appropriate to those in a more active posture, such as a missionary proving his religion to pagans, a woman asserting parentage, or a person asserting innocence outside coercive process.[6] Assessment of the healing process might be more appropriate for a process forced on individuals in ordinary legal process. Whether those expectations would be borne out by the data, this reviewer does not know. But Bartlett does not even note the distinction between the two methods. This analytical flaw weakens his whole argument.[7] As the author himself said, one cannot treat the demise of a

2. P. 2; *see also* p. 162.

3. *See* H. LEA, *The Ordeal,* in SUPERSTITION AND FORCE 222-61 (2d rev. ed. 1968) (1870).

4. For an early example of this test, see Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law,* in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 90, 93 (M. Arnold, T. Green, S. Scully & S. White eds. 1981).

5. H. LEA, *supra* note 3, at 246-47.

6. Bartlett distinguishes trial by battle from simple acts of violence and from acts that were "more formally regulated, yet not judicial." P. 113. It would perhaps be appropriate to separate this kind of ordeal by fire from judicial ordeals in the same way.

7. This confusion is a major flaw in his assessment of the efficacy and believability of the

practice without first understanding what the practice was.

## ORIGINS

Bartlett, granting that many other societies have used ordeals, restricts his treatment to Europe. Within Europe he distinguishes the continental tradition from the Irish tradition. He consigns the Irish tradition to obscurity by failing to find any influence on the continent: "As they represent a tradition uninfluenced by others, so the Irish ordeals were a legal tradition without influence" (p. 6). The continental tradition arose in the early sixth century with the Frankish ordeal of hot water and spread thereafter through the other Germanic tribes on the continent and into England. Bartlett is careful to admit that he is an amateur in early Irish law; the present reviewer cannot claim even that much. Nonetheless, it seems that Bartlett dismissed cultural interaction too rapidly.

The Irish and the Frankish traditions differed in the situations considered appropriate for the ordeal. The Frankish tradition originally used the ordeal for proof of innocence in cases of serious wrong such as contempt, theft, and false witness. The Irish tradition, traceable to the seventh century, was particularly concerned with "testing the legitimacy of doubtful claimants to the rights and property of the kindred" (p. 5). The former was a proof of innocence for a wrongdoer; the latter, a proof in an assertion of right. A diligent reader will see that difference in Bartlett's account. Although the author does not address it expressly, the distinction nevertheless reinforces his conclusion about the independent origins of the two traditions.

Bartlett's conclusion that the Irish tradition had no influence on the continent, however, is not clearly correct. The ordeal flourished under Charlemagne, extending even to prove a right to land (pp. 24-25). This usage, however, is similar to the Irish practice. Did the more restricted Frankish ordeal merely evolve into an Irish form or did it borrow from Irish practice? A close reading of the text raises this question. Bartlett is probably correct that the Irish tradition did not likely originate in the Frankish. However, the Irish missionaries and scholars, so important in the spread of learning and Christianity, were surely avenues for seventh- and eighth-century Irish influence on the continent.[8] Yet, having discarded the argument about interconnected origins, Bartlett also discounts the possibility of later influence

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ordeal. How could it be that more than half of those who went to the ordeal, p. 161, were acquitted if nature had to function abnormally to acquit them? Bartlett must have been willing both to subordinate the usual ordeal procedure to the unusual and to write about a physical universe far different from ours. If the elements only rarely acted abnormally, the continuance of the ordeal does not present a great problem: we still have instances occasionally in which normal expectations about the behavior of elements are frustrated by exceptional people.

8. *See* W. LEVISON, ENGLAND AND THE CONTINENT IN THE EIGHTH CENTURY 49-53 (1946); J. BOUSSARD, THE CIVILIZATION OF CHARLEMAGNE 118-56 (1968).

without discussion. In this, he is as likely right as wrong, but the text is certainly flawed by not considering the question.

## USAGE

Bartlett argues nicely that the ordeal was a reasonable instrument for settling disputes. It was used, he says, in extraordinary situations (high political disputes) and when other modes of proof failed (problems of sexual purity, religious orthodoxy, trials with no specific accusers, for people too suspect for compurgation, for foreigners, and for the unfree). The ordeal was thus "a device for dealing with situations in which certain knowledge was impossible but uncertainty was intolerable" (p. 33). Bartlett's approach makes sense of the institution, whereas an approach that emphasizes the regularity of the ordeal in the judicial machinery usually founders. There is some danger, however, that readers might conclude that the ordeal was appropriate only for the rare case. On the contrary, given the number of situations in which there was no specific accuser or in which the accused was unfree, the ordeal was likely used in a majority of criminal accusations, at least in late twelfth-century England. The ordeal was not rare.

Bartlett's refutation of the arguments explaining the ordeal and its decline in terms of changing social contexts is similarly strong. Peter Brown[9] and Paul Hyams[10] have analyzed the ordeal as a sensible institution in a cohesive community; that view perceives the ordeal as "therapeutic" and "popular" (pp. 35-37). Bartlett prefers to characterize the ordeal as "coercive and intrusive" (p. 37), emphasizing the application of the ordeal by political elites rather than the social disruptions ordeals were meant to cure. Brown and Hyams argue that the ordeal withered away because society changed. Bartlett refutes that convincingly, showing that the ordeal was a strong institution through the twelfth century (pp. 52-53, 61-62, 65-69). The emphasis on lordship and on the coercive and intrusive nature of the ordeal, together with the recognition that the ordeal remained strong through to the Fourth Lateran Council, are good and welcome additions to the literature.

Bartlett, however, deprives himself of a major argument in favor of his approach by misunderstanding the nature of judicial issues at the heart of the ordeal. He maintains, unambiguously and with neither argument nor proof, that

> the ordeal was intended to reveal a specific fact; it was designed to deal with specific allegations when other evidence or proof was lacking. This judicial function was diluted by the belief that God might be using the ordeal to show mercy, justify the good at heart, or punish the sinner

9. Brown, *Society and the Supernatural: A Medieval Change,* 104 DAEDALUS 133 (1975).

10. Hyams, *supra* note 4.

> regardless of whether he happened to be guilty in the case at issue. [p. 79]

The problems with this assertion — crucial for understanding the ordeal, how it worked in the law, and what it meant in society — lie in the assumption about the nature of the "judicial function" and in the relationship between that apparent judicial function and the question the ordeal was supposed to answer.

The "judicial function" of a trial, as ascertained by observing other forms of medieval trial, was not merely answering a specific factual question. In England, the grand assize answered the question "who has greater right?"[11] That issue assumes that both parties had some right, and that the sworn panel had to weigh the facts, mores, and legal rules to arrive at its answer. In debt on a contract, compurgation on the issue *"non debet"* did not plead a specific fact, because it is generally held to include "I do not owe because I never contracted the debt," "I do not owe because I paid," and possibly other explanations.[12] Further, the English criminal trial jury was substituted precisely into the position that had been held by the ordeal. Historians have noted that that jury did more than render answers to a specific factual question: it exercised mercy to the deserving; it showed prejudice to outsiders; it considered both factual historical questions of commission as well as matters of community standing and repentance.[13] If considerations of mercy or repentance would have "diluted" the judicial function of the ordeal, then the judicial function of many of the forms of English trial would have been seriously diluted also. Those other trials, however, worked in an acceptable manner. The ordeal clearly could have included considerations of mercy or community standing without diluting its judicial function.

Bartlett himself provides contemporaneous evidence revealing the complexity of the question the ordeal answered. In the eleventh and twelfth centuries, there was an increasing tendency to explain certain convictions or acquittals by claims that "the guilty had been cleared because they had confessed or because God wished to give them one more chance, and that the innocent, though not guilty of the specific charge brought against them, were condemned on some other count" (p. 78). Bartlett believes that those explanations were merely contortions provoked by problems inherent in the ordeal. Nevertheless, there is evidence that some people believed the ordeal worked to yield balanced, just results, and much evidence that people disagreed with the results.[14] We have no evidence that people believed the ordeal

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11. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 130-31 (2d ed. 1981).

12. *Id.* at 253-57.

13. *See* T.A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 28-64 (1985).

14. For some other examples of this balancing approach to the ordeal question, see Palmer,

should yield the answer to strict factual questions such as whether one accused of homicide wielded the instrument of death or whether there was penetration in a rape case. From thirteenth-century evidence, we know that the criminal trial jury considered the larger moral questions without raising any controversy. It would be strange indeed if people expected God to be less concerned with justice, mercy, and repentance than a jury.

The conflict Bartlett draws between the ordeal and confession is instructive. He notes several instances, both anecdotal and theological, in which confession was considered sufficient to have allowed the penitent to face the ordeal successfully. If the ordeal was solely about a factual, historical deed, then the two were genuinely in conflict. If the ordeal concerned the appropriateness of present punishment, an issue in some ways quite appropriate for divine judgment, then the two only had to be coordinated. Coordination would be impossible if the confession and ordeal were administered in close succession but yielded different results. Whereas Bartlett sees a conflict between ordeal and confession, arguing that confession undermined the "judicial function" of the ordeal and let the guilty go free, the real conflict lay in the impossibility of including both confession and ordeal in the list of sacraments, since they could yield different results.

Henry II's attitudes on the ordeal become much clearer in this light. The Assizes of Clarendon and Northampton[15] provided that people accused of a crime who were also of bad fame and denounced by the county should be exiled, even though they had been cleared by the ordeal. Bartlett notes that this has been interpreted as indicating that Henry II was skeptical of the ordeal (pp. 67-68). Bartlett argues against this view (pp. 68-69), but he recognizes that his argument is not strong (p. 69). The evidence he cites, however, is quite amenable to an interpretation that Henry II was interested in learning whether the accused still, all things considered, ought to be punished. The king was uninterested in the moral question of the appropriateness of present punishment; he cared only about the deed.[16]

Bartlett's insistence on the ordeal's concern with strictly factual questions seems to derive from his justifiable disagreement with Brown and Hyams. From his perspective, allowing for mercy or balancing in the ordeal might indicate that it served a therapeutic function. That conclusion does not follow. The mercy or strict justice rendered by the ordeal often ran counter to community sentiment. Surely, some individual ordeals acted as a purgative, but the major point remains

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*Conscience and the Law: The English Criminal Trial Jury* (Book Review), 84 MICH. L. REV. 787, 793-94 (1986).

15. *See* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 76-82 (C. Stephenson & F. Marcham eds. & trans. 1937).

16. I have made this argument previously. *See* Palmer, *supra* note 14, at 792-95.

that in regular judicial procedure, the ordeal was imposed by authority. And retaliatory actions thereafter would be judged in relationship to the ordeal's determination. The ordeal was a firm pronouncement on the appropriate present punishability, if not on historical truth or community feeling.

## DEMISE

Bartlett's exposition of the new metaphysics in his explanation of the causes of the ordeal's abolition is novel. He explores why theologians began to consider the ordeal wrong: it involved clerics in a process that ended in bloodshed, it lacked canonical authority, and it tempted God (pp. 81-90, 98). With regard to the last, the intellectual alternative posed seemed to be between declaring the ordeal miraculous and declaring it sacramental. To consider the ordeal miraculous would seem to be tempting God, since the ordeal was harnessed to a judicial procedure. The ordeal, however, was also hard to justify as a sacrament, the only context in which one could be assured that a ritual transcended the natural order. These canonical and metaphysical difficulties resulted finally in the Fourth Lateran Council's prohibition on clerical participation in ordeals. The ecclesiastical action, not a withering away of the social function of the ordeal, caused the decline of the ordeal.

## BATTLE

To Bartlett, battle differed greatly from the other ordeals. It was bilateral, demanding the participation of both sides to the dispute; it involved bloodshed as part of the ordeal itself; and it demanded no response from the natural elements. Moreover, battle was something with which people were familiar in a nonritualized context, so that it prompted greater skepticism (p. 116). These factors differentiate trial by battle from trial by fire and water.

Though Bartlett's conclusion that the history of battle was different is correct, his ascribed reasons are not. Certainly battle was bilateral. It is not clear, however, that people were more familiar with battle in a nonritualized context than they were with floating and sinking in water or with being burned and healing. But that is not a major point. Bartlett's differentiation by the response of the elements, however, conflicts with the evidence that in the ordeal of hot iron, the iron was indeed supposed to burn and the test was how the burn had healed after three days. This evidence makes it hard to distinguish battle from the ordeal. The real differentiation was that battle was bilateral and did not necessarily involve clerics. It was this latter difference that allowed battle to survive.

Bartlett maintains that the decline of trial by battle was an indirect effect of the clerical attack on unilateral ordeals. He states that "alter-

native judicial procedures . . . developed as a consequence of that lethal blow struck against trial by fire and water by the clerical critics of the age of Innocent III" (p. 126). This is a plausible point with respect to most of Europe but Bartlett should have set off England from this generalization. In England the possibility of substituting the grand assize for the trial by battle was provided in 1179 for cases concerning land,[17] well before the papacy of Innocent III. The growth of alternative legal procedures in England was unrelated to the clerical attack.

## AFTERMATH

Bartlett's choice of the word "aftermath" (p. 127) in describing the effects of the actions of the Fourth Lateran Council in 1215 is deliberate. The ordeal did not simply wither away; its abolition caused some consternation. In England, of course, the response was immediate: the royal government acknowledged the necessity of abandoning the ordeal (p. 127). Elsewhere, the reaction was slower, often the speed depending on the degree of papal influence and the degree of centralized political authority (p. 132). By 1300, however, the ordeal "had virtually disappeared" (p. 133). In most places, its demise necessitated the adoption of torture; in England, however, the ordeal was replaced by the criminal trial jury.[18] Bartlett details the ways in which torture, designed to handle situations in which other modes of proof failed, replaced the ordeal (pp. 140-43). He also traces briefly the revival of the ordeal as a trial for witches (pp. 144-52).

## RUMINATIONS

In the final chapter Bartlett deals with the ordeal and Christianity (pp. 153-56), the ordeal and rationality (pp. 156-60, 165), and the efficacy of the ordeal (pp. 161-63). These subjects, as much as they matter, could better have been handled in notes and stray comments in the text. Devoting a chapter to them is excessive.

His treatment of the relationship between Christianity and the ordeal is particularly perplexing. He had already stated his opinion that the European ordeal derived from the Franks prior to the time of their conversion to Christianity, but that Christian society adopted it (pp. 9-12). He repeats the point here, and follows with an extended rumination on how the ordeal can be considered Christian under a modern or apostolic model of Christianity. For those plagued by such

17. S. MILSOM, HISTORICAL FOUNDATIONS *supra* note 11, at 130.

18. Bartlett should have been somewhat more precise in his treatment of the criminal trial jury. One can read his treatment, which portrays the criminal trial evolving out of the presentment jury, as a discussion of the beginning of the trial jury itself. But the trial jury had already been in use in civil matters for decades, and it did not develop out of the jury of presentment. For more than a century, the trial jury was composed largely of members of the presentment jury, but the functions of the two bodies were quite distinct.

demons, the discussion may prove helpful; for others, it will seem a waste of time. Bartlett further asserts that "Christianity is not something given or essential. It is a nature that has to be shaped, determined, maintained, challenged, fought over, defined, and redefined in each generation" (p. 156). This theological premise may or may not be worthwhile. Regardless, it is strange to find it in a book by a professional historian.

More relevant to those interested in the study of law and history instead of theology is Bartlett's handling of the characterizations by T.F.T. Plucknett and Raoul van Caenegem[19] that the ordeal was irrational (p. 157). Bartlett's treatment of the problem misses the point. He perceives that "irrational," when used by legal historians, has the same emotive content as "superstitious." He thus perceives that Plucknett and van Caenegem said that the ordeal made no sense at all. Indeed, they may have thought that. But, for legal historians "irrational" deals with the later idea of "rational law," which describes the process whereby substantive law is applied to ascertained fact. The ordeal, from that perspective, was irrational because it did not allow for the development of substantive law and did not ascertain facts to which substantive law could be applied.[20] While such a conclusion might offend some because it evaluates an earlier society by modern standards, it at least does not imply the personal revulsion and intellectual incomprehensibility of the label "superstitious."

In attempting to assess the efficacy of the ordeal, Bartlett concocts a notion of "practical rationality," which, to him, indicates that the ordeal "worked" and that it "achieved certain desirable goals" (p. 158). He rejects as a justifiable goal merely the ending of the prosecution, regardless of justice, and admits that it is now impossible to ascertain empirically the reliability of the ordeal in rendering correct judgments. Bartlett, instead, thinks the ordeal functioned randomly,[21] in part because its practical rationality could be ascribed empirically only if God actually intervened or some external psychological factors made the guilty fail (pp. 160-61). Bartlett allows that the latter is a strained argument and that few would believe the former. His judgment thus is that the ordeal served no desirable goal judicially, that it was not practically rational. But "practical rationality" proves a useless category, because Bartlett ends by agreeing in fact with Plucknett.

19. T.F.T. PLUCKNETT, EDWARD I AND THE CRIMINAL LAW 69-71 (1959); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 63 (1973).

20. *See* S. MILSOM, HISTORICAL FOUNDATIONS, *supra* note 11, at 4.

21. P. 161. His standards are too high to be compelling. He asserts that more than half of those who went to the ordeal were vindicated and the rest were condemned. "It does not seem likely that all the former were innocent, all the latter guilty." P. 161. That is a high standard for any legal institution; we do not even have such a hope for jury determinations today. A random correlation would have to take into account that many of the actually guilty fled, and so could not be put to trial at all. Surely, however, at least *some* of the guilty were condemned, while some of the innocent were acquitted.

More important is Bartlett's argument about the congruence of the ordeal with medieval ideals and ideas. He states that the ordeal was consistent with the society's views of God and of God's other interventions in the world. To the reformers who opposed the ordeal, the problem was not that divine intervention was impossible or improbable, but simply that God had not committed himself to intervene in the ordeal and did not intervene in fact. Here again Bartlett takes issue with those who see the ordeal's disappearance as caused by a change in society instead of by the appearance of a theological problem. He asserts strongly that the people in later medieval Europe continued to believe that God could and did intervene in society. The abolition of the ordeal, he argues, resulted from a theological qualm when the ordeal was not included finally in the list of sacraments. In this, his main contention, he is persuasive.

Bartlett could have handled these matters more productively elsewhere in the book, without a separate chapter. The relationship with "essential" Christianity, for example, deserved only brief treatment. The "irrationality" of the ordeal could have been handled in his discussion of the workings of the ordeal, as could the congruence of the ordeal with medieval beliefs. And the additional attack on functionalists who argue that the ordeal withered away (pp. 163-65) should have been joined to his attack on Brown and Hyams.

## CONCLUSION

*Trial by Fire and Water* is not a great book and has only limited utility. One need have little doubt about the main contentions: the ordeal's Frankish origins; its usage only in that multitude of cases when other proofs fail; Bartlett's disagreement with the functionalists; and the clerical cause of the ordeal's demise. With additional thought and analysis, the book could have been very good, for Bartlett has some interesting and useful insights. Close readers will have great difficulty with questions the text presents but that the author ignores. Any reader will have problems with Bartlett's confusion over precisely what the ordeal was, and whether it did require that the elements act unnaturally, as in hot iron not burning a hand. Such a test ignores the accounts of bandaging the hand after carrying the iron and the evidence that many persons were acquitted. Finally, his justifiable disagreement with the functionalist argument skews his discussion of the question the ordeal was supposed to answer. Bartlett's polemical purpose has excluded careful consideration of certain vital issues, and thus, readers must still await a really good book on the ordeal.