



# Experts and the Law: A Historical Perspective

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**Professor Valerie Hans, Cornell Law School**

# Overview

- The first “experts” were the decision makers themselves – jurors might be chosen for their special knowledge, and might gather evidence themselves about the dispute they were to decide.
- Eventually experts served as witnesses who provided specialized information to the factfinders, usually the jury.
- In civil law countries, experts continue to be judge-appointed for the most part.
- Over time, in common law countries, experts came to be called by the parties rather than by the judge.

# Early Methods of Resolving Disputes

- Trial by battle—winner of battle prevails in

**the case.** Image taken from a plea roll; sketch shows trial by battle in Hampshire, 1249, between Hamo le Strange and Walter Blowberme. Le Strange lost and was hung. Image from [www.pro.gov.uk](http://www.pro.gov.uk)



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# Trial Methods

- Trial by ordeal
    - Fire, cold water, hot water, hot iron, corsnead
  - Trial by compurgators
    - Compurgators (often 12) swore to accused's good character, not the facts.
  - Religious rituals – and consensus about importance of religion -- essential to trial methods.
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# Decline of the Ordeals

- Trial by ordeal was a major method of resolving disputes.
  - The ordeals were imbued with religion; priests presided over them, and participants believed God would direct the outcome so that the correct verdict was reached.
  - However, in 1215, the Catholic church forbade priests to participate in ordeals.
  - Why?
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Consider the phenomenon of...

**TEBOWING**



# What's the matter with Tebowing?



- [Negocios Loucos](#) said... It's really pathetic that people think that some supreme being is paying attention to a football game. I mean let's say the Christian god is god, is Tebow saying that he's praying that god will help him win? And if god doesn't help him win what does that mean? Was god working on something else? Was he too busy saving say a starving child in Africa to help him win? And if he did spend time helping him win then did a starving kid in Africa die because he can't pay enough attention? There's a bit of absurd arrogance in thinking that God is paying attention to a football game. And if you think about it, if some god has the power to do all this stuff then why the hell do so many bad things happen? [December 16, 2011 1:55 PM](#) [insights taken from beerswithdemo blog]

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# Insights from history

- Some clergymen believed that all ordeals should be banned; increasingly the public began to feel the same way
  - The system of ordeals is a “temptation of God, useless in showing the guilt of criminals...”
    - Biblical exhortations against tempting God:
    - by assuming “the miraculous intervention of God into the regular affairs of judicial procedure [the ordeals were said to] constitute a flagrant tempting of God....”
    - Seen as “so susceptible to trickery, it never in fact reveals genuine judgments of God.”
  - By 1215 (the date of the Lateran Council) the Catholic Church had also a reasonably well-developed alternative procedure – employing the Roman law system with a legally trained judge who would gather evidence from witnesses and write a report, which then could be reviewed by those higher in the Church’s hierarchy.
  - Source: Langbein, Lerner & Smith, History of the Common Law (2009)
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# Court Sessions in Medieval England

- Trials by battle and ordeal decreased.
  - King/lords convened court sessions periodically.
  - Members of community in high standing were often selected as grand or presentment jurors, to identify disputes and crimes that had occurred in the community.
  - Private prosecution of crime was most common.
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# The Early English Jury

- In England, a rise in trial by “petty” jury, a modification of existing presentment or grand jury.
  - Jurors served royal objectives (Domesday Book)—and were cheap labor!
  - Jurors were men of relatively high standing.
  - Juries were “self-informing” (although there is some current debate about that) up until the late 15<sup>th</sup> century.
    - Often, they had personal knowledge of the parties, incidents, lawsuits.
    - They might also seek out additional relevant information from the community.
    - Jurors were witnesses as well as decision makers.
  - Trials were short, quick affairs.
  - Most crimes were punished by death.
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In England, the earliest “experts” were the fact finders themselves.

- **Special juries**

- Specialized knowledge
- Propertied; educated

- **Jury of matrons**

- Rare use of women as jurors
  - Evaluated pregnancy claim of a woman defendant who “pleaded her belly”
  - Practice declined as medical profession expanded
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# Jury of matrons (French illustration)



# From Proceedings at the Old Bailey: a 1676 trial of a woman for theft – a Jury of Matrons concluded she was not pregnant

A Woman that had several times troubled the Court at former Sessions, was now brought in again; the Crime she was charged with being thus: She had for some time lodged at a house in St. Sepulchres Parish, and on the 22th February last taking an opportunity, whilst her Landlord and his Wife were gone forth to a Funeral, cut away the posts of the door where they used to lie, and with a piece of Iron put back the Spring-lock, and stole away a silver Cup to the value of 5l. a Tankard worth 9l. and several other Goods, wearing Apparel, &c. There came in Evidence against her, that they saw a light in the Chamber where the Robbery was committed at the same time, and Knock'd at the door, but no body would answer; and that immediately after she was seen to come out of the house with a bundle or a heap in her Apron, &c. **After Conviction she pleaded her Belly, but a Jury of Matrons gave in their Verdict that she was not with Childe.**

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# The Mixed Jury

Suits between members of different communities could be heard by a mixed jury.

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# The Mixed Jury

Mixed juries contained equal numbers of members from each community.

- ❑ Mixed half-Jewish/half-Christian juries
  - ❑ Mixed merchant juries: half of natives, half of merchants from the merchant's own country.
  - ❑ Reflected the principle that judgment of a person should be in terms of their laws and customs.
  - ❑ Also showed an approach to incorporating expert knowledge of one community into the decision making body.
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# Special Juries

- The term “special jury” had a variety of meanings.
    - **Jury of experts**
    - Jury of individuals with higher-than-ordinary social status
    - Struck jury
      - Larger than usual number of people in the jury panel
      - Parties were allowed to strike or remove individuals from this panel
  - Special juries used in cases of national significance, in seditious libel and treason cases, and in cases requiring expert knowledge.
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# Transfer of English Trial Practice to British Colonies

- English legal procedures and practices were brought by the earliest British settlers to the American colonies and other outposts of the British Empire.
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# Experts in early courts: Example of witchcraft trials in the American colonial period

- Examination of a woman charged with being a witch
  - Women examined for evidence of the Devil's mark or "Witch's tit"
  - Moles & warts also examined
  - Pricking test: lack of pain?
  - Also asked to say Lord's Prayer in court



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# Early Testimony by Experts in English and American Courts

- Courts in 19<sup>th</sup> century and early 20<sup>th</sup> century determined:
    - whether expert was “qualified”
    - whether evidence was relevant to issues at trial
      - To determine relevance, some courts asked, early on, whether the qualified expert’s testimony was **beyond the knowledge of the average juror.**
  - Qualified experts allowed to testify on relevant matters.
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# Early testimony by experts

- Earliest experts served as advisors to the judge and court.
  - Experts were called mostly by the court to provide testimony to the jury (now a more passive factfinding body) by the 16<sup>th</sup> century, continuing through the 18<sup>th</sup> century.
  - By the latter half of the 18<sup>th</sup> century, parties began to call their own experts.
  - In England and the US, courts in 19<sup>th</sup> century and early 20<sup>th</sup> century determined:
    - whether the party expert was “qualified”
    - whether evidence was relevant to issues at trial
      - To determine relevance, some courts asked, early on, whether the qualified expert’s testimony was beyond the knowledge of the average juror.
  - Qualified party experts were then allowed to testify on relevant matters to the jury.
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# Dissatisfaction with experts who testified in court dates back to at least the late 1800s.

- Mnookin (2007: 772) lists the criticisms:
    - Partisan pressure corrupted expertise.
    - Seemingly qualified experts disagreed.
    - The criteria judges used for qualifying experts were too lenient.
    - The hypothetical question was awkward, unwieldy, impractical.
    - Opinion testimony was inherently unreliable and hard to evaluate.
    - Experts often failed to prepare adequately or communicate effectively.
    - Lawyers purposefully manipulated and humiliated well-intentioned experts.
  - Nonetheless, the use of expert testimony grew in frequency and importance.
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## Mnookin (2007: 773) argues:

- “...deep-seated anxiety about the use of adversarial experts results from the belief that scientific expert testimony *should have been able to be a more reliable form of evidence*, a more authoritative method for adducing knowledge than the other means available in court. Instead, it was seen as an enormous disappointment, every bit as flawed as all other forms of human testimony...”
  - In other words, the tendency to **idealize science** and scientists created dissatisfaction with the real world performance of scientists in court.
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# From Expert Decision Makers to Expert Witnesses – and Back Again?

- Today, in common law countries, there are numerous proposals for courts to use expert decision makers.
    - In USA, there are proposals for a new medical court that would be staffed by judges who had specialized training in medicine as well as law.
    - Special juries have been proposed for complex trials and complex areas of law.
      - The state of Delaware in the USA permits special juries, composed exclusively of those with college degrees, or, alternatively, other specialized training related to the case. They are rarely used.
      - For American patent litigation, an often complex subject, a number of proposals have been made for the use of special juries composed of highly educated jurors.
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# Question for Discussion: Should We Include Experts on our Decision Making Bodies?

- Suppose, for purposes of our discussion, that in the legal case of Maria Kay v. JobCorps, the plaintiff Maria Kay, who is a member of a minority race (Pakistani), argues that she suffered from race discrimination at her job, contrary to law. She will present social science evidence about the extent of job discrimination at JobCorps, and how she was treated differently than whites (Caucasians) who are in the majority.
  - Who would be ideal decision makers in this case – judges trained in law, lay jurors chosen at random from the population, or social scientist experts who study race discrimination?
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## Using Maria Kay v. JobCorps as an example:

- In the next 10 minutes, discuss the following with one other class member WHO IS FROM A COUNTRY DIFFERENT THAN YOUR OWN:
    - What are the advantages of having experts as decision makers?
    - What are the disadvantages?
    - Who would you choose as the ideal decision makers?
  - Write down your views of the advantages and disadvantages on a sheet of paper.
  - Reach a joint decision about your ideal decision makers in the case of Maria Kay v. JobCorps.
  - After 10 minutes, there will be a general discussion of the question in class.
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# Advantages of having experts as decision makers

Having a perspective on the science

Able to define discrimination from knowledge base of sociologists

Know subject matter , familiarity with it

Understand evidence

Understand base rate of discrimination so able to put current case in context

Able to grasp whether action was capable of constituting racial discrimination

Likely biased toward plaintiffs

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Better trained to weigh the merits of the arguments

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# Disadvantages of having experts as decision makers

Possibility of bringing in outside facts to their decision making

Pre-decision

Prone to quick decision

Not trained in the law

Too influenced by the science, lacking in other perspectives

Unable to maintain impartiality

Different experts could have different perspectives

Expectancy bias

This may not require expertise to resolve!

May have their own definition of racial discrimination

Different procedures might be taken to resolve dispute, unlike legal fact finders who follow one approach

Too much expertise!

Bias to their research

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# Your ideal decision makers for Maria Kay v. JobCorps

- Law-trained judges? 11 students
  - Lay jurors chosen at random from population? 0 students 1 professor
  - Social science experts who study race discrimination? 2 students
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