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TRIAL BY COMBAT IN THE MODERN WORLD

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Abstract

The ancient practice of trial by combat was abandoned hundreds of years ago and has never been employed in America. Yet this has not stopped litigants and others from demanding trial by combat—a tactic which, while infrequent, implicates deeper questions of the history of American law. In the past several years, several high-profile demands for trial by combat have prompted media attention and caused several commentators to suggest that trial by combat may be an option for civil litigants. Most coverage and commentary only focuses on each instance of trial by combat as they arise—without attention to other examples of demands or references to trial by combat in modern American law.

No more. This Article provides a systematic discussion of modern demands and references to trial by combat in American courts. From cases in the early 1800s, to Rudy Giuliani's infamous call for trial by combat on January 6, 2021, this Article surveys demands and mentions of trial by combat, and how courts have treated such demands. This Article examines what motivates parties who seek trial by combat, noting that the popular television series, *Game of Thrones* likely plays a role. This Article then examines parties' legal arguments for trial by combat, finding that they ignore relevant precedents and take a skewed view of history.

Recent demands for trial by combat prompt widespread media coverage—coverage which often suggests that trial by combat may be a possibility for litigants. This Article provides historic context for this discussion and, following a systematic review of cases involving or referencing trial by combat, concludes that such demands are not only legally baseless, but that they almost invariably will harm the demanding party's case. Still, this Article does not count out the possibility that parties may privately contract for a dispute resolution method that mirrors aspects of trial by combat—particularly if such a contract is crafted in a manner that puts both parties on an equal playing field and minimizes the chances of physical harm. While physical trial by combat between parties or champions may be a historic relic, the possibility for parties to agree to virtual trial by combat or similar dispute resolutions remains. And even though demands for trial by combat in court are likely to fail, this has not stopped litigants from making them for centuries, and parties will likely continue to do so in the decades and centuries to come.

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I. Introduction

On January 6, 2021, at a rally near the United States Capitol, Rudy Giuliani gave a speech to a crowd of supporters of then-President Donald Trump.[1] Trump had been urging his supporters to go to Washington to protest the results of the election in which Joe Biden had won the presidency.[2] Giuliani, the former mayor of New York City, who was then acting as Trump's personal attorney in various efforts to undermine and overturn the results of the 2020 election, was happy to push this narrative. Trump, Donald Trump Jr., Giuliani, and others all spoke at the rally, and all invoked violent imagery in describing how they would fight to ensure Trump's victory in the election.[3]

Giuliani's speech contained the following excerpt:

> Over the next ten days, we get to see the machines that are crooked, the ballots that are fraudulent, and if we are wrong we will be made fools of. But if we're right, a lot of them will go to jail! *So, let's have trial by combat!* I'm willing to stake—I'm willing to stake my reputation, the president is willing to stake his reputation on the fact that we're gonna find criminality there.[4]

Giuliani's now-infamous call for trial by combat is one of the most recent and highest profile calls for trial by combat. Critics accused Giuliani of using remarks like this to urge the protestors to become violent, resulting in the ransacking of the Capitol that occurred in the

[1] *See* David Leonhardt, *Rampage at the Capitol*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2021/01/07/briefing/white-house-capitol-donald-trump-jon-ossoff.html [https://perma.cc/36K8-PMZM].

[2] Lauren Leatherby, Arielle Ray, Anjali Singhvi, Christiaan Triebert, Derek Watkins & Haley Willis, *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html [https://perma.cc/6D6H-2W4F]; *see also* Rebecca Ballhaus, Joe Palazzolo, and Andrew Restuccia, *Trump and His Allies Set the Stage for Riot Well Before January 6*, WALL ST. J. (Jan. 8, 2021) https://www.wsj.com/articles/trump-and-his-allies-set-the-stage-for-riot-well-before-january-6-11610156283 [https://perma.cc/G4HJ-HP3L] (detailing Trump's tweets encouraging followers to attend the January 6, 2021 protest in the weeks prior to the event).

[3] *See* David Leonhardt, *Rampage at the Capitol*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2021/01/07/briefing/white-house-capitol-donald-trump-jon-ossoff.html [https://perma.cc/36K8-PMZM].

[4] Daily Mail, *"Let's Have Trial by Combat!" Rudy Giuliani Riles Up Crowd Before Riot*, YOUTUBE (Jan. 11, 2021), https://www.youtube.com/watch?v=KM_OF6jYlwg&ab_channel=DailyMail [https://perma.cc/ZL8K-PAXV]; *see also Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat'*, Rev, (Jan 6, 2021), https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat [https://perma.cc/YDZ3-2Y6N].

following hours.[5] The New York State Bar Association cited Giuliani's "trial by combat" language in launching an inquiry into removing Giuliani from their membership.[6]

Giuliani's take on things was a bit different. He claimed that, rather than calling for violence, he was referring to the television show, *Game of Thrones*, and "the kind of trial that took place for Tyrion . . . [w]hen Tyrion, who is a very small man, is accused of murder. He didn't commit murder, he can't defend himself, and he hires a champion to defend him."[7]

In his interview, Giuliani was referring to Tyrion Lannister, a character from George R.R. Martin's *A Song of Ice and Fire* series which was adapted to television in the show, *Game of Thrones*. Tyrion, played by Peter Dinklage, demanded trial by combat on several occasions, and in the instance that Giuliani was referencing in his interview, Tyrion ends up escaping a death sentence because the champion he selects to represent him in a fight to the death is victorious.[8] Trump, in Giuliani's metaphor, is a small, defenseless man who must resort to procedural tactics in the face of inevitable defeat.

Whether Giuliani meant to incite violence, or whether he was making a literary or pop culture reference in a speech devoid of any other references, Giuliani's invocation of the phrase, "trial by combat" is one of several modern instances where lawyers or other participants in legal proceedings have called for the practice.

Unfortunately, for Giuliani and others who demand trial by combat, one cannot simply demand trial by combat in the midst of civil or criminal proceedings. Courts are governed by a series of procedural rules based in statutes, court rules, and precedent, and none of these rules give litigators an option to request trial by combat. As a result, these ill-conceived attempts to bypass the legal system end in failure, and often have a detrimental impact on the would-be combatant's case and career.

This was not always the case. Historically, trial by combat was an established—if rare—method for parties to resolve disputes or for criminal defendants to demonstrate their innocence. The form of combat varied, but generally parties in a dispute would engage in physical combat, typically with weapons, either personally or through champions, with the outcome of the fight

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[5] *See* Katelyn Polantz, *Giuliani, Who Urged Supporters to Have "Trial by Combat," Says He Wasn't Literally Calling for Insurrection*, CNN (May 18, 2021), https://www.cnn.com/2021/05/18/politics/rudy-giuliani-january-6-insurrection-lawsuit/index.html [https://perma.cc/27S3-DFRP].

[6] Susan DeSantis, *New York State Bar Association Launches Historic Inquiry Into Removing Trump Attorney Rudy Giuliani From Its Membership*, N.Y. ST. B. ASS'N. (Jan. 11, 2021), https://nysba.org/new-york-state-bar-association-launches-historic-inquiry-into-removing-trump-attorney-rudy-giuliani-from-its-membership/ [https://perma.cc/23JS-MQ4H].

[7] Alexandra Del Rosario, *Rudy Giuliani Says "Trial by Combat" Remark Before Capitol Violence Was 'Game of Thrones' Reference*, DEADLINE (Jan. 14, 2021, 10:48 AM), https://deadline.com/2021/01/rudy-giuliani-game-of-thrones-trial-by-combat-capitol-violence-1234673891/ [https://perma.cc/3R7Z-SU8V] (Giuliani went on to defend himself further by claiming that the crowd did not become violent after his remark, noting that in the past, he had made remarks that inspired crowds to "jump up" and say "lock him up.") *Id*. (This Article leaves it to the reader to decide whether referencing a history of frequently inciting crowds to take such actions is a good defense against incitement).

[8] *See* Susan DeSantis, *New York State Bar Association Launches Historic Inquiry Into Removing Trump Attorney Rudy Giuliani From Its Membership*, N.Y. ST. B. ASS'N. (Jan. 11, 2021), https://nysba.org/new-york-state-bar-association-launches-historic-inquiry-into-removing-trump-attorney-rudy-giuliani-from-its-membership/ [https://perma.cc/23JS-MQ4H].

determining which party would prevail in the dispute.[9] This history hasn't been lost on everyone, as some of the cleverer[10] modern proponents of trial by combat argue that historic practices justify—and may even mandate—resorting to battle in modern proceedings.[11]

This Article catalogues modern instances in which those involved in legal proceedings have demanded trial by combat. "Modern" is used broadly to address instances of trial by combat after America's founding. The Article proceeds through the 1800s and 1900s, ultimately arriving at cases that took place within the last several years—at least two of which are at least indirectly related to *Game of Thrones*' popularity.

While this Article may not be an exhaustive list of all instances, I took effort to include as many instances as I could find—conducting Westlaw searches for both "trial by combat" and "trial by battle,"—as well as searches of news articles, blog posts, and other online resources referencing instances where the term was mentioned. As a result, you have the pleasure of reading an article that addresses the 1817 case of *Ashford v. Thornton*, which received widespread attention and prompted a change to English law,[12] as well as a 2020 case where an Iowa man sought to fight his ex-wife's attorney to the death in a contentious family law case.[13]

Before proceeding further, a brief note on terminology. This Article will use the terms "trial by combat" and "trial by battle" interchangeably. Historic discussion of the practice typically relies on "battle" terminology, particularly because of the medieval practice of "wager of battle" that often resulted in combat between litigants. Where those sources are being directly quoted and referenced, this Article will use "trial by battle" terminology. Modern references and invocations of the practice, however, tend to use the phrase "trial by combat." Accordingly, this Article will tend toward using "trial by combat" to describe both modern and historical demands that parties resolve their disputes through physical combat.

II. History

This Article focuses on modern instances of litigants demanding trial by combat or courts referencing trial by combat. Because modern, thorough demands for trial by combat typically refer to historic practices in England, an outline of historic practices in and around England is warranted.

This historic discussion of trial by combat is not meant to be an exhaustive treatment of the subject. It also focuses primarily on later trial by combat practices in England and does not purport to be a thorough survey of all forms of trial by combat in England or in continental Europe.[14] The purpose of this section is to provide enough background of trial by combat practices and procedures to give a basic understanding of how trial by combat was conducted, and to differentiate it from other practices, such as private duels. This section will focus on aspects of trial by combat history that are of particular relevance to modern practices in the United States—namely the practice and legal status of trial by combat around the time of the founding.

[9] *See infra* Section II.A.
[10] As you will see, it's a low bar.
[11] *See infra* Section V.B.8.
[12] *See infra* Section V.A.1.
[13] *See infra* Section V.B.9.
[14] For an example of such a broader historic discussion, *see* GEORGE NEILSON, TRIAL BY COMBAT (1890).

A. Appeals of Felony and Writs of Right

Trial by battle was introduced to England in 1066 by William the Conqueror, although its use was limited to military cases (or the court of chivalry), appeals of felony, and writs of right.[15] Initially, trial by combat was an available mode of trial in civil cases where the amount in dispute was greater than ten shillings.[16] Henry II limited the use of trial by battle to a narrower range of cases, including appeals of felony and writs of right.[17] Trial by combat was not popular in civil actions, and Pollock and Maitland estimate that by the mid-thirteenth century, the annual average of battles was likely less than 20.[18] Beyond the general unpopularity of trial by combat, many towns in England and Ireland enacted exempting charters which prohibited citizens of those towns from participating in trial by battle.[19]

In cases involving appeals of felony, the battle was waged by the parties themselves.[20] Unlike the modern use of the term "appeal," these cases were not further proceedings following a lower court or decisionmaker, but were instead original actions brought by private parties who accused another party of a crime.[21] The direct victim could bring an appeal of felony for crimes of larceny, rape, and arson.[22] The wife of a murdered man could bring an appeal of felony for the murder of her husband, as could a male heir of a murdered person.[23] When a wife's husband had been murdered, only she would have the appeal of murder.[24]

Even if a person accused of a felony had been tried on an indictment, or tried and pardoned by the king, an appeal by felony could still be filed within one year and one day following the acquittal or pardon, so the accused would often be imprisoned or required to post bail for that time period in the event an appeal was brought.[25] In 1285, the Appeal of Felony Act passed, which established penalties for those who brought unsuccessful appeals of felony, including imprisonment for one year, a fine to the king, as well as restitution to the accused.[26] Blackstone noted that concerns over being hit with these penalties resulted in a decline in appeals of felony.[27]

Trial by combat was also used to resolve property disputes, although the use of trial by combat became rarer as the option of resolving a dispute through the verdict of an assize or jury

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[15] 2 WILLIAM BLACKSTONE, COMMENTARIES *337; GEORGE NEILSON, TRIAL BY COMBAT 31 (1890).
[16] GEORGE NEILSON, TRIAL BY COMBAT 33 (1890).
[17] *Id*. at 33, 36. *See also* FREDERICK POLLOCK & F.W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 632 (2d ed. 1899, *reprinted in* The Legal Classics Library, 1982) (noting that trial by battle was limited to cases involving appeal of felony and writ of right prior to King Edward's accession to the throne in 1274); 2 WILLIAM BLACKSTONE, COMMENTARIES *337–38.
[18] POLLOCK & MAITLAND, *supra* note 17, at 633; *see also* M.J. Russell, *I. Trial by Battle and the Writ of Right*, 1 J. LEGAL HIST. 111, 126 (1980) (noting that battle was "never popular in civil actions" and had been "discredited as a method of trial almost before it was introduced" in England).
[19] M.J. Russell, *I. Trial by Battle and the Writ of Right*, 1 J. LEGAL HIST. 111, 118 (1980).
[20] *Ibid*.; *see also* POLLOCK & MAITLAND, *supra* note 17, at 632.
[21] 2 WILLIAM BLACKSTONE, COMMENTARIES *315; *see also* E.S. CREASY, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION 142, n.* (3d ed. 1856).
[22] 2 WILLIAM BLACKSTONE, COMMENTARIES *314.
[23] *Id*. at *314.
[24] *Id*. at *315.
[25] *Ibid*.
[26] Appeal of Felony Act 1285, 13 Edw. I c. 12; *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES *316.
[27] 2 WILLIAM BLACKSTONE, COMMENTARIES *316.

was introduced.[28] Trial by combat became restricted to writ of right cases—disputes over the ownership of real property—although the availability of a grand assize (essentially, a jury made up of 12 knights)[29] as an alternate means of resolving these controversies meant that these disputes would not always result in battle.[30] Blackstone noted several apparent pretexts for permitting champions to take part in trial by battle for a final resolution of property disputes, suggesting that the death of witnesses or "other defect of evidence," might make it impossible to prove a property interest to a jury.[31] Trial by battle was an option in such cases as long as a certain amount of property was in dispute.[32]

In property dispute cases, champions, rather than parties, participated in the battle because if a party to the suit died, the suit would abate and there would be no judgment regarding the lands at issue.[33] The demandant in a writ of right action would make an offer of battle staked on a champion, and the defendant would have the option of accepting the offer of battle, or resorting to a judgment of his neighbors to resolve the dispute.[34]

If the offer of battle was accepted, the parties would then retain champions.[35] The tenant would produce his champion, who would throw down his glove.[36] The demanding party's champion would then take up the glove, indicating his acceptance of the challenge.[37] While champions, in theory, were supposed to be combatants who swore by the truth of their respective parties' positions, combatants were frequently available for hire.[38]

Blackstone writes that once a wager of battle was accepted, the parties would proceed to a 60 square foot area, with a court erected for the judges of the court of common pleas, and another area prepared for the sergeants-at-law.[39] The champions would appear, dressed in armor with their heads, arms, and legs below the knee exposed.[40] Their weapons would be "only batons or staves of an ell long, and a four-cornered leathern target; so that death very seldom ensued this civil combat."[41] Pollock and Maitland disagree with this account, noting that despite translators thinking for some time that the weapons used were "staffs 'tipped with horn,'" that the weapons actually used were war-axes.[42] The champions would then swear that they each believe in the cause that

[28] GEORGE NEILSON, TRIAL BY COMBAT 35 (1890).
[29] *See The Early Plantagenets*, BRITANNICA, https://www.britannica.com/place/United-Kingdom/The-early-Plantagenets [https://perma.cc/GSS9-8PND] (last visited Mar. 13, 2022); *see also* GEORGE NEILSON, TRIAL BY COMBAT 35 (1890) (treating the verdict of a grand assize, petty assize, and jury as interchangeable).
[30] GEORGE NEILSON, TRIAL BY COMBAT 36 (1890).
[31] 2 WILLIAM BLACKSTONE, COMMENTARIES *338.
[32] *See* POLLOCK & MAITLAND, *supra* note 17, at 632–33 (noting that in Norman times, ten shillingsworth of property needed to be in dispute for trial by battle to be an option).
[33] 2 WILLIAM BLACKSTONE, COMMENTARIES *339; *see also* POLLOCK & MAITLAND, *supra* note 17, at 605 (noting that in writ of right cases, a plaintiff would offer proof "'by the body of a certain free man of his A. B. by name' who, or whose father, witnessed the seisin that has been alleged").
[34] POLLOCK & MAITLAND, *supra* note 17, at 632.
[35] 2 WILLIAM BLACKSTONE, COMMENTARIES *339.
[36] *Ibid.*
[37] *Ibid*.
[38] POLLOCK & MAITLAND, *supra* note 17, at 633.
[39] 2 WILLIAM BLACKSTONE, COMMENTARIES *339.
[40] *Ibid*.
[41] *Ibid*.
[42] POLLOCK & MAITLAND, *supra* note 17, at p. 634.

they are fighting for, and would then swear an oath that they were not seeking the assistance of sorcery or witchcraft.[43]

The champions would then fight "till the stars appear in the evening . . . ."[44] If the tenant's champion remained standing until then, the tenant would win.[45] If one of the champions died, or yielded by crying "craven; a word of disgrace and obloquy rather than a word of any determinate meaning," the party represented by that champion would lose.[46] Crying craven was bad news for a champion, as doing so condemned the champion to "become infamous," and disqualified him from serving on a jury or being admitted in as a witness in any future cases.[47]

While Blackstone took a dim view of trial by combat, he acknowledged that people still had the right to demand it at the time he was writing his Commentaries.[48] Indeed, it would still be hundreds of years until the unpopular practice was finally abolished in England.

B. The Decline of Trial by Combat and Failed Attempts at Abolishing the Practice

While trial by combat was never particularly popular or widespread in England, it became even more rare from the fourteenth century onward.[49] M.J. Russell writes that he is not aware of any "actual fight in a writ of right action later than about 1300."[50] In the 1571 case of *Lowe v. Paramour*, a party demanded trial by battle, which caused an outcry among scholars and legislators—although the House of Commons ultimately decided against abolishing trial by combat.[51] The battle in that case did not go forward, as the parties had settled the day before, but the arena was prepared and the champions showed up anyway—likely prompted by enthusiastic spectators.[52]

In 1774, England's Parliament debated a bill introduced by James Wallace that would have taken away the appeal for murder.[53] At the time, English law permitted a private spouse or male heir of a homicide victim to privately prosecute an alleged perpetrator—even if the perpetrator had previously been found guilty.[54] Such appeals were rare, with Blackstone noting in his *Commentaries on the Laws of England* (written between 1765 and 1769) that such private appeals were "very little in use."[55] Notably, this debate took place two years before the Declaration of

[43] 2 WILLIAM BLACKSTONE, COMMENTARIES *340.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*.
[47] *Ibid*.
[48] *Id*. at 341.
[49] M.J. Russell, *I. Trial by Battle and the Writ of Right*, 1 J. LEGAL HIST. 111, 127 (1980).
[50] *Id*.
[51] *Id*. at 127–28.
[52] *Id*. at 127.
[53] *See* 17 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST PERIOD TO THE YEAR 1803 1291–97 (1813).
[54] David S. Rudstein, *Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges' Rulings of "No Case to Answer,"* 13 SAN DIEGO INT. L.J. 5, 34 note 140 (2011).
[55] 4 WILLIAM BLACKSTONE, COMMENTARIES *312.

Independence was signed and ratified in the United States, which makes it the most pertinent debate over trial by combat for purposes of evaluating its place in the common law at the time.[56]

Member of Parliament John Dunning immediately rose to the defense of appeal for murder, characterizing it as "that great pillar of the constitution . . . ."[57] His defense faced some initial pushback, with the Solicitor General, Alexander Wedderburn, noting that appeal for murder did not seem essential and that it appeared to be a relic of a time before laws and society provide a means for determining right from wrong.[58] In giving this account of appeal for murder, Wedderburn noted that there was no law against trial by battle.[59] Edmund Burke also recognized that "combat was part of this appeal; but it was superstition and barbarism to the last degree," yet he argued that the common law should not be taken away from some of the King's subjects and not from others.[60]

Other members of Parliament followed suit, expressing reluctance to repeal appeal for murder in only America and not for all of England.[61] Some members argued against the Bill on the basis that the American colonies did not have the doctrine of appeal for murder to begin with.[62] And others favored the Bill, arguing that appeal for murder was an outdated, cruel, and barbaric doctrine.[63] A few joined in Dunning's initial defense of appeal for murder, such as Captain Charles Phipps, who warned against overreliance on Blackstone's writing: "[t]here is not a more insidious way of gaining proselytes to his opinion than that dangerous pomp of quotations which he has practised; it conveys some of the most lurking doctrines to lead astray the minds of young men."[64]

Phipps argued that "the finger of nature will never point out the principle of law" and hung his rhetorical hat on the notion that "the appeal for murder is the law of the land" and that mercy "without controul" would form a "blight that will destroy all our harvest . . . ."[65]

James Wallace ultimately withdrew the bill.[66] But Rose Fuller noted that he would, in the future, bring a bill to repeal appeal for murder in its entirety.[67] It appears that Fuller ultimately did not succeed in his efforts, as appeal of murder was not abolished in England until 1819.[68]

All of this debate is relevant because appeal of murder carried with it the option for the party responding to the appeal to defend against the appeal with his body—that is, to demand trial by combat.[69] While several members referenced the practice of trial by combat, there was no

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[56] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).
[57] 17 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST PERIOD TO THE YEAR 1803 1291 (Dunning MP 1813).
[58] *Supra* note 57, at 1292 (Wedderburn SG).
[59] *Ibid*.
[60] *Supra* note 57, at 1292 (E. Burke MP).
[61] *See supra* note 57, at 1292 (W. Burke MP); *supra* note 57, at 1293 (T. Townshend MP); *supra* note 57, at 1295 (Sutton MP); *supra* note 57, at 1295 (Fox MP).
[62] *See supra* note 57, at 1293 (Moreton MP).
[63] *See supra* note 57, at 1293 (Stanley MP).
[64] *Supra* note 57, at 1294 (Phipps MP) (Phipps later expressed embarrassment that he was the only member who apparently held such an opinion of Blackstone's writings). *Supra* note 57, at 1296 (Phipps MP) ("He sat down rather chagrined to find his opinion with regard to [Blackstone's] work was singular.").
[65] *Supra* note 57, at 1296 (Phipps MP).
[66] *Ibid.*
[67] *Supra* note 57, at 1296 (Fuller MP).
[68] Appeal of Murder Act 1819, 59 Geo. 3 c.46 (Eng.) (the circumstances that gave rise to this act are discussed at length below in Section V.A.1.).
[69] *See, e.g.*, EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 247 (E&R Brooke, 2d ed. 1797).

sustained discussion of trial by combat, nor any speeches in defense of the practice—indeed, the only apparent references to trial by combat were by those members who were referring to barbaric customs or aspects of the appeal of murder.[70]

All of this is important for those demanding trial by combat today, as one of their primary arguments is that trial by combat was part of the English common law at the time of America's founding.[71] Those advancing such a claim contend that because America incorporated that common law, the right to trial by combat still exists under American law.[72] While this argument is often presented in an absolute sense—particularly by those who want to make waves with headlines—[73] the reality is more complicated.[74]

III. Trial by Combat in Legal Opinions and Commentary

Trial by combat is frequently referenced by courts and legal commentators as an undesirable method for resolving disputes. These references often situate trial by combat in its historic context to demonstrate the evolution of dispute resolution from its violent origins. Sometimes commentators contend that the system has not evolved enough from historic trial by combat proceedings. And judges frequently mention trial by combat when making analogies to the conduct of the parties or attorneys appearing before them—an analogy that generally does not bode well for those on the receiving end.

A. References to Trial by Combat as a Part of Legal History

Courts occasionally reference trial by combat when describing the origin of trials by jury or other modern practices. Invocations of trial by combat serve to illustrate the evolution of legal practices from methods viewed as outdated or brutal. Trial by combat is often referenced in passing as one form of such an outdated or rejected proceeding.

In *People ex rel. Swanson v. Fisher*, for example, the Supreme Court of Illinois addressed a petition for a writ of mandamus filed by the state's attorney after a defendant entered into a guilty plea.[75] The state argued that the Court lacked the authority to permit the defendant to waive his right to a trial by jury.[76] Ultimately, the court disagreed, and in doing so, it walked through an extensive history of the right to trial by jury—noting that the right to a trial by jury took the place of older modes of trial such as battle, ordeal, or compurgation.[77] The Eleventh Circuit took a similar approach in *United States v. Gecas*, where it considered the scope of the defendant's right

[70] *See, e.g.*, 17 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST PERIOD TO THE YEAR 1803 1292 (E. Burke MP 1813).
[71] *See infra* Section V.B.8.
[72] *Id.*
[73] *See, e.g.*, Christina Sterbenz, *Trial by Combat May Still Be Legal In America*, BUS. INSIDER (Nov. 12, 2013, 10:14 AM), https://www.businessinsider.com/trial-by-combat-in-the-united-states-2013-11 [https://perma.cc/X5QR-3FMY] (noting that trial by combat was permitted under British common law in 1773 and that the original colonies inherited British common law).
[74] And bad news for those who wish to engage in trial by combat. *See infra* Section VI.A.
[75] 172 N.E. 722, 722–23 (Ill. 1930).
[76] *Id*. at 723.
[77] *Id*.

against self-incrimination under the Fifth Amendment of the United States Constitution.[78] Before even addressing the beginnings of the right, the court started its historic survey by describing the rise of jury trials from trial by ordeal, battle, and oath after those methods of proof "fell into disfavor."[79]

In *Price v. State*, the Court of Appeals of Maryland addressed a dispute regarding the removal of a criminal case from a city court to a county court.[80] The court noted that the form of requesting a trial by jury involved the defendant responding that he would be tried "'by my country,'" and that this originated from historic practices when a party could plead not guilty and state that "'he was ready to defend the same by his body.'"[81]

The Lawrence County Court of Oyer and Terminer and General Jail Delivery[82] of Pennsylvania, in *Commonwealth v. Cunningham*, discussed trial by battle in the context of addressing an issue of double jeopardy.[83] The court noted that article I, section 10 of the Pennsylvania constitution provided that "no person shall, for the same offense, be twice put in jeopardy of life or limb."[84] The court suggested that the "life or limb" language originated from the "ancient method of trial by battle," but that the "modern view" was that it applied only to capital cases, as only those cases involved danger to a defendant's life.[85]

In all of these cases, trial by combat was referenced as a part of a historic survey, and no parties requested or were required to do battle to establish their innocence. Indeed, trial by combat was treated as a relic—a historic feature with little modern relevance beyond its influence on the wording or development of present-day phrases and practices. These examples demonstrate that referring to trial by combat as a quintessential example of an out-of-date and barbaric practice turns out to be a fairly common practice.

B. Trial by Combat as a Critique of Modern Practices

In a 1984 speech to the American Bar Association, Chief Justice Warren Burger remarked on the growth of the number of attorneys practicing in America, concerns over attorneys' ability to practice law effectively, and accounts that the discovery process was frequently abused in cases.[86] Chief Justice Burger used trial by combat as a means of criticizing these practices:

> We Americans are a competitive people and that spirit has brought us to near greatness. But that competitive spirit also gives rise to conflicts and tensions. Our distant forebears moved slowly from trial by battle and other barbaric means of

[78] 120 F.3d 1419, 1440 (11th Cir. 1997).
[79] *Id*.
[80] 8 Gill 295, 302 (Md. 1849).
[81] *Id*. at 306.
[82] These are courts that used to have general criminal jurisdiction in Pennsylvania. *Court of Oyer and Terminer and General Gaol Delivery*, BLACK'S LAW DICTIONARY (11th Ed., 2019).
[83] 33 Pa. D. & C. 394, 400 (1938).
[84] *Id*.
[85] *Id*.
[86] Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 64–65 (1984).

> resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.[87]

Critiques of present-day practices as exemplifying trial by combat are not reserved for sweeping statements about the general state of the law. Courts occasionally characterize the conduct of litigants before them as trial by battle or trial by combat. It generally isn't good news for an attorney or party on the receiving end of this analogy, as trial by combat is associated with overly aggressive tactics that courts frown upon.

In *Columbus Railway v. Connor*, the Circuit Court of Ohio reversed the jury's verdict for the plaintiff in a car accident case.[88] Noting that the record was unnecessarily long, and that the cross-examinations in the trial court were "extended beyond purpose or reason," the court had strong words for the conduct of the parties' counsel:

> A party cannot be said to have had a fair trial when the jury is required to view the case through an atmosphere of passion and prejudice, excited by the conduct of counsel. From the opening statement to the close of the argument that was the condition in the trial of this cause in the court below, as is disclosed by the record. It would be difficult to find a case that more nearly approaches the ancient trial by battle. The zeal of counsel on behalf of their client, which, decorously exerted is always commendable, no doubt, will explain much of the hot blood and bad temper that abound, but the modern standard of decorum and fair argument was flagrantly violated. Whenever there is violent contention between counsel, the jurors are led to take sides because it is human to do so, the result being, that passion and prejudice find easy lodgment in their minds and vitiate their verdict. The instances of misconduct are too numerous for recital in this opinion.[89]

A more specific, if less dramatic example of conduct prompting a court to reference trial by combat occurred in *State v. Haberski*, where defendant, Steven Haberski had been charged with murdering his wife, Kirk Haberski.[90] Steven Haberski testified, and his cross-examination became combative, as he testified that he did not know why he had done what he did and that he was "sorry it ever happened," to which the prosecutor replied, "Sure Kirk Haberski is sorry it happened, too."[91] The Maine Supreme Judicial Court likened the prosecutor's tactic to "trial by combat rather than a civilized proceeding," but noted that the trial court's prompt striking of the remark and instruction that the jury ignore the remark did not warrant a vacation of the conviction.[92]

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[87] *Id*. at 66.
[88] 17 Ohio C.D. 229, 237 (1905).
[89] *Id*.
[90] 449 A.2d 373, 374 (Me. 1982).
[91] *Id*. at 378.
[92] *Id*. at 379.

Oppressive litigation tactics used to overpower the opposing party may also prompt a reference to trial by combat or trial by battle.[93]

C. Trial by Combat as a Joke

To round out this discussion of common trends in referencing trial by combat, several courts or attorneys refer to trial by combat as a joke, rather than formally demanding it. For instance, in *Sokolow v. Lacher*, a law firm and a former partner each claimed that the other party had interfered with their right of quiet enjoyment to a law office.[94] The firm argued that the partner had interfered with their business, citing (among 14 other examples)[95] an instance where the partner had tried to wrestle a chair away from one of the firm's attorneys.[96] The referee described the instance as a "tug-of-war" over a chair, which ultimately broke.[97] The referee found that both parties were equally culpable in this incident, and that both parties were interfering with the other's quiet enjoyment of the office.[98] The referee went on to find: "[c]learly, this was a test of strength and greed with neither side winning. *This may have been an attempt by the parties to opt for trial by combat rather than civil litigation*."[99]

The referee went on to discuss numerous other allegations by both sides, and ultimately concluded that both sides had interfered with the quiet enjoyment of the other and that one of them should be compelled to leave the office during the pendency of the action in light of the potential for further damage to property and possible physical harm.[100] Unfortunately, the referee did not elaborate on whether the parties had indeed engaged in trial by combat rather than litigation.

Beyond referees in silly cases, attorneys sometimes joke that they are open to pursuing trial by combat on behalf of their clients. In an April 1,[101] 2017, press release, the Florida firm of Gallagher and Associates announced that it would seek trial by combat on behalf of its clients in light of its frustration over banks' misconduct against their clients.[102] While the press release included some correct statements about the history of trial by combat, it made a few errors, such as claiming that "the last trial by combat is thought to have taken place in 1818,"[103] and that since 1776, "no American court in post-independence United States has addressed the issue of entitlement to trial by combat . . . ."[104]

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[93] *See* McFarland v. Gregory, 425 F.2d 443, 449 (2d Cir. 1970) (sufficient evidence supported a finding that the defense had engaged in obstructive conduct akin to "old fashioned total warfare" and that trial court judge had properly exercise discretion "to 'prevent either party from keeping alive the vestige of trial by battle.'").
[94] Referee's Report, Sokolow v. Lacher, No. 600228/01, 2001 WL 36172971, pp. 1–2 (N.Y. Sup. Ct. July 2, 2001).
[95] Including a claim the partner "would glare at [the firm's] personnel and clients with an angry look on his face and that he was in the habit of slamming his door as hard as he could." *Id*. at 4.
[96] *Id*. at 3.
[97] *Ibid*.
[98] *Ibid*.
[99] *Ibid*. (emphasis added).
[100] *Id*. at 21.
[101] Ah ha.
[102] Press Release, *Local Law Firm to Seek Trial by Combat in Bank Litigation*, TAMPA BAY NEWS WIRE (March 29, 2017), https://www.tampabaynewswire.com/2017/03/29/local-law-firm-to-seek-trial-by-combat-in-bank-litigation-55615 [https://perma.cc/XNP4-4YZU]. While the press release is dated April 1, 2017, the news outlet reporting the press release appears to have jumped the gun and ruined the joke.
[103] *Id.* This appears to refer to *Ashford v. Thornton*, which only involved a ***demand*** for a trial by combat—albeit a demand that led to a favorable outcome for Thornton. *See infra* Section V.A.1.
[104] *Id.*; *but see generally*, this Article.

Who says lawyers don't know how to have fun?

IV. Trial by Combat in Popular Culture

While trial by combat was already recognized as an antiquated process in the 1800s, it occasionally makes appearances in modern popular culture—particularly in George R.R. Martin's book series, *A Song of Ice and Fire*, and the television series (mostly) based on these books, *Game of Thrones*. I have seen the show, but have not read the books, and therefore have a limited understanding of how trial by combat operates within the world of *Game of Thrones*.[105] A former classmate of mine, however, knows much more about the operation, tradition, and mythology surrounding trial by combat in *Game of Thrones*, and provided an extensive background on the subject in an article that we previously coauthored.[106] In the *Game of Thrones* universe, parties accused of crimes occasionally resort to demanding trial by combat to avoid being found guilty by a jury.[107] When doing so, the characters often choose champions to fight on their behalf.[108]

The quintessential trial by combat moment in the television series occurred during an episode that aired on June 1, 2014, which featured a fight between Oberyn Martell (played by Pedro Pascal) and Gregor Clegane, a.k.a. The Mountain, (played by Hafþór Júlíus Björnsson).[109] As noted above, Martell fights as Tyrion Lannister's champion, after Tyrion demands trial by combat after being accused of murdering his nephew, King Joffrey.[110] The Mountain acts as the champion for the recently-vacated throne.[111] The trial by combat scene received broad attention for its drama, pacing, and brutal ending.[112]

Trial by combat in the *Game of Thrones* television series and this particular scene appear to have prompted the most widespread attention to trial by combat in at least 15 years. Google Trends shows a massive spike in searches for "trial by combat" in May and June 2014, far exceeding prior and subsequent peaks of interest for the term.[113] Given the widespread interest in

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[105] I suspect, but cannot prove, that there are many others in my position—particularly in light of the dwindling probability that the written series of books upon which the television series was based will ever be completed. *See* Sam Warner, *George RR Martin Suggests He's "Hugely Behind" on Long-Awaited 'Winds of Winter' Book*, NME (April 19, 2021), https://www.nme.com/news/tv/george-r-r-martin-suggests-hugely-behind-winds-of-winter-book-2923472 [https://perma.cc/6HRH-U33V].

[106] *See* Michael L. Smith & Raj Shah, *Arbitration by Combat*, 20 MEDIA & ARTS L. REV. 164 (2015).

[107] *Id*. at 165–66.

[108] *Id*.

[109] *Game of Thrones: The Mountain and the Viper* (HBO television broadcast June 1, 2014). A (graphic) video of the scene referenced in this Article is available here: https://www.youtube.com/watch?v=1JhbQbNf_WU [https://perma.cc/NM8Y-EGFX].

[110] *Game of Thrones: The Mountain and the Viper* (HBO television broadcast June 1, 2014).

[111] *Id.*

[112] *See, e.g.*, Alan Sepinwall, *10 Best "Game of Thrones" Moments So Far*, ROLLING STONE (Apr. 10, 2019), https://www.rollingstone.com/tv/tv-features/game-of-thrones-best-moments-817323/ [https://perma.cc/V7R5-CBRB] (noting that Budweiser ended up basing a Super Bowl commercial on the fight); Rowan Kaiser, *The 14 Scenes That Made "Game of Thrones" a Massive Hit*, VICE (Aug. 7, 2017), E**rror! Hyperlink reference not valid.**https://www.vice.com/en_us/article/bjm9k3/the-14-scenes-that-made-game-of-thrones-a-massive-hit [https://perma.cc/9EYW-A44N] ("On a technical and storytelling level, it's one of the greatest duels I've ever seen committed to screen").

[113] "Trial by Combat," GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&geo=US&q=trial%20by%20combat [https://perma.cc/9G37-

trial by combat following the episode, subsequent demands for trial by combat appear to be motivated by the show.[114]

While the spike of interest in trial by combat inspired by the Martell/Mountain television battle has died down, the notion of trial by combat occasionally pops up. Back when Trump's impeachment loomed, the *Babylon Bee*, published a satirical article fantasizing that Trump had demanded trial by combat in his impeachment inquiry.[115] The article went on to present a tasteful fantasy of Trump asserting that he would battle an unarmed Adam Schiff with a shotgun, rather than his "ceremonial broadsword."[116] Whether the memory of this characteristically ham-fisted attempt at satire prompted Giuliani's later demand for trial by combat remains a mystery.

Rising interest in trial by combat in popular culture has likely inspired some of the most recent demands by litigants that their opponents and judges agree to engage in the ancient practice. The latter portion of the next section delves into modern cases in which trial by combat was demanded or implicated in some way.

V. Modern Demands for Trial by Combat

Trial by combat had its day long ago, but eventually faded out of use. Courts in the United States have recognized the obscurity of the practice for hundreds of years.[117] The Supreme Court of the United States characterized trial by combat as one of several "dimly remembered curios of outworn modes of trial."[118] Other courts have joined in, noting the obscurity of trial by combat.[119]

Despite this, trial by combat makes appearances in cases from time to time. Often, these instances result from litigants demanding trial by combat for reasons that are unclear. In nearly all cases, courts refuse to recognize demands for trial by combat, and those who make the demand are often sanctioned or even subjected to psychological examinations.[120]

SF7P] (last visited May 5, 2020). The trial by combat storyline had commenced two weeks before in the previous episode, in which Tyrion demanded trial by combat, and Martell agreed that he would be Tyrion's champion. *See Game of Thrones: Mockingbird* (HBO television broadcast May 18, 2014).

[114] As noted in greater detail below, a New York attorney, Richard Luthmann, who demanded trial by combat in 2015, stated that he was a fan of the Game of Thrones show and books. *See* DJ Pangburn, *This Game of Thrones-Loving Lawyer Explains Why He's Seeking a Trial by Combat*, GOOD (Mar. 31, 2016), https://www.good.is/articles/luthman-trial-by-combate-game-of-thrones-staten-island [https://perma.cc/T76R-34YK]. The same appears to be true of David Ostrom, who demanded trial by combat in a family law dispute in January 2020. *See* Richard Dahl, *Man Requests "Trial by Combat" to Take Sword to Ex-Wife*, FINDLAW (Jan. 27, 2020) (noting that Ostrom stated that he is a fan of Game of Thrones).

[115] *Trump Requests Impeachment Trial by Combat*, THE BABYLON BEE (Nov. 15, 2019), https://babylonbee.com/news/trump-requests-impeachment-trial-by-combat [https://perma.cc/5MW4-ERLF].

[116] *Id*.

[117] *See* Witherow v. Keller, 1824 WL 2369 (Pa. 1824) (Gibson J.) (describing trial by battle as one of several "antiquated forms of the English common law" that are "entirely obsolete").

[118] Clark v. United States, 289 U.S. 1, 19 (1933).

[119] *See e.g.*, People v. Gholson, 106 N.E.2d 333, 337 (1952) (likening the doctrine of purgation by oath to trial by battle and other "'dimly remembered curios of outworn modes of trial.'") (quoting *Clark v. United States*, 289 U.S. 1, 19 (1933); *In re New Haven Grand Jury*, 604 F. Supp. 453, 461 (D. Conn. 1985) ("Private prosecutions vanished from our system of jurisprudence centuries ago, along with trial by battle.").

[120] *See*, *infra*, Section V.B.9.

Despite courts' general dismissal of trial by combat as a relic, there are occasional instances where the person demanding trial by combat succeeds. Whether it is a despot deciding he can do whatever he wants, a savvy litigant appealing to obscure historic practices before anyone ever heard of *Game of Thrones*, or a business owner trying to get some easy publicity, trial by combat is not always a disaster for the party that seeks it.

This section surveys cases of trial by combat from the late 1700s onward. As trial by combat largely fell out of favor hundreds of years ago, I refer to these cases as "modern" instances of trial by combat—even though some of the earlier cases were heard in the late 1700s and early 1800s. I compiled these cases based on searches for mentions of trial by combat in cases, pleadings, and news reports over the years. Coverage of the cases varies depending on the original court materials available, the amount of media and scholarly coverage of each incident, and—for some cases—the level of commitment of the party seeking to invoke their purported right to trial by combat.

A. Trial by Combat in Modern England

As discussed previously, by the 1800s, English legal historians considered trial by combat to be a relic of the past. Despite this prevailing view, Parliament had not yet outlawed trial by combat—an oversight that led to one of England's most infamous cases, and likely the most significant case involving trial by combat in modern times.

1. A Successful Demand For Trial by Combat – *Ashford v. Thornton*

Mary Ashford attended a dance on the evening of May 26, 1817, where she "danced frequently" with Abraham Thornton.[121] One witness at the dance claimed that he heard Thornton say that he'd "been connected" with Ashford's sister, and that he would do the same with Mary Ashford "or I'll die for it."[122] Mary Ashford, Thornton, and Ashford's friend, Hannah Cox, left the dance together sometime after midnight.[123] Cox left Ashford and Thornton to go to her mother's house, and saw Thornton again at approximately 4:00 a.m. when Ashford stopped by to get some clothes.[124] Ashford was found drowned in a pit of water the next morning.[125]

Thornton was identified as the primary suspect in Ashford's murder and admitted that he had sexual relations with her before she had been killed.[126] At trial, however, witnesses testified that they had seen Thornton walking down the road far from where Ashford's body had been found within 11 minutes of when Cox had last seen Ashford.[127] The jury quickly acquitted Thornton.[128]

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[121] Gary R. Dyer, *"Ivanhoe," Chivalry, and the Murder of Mary Ashford*, 39 CRITICISM 383, 385 (1997); TRIAL OF ABRAHAM THORNTON 1 (John Hall ed. 1926).
[122] TRIAL OF ABRAHAM THORNTON 94 (John Hall, ed. 1926).
[123] Dyer, *supra* note 121, at 385; TRIAL OF ABRAHAM THORNTON 70 (John Hall ed. 1926).
[124] Dyer, *supra* note 121, at 385.
[125] Dyer, *supra* note 121, at 385.
[126] *Id*. at 385–86.
[127] *Id*. at 386; TRIAL OF ABRAHAM THORNTON 99, 111 (John Hall ed. 1926).
[128] Dyer, *supra* note 121, at 386.

Following public outcry over the outcome of the trial, Mary Ashford's brother, William Ashford, brought an appeal of murder against Thornton.[129] A writ of appeal was issued on October 1, 1817, and Thornton was arrested several days later on October 10.[130] Thornton was held to answer for the death of Mary Ashford.[131] As the prosecution had done so in the prior proceedings, William Ashford accused Thornton of assaulting Mary Ashford and then drowning her in a pit of water.[132]

When asked how he pled, Thornton replied "Not guilty; and I am ready to defend the same by my body" and threw his glove on the courtroom floor. [133] Ashford argued that Thornton should not be permitted to wage battle in the appeal because of "the violent and strong presumptions, and proofs following, that . . . [Thornton] was and is guilty," and proceeded to recount the evidence against Thornton that had been presented at trial.[134] Thornton, in response, contended that he was not required to reply, because the argument set forth against his counterplea was insufficient.[135] That being said, Thornton set forth his version of the facts—noting the testimony of witnesses who claimed to have seen him far from where Ashford had been killed.[136]

Ashford demurred to Thornton's counterplea, and his counsel, Joseph Chitty, argued that Ashford was not competent to state facts in support of his innocence and that the facts were not sufficient to raise a presumption of innocence.[137] Chitty also argued that Thornton could not respond with a wager of battle, citing numerous authorities such as Glanville who stated that a party could not be permitted to try a question "by battel, but by the trial by ordeal," in cases where there is "a probable ground of suspicion."[138] The upshot of these authorities was that a wager of battle could not be permitted in cases where there were strong grounds for a presumption of guilt.[139]

Thornton's counsel responded that Thornton had a right to trial by battle.[140] Thornton's counsel argued that numerous authorities established that trial by battle had been brought to England by the Normans, and that authorities were consistent in recognizing that a defendant to an appeal of felony "'may chuse either to put himself on his country or to try it by body to body.'"[141] Thornton's counsel further argued that by demurring to the wager of battle, Ashford

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[129] *Ibid*. (English law permitted a private spouse or male heir of a homicide victim to privately prosecute an alleged perpetrator—even if the perpetrator had previously been found guilty). David S. Rudstein, *Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges' Rulings of "No Case to Answer,"* 13 SAN DIEGO INT. L.J. 5, 34 note 140 (2011). Such appeals were rare, with Blackstone noting in his *Commentaries on the Laws of England* (written between 1765 and 1769) that such private appeals were "very little in use." 4 WILLIAM BLACKSTONE, COMMENTARIES *312.

[130] Ashford v. Thornton (1818) 106 Eng. Rep. 149, 149.

[131] *Id.* at 150.

[132] *Ibid*.

[133] *Ibid*.

[134] *Id*. at 150–51.

[135] *Id*. at 153.

[136] *Id*. at 153–56.

[137] *Id*. at 156.

[138] *Ibid*.

[139] *Id*. at 159–60.

[140] *Id*. at 161.

[141] *Id*. at 162 (quoting EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 2d 247 (E&R Brooke, 1797)). The court's partial quotation of Coke omitted the remainder of the sentence, elaborating that trying the case "body to body"

had admitted the facts set forth in the counterplea to be true—facts that contradicted Ashford's allegations.[142] Thornton's counsel argued that he was therefore entitled to his wager of battle, despite "the inconvenience or impiety of this mode of trial," or that he be permitted to go free.[143]

All four judges hearing the case found in favor of Thornton. The Chief Judge, Lord Ellenborough, held that Thornton was entitled to trial by battle at his election, and that Thornton's case did not fall into certain exceptions where trial by battle was unavailable (such as cases where the appellant is an infant, a woman, over 60 years old, or a prison escapee).[144] Accordingly, Ashford was required to proceed with trial by battle, or decline the wager of battle, in which case Thornton would go free.[145] Judge Bayley emphasized the unusual nature of the case, noting that proceeding by appeal was "unusual in our law, being brought, not for the benefit of the public, but for that of the party, and being a private suit, wholly under his controul."[146]

In conclusion, and in apparent recognition of the outdated nature of trial by combat and the popular opinion that Thornton was guilty, Lord Ellenborough stated:

> The general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices therefore ay justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it.[147]

Ashford did not accept Thornton's wager of battle, and Thornton was released on April 20, 1818.[148]

The following year, England's Parliament passed "An Act to abolish Appeals of Murder, Treason, Felony or other Offences, and Wager of Battel, or joining Issue and Trial by Battel, in Writs of Right," which provided:

> 1. WHEREAS Appeals of Murder, Treason, Felony and other Offences, and the Manner of proceeding therein, have been found to be oppressive; and the Trial by Battel in any Suit, is a Mode of Trial unfit to be used; and it is expedient that the same should be wholly abolished: Be it therefore enacted by The King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act, all Appeals of Treason, Murder, Felony or other Offences, shall cease, determine and become void; and that it shall not be lawful for any Person or Persons, at any time after the passing of this Act, to commence, take or sue Appeal of

meant "combate between him and the plaintiff, but there the parties themselves shall fight." COKE, INSTITUTES 2d, *supra* note 69, at 247.
[142] Ashford, 106 Eng. Rep. at 165–66.
[143] *Id*. at 167.
[144] *Id*. at 167–68.
[145] *Id*. at 168.
[146] *Id*. at 168 (opinion of Bayley, J.).
[147] *Id*. at 169 (opinion of Ellenborough, C.J.).
[148] *Id*.

> Treason, Murder, Felony or other Offence, against any other Person or Persons whomsoever, but that all such Appeals shall, from henceforth, be utterly abolished; any Law, Statute or Usage to the contrary in anywise notwithstanding.
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> 2.—And be it further enacted, That from and after the passing of this Act, in any Writ of Right now depending, or which may hereafter be brought, instituted or commenced, the Tenant shall not be received to wage Battel, nor shall Issue be joined nor Trial be had by Battel in any Writ of Right; any Law, Custom or Usage to the contrary notwithstanding.[149]

Thornton's demand of trial by combat was controversial, provoked extensive argument and reliance on numerous historic sources, and prompted legislation that ensured that such an outcome would not be repeated.[150] It stands as one of the only examples of a successful invocation of the right to trial by combat since the practice was abandoned many centuries ago. As the cases that follow make clear, others have tried to duplicate Thornton's strategy—with little to no success.

2. Thornton's Legacy: No Trial by Combat in England

Thornton is one of the only success stories for trial by combat in modern history. The popularity of the case spurred Parliament into banning the practice. But *Thornton* also serves as inspiration for less-savvy litigants who apparently hear about the case and the prior success of a demand for trial by combat without investigating further and realizing that the practice was explicitly banned a year after the outcome of Thornton's case.

An example of such a litigant is Leon Humphreys, a mechanic in Suffolk who got a £25 ticket for failing to inform England's Driver and Vehicle Licensing Agency (DVLA) that his motorcycle was no longer being driven on the road.[151] Humphreys, as one does, claimed that he was "entitled to ask the court to establish his guilt or innocence by allowing him to fight to the death against a champion nominated by the DVLA."[152] Humphreys claimed (incorrectly) that the battle needed to be to the death, and claimed (also incorrectly) that the right to trial by combat was still on the statute books.[153] Humphreys further claimed that he was "prepared to fight with Japanese samurai swords, razor sharp Ghurka knives or even heavy blacksmith hammers."[154]

Rather than denying the request outright, the court logged Humphreys' request as a not guilty plea.[155] While Humphreys' demand was clearly contrary to the 1819 statute prohibiting trial

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[149] Appeal of Murder Act 1819, 59 Geo. 3 c.46 (Eng.).
[150] *Id.*; *see Ashford*, 106 Eng. Rep. at 149.
[151] *See Obiter Dicta*, 89 A.B.A. J. 12 (2003).
[152] *Magistrates Decide on Trial by Combat*, IPSWICH STAR (Nov. 2, 2002, 12:57 PM), https://www.ipswichstar.co.uk/news/magistrates-decide-on-trial-by-combat-1-130488 [https://perma.cc/8EDA-2AA3].
[153] *Ibid*.
[154] *Ibid*.
[155] *Ibid*.

by combat, the judge evaluating ticket cases likely did not have a citation to this statute at the ready. After a short period of time, though, the court correctly rejected Humphreys' request.[156]

Thornton and the law that case prompted make trial by combat a clearly unlawful tactic in England. But Thornton's successful demand confirmed that trial by combat was still permitted under English common law in 1818—well after the United States gained independence. As will be noted in greater depth below—particularly in the Luthmann litigation[157]—this gives those who would demand trial by combat in American courts a potential hook to justify their requests.

B. Trial by Combat in American Courts

While England has a history of trial by combat, the United States does not, as its legal system was founded long after trial by combat had gone out of practice in England. Despite this, trial by combat tends to pop up in cases—whether it is by reference to the conduct of the litigants or third parties, or explicitly demanded by one of the parties to the case. This subsection surveys instances of trial by combat in United States opinions and rulings, starting with one of the earliest examples, and eventually moving to the modern, post *Game of Thrones* era.

1. Trial by Combat Whether You Want it Or Not—*D'arcy v. Lyle*

In *D'Arcy v. Lyle*, the plaintiff, D'Arcy brought an action of indebitatus assumpsit against the defendant, James Lyle, for money paid out, expenses, and work and labor fees arising from D'Arcy's work as an agent for Lyle.[158] The Chief Justice of the Supreme Court of Pennsylvania characterized the facts as "one of those extraordinary cases arising out of the extraordinary situation into which the world has been thrown by the French revolution."[159]

In August 1804, D'Arcy received a power of attorney from Lyle to recover unsold goods from Suckley & Co. at Cape Francois[160] and to settle all of Lyle's accounts with Suckley & Co.[161] On his way to Cape Francois, D'Arcy was pursued by a French privateers and threw various items overboard—including the power of attorney.[162] Despite this, Suckley & Co. agreed to deliver up the goods once D'Arcy paid an agreed-upon balance due.[163] Before the goods were delivered,

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[156] David Sapsted, *Court Refuses Trial by Combat*, THE TELEGRAPH (Dec. 16, 2002, 12:01 AM), https://www.telegraph.co.uk/news/uknews/1416262/Court-refuses-trial-by-combat.html [https://perma.cc/7E85-SV5K].
[157] *See infra* Section V.B.8.
[158] 5 Binn. 441, 441 (Pa. 1813).
[159] *Id*. at 449.
[160] Cape Francois, a city in northern Haiti that was also known as Cap Francais, is now known as Cap-Haïtien. *See Cap-Haiten*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Cap-Haitien [https://perma.cc/D832-MYMZ] (last visited Mar. 13, 2022); *"Culture,"* REMEMBER HAITI, THE JOHN CARTER BROWN LIBR., https://www.brown.edu/Facilities/John_Carter_Brown_Library/exhibitions/remember_haiti/culture.php [https://perma.cc/7J8H-7LHC] (last visited Mar. 13, 2022).
[161] *D'Arcy*, 5 Binn. at 441.
[162] *Ibid*.
[163] *Ibid*.

however, a third party, Thomas Richardson, attached the Suckley & Co. goods to secure a debt they owed to a separate business, Knipping & Steinmetz.[164]

On behalf of Lyle, D'Arcy filed a claim in St. Francois's Chamber of Justice, which ruled that he could obtain the goods if he could produce an authentic power of attorney within four months—to be secured by a recognizance of $2,089.[165] D'Arcy paid the bond, and a month later he presented a power of attorney and asked that the recognizance be nullified.[166] A year later, in November 1805, D'Arcy accounted the goods to Lyle, and everything seemed fine.[167]

In 1808, however, Henry Christophe took over as President of the state of Haiti after Jean Jacques Dessalines, the prior president, was killed by a mob.[168] Richardson, who was friends with Christophe, filed suit against D'Arcy again—claiming that he was owed $3,000.[169] The trial court, noting its prior ruling, found in D'Arcy's favor, and this was confirmed on appeal to the Civil Tribunal, but Christophe interfered with the proceedings and ordered that D'Arcy's attorney be jailed.[170]

Christophe then issued a second order that D'Arcy and Richardson were to resolve their dispute through a fight to the death.[171] D'Arcy did not want to fight, but also did not want to pay the money.[172] He and Richardson met, but did not fight.[173] Still, Christophe insisted on the trial by combat and demanded that the parties fight at six the following morning and that Christopher himself would be present to ensure that they fought.[174] At this point, D'Arcy's friends told him to escape, but D'Arcy was intercepted by Christophe's men.[175] D'Arcy continued to refuse to pay until he had a conversation with Christophe that evening—the contents of which are unknown—after which D'Arcy agreed to the reversal of the earlier judgments, the retraction of his oath that he owed Richardson nothing, and the payment to Richardson of $3,000.[176]

D'Arcy filed suit against Lyle to recover the money he had lost.[177] The trial court instructed the jury that if D'Arcy had individually promised to pay Richardson $3,000, he could not recover.[178] But if the jury found that he had been extorted in his capacity as Lyle's agent, he could

[164] *Ibid*.
[165] *Ibid*.
[166] *Id*. at 441–42.
[167] *Id*. at 442.
[168] *See* Walter Monfried, *Henri Christophe: The Slave Who Became King*, XII NEGRO DIGEST 41, 42 (1963). The *D'Arcy* Court refers to the respective presidents only by their surnames. *See D'Arcy*, 5 Binn, at 442,451.
[169] *D'Arcy*, 5 Binn, at 442.
[170] *Id*. at 442.
[171] *Id*. at 442–43.
[172] *Id*. at 443.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.
[176] *Ibid*. Christophe's aggressive tactics toward D'Arcy are in line with accounts of his autocratic approach in ruling Haiti—which include claims that over 4,000 people were released from prisons following Christophe's suicide as the nation was on the verge of a military coup. *See* 19 Niles Weekly Register 201-02 (Nov. 25, 1820).
[177] D'Arcy, 5 Binn. at 443.
[178] *Id*. at 444.

recover, as losses "incurred by the agent without fault, ought to be compensated by the principal."[179] D'Arcy prevailed, and Lyle moved for a new trial.[180]

The Pennsylvania Supreme Court ruled that the motion for new trial should be denied.[181] Chief Justice Tilghman held that D'Arcy's confession of judgment "was beyond all doubt extorted from the plaintiff by duress," and that while D'Arcy had paid his own money, the amount he paid was estimated to be the same as the amount he had previously recovered as Lyle's agent.[182] Recognizing the concern that agents facing threats from "unprincipled tyrants in foreign countries" may be forced to pay far more than the amount obtained from the principal, the Chief Justice emphasized that this was not a case, and that the jury indemnified D'Arcy "to an amount, very little if at all exceeding the property in his hands, with interests and costs."[183]

In his concurring opinion, Justice Yeates directed stronger language against Christophe's trial by combat proceedings. Justice Yeates characterized the proceedings as Christophe "compel[ling] the litigant parties under his savage power, into a trial by battle, in order to decide their civil rights."[184] He went on to describe the proceedings as a "mockery of justice" in a "barbarous foreign country" in which D'Arcy had been "doomed by the cruel order of an inexorable tyrant" to pay the $3,000.[185]

While the *D'Arcy* case did not involve the direct litigation of a party's demand for trial by combat, it is instructive for several reasons. First, the trial by combat that Christophe had ordered to take place is central to the eventual decision. *D'Arcy* is a cautionary tale of how established court procedures may be altered or abandoned entirely if an unchecked authority figure decides to interfere. The power of courts to adhere to prior binding rulings and avoid the institution of ad hoc, unjust procedures depends on the recognition of courts' authority by the people and by others that hold political power—a recognition that was lacking in Christophe's government.

Second, the *D'Arcy* case is an early example of American courts' distaste for trial by combat. As will be discussed in greater depth later, a common argument employed by those demanding trial by combat in the United States is that the practice of trial by combat had not been abolished in English common law, and that the United States inherited and incorporated the English common law.[186] While courts in the early days of the United States were certainly willing to rely on parts of English common law in reaching decisions, this is a far cry from incorporating English common law in its entirety—an extreme proposition that is demonstrably untrue.[187]

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[179] *Ibid*.
[180] *Ibid*.
[181] *Id*. at 451–52, 455.
[182] *Id*. at 449.
[183] *Id*. at 450.
[184] *Id*. at 451.
[185] *Id*. at 452.
[186] *See infra* Section V.B.8.
[187] The characterization of parishioners' property interest in church pews is a clear—if woefully underdiscussed—example of an area of law where courts in the United States adopted a far different approach than English courts. *See* Carl Zollmann, *Pew Rights in the American Law*, 25 YALE L.J. 467, 468–69 (1916) (noting that American law regarding interests in pews is a matter of contract, while pew rights in England derive from membership in an established church). The limits of America's adoption of the common law is discussed in greater length below in Section V.B.

2. Illinois's Prohibition of Trial by Battle – *United States ex rel. Gapinski v. Ragen*

Illinois is one of only a few states that has, at some point, explicitly banned trial by combat through statute.[188] For nearly 100 years, Illinois law explicitly prohibited trial by battle, along with appeals of felony and the benefit of clergy.[189] The combined prohibition of trial by battle and appeals of felony appeared to track England's then-recent prohibition of both trial by battle and appeals of felony following the outcome of *Ashford v. Thornton*.[190] At some point since the early 1900s, however, the statutory prohibition against trial by battle has disappeared.[191]

As of 1945, however, courts recognized a statutory prohibition against trial by combat in Illinois, as illustrated by the case of *United States ex rel. Gapinski v. Ragen*.[192] There, the Seventh Circuit heard the appeal of Hubert Gapinski's writ of habeas corpus for release from the psychiatric division of the Illinois State Penitentiary.[193] Gapinski was serving a sentence for assault with intent to commit rape, and had two prior convictions for burglary.[194] Gapinski did not appear to challenge the validity of his original conviction, but primarily complained about being incarcerated in the psychiatric division in Menard, Illinois.[195]

Gapinski made several complaints in his petition, all of which the court rejected. Gapinski claimed that the trial judge should have subpoenaed various officials and psychiatrists, but the court noted that the trial court had discretion to do so.[196] Gapinski complained that he was entitled to a "trial by record," in which the court would review all of "the papers and documents which he has forwarded to various officials of both the state and federal governments"—an approach that the court rejected.[197]

Gapinski also claimed that he was entitled to a trial by battle—a contention that the court highlighted immediately after noting that Gapinski's statement "leaves little room for doubt but that he is confined in the proper institution."[198] The court noted that the procedure was not available in Illinois, citing an Illinois statute.[199]

There is little additional detail regarding Gapinski's request for trial by battle, although the (admittedly scant) coverage of the case suggests that Gapinski's protestations may not have been

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[188] ILL. REV. CODE 158/160 (1827).
[189] The first instance of this prohibition that I could locate appears in 1827, with a law providing that "[t]he benefit of clergy, appeals of felony, and trials by battle, shall be and are hereby forever abolished." *Id.* Similar statutes appear in various editions of Illinois statutory compilations up through the early 1900's. *See* ILL. REV. L. 209, § 162 (1833); ILL. COMP. STAT. 229/ § 162 (1839); *see* ILL. R.S. 182, § 172 (1845); ILL. ST. CH. 38, ¶ 489 (1885); ILL. R.S. 786, § 429 (1908); ILL. STAT. ANN. 2229, ¶ 4128 (1913); ILL. ST. CH. 45, § 683 (1916).
[190] *See supra* Section V.A.1.
[191] While I have been unable to locate a particular act eliminating the trial by battle prohibition, the 1916 edition of Illinois' statutes is the last statutory compilation to which I have access that appears to contain the law. *See* ILL. ST. CH. 45, § 683 (1916).
[192] 152 F.2d 268 (7th Cir. 1945).
[193] *Ibid*.
[194] *Ibid*.
[195] *Id*. at 268–69.
[196] *Id*. at 269.
[197] *Ibid*.
[198] *Ibid*.
[199] *Ibid*. (citing 38 Ill. Comp. Stat. Ann. ACT #/739 (YEAR). As noted below, I have been unable to locate the text of the particular, cited statute. See, infra, Section VI.B.

entirely baseless. In the underlying hearing on the habeas petition, Gapinski claimed that he had been transferred to the psychiatric hospital in Menard so that he would be unable to testify in his habeas petition proceedings.[200] The judge stated that he did not believe that Gapinski was guilty of the underlying crime following his testimony, and warned that if Gapinski "'is being punished for sending applications to court, I'll send someone to jail and it won't be an underling.'"[201]

It appears that Gapinski was not released, as the following year he appealed the denial of his writ of habeas corpus.[202] Gapinski appears to have remained in custody for some additional time as well, as Supreme Court reports show that he filed three petitions for certiorari from 1945 to 1947, all of which were denied.[203] There is no record of whether Gapinski tried to continue demanding trial by battle.

Gapinski highlights Illinois's prohibition against trial by combat. While this statute appears to no longer be on the books, its prior existence and application suggest that demands for trial by combat in Illinois courts will likely be met with even more skepticism than demands filed in jurisdictions without any historic mention of trial by combat.[204]

3. An Improper Motion to Strike – *McNatt v. Richards*

McNatt v. Richards involved a lawsuit by the plaintiff, June McNatt against George Richards and the Freedom Church of Revelation.[205] Freedom Church was not represented by an attorney, as Reverend John Nichols, a trustee of the church, is listed as appearing on Freedom Church's behalf.[206] It appears that Mr. Nichols is still with Freedom Church as a "Presiding Bishop."[207] Details on the parties and the circumstances of the litigation—including McNatt's allegations and causes of action—are absent from the Delaware Court of Chancery's opinion. But a federal opinion issued the following year provides some background on the defendant, Freedom Church of Revelation ("Freedom Church").[208]

Freedom Church was an organization that recruited individuals to be "ministers," upon their payment of a $4,100 donation, after which they would open a bank account in the church's name and "donate" half of their income to that account—and then use funds in that account as a "parsonage allowance" for personal expenses.[209] The court unsurprisingly affirmed the IRS's

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[200] Associated Press, *Continue Habeas Corpus Proceedings of Gapinski*, FREEPORT JOURNAL-STANDARD, June 20, 1944, at 2. https://www.newspapers.com/image/?clipping_id=988490&fcfToken=eyJhbGciOiJIUzI1NiIsInR5cCI6IkpXVCJ9.eyJmcmVlLXZpZXctaWQiOjQ0MjQ2NTYsImlhdCI6MTU4NzkzOTMxOCwiZXhwIjoxNTg4MDI1NzE4fQ.on0KhUfNo6rq3oq2BelGC0Tu16qks27_c_imd6hsP1c [https://perma.cc/N78E-SKR6].

[201] *Ibid*.

[202] *See ibid*.

[203] *See generally* Gapinski v. Nierstheimer, 324 U.S. 846 (1945); Gapinski v. Nierstheimer, 329 U.S. 778 (1946); Gapinski v. Wham, 332 U.S. 752 (1947).

[204] Although, as we keep going, we will see that these other jurisdictions aren't all that accommodating of such demands in the first place.

[205] No. 6987, 1983 WL 18013, at *1 (Del. Ch. Mar. 28, 1983).

[206] *Id.*

[207] *See* John Nichols, LINKEDIN, https://www.linkedin.com/in/john-nichols-87125742 [https://perma.cc/4DES-STCX] (last visited Apr. 24, 2020).

[208] Freedom Church of Revelation v. United States, 588 F.Supp. 693 (D.D.C. 1984).

[209] *Id*. at 694.

determination that Freedom Church was not operating for an exempt purpose, and that it had failed to show that it did not operate for the benefit of private individuals.[210]

Back to the *McNatt* case. Freedom Church responded to the complaint with an answer and counterclaim, which the court characterized as a "rambling tirade which asserts various preposterous allegations and claims."[211] McNatt, in turn, moved to strike Freedom Church's answer and counterclaim on "various grounds, including irrelevancy, immateriality, insufficiency of defenses and redundancy."[212]

Freedom Church then filed a "Motion to Strike Plaintiff's Motion to Strike."[213] It appears that in this motion, Freedom Church offered "to waive its counterclaim on the condition that plaintiff accept a challenge of trial by combat to death . . . ."[214] The court noted that this was "not a form of relief this Court, or any court in this country, would or could authorize" and further stated that dueling was illegal and that Freedom Church should not make further requests for unlawful relief.[215] The court granted McNatt's motion to strike, and gave Freedom Church ten days to file a proper responsive pleading.[216]

Considering that Freedom Church had sought trial by combat to the death—a request that the court interpreted as seeking an illegal duel—it is notable that the court did nothing more than strike Freedom Church's answer and counterclaim. This lenience may be partially explained by the court recognizing that Freedom Church was not represented by counsel—though the court warned that Freedom Church still needed to comply with the court's rules and procedures.[217]

4. The Crime of Trial by Combat – *People v. Turner* and Similar Cases

Litigants may think that one way around courts' hostility to demands for trial by combat is to simply take the procedure into their own hands. While a carefully crafted, non-lethal agreement is not outside the bounds of possibility,[218] encouraging and arranging a fight to the death is a path to a homicide conviction.

Clarence Turner found this out the hard way. When a dispute arose between "the two women with whom he lived," Turner provided each of the women with loaded firearms and "directed that a 'trial by battle' would be held" to resolve the dispute.[219] Turner instructed one of

[210] *Id*. at 697–98.
[211] *McNatt*, ,1983 WL 18013, at *1.
[212] *Ibid*.
[213] *Ibid*.
[214] *Ibid*.
[215] *Ibid*.
[216] *Ibid*.
[217] *Ibid*.
[218] *See, e.g.*, Christopher Immormino, *I'm Gonna Knock You Out: Why Physical Force is a Legitimate Form of Dispute Resolution*, 27 OH. ST. J. DISP. RESOL. 207, 232–34 (2012) (analyzing a contract between the partners of United Fighting Championship calling for disputes to be settled through a sport jiu-jitsu match and concluding that the contract could constitute a valid dispute resolution clause); *see also infra* Section VI.C.
[219] People v. Turner, 336 N.W.2d 217, 218 (Mich. Ct. App. 1983).

the women, Ms. Tompkins,[220] to aim the gun at the other woman, Ms. Smith.[221] The gun went off, and Ms. Smith was killed.[222]

The trial court concluded that "while the gun had been intentionally pointed, the shooting was an accident," and neither Turner nor Tompkins had intended to kill Smith.[223] Turner was convicted of aiding and abetting involuntary manslaughter—a conviction that Turner challenged on the grounds that aiding and abetting presupposes an intent, yet involuntary manslaughter does not require a showing of malice.[224] After surveying other states' case law and language from the Michigan Supreme Court, the court concluded that Turner could be guilty of aiding and abetting involuntary manslaughter even though intent was not an element of the offense itself.[225] The court found that Turner induced the commission of the crime, noting that he had directed Thompson to point a loaded gun at Ms. Smith and that he had provided the weapons to both Thompson and Smith.[226]

Turner's demand for trial by combat was unusual—as he was a third party that was not involved in the dispute between Tompkins and Smith. Unlike historic trial by combat, in which one of the parties to the dispute makes the demand, Turner took it upon himself to impose the deadly method of dispute resolution. What inspired Turner to orchestrate the battle remains unclear.

While not a criminal case, the Court in *Hollingshead v. Watkins*[227] portrayed the facts before it in a similar light. There, the jury had issued a substantial monetary award to the plaintiff in a battery action, despite the defendant's claim that the plaintiff had been the aggressor.[228] The Iowa Supreme Court characterized the plaintiff's initial striking of the defendant on the breast as a "slap on the wrist" that did not pose a great menace.[229] By responding violently, however, the defendant "availed himself of the privilege of combat regardless of cost."[230] While the defendant took issue with the damages awarded to the plaintiff, the Court noted that it was "the clear policy of the law to make trial by combat odious and discouraging," and refused to reduce the verdict of the jury.[231]

A more questionable case is *People v. Fort*,[232] where the defendant, Jeff Fort, had been found guilty of resisting or obstructing a peace officer.[233] Officers had responded to a report of a stolen shotgun, and the victim told them that Fort and another youth had been involved in the theft.[234] The officers found Fort and the other youth, along with three others, sitting on the porch

[220] The opinion does not contain the first names of either of the women. *Ibid.*
[221] *Ibid*.
[222] *Ibid*.
[223] *Ibid*.
[224] *Ibid*.
[225] *Id*. at 217–19.
[226] *Id*. at 217–18.
[227] 173 N.W. 4 (Iowa 1919).
[228] *Id*. at 5.
[229] *Ibid*.
[230] *Id*. at 6.
[231] *Ibid*.
[232] 234 N.E. 2d 384 (Ill. App. Ct. 1968).
[233] *Id*. at 385.
[234] *Id.*

of a house, and later located the stolen shotgun inside the house.[235] When one of the officers told the group that they were all under arrest, Fort replied, "bullshit."[236]

For those unfamiliar with the meaning of Fort's response, the Court helpfully noted that the word, "slang and vulgar, has a contemptuous and defiant connotation. (See Webster's Third New International Dictionary, unabridged, 1964.)"[237] The officer thought that the group was trying to prevent Fort from being taken into custody, so he grabbed Fort, "who pushed and struck him," leading to several other officers "subdu[ing]" Fort.[238]

Fort claimed that the officer was not justified in grabbing him but the Court disagreed, finding that the arrest "occurred in a tense situation," and that the defendant's "abusive and defiant remark . . . unquestionably aggravated the tension and gave the police reasonable cause to believe that force was required to maintain custody of the defendant."[239] The court noted that "peace is best preserved when the citizen submits to arrest without regard to the merits of the case," and likened Fort's reaction to "trial by combat."[240]

This all happened in 1966, and one wonders what might have happened had the events leading up to Fort's arrest been caught on camera. The case has not yet been overturned, although a similar outcome today is less likely, as a court would probably find that there is a First Amendment right to swear at police during an investigation.[241]

It is also worth noting that Fort was not a run of the mill suspect—at the time of the case, he was one of the leaders of a fast-growing gang called the Blackstone Rangers, which would ultimately become the Almighty Black P. Stone Nation, also known as the "Stones."[242] Fort's involvement in the Stones included community work, part of which involved founding a non-profit organization to create skills development programs for gang members—an effort that gained President Richard Nixon's attention and earned Fort an invitation to his 1969 inauguration.[243] Fort declined the invitation.[244] Fort ended up misusing grant funds, and was sent to prison for five

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[235] *Ibid*.
[236] *Ibid*.
[237] *Ibid*.
[238] *Ibid*.
[239] *Id*. at 387.
[240] *Ibid*.
[241] *See, e.g.*, State v. E.J.J., 354 P.3d 815, 816–17, 820 (Wash. 2015) (overturning juvenile's conviction for obstructing a law enforcement officer after the juvenile had yelled profanities at officers, and finding that the juvenile had a First Amendment right to criticize how police were handling the situation).
[242] For a thorough background on the Stones, along with Fort's involvement in the rise, fall, and evolution of the gang, *see generally* NATALIE Y. MOORE & LANCE WILLIAMS, THE ALMIGHTY BLACK P STONE NATION: THE RISE, FALL, AND RESURGENCE OF AN AMERICAN GANG (2011).
[243] Phoebe Mogharei, *From the Vault: The Making of Jeff Fort*, CHI. MAG. (Nov. 5, 2018), http://www.chicagomag.com/Chicago-Magazine/November-2018/The-Making-of-Jeff-Fort/ [https://perma.cc/6YYU-HRVE]. I'm confident that this is the same Jeff Fort from the Illinois case because one of Fort's compatriots and co-founder of the Stones, Eugene Hairston, was one of the other suspects in the Illinois case—and likely the one who was eventually found to have stolen the shotgun, as he was imprisoned starting in 1966. Samuel Momodu, *Jeff Fort (1947-)*, BLACK PAST (Dec. 30, 2019), E**rror! Hyperlink reference not valid.**https://www.blackpast.org/african-american-history/people-african-american-history/jeff-fort-1947/ [https://perma.cc/E8TA-SLRN].
[244] Samuel Momodu, *Jeff Fort (1947-)*, BLACK PAST (Dec. 30, 2019), E**rror! Hyperlink reference not valid.**https://www.blackpast.org/african-american-history/people-african-american-history/jeff-fort-1947/ [https://perma.cc/E8TA-SLRN].

years.[245] In 1983, Fort was imprisoned for drug trafficking and while in prison, he tried to arrange a deal with Moammar Gadhafi where Fort's gang would "bomb government buildings and commit other terrorist acts in the United States," in exchange for $2.5 million.[246] After one of the other members of Fort's gang bought a rocket launcher from an undercover agent, and after another member agreed to testify as a witness for the prosecution, Fort was indicted.[247] Fort was convicted on domestic terrorism charges and sentenced to 80 years in prison, and is currently incarcerated in the ADX Florence Supermax Prison in Florence Colorado.[248]

While not all demands for trial by combat will necessarily end with one's eventual incarceration in a supermax prison, Fort's tale remains a cautionary one.

5. "Motion for Fist Fight" – *State v. Mauhar*

In 2005, Jesse James Mauhar was charged with stabbing and killing Matt Palagi at "a high school drinking party."[249] Mauhar, Palagi, and Demetrius Joslin were all at a party when a fight broke out between Pagali and Joslin.[250] As the two were fighting, Mauhar stabbed Palagi repeatedly with a knife.[251] Mauhar then cut or stabbed three other people who attempted to step in and stop the fight.[252] Joslin also stabbed Pagali, but was acquitted by a jury on March 14, 2006, on the grounds of self-defense, after eyewitness testimony regarding Palagi's "aggressive behavior" and bullying toward Joslin during the month preceding the fight.[253]

On March 27, 2006, Mauhar's attorney, Kirk Krutilla, filed a "Motion for Fist Fight."[254] In the motion, Krutilla[255] requested that the court order "a fist fight between Shaun Donovan and

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[245] Phoebe Mogharei, *From the Vault: The Making of Jeff Fort*, CHI. MAG. (Nov. 5, 2018), http://www.chicagomag.com/Chicago-Magazine/November-2018/The-Making-of-Jeff-Fort/ [https://perma.cc/6YYU-HRVE].
[246] *Id*.
[247] *Id*.
[248] *Id*.
[249] Tristan Scott, *Motion for Fistfight Leads to Murder-Case Shakeup*, INDEP. REC. (May 7, 2006), https://helenair.com/news/state-and-regional/motion-for-fistfight-leads-to-murder-case-shakeup/article_74fc7a33-8b4b-5967-9567-090294ed6692.html [https://perma.cc/9FVZ-SJNN].
[250] *Ibid*.
[251] *Ibid*.
[252] *Ibid*.
[253] *Ibid*.; Associated Press, *Jury Acquits Teen in 2005 Stabbing Death*, BILLINGS GAZETTE (Mar. 14, 2006), https://billingsgazette.com/news/state-and-regional/montana/jury-acquits-teen-in-stabbing-death/article_fd5985c9-a275-5293-8830-4ee6406d89ea.html [https://perma.cc/B53K-DSCA].
[254] Mot. for Fist Fight, State v. Mauhar, No. D2005-8 (D. Mont.., Mar. 27, 2006) (copy available at https://loweringthebar.net/pleading-archive/motion-for-a-fist-fight [https://perma.cc/8D5A-HSLW]).
[255] As later events suggest, it does not appear that Mauhar wanted Krutilla to file this motion—and the opening line of the motion "COMES NOW counsel for Defendant, through his and respectfully requests…" rather than the typical, "COMES NOW Defendant, through his counsel, and respectfully requests…" therefore may be less of a typo and more an admission that Krutilla is responsible for the motion. *Id.*

John Conner [sic][256] on one side [sic] and Kirk Krutilla and Bill Buzzell on the other side."[257] Krutilla claimed that Donovan and Connor had maintained that "it was perfectly right, legal and moral" for Palagi to beat up Joslin and that Joslin did not need to worry because Palagi's "drunk and stoned friends" would protect Joslin.[258]

The remainder of Krutilla's motion states:

> The defense team disagrees but would love to give Donovan and Conner [sic] a chance to stand up for the principle they stand up for; i.e. the brutal humiliation and beating up of weaker human beings is the most cherished principle in life. Therefore; the defense moves that before the hearing [on] April 17, 2006 that the state be given a chance on what they cherish in a resolution of dispute and that there be a fist fight with one side being Mr. Conner [sic] and Mr. Donovan and the other side being Kirk Krutilla and Bill Buzzell. For further insurances, that Coroner [sic!] and Donovan don't get beat up to bad, [a] group of defense attorney's drunk and stoned friends will be there to assure Conner's [sic] and Donovan's safety.[259]

This motion does not comport with many of the historical requirements of trial by combat. First, it does not involve single combat, as it proposes a two-on-two match. Second, the fist fight requested does not appear (at least on the face of the motion) to include criteria for one side's victory, nor does it include requirements that the parties swear the necessary oaths. Third, the fist fight sought does not request oversight by the court or a neutral third party—stating only that some of "defense attorney's" (presumably Krutilla's) "drunk and stoned friends" will be nearby. It is also unclear what would be gained by the winner of the fight—although the motion mentions "a resolution of dispute" in the middle of one of the most incoherent sentences I have ever read.

Krutilla claimed that he had filed the motion to get the prosecutors' attention, "but that the intended irony was ultimately missed."[260] Mauhar certainly wasn't happy, firing Krutilla after learning about the motion.[261] This, in turn, led to his case being postponed so that his new attorney

[256] Shaun Donovan was the Mineral County Attorney, and John ***Connor*** was Montana's Assistant Attorney General. *See* Tristan Scott, *Motion for Fistfight Leads to Murder-Case Shakeup*, INDEP. REC. (May 7, 2006), https://helenair.com/news/state-and-regional/motion-for-fistfight-leads-to-murder-case-shakeup/article_74fc7a33-8b4b-5967-9567-090294ed6692.html [https://perma.cc/9FVZ-SJNN]. To my knowledge, Mr. Connor is not the same John Connor who will one day lead the surviving members of the human race in their battle against the machines. *See John Connor*, WIKIPEDIA https://en.wikipedia.org/wiki/John_Connor [https://perma.cc/WJ7N-3BX8] (last visited May 6, 2020).

[257] Mot. for Fist Fight, State v. Mauhar, No. D2005-8 (D. Mont. Mar. 27, 2006) (copy available at https://loweringthebar.net/pleading-archive/motion-for-a-fist-fight [https://perma.cc/8D5A-HSLW]).

[258] *Ibid*.

[259] *Ibid*. It appears that Bill Buzzell refers to William Buzzell, a retired deputy sheriff who worked as a private investigator in Montana. *See* BUZZELL & ASSOCIATES, http://buzzellassociates.weebly.com/ [https://perma.cc/JKA5-XYNN] (last visited May 6, 2020).

[260] Tristan Scott, *Motion for Fistfight Leads to Murder-Case Shakeup*, INDEP. REC. (May 7, 2006), https://helenair.com/news/state-and-regional/motion-for-fistfight-leads-to-murder-case-shakeup/article_74fc7a33-8b4b-5967-9567-090294ed6692.html [https://perma.cc/9FVZ-SJNN].

[261] *Ibid*.

could get up to speed.[262] Ultimately, Mauhar pleaded guilty and was sentenced to 17 years in prison.[263]

Any discussion of a motion for a fist fight would be incomplete without a reference to the late Joe Jamail's challenge to fight a witness during a deposition.[264] After calling opposing counsel "fat boy," and after calling the witness "asshole," and after the witness responded by saying that he'd like to "knock [Jamail] on [his] ass," Jamail responded by asking that the witness "come over here and try it, you dumb son of a bitch."[265] The witness tried to rise to his feet, but was restrained by his attorney.[266] While I have not been able to locate any additional information, including what sort of impact this exchange had in the broader litigation, this exchange has been described as a "prime example" of incivility, and does not reflect well on Mr. Jamail's conduct as a litigator.[267]

6. A Possible Typo – *So v. NYK Line*

One of the more mysterious examples of trial by combat in this article is the case of *So v. NYK Line*—a 2014 class action antitrust lawsuit against several companies that shipped cars, trucks, and other vehicles by cargo ship.[268] So alleged that the defendants engaged in price fixing in violation of various antitrust and unfair competition statutes and sought to certify a class of plaintiffs damaged by this price-fixing.[269]

For the most part, nothing in So's Complaint was out of the ordinary. So set forth the facts, jurisdictional claims, class certification claims, and causes of action. But at the end of the document, in So's demand for jury trial, So states: "[p]ursuant to Fed R. Civ. P. 38(b), Plaintiff hereby demands a trial by combat."[270]

It is unclear why So demanded a trial by combat, and the court never raised this issue. Ultimately, the case was transferred to the District Court of New Jersey, which was overseeing multi-district litigation against the vehicle shipping companies.[271] From there, the case gets lost in the shuffle of complex litigation.

The court never addressed So's demand for trial by combat, and its appearance under a demand for jury trial heading and citation of the proper rule of civil procedure suggest that

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[262] *Ibid*.

[263] Tristan Scott, *Teenager Gets 17 Years in Superior Party Killing*, MISSOULIAN (Sept. 15, 2006), https://missoulian.com/news/state-and-regional/teenager-gets-years-in-superior-party-killing/article_97588c76-1019-534d-9313-d8039a6b2036.html [https://perma.cc/3ZNK-PV6D].

[264] *See* Iowapublicdefender, *Texas Style Deposition*, YOUTUBE (June 27, 2007), https://www.youtube.com/watch?v=ZIxmrvbMeKc&ab_channel=iowapublicdefender [https://perma.cc/73P9-JE2H].

[265] *Id*.

[266] *Id*.

[267] *See* David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS, 135, 144 (2019).

[268] Compl. at 1, So v. NYK Line, No. 4:14-cv-04559, 2014 WL 5139398 (N.D. Cal. Oct. 13, 2014). For reasons that are unclear, the Westlaw version ***and pdf version*** of the complaint that can be obtained through Westlaw include an apparently incorrect docket number of 3:14-cv-04559. This docket number does not exist on PACER. A search for the correct docket number yields the same case, with the same complaint, as the version on Westlaw, with the only difference being the one number in the stamped docket number. A copy of the correct complaint, downloaded from PACER, is on file with the author.

[269] *See generally*, Compl., So. v. NYK Line, No. 4:14-cv-04559, 2014 WL 5139398 (N.D. Cal. Oct. 13, 2014).

[270] *Id*. at 40.

[271] *See* MDL Order Transferring Case to the District of New Jersey, No. 4:14-cv-04559 (N.D. Cal. Nov. 17, 2014).

"combat" was a typo. How the word "jury" could be mistaken with the word "combat" is unclear. Sadly, the question of whether So's demand for trial by combat was a sufficient demand for a jury trial was never litigated, and therefore remains a mystery.

7. Demanding Trial by Combat as Evidence of a Lack of Credibility – *Rochelle v. United States*

In 2005, Okang Rochelle was indicted for two counts of being a felon in possession of a firearm in violation of federal law.[272] After officers stopped Rochelle, who appeared to be filming prison buses, they saw that he had a loaded crossbow in his vehicle. [273] When the officers told Rochelle he would need to be secured while they located a BB gun he said he had in his trunk, Rochelle attempted to run away.[274] After catching and restraining Rochelle, officers found multiple weapons in Rochelle's vehicle. [275] Rochelle was convicted on both counts of the indictment in 2009.[276]

Rochelle filed numerous writs and petitions challenging various aspects of his conviction.[277] The pleadings that Rochelle would file also tended to be "voluminous," and sometimes "difficult to follow."[278] Rochelle also was disruptive during his trial, evidenced by "continuing efforts to make improper, inappropriate, and inflammatory comments in the presence of the jury."[279]

Among these improper comments and actions, Rochelle apparently demanded "trial by combat" rather than a trial by his peers.[280] The court assessing Rochelle's motion to set aside the verdict and sentence did not evaluate this request or analyze whether it was improper beyond including it as an example of Rochelle's conduct that showed that Rochelle would have been a poor witness had he testified in a motion to suppress hearing.[281]

There is no other mention of Rochelle's request for trial by combat in Rochelle's pleadings or in the other opinions evaluating and dismissing Rochelle's various appeals and writs. The court's treatment of Rochelle's request for trial by combat as an example of Rochelle's disruptive conduct suggests that the court did not take a favorable view of the request.

8. A Thorough Demand for Trial by Combat – The Luthmann Litigation

Most of the cases discussed in this article so far involve offhand demands for trial by combat by litigants who don't appear to know what they are doing. But Richard Luthmann, a New

[272] Rochelle v. United States, No. 1:12CV1121, 1:05CR112-1, 2016 WL 1241329, *1 (M.D. N.C. Mar. 28, 2016).
[273] *Id*. at *3.
[274] *Ibid*.
[275] *Ibid*.
[276] *Id*. at *3.
[277] *Id.* at *1.
[278] *See ibid*.
[279] *Id*. at *10, n.11.
[280] *Ibid*.
[281] *Ibid*.

York attorney and self-proclaimed fan of *Game of Thrones*,[282] decided to do at least a bit of homework before demanding trial by combat.[283]

Luthmann was named as a defendant in a lawsuit in which the plaintiffs claimed that he had urged his clients to fraudulently transfer assets.[284] It appears that Luthmann moved to dismiss the complaint—a motion that the plaintiffs opposed.[285] In the affirmation supporting their opposition, the plaintiffs accuse Luthmann of submitting papers that "are a rambling, often incoherent series of sarcastic, irrelevant, outrageous[,] and inflammatory legal and factual statements and misstatements."[286]

Luthmann submitted an affirmation in reply to this opposition, arguing that after the plaintiffs realized that they could not enforce their judgment from defendants in a prior case, they resorted to the "thug tactics" of trying to recover from him as the defendants' attorney.[287] Luthmann's reply affirmation was rife with colorful language, and accused plaintiffs of harboring an "appetite for extortion,"[288] likened their application to "a glorified comic book piled on top of pure and adulterated extortion wrapped in a transparent abuse of legal process,"[289] and repeatedly referred to plaintiffs' counsel's affirmation as "the Comic Book Affirmation."[290]

But Luthmann's extreme rhetoric was just the start. After arguing that plaintiffs' complaint didn't stand up to legal scrutiny, Luthmann shifted gears and demanded trial by combat: "[d]efendant invokes the common law writ of right and demands his common law right to Trial By Combat as against Plaintiffs and their counsel, whom plaintiff wishes to implead into the Trial By Combat by writ of right."[291]

Luthmann walked through the history of trial by combat, providing details about its origins, procedures, and use and eventual disuse in England.[292] Luthmann noted that in 1774, Parliament had considered a bill to abolish appeals of murder and trials by battle in the American colonies, and claimed that the bill was successfully opposed by John Dunning, a member of Parliament who

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[282] *See* Frank Donnelly, *Real-Life Game of Thrones: Lawyer Seeks Trial by Combat to Resolve Lawsuit*, STATEN ISLAND ADVANCE (Jan. 3, 2019), https://www.silive.com/northshore/2015/08/real-life_game_of_thrones_layw.html [https://perma.cc/9NJK-KDJB].

[283] *But see* Kevin Underhill, *"Game of Thrones" Fan Demands Trial by Combat*, LOWERING THE B. (Aug. 7, 2015), https://loweringthebar.net/2015/08/game-of-thrones-fan-demands-trial-by-combat.html [https://perma.cc/GT2L-Y5XS] (noting that Luthmann's material "appears to be largely derived from Wikipedia").

[284] *See* Frank Donnelly, *Real-Life Game of Thrones: Lawyer Seeks Trial by Combat to Resolve Lawsuit*, STATEN ISLAND ADVANCE (Jan. 3, 2019), https://www.silive.com/northshore/2015/08/real-life_game_of_thrones_layw.html [https://perma.cc/9NJK-KDJB].

[285] Filings available online for this case are limited, but the May 27, 2015, Affirmation of Richard Chisud (the attorney for the plaintiffs) opposing Luthmann's motion to dismiss appears to support this sequence of events. *See* Affirmation of Richard Chisud, Foley v. Luthmann, No. 1501752014, 2015 WL 12844228 (N.Y. Sup. Ct. May 27, 2015). Luthmann had filed an earlier motion to dismiss, which is available online, in May 2014—which describes the plaintiffs' cause of action as "undignified, uncouth and pathetic," and claims that the matter "sink[s] to the lowers levels of despicability in the legal profession." Mem. of Law in Support of Def.'s Mot. to Dismiss, To Disqualify Pl.'s Counsel and for Sanctions, Foley v. Luthmann, No. 150175/2014, 2014 WL 12621524 (N.Y. Sup. Ct. May 12, 2014).

[286] Affirmation of Richard Chisud at ¶ 1, Foley v. Luthmann, No. 1501752014, 2015 WL 12844228 (N.Y. Sup. Ct. May 27, 2015).

[287] Reply Affirmation of Richard A. Luthmann, Esq. at ¶ 3, Foley v. Luthmann, No. 1501752014, 2015 WL 12844230 (N.Y. Sup. Ct. July 21, 2015).

[288] *Id*. at ¶ 4.

[289] *Id*. at ¶ 3.

[290] *See, e.g.*, *id*. at ¶¶ 8-10.

[291] *Id*. at ¶ 26.

[292] *Id*. at ¶¶ 27–46.

described the appeal of murder as "that great pillar of the Constitution."[293] Luthmann concludes his survey of English trial by combat by describing the *Ashford v. Thornton* case, and noting that Parliament abolished wager of battle the following year.[294]

Luthmann's point about the attempted 1774 repeal of appeals of murder in the American Colonies is both an overstatement and of dubious relevance to his argument for trial by combat. First, the debate over the Bill focused heavily on the doctrine of appeal of murder rather than on trial by combat.[295] Additionally, the bulk of the opposition to the Bill did not rest on the purported "greatness" of the doctrine—instead, arguments against the bill included the point that the American colonies did not have the doctrine of appeal for murder to begin with, along with the argument that a piecemeal repeal of appeal for murder in America only, was not appropriate.[296]

As for trial by combat in the United States, Luthmann claimed that all 13 original United States Colonies inherited British common law in 1776, that no American court "in post-independence United States to the undersigned's knowledge" addressed whether people have a right to trial by combat, and that "trial by combat remains a right reserved to the people and a valid alternative to civil action."[297] Luthmann argued that the Ninth Amendment of the United States of the Consitution reserves rights not specifically mentioned in the Bill of Rights, and presumably believed that he can claim a right to trial by combat under the Ninth Amendment, though he did not explicitly state this.[298] The final paragraph of Luthmann's affirmation stated:

> The allegations made by Plaintiffs, aided and abetted by their counsel, border upon the criminal. As such, the undersigned respectfully requests that the Court permit the Undersigned to dispatch Plaintiffs and their counsel to the Divine Providence of the Maker for Him to exact His Divine Judgment once the Undersigned has released the souls of the Plaintiffs and their counsel from their corporeal bodies, personally and/or by way of a Champion.[299]

It is unclear whether the language Luthmann used in this final paragraph was copied from a source discussing or reporting on trial by combat, or if Luthmann drafted the demand himself. In any event, with this language Luthmann asked that he, or a champion, be permitted to fight and kill the plaintiffs and their attorneys.

On September 15, 2015, Luthmann filed his own complaint against the plaintiffs and their attorneys for abuse of process, and sought trial by combat.[300] In this complaint, Luthmann recycled a great deal of discussion about the history and practice of trial by combat from his earlier affirmation, although he went into a little more detail about the *Ashford v. Thornton* case, and took

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[293] *Id*. at ¶ 43 (citing MARK SHOENFELD, WAGING BATTLE: ASHFORD V. THORNTON, IVANHOE, AND LEGAL VIOLENCE, IN MEDIEVALISM AND THE QUEST FOR THE "REAL" MIDDLE AGES 61 (Clare Simmons 1st ed. 1997)).
[294] Reply Affirmation of Richard A. Luthmann, Esq. at ¶¶ 45-46, Foley v. Luthmann, No. 1501752014, 2015 WL 12844230 (N.Y. Sup. Ct. July 21, 2015).
[295] *See* 17 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND: FROM THE EARLIEST PERIOD TO THE YEAR 1803, 1291–97 (1813).
[296] *See supra* note 57, at 1293 (Moreton M.P.).
[297] *Id*. at ¶¶ 47–48.
[298] *See id.* at ¶¶ 50–51.
[299] *Id*. at ¶ 54.
[300] Summons at ¶¶ 146–49, Luthmann v. Chusid, No. 150848/2015, 2015 WL 5657533 (N.Y. Sup. Ct. Sept. 15, 2015).

efforts to distinguish trial by combat from unlawful dueling.[301] Luthmann stated that the prohibition against dueling only applies to duels with deadly weapons.[302] Possibly in line with this addition, Luthmann did not include a request that he "dispatch Plaintiffs and their counsel to the Divine Providence of the Maker" once he had released their souls from their corporeal bodies.[303] Instead, Luthmann demanded trial by combat against the defendants (which included counsel for the plaintiffs who were suing Luthmann) and requested that the combat be between him and Defendants themselves, or through champions.[304]

One of the defendants, Richard Chusid, filed a motion to dismiss the complaint, noting that Luthmann had already made a demand for trial by combat in the previous lawsuit, and suggesting that "this was an elaborate publicity stunt for Luthmann who for years has had political aspirations in Richmond County."[305] Chusid's motion to dismiss did not address the substance of Luthmann's trial by combat claims at length, and instead argued that the request was absurd, sought an inappropriate advisory opinion, and raised "obvious ethical issues."[306] For the most part, however, the motion to dismiss focused on arguments that Luthmann's action was an impermissible retaliatory lawsuit, and that it was barred on other grounds—arguments that are too normal for this Article.[307]

Luthmann responded, arguing that the availability of trial by combat was an important state constitutional question of first impression and would serve judicial economy as "this entire controversy may be decided in a mere matter of minutes," if the court granted his request.[308] In reply, Chusid asserted his right to a jury trial, stating that Luthmann's argument was "ridiculous and offensive," and that it was "incredible that a New York attorney could seriously and continuously advance those arguments."[309] Chusid reiterated that Luthmann's request was an improper request for declaratory judgment, an "improper and ludicrous request for a barbaric form of alternative dispute resolution," and "nothing more than an elaborate publicity stunt."[310]

Meanwhile, in the plaintiffs' lawsuit against Luthmann, Luthmann quoted article I, section 2 of the New York State Constitution, which guarantees trial by jury in all cases where it has previously been guaranteed by constitutional provision.[311] Luthmann then argued:

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[301] *Id*. at ¶¶ 137, 143–44.
[302] *Id*. at ¶ 144.
[303] *See id.* at ¶ 145, p. 44.
[304] *Ibid*.
[305] Mot. to Dismiss at 7, Luthmann v. Chusid, No. 150848/2015, 2015 WL 5657533 (N.Y. Sup. Ct., Dec. 11, 2015); *see also* Affirmation of Richard Chusid, Esq. at ¶ 7, Luthmann v. Chusid, No. 150848/2015 (N.Y. Sup. Ct. Dec. 11, 2015) (asserting that "a defendant in a case may not demand a judicial declaration that a civil case may be resolved by mortal combat.").
[306] Mot. to Dismiss at 8, 10, 16, Luthmann v. Chusid, No. 150848/2015, 2015 WL 5657533, p. 7 (N.Y. Sup. Ct., Dec. 11, 2015).
[307] *See generally id.*
[308] Affirmation of Richard A. Luthmann, Esq. at ¶¶ 62–63, Luthmann v. Chusid, No. 150848/2015, 2016 WL 7325050 (N.Y. Sup. Ct. Mar. 17, 2015).
[309] Affirmation of Richard Chusid, Esq. in Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss and in Supp. of Def.'s Opp'n to Pl.'s Cross Mot. at ¶ 9, Luthmann v. Chusid, No. 150848/2015, (N.Y. Sup. Ct. Mar. 23, 2015).
[310] *Id*. at ¶ 11.
[311] *See* Reply Affirmation of Richard A. Luthmann, Esq. at ¶ 15, Foley v. Luthmann, No. 150175/2014, 2016 WL 7330838 (N.Y. Sup. Ct. Mar. 23, 2016) (quoting N.Y. CONST. art. I, § 2).

> Since the right to a Trial by Combat or a Judicially-Sanctioned Duel predates the right to Trial By Jury, it cannot be said that Trial by Combat is guaranteed under the New York State Constitution and through its common law origins where the right of to a Trial by Combat or a Judicially-Sanctioned Duel flies directly in conflict.[312]

It appears that Luthmann may be arguing that because the practice of trial by combat precedes the New York State Constitution, any limits that it places on trial by jury fall outside of the state constitutional guarantee for trial by jury—an interpretation that is consistent with his later assertion that the defendants have an "ancient right" to trial by combat that New York inherited through the common law.[313] Luthmann once again requested to take the plaintiffs "out of their misery in a manner of minutes" through trial by combat.[314]

The court issued two, single-page handwritten orders on March 24, 2016—resolving the various motions to dismiss in both cases, and denying Luthmann's requests for trial by combat.[315] In both orders, the court stated that while Luthmann's request for trial by combat was denied, "this court does not deny that such power resides within the Supreme Court," and that the matter is to ultimately be decided by trial by jury or judge.[316]

Because we are dealing with a question of whether courts may allow litigants to fight to the death, a restrictive reading of the opinion is warranted. The court did not rule that trial by combat *was* available to Luthmann or other litigants—instead the court denied Luthmann's specific request, while noting that it was not denying it had the power to order trial by combat.[317] *Not denying* that the court can do something and stating that the court *can* do something are not the same.

That sounds a bit like a bad legal fortune cookie, so perhaps thinking about the case in the context of a potential appeal will clarify things. If there were an appeal of this ruling, there would be no need for the appellate court to reach a decision on the broader question of whether Luthmann has the right to demand trial by combat, as it could conclude that this specific case did not warrant trial by combat. And even if the appellate court chose to analyze that issue and conclude that trial by combat was available for Luthmann, the trial court's opinion may still stand, as its non-denial forecloses Luthmann from claiming that the ruling was based on an erroneous, blanket conclusion that trial by combat was improper in all cases. A more plausible explanation would be that the trial court concluded that it was not appropriate for Luthmann's case.

This isn't how the media interpreted the ruling, though. Headlines following the ruling include: "Judge Admits Trial by Combat is Available in New York… Then Declines to Order

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[312] *Id*. at ¶ 16.
[313] *See id.* at ¶ 16.
[314] *Id*. at ¶ 18.
[315] *See* Order, Foley v. Luthmann, No. 150175/2014 (N.Y. Sup. Ct. Mar. 24, 2016); Order, Luthmann v. Chusid, No. 150848/2015, (N.Y. Sup. Ct. Mar. 24, 2015).
[316] *Ibid*.
[317] *Id.*

It,"[318] and "This is how 'Trial by Combat' is Totally Legal in New York State."[319] Other coverage of the case suggested that the judge had agreed that "the power to sanction or deny trial by combat 'resides within the [state] Supreme Court.'"[320]

With that, Luthmann's trial by combat dreams were shattered. But filing doomed requests for trial by combat appears to have been only one of Luthmann's hobbies.

In 2017, Luthmann was arrested for kidnapping, money laundering, and conspiracy to commit extortion.[321] Federal prosecutors alleged that Luthmann and two others started fake scrap metal businesses that sold fake parts and pressured one of Luthmann's clients (a blind person receiving public welfare assistance) into being the head of one of the companies.[322] Luthmann was later accused of sending a "'Game of Thrones'-themed" threatening letter to his estranged wife, who was a potential witness against him.[323] While the judge stated that he did not understand the reference to "Game of Thrones," he found that the letter was a threat and ordered that Luthmann's bail be revoked and that Luthmann undergo a psychological evaluation.[324]

Luthmann pleaded guilty to a count of wire fraud conspiracy and extortion conspiracy in March 2019.[325] He was sentenced to four years in prison in September 2019.[326] At his sentencing, the judge described Luthmann's actions as "'an absurd, bizarre, ruthless crime.'"[327]

9. Trial by Combat in the Heartland – David Ostrom

[318] Joe Patrice, *Judge Admits Trial by Combat is Available in New York… Then Declines to Order It,"* ABOVE THE L. (Mar. 31, 2016), https://abovethelaw.com/2016/03/judge-admits-trial-by-combat-is-available-in-new-york-then-declines-to-order-it/ [https://perma.cc/J3EE-QSQ9] (stating that the judge "determined that while Luthmann is indeed correct that trial by combat is absolutely a viable option for resolving a legal dispute, he would decline to order it in this matter.").

[319] Blake Stilwell, *This is How "Trial by Combat" is Totally Legal in New York State,"* WE ARE THE MIGHTY (Aug. 31, 2017), https://www.wearethemighty.com/articles/this-is-how-trial-by-combat-is-totally-legal-in-new-york-state [https://perma.cc/2KKB-SRQV].

[320] Frank Donnelly, *No "Game of Thrones" Throwdown: Trial by Combat Nixed for Lawyer Richard Luthmann*, SI LIVE (Mar. 28, 2016), https://www.silive.com/news/2016/03/no_game_of_thrones_throwdown_j.html [https://perma.cc/8MR7-4GAA].

[321] Allie Conti, *The "Trial-By-Combat" Lawyer is Back and Scarier Than Ever*, VICE (Dec. 19, 2017), https://www.vice.com/en_us/article/59wbga/richard-luthmann-trial-by-combat-staten-island-lawyer-vgtrn [https://perma.cc/FQB3-K7HK].

[322] *Ibid*.

[323] Priscilla DeGregory & Ruth Brown, *Judge Orders "Trial by Combat" Lawyer Get Psych Evaluation*, N.Y. POST (June 6, 2018), https://nypost.com/2018/06/06/judge-orders-trial-by-combat-lawyer-get-psych-evaluation/ [https://perma.cc/BQJ5-CTF2].

[324] *Ibid*.

[325] Irene Spezzamonte, *With Mom by his Side, Trial-by-Combat Lawyer Richard Luthmann Sentenced in Scrap Scheme*, SI LIVE (Sept. 9, 2019), https://www.silive.com/crime/2019/09/with-mom-by-his-side-trial-by-combat-lawyer-richard-luthmann-sentenced-in-scrap-scheme.html [https://perma.cc/MSQ8-4GSB].

[326] *Ibid*.

[327] *Ibid*.

One of the most recent demands for trial by combat occurred in Iowa, where a Kansas man, David Ostrom, was involved in a dispute with his ex-wife.[328] Ostrom, who was representing himself, claimed he was frustrated with his ex-wife's attorney and filed a motion demanding trial by combat.[329]

In his "Motion for Trial by Combat," Ostrom claimed that "**Trial By Combat**"[330] was "still regarded as a legitimate method for dispute resolution when the Constitution was ratified by the United States and by the original 13 colonies."[331] He further claimed that trial by combat had never been "explicitly banned or restricted as a right" in the United States, and implied that he retained the right to demand trial by combat under the Ninth Amendment.[332] Ostrom noted that trial by combat "was used as recently as 1818 in British Court" (a reference to *Ashford v. Thornton*), and cited Luthmann's demand for trial by combat (which was addressed in the preceding section of this Article).[333] Ostrom claimed, incorrectly, that the New York Supreme Court judge and noted that the state had the power to sanction trial by combat.[334]

As for the manner of combat, Ostrom stated that he wanted to give his ex-wife and her attorney "the chance to meet me on the field of battle where I will REND THEIR SOULS from their corporal [sic] bodies."[335] Ostrom demanded that the court order his ex-wife to participate, "or in the alternate the Respondent may choose a **Champion** (Her counsel Matthew Hudson) to stand in her stead."[336] Ostrom requested that "melee weapons be sanctioned" for the trial by combat, and that he have 12 weeks to obtain or forge one katana and one wakizashi for use.[337] In anticipation of pushback against his demand for trial by combat, Ostrom demanded that any response to his motion be resolved through trial by combat as well.[338]

A week later, Ostrom's ex-wife moved to suspend Ostrom's visitation of his children and requested that the court order Ostrom to undergo a psychological examination.[339] She argued that the request to rend her soul from her body was "a threat on Respondent's life in no uncertain terms," and noted that Ostrom's motion had been profiled in a newspaper article.[340] She argued

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[328] Anna Spoerre, *Man Requests "Trial by Combat" With Japanese Swords to Settle Dispute with Iowa Ex-Wife*, DES MOINES REG. (Jan. 13, 2020), https://www.desmoinesregister.com/story/news/crime-and-courts/2020/01/13/iowa-courts-david-ostrom-requests-trial-combat-swords-settle-dispute/4456079002/ [https://perma.cc/X79T-HUZB]. For reasons that are unclear, this article includes photos from the Netflix show, *The Witcher* rather than *Game of Thrones*, even though trial by combat is never demanded or employed by any characters in *The Witcher*.
[329] *Ibid*.
[330] All instances of bold, quoted text retain the formatting of the original.
[331] Mot. for Trial by Combat at 1, Ostrom v. Ostrom, No. DRCV020200 (Jan. 3, 2020).
[332] *Ibid*.
[333] *See ibid*.
[334] *Ibid*.
[335] *Ibid*.
[336] *Ibid*.
[337] *Ibid*. Katanas and Wakizashis are Japanese swords with curved blades of varying length, and when worn together are known as daisho. KANZAN SATO, THE JAPANESE SWORD: A COMPREHENSIVE GUIDE 68 (Joe Earle trans.) (1983).
[338] Mot. for Trial by Combat at 1, Ostrom v. Ostrom, No. DRCV020200 (Jan. 3, 2020).
[339] Mot. to Suspend Visitation and for the Ct. to Order Psych. Evaluation of Pet'r at 1, Ostrom v. Ostrom, No. DRCV020200 (Jan. 10, 2020).
[340] *Ibid*.

that Ostrom's mental state was "severely in question," and requested that the court order Ostrom to submit to a psychological examination to determine if he was still fit to care for their children.[341]

Ostrom fired back, stating that he was not suggesting "an **illegal Duel**," but "Trial by Combat" (no longer in boldface), which he continued to (incorrectly) claim had been recognized by New York in 2016.[342] Ostrom objected to the suggestion that he was insane, but stated that he would submit to any psychological tests if his ex-wife *and her attorney* would do so as well.[343] Ostrom then claimed victory, arguing that a party engaged in trial by combat could lose by "CRYING CRAVEN (yielding)," and that his ex-wife and her attorney "have chosen to **CRY CRAVEN** and thus have chosen to lose this Trial by Combat of their own volition."[344]

Ostrom appeared to have found a word he liked, going on to state that his ex-wife and her attorney "have proven themselves to be CRAVENS by refusing to answer the call to battle," and asking that the court find "that the Respondent and her counsel [were] CRYING CRAVEN," and rule in his favor.[345] In the alternative, Ostrom proposed trial by combat using "BLUNTED practice style Katana and Wakizashi."[346]

Later that evening, Ostrom filed a motion to sanction opposing counsel, complaining that his ex-wife's attorney, Matthew Hudson, had claimed he "destroyed the Petitioner in court" and that Ostrom should take that as "warning enough"—a statement that Ostrom claimed was a threat.[347] Ostrom claimed that Hudson bullied and threatened Ostrom, and called Ostrom "A Dipshit."[348] Ostrom claimed that this was unprofessional conduct, and—incredibly—went on to claim that: "[a]ttorney Hudson has needlessly multiplied these proceedings, rather than communicate fairly toward resolution we must now involve the court when matters could have been resolved amicably between parties were it not for Attorney Hudson inflaming communications."[349]

Keep in mind, this is one week after Ostrom had demanded that the court permit him to meet Hudson or his ex-wife on the field of battle to rend their souls from their bodies with a katana, and *the same day* that Ostrom had reiterated his right to that claim and asserted that his ex-wife and opposing counsel had cried craven and forfeited the case.

The media got wind of the case and decided to reward Ostrom's antics with stories and interviews. In a January 15, 2020, interview, Ostrom noted that he'd seen *Game of Thrones* and read the books.[350] Backing off on the statements in his filings, he claimed that he was "not

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[341] *Ibid*.
[342] Resp. to Resistance for Trial by Combat at 1, Ostrom v. Ostrom, No. DRCV020200 (Jan. 10, 2020).
[343] *Ibid*.
[344] *Ibid*.
[345] *Ibid*.
[346] *Ibid*.
[347] Mot. to Sanction Opposing Counsel Matthew Hudson for Misconduct at 1, Ostrom v. Ostrom, No. DRCV020200 (Jan. 10, 2020).
[348] *Ibid*.
[349] *Ibid*.
[350] Betsy Webster & Maggie Holmes, *Paola Man Asks Court for "Trial By Combat" Inspired by Game of Thrones*, KCTV NEWS (Jan. 15, 2020), https://www.kctv5.com/news/local_news/paola-man-asks-court-for-trial-by-combat-inspired-by/article_83cdcdaa-3745-11ea-b24f-f3d9ad1f2e4c.html [https://perma.cc/X6PN-MTNU].

interested in causing physical harm to anyone."[351] He apparently claimed that the system was stacked against men, and that he knew that what he was doing was absurd.[352]

In March 2020, the court held a (non-combat) hearing on his ex-wife's request to suspend visitation rights, and her claim that the motion for trial by battle was a threat of bodily harm.[353] Ostrom argued that he was "simply exercising his freedom of speech," and that if he had intended to make a threat, he simply would have acted upon the threat.[354] On March 12, 2020, the court granted the request that Ostrom undergo a psychological evaluation and that his visitation rights be restricted pending an outcome of his evaluation.[355]

Ostrom told the Des Moines Register that he had filed his motion for trial by combat "in an attempt to get media attention and with the hope it could lead to both parties airing their grievances in front of a judge with the goal of reaching a resolution."[356] He thought the court's ruling was "highly, highly insulting," and that it "leaves a really bad taste in my mouth."[357] Even though Ostrom had demanded to fight his ex-wife or her attorney to the death, the Des Moines Register goes on to describe the supposed ordeal that Ostrom had been through, noting that he had thrown up on the first day of his hearing, that he could barely breathe, and his quote that "after all of this, I feel like I've been through battle . . . [t]here's not enough to shock me anymore."[358]

C. Borderline Cases: Push-Up Contests and Videogames

While the cases described above involve explicit references to or requests for "trial by combat," some other cases that involve contests of strength or skill to resolve legal disputes are worth mentioning. Two such cases are addressed in this sub-section: a case in which a sued party suggested that the dispute be resolved by way of a push-up contest, and a case where a party facing a likely lawsuit suggested that the dispute be resolved through a videogame competition.

1. A Contest of Strength: *Lautner v. McMahon*

The prospect of owing someone tens of thousands of dollars may cause a party to act out in unusual ways. In August 2010, Taylor Lautner—known for playing the werewolf, Jacob, in the Twilight series of films—sued Brent McMahon, the owner of an RV dealership, claiming that McMahon had failed to deliver a $300,000 customized RV on time for Lautner to use it as an on-

[351] *Ibid*.
[352] *Ibid*. (the video of Ostrom's interview does not include this statement by Ostrom and is instead a characterization of his position stated in the report).
[353] Anna Spoerre, *"I Feel Like I've Been Through Battle": Man Who Requested Trial by Combat to Settle Custody Dispute is Ordered to Take Sanity Test*, DES MOINES REG. (Mar. 12, 2020), https://www.desmoinesregister.com/story/news/crime-and-courts/2020/03/12/iowa-courts-trial-by-combat-sword-fight-child-custody-judge-restricts-kansas-mans-time-with-kids/5011631002/ [https://perma.cc/Z8CP-8DPB].
[354] *Ibid*.
[355] *Ibid*.
[356] *Ibid*.
[357] *Ibid*.
[358] *Ibid*.

set dressing room.[359] Lautner further claimed that once the RV was delivered, "it needed additional work."[360]

Rather than file a responsive pleading, McMahon scheduled a press conference featuring both himself and his attorney.[361] There, his attorney—no doubt marveling that his career had reached this point—made the following statement: "Mr. McMahon, age 47, challenges Taylor Lautner, age 18, to a push-up contest at a time and place of Lautner's choosing."[362]

McMahon claimed that he had proposed resolving the matter in an amicable way but Lautner had declined, and that since Lautner is "a stud," who is "portrayed as being in great shape," he thought a push-up contest would be an appropriate approach to take.[363] McMahon stated that if he won the contest, the $40,000 that Lautner was demanding would go to charity, but if Lautner won, it would go to Lautner.[364]

Lautner's counsel referred to the proposal as "facetious" and accused McMahon of a lack of professionalism.[365] Lautner ended up settling with McMahon for $40,000 shortly thereafter, and his attorney stated that Lautner would give that money to the children's charity, Lollipop Theater Network.[366]

This is a borderline case, as McMahon's proposal was not so much a trial by combat as a contest of strength. Additionally, McMahon made the challenge through the press, rather than filing a motion in court. It seems that his attorney—while willing to do a lot for his client—was not willing to go that far.

Because of the physical nature of the proposed competition, and since it was proposed explicitly to settle pending litigation, I included it in this Article. Unlike many of the other examples of people demanding trial by combat, this one appears to have essentially succeeded, as McMahon had already proposed giving $40,000 to charity if he won the competition, which is what ultimately occurred. McMahon also received the added bonus of media attention for his business as a result of his outlandish demand.

2. Virtual Trial by Combat: *Bethesda v. Mojang*

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[359] *Let's Settle This With Push-Ups, Suing Actor is Told*, L.A. TIMES: DAILY PILOT (Aug. 31, 2010), https://www.latimes.com/socal/daily-pilot/entertainment/tn-dpt-0901-lautner-20100831-story.html [https://perma.cc/77VU-6D47].

[360] *Ibid*.

[361] Orange County Register, *"Twilight" Star Jacob Challenged to Push-Up Contest – 2010-08-30*, YOUTUBE (Jul. 24. 2015), https://www.youtube.com/watch?v=KFmqjfrlMbE [https://perma.cc/3J4H-8UYZ].

[362] *Id*.

[363] *Id*.

[364] *Id*.

[365] *Taylor Lautner's Push-Up Challenge*, INDEPENDENT.IE (Aug. 31. 2010), https://www.independent.ie/entertainment/movies/taylor-lautners-push-up-challenge-26676375.html [https://perma.cc/8PVX-KA2A].

[366] *Taylor Lautner Reaches Settlement in RV Lawsuit*, NBC PHIL. (Sept. 4, 2010), https://www.nbcphiladelphia.com/news/national-international/taylor-lautner-reaches-settlment-on-rv-lawsuit/1853374/ [https://perma.cc/SLN8-NK5F].

From physical feats of strength to virtual shootouts. In 2011, the videogame company, Bethesda, threatened to sue videogame developer Mojang Studios for trademark infringement after Mojang announced that it was developing an upcoming game called "Scrolls."[367] Bethesda had developed a series of games called "The Elder Scrolls," and claimed that Mojang's plan to develop a "Scrolls" game would infringe on its trademarks.[368]

Markus Persson (aka "Notch") the creator of Minecraft, fired back a response that would give heartburn to the most seasoned litigation attorney:

> Remember that scene in Game of Thrones where Tyrion chose a trial by battle in the Eyrie? Well, let's do that instead!
>
> I challenge Bethesda to a game of Quake 3. Three of our best warriors against three of your best warriors. We select one level, you select the other, we randomize the order. 20 minute matches, highest total frag count per team across both levels wins.
>
> If we win, you drop the lawsuit.
>
> If you win, we will change the name of Scrolls to something you're fine with.
>
> Regardless of the outcome, we could still have a small text somewhere saying our game is not related to your game series in any way, if you wish.
>
> I am serious, by the way.[369]

Quake 3 is a multiplayer, first-person shooter game that was released in 1999.[370] It also is, apparently, a game that several of Bethesda's employees played professionally, which led Persson to conclude that choosing that game for the challenge "might have been a poor choice."[371] As for the implications of his challenge, Persson acknowledged that his attorneys were in contact with Bethesda's attorney, but the process was "terribly boring," so he did not know more beyond that.[372]

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[367] Jason Schreier, *Minecraft Maker Jokingly Calls Quake Challenge "Poor Choice," Vows to Fight*, WIRED (Aug. 10, 2011), https://www.wired.com/2011/08/minecraft-bethesda-lawsuit/ [https://perma.cc/7R76-W53N].
[368] *Id*.
[369] *Hey, Bethesda! Let's Settle This!*, THE WORD OF NOTCH (Aug. 17, 2011), https://notch.tumblr.com/post/9038258448/hey-bethesda-lets-settle-this (available at https://web.archive.org/web/20191127205343/https://notch.tumblr.com/post/9038258448/hey-bethesda-lets-settle-this [https://perma.cc/V46B-DPVK]). "I am serious, by the way" is now my default closing line for legal correspondence—taking the place of other over-the-top lines like "govern yourself accordingly."
[370] *Quake III Arena*, WIKIPEDIA, https://en.wikipedia.org/wiki/Quake_III_Arena [https://perma.cc/PD7R-554G].
[371] Jason Schreier, *Minecraft Maker Jokingly Calls Quake Challenge "Poor Choice," Vows to Fight*, WIRED (Aug. 10, 2011), https://www.wired.com/2011/08/minecraft-bethesda-lawsuit/ [https://perma.cc/7R76-W53N].
[372] *Id*.

Unfortunately, for videogame and trial by combat fans alike, Bethesda did not take Persson up on his offer, and chose to take Mojang to court rather than to proceed with the videogame match.[373] The case settled in March 2012, with Bethesda's parent company keeping all rights to the "Scrolls" trademark and licensing the mark to Mojang for use in its existing Scrolls "digital card game"—while barring Mojang from using the Scrolls mark for "any other video game."[374]

While Persson did not propose trial by means of physical combat, the dispute resolution process that he proposed can easily be characterized as a battle—albeit in a virtual realm. As videogame companies become more sophisticated and profitable, further IP disputes are inevitable, and it is likely only a matter of time before a virtual trial by combat is proposed again.

VI. Trial by Combat as a Form of Dispute Resolution

With the history—both modern and medieval—of trial by combat in mind, evaluating whether a modern litigant could demand trial by combat in an official proceeding becomes easier. While the practice is relatively uncommon, it isn't unheard of. And some of the more detailed attempts at asserting a right to trial by combat—particularly Mr. Luthmann's ill-fated demand—reveal the arguments that modern litigants will likely employ.

Unfortunately for these combat enthusiasts, their demands for trial by combat will almost certainly fail. As discussed below, the argument that the United States inherited the common law right to demand trial by combat runs into a number of problems. Additionally, even if trial by combat were permitted under centuries-old American law, many courts routinely express hostility toward the practice in unrelated cases and would likely have a similar reaction to an explicit demand for trial by combat.

A. Whether The United States Inherited the Common Law Right to Demand Trial by Combat

For the most part, litigants attempting to demand trial by combat in the United States tend to fail. In some cases, this appears to be because their demand is impulsive and made without much thought or consideration.[375] But for those litigants with a coherent theory, their general argument tends to be that at the time of the founding, the United States adopted England's common law. At that time, trial by combat was still a part of England's common law, as it was not abolished by statute until 1819, following *Ashford v. Thornton*.[376] Advocates for trial by combat in American courts argue that trial by combat is therefore part of America's legal system, and there has been no similar statute outlawing trial by combat.[377]

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[373] Paul Miller, *Mojang and Bethesda Settle "Scrolls" Trademark Dispute*, THE VERGE (Mar. 10, 2012), https://www.theverge.com/2012/3/10/2860164/mojang-bethesda-scrolls-trademark-dispute [https://perma.cc/J3SS-NRZU].
[374] *Id*.
[375] *See, e.g.*, McNatt v. Richards, No. 6987, 1983 WL 18013, *1 (Del. Ct. Chan. 1983).
[376] *See* Appeal of Murder Act 1819, 59 Geo. 3 c.46 (Eng.).
[377] *See supra* Section V.B.8.

There are several problems with this argument. The most fundamental issue is the claim that the States adopted all of England's common law at the time of the founding. While law in the United States drew heavily from England's common law, the absolute claim that the States adopted the common law in its entirety is an exaggeration. As the Supreme Court of the United States noted in *Wheaton v. Peters*:

> It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage. That this was the case, *to a limited extent*, is admitted. *No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted, so far only as its principles were suited to the condition of the colonies*: and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each.[378]

Admittedly, the Supreme Court of the United States has never taken up the issue of whether people have a right to demand trial by combat. But this has not stopped the Court from making strong suggestions that such a demand would likely fail. In *Clark v. United States*, Clark had been found guilty of criminal contempt for giving false and misleading answers regarding her qualifications as a juror.[379] In affirming the lower court's judgment, the Supreme Court of the United States addressed whether Clark's oath could serve as a bar against being prosecuted for contempt, and considered whether she could raise the defense of "purgation by oath."[380] In asserting this defense, the accused in a contempt proceeding submits a sworn affidavit, which must be accepted as true.[381] The only remedy to such an affidavit is for the accused to be prosecuted for perjury.[382]

The Court recognized that it largely abolished the defense of purgation by oath in a prior decision, but stated that the time had come "to renounce the doctrine altogether and stamp out its dying embers."[383] The Court noted that purgation by oath ceased being a defense in England in 1796, had been "rejected generally" by the States, and had lost "the title to respect that comes of a long historical succession."[384] The Court concluded that purgation by oath "has taken its place with ordeal and wager of law and trial by battle among the dimly remembered curios of outworn modes of trial."[385]

As with trial by combat, purgation by oath had not been abolished in England at the time of the founding.[386] The Court's reasoning for finding that purgation by oath was no longer an available defense was largely based on its finding that it was an outdated, "outworn," mode of

[378] 33 U.S. 591, 658–59 (1834) (emphasis added).
[379] 289 U.S. 1, 6 (1933).
[380] *Id*. at 19.
[381] *See* Grohman v. State, 258 Md. 552, 564 (1970) (describing the defense of purgation by oath).
[382] *Ibid*.
[383] Clark v. U.S., 289 U.S. 1, 19 (1933) (citing U.S. v. Shipp, 203 U.S. 563, 574 (1906)).
[384] *Ibid*.
[385] *Ibid*.
[386] *See ibid*.

trial—like "trial by battle."[387] While the Court's reference to trial by battle is technically dicta, its inclusion by the Supreme Court of the United States in a list of "dimly remembered curios" strongly suggests that any argument that trial by combat remains part of American law will fail.

Moreover, just two years before the United Sates declared independence, the issue of abolishing appeals of felony (and by extension, trial by combat) in the United States (then the American Colonies) was debated in England's Parliament.[388] While the practice was ultimately maintained, much of the opposition to abolishing trial by combat originated in concerns over abolishing it for some, but not all, British subjects and concerns that America did not have a history of permitting appeals of felony.[389] Most members of Parliament who spoke out during the debate decried the practice as an outmoded relic of ancient practices.[390] This near-contemporaneous evidence cuts against the notion that America adopted trial by combat when it adopted the common law.

A party seeking to demand trial by combat may attempt to distinguish *Clark* on the basis that the *Clark* Court found that purgation by oath had been "rejected generally" in the States.[391] The Court cited cases from ten different states that purportedly rejected the defense.[392] One could argue that for *Clark*'s reasoning to apply, trial by combat would need to be similarly rejected by courts in numerous states.

While few courts have directly addressed requests for trial by combat, many courts have referred to the doctrine as an outdated practice. The Illinois Supreme Court, in ruling that purgation by oath was not an available defense, quoted the *Clark* Court's language about trial by combat being an outworn mode of trial.[393] Courts in Massachusetts[394] and Missouri[395] have applied the *Clark* Court's reasoning as well—quoting the Court's characterization of trial by combat as being on par with the rejected defense of purgation by oath. Federal district courts have recognized trial by combat's obscurity.[396] And while it was not a majority opinion of the court, in *Witherow v. Keller*, Justice Gibson of the Pennsylvania Supreme Court argued that the original colonists had not brought with them "the worn out machinery" of the common law which "had been cast away as useless" in England, and counted trial by battle as one such obsolete aspect of law.[397] While the parties before these courts had not demanded trial by combat, the courts' dismissive language toward the practice is evidence of a widespread view that the practice is unavailable in United States courts.

While there is no controlling authority by the Supreme Court of the United States or state appellate courts explicitly denying requests for trial by combat on the grounds that the practice

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[387] *See ibid.*
[388] *See supra* notes 54–55 and accompanying text.
[389] *Ibid*.
[390] *Ibid*.
[391] *See Clark*, 298 U.S. at 19.
[392] *See ibid.*
[393] People v. Gholson, 412 Ill. 294, 301 (1952).
[394] Dolan v. Commw., 304 Mass. 325, 336 (1939).
[395] Osborne v. Purdome, 244 S.W.2d 1005 (Mo. 1951).
[396] *See, e.g.*, *In re* New Haven Grand Jury, 604 F. Supp. 453, 461 (D. Conn. 1985) (recognizing that trial by battle "vanished from our system of jurisprudence centuries ago"); Doss v. Long, 93 F.R.D. 112 (N.D. Ga. 1981) ("Trial by battle, the ordeal, and compurgation are no longer trusted as competent fact-finding techniques in trial courts.").
[397] Witherow v. Keller, 1824 WL 2369, at *4 (Pa. 1824) (opinion of Gibson, J.).

was not part of common law inherited by the United States, if such an argument were raised, it would likely be rejected. The New York Supreme Court's decision in *Luthmann* may therefore be misleading to future litigants (like Ostrom), as its explicit hedging on whether trial by combat may be ordered may be taken as a tacit confirmation that the procedure is available. In fact, such hedging is almost certainly a tactic to avoid further arguments on the issue in an appeal, which—while sensible for a trial court—is disappointing for future litigants and scholars who crave clarity on whether the United States' inherited common law permits trial by combat.

B. Hostility Towards Trial by Combat in the United States Courts and Legislatures

Courts are not the only legal institution in the United States that have expressed hostility towards trial by combat. At least two states have, at some point in their history, outlawed trial by battle. As discussed above, Illinois law explicitly prohibited trial by battle for nearly one hundred years.[398] While that statute no longer remains on the book, at least one court has recognized the law in overturning a party's request for trial by battle.[399]

Illinois is not the only state that has, at one time, had a statute specifically outlawing trial by combat. Prior to becoming a state, the territory of Michigan abolished trial by battle in 1821.[400] Modern Michigan statutory law, though, does not reference the abolishment of trial by battle.[401] While no statute on the books today explicitly abolishes trial by combat, Michigan's historic ban of the practice, while it was still a territory, suggests that litigants seeking to demand trial by combat will face a particular challenge in arguing that Michigan adopted those aspects of English common law that provided for trial by combat.

Other courts, while not directly addressing cases involving demands for trial by combat, have expressed strong disfavor towards the practice. The South Carolina Supreme Court, for example, in *Duncan v. Record Publishing Company*, included a brief history of the practice of trial by battle in addressing an appeal of a verdict and refusal to grant a new trial in a defamation action.[402] The Court's account of history was somewhat imprecise, as the court treated "trial by battle" and "dueling" as synonyms, and discussed a history of English law's treatment of dueling.[403] But the historic account included some accurate information, including the correct statement that trial by battle was abolished in Great Britain in 1819. The Court goes on to note:

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[398] The first instance of this prohibition that I could locate appears in 1827, with a law providing that "[t]he benefit of clergy, appeals of felony, and trials by battle, shall be and are hereby forever abolished." ILL. REV. CODE 158, § 160 (1827). Similar statutes appear in various editions of Illinois statutory compilations up through the early 1900's. *See* ILL. REV. L. 209, § 162 (1833); Gale's Comp. ILL. STAT., 229, § 162 (1839); *see* ILL. R.S. 182, § 172 (1845); ILL. ST. CH. 38, ¶ 489 (1885); ILL. R.S. CH. 38, § 429 (1908); ILL. STAT. ANN. 2229, ¶ 4128 (1913); ILL. ST. CH. 45, § 683 (1916).

[399] *See supra* Section V.B.2 (discussing United States *ex rel* Gapinski v. Ragen).

[400] LAWS OF THE TERRITORY OF MICHIGAN: AN ACT TO REGULATE THE ACTION OF RIGHT AND FOR OTHER PURPOSES § 25 222 (Sheldon & Wells eds., 1827).

[401] The most recent reference to the act that I have been able to locate is in Justice Potter's dissenting opinion in *Dolby v. Dillman*, 283 Mich. 609 (1938) in which he walks through an extensive history of Michigan law, starting with adoption of the common law "subject to some modifications" when colonists first settled Jamestown in 1607, and referencing the 1821 Act's abolishment of trial by battle. Dolby v. Dillman, 283 Mich. 609, 625, 635 (1938).

[402] 143 S.E. 31, 42 (S.C. 1927).

[403] *Id*.

> [Trial by battle] was never judicially sanctioned by the courts of South Carolina. The custom of dueling has been proscribed by the amendment to our Constitution in 1881 (see Const. 1895, art. 1, § 11), and it no longer affords an exception to the law of mutual combat. State v. Brown, 108 S.C. 500, 95 S.E. 61. Shooting at sight should not be invited to take its place. The remedy in civil courts should, and must, be ample.[404]

The case did not involve a request for trial by combat, so the Court's disapproval of the practice is technically dicta. Even so, the language against trial by combat is strong—the Court goes out of its way to note that trial by combat is not sanctioned by the state's courts. Were the Court to ever address a demand for trial by combat, it would not be a surprise if it drew on its old language denigrating the practice in overturning the demand.

Cases surveyed above provide further examples of courts' common disapproval of trial by combat. Recall that in *D'Arcy v. Lyle*—a case decided several years before *Ashford v. Thornton*, and the subsequent elimination of trial by combat in England—the Pennsylvania Supreme Court determined that obtaining a confession of judgment through requests that parties engage in a fight to the death was found to be obtained through duress, rather than through proper legal procedures.[405]

Courts are so hostile to trial by combat that raising the prospects of such a proceeding is almost certain to torpedo a litigant's case. As noted above, the court in *United States ex rel. Gapinski v. Ragen* implied that an inmate's demand for trial by combat supported the conclusion that he should be institutionalized.[406] In Mr. Ostrom's family law litigation, the court ordered that Mr. Ostrom be subjected to a psychological examination after he filed his demand for trial by combat.[407] Arguing to a court that it should resolve a dispute through trial by combat is not just likely to fail, it is likely to result in additional, adverse consequences for the party making the demand.

C. Could Parties Agree to Trial by Combat?

So far, this Article has addressed situations where litigants' demands for trial by combat are made in court. Many of these opinions do not address whether parties to agreements may contract to employ trial by combat as a means of dispute resolution in the event of a future claim or lawsuit arising from the parties' agreement. While I am unaware of any cases in which parties have litigated over a provision in an agreement calling for trial by combat, I am aware of at least

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[404] *Id*.
[405] D'Arcy v. Lyle, 5 Binn. 441, 449–50 (Pa. 1813).
[406] United States *ex rel* Gapinski v. Ragen, 152 F.2d 268, 269 (7th Cir. 1945).
[407] Anna Spoerre, *"I Feel Like I've Been Through Battle": Man Who Requested Trial by Combat to Settle Custody Dispute is Ordered to Take Sanity Test*, DES MOINES REG. (Mar. 12, 2020), https://www.desmoinesregister.com/story/news/crime-and-courts/2020/03/12/iowa-courts-trial-by-combat-sword-fight-child-custody-judge-restricts-kansas-mans-time-with-kids/5011631002/ [https://perma.cc/Z8CP-8DPB].

one such agreement that was in use for some time—although the parties never ended up in a dispute that required trial by combat.[408]

As it turns out, I've written about this specific question at length before with my former classmate, Raj Shah. Our 2015 article, *Arbitration by Combat*, was published in a symposium issue on law and law breaking in *Game of Thrones* and therefore includes extensive discussion of the *Game of Thrones* universe, as was the style of the time.[409] But our primary focus was on whether parties to a contract could agree to arbitrate future disputes through trial by combat. After all, the Supreme Court of the United States had been (and continued to) issue a series of decisions favorable of agreements to arbitrate disputes—and struck down state laws or precedent that it viewed as obstacles to arbitration agreements.[410] With such a favorable view toward arbitration, would the Court permit an arbitration provision calling for parties to resolve their disputes through trial by combat?

Our conclusion was that such a finding would be unlikely, but not impossible.[411] As surveyed and discussed above, there are many obstacles to trial by combat as a procedure for dispute resolution—from outright bans to unfavorable language in longstanding precedent. Additionally, state laws prohibiting dueling present an obstacle to trial by combat provisions, meaning that contractually mandated combat procedures that stray too far in the direction of an outright duel—particularly a duel to the death—will be struck down as unlawful, and therefore invalid.[412] Some courts have expressed hostility toward the idea of parties stipulating to conduct arbitration through trial by combat or battle, but because courts have not yet directly confronted such a stipulation, this language remains dicta.[413]

Courts may be willing to recognize agreements to engage in dispute resolution that takes the form of a competition or contest that does not involve a risk of physical injury. Take, for example, the borderline cases of a pushup contest or a videogame competition to resolve a dispute between two parties. If the parties had reached an agreement to resolve their disputes by way of those approaches, and had they gone forward with the contests, a court would have likely overturned an attempt by the loser to overturn the results. After all, the parties were on relatively

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[408] Christopher Immormino, *I'm Gonna Knock You Out: Why Physical Force is a Legitimate Form of Dispute Resolution*, 27 OH. ST. J. DISP. RESOL. 207, 232–34 (2012) (analyzing a contract between the partners of United Fighting Championship calling for disputes to be settled through a sport jiu-jitsu match).

[409] Michael Smith & Raj Shah, *Arbitration by Combat*, 20 MEDIA & ARTS L. REV. 164 (2015).

[410] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341–42 (2011) (finding that state law applied in a manner that disfavors arbitration to be preempted by the Federal Arbitration Act).

[411] Smith & Shah, *supra* note 409, at 175–80.

[412] *Id*. at 170.

[413] *See* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."); General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704, 711 (6th Cir. 1982) ("The parties might jointly desire a trial by ordeal or trial by battle, but the public interest would not allow this. The public interest demands a seemly and efficient use of judicial resources towards the just, speedy, and inexpensive remedy spoken for in Fed. R. Civ. P. 1."); Annapolis Professional Firefighters Local 1926 v. City of Annapolis, 100 Md. App. 714, 725 n.6 (1994) ("We recognize that alternative dispute resolution is an evolving concept and that new mechanisms, often borrowing on more traditional methods, are being created. Although we would not likely be inclined to enforce an agreement to resolve a dispute through trial by combat or ordeal, we do not wish to put a straightjacket on the creative development of new forms of alternative dispute resolution that individual parties, or industries, find useful and preferable to litigation.").

even footing (with the less well-known and financially powerful party in both cases proposing the contest) and there is nothing illegal or harmful to public policy about two parties engaging in a pushup contest or a videogame match.

As dispute resolution moves from virtual or harmless physical contests toward fights between parties and their champions, those provisions will likely draw more scrutiny from courts. While it is possible that courts will permit such provisions and overturn the results of disputes reached through trial by combat or battle, the parties must take care to ensure that the combat is not illegal or contrary to public policy (and therefore involves low risk of serious physical injury). Additionally, such an agreement will likely only be upheld where the parties are both sophisticated and on relatively equal footing in negotiations, as courts will likely jump to overturn a trial by combat agreement by labeling such an agreement as an unconscionable contract of adhesion.

Parties must also consider whether a trial by combat provision would best fit their interests. There are certainly several aspects of trial by combat that make it a more appealing choice than litigation. For one, the costs of litigation would likely be far lower if the parties carried out a battle to resolve their disputes, as they would not need to take the time to file pleadings, conduct discovery, and try the case. Additionally, as several of the cases addressed above reveal, proposing trial by combat is a good way of getting publicity. Demands for trial by combat—even in the post-*Game of Thrones* era—remain rare, and those who demand trial by combat end up drawing attention from the media. Where the demanding party's opponent happens to be a famous actor who plays a shirtless movie werewolf, the likelihood of publicity is even higher.

But trial by combat remains an unpredictable, and potentially arbitrary means of resolving a dispute that is unrelated to the merits of a party's claim. If a party to an agreement intends to follow through with the agreement's terms, they will likely be hesitant to agree to a provision that may let the other party get away with a violation so long as the other party can prevail through a physical contest or other form of battle. Indeed, a party that suspects that another party may violate the terms of an agreement should consider including provisions that make a violation riskier for the violating party—including through the inclusion of an attorney's fees provision for a party that prevails in litigation arising from the breach of an agreement, or liquidated damages for a party breaching the agreement. An arbitration by combat provision cuts in the opposite direction—suggesting that a party may get away with violating the agreement so long as they can prevail in a contest that is determined independent of the merits of whether the agreement was breached at all.

While skeptical treatment by courts of agreements to resolve conflicts through trial by combat poses one obstacle to these provisions, an even larger obstacle is the need for both parties to agree to such a provision in the first place. The unpredictability of trial by combat, as well as its complete disconnect from the merits of any dispute between the parties, makes it a "wild card" provision that one or both parties would likely regret were a dispute over a breach of an agreement to arise. Even if the law of the United States permits parties to agree to arbitration by combat in limited circumstances, such agreements are unlikely to arise in the first place.

VII. Conclusion

If a party to litigation demands trial by combat, something has probably gone wrong. The party is likely trying to distract the court or the opposing party, or is more interested in getting

media coverage than prevailing in the dispute. Even if litigation has been going well for that party, a demand for trial by combat is a surefire way to reverse one's positive fortune.

This Article's survey of demands for trial by combat, both serious and outlandish, demonstrates that while there is no on-point Supreme Court of the United States case explicitly outlawing the practice, a demand that a court resort to trial by combat is almost sure to fail. Some litigants don't seem to mind—as they prefer to insult or intimidate the other side—or include trial by combat as one of many requests for relief in the hope that something gets the court's attention. Other litigants seem to put some effort into the arguments—whether they truly believe they have a shot, or whether they're ultimately trying to get attention remains an open question.

While historic trial by combat is an outmoded relic, its staying power is notable, as litigants over the centuries continue to reference and demand it in litigation. The popularity of *Game of Thrones* likely contributed to some of the most modern demands, as does the widespread, if short-lived, attention that such demands tend to elicit from the media. While *Game of Thrones* will soon fade into memory (depending on how popular the upcoming prequel and spin-off series are), it's reasonable to expect that demands for trial by combat will persist, however infrequently, for decades and centuries to come.