BURDEN OF PROOF

Every generation questions the belief systems of its predecessors and looks for ways to weed out old ideas. It's a healthy instinct. Some ideas, however, are not outdated and, in fact, may never be. Prosecutorial burden of proof "beyond a reasonable doubt" is such an idea. It is one of the safeguards we have built into our criminal justice system in an attempt to not convict the innocent. The concept of burden of proof, however, did not originate as a protective mantel for the accused.

The evidence of the evolution of the jury system begins with a panel system in England as early as 800 BC. These were county courts presided over by a bishop and a sheriff. and may have been a direct result of The Viking invasion in England, Ireland, Scotland, Wales and Iceland. The word "law" in English is a Viking word. 'Ting' was the Viking word for a legislative assembly and a court. A criminal was brought here to stand trial. The presumed facts of the case were established by a panel of people stating what they thought was the truth. A jury of 12, two times twelve or three times twelve, depending on the importance of the case, decided the question of guilt. The 'law-sayer' told the jury what the law said about the crime committed and the accused was either convicted or declared innocent by the jury.

If convicted, the criminal was either fined or declared an outlaw. To be an outlaw meant living out in the wilderness. No one was allowed to help an outlaw in any way, and he was free game for his enemies who were free to hunt him down and kill him.

By the Middle Ages, Trial by Ordeal swept across England and the continent. The panel system, a trying of man by other men, was replaced by the trying of man by representatives of God. A suspect accused of a crime had to undergo an agonizing trial (by fire, by boiling water, by freezing water, by poison), and if he were innocent, God would intercede with a miracle. Usually the accused died—proof of guilt. All that was required was an accusation, an excruciating "trial" and case closed. Though perhaps not as fair-minded as our current system, Trial by Ordeal justice was far less costly then than it is now.

Justice began to take a kindlier tone under the reign of Henry II, Plantagenet, who implemented what many perceive as the beginnings of common law. In a series of Assizes (meetings with barons that issued binding decrees), many of the basic principles of common law were established.

The problem for the King Henry II was that the Church acted like a kingdom within a kingdom, only partially subject to Henry's laws, operating its own court system, which answered not to Henry but to the Pope. The Church was a large landowner and a powerful vested interest, declaring itself exempt from providing either soldiers or taxes to the Crown. The conflict between King and Church eventually ended in the assassination of Thomas Beckett, once Henry's closest friend.

Henry became even more determined to establish a system of justice that would enlarge the power of the Crown at the expense of the clergy. His strategy was to inaugurate various assizes (courts that convened in various towns periodically, rather than being permanently established in London). The primary and most general court meeting, the Assize of Clarendon, was issued in 1166 and its goal was not so much to bring justice to the criminally accused as it was to wrest property and taxes from the Church.

Henry did not, however, ignore the reforms needed in the criminal justice system. In fact, the scope of his ingenuity is best seen in the innovations he brought to criminal justice. Henry appointed "justices in eyre," the counterpart of circuit judges, to travel from town to town. In each town, they called upon the sheriff to summon twelve free men from the surrounding areas. These twelve free men were a prototype of a grand jury. They were called to report under oath any accusations of crime they were aware of in the community. In theory, then as now, the grand jury only brought accusations; it did not find guilt or innocence. The crimes to be investigated were specified in the Assize of Clarendon to be robbery, murder or theft or anyone who has harbored a robber, murderer, or thief.

To these crimes, the Assize of Northampton (1176) added counterfeiting, forgery, and arson. Minor crimes were specifically excepted. The new assizes only concerned themselves with what would later be labeled "felonies."

The entire system took a great leap forward thanks to King John who gave in to his nobles and signed the Magna Carta on 15 June 1215. It was the first document ever signed by a King that limited his own powers and protected the rights of the barons. Not the people—but one step at a time! The Magna Carta, which, in part, reads: “No free men shall be taken or imprisoned… except by the lawful judgment of his peers or the law of the land” is widely held to be the basis for constitutional law in England.

Trials began to be conducted by panels of free and lawful men who, knowing something about the circumstances of the case, were charged with both discovery and determination of innocence or guilt. But the panels—or jurors—carried a heavy burden. As recently as the seventeenth century, English juries could be punished for delivery of an "untrue" verdict. If a Judge or a Magistrate wasn't satisfied with the verdict, he could impanel a second jury to review it. If this second jury overturned the original verdict, the first jurors could be imprisoned and lose their lands and their goods. Needless to say, this made potential jurors very nervous. They began pressing for protection against verdict punishment and herein, some believe, lie the roots of "reasonable doubt."

In 1670, the principle of juror independence was finally granted in the celebrated "Bushel's Case," which held that a juror could not be fined or imprisoned for giving a verdict according to his own conscience, no matter what the Judge wanted. It was a major victory.

Still, there was another fear held by the people of that time that had to be overcome. The prevailing religion in England and Europe was Christianity and the Christian belief was that you would be damned to Hell for spilling another's blood. Juries, worried about their own immortal souls, brought in a preponderance of "Not Guilty" verdicts. This ultimately led to the creation of jury instructions designed to reassure jurors that a "Guilty" verdict would not send them to Hell. Possibly the first instructions of this nature were given from the bench at the Old Bailey in 1786. "If you are satisfied, Gentlemen, upon the whole, that he is guilty, you will find him so; if you see any reasonable doubt, you will acquit him." Reasonable doubt gave the jurors their out: they were merely following instructions, the way any reasonable man would. If the defendant was executed as a result, it wasn't really their fault.

As beliefs and customs have changed, the semantics of "beyond a reasonable doubt" have shifted to give a protective shield to the accused, not to the trier of fact. Nevertheless, the principle behind the words is the same: the government has tremendous powers to arrest and punish whomever they choose. Even in a courtroom where a charge has been brought by indictment or by criminal complaint, where twelve "peers" have been seated to hear evidence and determine innocence or guilt, the government has an overwhelming advantage over the accused.

Perhaps because of this inequality of power, we see cases where the Government wrongly accuses and successfully prosecutes innocent defendants. Thanks to evolving technology, as well as the hard work of a growing group of honorable people, wrongly

convicted defendants are being exonerated. Even so, if prosecutorial burden of proof means that sometimes—the O.J. Simpson case comes to mind—there is reasonable doubt even when the defendant is guilty, it is far better to set him free than to risk the greater injustice of sending innocent people to jail under a lesser burden of proof. If, with all its resources, the Government cannot prove its case beyond a reasonable doubt, they should not be handed the conviction.

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