2007

Roger Groot, Legal Historian

David K. Millon
Washington and Lee University School of Law, millond@wlu.edu

way he talked about Ellen and his three children, Michael, Stephanie and Donna. He was proud to be an integral part of his family. His feeling for family carried over to his colleagues at work. Roger viewed all of us as part of his extended family, and the members of this community were much better off because he did.

David Millon*

Roger Groot, Legal Historian

Many of Roger Groot's professional and public service accomplishments are well known. He was, of course, a dedicated and inspirational teacher and mentor, in the classroom and in the clinic. A passionate opponent of capital punishment, he labored zealously and effectively to save criminal defendants from the death penalty. His treatise *Criminal Offenses and Defenses in Virginia* is a bible for judges and lawyers throughout the Commonwealth. He was a leader of the Virginia Bar Association. For several years he was a member of the city council in Buena Vista. Before law school, he served with courage and distinction as an officer in the U.S. Marine Corps.

Maybe all that should have been enough, but there was still more. As an historian of English law, he made conspicuous contributions of enduring scholarly value. A small but energetic community of English legal historians thrives on both sides of the Atlantic. Within this scholarly fellowship Roger was well known and highly respected for a number of pathbreaking articles, especially three classic pieces on the early criminal jury. I suspect that many of those who celebrate Roger's accomplishments as a teacher, scholar of today's criminal law, and advocate for capital defendants have only the vaguest awareness of his historical work. This is unfortunate, because the work is important and he was proud of it.

* J.B. Stombock Professor of Law, Washington and Lee University. The author is grateful to Tom Green, John Jacob, Lash LaRue, Andrew Lewis, and Judy Stinson, each of whom provided valuable assistance.

Roger did not come to Washington and Lee as a professor of criminal law. Instead, in the years following his arrival at Washington and Lee in 1973, he taught various property law courses. In addition to the first-year required course, he also taught Real Estate Transactions, Land Use Planning, and a course called Suretyship and Mortgages. He was, however, interested in legal history and taught his property courses from an historical perspective. Lash LaRue remembers that Roger "was one the few people I have known with whom I could share a conversation about land tenure in medieval England."[5] (This may explain Roger's affection for the obscure technicalities of the Surety and Mortgages course, which he remembered fondly long after it was defunct.) He began teaching criminal procedure in 1977 and added the substantive criminal law course in the following year. It should come as no surprise that his approach to these subjects was informed by a strong interest in history.

What should surprise us is how little time it took Roger to publish two articles of fundamental importance to our understanding of the origins of the criminal jury. When he turned his historian's gaze to criminal law, he was not content to study some development of relatively recent vintage, say, three or four hundred years ago. Instead, he went all the way back to the beginning, to the jury's emergence in the first decades of the thirteenth century as the normal vehicle for deciding questions of guilt and innocence in criminal cases.

This development is of great historical interest because England took a path different from that of the rest of Europe, relying on jury verdicts rather than confession (and, eventually, torture) to determine guilt.[6] Choices had to be made after the Fourth Lateran Council in 1215 banned clerical participation in ordeals. At that time, ordeals were used throughout western Europe to judge accused criminals.[7] In England, a defendant would be required to grasp a red hot lump of iron; if later examination indicated that the wound had festered it was taken as a message from God that the defendant was guilty. Or an accused would be thrown into a pond; if he or she floated rather than sank, amounting to rejection by the water, again there was a divine indication of guilt. If, though, the result of an ordeal was to be taken as an expression of divine judgment, there could be no faith in the process if there was no priest to offer the requisite blessings and prayers. Some other procedure for deciding questions of guilt would be needed instead. The decision in England was to turn to juries of lay men drawn from the localities where the crime in question

5. Personal communication.

6. For continental developments, see JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (1977).

7. *See generally* ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL (1986).

had occurred. This proved to be of momentous importance, because it meant that ordinary people rather than ministers of the king would have the final say in determining the fate of those accused of crime.

How this came to be—in comparison to the very different approach adopted in continental Europe—is an urgent historical question. Roger's answer appeared in two parts, in a pair of articles published in the *American Journal of Legal History* in 1982 and 1983.[8] He argued that before 1215 juries were already being used to perform a function not too different from a final judgment of guilt or innocence. By the final decades of the twelfth century, public prosecutions were initiated by juries of lay men ordered to "present" or identify people suspected by the local community of criminal activity. These jurors were then asked further to give their opinion about the validity of the community's mistrust. Only if the jurors expressed their own suspicion would the accused then be sent to the ordeal. If instead the jury said it did not suspect the accused that would be the end of the matter. Roger identified a similar pattern in private criminal prosecutions, those initiated by the accusation of a private party. In such cases the accused had a right to demand a jury's verdict on the merits of the accusation. Again, only if the verdict were unfavorable would the accused then be put to the ordeal.

These jury determinations did not have the finality of post–1215 verdicts because a jury's endorsement of community suspicion still resulted in the ordeal. They were in this sense merely medial. Nevertheless, and this was Roger's central point in these articles, by 1215 the jury was being used to perform an adjudicative (as opposed to merely accusatory) function, and its judgment on the merits was given substantial credence in both public and private criminal prosecutions. In this context, it was then a small step to accord full determinative weight to these verdicts. "Because the English had this ready, developed substitute for the ordeal, they were spared the search for an alternative."[9]

The trial jury with full power to convict did not emerge fully formed in 1215. As Roger showed in a third article,[10] the developmental process was fitful and complicated. Initially, jury verdicts that previously would have led to the ordeal—because of the jurors' belief in the accused's culpability—did not result in conviction and the punishment usually reserved for felony, typically death by hanging. They were, however, the basis for imposition of a fine in

8. *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1 (1982); *The Jury in Private Criminal Prosecutions Before 1215*, 27 AM. J. LEGAL HIST. 113 (1983).

9. *Jury of Presentment*, *supra* note 8, at 24.

10. *The Early Thirteenth-Century Criminal Jury*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL JURY IN ENGLAND, 1200-1800 (J.S. Cockburn & Thomas A. Green eds., 1988).

certain kinds of cases, with the accused imprisoned until payment was made. For the first time, then, verdicts were treated as a sufficient basis for legal sanction. The first truly convicting juries appeared in 1220 but were limited to a particular class of cases. Very soon thereafter the jury was used more generally, though there were differences among judicial sessions until the jury was accepted as the usual vehicle for deciding criminal cases in the first years of the 1220's. As Roger noted, this development depended on the creation of mechanisms to require accused persons to put their fates in the hands of juries. It depended also on the royal justices' willingness to honor the judgments of lay men even when the result was acquittal. What otherwise might have been problematic was no doubt less so because of the well established pre–1215 practice of terminating prosecutions on the basis of medial verdicts of acquittal.

Together these three papers trace in meticulous detail a story of great importance to Anglo-American legal history. One cannot fully appreciate Roger's achievement, however, without an understanding of his method. There exists a continuous though incomplete record of cases in the king's courts from the last decade of the twelfth century. The early records are written on parchment in a hand that can be difficult to decipher. The language is Latin, and the individual case records are generally terse and formulaic. As such, they are often opaque and don't necessarily include information that might be of interest to today's historians. Much that was obvious to contemporaries and would be important to us was not written down.

Roger took a fresh look at materials that many others have studied and found a more complex picture of the early jury's activities than anyone else had seen before. By paying careful attention to idiosyncratic factual details in individual cases and comparing a large number of these cases with each other, Roger was able to see evidence of regular practices that previous scholars had not noticed. It is as if he assembled the pieces of a puzzle to reveal patterns that otherwise would have remained invisible. He had to be able read Latin, because, while a substantial body of the earliest records has been transcribed and published, much of this is not translated. He had learned Latin in high school (he studied Russian as an undergraduate), but the phrases of the early thirteenth-century court clerks are very different from the diction of Caesar or Cicero. It is thus all the more remarkable that Roger's scholarship depended so heavily on meticulous parsing of elliptical Latin texts.

Roger's articles are important not only because they trace the process of transition from trial by ordeal to trial by jury. It reminds us that the criminal jury's remarkable power over the criminal law—expressed in the finality of its judgments of acquittal even in the face of contrary judicial opinion—has been central to the jury's nature since its inception. Thomas A. Green, John P.

Dawson Collegiate Professor of Law at the University of Michigan and himself the author of a path-breaking book in the criminal jury's early history,[11] emphasizes this aspect of Roger's work in his assessment of its importance:

> Roger's pioneering explorations of early pre-trial process, and especially his discovery that a more complex process than we had supposed existed for the sifting of defendants on the basis of evidence, allowed a more informed assessment of the significance of, e.g., the fairly frequent acquittals by early trial juries. These acquittals, in cases where defendants had already been sifted in this fashion, suggested how strongly trial jurors resisted convicting (and thereby effectively condemning) defendants except for what jurors deemed the most serious offenses, or where the evidence met an extremely high standard. Indeed, they suggested that the practice of occasional nullification of the law took hold at the very outset of the trial jury's history.[12]

I suspect but don't know with certainty that it was fascination with this power—the power of "common folk who could say no to the king"[13]—that led Roger to go back to the beginning and undertake his remarkably ambitious exploration of this evidentiary forest. I think he admired the men who exercised this power in the face of authority and still more the legal system that invested them with it. Many years later, when he was defending people caught in Virginia's voracious capital punishment machine, Roger saw in the jury a mechanism that invested ordinary people with the capacity to obstruct the state's mightiest power, its power to kill. The inhumanity of the death penalty revolted him, but investing the state with such massive power offended him at a basic level. The humanitarian impulse I think was at least in part religiously motivated. The distrust of state power seemed to me to have been imbibed during a childhood spent in the open spaces of South Texas.

Roger's best known historical work will probably always be his pathbreaking articles on the origins of the criminal jury. There was more, though. His paper on the early history of suicide as a felony, together with another scholar's article on medieval suicide law, occasioned a colloquium held at Magdalen College, Oxford in 1999. This was not a large gathering but it included most of the leading British legal historians. I recall that Roger was nervous before his departure. I think he felt humbled both by the grandeur of the venue and also by the illustrious company. In the event his presentation

---

11. VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (1985).

12. Personal communication.

13. *Early Thirteenth-Century Criminal Jury*, *supra* note 10, at 35.

was well received, and the paper was later published in a special issue of the *Journal of Legal History* devoted to suicide in medieval England.[14]

Roger was a regular participant at legal history conferences in this country and in Britain. His Washington and Lee students would have recognized him: the same white button down shirt and suspenders and the same direct, at times gruff, but fiercely articulate manner of speech. I have wondered what British legal historians thought of this large man with the gentle southern accent, military haircut and upright bearing, and razor-sharp intellect. I think they soon learned that the obvious differences between them and him were only superficial. His work earned their respect and the warmth of his personality made him many friends. Andrew D.E. Lewis, Professor of Comparative Legal History at University College London, recalls "a large presence that contrasted surprisingly with a delicate personality."[15] The reference, I think, was to a warm and open disposition that seemed at odds with the imposing physical aspect.

At the time of his death, Roger was at work on an article studying the variety of punishments meted out in non-felonious cases—what would later be called misdemeanors.[16] In contrast to felonies, in which the judicial response was standard, automatic, and very harsh, Roger found in the records that there was broad discretion to apply a range of sanctions, including the finding of pledges for good behavior, banishment from the defendant's county or town, and mutilation. Roger hypothesized that punishments were tailored according to the individual defendant's status in the community. If the community was willing to tolerate his or her continued presence, pledges might be sufficient. In small communities at least, "the local miscreants are known and can be avoided."[17] In London, though, things were different. Criminals might more readily hide behind their anonymity. Accordingly, banishment or mutilation—cropping of an ear—would either remove potentially dangerous persons or put the community on notice of prior wrongdoing.

---

14. Volume 21, Number 1 was dated April 2000. Roger's paper, *When Suicide Became Felony*, appears at pages 1–20.

15. Personal communication.

16. Roger presented his findings at the 17th British Legal History Conference in London in July 2005. His talk was titled "Petty Thieves and Other Miscreants: 'Misdemeanours' in the Thirteenth Century." Unfortunately this work was not far enough along for posthumous publication. All that survives is a two-page abstract (on file with the author).

17. The quoted language appears in the abstract referred to in *supra* note 16.

There were additional articles on the origins of the criminal jury[18] and papers on the early history of the crimes of rape[19] and petit larceny.[20] All of these were based on meticulous study of opaque primary sources and all of them make important contributions. As with the jury articles, the work was never merely antiquarian. Roger had no interest in uncovering historical tidbits simply for their quaintness or their entertainment value. Rather, the detailed linguistic analysis and the many illustrations culled from the records were always in the service of larger questions of genuine historical importance. Taken together, Roger's legal historical scholarship is a weighty monument to an original thinker, a painstaking and dogged researcher, and a sorely missed member of the fellowship of English legal historians.

* * *

Roger D. Groot's Legal Historical Scholarship

"The Jury of Presentment Before 1215," *American Journal of Legal History*, vol. 26, pages 1–24 (1982).

"The Jury in Private Criminal Prosecutions Before 1215," *American Journal of Legal History*, vol. 27, pages 113–141 (1983).

"Lie Detectors: Of Sacred Morsels and Polygraphs," *Legal Studies Forum*, vol. 10, pages 203–214 (1986).

"The Early Thirteenth-Century Criminal Jury," in *Twelve Good Men and True: The Criminal Jury in England*, 1200-1800, pages 3–35 (edited by J. Cockburn & T. Green, Princeton University Press 1988).

"The Crime of Rape *temp.* Richard I and John," 9 *Journal of Legal History*, vol. 9, pages 324–334 (1988).

"Proto-Juries and Pubic Criminal Law in England," in *Die Entstehung des öffentlichen Strafrechts* [*The Emergence of Public Criminal Law*], pages 23–39 (edited by D. Willowweit, Böhlau Verlag 1999).

---

18. *Proto-Juries and Pubic Criminal Law in England, in* DIE ENTSTEHUNG DE ÖFFENTLICHEN STRAFRECHTS 23 (Dietmar Willowweit ed., 1999); *Teaching Each Other: Judges, Clerks, Jurors and Malefactors Define the Guilt/Innocence Jury, in* LEARNING THE LAW: TEACHING AND TRANSMISSION OF LAW IN ENGLAND 1150–1900, at 17 (Jonathan Bush & Alain Wijffels eds., 1999).

19. *The Crime of Rape temp. Richard I and John*, 9 J. LEGAL HIST. 324 (1988).

20. *Petit Larceny, Jury Lenity, and Parliament, in* THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW 47 (John Cairns & Grant MacLeod eds., 2002).

"Teaching Each Other: Judges, Clerks, Jurors and Malefactors Define the Guilt/Innocence Jury," in *Learning the Law: Teaching and Transmission of Law in England 1150-1900*, pages 17–32 (edited by J. Bush & A. Wijffels, Hambledon Press 1999).

Review of L. Boatwright ed., *Inquests and Indictments from Late Fourteenth Century Buckinghamshire, Law and History Review*, vol. 17, pages 171–172 (1999).

"When Suicide became Felony," *Journal of Legal History*, vol. 21, pages 1–20 (2000).

"Petit Larceny, Jury Lenity, and Parliament," in *'The Dearest Birthright of the People of England': The Jury in the History of the Common Law*, pages 47–61 (edited by J. Cairns & G. McLeod, Hart Publishing 2002).

Uncas McThenia*

A Man Standing High
November 15, 2005

Thoughts written while trying to come to terms with the death of my best friend

Roger traveled in a lot of different circles, and many of them included some pretty strong women. Elle Dod and my wife Anne were talking about that yesterday. Elle, who is Roger's coffee drinking companion and the wife of his hunting buddy Rader, said that Ellen got him in the morning, Mellie Strickler got him for lunch at Woods Creek, Elle got him after hunting, and then he made it home to Ellen again for the evening. He somehow managed to fit the rest of us in as well. And the rest of us is a pretty long list:

- generations of students,
- colleagues here for 33 years,
- a staff at the law school which was absolutely devoted to him,
- scholars around the world,
- the death penalty defense bar,

* James P. Morefield Professor of Law, Emeritus, Washington and Lee University School of Law.