4 Trial by Ordeal: The Key to Proof in the Early Common Law

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In twelfth-century England no regular legal means existed to challenge a court decision, duly made in the proper form, simply on the ground that it was the wrong decision. The many disgruntled litigants could take the matter further only by self-help, or by alleging that the court holder had denied them justice (*defectus iustitie*) or had wilfully mishandled the proceedings (*falsum* or *iniustum iudicium*). Either allegation began new proceedings before a royal court,[1] where the holder or suitors of the inferior court might have to be fought, quite literally, in a judicial duel. Even after Henry II's reforms had introduced various kinds of trial by jury, the common law hardly recognized remedial appeal against error.[2] Certainly this is a severe deficiency for any system of law with pretensions to rationality, but final proof in early English law, as elsewhere, was generally left to the judgment of God. Because God was by definition impeccable, His judgments appeared erroneous to honest men only when there had been malfeasance on the part of those who purported to question God and interpret His verdict—that is, the judge and suitors. Genuine error was impossible, and there could be no appeal to higher authority.

The functioning of trial by ordeal, that most notorious form of God's judgment, is a subject of keen intrinsic interest. Its reexamination, together with that of its legacy to the early common law, is long overdue. The difficult questions involved have been unwarrantably overshadowed by the quest for the mystical origins of the English jury. Many English legal historians have cursorily dismissed the ordeal as irrelevant, because

I have been thinking around the subject of this paper on and off since about 1970, and have delivered a number of talks and lectures on both sides of the Atlantic. The friends, colleagues, and questioners who have corrected errors and enlightened me in different ways are too many to be thanked here. I shall do so when I write further on ordeals, as I hope to do shortly. I must, however, at least acknowledge the help of my wife, Elaine Marcotte Hyams, and the authors of several works cited below.

1. *Leges Henrici Primi*, 33, 1a–2, ed. L. J. Downer (Oxford, 1972) (hereafter cited as *LHP*); apart from this I follow the sigla for English laws of F. Liebermann, *Gesetze der Angelsachsen*, 3 vols. (Halle, 1903–16) (cited hereafter as *Gesetze*).

2. T. F. T. Plucknett, *The Concise History of the Common Law*, 5th ed. (London, 1956), p. 131 and n. 4; *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur*, ed. and trans. G. D. G. Hall (London, 1965) (hereafter cited as *Glanvill*), p. 36, n. 1; Donald W. Sutherland, *The Assize of Novel Disseisin* (Oxford, 1973), pp. 74–76. T. F. T. Plucknett, *Edward I and Criminal Law* (Cambridge, 1960), pp. 73–76, notes the lack of full criminal appeals before the present century. François Louis Ganshof, *Frankish Institutions under Charlemagne*, trans. Bryce and Mary Lyon (New York, 1970), pp. 93–94, reveals exact Carolingian parallels.

its disappearance apparently coincided with the very beginning of that modern "scientific" law which was their major concern. This neglect is unfortunate. The functioning and demise of the old proofs actually shaped the classical common law in multifarious ways. Western Europe's transformation of the old ordeals into the seeds of its modern, supposedly rational systems involved choices about the direction of change whose consequences still affect us today, in both the Anglo-American and the Continental systems.[3] The changes involved loss as well as gain. For example, the failure of western European courts until quite recently to appreciate the community roles and standing of the individuals who came before them, outside the specific facts of the case, partly resulted from the exclusion of the ordeal.[4] A fuller understanding of medieval proofs promises rather more than mere exposition of the peculiar institutions of English law six hundred years ago.

Trial by ordeal is a very widespread institution, known and practiced in a wide range of premodern societies. Any attempt to explain its history in England can therefore draw on a vast body of comparative material. English hypotheses must also consider the ordeal's history in the other parts of western Christendom, where modes of proof based on the judgment of God predominated between (roughly) the end of the Western Roman Empire in, say, the fifth century, and the cultural renaissance of the West in the High Middle Ages.

I shall first offer a possible model for the working of the early medieval ordeal, based on the assumption that so ubiquitous an institution must have made sense within its time and context. From this sketch of the "world of the ordeal," I can try to explain the transformation of the old ordeals during the High Middle Ages.[5] Within the rough pattern of European change this reveals, each area and jurisdiction of course developed at its own pace and in its own way. England is an interesting case. Many historians see the Anglo-Norman state as a cultural laggard in the context of the twelfth-century renaissance.[6] Yet they generally agree that its legal advances began relatively early. Thus, because the eleventh-century starting point was a legal and political system not too far out of

3. The demise of the ordeal was in one respect the triumph of adversary process over other forms of legal inquiry. Does this not help to explain why the common law long thought essentially in terms of winners and losers, even in disputes over matrimonial causes or family rights?

4. S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976), pp. 2–3, insists on the importance of forms of proof for the understanding of the early common law.

5. By the "old ordeals" I refer to those unilateral forms, most notably the water and hot iron, which passed finally out of official use after 1215. This distinguishes them from "new ordeals" like the jury, and from oaths and duels. I consider forms used mainly in northwestern Europe, thus excluding the Mediterranean lands, where written law persisted. I confess that as yet I do not begin to understand the functioning of law in the society of the Norse sagas; so I exclude those forms too.

6. R. W. Southern, "The Place of England in the Twelfth Century Renaissance," in his *Medieval Humanism* (Oxford, 1970), chap. 9, may exaggerate this lag.

line with the rest of post-Carolingian Europe,[7] the English experience furnishes a reasonably fair first test to the approach canvassed in the model. To my summary model of large-scale European metamorphosis I therefore append a summary narrative of the development of ideas and techniques of proof in English law between about the year 1000 and the mid-thirteenth century.

A final preliminary is necessary: to specify how "ordeal" will be used in this paper, to say what unites the group of practices studied. A dictionary definition runs: "an ancient . . . mode of trial, in which a suspected person was subjected to some physical test fraught with danger, . . . the result being regarded as the immediate judgment of the Deity."[8] This meets our purpose, providing that we note that ordeals were used in civil suits too.[9] The tests used varied considerably in nature. It is helpful to distinguish between those faced by a single proband (unilateral ordeals) and bilateral ordeals, such as the judicial duel, which pitted opponents against one another.[10] Most scholars would further distinguish judicial oaths. In early litigation the parties not only offered oaths to validate their assertions of fact; they also swore oaths before embarking upon proof by an ordeal, test, or duel. In addition, oaths themselves constituted a form of proof, and the performance of an important oath to conclude a case could be a moment so fraught with tension as almost to constitute a "physical test" within the ordeal definition quoted above. For example, one simoniac bishop discovered, when challenged by Hildebrand at a Council in the 1050s, that he was totally unable to pronounce the simple formula *Gloria filio et patri et spiritui sancto*.[11] Although proof-oaths are perhaps not full, genuine ordeals, they are far too closely related to be ignored here.

Unilateral ordeals, oaths, and duels share one important factor. All three methods of proof purport to work by revealing God's judgment. The proof-oath is no exception. By the standard theory that *jurare est testem Deum invocare*, those swearing understood that God and the saint on whose relics the oath was made would be their witnesses, who

7. J. Campbell, "Observations on English Government from the Tenth to the Twelfth Century," *Transactions of the Royal Historical Society*, 5th ser. 25 (1975): 39–54.

8. *Shorter Oxford English Dictionary*, 3d ed., corrected; but see below, at n. 34, on the phrase "fraught with danger." The excellent paper of J. M. Roberts, "Oaths, Autonomic Ordeals and Power," *American Anthropologist* 67 (1965): 186–209, starts from a definition too specific about "guilt and innocence."

9. See below, at n. 42, for the distinction between civil and criminal law.

10. There is a vast literature. H. C. Lea, *Superstition and Force*, 3d ed. (Philadelphia, 1878), remains the starting point; one relevant chapter is reissued as *The Ordeal*, ed. E. Peters (Philadelphia, 1973). H. Nottarp, *Gottesurteilstudien* (Munich, 1956), is a comprehensive and intelligent survey. A great deal of valuable material is assembled in *La preuve*, Receuils de la Société Jean Bodin, vol. 17 (Brussels, 1965).

11. A. Stacpole, "Hugh of Cluny and the Hildebrandine Miracle Tradition," *Révue Benedictine* 77 (1967): 341–63, at 356–58; and I. S. Robinson, "The Friendship Network of Gregory VII," *History* 63 (1978): 6, outline the story and show that it circulated widely from ca. 1060 into the mid-twelfth century.

could and would punish any perjury.[12] Lawsuits that came to proof almost always concluded, then, with some act that conveyed graphically the idea that the final say in the matter resided with God, whose vengeance could enforce His judgment. To explore the ramifications of the common rationale of these forms of proof, we begin with unilateral ordeals. The two best evidenced in England were the cold water, into which a proband was lowered to see if it would "receive" him, and the red-hot iron, which the proband carried, his hands then being bound up and examined later to see how they were healing.[13]

Let us first recount an actual criminal trial from southwestern England in the last decade of the tenth century.[14] A slave arrested for an unspecified crime was brought to trial before Eadric the reeve, at Calne, a royal hundred vill in Wiltshire, and sentenced to the ordeal by the hot iron. A freeman of good reputation with no criminal record would have expected to clear himself by some kind of oath, but this option was hardly open to a slave without free, law-worthy oath helpers.[15] Nevertheless, our informant, the Winchester monk Wulfstan Cantor, thought the judgment harsh. Eadric ordered that the slave be kept in custody until his master Flodoald, a well-known foreign merchant of Winchester, could be present to witness the proof. Flodoald hurried to the spot and, being particularly fond of this loyal slave, offered him to the reeve together with a pound of pure silver in return for the remission of the *iniustum iudicium*. The slave's own relatives added their pleas and proffers too, all to no avail. Here, far from Winchester, the proud reeve was all-powerful, and even Flodoald had little influence. The arrogant Eadric had his men bank up the fire unusually high[16] and ordered a heavier iron than was customary. At the appropriate moment in the ritual, the slave lifted the iron and experienced immediate, searing pain—apparently increased by a guilty conscience. Nevertheless, the prescribed procedure was followed: the hand was bound for reexamination after three days. By now Flodoald despaired, and in his distress turned to prayer as a last resort, offering the

12. Yvonne Bongert, *Recherches sur les cours laïques du Xe au XIIIe siècle* (Paris, 1949), pp. 205 ff.; Marguerite Boulet-Sautel, "Aperçus sur le système des preuves dans la France Coutumière du moyen âge," in *La preuve*, p. 281; Nicole Hermann-Mascard, *Les reliques des saints: formation coutumière d'un droit* (Paris, 1975), pp. 265–66. Lea, *Superstition and Force*, gives examples of oaths as ordeals.

13. Other forms known in England include trial by morsel (*corsnaed*) and various tests involving boiling water. These, and still other forms, may have been equally widespread in popular ordeals outside major centers.

14. *Frithegodi Monachi Breviloquium Vitae Beati Wilfredi et Wulfstani Cantoris narratio metrica de S. Swithino*, ed. Alistair Campbell (Zurich, 1950), pp. 150–54 (bk. 2, lines 299–434). D. Whitelock, "Wulfstan Cantor and Anglo-Saxon Law," in *Nordica et Anglica, Studies . . . S. Einarsson*, ed. A. H. Orrick (The Hague, 1968), pp. 87–92, offers valuable commentary.

15. Cf. below, at n. 82 and accompanying text.

16. L. Halphen, "La justice en France au XIe siècle: région angevine," in his *A travers l'histoire du moyen âge* (Paris, 1950), p. 188, n. 2, cites an ordeal when the water was boiled *ultra statutum morem*.

slave to St. Swithin if God could be persuaded to preserve him. On the third day after the ordeal, the court reassembled to determine the result. The bandages were unwrapped and a clean (*mundus*) hand revealed. The astounded reeve and his cronies had to admit: this man is not guilty (*inculpabilis*); there is no blame, no crime in him! The rest of the onlookers were even more surprised, for *they* could clearly discern the signs of guilt, the pus and decay on the hand. Judgment had, however, been declared. With the unexpected change of fortune, the atmosphere of the court shifted abruptly. Eadric and his crew slunk away, shamed by a judgment that condemned them and vindicated the accused slave. Meanwhile, St. Swithin at Winchester received an extra slave, who surely lived happily ever after.

Of course this account comes from a poem in honor of St. Swithin. Although all the story's details cannot be guaranteed, they nevertheless fit without strain into what we learn from the laws and rituals of the time. Despite the very unusual miraculous denouement, the anecdote certainly contains some general lessons. The poem vividly portrays the dynamics of an actual ordeal case.[17] No procedural formalism need be assumed here. Wulfstan Cantor focuses rightly on the interplay of personalities within the community—the slave and his supporters, the reeve and his, the audience in general. Everything centered on the reeve. As the court's president, he could bully and manipulate toward the judgment he desired. Whatever his motive on this occasion, he orchestrated proceedings to establish the accused's guilt and punish him in an awesome manner. This too was intended as a lesson for the whole community, which would know better in the future what he expected of it. But the planned drama miscarried, and the public rebuff undermined Eadric's own position. Local officials like a reeve must exercise power with continuous success if they are to retain it. Eadric's failure was dramatized by the exceptional emotional charge in the crowd on that third day. All present knew what had been expected. When it failed to materialize, the reeve consequently lost face and authority. This moment of truth was the grand culmination of the trial, when the court formally perceived the result of the ordeal and embodied it in a final judgment. These three high spots—the concluding decision, the performance of the ordeal itself, and the reeve's *iniustum iudicium*—were separated by public debate of the issues at the court hearings. Meanwhile, the less dramatic negotiations between the slave's party and the reeve, mostly conducted outside court, were equally important.[18] The story makes little sense until we realize that the affair was as much a quasi-political episode as a judicial inquiry. From a possibly trivial starting point, it eventually concerned power relationships that affected the whole community served by Calne's hundred court.

17. This insight into practice is an important addition to our knowledge, pace Whitelock, "Wulfstan Cantor," p. 88.

18. Ibid., pp. 89 ff., concludes that the offer was a "legal composition" and not "a barefaced attempt to bribe." This fine distinction is not important here; proffers were part of the game.

This anecdote no more establishes a general pattern for early medieval law than the arrival of the first swallow proves that an English summer will follow. But it does indicate a pattern of actual behavior that may recur. Thus prompted, one can now try to frame a model that answers two basic questions. Into what *kind* of world can the ordeal comfortably fit? And what kind of law would suit that world?

The ordeal, primarily a device of small communities, functions most comfortably in milieus where each man's personal character and standing are publicly known and affect the welfare of the rest. The community is not too tiny for variety of interest, daily occupations, and so on.[19] No one man can dominate it on personality alone, certainly not so completely as to settle all disputes without challenge. Yet the harsh realities of life demand cooperative effort, such as the administration of open-field agriculture or communal defense, and thus entail some method of enforcing a communal will against dissenters. If the level of acceptable violence seems high, influential members remain keenly aware of the premium on consensus and are prepared to act as necessary for its maintenance. They can be hardheaded, quite clear-sighted about individual and group interests, and accustomed, as farmers or warriors, to relying on their courage and common sense. At the same time, in their world the sacred and profane are everywhere inextricably intertwined.[20] No modern western distinction between the natural and supernatural inhibits their efforts to survive and prosper. They naturally seek assistance when appropriate from God and His saints, or demons and the like. They keep their powder dry—of course—but accept the possibility of miraculous intervention as feasible, indeed natural, and perhaps in the last resort, expected. Miraculous forces beyond human reach exist always as a reserve explanation for events otherwise inexplicable. For some, no doubt, the divine means considerably more, but all agree on the necessity of the reserve, because everything that happens must have a cause.[21] The apparently inexplicable must somehow be integrated into the common thought-world. The most spectacular occurrence must be described so as not to contravene the accepted basic rules of existence. This "secondary elaboration"[22] tames and slows down the pace of fundamental change. It sometimes seems as

19. Gavin I. Langmuir, "Community and Legal Change in Capetian France," *French Historical Studies* 6 (1970): 275–86, makes imaginative use of concentric communities at the levels of lordship, county, etc.

20. Peter Brown, "Society and the Supernatural: A Medieval Change," *Daedalus* 104 (1975): 133–51, at 135.

21. See Gregory VII's explicit statement, quoted by C. Morris, "Judicium Dei: The Social and Political Significance of the Ordeal in the Eleventh Century," *Studies in Church History* 12 (1975): 95–112, at 110. Today, when we no longer believe that everything has a meaningful cause, we often use coincidence as a pseudo-explanation.

22. The thought comes from E. E. Evans-Pritchard, *Witchcraft, Oracles and Magic among the Azande* (Oxford, 1937) pt. 3, chap. 4, esp. p. 319. Cf. Mary Douglas, ed., *Witchcraft Confessions and Accusations*, A.S.A. Monographs, vol. 9 (London, 1970), introduction, for exposition; and Lea, *Superstition and Force*, pp. 350 ff., for examples.

if fundamental change cannot happen at all until the arrival of outside observers, whose different system of beliefs enables them to criticize, to transform, or even to destroy a system alien to them.[23] In the absence of intervention from outside, the community has to find its own way to reconcile apparent anomalies with conventional wisdom.

The reconciliation of anomalous behavior with convention is the task of social control in general and the role of law in particular. In this world the distinction between law and other forms of control is far from clear. Violent self-help and private warfare compete directly with law as means of achieving a new status quo or maintaining the old one. Even where the society is technically literate, in some sense, legal process often remains largely oral.[24] Because there is no accurate memory of past decisions, each new case reviews the good old custom in the context of the current situation. Thus, the quiet modification of norms precludes the upheaval sometimes entailed by a direct challenge to ancient roots and the communal belief in a continuous tradition. Consequently, legal rules, in the modern sense of generalized prescriptive guides applied rigorously by the courts to diverse situations,[25] rarely figure in litigation. Early medieval Europe, unlike most of the recent societies with comparable legal systems, did, however, possess a legal literature. But we probably expect too much of barbarian law codes, whose resemblance to modern statutes and legislation is often merely superficial.[26] Unless laws can be shown to have been used in actual cases, we ought to be very cautious about accepting them as compelling evidence of practice.[27] To set custom down in writing highlights a formalism that is more apparent than real. In the longer term, written precedent inhibits the free development of custom,[28] and may ultimately lead toward genuine legal formalism later.

In fact, court proceedings in the world under scrutiny are far removed

23. Cf. below, at n. 55.

24. C. P. Wormald, "The Uses of Literacy in Anglo-Saxon England and Its Neighbours," *Transactions of the Royal Historical Society*, 5th ser. 27 (1977): 95–114.

25. L. Twining and D. Miers, *How to Do Things with Rules* (London, 1976), chap. 2.

26. The inspiration for these assumptions about the nature of the *Volksrechte* is J. M. Wallace-Hadrill, *Early Germanic Kingship in England and on the Continent* (Oxford, 1971), pp. 33 ff. Patrick Wormald, "*Lex Scripta* and *Verbum Regis*: Legislation and Germanic Kingship from Euric to Cnut," in *Early Medieval Kingship*, ed. P. H. Sawyer and I. N. Wood (Leeds, 1977), pp. 105–38, and Patrick Wormald, "Aethelred the Lawmaker," in *Ethelred the Unready*, ed. D. Hill, British Archeological Reports, British ser., vol. 59 (1978), pp. 47–79, carry on the torch.

27. See Wormald, "*Lex Scripta* and *Verbum Regis*," esp. pp. 119–23, 135–36. Wormald, "The Uses of Literacy," p. 113, n. 77, gives some Continental examples. Cf. below, at text accompanying note 73, for England.

28. Cf. M. T. Clanchy, "Remembering the Past and The Good Old Law," *History* 55 (1970): 165–76, a paper the sight of whose early draft inspired this line of inquiry. Robert Besnier, "'Vadiatio legis et leges': les preuves de droit commun à l'époque des coutumiers normands," *Revue historique de droit français et étranger* (hereafter cited as *RHDFE*), 4e sér. (1940): 88–135, is in the same direction. It is equally possible, however, that setting custom down in writing encourages kings to think of changing it, as Dr. C. J. Wickham pointed out to me; cf. Wormald, "*Lex Scripta* and *Verbum Regis*," pp. 124–25, 129, for ninth- and tenth-century developments in northern Europe.

from the highly formalistic model beloved of German legal scholarship, except for the set pieces of oath swearing and the making of proof. The argument pivots around these two elements. First the court must decide the nature of the proof to be made—by whom, when, and in what circumstances. Then, after proof, it proclaims success or failure and the consequences in a final judgment.[29] Modern courts seek to establish whether or not certain specific acts have been committed, then whether these constitute some crime of the accused or some actionable tort, and finally what the law should do. But in this more localized world of the ordeal, the goal is as much "to make the balance" and reestablish a workable peace within the community as to redress any specific grievance.[30] The strategies vary according to the desired ends. They may aim to effect a compromise between the disputants on honorable terms, for example, or even to eliminate a troublemaker from future calculations by deprivation of civil rights, expulsion, mutilation, or death. Ideally, the court inches cautiously toward the best practicable solution, and attempts to lower the emotional temperature in thrashing out the problem aloud. En route it exposes much material in open court (and also, less formally, outside) that today's practice and the rules of evidence would conceal. Passions are more open, audience involvement closer, than most modern judges would permit. The presiding judge here cannot force his preferred judgment down the court's throat. He can merely guide the deliberations through meanderings that strike an unprepared observer as aimless,[31] until a satisfactory conclusion gradually emerges. The court then declares the proof to be attempted, and now at last comes the moment for God's participation.

29. Besnier, "'Vadiatio legis et leges,'" p. 135; Frederic L. Cheyette, "Custom, Case Law and Medieval 'Constitutionalism': A Re-examination," *Political Science Quarterly* 78 (1963): 362–90, at 368–69, a paper that foreshadowed and influenced much in the current argument. English plea rolls generally call the mesne judgment *judicium* (= OFr. *iuise*, "ordeal") and introduce the final judgment with the words "Consideratum est . . . " Cf. Melville Madison Bigelow, *History of Procedure in England* (London, 1880).

30. Brown, "Society and the Supernatural," p. 137, talks of "an instrument of consensus . . . a theatrical device by which to contain disruptive conflict," but the ordeal could equally be used to crush some people in the interest of others. The phrase "to make a balance" derives from the anthropologist Laura Nader; Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester, 1955), was my starting point. It must be admitted that the anthropologists tell much about informal legal process and a good deal about ordeals, but worryingly little about the two combined in the manner argued for here.

31. C. Lévi-Strauss, "The Sorcerer and His Magic," in his *Structural Anthropology*, trans. Claire Jacobson (1963; reprint ed., New York, 1967), chap. 9, brings out strongly the role of onlookers; read this essay for the extraordinary and suggestive story of Quesalid the skeptical sorcerer, pp. 169 ff. Late evidence of interference by committed spectators in English duels is some confirmation of the idea. See *Curia Regis Rolls* (London, 1922–) (hereafter cited as *CRR*), 1:100 (1199); and *CRR*, 10:189 (1221); as well as *Régistres de Grégoire IX*, ed. L. Auvray, 4 vols. (Paris, 1890), 2:4744 = *The Register of Walter Gray*, Surtees Society, vol. 56 (Durham, 1872), pp. 182–83; and further references cited in C. T. Clay, *Early Yorkshire Charters*, vol. 5, Yorkshire Archeological Society (Wakefield, 1936), pp. 224–25, for an incident of 1235; and *Calendar of Patent Rolls, 1266–1272*, p. 579 (before 1271).

In the rough de facto democracy of the court and its suitors, the constant urge to reopen *res judicata* is the law's greatest bane.[32] The conclusion of cases by God's judgment gives the court's verdict a better chance of lasting acceptance, for God is uniquely qualified to settle authoritatively just those cases most difficult for human tribunals. Such cases might hinge on an act committed in secret without witness[33] or concern the manner of commission, rather than the admitted fact. When the rift runs deepest, the community requires an especially harsh and spectacular method of seeking God's judgment, comprising more than an element of punishment.[34] The decision about proof is the crucial step to which all else is subordinate. Courts enjoyed an unexpectedly broad freedom of maneuver. Suitors might propose a whole range of draft judgments before the court chose one and stipulated terms for the performance of proof. Each part of the judgment was important. In a world where no man entirely evaded belief, a conscience unable to accept fully the wording of the oath could cause utter failure in a test that would otherwise be confidently handled.[35] Before the test, the proband was cloistered away from the everyday world of his community and submitted to intense psychological pressure.[36] By now it was common knowledge what result was desired. Even the parties knew. Concord, or straight confession and capitulation, remained possible and indeed frequently occurred right up to the final moment.[37] In a sense they were the most satisfactory conclusion to the case. A *iudicium* actually performed meant obstinate disputants, a quarrel that might yet revive. Men had to hope that the rare *spectaculum* of a "good ordeal" would mercifully release tensions and reinforce the community's standards of proper behavior. Otherwise, trouble might recur in the future. Hence the final moment,

32. *English Historical Documents, c. 500–1042*, vol. 1, ed. D. Whitelock (London, 1955), no. 102 (p. 502): "Then we all said it was a closed suit when the sentence had been fulfilled. And, Sire, when will any suit be ended if one can end it neither with money nor with an oath? And if one wishes to change every judgement which King Alfred gave, when shall we have finished disputing?"

33. S. Kuttner, "Ecclesia de Occultis non iudicat," in *Actus Congressus Iuridici Internationalis, Romae . . . 1934*, vol. 3 (Rome, 1936), pp. 227–46, esp. 230–33, indicates the continuing problem for canonists of facts hidden to all but God. *Peter Abelard's Ethics*, ed. D. Luscombe (Oxford, 1971), pp. 38–40, 42–44, gives one answer to the famous *questio* about whether a judge should give judgment according to the *allegationes* or his own knowledge. These theoretical difficulties only arose when God ceased to judge through the ordeals.

34. This is the justification for the phrase "fraught with danger" in the definition above, at n. 8. It is not applicable to all ordeals but may become truer as the ordeal declines; see further below.

35. The scenes in the Tristan stories are the best known literary illustrations of sensitivity to the precise wording of oaths. This literary depiction of a God who could be thus easily fooled may be a late reflection of genuine problems of conscience. For an example, see above, at text accompanying n. 11. Trial accounts show the care taken in decisions about the formulation of proof.

36. Brown, "Society and the Supernatural," p. 138.

37. Halphen, "La justice en France," pp. 189–91.

when the court perceived the result of God's judgment (occasionally, as at Calne, with surprising effect), was of paramount importance.

In a world of this type, trial by ordeal performs, I believe, several sensible functions in a useful manner. Admittedly our model is idealized. Not even in an ideal world could all cases follow the exact lines sketched. For one thing, institutions have a life of their own. A device like the ordeal, rational within the particular social and intellectual context where it originated, often finds new and seemingly less appropriate applications. For example, in 1077 a duel (and perhaps the fire ordeal) was held to choose between the Roman and Mozarabic liturgies.[38] However, the basic argument remains unaffected. In any case, close examination of individual anecdotes will deepen our generalized analysis.[39] In addition, early Europe certainly retained much local variation in ordeal forms and customary guidelines for the courts' judgments. All reservations acknowledged, much historical evidence about the judgment of God now becomes comprehensible without the need to dismiss early Europeans as savages bereft in this respect of rationality.[40] In its context the ordeal is rational and remains so until the transformation of its world demands a new rationality.[41] One major contention of this essay is that the transformation of northern European society during the eleventh and twelfth centuries was a main cause of the ordeal's transformation in England and generally. Before we consider how these changes occurred, one final point about law in the world of the ordeal demands attention.

Readers trained in modern law may have wondered at the rather casual dismissal of substantive law in the model. Are they asked to believe that in medieval courts everything was quasi-political and undivided, and thus lacked some of the essential distinctions around which most modern law is organized? The answer is that learned men were vaguely aware of such problems from Roman law, directly or through canons of the church.[42] But such sophisticated learning was scarce and not influential; it was usually inappropriate to society's needs. No distinction between

38. Morris, "Judicium Dei," p. 99, n. 10.

39. The complete anecdotes are much more illuminating than any brief citations suggest. When I return to this subject, it will be to supplement analysis with texts. One excellent example is Herman of Laon, *De Miraculis S. Mariae Laudunensis*, III, 28, in J.-P. Migne, *Patrologiae cursus completus: Patres ... ecclesiae latinae*, 221 vols. (Paris, 1844–64) (hereafter cited as Migne, *PL*), 156:1011–12; and Guibert of Nogent, *De Vita Sua*, III, 15, ed. John F. Benton, trans. C. C. Swinton-Bland (New York, 1970), pp. 207–9, on the theft of cathedral treasures at Laon.

40. Rebecca V. Colman, "Reason and Unreason in Early Medieval Law," *Journal of Interdisciplinary History* 4 (1974): 571–91.

41. Steven Lukes, "Some Problems about Rationality," *European Journal of Sociology* 8 (1967): 247–64. The calculating *ragione* whose origins are traced by A. Murray, *Reason and Society in the Middle Ages* (Oxford, 1978), is what is at issue here.

42. Early European laws seldom drew a sharp distinction between criminal and civil law, as Roman law and modern systems do. The entry of this distinction into currency about the end of the twelfth century is another pointer to the nature of the changes at that time. I use

fact and law is necessary when formulating questions for the omniscient Deity's answer. God in an ordeal declares that the litigant is *justus* or *justificatus* or perhaps *culpabilis* or *incredibilis*[43] in an effortless mix of factual and legal/moral questions. Such a system encourages neither scientific factual investigation nor analysis of substantive law; these remain secondary considerations for the world of the ordeal that its law is not designed to treat. Not until the triumphant revival of the learned laws in the eleventh and twelfth centuries were such distinctions again current in the courts, to become entrenched swiftly as central criteria of a respectable, scientific legal system.[44] Men schooled in these avant-garde ideas sneered at the ordeal critically. But by this time, the ordeal and its world were already disappearing.

The present essay cannot hope to describe or even sketch the vast changes associated with the renaissance of the twelfth century, which are pertinent to the transformation of legal proof. Certainly the quickening of communications and the extension of political units able to wield more than local power, in particular, influenced the timing and pace of change. Here we concentrate on the general pattern. As the world of the ordeal atrophied, men became able to create new social arrangements. The old ordeals were progressively less useful as communities' horizons became less restricted. Their use indeed continued, but in circumstances where the idea of God's judgment was more a fifth wheel than a central theme.[45] Or men cynically imposed harsh ordeals as a deterrent or quasi punishment. Frederick II's famous exposition of the circumstances in which he was prepared to retain trial by battle demonstrates this point: "It is not remarkable that we subject defendants in treason, murderers by stealth and poisoners not so much to judgement as to terror by combat . . . [because] we desire that murderers of this kind should be put in the public view of men under a fearful test as an example to others."[46]

"civil" actions crudely to refer to suits between party and party before the mid-twelfth century.

43. I. Zajtay, "Le Registre de Varad: Un monument judiciaire du début du 13e siècle," *RHDFE*, 4e sér. 32 (1954): 527–62, at 547, 548 ff. At the hot iron of Varad, Hungary, a proband was either *justificatus* or burnt!

44. Marsilio of Padua, *Defensor Pacis*, II.x.4–6, ed. C. W. Previté-Orton (Cambridge, 1928), pp. 200 ff., gives an excellent account of how later law functioned around the distinction between fact and law—and he was aware that earlier conditions were different; cf. ibid., I.iii.4; and A. Gewirth, *Marsilio of Padua*, 2 vols. (New York, 1951), 1:140–41. Gratian, *Decretum*, Dist. 29, q.1; C.15, q.6, c.1 and gl. *que fiunt*; C.23, q.8, c.14 and gl. *homicidium*, broadcast the distinction in the twelfth century.

45. Written record of ordeals is always exceptional. Dr. C. J. Wickham makes the point that, though feud, oaths, and trial by battle (but no old ordeals) remained common in Italy well into the later Middle Ages, almost all recorded court cases are represented as turning on documents and evidence. This strengthens my view that ordeal survivals were more numerous than our evidence for them. Cf. below, n. 161.

46. *The Liber Augustalis*, II.xxxiii, trans. James M. Powell (Syracuse, N.Y., 1971), p. 93; cf. H. Conrad, "Das Gottesurteil in den Konstitutionen von Melfi Friedrichs II von Hohenstauffen," in *Festschrift . . . W. Schmidt-Rimpler* (Karlsrühe, 1959), pp. 9–21. This tendency for the ordeal to end up as a criminal proof of last resort is well illustrated by

The systematic collection of information as the basis of reasoned conclusions, a familiar practice in private everyday life, was now more frequently applied to public affairs. Gradually but inevitably, people realized the limitations of the old ordeals in the new social context. Once they had distanced themselves from the old system, albeit with difficulty, they could finally, from their new perspective, risk its complete rejection. This process did not occur overnight.[47] It was at least a century and a half old in 1215 when the Fourth Lateran Council proclaimed the church's official disapproval. "Civil" ordeals were probably extremely rare in the West when the Council met. Indeed, the canon did end the criminal ordeal, after anxious debate in Denmark and England on the form of its replacement,[48] but even these criminal ordeals had long functioned less as an inquiry into truth than as a sanction. The duel, though apparently condemned alongside the water and iron, was unaffected; its use actually revived in some areas later in the century.[49] In Navarre the prohibition merely replaced the officiating priests with lay bailiffs.[50] The Lateran canon symbolized the departure of the last vestiges of respectability from an already discredited institution. Deprived of a welcome in high-class circles thereafter, the old ordeals drifted ever outwards and deeper into the countryside, into backward areas where conditions could still sometimes approximate to that older "world of the ordeal." Miracle stories and vernacular literature[51] attest to their retention within the popular consciousness, to reemerge sporadically under favorable conditions.[52]

The supposed preeminence of 1215 in the history of ordeals largely arises from a widely held view about the reforming canon's "intellectual

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England (see below, at nn. 114–27 and accompanying text). See also Jean-Marie Carbasse, "Le duel judiciaire dans les coutumes meridionales," *Annales du Midi* 87 (1975): 387–88; and, for customs similar to Frederick II's rule, ibid., pp. 392, 399, and nn. 33, 62.

47. Georges Duby, "Recherches sur l'evolution des institutions judiciaires . . . ," in his *Hommes et structures du moyen âge* (Paris, 1973), p. 40, says that ordeals were already rare in eleventh-century Burgundy, though not in other provinces.

48. R. C. van Caenegem, "La preuve dans le droit du moyen âge occidental: rapport de synthèse," in *La preuve*, pp. 715 ff., 718, 730, n. 4; see also below, at text accompanying nn. 189–90. Scotland did not formally abolish the ordeal until 1230 (Ian Douglas Willock, *The Origins and Development of the Jury in Scotland*, Stair Society, vol. 23 [Edinburgh, 1966], pp. 23–26).

49. John P. Dawson, *A History of Lay Judges* (Cambridge, Mass., 1960), pp. 49–50; Boulet-Sautel, "Aperçus," pp. 295–99, 300–301, 315–25; Carbasse, "Le duel judiciaire," pp. 391, 396, and nn. 29, 51; Q. Griffiths, "New Men among the Lay Counsellors of St. Louis' Parlement," *Medieval Studies* 32 (1970): 234–72, at 255–56, 266.

50. Van Caenegem, "La preuve," pp. 719, n. 2, 719–25.

51. For examples, cf. G. G. Coulton, *Life in the Middle Ages*, 4 vols. (1928; reprint ed., Cambridge, 1967), 1, no. 93; and Caesarius of Heisterbach, *The Dialogue of Miracles*, bk. I, cc. 16–17, bk. X, cc. 25–26, trans. H. von E. Scott and G. C. Swinton-Bland, 2 vols. (London, 1929), 1:148 ff., 2:202 ff. See also Nottarp, *Gottesurteilstudien*, pp. 116–17; Hans Fehr, "Die Gottesurteile in der deutschen Dichtung," in *Festschrift Guido Kisch* (Stuttgart, 1955), pp. 271–81; and R. J. Hexter, *Equivocal Oaths and Ordeals in Medieval Literature* (Cambridge, Mass., and London, 1975).

52. Lea, *Superstition and Force*, pp. 328 ff., gives some early examples of "popular"

preparation." Historians have rightly sought this among the writings of the previous generation critical of the institution.[53] But they have too easily accepted the writers' own assessment of themselves as reforming critics. Consequently, our own first reactions to a long-gone, very alien system are mistakenly attributed to the late twelfth century. Men still struggling then to escape the old thought-world could not consider it clearly or dispassionately. Even Peter the Chanter, for whom the ordeal was a kind of obsession, concentrated as much on its connection with sin and bloodshed as on his attempted "scientific" refutation.[54] Before him, few westerners hazarded an outright denial of the ordeal's validity in terms comparable to the repudiations by outsiders uncommitted to western intellectual premises.[55] The total refutation of an institution like the ordeal from within its own thought-world is next to impossible until intellectual eyes are opened by what is actually happening around them. The materials habitually assembled by scholars to illustrate the crumbling of the old ordeals under rational assault are better understood as late and untypically learned aspects of a long line of criticism that existed throughout the ordeal's history. But outside the intellectual revivals of the ninth and eleventh to twelfth centuries, they were seldom written down. The extreme moral concern of many writers is indisputable, but greater than their actual influence. At the most they would encourage readers to reform and revise, rather than to reject, the ordeals. Their arguments generally boil down to a secondary elaboration that left the system intact; that is, they do not assert roundly that the idea of God's judgment is a fraud which could never act as it claimed to do. They declare the ordeal's use inexpedient on the ground that the temptation of God is wicked; or they argue that it is so susceptible to trickery, it never in fact reveals

ordeals. See also K. V. Thomas, *Religion and the Decline of Magic* (London, 1971), chap. 8.1. Dr. J. D. Walsh informs me that comparable ordeals continued at a popular level in remote parts of Britain until the nineteenth century; see M. A. Courtney, *Cornish Feasts and Folk-Lore* (Penzance, 1890), pp. 68–70. Dr. P. Doob brought to my knowledge the most recent offer of which I am aware, from the *Toronto Globe and Mail*, 16 November 1973!

53. John W. Baldwin, "The Intellectual Preparation for the Canon of 1215 against Ordeals," *Speculum* 36 (1961): 613–36, is a learned survey of lawyers and theologians that reaches different conclusions from those in the text here. See further his valuable *Masters, Merchants and Princes*, 2 vols. (Princeton, N.J., 1970), 1:323–32.

54. Baldwin, *Masters, Merchants and Princes*, 1:326–29.

55. Compare Frederick II's unsentimental attitude (see above, at n. 46 and accompanying text) with that of a Jew (e.g., Jacob Katz, *Exclusiveness and Tolerance* [Oxford, 1961], pp. 52–53, 96; or Jacob R. Marcus, *The Jew in the Medieval World* [1938; reprint ed., New York and Philadelphia, 1964], p. 128), or a Moslem (e.g., *Memoirs of an Arab-Syrian Gentleman . . . Usamah ibn-Munquidh*, trans. Philip K. Hitti [1930; reprint ed., Beirut, 1964], pp. 167–69), or a Greek (e.g., Charles Diehl, "La société byzantine à l'époque des Comnènes," *Révue historique du sud-est européen* 6 (1929): 197–280, at 275. All three are credulous in other texts (e.g., Diehl, "La société byzantine," pp. 249 ff.) but perceive and reject the nonsense of a different culture. *The Table Talk of a Mesopotamian Judge*, trans. D. S. Margoliouth, Oriental Translations Fund, n.s., vol. 28 (London, 1922), pp. 187–89, is not to be missed as an illustration of tenth-century rationalism in the East.

genuine judgments of God.[56] These ecclesiastical gentlemen had nothing to teach experienced laymen about the dodges that fixed the results in court; they said little new.[57] The ordeal must always have attracted complaints. In every system of law, failed litigants blame their woes on fraud and mismanagement, or anything else except their own lack of a good case. These grumbles at injustice—for the most part unevidenced in the period[58]—are not easily distinguished in the extant texts. Criticism rarely touches upon the logic of the process. We may concede the odd exception, but still feel that the arguments found in the writings of the eleventh and twelfth centuries were insufficient in themselves to create so important an institutional change.

In any case the received opinion relies once again on another unargued assumption, that the initial stimulus toward change originated with writers of the time, men with some distant resemblance to modern academics like ourselves! On reflection, thinkers and intellectuals are rather unlikely to have given the lead. In any age they usually explain with the benefit of hindsight change already initiated elsewhere. In the eleventh and twelfth centuries, their representatives were all within the church, an improbable engine room of radical change. Churchmen felt the weight of tradition too directly. As keepers of authority they could not ignore awkward scriptural texts, which they had painfully to interpret out of contention.[59] The adultery test of bitter waters, for example, still reads in the Vulgate Latin of Numbers, chapter 5, like a medieval ordeal text. In the late twelfth century, some readers happily applied it—under the influence of apocryphal literature like the so-called Pseudo-Matthew—even to the exceptional marriage of Joseph and Mary.[60] As

56. The suggestion that Charlemagne encouraged duels as an alternative to oaths, because fighting was better than perjury (Ganshof, *Frankish Institutions*, p. 88 and n. 130), implies a view on the temptation of God different from that publicized later.

57. Many dodges are mentioned in the penitentials. See, for example, C. Vogel, *Le pécheur et la pénitence au moyen âge* (Paris, 1969), p. 107 for Burchard of Worms; and Adrian Morey, *Bartholomew of Exeter, Bishop and Canonist* (Cambridge, 1937), pp. 241–42, 258–60.

58. Medieval texts mention the skeptic who doubts a miracle only very occasionally, as when the saint puts him down; see John of Salerno, *Vita Sancti Odonis*, II.xxii (Migne, *PL*, 133:72–73), trans. by G. Sitwell as *St. Odo of Cluny* (London, 1958), pp. 65–66, for an example. The grumbler similarly escaped publicity.

59. Marie-Thérèse d'Alverny, "Astrologues et théologiens au XIIe siècle," in *Mélanges . . . M. D. Chenu* (Paris, 1957), pp. 31–50; *The Letters and Charters of Gilbert Foliot*, ed. Adrian Morey and C. N. L. Brooke (Cambridge, 1967), no. 237. In 1112 the noted theologian Master Anselm of Laon suggested the use of the cumbersome procedure from Joshua 7:14 to locate the thief of cathedral treasure. Other, more practical views prevailed (Herman of Laon, Migne, *PL*, 156:1013).

60. Compare Priester Wernher, *Maria*, ed. Karl Wesle, 2d ed. (Tübingen, 1969), pp. 165–73 (lines 3267 ff. of MS D), written in 1172 in south Germany, with Pseudo-Matthew, *Liber de Ortu B. Mariae et Infantia Salvatoris*, cc. 10–12, ed. C. de Tischendorf, in *Evangelia Apocrypha*, 2d ed. (Leipzig, 1876), pp. 71–75, a possible source. See also H. Fromm, "Quellenkritische Bemerkungen zum Marienleben des Priesters Wernher," *Annales Academiae Scientiarum Fennicae*, ser. B, 84 (1954): 326–27. I am grateful to Prof. Peter Ganz and Dr. R. Combridge for help here.

the learned canonist Gratian included Numbers 5:12–28 in his authoritative *Decretum*, it is not surprising that he and his fellow canon lawyers were slow to exclude the vulgar ordeals entirely.[61] And less intellectually advanced ecclesiastics remained conscious that they, who lacked the physical power of their lay neighbors, had sometimes to depend on the threat of the miraculous to protect their property and position. The twelfth century was almost as notable for the collection of relics[62] and wonder-tale miracles[63] as for intellectual inquiry. Relics indeed figure prominently at every level of society; from courts like those of Henry II and Frederick Barbarossa, and along pilgrimage routes to Compostella or the East, men fought for relics because they believed in their power. The same Lateran Council that outlawed in the ordeal one type of controlled miracle approved another by sanctioning the doctrine of transsubstantiation. Thus the twelfth century still produced a trickle of approving *exempla* about the ordeal, as well as a few cases where men confident of the justice of their cause spontaneously offered to submit to the judgment of God by the hot iron.[64]

The erroneous belief that change resulted from positive decisions has encouraged a late dating. Although explicit decisions to change existing custom after public debate may have been more common than they seem from records, genuine legislation remained abnormal before the thirteenth century. Consequently, the best publicized pronouncements about the ordeal arrive late in our story, after a slow, silent revolution that must be deduced from fragmentary direct evidence and by reading between the lines of well-known texts. The prime movers are men of affairs—doers, not writers—who seldom get to tell their own tale. They were in the eleventh century already seeking new and better ways to organize administration and to maintain order in their own best interests. In the field of law, the flexibility of the ordeal system assisted their efforts. Courts and their judges could select their preferred proofs according to the need of

61. Gratian does not seem to me to tackle *purgatio vulgaris* directly in *Decretum*, C.2, q.5, which is concerned with the purgation of a bishop. Cc. 20–26 form an appendix of texts that do tell against lay ordeals, though c. 21 is Numbers 5:12–28. Many of the texts in the *questio* could be used to illustrate the world of the ordeal. Gratian's views are extraordinarily hard to establish to the satisfaction of, for example, Prof. Stephan Kuttner. Because I do not yet convince him, I must return to the subject on another occasion. Cf. Jean Gaudemet, "Les ordalies au moyen âge: doctrine, législation et pratique canoniques," in *La preuve*, pp. 99–135, esp. 123 ff.

62. C. Morris, "A Critique of Popular Religion: Guibert of Nogent on the Relics of the Saints," *Studies in Church History* 8 (1971): 55–60, and K. Leyser, "Frederick Barbarossa, Henry II and the hand of St. James," *English Historical Review* 90 (1975): 481–506, at 487–88, give references. Also, Hermann-Mascard, *Les réliques des saints*, pp. 225–34, illustrates saintly property defense after human efforts proved inadequate.

63. For example, Southern, "The Place of England in the Twelfth Century Renaissance," pp. 171–74, surveys miracle collections. See P. Rousset, "La croyance en la justice immanente à l'époque féodale," *Le moyen âge* 54 (1948): 225–48; and the interesting remarks of Benedicta Ward, S.L.G., "Miracles and History: A Reconsideration of the Miracle Stories Used by Bede," in *Famulus Christi*, ed. Gerald Bonner (London, 1976), pp. 70–76.

64. Lea, *Superstition and Force*, pp. 356–57; cf. below, at nn. 137 and 147 and accompanying text.

the moment. Now and again we glimpse their criteria,[65] but the process is mostly unobservable.[66] The harsher old ordeals were unnecessary for the handhaving thief, whose guilt was manifest from the circumstances of his capture. Similarly, courts might use ordeals merely to crush the already condemned. As skill in the assessment of documents and evidence improved (perhaps, too, as court holders increased their power to sway decisions), resort to the ordeal correspondingly waned. One can guess that in communities approximating to the perfection of our model, ordeals had been common enough to rouse people's expectations, but not so commonplace that the spectacle lost its drama and tension. The now rarer ordeal spectacles progressively lost their glamor and degenerated into physical tests without rational context or justification.

In retrospect, the apparently deliberate general policy of change was merely the cumulative effect of many individual acts that arose from actual cases.[67] Because the great questions were never explicitly raised, there was little backlash; people seldom noticed the disappearance of their traditional ways. Where individuals led, whole groups followed. In the same kind of way that Flodoald and the rest had once sought to buy one slave off from the hot iron at Calne, whole communities now purchased from princes who could enforce their grants exemptions and the right to meet allegations with oaths instead of ordeals. As well as familiar municipal privileges, eleventh-century grants to the churches, Jews, and so on attest to the same point.[68]

65. See Galbert de Bruges, *Histoire du meurtre de Charles le Bon, Comte de Flandres (1127–1128)*, ed. H. Pirenne (Paris, 1891), esp. chaps. 76, 87, 105, 108, for the story of Lambert of Aardenburg, a guilty participant in the assassination, who survived the hot iron only to die later in battle. Galbert decided that God had spared Lambert in the hope that he would repent, but later let him die after he had acted arrogantly and without any sign of contrition. Galbert probably wrote the whole work to puzzle out the workings of divine Providence on his town in the disturbed period during the collapse of order after the count's death. He was worried by Lambert's acquittal, but concluded that God's ways were not those of men. "Unde fit, ut in bello alter inquus prosternatur, in judicio aquae vel ferri iniquus, penitens tamen, non cadat" (p. 156). Probably Galbert preferred to advocate battle for future use.

66. Most attempts at statistics use the thirteenth-century register from Varad, Hungary, on which see Zajtay, "Le Registre de Varad," pp. 527–62, and van Caenegem, "La preuve," pp. 699–700. The results are interesting but do not advance knowledge in the critical areas. We know very little even about the proportion of cases that went to the different proofs.

67. The final stages of the process in the English Curia Regis can be documented; see below, at n. 190 and accompanying text.

68. There seems to be no general survey of exemptions. R. C. van Caenegem, *The Birth of the Common Law* (Cambridge, 1973), p. 70, cites early examples from the Netherlands; and K. Helleiner, "Osterreichs älteste Stadtrechtsprivileg," in *Beiträge zur Stadtgeschichtsforschung* (St. Pölten, 1959), pp. 49–57, presents the earliest Austrian example. Carbasse, "Le duel judiciaire," is a model area study that goes beyond towns. *Materials . . . Thomas Becket*, vol. 4, ed. James Craigie Robertson, Rolls Series (London, 1879), p. 148, a plea that clerics might receive equal exemption with Jews and burgesses, suggests the way aspirations spread; and *The Chronicle of Jocelin of Brakelond*, ed. H. E. Butler (London, 1949), pp. 100–101, is a particularly instructive text. For English towns, see Mary Bateson, ed., *Borough Customs*, vol. 1, Selden Society, vol. 18 (London, 1904), pp. 32–36; and Bigelow, *History of Procedure*, pp. 296, 323 ff.

The demise of the old ordeals was, then, largely a straight shift from some kinds of proof to others, the consequence of commonsense choices unencumbered by much theory. New cases were found to be soluble by existing techniques without the need to consult God; few new techniques, if any, were invented. God was not needed to determine how things were at a particular time, for example in the Domesday Inquest. Boundaries or the dues previously paid were best established by the men who had experienced them. Though their oath was an added safeguard, the Domesday inquiry is rightly regarded as factual. But the mystery of seisin and right, for example, or the question of who *ought* to hold land under dispute in Domesday *invasiones*, was much less easily abstracted from the divine judgment. By the twelfth century many laymen so fully believed in the efficacy of the new methods of factual inquiry that they happily applied them to every question, perhaps even the choice of a wife! The spread of rational methods of inquiry is one of the age's most exciting aspects. Yet when schoolmen like Abelard applied these novel approaches to matters like the Trinity, they appalled and angered powerful conservatives. Similarly, the submission of property rights to human factual judgment with no appeal to God might have raised objections, though at a lower level. In order to avoid traditionalist reproaches, medieval innovation often had to disguise itself as a revival of good old custom, or pose as an adaptation of accepted forms.[69] Legal innovators may have tried to conceal their supersession of the old ordeal in some such fashion. The English jury of the late twelfth century could plausibly be represented as a new type of ordeal in answer to conservative challenge. Similar confrontations may have occurred elsewhere, too.[70]

Legal enactments that specify the use of the ordeal first become common in England about the middle of the tenth century. The explanation for their appearance at this moment is twofold. For the first time in England, a comprehensive Christianization of the ordeal was attempted,[71] along Carolingian lines and under direct Continental influence. Soon afterwards a royal drive was mounted against theft and disorder, also influenced from abroad and unparalleled before the Angevins.[72] The compilers of the relevant law codes concentrated on specific problems like cattle theft and never intended comprehensive coverage. "Though

69. B. Smalley, "Ecclesiastical Attitudes to Novelty, c. 1100–c. 1250," *Studies in Church History* 12 (1975): 113–31.

70. R. H. Bloch, *Medieval French Literature and Law* (Berkeley and Los Angeles, 1977), chaps. 1–2, which contains much that is pertinent to the foregoing, became available to me only after this paper was completed.

71. The ordeal was by no means new to tenth-century England. See *Ine*, 37, and the commentary of F. L. Attenborough, *The Laws of the Earliest English Kings* (Cambridge, 1922), pp. 187–89.

72. Here and in much that follows about Old English law, I lean heavily on the preliminary conclusions of Patrick Wormald, who has very kindly permitted me to see some early drafts of his work on English legislation. See nn. 24, 26, above, for publications to date. I hope I have not distorted his views in making them my own.

Anglo-Saxon codes, unlike those of the Continent, were issued in the vernacular, they probably remained marginal to what was always a largely oral system of pronouncement and enforcement. There were demands for the use of the *domboc*, but no recorded Anglo-Saxon case cites or refers to written law, and the manuscript tradition is dependent on very few preconquest scriptoria and twelfth-century collections."[73] These *leges* refer to the ordeal *only* in the context of theft. In all the enactments concerning "civil" actions for compensation, there is no mention of the ordeal. This is surprising, and one hesitates to argue from silence in such a matter. Yet it seems likely that the Old English legal system may have struck eleventh-century Norman observers as strange almost as much for its lack of "civil" ordeals as for its neglect of the judicial duel. The implication is that Old English "civil" procedure had centered on oaths.

Detailed study of the ordeal is consequently limited to the treatment of proof in theft accusations, which is useful enough for present purposes. Preferably, an accuser would lay his reputation against that of the suspect before God.[74] He had to make at least a prima facie case before the accused could be put to his law.[75] The court no doubt listened to oral argument before deciding on the details of the accuser's fore-oath[76] and the proof to be made by the accused himself. It would consider the gravity of the alleged offense[77] and the social rank of the parties,[78] but the crux of the argument was reputation, especially that of the accused in his own community. The laws impose different treatment on three categories of accused. He could class as a *getreowe* man if he persuaded his lord and two thegns to certify on oath that he had not recently failed an oath or ordeal.[79] The man whose lord dare not so swear thus revealed himself *ungetreowe*[80] or *tihtbysig*,[81] of so doubtful a reputation that

73. C. P. Wormald, "Angelsächsisches Recht," in *Artemis Lexicon des Mittelalters* (Munich, 1978).

74. For example, 2 *As.*, 23.2. But 3 *Atr.*, 4–6, follows 3 *Atr.*, 3, the much discussed text that still seems to provide for communal accusation. The laws say little of what happened when an accuser was lacking. See most recently R. C. van Caenegem, "Public Prosecution of Crime in Twelfth-Century England," in *Church and Government in the Middle Ages . . . Essays Presented to C. R. Cheney*, ed. C. N. L. Brooke, et al. (Cambridge, 1976), pp. 41–76.

75. The notion that the simple word of an accuser was insufficient to put a man to his law was already old in the twelfth century. Magna Carta, c. 38, insisted that royal officials conform too; note the changes in c. 31 of the 1217 reissue (Sir Frederick Pollock and Frederic W. Maitland, *The History of English Law before the Time of Edward I*, 2d ed., reissued with a new introduction and select bibliography by S. F. C. Milsom, 2 vols. [Cambridge, 1968] [hereafter cited as *P&M*], 2:605–6; van Caenegem, "Public Prosecution," p. 71; the Norman *Très ancien coutumier*, c. 40, ed. E. J. Tardif, *Coutumiers de Normandie*, vol. 1 [Rouen, 1881], p. 34). Some French customs were more willing to burden an accused (Boulet-Sautel, "Aperçus," pp. 282–83; Bongert, *Recherches*, pp. 184–85).

76. *LHP*, 14, is a full discussion of fore-oaths. See *Gesetze*, 2:546, s.v. *Klageeid.*

77. 8 *Atr.*, 27; 2 *Cn.*, 51.

78. *LHP*, 67.2; cf. below, at n. 184.

79. 1 *Atr.*, 1.1–4; 2 *Cn.*, 22, 30; *Leges Willelmi*, 14; *LHP*, 64.9, 67.1.

80. 2 *Cn.*, 22, 30, 33, etc.; *LHP*, 64.9a, 67.1.

81. Van Caenegem, "Public Prosecution," p. 48 n, reviews the concept of the *tihtbysig*

much weightier proof was required to clear his name. Worst of all, the friendless man who had no one to speak for him consequently had no reputation at all within this community.[82] He would be imprisoned until he could undergo his ordeal. In contrast, the *getreowe* man (or *credibilis*, as the Latin texts say) might face only a simple oath or ordeal, as opposed to the triple oath or ordeal imposed on the *ungetreowe*. This distinction between simple and triple proof is explained by the equation in the texts of a simple oath with one pound weight of hot iron, or a triple oath (thirty-six men) with three pounds or sixty shillings of silver.[83] The crucial choice between oath and ordeal might seal a suspect's fate. Although the texts do not illuminate the decision process, they do stipulate the mode of ordeal to be used in certain specified cases.[84] The relevant clauses of the laws probably cannot have served as a blow-by-blow guide for the reeves and others who presided over trials. Rather, they established rules of thumb for the general guidance of courts. The seriousness of the alleged theft and the parties' standing within the community certainly weighed strongly in the court's deliberations, as well they should. But of course more worldly, quasi-political considerations, of the kind apparent in Old English case records, also influenced their verdicts.[85]

Once the court had agreed on formal award of proof, the parties' sureties were expected to ensure that the principals reappeared on a later day fixed for the ceremonial attempt to make proof,[86] by the ordeal[87] or the swearing of oaths. Sundays and holy days were deemed inappropriate for such a solemn event.[88] The accuser swore his fore-oath and witnessed the accused's attempt to make his law.[89]

The anonymous but probably official version of these ceremonial steps

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man. Julius Goebel, Jr., *Felony and Misdemeanor* (1937; reprint ed., Philadelphia, 1976), pp. 322 ff., is illuminating on the connection between the ordeal and the concept of *infamia*, for which see also below, at n. 168 and accompanying text.

82. 2 *Cn.*, 35; *LHP*, 65.5.

83. 2 *As.*, 4–6; 5 *Atr.*, 30; 2 *Cn.*, 57; *LHP*, 67.1b–c. *Gesetze*, 3:603, s.v. *Ordal*, says that the distinction is unique to England.

84. 3 *Atr.*, 6, says that the choice is the accused's, but in the special circumstances of *Blas*, 2 (ca. 930–75), the choice apparently went to the accuser.

85. Frederick Pollock, "English Law before the Norman Conquest," in *Select Essays in Anglo-American Legal History*, vol. 1 (Boston, 1907), pp. 88–107, at 92–94, asserts categorically that Old English procedure "was governed by traditional rules of the most formal and unbending kind" against an older view that saw a more natural informality in the popular courts. See also James Bradley Thayer, "The Older Modes of Trial," in *Select Essays in Anglo-American Legal History*, vol. 2 (1908), pp. 368 ff. (also in his *A Preliminary Treatise on Evidence at the Common Law* [Boston, Mass., 1898]). Cf. the influence of Declareuil (1898–99) on Besnier, "'Vadiatio legis et leges,'" pp. 110–13.

86. *Gesetze*, 3:601, s.v. *Ordal*, cites 2 *As.*, 23.2, and *Ordal*, 4, as authority for another English peculiarity.

87. 1 *Atr.*, 1.1–7.

88. 5 *Atr.*, 18; 6 *Atr.*, 25; 1 *Cn.*, 17; *LHP*, 62.

89. 2 *Cn.*, 22, removed previous exceptions; see also *LHP*, 64.1, 9b–c. *Leges Willelmi*, 14.3, would make an accuser swear that he acts for *jus suum*, not *odio*.

toward the ordeal, given in the tenth-century tract *Ordal*,[90] accords closely with the prescriptions in the laws. If read together with the extant liturgical *ordines* for the holding of ordeal ceremonies, a convincing picture emerges of what *may* have happened. However, even more than the *leges*, liturgical manuscripts present the historian with severe problems of interpretation.[91] All our English rituals belong to one large Carolingian family, and may indeed descend from a single northern French archetype imported early in the tenth century.[92] Even the postconquest ones are associated with this same family. The greater detail found in these later rituals produces a rounder, more colorful picture. This, however, must not be read back into the Old English period, because the Norman compilers undoubtedly wrote in a more self-conscious vein, under occasional challenge from skeptical laymen and others. They therefore added fresh material to justify the procedures they laid down.[93] But even with the strictly contemporary rituals, evidence of actual use is lacking.[94] We can say only that they are generally compatible with stories like that of the trial at Calne. No charters, for example, enable one to match actual procedure with liturgical prescriptions.[95] And even when one assumes that an *ordo* was followed in a particular case, many details remain unclear. The celebrant priest retained considerable freedom of choice in the most densely written ritual. Some ordeal *ordines*, for example, offered him alternative forms of *oratio* to the proband;[96] none covers every

90. *Gesetze*, 1:386–87 (ca. 936–50 or a little later). Note that this text envisages boiling water as well as hot iron. Cf. 2 *As.*, 23, 23–2.

91. Cf. J. L. Nelson, "Ritual and Reality in the Early Medieval Ordines," *Studies in Church History* 11 (1975): 41–51: "He who consults the early medieval *ordines* should be wary of imposing on the age of liturgy the preoccupations of an age of law" (p. 51).

92. This is argued by Patrick Wormald (see above, at n. 72) from Liebermann's *ordines* I–IX (*Gesetze*, 1:401–17). *The Portiforium of St. Wulstan*, ed. A. Hughes, Henry Bradshaw Society, vol. 89 (London, 1956), pp. 166–72, and *Pontificale Lanaletense*, ed. G. H. Doble, ibid., vol. 74 (London, 1937), pp. 108–9, 116–25, are modern editions of some of these in their MS context.

93. *Ordines* X–XVI (*Gesetze*, 1:417–29). Mr. Wormald also relates the Carolingian *ordines* to the issues and texts debated by such men as Agobard of Vienne and Hincmar of Rheims in the early ninth century. Sources for the Anglo-Norman *ordines* were more general and will be hard to identify.

94. Walter Dürig, "Gottesurteile in Bereich des Benediktinerklosters WeihenStephan (Freising) unter Abt. Erchanger (1082–96)," *Archiv für Liturgiewissenschaft* 15 (1973): 101–7, associates the rituals in a late eleventh-century MS with a particular religious house some of whose monks left evidence of coolness toward the old ordeals. He concluded that mere copying is insufficient to prove use. This is of course true, but his evidence does not establish the contrary either.

95. Halphen, "La justice en France," pp. 187–88, cites charters that could be compared with rituals known to have been used in Anjou. Liebermann pointed out (*Gesetze*, 3:239) that Eadmer, *Historia Novorum in Anglia*, ed. Martin Rule, Rolls Series (London, 1884), p. 102 (for which see further below, at nn. 139–42 and accompanying text), uses language quite strongly reminiscent of *ordines* I–II and suggests that Eadmer knew them or something similar. *The Chronicle of John of Worcester, 1118–1140*, ed. J. R. H. Weaver, Anecdota Oxoniana, vol. 13 (Oxford, 1908), p. 30, furnishes full detail of a hot iron ordeal in 1130; the work circulated to other monasteries, one of which (Gloucester) omitted this passage.

96. For example, *ordines* III, 1–2; X, 2.20.

possible variant. At best coverage was incomplete. Like the laws, for instance, extant rituals apparently envisage no "civil" uses; probands are always suspects of serious crimes or adultery.[97] Finally, some parts at least needed translation into English, if the proband were to understand fully and be impressed,[98] for, unlike the laws, *liturgica* are always in Latin.

In short, the rituals must be treated as a small selection from liturgical literature that, despite the number of copies known and their fairly wide geographical spread, might stand revealed as quite unrepresentative of actual practice, could we but view the whole scene. All the same, within the field of royal prosecution for serious crime, the rituals helpfully corroborate our global model in certain respects and prompt at least one reservation. In particular they well illustrate some of the techniques adopted to increase the chances of achieving the desired end. They show, first of all, the effort to abstract the proband from the normal atmosphere of his everyday life. Sequestrated from his community, he had to forego his family, friends, and clothes, and was compelled to spend the few days before his test in prayer and fasting with a priest he did not know as his only company inside a strange church.[99] Meanwhile the ritual begs God to manifest here on earth His divine justice. This may be all the compilers intended, but the priest's every act intensified the moral pressure on the proband. Each stage of the ritual on the day further charged the atmosphere. The priest's exhortatory address could easily be modified to suit the individual case and take advantage of any appropriate sculpture or paintings (the Last Judgment was particularly apt!) in the church. Like the repetitive litanies that followed, it cited biblical precedents to stress God's immanent justice.[100] The blessing of the ordeal equipment called upon God to harm the guilty but spare the innocent. The proband was ushered toward a mass but warned not to accept the Eucharist unless he was innocent; otherwise, he might choke! "May the Lord's body be with you at the proof today," a postconquest ritual adds.[101] Again and again the theme of no escape for the wicked thunders out. The keeper of truth and guardian of the weak will make evident any *maleficia*, and thwart all diabolic attempts to subvert the proof.[102] Despite the supernatural tone and context, I doubt whether compilers or readers intended any clear

97. Unlike the laws, the rituals are silent about accusers or observers from the two parties. Contrast in particular *Ordal*, 4. The laws envisage private accusers as well as perhaps public prosecution (cf. 3 *Atr.*, 3, etc.) or ex officio persecution by reeves and others.

98. *Gesetze*, 3:239, thought this likely, in part on the evidence of Old English glosses.

99. The proband's home village could be some way from the ordeal church. Note that fasting meant a restriction to food and water as defined by the rituals: so much bread, cress, salt, etc.

100. Morris, "Judicium Dei," p. 100.

101. *Ordo* XIII.4.1 and cf. *ordines* III.2.3–4, VII.12.1, and XIII.9.

102. For example, *ordines* I.1, II.3. Cf. *Novae Narrationes*, ed. Elsie Shanks, completed with a legal introduction by S. F. C. Milsom, Selden Society, vol. 80 (London, 1963), B. 13, for the champion's oath on the field in thirteenth-century duels.

distinction between magic and more commonplace tricks and dodges:[103] all equally were of the Devil and would fail if God willed them to do so. Meanwhile the proband was continually reminded of the iron heating nearby when holy water sprinkled on it provoked steam and spluttering, which perhaps exaggerated the temperature it had reached.[104] Only the most resolute of men entertained no second thoughts under this psychological bombardment.

Many no doubt surrendered. Others were now so jittery that they threw away their chance of success. All the while members of the affected community were watching attentively. Whatever the outcome, they too, equally uncomfortable in the alien surroundings, could perceive important lessons. The *spectaculum* presented a visible sign "so that the rest seeing this might be freed from their incredulity through God's mercy."[105] For example, the crucial distinction between fidelity and infidelity[106] had a much wider potential significance than for the suspect and his alleged crime only. Thus were the onlookers imbued with the standards of behavior. Yet at the same time, the resolution of doubt[107] apparently concentrates on the specific allegation more closely than our model suggested. God proclaims a man's guilt or innocence of a particular act in the course of a judgment on the whole man and his soul.[108]

After 1066 the Old English enactments about proof procedure in theft were repeated, ostensibly as living law, in various translations and revisions. The later *leges* are slightly more detailed.[109] England was now dominated by an alien French aristocracy who were not fully conversant with English procedure. The newcomers' possession of their own personal laws was a further minor complication, because French proof customs differed a little from the English ones.[110] The only notable innovation, however, was the introduction of trial by battle.[111] Postconquest

103. Morris, "Judicium Dei," p. 102, takes a slightly different line, which may be compared with evidence he cites later, pp. 106, 108.

104. *Ordo*, XVI.8 (1067–1210).

105. *Ordo*, II.4; cf. *ordines* VII.24, X.2.20.4.

106. *Ordo*, II.2.

107. Cf. n. 106.

108. The statement in Brown, "Society and the Supernatural," p. 127, that "God is revealing 'truth' not any specific fact" should be compared with the text he cites in n. 28.

109. References are mostly in the notes below. *LHP* has slightly more extended treatment: see below at nn. 114–16 and accompanying text. *Wl. Lad.*, 1.2, 2, and *Wl. Ep.*, 4, specify the kind of ordeal envisaged.

110. L. Delisle, "Cérémonial d'une épreuve judiciaire," *Bibliothèque de l'école des chartes* 18 (1857): 253–57, is an interesting early twelfth-century *ordo* from Fécamp including a "book" ordeal. Adolphe Tardif, *La procédure civile et criminelle au XIIIe et XIVe siècles* (Paris, 1885), pp. 90–101, is a fair general survey.

111. I am prepared to believe that the Scandinavian *holmgangr* (single combat) was practised in eleventh-century England, as suggested by C. E. Wright, *The Cultivation of Saga in Anglo-Saxon England* (Edinburgh, 1939), pp. 191–92, despite his reliance on late evidence. Equally, the English were very familiar with the idea of battles as judgments of

ordeal rituals, for example, followed the same sub-Carolingian lines as before.[112] Some conflicts of custom were, nevertheless, inevitable, although under the new regime the two peoples lived mostly apart, each organizing its own affairs. Even limited contacts, however, produced disputes; to avoid chaos, the king himself had to pronounce on the mode of trial. A decree of William I's ruled on the proofs used in certain actions directly concerning royal justice. Frenchmen could offer their accustomed battle against English opponents, but the English could decline it in favor of some other *dom*. But this was no soft option. The accused Frenchman could clear himself with an "unbroken" oath, that is an oath that need not be word perfect. On the other hand, an Englishman faced by a French accusation might evade battle only by offering to carry the red-hot iron.[113]

This decree regulated only those allegations of serious crime like homicide and theft that later classified as appeals of felony. Very little can be learned about "civil" use of ordeals elsewhere. In the century after 1066, the use of the old ordeals probably atrophied except for the repression of crime. Disappearances are hardest of all to document, but the process roughly coincided with the withering away of the old law of *bot* and *wer*. Certainly the twelfth-century *leges* proclaim no great changes from the Old English system. When the compiler of the *Leges Henrici Primi*, for example, appears momentarily to condemn *peregrina vero judicia*, he is mechanically following Pseudo-Isidore.[114] Elsewhere he comfortably accepts the old verities of his Anglo-Saxon sources and advocates ordeal and battle alongside proof by *testes* and oath.[115] He rehearses much of the preconquest material on the subject, adding detail on such matters as the court's discretion in the award of proof.[116]

Although the *Leges Henrici* are less than convincing evidence of practice, in all likelihood use of unilateral ordeals in local courts as the criminal proof of last resort was rapidly becoming their main surviving function. The great twelfth-century rise in the importance of private justice is no objection, for private lords must in any event have been responsible for most of those who went to the ordeal. Even in the tenth century, royal control of theft trials left to them a considerable role and share in the profits. Ethelred's Wantage code had ordered that ordeals always be held in a royal *byrig*, but made *landrica* responsible for putting to the ordeal any suspect whom no one would accuse.[117] In the twelfth

God. But M. Bloomfield, "Beowulf, Byrhtnoth and the Judgment of God: Trial by Combat in Anglo-Saxon England," *Speculum* 44 (1969): 545–59, strangely can produce no good evidence of the duel as a judicial institution.

112. See above, at n. 93.

113. *Wl. Lad.*, 1, 1.1, 2, 3.2; *Wl. Art.*, 6, 6.3; *P&M*, 1:90–91.

114. *LHP*, 31.7a; Downer, *LHP*, p. 135, however, translates as "judgments pronounced by strangers."

115. *LHP*, 45.1a, 87.6; see below, at n. 125.

116. *LHP*, 9.6, 18.1, 45.1a, 64.1 ff., 64.9, 65.3, 72.

117. 3 *Atr.*, 4.2, 6.1.

century private individuals clearly valued the right to hold ordeals.[118] The average baron still wished to order suspects to the ordeal and expected to hold duels regularly at his *caput* to determine disputes over his fees and other pleas.[119] Contemporaries felt that this ability was essential to baronial dignity. Yet the continuance of grants of ordeal rights long after 1215 suggests that they were a franchisal matter, theoretically of royal grant.[120] Furthermore, most of the churches that staged ordeals can be associated with hundreds[121] or hundred groups[122] from before the conquest, or with bishops to whom the Conqueror entrusted control after 1066.[123] Most barons would certainly have resented the idea that they held their ordeals by royal license; yet, royal officials attended nonroyal ceremonies to ensure fair play and execute the king's justice on condemned men.[124] This context of royal theft jurisdiction and the whole public flavor of twelfth-century ordeals makes "civil" usage questionable. Of course the duel was the standard proof in land suits and a variety of other serious "civil" cases.[125] But the evidence most usually cited to

118. Naomi D. Hurnard, "The Anglo-Norman Franchises," *English Historical Review* 69 (1949): 433–60, at 436–37.

119. F. M. Stenton, *The First Century of English Feudalism*, 2d ed. (Oxford, 1961), pp. 103–4 n, approved this thesis of R. R. Reid, "Barony and Thanage," *English Historical Review* 35 (1920): 161–99, at 169–76 (with argument about France and Scotland on pp. 166–68, 180–81), despite his skepticism about other parts of her argument. Reid, "Barony and Thanage," p. 168 n, was probably right to read *LHP*, 55.1, as envisaging the holding of baronial duels; R. B. Patterson, ed., *Earldom of Gloucester Charters* (Oxford, 1973), no. 109 (1126), is an illustration.

120. Hurnard, "Anglo-Norman Franchises," p. 436. A former right to hold the ordeal was good evidence for present possession of *infangthief*, the right to hang handhaving thieves.

121. Calne's old minister may be one example; cf. *Britain before the Norman Conquest*, Ordnance Survey (Southampton, 1973), p. 56; *Domesday Book*, vol. 1, fol. 64b; and above, at pp. 93–95. For Sherburn, cf. Patterson, *Earldom of Gloucester Charters*, no. 171. For Shorne, Kent, cf. *CRR*, 15:835 = *Bracton's Note Book*, ed. Frederic W. Maitland, 3 vols. (London, 1887), no. 821 (1233). *E. Cf.*, 9.3, implies that there could be more than one ordeal church in a hundred.

122. James Tait, *The Medieval English Borough* (Manchester, 1936), p. 37; Helen M. Cam, *Liberties and Communities in Medieval England* (Cambridge, 1944), pp. 101–2, for Wye, Kent; *Domesday Book*, vol. 1, fol. 87b; A. J. Robertson, *Anglo-Saxon Charters* (Cambridge, 1939), pp. 236–39, for Taunton, Somerset.

123. *Wl. Ep.*, 4.2, *Ep.*, 5, and *Inst. Cn.*, iii.58, are the legislative texts; cf. Hurnard, "Anglo-Norman Franchises," pp. 459–60. Bishops already enjoyed control in Normandy (Colin Morris, "William I and the Church Courts," *English Historical Review* 82 [1967]: 452–63). Council of Lillebonne (1080), c. 40, which confirmed this position, was apparently later reissued in England, too; cf. P. Chaplais, "Henry II's Reissue of the Canons of the Council of Lillebonne of Whitsun, 1080 (?25 February 1162)," *Journal of the Society of Archivists* 4 (1973): 627 ff. Nottarp, *Gottesurteilstudien*, pp. 246–47, cites two papal letters to England on the subject of clerical extortion; the archdeacon of Coventry allegedly required thirty pence (!) to hold an ordeal.

124. *E. Cf.*, 9; *LHP*, 26.4; cf. R. F. Hunnisett, *The Medieval Coroner* (Cambridge, 1961), p. 6; and Reginald of Durham, *Vita Sancti Godrici*, ed. J. Stephenson, Surtees Society, vol. 20 (London, 1847), p. 235. Procedure was similar in Scotland, if the texts are to be believed. In general, the Scots seem to have followed England with a time lag; see Willock, *The Jury in Scotland*, chap. 4; and Reid, "Barony and Thanage," pp. 180–81.

125. *Hn. Com.*, 3.3; *LHP*, 48.12, 49.6, 59.16a. The implication of later evidence, like

establish "civil" use of the unilateral ordeals comes from the wholly exceptional circumstances of the Domesday *invasiones*, before a public, perhaps fiscally inspired, inquiry. The commissioners may not even have accepted the offers, which are all the references show.[126] How much, if at all, were unilateral ordeals still used in English law courts? I know of no firm twelfth-century evidence for the actual holding of ordeals in "civil" cases. An England with few or no "civil" ordeals at this stage apparently differs from her neighbors.[127] Significantly, if this really was so, she had reached that situation by natural attrition, without any formal decisions.

Meanwhile, popular ordeals continued deep in the English countryside where royal justice seldom reached.[128] Even as politicians and sophisticated thinkers advanced to newer ways, clerical writers voiced the old sentiments. Scribes copied and elaborated ordeal rituals well into the Angevin period.[129] Seven manuscripts of the mid-twelfth century or later preserve the form of benediction used by the Church of York to favor its approved champions in judicial duels.[130] Approving ordeal anecdotes were published in historical works[131] and in *vitae* of the holy men whose aid ordeal probands earnestly besought,[132] as well as in the largely oral

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Glanvill (see below) and practice in felony appeals, is corroborated by a smattering of references to contemporary duels in charters, *vitae*, and cases such as *Bracton's Note Book*, no. 1436.

126. See below, at nn. 137 and 147 and accompanying text, for other twelfth-century offers of ordeals.

127. Civil use of ordeals certainly continued in Normandy; P. Le Cacheux, "Une Charte de Jumièges concernant l'épreuve par le fer chaude," in *Mélanges société de l'histoire de Normandie* (Rouen, 1927), pp. 203–17, describes a colorful example. See also Bongert, *Recherches*, pp. 203 ff.; and Nottarp, *Gottesurteilstudien*, pp. 117 ff.

128. The only English evidence for this assumption that I have noticed is R. W. Southern, *The Making of the Middle Ages* (London, 1953), p. 97, from the mid-thirteenth century Roger Bacon. William of Malmesbury, *Gesta Pontificum*, ed. N. E. S. A. Hamilton, Rolls Series (London, 1870), p. 181, and *Chronicon Monasterii Abbendoniae*, vol. 2, ed. Joseph Stevenson, Rolls Series (London, 1858), p. 259, tell the kind of story that would have encouraged men to hold popular ordeals.

129. See Liebermann's apparatus to *ordines* X–XVI, *Gesetze*, 1:417–29.

130. *Duel, Gesetze*, 1:430–31. By *Regesta Regum Anglo-Normannorum*, vol. 2, *1100–1135*, ed. Charles Johnson and H. A. Cronne (Oxford, 1956), no. 1083, Henry I granted duel privileges to St. Peter's, York. The privilege was confirmed in 1136 by Stephen, *Regesta Regum Anglo-Normannorum 1066–1154*, vol. 3, *1135–54*, ed. H. A. Cronne and R. H. C. Davis (Oxford, 1967), no. 975 = *Historians of the Church of York*, vol. 3, ed. J. Raine, Rolls Series (London, 1894), p. 36.

131. Earl Godwin's death from a stroke in 1053 was represented as a popular ordeal by morsel in later Norman tradition. Wright, *The Cultivation of Saga*, pp. 233–36, conveniently discusses the texts that may be compared with the contemporary *Anglo-Saxon Chronicle*, C, s.a. 1053. Geffrei Gaimar, *Lestorie des Engles*, ed. T. D. Hardy and C. T. Martin, Rolls Series (London, 1888), lines 4870 ff. (pp. 206–13), details Godwin's supposed trial for the Aetheling's death much more fully than Florence of Worcester, *Chronicon*, ed. Benjamin Thorpe (London, 1848), 1:195.

132. *Historians of the Church of York*, 2:542–43, is of special interest because the saint there modified an autonomic response; he caused a great swelling, which came up after touching the hot iron, to go down, and the woman was freed. See also ibid., pp. 289–90,

vernacular literature.[133] And, because God's judgment remained an approved theme in accounts of battle and warfare,[134] the civil duel, which flourished throughout the century, was still sometimes described (and rather less often experienced) as a test of the old providential kind. Men were still inclined to seek supernatural aid from the saints before entering upon a duel; Robert de Montfort, awaiting his treason appeal against Henry de Essex in 1163, apparently traveled, like so many others, to Soissons for a vigil before the remains of St. Drausius.[135] And a few years later, Roger de Clere added to his grant of a quarter church to a Gilbertine house the explanatory note that "I acquired the aforesaid fee with God's help by a duel in the lord king's court at London and therefore deemed it necessary to give part of the fee into God's service for the souls of my father *etc. etc.*"[136] That these sentiments probably belonged as much to the monastic draftsmen as to Roger himself only confirms the continuing clerical commitment to the old rationale. This is especially impressive in the case of the duel because of clerical feeling against violence and bloodshed. It is equally suggestive that the last two offers of an old ordeal that I have noted both came from clerics.[137] In about 1157 an aged retired prior to Worcester did not hesitate to proffer the hot iron, or any proof dictated in equity, in support of a Gloucester Abbey land claim against the Church of York. His archaic offer was intended to vindicate the testimony he based on respectable charters, chronicles, and *testes*. A little earlier, one of Archbishop William of York's clerks was ready to undergo hot iron, hot water, or battle to substantiate his allegation that Osbert the archdeacon was guilty of his master's death. Neither offer was accepted; Osbert understandably responded by seeking *ecclesiasticum iudicium*. The striking fact is that these offers were made at a time when

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and *Chronicon Abbatiae De Evesham*, ed. William Dunn Macray, Rolls Series (London, 1863), pp. 323–24.

133. Hexter, *Equivocal Oaths*, and E. C. York, "Isolt's Ordeal: English Legal Customs in the Medieval Tristan Legend," *Studies in Philology* 68 (1971): 1–9, make some interesting points. The lack of a contemporary literature in English can fairly be met, up to a point, by recourse to French works such as the Tristan cycle, with its mass of commentary.

134. William of Poitiers, *Gesta Guillelmi*, ed. R. Foreville (Paris, 1952), pp. 174–78, on the battle of Hastings, is particularly "legal" in tone. Georges Duby, *Le Dimanche de Bouvines* (Paris, 1973), pp. 147–59, makes about as much as can be made of this theme.

135. John of Salisbury, *Ep.*, 145 (Migne, *PL*, 199, cols. 136–37), stresses the saint's wide appeal to those in search of invincibility. M. Germain, *Histoire de l'abbaye royale de N. D. de Soissons* (Paris, 1675), p. 427, prints the relevant passage from the *Vita* (tenth century or earlier). *The Chronicle of Jocelin of Brakelond*, pp. 70–71, is one account of the Montfort-Essex duel.

136. *Transcripts of Charters Relating to Gilbertine Houses*, ed. F. M. Stenton, Lincolnshire Record Society, vol. 18 (Lincoln, 1922), p. 43, no. 9 (before 1184). Cf. *The Letters . . . of Gilbert Foliot*, no. 119.

137. Melville Madison Bigelow, *Placita Anglo-Normannica: Law Cases from William I to Richard I* (London, 1879), p. 196; *The Letters of John of Salisbury*, ed. W. J. Millor, H. E. Butler, and C. N. L. Brooke (London, 1955), 1, no. 16; cf. M. D. Knowles, "The Case of St. William of York," *Cambridge Historical Journal* 5 (1937): 175.

learned opinion sanctioned the vulgar proofs only for possible use against laymen. English scholars, even those outside the learned vanguard, were certainly not unaware of the current of thought flowing against the ordeal.[138]

The rising tide of clerical disapproval of the ordeal is often illustrated with a famous story from Eadmer's *History of Recent Events*, written under Henry I.[139] Properly understood, however, this text jeopardizes the view of the church as the major force behind the transformation of proofs. Fifty men accused of forest offenses were adjudged to the hot iron, which they duly carried at the appointed time to reveal on the third day afterwards the unburnt hands of the innocent. Eadmer represented their trial as King William Rufus's attempt finally to break the Old English families of the accused, and described the king's outburst on their acquittal. Rufus railed at God's judgment, which, he complained, could be swayed by men's prayers. He would in the future, therefore, retain judgment in his own hands. Perhaps he suspected that the celebrant priests had arranged the acquittal—and perhaps he was right.[140] In that event, it would be quite understandable to seek modes of proof less susceptible to clerical management. That Eadmer, who clearly sympathized with the English accused, chose to interpret the king's attitude as religious skepticism, a straight denial almost of divine omniscience and providential power, reflects the monk's own belief in God and the ordeals. The story is an *exemplum* to demonstrate St. Anselm's difficulties with the impossible king and to justify the saint's attempt to abandon his duties on papal license.[141] Modern readers, if prepared to accept the anecdote's basic truth, may prefer to interpret it as a royal political stroke thwarted by the chicanery of interfering clerics. At any rate, the ordeal critic here is the lay king, intent on power over men. The studious monk Eadmer, his friends round St. Anselm, and more generally the Gregorian party in England probably remained sympathetic to the old ordeals into the second quarter of the century.[142]

How then might an interested and informed observer have summarized

138. The earliest English condemnation I have noted dates from 1142–44 and was produced at Paris (F. Courtney, *Cardinal Robert Pullen*, Analecta Gregoriana, vol. 64 [Rome, 1954], p. 242 and n.). See also *The Letters . . . of Gilbert Foliot*, no. 237 (1163–77), with the editors' comments in A. Morey and C. N. L. Brooke, *Gilbert Foliot and His Letters* (Cambridge, 1965), p. 241 and above, at n. 57 for Bartholomew of Exeter; and E. Rathbone, "Roman Law in the Anglo-Norman Realm," in *Collectanea Stephan Kuttner*, 4 vols. = *Studia Gratiana*, vols. 11–14 (Bologna, 1967), 1:265–66, 271, for Senatus of Worcester (before 1179) and Alanus Anglicus.

139. Eadmer, *Historia Novorum*, pp. 101–2; see van Caenegem, "La preuve," pp. 710–11.

140. An officiant might allow the iron to cool, for example, as in *Pipe Roll, 21 Henry II*, Pipe Roll Society, vol. 22 (London, 1897), p. 131: "de Philippo filio Wiardi et v. aliis pro ferro iuise bis portato de i calefactione."

141. Eadmer, *Historia Novorum*, pp. 99, 103.

142. Morris, "Judicium Dei," abundantly documents the reliance of the Gregorian party on the miraculous, including ordeals. The story cited above, at text accompanying n. 11, was certainly circulating among English Gregorians and followers of St. Anselm into the 1130s.

current practice about proof at the end of Henry I's reign? In theory the ordeal still flourished. Lordships claimed and valued the right to order men to it. Local courts and their associated churches understood its scope and procedure. Relatively little public comment was unfavorable. But practice was another matter. Actual use of the old ordeals in properly constituted courts was more or less confined to serious crimes that had defeated more mundane methods. The judicial duel was favored in land suits as well as appeals of felony, but some form of oath probably served as the judgment of last resort in many "civil" cases.[143] In general, moreover, a hypothetical observer might have noticed (where the historian tied to written evidence cannot) a steady growth of reliance on rational argument about evidence, with the aid of documents[144] and *testes*.[145] True, progress was uneven, largely confined to a few major centers and their hinterlands. And just as Anglo-Norman centralization of justice had helped before 1135, the ensuing relaxation of royal grip under Stephen and Matilda may have signaled some slight revival of the older proofs. All the same, Henry of Anjou, law reformer-to-be, came in 1154 to the throne of a country whose law of proof was already under reconstruction.[146]

Henry's legal reforms primarily affected the Curia Regis, where unilateral ordeals were seldom seen in the twelfth century.[147] The impact on the local and seignorial courts that handled most duels and ordeals is harder to assess. Nevertheless, Angevin adjustments to proofs set the pattern for the future. The battle of ideas, already underway in 1154, was still far from won. Its completion required considerable ingenuity and a real effort to justify innovation against conservative doubts.[148]

143. *Pipe Roll, 31 Henry I*, ed. J. Hunter, Record Commission (London, 1833); repr., ed. Charles Johnson (London, 1929), p. 35, records a proffer of twenty marcs "ut purgaret se de judicio ferri per sacramentum." The ordeal can be referred to as *lex*, e.g., *Pleas before the King or His Justices, 1198–1212*, 4 vols., ed. Doris M. Stenton, Selden Society, vols. 67 (London, 1948), 68 (1949), 83 (1966), 84 (1967) (hereafter cited as *PKJ*), 1, no. 3169 (1201); *CRR*, 2:56 (1201). For wager of law, see *P&M*, 2:634–37; R. L. Henry, *Contracts in the Local Courts of Medieval England* (London, 1929), chap. 2; and A. W. B. Simpson, *A History of the Common Law of Contract* (Oxford, 1975); pp. 137–44. See also above, at n. 68.

144. Hence the boom in forgery! Morey and Brooke, *Gilbert Foliot and His Letters*, chap. 7.

145. Eadmer, *Historia Novorum*, p. 138, is an enlightening anecdote about eleventh-century attitudes toward the advantages of witnesses as against documents: why should one prefer the word of monks plus a piece of sheepskin, marked with ink and a lump of lead (i.e., a papal bull!), against that of three bishops?!

146. An assessment of the extent of royal influence over the whole range of litigation and dispute settlement in the first half of the twelfth century is badly needed. I take no position here on, for example, the prehistory of the Angevin jury.

147. Two apparently serious offers of ordeals are, however, known from Stephen's court *coram rege*. In addition to those cited above, at n. 137 and accompanying text, one is recorded by Thomas of Monmouth, *The Life and Miracles of St. William of Norwich*, ed. Augustus Jessopp and Montague Rhodes James (Cambridge, 1896), p. 47 (1144).

148. In a forthcoming exploratory paper entitled "The Place of Henry II in English Legal History," I discuss this subject at greater length.

The central theme of the Angevin reforms is the institutionalizing of local community testimony in the jury.[149] Juries attracted royal advisers for two main reasons. First of all they appealed to common sense. Royal *familiares* made their political choices and managed their estates most of the time along lines that were quite rational in the terms of today. Why should they not develop court procedure similarly? Masters of the two learned laws might then sneer a little less at England's unwritten custom.[150] Furthermore, the king and his justices secured the kind of control over judgment and proof whose lack Rufus had already felt. The second consideration was probably less important. Some consciences were certainly disturbed by the sin inherent in the ordeal's tempting of God. Many *familiares* were, of course, at least conventionally religious, as is evident from their pious benefactions that often included a prayer for their royal master's soul. Nevertheless, concern for salvation was probably not a decisive factor. Rather, expediency dictated their innovations and also alerted them to the possibility of some traditionalist resistance to change.[151] Like colonial administrators, the reformers imposed progress "for their own good" on benighted rustics slow to see its benefits. To avoid giving unnecessary offense to the church was only sensible. Consequently, they armed themselves with a rationale that would satisfy critics from that quarter.

The most compelling evidence for this view comes from the civil jury in the real actions. Scholars quite rightly place the petty assizes in a rational context of judgments derived from the systematic collection and processing of relevant information. During the first generation of the reforms, however, contemporaries may sometimes have followed quite a different line of rationalization. An unsympathetic questioner could have been advised to regard the jury as a new method of putting issues to God, no more, no less. This conception of the jury as a new ordeal made some sense at the time.[152] The issues put to early assizes and recognitions were mixed questions similar to those formulated for ordeals.[153] Initially, there was no obvious awareness of the distinction between fact and law.

149. Ralph V. Turner, "The Origin of the Medieval English Jury: Frankish, English, or Scandinavian?" *Journal of British Studies* 7 (1967): 1–10, is a competent recent survey of the state of the question. *Glanvill*, XII, 25 (p. 148), seems to imply that recognitions are a royal monopoly.

150. *Glanvill*, Prologue, proves that one royal adviser was sensitive to slights from his colleagues of the two laws.

151. Recent studies have made little of the critical response to the legal reforms. Much of the material cited by M. T. Clanchy, "*Moderni* in Education and Government in England," *Speculum* 50 (1975): 671–88, is from this period. For Ralph Niger, see H. Kantorowicz and B. Smalley, "An English Theologian's View of Roman Law," *Medieval and Renaissance Studies* 1 (1941): 237–52.

152. Plucknett, *Concise History*, pp. 137–38, 417–18; F. Jouon des Longrais, "La preuve en Angleterre depuis 1066," in *La preuve*, pp. 193–274, at p. 206; Cheyette, "Custom, Case Law and Medieval 'Constitutionalism,'" pp. 372–73.

153. Early assizes were asked to decide, for example, if a plaintiff had had seisin *ut de libero tenemento* before he was disseised *iniuste* (novel disseisin: *Glanvill*, XIII, 33 [p. 167]), or if his ancestor had been seised *in dominico suo sicut de feudo suo* (mort

Jurors, selected for their local knowledge, could and did attempt to check the facts of the case,[154] but only God could say whether their views on the moral imperatives implied by questions about the manner of seisin were correct. Thus early jury verdicts were genuinely inscrutable; they do not merely appear so because of our sources.[155] One could accuse a court of mishandling and fraud, or challenge jurors to defend their perjury by battle, but as in the old ordeals, God would neither explain His motives nor change His mind on request.

This kind of justification, although required only briefly, had considerable effect. Juries answered questions about land seisin for about fifteen years before the establishment of the Grand Assize.[156] The right to land was of much greater moment than mere seisin. To call upon human beings to declare who had in the past held land made very good sense. Physical control was visible to human eyes, and could be symbolized in tangible, memorable acts.[157] But past events were merely persuasive evidence for the location of *dreit*, the right to hold land: only God could say who *ought* to be the tenant. Some hesitation before the jury was applied to questions of right is therefore to be expected. Ambiguous feelings about the new ordeal, and even more a consciousness that decisions in the right were permanently binding, explain this reluctance. A procedure for right had to be in many ways the equivalent of the judicial duel that it replaced. As Glanvill's account of proof shows, the Grand Assize was just such an equivalent.

For Glanvill, battle remained a fully respectable part of the *generalis probandi modus*[158] that could still be used to declare the right in a wide variety of disputes. For most of these, the Angevins never offered a procedure of the newer type. Battle might decide, for example, a question of right arising out of an assize of mort d'ancestor, or an action of debt, even when a written charter existed.[159] Perhaps current practice (*modo*

d'ancestor: *Glanvill*, XIII [p. 150]). In each case, the specifications of the *kind* of seisin involved legal questions that were not always argued in open court. The very concept of "seisin" probably referred to a legal/moral, as well as factual, state, until learned lawyers like Glanvill reduced it to a lesser counterpart of *ius* = "right." Early jurors might not separate these different strands in their own minds, but clearly their verdicts involved nonfactual judgments too.

154. Stenton, *First Century of English Feudalism*, pp. 82, 270 (app., no. 21), and David Walker, "A Letter from the Holy Land," *English Historical Review* 72 (1957): 662–65, print documents concerning information offered to jurors by great men. Jurors' enquiries of lesser folk are harder to document.

155. S. F. C. Milsom, "Law and Fact in Legal Development," *University of Toronto Law Journal* 17 (1967): 1 ff., explores this area in brilliant fashion; see also his *Legal Framework*, chap. 1 and passim.

156. Here I follow Round's dating of ca. 1179. However, if the view of Milsom, *Legal Framework*, on the *breve de recto* were correct, an earlier date for the origins of the grand assize, back almost to the first of Henry II's writs *de recto*, might follow.

157. Samuel E. Thorne, "Livery of Seisin," *Law Quarterly Review* 52 (1936): 345–64, still has a great deal to teach us.

158. *Glanvill*, X, 17 (p. 132).

159. *Glanvill*, V, 4, 5 (pp. 55–58), VI, 11, (p. 64), X, 12, 15, 17, (pp. 126, 131, 132), XIII, 11 (p. 154).

solet) preferred now to deal with disputes about grants *aliquibus certis et manifestis indiciis*,[160] but wager of a duel between charter witnesses was still perfectly legitimate. Before 1200 battle was not obviously superseded by the Grand Assize and other recognitions. Relatively few charters that refer to proof of right mention the Grand Assize.[161] In any case, battle and Grand Assize, near equivalents for Glanvill, remain genuine alternatives at the defendant's option.[162] The rules under which they operate are very similar.[163] Defenses to the Grand Assize are *pari ratione ac per duellum*.[164] And each should lead to a decision that binds the present parties forever.[165]

Why then was the *regale beneficium* a matter for praise? Glanvill's explanation reflects above all the contemporary consciousness of the chancy nature of duels. The miracle stories that emphasize the participants' desire for supernatural assistance demonstrate this same awareness.[166] The combatant risked both his life and his good name, for the cry of "craven" entailed perpetual infamy, the loss of a man's free law.[167] The new assize offered three advantages over battle; two amounted to good common sense.[168] By the Grand Assize, a freeman could avoid physical danger without thereby forfeiting his land. Initially the procedure was, too, swifter than battle, whose formalities necessitated adjournments while the proper arrangements were made. The trouble and money thus saved were an especial boon to the poor. Glanvill's third point is quite different. He explains that the assize was born of the highest equity because the oaths of twelve "suitable" witnesses are weightier in judgments than the single oath of one duel combatant. The archaic ring derives from a world where the numbers and standing of oath helpers were all-important and where jury process was understood as compurgation updated.[169] And if here, too, theory very soon advanced to more "modern" conceptions, one important reason was the reformulation of the issue in terms of *maius ius* to the disputed property. Where com-

160. *Glanvill*, X, 12 (p. 127).

161. That J. H. Round could adduce so few charters in his article "The Date of the Grand Assize," *English Historical Review* 31 (1916): 268–69, speaks for itself. Most charters specify trial by duel if they mention proof at all.

162. *Glanvill*, IX, 1, (p. 105); cf. *CRR*, 2:18–19 (1201).

163. *Glanvill*, II, 19 (p. 36).

164. *Glanvill*, III, 5 (p. 41).

165. *Glanvill*, II, 3, 18 (pp. 25, 35); cf. *Bracton's Note Book*, no. 1436 (1220), where the court would not rule a second time on an issue already submitted to trial by battle some time before 1166.

166. Reginald of Durham, *Vita Sancti Godrici*, pp. 189–91, reminds one that innocent men who had sought saintly aid nevertheless sometimes died in the duel.

167. *Glanvill*, II, 3 (p. 25); cf. *LHP*, 43.7. The letters patent, cited above, at n. 31, display something of the impact this sanction retained even in the 1270s.

168. *Glanvill*, II, 7 (p. 28).

169. Cf. n. 143 above. Milsom, *Legal Framework*, pp. 84–85, makes a very different suggestion about the Grand Assize, quite plausible in itself and not incompatible with the view in the text here. Note however that *Glanvill*, VII, 3 (p. 78), does not prohibit battle between a nephew and the uncle who is also his lord, providing that no homage has been performed.

batants had once perhaps called on God through the duel to declare which party had absolute right,[170] the knights of the assize were asked only to compare claims as well as human beings could. This formulation of the issue promoted factual discussion and argument, and facilitated "the rise of an abstract concept of property in land," perhaps for the first time in English law.[171]

So Glanvill's comments on battle and its replacements are less clear and rational than some scholars have thought. His treatment of unilateral ordeals is briefer and less controversial. He gives no hint that they were ever used in civil actions.[172] Even in appeals of felony, proof was always by battle unless the appellor was too old, physically incapable, or female.[173] Otherwise the ordeal was reserved for prosecutions *de fama* against people suspected of serious crime in the absence of a willing accuser. Glanvill is referring to the jury of presentment procedure, under the Assizes of Clarendon and Northampton,[174] which in the present context of proofs clearly stands toward the end of the old ordeals' long development as well as the start of the history of indictment.[175]

Henry II was not the first to link a royal drive against crime in the countryside with rules that put suspects to an exculpatory ordeal. The drive initiated in late 1165 or early 1166[176] perhaps differed less from its

170. Milsom, in *Novae Narrationes*, pp. xxv, xxxiv, argues from thirteenth-century evidence that the issue of a duel concerned the truth of the oaths the two champions had sworn; cf. *CRR*, 5:265–66 (1208). This may not have been the case earlier, before the evolution of the forms of action deprived courts of the freedom to formulate issues as they thought most fit. The evidence of *Glanvill*, II, 3 (p. 23), VIII, 9 (p. 100), is congruous with this possibility, in which case defenses *de verbo in verbum* would have been very exacting in the twelfth century. A precise record of the issues in duels waged at the shire would have been necessary before royal justices could determine how properly the inferior court had acted. The many allegations of procedural irregularity in the shire from the early plea rolls (C. T. Flower, *An Introduction to the Curia Regis Rolls, A.D. 1199–1230*, Selden Society, vol. 62 [London, 1943], p. 119) suggest that procedure had formerly been freer there than in the Curia Regis of the late twelfth century.

171. Milsom, *Legal Framework*, pp. 76–77. The 1201 case (*CRR*, 1:430; *Chronicle of Jocelin of Brakelond*, pp. 58–59, 123–24, 138–39) is an excellent illustration of the changes.

172. See, however, below, at n. 192.

173. *Glanvill*, X, 5 (p. 120), XIV, 1, 3, 6 (pp. 173, 174, 176); *PKJ*, 2, nos. 288, 619 (1201), is an example. Cf. Besnier, "'Vadiatio legis et leges,'" pp. 99–101. The ordeal was also used for accessories (Flower, *Introduction to CRR*, p. 321) and when an appellant withdrew (*PKJ*, 2, no. 729 [1201]).

174. *Glanvill*, XIV, 1 (p. 171). Suspected concealers of treasure trove were not, however, put to the ordeal on mere *infamia*; compare *Glanvill*, XIV, 2 (pp. 173–74), with the 1116 case recorded in *Liber Eliensis*, ed. E. O. Blake, Camden Society, 3d ser., vol. 92 (London, 1962), pp. 266–69; and Ordericus Vitalis, *Historia Ecclesiastica*, ed. and trans. Marjorie Chibnall, 6 vols. to date (Oxford, 1969–78), 3:347–58.

175. Naomi D. Hurnard, "The Jury of Presentment and the Assize of Clarendon," *English Historical Review* 56 (1941): 374–410, lies at the head of modern argument on the subject. See Thomas A. Green, "The Jury and the English Law of Homicide, 1200–1600," *Michigan Law Review* 74 (1976): 414 ff., for a brief survey.

176. Sutherland, *Assize of Novel Disseisin*, p. 7, n. 2; Janet Loengard, "The Assize of Nuisance: Origins of an Action at Common Law," *Cambridge Law Journal* 37 (1978): 144–66, at 154, n. 28.

tenth-century precedent (apart from its superior documentation) than we have realized. The suspect's reputation and record was the key in each case, though in different ways. The essence of the Angevin enactment was an order to each local community to report (through its representatives) to royal justices sitting in an afforced shire court[177] the names of any people the community feared as persistent offenders of serious crime. The community's perceptions were undoubtedly treated in a more sophisticated way, and were rigorously controlled to the king's interest, but the underlying principle was quite similar. Evil fame sufficed to force a suspect to his law and, because the fact of presentment already established this, no exculpatory oath was permitted.[178] All suspects either went to the water or were freed;[179] the justices might order acquittal, for example, if they believed the presentment malicious.[180] Distinctions like those of the Old English laws reappear only after the ordeal. Success did not ensure full freedom; men of very bad reputation could still be required after acquittal to find sureties or abjure the realm.[181] The proceedings, then, look highly mechanistic. But the justices retained enough discretion to be worth bribing. Glanvill explains that the court listened to argument before deciding to send a man to the ordeal, and the early plea rolls testify to careful inquiry into the grounds for suspicion.[182] The procedure comprised accusation, checking, and proof, but no real trial, even in the sense of the communal self-examination of popular ordeals. These hearings under the assizes were held at the king's expense[183] to repress crime and disorder in his realm to his greater credit. Hard evidence of high moral aims or any keen desire for justice is lacking. The presiding justices could have duly performed their duties without any

177. J. C. Holt, "The Assizes of Henry II: The Texts," in D. A. Bullough and R. L. Storey, eds., *The Study of Medieval Records* (Oxford, 1971), pp. 103–6, demonstrated the role of the sheriffs in the first visitation under the assize.

178. Charles L. Wells, "Early Opposition to the Petty Jury in Criminal Cases," *Law Quarterly Review* 30 (1914): 97–98, associates the shifting of the onus of proof onto the accused; this oversimplifies the previous position. Ralph Niger mentions in his *De re militari* (1189) *scelerati, quibus interdiceretur aqua et ignis in patria sua* (*Medieval Studies* 9 [1947]: 181), alongside criminals fleeing punishment by going on crusade. Presumably the *scelerati* were either convicted under the assize or forced to abjure the realm as *de pessimo testimonio*.

179. *Glanvill*, XIV, 1 (p. 171).

180. The writ *de odio et atia* is briefly mentioned below. See also above, at n. 89.

181. *Assize of Clarendon*, c. 14; *Northampton*, c. 1. *E. Cf.*, 9, assumes that those cleared by the ordeal went free.

182. *Glanvill*, XIV, 1 (p. 171); cf. ibid., XIV, 2 (pp. 173–74), for the more stringent requirements in the case of alleged concealment of treasure trove. Early plea roll illustrations include *PKJ*, 2, no. 255 (1201); *Somersetshire Pleas*, ed. Charles E. H. Chadwyck-Healey, Somerset Record Society, vol. 11 (London, 1897), pp. 88, 91, 95, 100 (1201); *The Earliest Northamptonshire Assize Rolls, A.D. 1202 and 1203*, ed. D. M. Stenton, Northants. Record Society, vol. 5 (1930), p. 726 (1203). See also Charles L. Wells, "The Origin of the Petty Jury," *Law Quarterly Review* 27 (1911): 347–61, at 348–49, 353.

183. *Dialogus de Scaccario*, ed. and trans. Charles Johnson (London, 1950), II.vii.A (p. 87), explains the pipe roll entries; cf. Holt, "The Assizes of Henry II," p. 104.

belief that the ordeal actually did reveal God's judgment. The fact is that the vast majority of those prosecuted under the procedure were of low social status.[184] The two assizes used the presentment jury and ordeal to make an example of those who could be caught.

In the end, then, the Henrician reforms occupy a rather paradoxical position in the transformation of proofs. Although the forward-looking civil jury represented to some extent a posthumous existence for the logic of the old ordeals, the one area where ordeals actually continued—public presentment of crime—exhibited toward its customers thoroughly unsentimental attitudes that belong to no single epoch or stage of legal development. By the end of the twelfth century, though, change moved unmistakably toward more juries, albeit still at a gentle canter. Sporadic batches of plea roll entries, recording criminal ordeals under the surveillance of eyre justices, remind one that the occasional peasant still had to carry the hot iron in the England of Magna Carta.[185] Ordeals may have remained quite common in private courts.[186] The number of county court duel cases whose records came before royal justices certainly implies that many battles were waged in the shires.[187] But royal justices were working to curtail the ordeal's scope long before 1215. They raised technical barriers under various pretenses to divert suspects from ordeals toward inquests.[188] Indeed, chapter 36 of Magna Carta, which freed the writ *de odio et atia* from impediments and thus helped to boost the criminal inquest, is almost as significant for the English law of proof as the Lateran Council's pronouncements in the same year, 1215.[189] In the absence of eyre visitations because of the civil war, the infant Henry III's council did not have to make a decision about the ordeal, at which no

184. This was Lady Stenton's impression too (*PKJ*, 1:41). M. T. Clanchy, "Highway Robbery and Trial by Battle in the Hampshire Eyre of 1249," in *Medieval Legal Records . . . C. A. F. Meekings*, ed. R. F. Hunnisett and J. B. Post (London, 1978), pp. 26–61, makes a similar guess about the social background of approvers. The assertion of *Glanvill*, XIV, 1 (p. 173), that villeins went to the water ordeal, freemen to the hot iron, may reflect not only learned legal sources (briefly indicated in my *King, Lords and Peasants in Medieval England* [Oxford, 1980], chap. 9) but also an awareness of the social distinctions involved. In fact, most suspects went to the water, among them at least one rich Londoner: see Roger of Howden, *Gesta Regis Henrici Secundi Benedicti Abbatis*, ed. William Stubbs, vol. 1, Rolls Series (London, 1867), p. 156 and *Chronicon*, ed. W. Stubbs, vol. 2, Rolls Series (London, 1869), p. 131. The hot iron seems to have been reserved for extreme cases, i.e., used as a quasi-punishment. In 1198 an alleged sorceress cleared herself by the hot iron (*PKJ*, 2, no. 103; *CRR*, 1:108). Lady Stenton suspected that the justices were less sure of her guilt than angry Norwich citizens were (*PKJ*, 1:45).

185. *CRR*, 3:144 (Oxford, 1204); *CRR*, 7:241 (Newgate delivery, 1214).

186. They leave little trace there. *CRR*, 8:41–42 (1219), is one example.

187. Flower, *Introduction to CRR*, pp. 113 ff., 119.

188. Lady Stenton, in *Rolls of the Justices in Eyre for Lincolnshire, 1218–19, and Worcestershire, 1221*, Selden Society, vol. 53 (London, 1934), p. lxviii, and in *Rolls of the Justices in Eyre in Yorkshire, 1218–19*, Selden Society, vol. 56 (London, 1937), pp. xl–xli, and Naomi D. Hurnard, in *The King's Pardon for Homicide before A.D. 1307* (Oxford, 1969), pp. 339–50, esp. 345–46, describe parts of the process.

189. See Hurnard, cited in the last note.

priest should now officiate, until 1219. Apparently his councillors understood the papal canons as an absolute prohibition of unilateral ordeals, because they presented the eyre justices with new guidelines that divided crimes into three crude grades, each to be treated differently. But they sensibly left the real decisions to be made locally, where the truth about suspects and their alleged crimes could be learned.[190] The justices then exploited this freedom in creative manipulation of the accused toward inquests;[191] furthermore, they occasionally exceeded their instructions by actively discouraging the duel.[192] By the middle of the century criminal duels were rare, except for the appeals of approvers,[193] and the appeal of felony was "virtually a jury action."[194] The protracted delay before the petty jury became the standard trial procedure in crime confirms that insistence from the bench, not enthusiasm for innovations, was responsible for the jury's spread. Once battle was waged, the case was outside the justices' hands, although they could bully or cajole jurors almost at will.[195] They exerted no similar pressure against civil duels, which remained quite common in mid-century.[196] Men well knew the juries' susceptibility to ties of affinity or coercion by impaneling sheriffs. Defendants therefore still sometimes preferred battle to decide their case. By the end of the century, indeed, the availability of battle was regarded as an essential liberty, rather like the jury much later.[197]

This essay has reminded its author of the importance of understanding the Old English basis of the legal system from which Henry II launched

190. Thomas Rymer, *Foedera*, vol. 1 (London, 1704), p. 228.

191. Wells, "The Origin of the Petty Jury," pp. 347–61; C. A. F. Meekings, *Crown Pleas at the Wiltshire Eyre, 1249*, Wiltshire Archaeological Society, Records Branch, vol. 16 (Devizes, 1960), pp. 89 ff.; J. M. Kaye, *Placita Corone*, Selden Society, supplementary ser., vol. 4 (London, 1966), pp. xvi, xxv.

192. The royal letters patent are silent on the duel and indeed appeal process in general, for they are clearly aimed at presentments under the assizes. *CRR*, 10:120 (1221), contains an attempt to understand the prohibition as extending to battle in actions of right, for the purposes of an old ordeal exemption.

193. On the other hand, battle remained the standard criminal proof for the Scots, according to Willock, *The Jury in Scotland*, pp. 21–22. *Dialogus de Scaccario*, II, vii (pp. 87–88), already sees approvers as deterrents; Thomas of Chobham singled them out for special condemnation ca. 1215 (Baldwin, *Masters, Merchants and Princes*, pp. 329–30). Cf. Frederick C. Hamil, "The King's Approvers: A Chapter in the History of English Criminal Law," *Speculum* 11 (1936): 238–58; and Clanchy, "Highway Robbery," pp. 29 ff.

194. Meekings, *Crown Pleas*, p. 70.

195. Kaye, *Placita Corone*, p. xxvii.

196. *P&M* 2:633; M. J. Russell, "Hired Champions," *American Journal of Legal History* 3 (1959): 242–59, at 257. Men argued for or against battle as it suited them. See the exchange of 1255–60 in E. Faral, "Le procès d'Enguerrand IV de Couci," *RHDFE* 4e sér. 26 (1948): 221; and for French practice generally, above, at n. 49 and accompanying text.

197. V. H. Galbraith, "Death of a Champion (1287)," in *Studies in Medieval History Presented to Frederick Maurice Powicke*, ed. R. W. Hunt, W. A. Pantin, and R. W. Southern (Oxford, 1948), pp. 283–95; Kaye, *Placita Corone*, p. xvi. Ecclesiastics continued to use the civil duel much as laymen did; cf. F. M. Powicke and C. R. Cheney, eds., *Councils and*

his reforms. The greatest surprise was to realize that the overwhelming proportion of ordeal evidence points to its use for crime alone, from the tenth century right through to its transformation in the twelfth. England apparently differed from its neighbors in preferring to close property disputes with a judicial oath rather than an ordeal. To understand why this was so demands a wider context; we must view the ordeal together with the other available proofs. A study of the judicial oath through its transition into the old common law's "wager of law" might explain England's apparent singularity in "civil" suits, and would enhance the arguments in this essay. The other pertinent background is the supernatural. The ordeal functioned and declined throughout in a world where miracles and relics ruled men's minds and actions. A declining belief in divine providence might have caused the old ordeals to vanish. But no such decline can be established. This paper has therefore not pursued the connections between ordeals and other manifestations of supernatural power. Further study of the manner and direction of men's choices among various means of access to this power could allocate to each certain types of dispute or social tension. The resulting deepened sense of the role of law will inevitably alter our perceptions of the early common law.

In conclusion, the underlying theme of the paper has perhaps been this: in the early Middle Ages, legal change seldom emerged directly from positive, public decisions motivated by a driving desire for a higher rationality. Perhaps it never does. Hosts of private individuals transformed medieval law in their struggles toward their own goals. Behind the transformation of the old ordeals lies the political need to condemn that unnamed villager who irritated his leaders, the urge to quash that unjust theft allegation or to win that desirable water meadow. Men's mundane needs, and not the belated, banal pronouncements of leaders of church and state, explain English development.

Northern Europe had entered the Middle Ages armed with the knowledge that testimony and evidence were the best methods of establishing the facts of a dispute. Then, over about six hundred years, men periodically sought to buttress proof by *testes* in a world that knew few men's words were to be trusted. The paradox is that the demise of the old ordeals never became the triumph of witness proof, which now survived in two eccentric forms. Either *testes* were managed in juries and inquisitions; or they figured as juristic fossils in an offer of suit, never intended to be taken up, a formal preparation for trial by jury, or indeed duel. Whether the so-called rational proofs, now revived or imported from the learned laws, functioned more justly and efficiently than the old ordeals is a matter for further discussion. The later medieval witness remains a symbol of the reasons why men once preferred God's judgments to those

Synods . . . Relating to the English Church, vol. 2 (Oxford, 1964), 1.283–84 (c. 29); and R. B. Flahiff, "The Writ of Prohibition in the Thirteenth Century," *Medieval Studies* 7 (1945): 267, n. 23.

of men. One tangible consequence of this loss of God's aid was, after all, the rise over most of Europe of judicial torture.[198] Not in England, however; and this is another fact certainly to be explained in terms of evolving doctrines of proof.

198. See J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago, 1977), chap. 1, etc. I am grateful to the author for letting me see this in proof and heartened by the similarity between his quite independent line on the beginning and end of torture in European law and the hypothesis of this paper about ordeals.