STUDIA IN HONOREM EMINENTISSIMI CARDINALIS ALPHONSI M. STICKLER

CURANTE

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Although the constitutions of the Fourth Lateran Council represent «the most important single body of disciplinary and reform legislation of the medieval church»,¹ the conciliar decrees did not spark much discussion among the assembled prelates. The Curia drafted the constitutions, and the Council confirmed them upon a public reading without debate. Even the rubrication of subsequent canonical collections reflected the fact that the Council simply confirmed what the pope proposed, for the inscription for each of these constitutions describes the legislation as that of Innocent III in the general Council.² Contemporaries responded with complacency, as well. One anonymous eyewitness, having narrated in some detail the pomp and ceremony of the Council, recounted the legislative activity of the council in a single sentence: Deinde leguntur constitutiones domini pape.³

In contrast, recent years have seen considerable scholarly debate concerning the decrees of the fourth Lateran Council, particularly the decree that

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² This point is made in KUTTNER-GARCÍA, «New Eyewitness», p. 164. For example, IV Lat. c. 8, Qualiter et quando, was incorporated in Liber Extra at X 5.1.24, under the rubric Innocentius in concilio generali. But the practice of rubricating conciliar decrees as Papa in concilio neither began nor ended with IV Lateran. Cf. X 5.4.1, rubricated Alexander III in concilio Lateranensi, and X 1.1.1, rubricated Innocentius IV in concilio concilio Lugdunensi. The more important linguistic evidence is in the text of the decrees themselves, where the rhetoric is that of the pope acting and the council approving.
³ The text is edited in KUTTNER-GARCÍA, «Eyewitness Account», pp. 123-129. This passage is at p. 128, line 184.
effectively abolished judicial ordeals in Christian Europe. In 1961 John Baldwin captured the sensibility of one school of thought when he presented the ban upon clerical participation in ordeals as the culmination of an intellectual process. According to this view, the twelfth century had witnessed a dramatic re-birth of rational discourse about theology and law, and the abolition of ordeals in 1215 represented a rejection of an irrational procedure in favor of rational forms of proof. More recently, Rebecca Colman and Peter Brown have argued that the ordeal was not a functionally irrational procedural device in the context of early medieval European society. Brown portrayed the ordeal a flexible instrument for generating consensus and reaching closure of disputes in the intimate world of small medieval communities. Paul Hyams has extended the logic of this perception to the question of the demise of the ordeal. He argued that the decree of the Fourth Lateran Council abolishing ordeals represented no more than a belated recognition on the part of the clerical elite of the fact that ordeals had lost their social function. Given the displacement of ordeals by jury trials beginning with Henry II's legal reforms, Hyams concluded that the ordeal withered away because men's mundane needs were better served by other devices. Finally, Robert Bartlett has produced a rejoinder to Hyams's assertion that the Council's ban on clerical participation in ordeals amounted to no more than «the belated, banal pronouncement» of an unperceptive class of learned clerics. Bartlett refuted Hyams's proposition that the ordeal had begun to decline prior to the Council, and argued instead that 1215 was in fact a decisive moment. In a sense, Bartlett's argument is a reiteration of Baldwin's position. First, a dominant group within the clergy had become

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4 A. García y García, ed., Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum. Monumenta iuris canonici, Series A: Corpus Glossatorum, vol 2 (Città del Vaticano, 1981) c. 18. All subsequent citations to the decrees of IV Lat. are from the García edition.
intellectually committed to the proposition that the practice of the ordeal was wrong. Then this elite within the clergy gained command of an administrative machinery within the Church that guaranteed responsiveness to direction from the top. Bartlett found that the intellectual commitment to abandoning ordeals, the control of the Church, and the administrative capacity to ensure compliance all coalesced in the pontificate of Innocent III, when the pope shared with the critics of the ordeal a common training Roman-canon law, and when the institutions of the Church were capable of sustained institutional reform. From Bartlett's point of view, therefore, ordeals did not wither away because of social factors: «In 1215 they were abandoned on the most ideological of grounds».

The central argument of this paper is that Hyams and Bartlett have both misunderstood what happened at the Fourth Lateran Council, because they have viewed the issue of the ordeal in isolation. The prohibition on clerical participation in ordeals constituted neither a belated recognition of a fait accompli, as Hyams would have us believe, nor a purely ideological decision, as Bartlett would contend. Instead, the decree Sententiam sanguinis represented just one aspect of a concerted program undertaken by Pope Innocent III, who aimed to impose hierarchical control over criminal procedure and to enhance the efficiency of criminal prosecutions. As Winfried Trusen has shown, Innocent began to experiment with criminal procedure from the very beginning of his pontificate. By 1215, the period of experimentation had ended, and Innocent's innovation culminated in a programmatic legislative initiative consisting of three elements, the decrees Qualiter et quando, Sententiam sanguinis, and Quoniam contra falsam. The first of these, Qualiter et quando, employed the occasion of a general Council to confirm and publicize the adoption of the inquisitorial process in the ecclesiastical courts. The second forbade clerics to participate in any judicial proceeding that involved shedding blood or to perform any benediction or consecration of a judicial ordeal by fire or

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11 Bartlett, Fire and Water, p. 100.
12 Idem, p. 102.
14 IV Lat., c. 8.
15 IV Lat., c. 18.
16 IV Lat., c. 38.
17 IV Lat., c. 8, lin. 1-5: «Qualiter et quando debeat prelatus procedere ad inquirendum et puniendum subditorum excessus, ex auctoritatibus Noui et Veteris Testamenti colligitur evidenter, ex quibus postea processerunt canonice sanctiones, sicut olim aperte distinximus et nunc sacri approbatione concilii confirmamus. The portion of the text within quotation marks reiterates verbatim one of Innocent's decretals of 1206, 3 Comp. 5.1.4 (X 5.1.17).
water. The third required every ecclesiastical judge to employ a clerk responsible for producing and maintaining a written record of every judicial act, for purposes of appellate review. The enforcement of these decrees, taken together, amounted to a consciously contrived revolution in criminal procedure. One cannot understand the abolition of the ordeal without reference to the wider context of Innocent’s ambitious program for reform.

In one matter, this paper will agree with Hyams’s explanation for the disappearance of the ordeal. For the lawyer-popes of the twelfth and thirteenth centuries, the hard school of practical experience was as important as the scholarly yearning for order, reason, and adherence to textual authority. Hyams was therefore correct in looking for the practical social and political reasons as well as the ideological grounds for the shift away from proof by ordeal. On the other hand, Bartlett was right to insist that 1215 remains the decisive moment, for the culminating step in Innocent III’s revolution was taken at the Council. Later generations of jurists would look back to the Lateran decrees as the foundation of the law governing the criminal procedure that pervaded continental courts from the thirteenth century until the modern era.

The need for a radical revision of the Church’s criminal procedure had its roots in a social phenomenon that R.I. Moore has labelled «the formation of a persecuting society». One might have used a slightly different term, «prosecuting», to define the new attitude toward deviancy in European society during the age of the Gregorian reform, for it was not merely the clergy’s identifiable rivals for power, such as Jews and heretics, who became the focus of the clerical effort to extirpate deviant behavior. Efforts to detect and eradicate individual wrongdoing by the wayward clerics became a mainstay of the reforming party’s efforts to purify and revivify the Church from the eleventh century onward. It seems clear, as well, that the effort to wipe out deviancy

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18 See the text of Sententiam sanguinis, infra at n. 55.
19 See the text of Quoniam contra falsam, infra at n. 61-63.
20 This is not to agree with Hyams’s statement that «legal change seldom emerged directly from positive, public decisions motivated by a driving desire for a higher rationality» (HYAMS, «Trial by Ordeal», p. 129). For the medieval scholastic jurist, the search for higher rationality was an essential element of the process of using law to effect social change. It is not always possible to distinguish the scholastic jurists’ all-pervasive yearning after rational order from their desire or their capacity to produce particular political or social effects.
21 BARTLETT, Fire and Water, p. 100.
was not simply a campaign by the literate clergy against their potential rivals, for the new ruling elites in secular society also took up the cry that public interest demanded the punishment of miscreants.24

Despite a broad social consensus favoring the new prosecutorial agenda, from 1050 to 1200 the hierarchy’s theoretical commitment to prosecuting deviant behavior stumbled over a series of obstacles that lay in the path of practical implementation. To put it in the starkest terms, there simply was not a procedural avenue that would serve all of the purposes of the reform party within the Church. In the context of ecclesiastical reform, the ideal criminal process needed to possess three qualities. First, the form of the procedure needed to be grounded in respectable authority that lent the proceedings a quality of fairness and legitimacy.25 Secondly, if the effort to prosecute deviant behavior were not to be wasted, the procedure needed to be reasonably efficient at producing convictions. Thirdly, the criminal procedure needed to be susceptible to control and direction from on high, if in reality the hierarchy were going to be able to use criminal sanctions to enforce systematically a comprehensive program for permanent institutional reform.

None of the procedural devices available to the reforming hierarchy prior to 1200 provided all of these desiderata. Every form of process that was in use in 1050 was fatally flawed from the perspective of the hierarchy in search of effective enforcement of the canons. It is clear that during the eleventh and twelfth centuries ecclesiastical reformers employed both the procedures outlined in the ancient canons and the so-called vulgar procedures. An examination of the procedural alternatives explored by the canon lawyers between 1050 and 1200 makes it clear that none of the procedures worked, so that by the beginning of Innocent III’s pontificate a century and a half of frustration gave rise to drastic innovation.

Let us begin with the procedural forms that were most obviously approved by ancient authority. Setting aside for a moment the category of manifest or notorious crimes, the ancient canons provided essentially two models for prosecuting a crime: accusatio and denunciatio. The great advantage of these procedural forms lay in their impeccable grounding in ancient authority.

the Gregorian reformers, as a part of their program to establish a distinct clerical elite directed from Rome, committed the hierarchy to detecting, punishing, and eradicating clerical misbehavior, especially simony and concubinage»


25 This theme pervaded, for example, the scholastic discussion of the judge’s role in the legal process. See K. NörR, Zur Stellung des Richters im gelehrt en Prozess der Frühzeit: Index secundum allegata non secundum conscientiam indicat (Munich, 1967).
The accusatorial form constituted the heart of the *ordo iudiciarius*, the model of judicial procedure that the medieval Church had inherited — or adapted — from Roman procedural law. If there was any medieval institution that embodied juristic notions of legitimacy and fairness, it was the *ordo iudiciarius*. In the accusatorial procedure, a private *accusator* filed a charge in writing before a *iudex*. The defendant was summoned, the issue was joined, and a determination of guilt depended upon the testimony for two unimpeachable witnesses or confession by the accused. At least in theory, and increasingly in fact, a defendant could not be despoiled or punished unless a judge had handed down a definitive judgment of guilt.

Although accusatorial procedure had the advantage of ancient lineage, the accusatorial *ordo* was hopelessly inefficient, and even when it worked to produce convictions, it was not easily controlled or coordinated from on high. In part these defects resulted simply from dependence upon a private *accusator*, who bore the expenses and the quite considerable risks of litigation. At least in theory, an accuser who failed to secure a conviction became liable for the penalty that the defendant would have received if he had been found guilty. In part the inefficiency resulted from the ludicrously strict standard of proof embodied in the *ordo iudiciarius*.

*Denunciatio* shared most of the disadvantages of the accusatorial process aside from the burden of *lex talionis* and added some defects of its own. The authority for procedure per *denunciationem* was Matthew’s Gospel, which required any member of the ecclesiastical community to admonish a wayward individual in private before denouncing the malefactor to the Church. Thus, if a *denunciator* failed to deliver the scripturally required admonition, the case could not proceed via denunciatorial procedure. Furthermore, according to Tancred, denunciation was expressly linked with a penitential approach to

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27 This was the gist of C.2 q.1 of the *Decretum*.


30 Mt. 18,15-17: Si autem peccaverit in te frater tuus, vade, et corripe eum inter te et ipsum solum: si te audierit, lucratus eris fratrem tuum: si autem te non audierit, adhibe tecum adhuc unum, vel duos, ut in ore duorum, vel trium testium stet omne verbum. Quod si non audierit eos: dic ecclesiæ. Si autem ecclesiam non audierit, sit tibi sicut etnicus et publicanus.

31 Tancred, *Ordo iudiciarius*, p. 152: unde, si denunciator non praemonuit, repellitur a denunciatione.
correction rather than a retributive approach, so the penalties inflicted subsequent to a conviction per denunciationem were supposed to be more lenient than those imposed subsequent to an accusatio. Secular law following the Roman model found efficient uses for a procedure per denunciationem, in which official nunciatores secretly denounced miscreants to the courts, but the canon law was unable to fashion an effective device out of procedure per denunciationem.

The final procedural possibility offered by the ancient authorities lay in a summary process in cases of manifest or notorious crime. A dictum attributed to St. Ambrose and letters of Nicholas I and Stephen V provided authority for the proposition that in cases of manifest wrongdoing, an ecclesiastical judge could impose punishment without going through the rigors of the ordo iudiciarius. Roman law similarly authorized a judge to accept as proven, without examining any evidence, facts that were known by everyone to be true. The decretals built upon this basis a class of crima notoria and permitted ecclesiastical judges to punish a notoriously guilty malefactor without the formality of inscription or taking evidence. At first glance, this procedural model appears to bring together all of the qualities that the hierarchy desired. There was ancient authority for using it. It appeared to be efficient, since notoriety of the defendant's guilt dispensed the court from the necessity of conducting any further investigation or meeting any further standard of proof beyond establishing the notoriety itself. Finally, this summary procedure offered the singular advantage of lying within the initiative and control of the ecclesiastical judge rather than depending upon private accusatores or denunciatores. Hence, the ecclesiastical authorities repeatedly attempted to expand the scope of crimen manifestum and crimen notorium. But this procedure was inherently limited in its application, since most criminal behavior does not occur in circumstances that make the crime «manifest» or «notorious». Moreover, the professional canonists, to their credit, remained steadfast in their resistance to per-

32 TANCREDDORSIDII, Ordo iudiciarius, p. 153: Poena huius processus est mitis, quia debet poenitentia sibi imponi pro illo crimen.
34 Preserved in C.2 q.1 c. 15, 16 and 17.
35 See Cod. 9.47.16; Dig. 2.8.5.1.
36 X 3.2.8: quod si crimen eorum ina publicum est, ut merito debeat appellari notorium, in eo casu nec testis nec accusator est necessarius: cum butusmodi crimen nulla possit tergiversatione celari.
37 Cf. X 3.2.7 and 3.2.8 for decretals that expanded the scope of crimen manifestum and crimen notorium in the context of clerical concubinage; for conciliar decrees broadening the definition of manifest or notorious usury, see II Lyons c. 26 and Vienne c. 29.
sistent reformist efforts to overextend the application of procedure per notori-rium.  

For everyday deviancy that fell short of manifest or notorious crime, the ancient authorities of the canon law suggested that the Church must use one of the two dreadfully inefficient procedures that relied upon private initiative. Given the shortcomings of accusatio and denunciatio as interpreted by the canonists and employed by the courts, it is hardly surprising to find that the ecclesiastical reformers of the eleventh and twelfth centuries frequently employed «vulgar» procedures that relied on divine judgment for proof, in the form of ordeals and oaths. Indeed, it appears that the reforming party turned first to vulgar proofs and only gradually, at the insistence of knowledgeable defendants, began to employ the accusatory ordo to prosecute adulterous and simoniacal prelates. As Colin Morris has shown, the reform party under Leo IX employed the iudicium Dei at the Councils of Mainz and Rheims and in synods at Rome in the form of the communion-ordeal and in the form of compurgation, to prove the guilt of the bishops who failed to confess when confronted with accusations of having violated canonical discipline.  

But both forms of vulgar proof, oaths and ordeals, implicated serious difficulties for the reforming hierarchy. Proof by oath simply failed to convict those defendants who were evidently guilty but were capable of cold-blooded perjury. If we can believe the Burgundian laws, this defect in proof by compurgation was one of the factors that had led to the adoption of ordeals in the early middle ages.  

For every case such as those reported in the lives of Leo IX, in which perjurious oath takers collapsed or were struck dumb, one can assume the existence of cases that came out the other way and remained unreported by the reformist chroniclers. Oaths would remain part of the Church’s judicial apparatus beyond the middle ages, but procedures that employed proof by compurgation

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38 E.g. HOSTIENSIS, Lectura in quinque Gregorii decretilium libros (Paris, 1512) at 3.2.8: Dicas quod generaliter in quolibet notorio potest procedi sine citatione et probationibus, sed melius est et tutius si citatio fiat antequam procedatur, nisi forte scandalum vel magnum periculum reipublicae sit in mona.


40 Leges Burgundionum, ed. L.R. De SAILS, MGH, Leges (Hannover, 1892) c. 45, dated 502, established judicial combat as a iudicium Dei, because litigants did not hesitate to commit perjury when proof was made by compurgation.

41 Vita Leonis, PL 143 (1880) col. 492c.

42 Compare two accounts of the trial of Sibico of Speier at the Council of Mainz. The Vita Leonis reports that he failed his communion ordeal and that his jaw remained paralyzed: PL 143, col. 493b. In contrast, ADAM OF BREMEN, Gesta Hamburghensis Ecclesiae Pontificum, B. SCHMIEDLER ed., MGH, Scriptores, (Hannover and Leipzig, 1917) pp. 172-173, reported that a certain bishop of Speier, Sibico, who was accused of the crime of adultery was cleared by sacri-
could not resolve the really hard cases, where suspicion was strong and persistent, but the suspect was well enough connected to provide socially acceptable oath-helpers.

There remained the ordeal. As Bartlett has shown, ordeals were particularly suited to prosecuting precisely the kinds of crimes that underscored the inefficiencies of the other available forms of procedure. Where there were not two witnesses, as one might expect to be the case when the alleged crime was simony or fornication, the accusatory *ordo iudiciarius* was useless, and similarly, where the suspected simoniac was willing to swear to his innocence with the support of oath-helpers, compurgation would result in an outcome more likely to reinforce the suspect's position than to undermine it. Trial by fire or water offered greater likelihood of securing convictions, especially if the ordeal operators were willing to cook the results. Hence, ordeals were useful not only to the Gregorian reformers bent on enforcing clerical discipline, but also to the promoters of the Peace and Truce of God, and to prelates and urban crowds intent upon lynching suspected heretics.

Bartlett has assured us that the decisive problem with ordeals by fire and water was intellectual: ordeals lacked foundation in traditional canonical authorities, and both the lawyers and theologians of the twelfth century lacked confidence in the results of ordeals. It is true that a charge of infidelity to the ancient canons must have embarrassed the ecclesiastical authorities, whose reform program consisted of eradicating the supposedly recent corruptions of the Church through enforcement of the earliest canonical authorities. Yet Bartlett himself points out that local ecclesiastical officials continued to espouse the use of ordeals in cases of suspected heresy, right up until the eve of the Fourth Lateran Council, so it seems clear that the embarrassment was not acute enough to deter prelates from using ordeal procedures to eradicate heresy. It is true that the first papal prohibition against clerical participation in ordeals was expressly based on intellectual grounds resonant with the ideology of the Gregorian Reform. In 1063, Alexander II condemned the employment of ordeal procedures because they were a vulgar popular invention, lacking any canonical sanction. Bartlett is correct in his argument that the intellectual attack on the ordeal gained focus as scholastic lawyers and theologians

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43 Bartlett, *Fire and Water*, p. 33.
44 Bartlett, *Fire and Water*, pp. 52-53.
45 Bartlett, *ibid.*, citing the decrees of the Council of Rheims in 1157, and a letter of Innocent III rebuking the Bishop of Strassburg for using ordeals against heretics in 1212.
46 The text is C.2 q.5 c.7: *Vulgarem denique, ac nulla canonica sanctione fultam legam, feraentis scilicet siue frigidae aquae, ignitique ferri contactum, aut cuirslibet popularis intentionis*
refined their disciplines in the twelfth century. Nevertheless, it seems clear
that the intellectual debate could have come out in favor of the ordeal, if the
issue turned on whether ordeals represented a pernicious vulgar invention or a
canonically sanctioned procedure. The Book of Numbers prescribed in detail
a procedure for using an ordeal of bitter waters against suspected adultresses in
the absence of eyewitness testimony.  

By itself the passage from Numbers would have provided a sufficient basis for the canonists to validate the ordeal as authoritatively grounded, if there were no quarrel with the *iudicium Dei*
aside from the slenderness of its pedigree. Innocent III, as we shall see, erected
the inquisitorial process upon scriptural foundations more slender than this,
and the ordeal prescribed in the Book of Numbers could have been used to
refute Alexander II's assertion that ordeal procedures were a popular invention
that lacked canonical sanction.

Yet the scholastics did ultimately convince themselves that the ordeal
lacked an authoritative basis, and Innocent III did ultimately prohibit clerical
participation in ordeals. Did the ecclesiastical authorities act on «the most ide-
ological of grounds»? Perhaps, as Bartlett has suggested, the answer to this
question consists in part of the scholastics' growing scepticism about the re-

results produced by ordeals and their unwillingness to accept the miraculousness
of the *iudicium Dei*. But a key at least as important as the scholars' doubts lies
back in the pontificate of Alexander II. In 1067-8, four years after Alexan-
der's prohibition on the use of ordeals, a tumult arose at Florence. The bishop,
Peter Mezzabarba, was accused of simony. His accusers, led by Vallombrosan
monks, took the case before a Lenten synod and offered to prove the charge by
walking through fire. Alexander, consistent with his decision in 1063, prohib-
ited the use of the ordeal and refused to proceed against the bishop. Unde-
terred, the monks conducted a theatrical ordeal by fire, in which one of the
accusers walked unscathed along a narrow path between two roaring blazes.
Peter Mezzabarba was forced to withdraw, and his deposition followed at the
Lenten synod of 1068.  

A similar tale unfolded at Milan in 1103.  

And despite repeated papal prohibitions, local churches continued to employ ordeal
procedures right up to the eve of the Fourth Lateran Council. By 1215, Inno-
cent III had learned that the *iudicium Dei* was an intractable device that could
not be controlled from Rome.

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(quia fabricante nec sunt omnino ficta inuidia), nec ipsum exhibere, nec aliquo te modo volumus
postulare, imo apostolica auctoritate prohibenus firmissime.

47 Num. 5,11-31.
49 This narrative is based on Morris, «Judicium Dei», pp. 105-106.
50 Idem, at 109.
Bartlett has insisted that the ordeal was an instrumentality of royal power. Perhaps this was true in Carolingian Europe, but in the age of the Gregorian Reform and afterwards, the *iudicium Dei* proved more effective as an instrument of local politics. In the eleventh and twelfth centuries ordeals undermined the centralizing power of the reforming clergy. As is illustrated graphically in the case of Peter Mezzabarba, the pope could not maintain control over the administration of ecclesiastical affairs so long as the ordeal remained available as a locally orchestrated manifestation of «the politics of enthusiasm». Furthermore, as R.I. Moore has suggested, ordeal procedures were based upon a conception of the local community as the source of justice and order. By 1200, the hierarchy in Rome no longer viewed local ecclesiastical communities in this light, although local ordinaries persisted in holding an old-fashioned view of episcopal autonomy. From Rome's perspective, ordeals that took place in Florence or north of the Alps could not be controlled as they happened, nor did ordeals produce decisions that could be reviewed and if necessary reversed by higher authority.

Alongside the purely ecclesiastical politics of the ordeal, which pitted local enthusiasm against centralizing hierarchical supervision, there lay the quintessentially Gregorian question of the relationship between the ecclesiastical order and the secular world. In 1212 Innocent underscored a familiar line of separation between ecclesiastical and secular courts when he admonished the Bishop of Strassburg not to use ordeals to try suspected heretics: «Although vulgar procedures, such as those of cold water or hot iron or combat, may take place before secular judges, the Church does not permit such procedures». The pope dutifully recited the scriptural basis for his very brief ruling; he omitted the lengthy discussion that would have been needed to explain the politics of the ordeal. In 1215, Innocent carried out the final step in the Gregorian logic of separating ecclesiastical and secular processes completely. *Sententiam sanguinis* prohibited clerics from participating in a number of functions that properly belonged to the secular realm, including the ordeal.

In 1215, as the Council was convening, Innocent has settled on a course

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51 Bartlett, *Fire and Water*, p. 36.
52 The phrase is from Morris, *Indicium Dei*, p. 106.
55 IV Lat., c. 18: *Sententiam sanguinis nullus clericus dictet aut proferat, set nec sanguinis vindictam exerceat aut ubi exerceatur interist... Nec quisquam clericus litteras dictet aut scribat pro vindicta sanguinis destinandas... Nullus quoque clericus ruptaris vel balistariris aut hujusmodi uris sanguinum preponatur, nec illam chirurgie partem subdiaconus, diaconus, vel sacerdos exerceat...*
of action that was designed to resolve the intellectual problems posed by the ordeal and the practical difficulties that he and his predecessors dating back to Leo IX had encountered in enforcing the Church’s criminal law. The remedy for the inefficiencies of *accusatio* and *denunciatio* was the universal adoption of procedure *per inquisitionem*, a procedural device with which Innocent had been experimenting since early in his pontificate.\(^{56}\) Under *inquisitio*, an ecclesiastical judge did not need to await a private *accusator* before the court could prosecute a malefactor. Once *fama* arose concerning an alleged crime, the officer of the Church could act. The advantage of the *inquisitio*, in giving public authority the initiative to investigate and prosecute criminal cases, ensured the adoption of this form of procedure and large-scale displacement of its antecedents, *accusatio* and *denunciatio*.

Innocent was quite cognisant of the inefficiencies of the older forms of procedure, and he expressly introduced *inquisitio* as a more efficient alternative, albeit one that rested upon scriptural foundations. According to *Qualiter et quando*, the fathers of the Church had wisely rendered it very difficult to prosecute clerics by *accusatio*, because many accusations brought by laymen were not only false but were motivated by malice.\(^{57}\) But when *fama* arose concerning a cleric’s excesses Innocent wrote that the miscreant’s ecclesiastical superior could proceed against him *per inquisitionem*.\(^{58}\) The scriptural foundation for *inquisitio* was more slender than the Old Testament reference to ordeals. Innocent claimed that the *inquisitio* was based on the parable of the unjust steward in Luke’s Gospel\(^{59}\) and God’s announcement in Genesis that He would go down to investigate the outcry that He had heard against Sodom and Gomorrah.\(^{60}\) *Qualiter et quando*, as originally promulgated in 1206 and as confirmed by the General Council in 1215, represented purposeful, innovative legislation dressed in conservative scholastic garb.

The introduction of *inquisitio* resolved part of the problem with criminal procedure, but not all of it. *Inquisitio* liberated the ecclesiastical courts from their dependence upon private accusers, but this innovation by itself did not guarantee that the hierarchy could preclude the kind of false or malicious per-

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57 IV Lat., c. 8, lin. 22: *Et ideo sancti patres pro vide statuerunt ut accusatio prelatorum non facile admittatur, ne concussis columnnis corrnut edificium, nisi diligens adhibeat cautela (scil. inscriptio), per quam non solam false set etiam maligne criminationis ianua precludantur.*
58 IV Lat., c. 8, lin. 11-14: *... si per clamorem et famam ad aures superioris perueni... debet coram ecclesie senioribus veritatem diligentius perscrutari.*
59 Lc. 16,1-7; IV Lat., c. 8, lin. 7-8.
60 Gen. 18,20-21; IV Lat., c. 8, lin. 8-9.
secutions which Innocent believed that the fathers has wisely precluded. In-
quiritio would become an effective weapon of hierarchical control only if fur-
ther legislation displaced the uncontrollable procedural alternative, ordeals,
and imposed a mechanism for meaningful review of procedures conducted by
local ordinaries. Sententiam sanguinis, as we have seen, accomplished the first
of these ends. Quoniam contra falsam provided the second.

The decree requiring every ecclesiastical judge to create and preserve
written records of every judicial proceeding stated on its face that its purpose
was to alleviate the hardship faced by the innocent party who was confronted
in litigation by a dishonest judge.\textsuperscript{61} The mechanism for enforcement was that
judges who failed to maintain written records became subject to discipline
from their superiors and, more importantly, any unrecorded proceedings lost
their presumptive validity.\textsuperscript{62} One need not doubt that Innocent and the assem-
bled prelates sincerely meant this constitution to protect truth and justice, just
as the text asserts,\textsuperscript{63} but the inescapable practical consequence of this decree,
and in all probability its primary purpose, was to tighten the hierarchy’s con-
trol over procedure in the local ecclesiastical courts by creating a ubiquitous
basis for appellate review.

Taken together, the procedural innovations of the IV Lateran Council
amounted to a revolutionary change in the prosecution of criminal cases. It is
the contention of this paper that the conciliar endorsement of inquisitorial
process, the conciliar abolition of clerical participation in ordeals, and the
imposition of appellate review through the simple device of requiring every eccle-
siastical court to keep written records represented a purposeful, interrelated
program conceived by Innocent III. The pope wanted a more efficient means
of prosecuting deviant behavior, and he intended to assert the hierarchy’s ex-
clusive control over the criminal process insofar as ecclesiastical cases were
concerned.

Innocent’s seizure of control over the criminal process paralleled his im-

\textsuperscript{61} IV Lat., c. 38, lin. 1-7: Quoniam contra falsam assertionem iniqui iudicis innocens litiga-
tor quandoque non potest ueram negationem probare... statuimus ut tam in ordinario iudicio quam
extraordinario iudex semper adhibeat aut publicam... personam aut duos iuros idoneos qui fideliter
uniuera iudicii acta conscribant..

\textsuperscript{62} IV Lat., c. 38, lin. 16-20: Index autem qui constitutionem istam neglexerit observare... per
superiorem iudicem animadversione debita castigetur, nec pro ipsius presumatur processu, nisi in cau-
sa legitimis constiterit documentis.

\textsuperscript{63} IV Lat., c. 38, lin. 14-16: ut si super processu iudicis fuerit suborta contentio, per boc possit
uertas declarari, quatenus boc adhibito moderamine sic honestis et discretis deferatur iudicibus, quod
per improvidos et iniquos innocentium iustitia non ledatur.
position of papal authority over the cults of relics. Criminal procedure, like the process of canonization, was being altered in two ways: from lay to clerical control and from local decision-making to centralized papal decision-making. Innocent used the Council to establish principles of decisive hierarchical control over both the prosecution of criminals and the canonization of saints.

On the whole, subsequent events testify to the success of Innocent’s revolution in criminal procedure. Inquisitio ultimately became the criminal remedium ordinarium not only in the ecclesiastical courts but also in the secular courts across Europe. The prohibition upon clerical participation in ordeals finally resulted in the virtual disappearance of the trials by fire and water, so that juridical pyrotechnics could create fewer subsequent occasions of popular enthusiasm escaping from hierarchical control. Clerics were no longer dragooned into participation in secular courts. Finally, the use of written records from ecclesiastical tribunals as a means of appellate control over local ordinaries represented an important evolutionary step in the use of written documents as an instrument of governance.

The one singular failure of the new criminal process lay in the area of proof. It is a commonplace among legal historians to observe that the abolition of ordeals led to the adoption of torture as an investigative device. Perhaps Innocent believed that his own previous jurisprudence concerning crimen notorium had fixed the problem of proof, or perhaps he was unaware of the fact that in abolishing the iudicium Dei he was depriving the courts of their only effective device for reaching closure in certain kinds of cases. It is clear in retrospect that subsequent popes and canonists believed that criminal prosecutions could proceed efficiently only if the lawyers could circumvent or interpret away the impossibly strict Romano-canonical standard of proof.

64 IV Lat., c. 62; cf S. KUTTNER, «La reserve papale du droit de canonisation», Revue historique de droit français et étranger, 4e serie, 17 (1938) 172-228.
66 M. CLANCHY, From Memory to Written Record: England 1066-1307 (London, 1979) 138-147, makes the point that systematic record-keeping for later use and reference marks a major step beyond writing down information for purposes of immediate administrative use or for memorialization of events. R.I. MOORE, Persecuting Society, 138-139, portrays a dominance by the literate clerici over an illiterate society.
68 See Innocent’s decretal Vestra, X 3.2.8, and the subsequent glosses expanding upon notorium.
What then can one conclude concerning the establishment of *inquisitio*, the abolition of ordeals, and the reforming vision of Innocent III and the IV Lateran Council? It seems clear that scholars cannot treat this council's decrees in isolation from one another or in isolation from the social, political, and intellectual contexts which gave rise to the legislation. The abolition of ordeals, the introduction of inquisitorial procedure, and the imposition of appellate hierarchy represent at least three things. First, these decrees embodied a conscious effort to make the criminal process more efficient. Second, in each of these pieces of legislation, one perceives an attempt to resolve intellectual issues that had come to concern the scholastic lawyers and theologians in the course of the twelfth century. Even the relatively straightforward pronouncement in *Quoniam contra falsam* included a bow to the schoolmen's quibbling over the impossibility of proving a negative assertion. Finally, and all pervasively, these decrees marked a programmatic assertion of the hierarchy's authority over the Church, at the expense of the laity and of local clerical autonomy. Contrary to the perceptions of some recent scholars, *Sententiam sanguinis* was neither belated and ineffectual nor purely ideological. The prohibition on clerical participation in ordeals makes sense when seen, alongside the birth of *inquisitio* and appellate review, as an expression of Innocent III's coherent vision of both the practical politics and the ideology of ecclesiastical reform.

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70 IV Lat., c. 38, lin. 2-3: *... cum negantis factum per rerum naturam nulla sit directa probatio...*