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Recommended Citation

Richard. H. Helmholz, "The Early History of the Grand Jury and the Canon Law," 50 University of Chicago Law Review 613 (1983).

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The Early History of the Grand Jury and the Canon Law

R.H. Helmholz†

The modern grand jury traces its origins to the Assize of Clarendon, an enactment of King Henry II in 1166.¹ The Assize called for inquiry to be made, by the oath of twelve men from every hundred and four men from every vill, as to what persons were publicly suspected of robbery, murder, or theft or of receiving men guilty of those crimes. The crimes covered were expanded ten years later by the Assize of Northampton to include forgery and arson,² and over the course of succeeding years the group grew to include almost all serious crimes. Under the procedure called for by the Assize of Clarendon, the suspected criminals were presented before royal justices, and then their guilt or innocence was determined by the judgment of God, that is, by ordeal. From this method of inquiry and presentment of persons suspected of serious crimes, later expanded and adapted to changed circumstances, grew the two-stage process of indictment and trial that we recognize as the essence of common law criminal procedure.

The Assize has naturally attracted its share of scholarly attention. Its centrality in the history of criminal procedure, as well as the mists of uncertainty that surround its adoption, its intent, and even the accuracy of the text that has come down to us, have made it a subject of interest for anyone curious about the development of our law. Bishop Stubbs regarded it as "of the greatest impor-

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¹ The text is printed in W. STUBBS, *SELECT CHARTERS* 170-73 (H.W.C. Davis 9th ed. 1913). An English translation appears in 2 *ENGLISH HISTORICAL DOCUMENTS* 1042-1189, at 407-10 (D. Douglas & G. Greenaway eds. 1953); 1 *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 76-80 (C. Stephenson & F. Marcham eds. 1972). The Assize was not a statute in the modern sense, but its authenticity as a genuine act of Henry II's government has been vindicated, despite attacks on the authenticity of its text. See Corner, *The Texts of Henry II's Assizes*, in *LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY* 7-20 (A. Harding ed. 1980); Holt, *The Assizes of Henry II: the Texts*, in *THE STUDY OF MEDIEVAL RECORDS* 85-106 (D. Bullough & R. Storey eds. 1971). The attack on the authenticity of the Assize was made by H. RICHARDSON & G. SAYLES, *THE GOVERNANCE OF MEDIEVAL ENGLAND* 438-44 (1963).

² 2 *ENGLISH HISTORICAL DOCUMENTS* 1042-1189, *supra* note 1, at 411-13; W. STUBBS, *supra* note 1, at 179.

tance in English legal history.”³ F.W. Maitland treated it as the foundation of the movement away from the old system of private criminal appeals towards a centralized and more public system of criminal prosecution.⁴

The origins of presentment procedure and the sources of the Assize of Clarendon have been the objects of particular scrutiny.⁵ One school of thought has regarded the presentment procedure as essentially the product of innovation. This was, for instance, Maitland’s view,⁶ and it continues to have its adherents. What is probably the dominant opinion today, however, plays down the elements of innovation in the Assize. This view was most clearly and persuasively presented by Miss Naomi Hurnard in a 1941 article in the *English Historical Review*.⁷ She found precedent for the Assize’s procedure in prior usages of English local courts and noted that English kings used inquests of sworn men to answer questions of importance to the crown long before 1166.⁸ She was willing, moreover, to connect the Assize directly with a late tenth-century precedent, the twelve thegns of the Wantage Code, who seem to have acted as something like a presenting jury.⁹ There was, in her view, continuity with Anglo-Saxon institutions. Although she was prepared to grant some significance to the Assize of Clarendon¹⁰—it did formalize and strengthen the procedure—Miss Hurnard saw the presentment procedure established at Clarendon as growing from immemorial English custom that had its roots, and even its existence, in the laws of Ethelred and the Anglo-Saxon past.

³ W. STUBBS, *supra* note 1, at 167.

⁴ I F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 137 (1898).

⁵ The early opinions are conveniently summarized in Turner, *The Origins of the Medieval English Jury: Frankish, English, or Scandinavian?*, J. BRIT. STUD., May 1968, at 1.

⁶ Maitland, *Introduction to SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS* at xxxi-xxxvi (F.W. Maitland ed. 1889) (2 Selden Soc’y).

⁷ Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 ENG. HIST. REV. 374 (1941). This article is the basis, for example, of the account given by the most recent biographer of Henry II: W. WARREN, *HENRY II* 354 (1973). Other examples include J. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 208-09 (4th ed. 1961); A. POOLE, *FROM DOMESDAY BOOK TO MAGNA CARTA* 397-98 (2d ed. 1955); and G. SAYLES, *THE MEDIEVAL FOUNDATIONS OF ENGLAND* 333-36 (2d ed. 1950).

⁸ Hurnard, *supra* note 7, at 380-96. The most important collection of evidence on this point is R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* (1959) (77 Selden Soc’y).

⁹ Hurnard, *supra* note 7, at 376-78, 407-08. The text of the Wantage Code is printed, with facing page English translation, in *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I*, at 64-67 (A. Robertson trans. & ed. 1925).

¹⁰ Hurnard, *supra* note 7, at 396-99.

Miss Hurnard's views, however, have not gone unchallenged.¹¹ Many legal historians have objected that her argument cannot represent a complete understanding of the Assize. There is, for example, a decided lack of positive intervening evidence of the existence of presentment juries between the Wantage Code and 1166. It is strange that so significant an institution should have left so few traces. It is also noteworthy that contemporaries spoke of the Assize as an enactment.¹² The Assize reflects thought about the best way of dealing with criminals, not simple continuation of past practice. Moreover, certain elements of the Assize separate it from legal usages of early twelfth-century England. For instance, the preeminent place of public suspicion in the presentment process was new. Miss Hurnard herself acknowledged this.¹³ Perhaps most significantly, the two-stage nature of presentment and trial was a more substantial change from prior usage of juries than her argument allowed. The inquests initiated by the King during the years immediately before 1166 were used to settle questions of fact. The sworn men were asked to tell the King something he wanted to know: Who has concealed a killing for which a murder fine is due? Who has hidden a treasure owed to the King? The answers to these questions established a fact, on the basis of which the King or his ministers could act.¹⁴ The same was true in the local courts; the presentments of sworn men established a fact. Presentments were, in the legal parlance of a later day, not traversable.¹⁵ The answers to the questions put to jurors under the Assize of Clarendon, on the contrary, initiated further legal proceedings. Accordingly, Miss Hurnard's explanation presents evident difficulties.

Recently, Professor Raoul Van Caenegem, one of the critics of Miss Hurnard's argument, has turned his attention to the question and in a subtle and cogently argued article has contended that the Assize is best understood as Henry II's deliberate choice of many elements of existing legal institutions, joined in a "new and effi-

¹¹ See, e.g., the doubts expressed about the Hurnard account in R. VAN CAENEDEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 79-80 (1973), and in Chrimes, *Introductory Essay*, in 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 49-50 (7th ed. 1956).

¹² *CHRONICA MAGISTRI ROGERI DE HOVEDEN*, reprinted in 51:2 *RERUM BRITANNICARUM MEDIÆ Aevi SCRIPTORES* (Roll Series) 248 (W. Stubbs ed. 1869 & photo. reprint 1964); RICHARD FITZNEAL, *DIALOGUS DE SCACCARIO* 101 (C. Johnson trans. & ed. 1950).

¹³ See Hurnard, *supra* note 7, at 408.

¹⁴ See R. VAN CAENEDEM, *supra* note 8, at 284 (contrasting the Assize procedure with an earlier criminal inquest in which "the statement of the jurors was at the same time indictment and conviction").

¹⁵ See Maitland, *supra* note 6, at xxviii.

cient" way as to amount to an innovation.¹⁶ He argues, moreover, that ecclesiastical practices particularly the use of "synodal witnesses" to make communal accusations, was one of the important preexisting elements.¹⁷ Although examination of ecclesiastical evidence is not an entirely novel idea,¹⁸ Van Caenegem provides new reason for it and puts the argument into a new context. He contends that the twelfth century witnessed the rise to regular use of *ex officio* proceedings in church practice. Such proceedings allowed ecclesiastical officials to prosecute on their own initiative and were therefore open to abuse by overzealous or high-handed churchmen.¹⁹ No longer dependent upon communal accusation or the chance of private prosecution, ecclesiastical judges could now "[put] a man in jeopardy simply by their bare words alone."²⁰ Henry II rejected these unhappy developments. He tried (unsuccessfully) to impose a system of communal presentment on the Church, and he established (successfully) a regular system of communal presentment in his own courts by making use of the older practices of ecclesiastical law.

This article takes up this same subject and examines the canon law's procedural rules more closely than Van Caenegem attempted. Its aim is both to modify and to support Van Caenegem's argument. It modifies his characterization of *ex officio* procedure as inherently arbitrary and qualifies the sharp division he makes between "old" and "new" ecclesiastical procedure. It supports his position that ecclesiastical sources formed one of the constituent elements of presentment procedure. Investigation of the canon law and of the surviving church court records shows several striking parallels with presentment procedure. The parallels are close enough, this article suggests, to imply concrete connections between secular and canon law in the sphere of criminal procedure.

To make this contention and to put the canon law into perspective, one should begin by paying close attention to the Assize of Clarendon itself. Under its terms the sworn men of the inquest were asked not to accuse anyone, still less to evaluate evidence set

¹⁶ Van Caenegem, *Public Prosecution of Crime in Twelfth-Century England*, in *CHURCH AND GOVERNMENT IN THE MIDDLE AGES* 41, 72-73 (C. Brooke, D. Luscombe, G. Martin & D. Owen eds. 1976).

¹⁷ *Id.* at 61-70.

¹⁸ See Haskins, *The Early Norman Jury*, 8 *AM. HIST. REV.* 613 (1903), reprinted in modified form in C. HASKINS, *NORMAN INSTITUTIONS* 196 (1918); C.R. CHENEY, *ENGLISH SYNODALIA OF THE THIRTEENTH CENTURY* 28-29 (1968).

¹⁹ Van Caenegem, *supra* note 16, at 64-68.

²⁰ *Id.* at 70.

before them, but to give voice to common fame:²¹ Who is publicly suspected? That is the question they answered. They were not grand jurors in the modern sense. On the basis of their answer, the second stage of trial took place.²² Persons presented as objects of suspicion were required to swear an oath that they were innocent of the crime, an oath to be tested by the ordeal of water. One's attention should not be diverted by any details of this picturesque ordeal, however. The petit jury replaced it in the years following the Fourth Lateran Council's (1215) prohibition of clerical participation in ordeals,²³ and in all events the ordeal was not the central point of the reforms at Clarendon. Rather, their essential features were the use of an inquest to present persons publicly suspected of crime, the presence of royal officials to take the presentments, and the subsequent testing of guilt or innocence by oath and a formal method of proof. The canon law contained close analogies to each of these.

THE CANON LAW

The medieval canon law had a great deal to say about crime and criminal procedure. This may seem strange today, when religion has been relegated to a corner of life and morality has been converted into a private matter, but such an attitude would have been foreign to the time when the Assize of Clarendon was adopted. Twelfth-century churchmen (and indeed all men) assumed that the law of the Church ought to provide rules for dealing with crimes and public offenses against moral standards. We find, for example, the statement, "According to the canons all crimes are considered public matters," made in a gloss to Gratian's *Decretum* (1140),²⁴ the standard collection of canonical texts used during the period. That principle, the one that evidently also lay behind the reforms of Henry II, was more than vague theory. It had concrete consequences in the organization of the medieval

²¹ The words of the Assize were *rettatus vel publicatus*. Contemporary documents also used *diffamatus* and *malecreditus*. See 2 F. POLLOCK & F.W. MAITLAND, *supra* note 4, at 642.

²² That the process, as it worked in the years before 1215, was not quite so immediate and left room for "medial" adjudication, has recently been well argued by Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1 (1982).

²³ 22 J. MANSI, SACRORUM CONCILIORUM NOVA ET AMPLISSIMA COLLECTIO col. 1007 (1778). On the canon law background to this canon, see Baldwin, *The Intellectual Preparation for the Canon of 1215 against Ordeals*, 36 SPECULUM 613 (1961).

²⁴ DECRETUM GRATIANI, *Glossa Ordinaria*, at C. 2, q. 3, c. 8 (*Si quem penituerit*) s.v. *in omnibus* (Venice 1615) ("*quia omne crimen videtur secundum canones esse publicum*").

Church. The Church developed public ecclesiastical courts that operated with regular procedural rules and dealt with offenders against the Church's laws in what was called "the external forum."

The English church courts dealt frequently with criminal matters. For one thing, they had to try "criminous clerks." In the wake of the controversy between King Henry II and Archbishop Thomas Becket, the Church secured the right to try all men in holy orders accused of a crime.²⁵ Because of the size of the medieval clerical population, this was no negligible task. Even more important, the English Church's tribunals exercised regular jurisdiction over the laity in a vast array of "spiritual" crimes: matters like adultery, blasphemy, usury, and illicit games.²⁶ These crimes were actively prosecuted throughout the medieval period, normally by means of a procedure under which the court itself assumed responsibility for prosecution. And it is remarkable how similar was the Church's procedure for prosecuting these crimes to many features of the presentment procedure adopted by the Assize of Clarendon. There are remarkable parallels.

Under the canon law, prosecution of offenders against the Church's rules was initiated by public fame, the same source of presentment called for by the Assize of Clarendon. "If there is ill fame against a priest" begins a text from Gratian's *Decretum*,²⁷ which goes on to define the action to be taken pending a full determination of the priest's guilt. Several *summae* or manuals of ecclesiastical court procedure familiar to Englishmen during the period also noted specifically this use of public fame.²⁸ We know that this legal theory was put into practice, for several contemporary sources mention its use to initiate legal proceedings. The most spectacular example is the case of the murder by poisoning of Archbishop William of York in 1154. His nephew Osbert was suspected. "[W]ord of this [the suspicion] was spread abroad through

²⁵ See L. GABEL, BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES 25-28 (1928-1929). For the canon law background to the issue raised by the Becket controversy, see Cheney, *The Punishment of Felonious Clerks*, 51 ENG. HIST. REV. 215 (1936); Duggan, *The Becket Dispute and the Criminous Clerks*, 35 BULL. INST. HIST. RESEARCH 1 (1962); Fraher, *The Becket Dispute and Two Decretist Traditions: The Bolognese Masters Revisited and Some New Anglo-Norman Texts*, 4 J. MEDIEVAL HIST. 347 (1978).

²⁶ See F. MAKOWER, THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND 439-44 (1895).

²⁷ DECRETUM GRATIANI, C. 2, q. 5, c. 16, in 1 CORPUS IURIS CANONICI col. 459 (A. Friedberg ed. 1879).

²⁸ E.g., ALEXANDER III (MAGISTER ROLANDUS), SUMMA 17 (F. Thaner ed. 1874); DIE SUMMA DECRETORUM DES MAGISTER RUFINUS 248-49 (H. Singer ed. 1902); THE SUMMA PARI-SIENSIS ON THE DECRETUM GRATIANI 106 (T. McLaughlin ed. 1952).

the entire island," reported John of Salisbury.²⁹ In consequence of this public fame the prosecution against Osbert was carried forward by Archbishop Theobald of Canterbury. The letters of Gilbert Foliot³⁰ and of Arnulf of Lisieux,³¹ both active churchmen much involved in affairs of church and state, also specifically mention this use of public fame, together with subsequent action taken against offenders.

No ecclesiastical court records survive from this early period to demonstrate what happened in routine cases, but once we reach a time from which they do survive, the records make clear that the requirement of public fame was a real one. Normally an inquest of sworn men told on oath whether fame existed, and actual cases turned on whether public fame existed. The question was determined by an inquest similar to the English jury. For example, at Canterbury in 1273, the question was whether William the Chaplain was publicly suspected of incontinence with a certain Alice. An inquest (*inquisitio*) was summoned, and the question the inquest addressed was whether public suspicion existed.³² When the outcome showed that public fame did in fact exist, William was subject to further proceedings to determine the truth. In a later case from the diocese of Chichester, a man named George Fullbyke had been cited for adultery. He denied the existence of any public suspicion against him, and again that matter was decided by inquest. The record reads, "[a]nd as to the inquest the said sworn men say that there is no such fame in the parish aforesaid, therefore the judge . . . dismissed him."³³ Determination of the existence of public fame, in other words, was a preliminary question, the an-

²⁹ 1 THE LETTERS OF JOHN OF SALISBURY 27 (W. Millor & H. Butler eds. 1955) (letter no. 16). The accusation against Osbert is but one episode in a 20-year struggle over succession to the archbishopric of York. The story of the entire struggle is reconstructed by Knowles, *The Case of Saint William of York*, 5 CAMBRIDGE HIST. J. 162 (1936), reprinted in D. KNOWLES, *THE HISTORIAN AND CHARACTER* 76-97 (1963).

³⁰ THE LETTERS AND CHARTERS OF GILBERT FOLIOT 134 (Z. Brooke, A. Morey & C. Brooke eds. 1967) (letter no. 96 (1150)). See also A. MOREY & C. BROOKE, *GILBERT FOLIOT AND HIS LETTERS* 65-66 (1965), with reference to *DECRETUM GRATIANI*, C. 2, q. 5 *ad init.*

³¹ THE LETTERS OF ARNULF OF LISIEUX 22-23 (F. Barlow ed. 1939) (61 Camden Soc'y, 3d Ser.) (letter no. 17 (1159)).

³² Archives of the Dean and Chapter, Canterbury Cathedral, Sede Vacante Scrapbook III, no. 22; the heading reads: "Hec est inquisicio facta apud Wodecherche die sancti Laurencii domino Willelmo capellano de eodem."

³³ West Sussex Record Office, Chichester, Act book Ep I/10/1, fol. 70v (1507); the full entry reads: "negat famam publicam ideo iudex fecit inquiri de huiusmodi fama per duos parochianos et vicinos dicti Georgii . . . et quoad inquisitionem dicti iurati dicunt quod non est talis fama in parochia predicta ideo iudex iniunxit sibi quod decetero non frequentetur consorcium dicte Alicie sub pena iuris et sic dimittitur pro isto die."

swer to which decided whether further action was necessary. And that determination was made by an inquest of sworn men not greatly dissimilar from the presentment jury of the Assize of Clarendon.

The use of public fame to initiate prosecutions in the church courts did not become the purely formal matter one might suppose. Medieval communities were smaller and the courts were more immediately tied to them than would be true anywhere today. Public suspicion could, and did, circulate. The canon law also gave it legal content, excluding from the category of legitimate public fame that could give rise to ex officio prosecution rumors that had their source in the opinion of a single person or in the malevolence of one's enemies.³⁴ In medieval conditions, public fame seems to have been a workable juristic requirement. The Assize of Clarendon itself supports this, for the Assize adopted the same standard.

Two particular points about the initiation of criminal prosecutions in the ecclesiastical courts merit emphasis here, because legal historians have not always appreciated the importance of the canon law provisions on the subject. Some have taken the canon law's general preference for proof by witnesses and contrasted it with the common law's jury trial in order to suggest more fundamental differences between the two systems than in fact existed.³⁵ They have ignored the requirement of public fame entirely in dealing with ex officio procedure in the church courts, again underestimating the resemblance of canonical procedure to that which occurred under the Assize of Clarendon.³⁶ Neither position is warranted by the evidence.

First, the canon law *did* prefer proof to be made by witnesses. The Church, however, never set its face against the inquest as a legitimate means of proof. In fact the Church regularly used inquests in a number of settings, with inquests about the vacancy of ecclesiastical benefices or about claims of consanguinity in divorce cases being the most frequent instances.³⁷ And in "criminal" cases,

³⁴ See, e.g., HOSTIENSIS, *SUMMA AUREA*, Lib. V, tit. *de purgatione canonica* no. 3 (Venice 1674).

³⁵ See 2 F. POLLOCK & F.W. MAITLAND, *supra* note 4, at 604 n.1.

³⁶ See, e.g., 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 619-20 (7th ed. 1956).

³⁷ See Gray, *The Ius Praesentandi in England from the Constitutions of Clarendon to Bracton*, 67 *ENG. HIST. REV.* 481 (1952). There is a printed example from a marriage case in R.H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* 215 (1974), also printed in part in *SELECT CASES FROM THE ECCLESIASTICAL COURTS OF THE PROVINCE OF CANTERBURY C. 1200-1301*, at 29 (N. Adams & C. Donahue eds. 1981) (95 Selden Soc'y) [hereinafter cited as

an inquest regularly determined the existence of public fame wherever there was doubt or failure of affirmative proof. An extract taken from an Act book of the Archdeaconry of St. Alban's illustrates this particularly well. A certain William Cressy had been cited for adultery. He denied both the fact and the public fame. Accordingly, the matter was put over to his parish church at a later day. "On that day," the scribe subsequently recorded,

the synodal witnesses and the men of the inquest, being sworn in the same church, say and present that there is fame in the mouth of almost all the parishioners there that William Cressy, while his wife was alive, kept a certain Elizabeth his servant in adultery.³⁸

Putting aside the natural differences in venue and the nature of the crime, the procedural use of public fame and its proof by inquest described here seems much like that specified by the Assize of Clarendon.

This same extract also illustrates the second point. There was nothing inherently arbitrary about *ex officio* procedure as used in the English church courts. The judge had no unfettered authority to proceed against any person he chose. Rather, he could proceed only with the concurrence of public fame. Thus, if a person were cited to appear before an ecclesiastical tribunal and charged with an ecclesiastical offense, he or she had a right to an inquest to determine whether there was such public fame. That right was recognized and respected in the case from the court at St. Alban's. And it was not infrequent in the surviving records of other courts.³⁹ Of course, in some cases there was no doubt about the question, and it often happened that the person cited did not deny the public fame.⁴⁰ Then no inquest was needed; he or she could move directly to the stage for proof. But if there were doubt, determination was

SELECT CANTERBURY CASES].

³⁸ Hertfordshire Record Office, Hertford, ASA 7, fol. 6 (1515): "[T]estes sinodales et inquisitores iurati in eadem parochia dicunt et presentant quod est fama in ore fere omnium parochianorum ibidem quod Willelmus Cressy tempore vite uxoris sue custodivit quandam Elisabeth famulam suam in adulterio."

³⁹ *E.g.*, *Ex officio c. William Thorpe*, Diocese of Salisbury, Wiltshire Record Office, Trowbridge, Act book 3, fol. 22v (1565): "et quod fama publica desuper laborat cui objectioni etc. dictus Thorpe respondebat negative unde dominus decrevit inquisitionem fieri ad inquirendum de fama predicta."

⁴⁰ *E.g.*, *Ex officio c. James Barow*, Diocese of Exeter, Devon Record Office, Exeter, Chanter MS. 777 s.d. Thursday before Palm Sunday 1530: "quo die comparuit Jacobus Borow detectus apud officium de arte magica quem iudex vive vocis oraculo interrogavit eum an usus fuit dicta arte cui respondebat negative sed quia publica fama laborat contra eum iudex assignavit eidem ad purgandum se quinta manu."

made by an inquest. It is therefore not true that the canon law permitted *ex officio* prosecutions solely at the initiative of the judge. In form, the court undertook prosecution in its own name, but only because no specific accuser had come forward. The procedure was styled "summary," but this was to contrast it with full trials in which witness testimony was required. Summary procedure is not necessarily unfair procedure.

Certainly it is true that the procedure described here *could* leave room for high-handed behavior by judges. They might cite for frivolous reasons or to extort bribes, or they might even ignore the requirement of public fame entirely. There were contemporary complaints about these things.⁴¹ But they were all contrary to the canon law itself. When the *ex officio* procedure was properly enforced, it was not a system unfettered by legal rule. It was not fundamentally inconsistent with communal presentment on the basis of public suspicion, and in this it was like the presentment system adopted by the common law. Public suspicion initiated the process, and its existence was determined by a formal inquest of sworn men.

Criminal procedure in the church courts also resembled the presentment system in that it had two separate stages. Public fame was not tantamount to guilt. Once its existence had been ascertained, canonical purgation followed.⁴² Purgation was the formal method of proof regularly used in "criminal" cases in the church courts, a method prescribed and regulated by several titles in the canon law books. The publicly suspected person swore an oath that he or she was innocent of the underlying charge, and this oath was tested by compurgation, by which a number of oath helpers would swear solemnly that they believed the oath was true.⁴³ This determined guilt or innocence. In other words, it was a two-stage process just as the Assize required—the major difference being that in the canon law trial proof was by wager of law, and in the English common law it was by ordeal.

To modern perceptions, such a difference may seem to be all the difference in the world. But to medieval perceptions it was not. The ordeal was treated as one form of compurgation in medieval

⁴¹ See Van Caenegem, *supra* note 16, at 66-68.

⁴² See *DECRETUM GRATIANI, Glossa Ordinaria*, at C. 2, q. 5, c. 19 (*Omnibus vobis*) s.v. *aut, supra* note 24 ("*propter calumniosam accusationem cogitur quis se purgare*").

⁴³ The oath helpers or compurgators swore not to the truth of the underlying facts, but to their belief in the veracity of the oath. See *DECRETALES GREGORII IX, Liber V, tit. 34, c. 13 (De testibus)*, in 2 *CORPUS IURIS CANONICI, supra* note 27, at col. 875.

law. It was a severer form, but not different in kind.⁴⁴ The canon law texts referred to an ordeal as *purgatio vulgaris*; they called compurgation *purgatio canonica*.⁴⁵ The English royal courts likewise used the same terminology for both forms of proof. "Let him purge himself by water," ran the standard formula.⁴⁶ *Purgare* was the word used. In fact, the portion of Gratian's *Decretum* that authorized the procedure for the Church allowed the ordeal as a possible means of proof, a fact suppressed as embarrassing or anachronistic a century later when the same text was incorporated into the *Decretals* of Gregory IX.⁴⁷ When the Assize of Clarendon was formulated in 1166, therefore, no substantial dissimilarity between the formal canon law and the Assize existed regarding the means of proof.⁴⁸ The coincidence may in fact be even closer, for the canon incorporated in the *Decretum* called for the purgation to be made by twelve men, exactly the number normally used in English jury practice.⁴⁹ Accordingly, canonical procedure and the presentment system were clearly similar at three crucial points: the importance of public fame, the use of inquests to verify the existence of

⁴⁴ There is a charming contemporary example in *THE LIFE OF CHRISTINA OF MARKYATE* 62-63 (C. Talbot ed. 1959).

⁴⁵ Compare, for example, *DECRETALES GREGORII IX, Liber V, tit. 34 (De purgatione canonica)* with *id. tit. 35 (De purgatione vulgari)*, in 2 *CORPUS IURIS CANONICI, supra* note 27, at cols. 869-880. The rough equivalence between the two in popular attitudes is also well indicated by the case of a woman suspected of adultery: the option was ordeal by hot iron or use of an oath of purgation. See *THE LETTERS AND CHARTERS OF GILBERT FOLIOT, supra* note 30, at 309 (letter no. 237 (1163-1177)).

⁴⁶ See, e.g., *THE EARLIEST LINCOLNSHIRE ASSIZE ROLLS A.D. 1202-1209*, at 121 (D. Stenton ed. 1926) (entry no. 693a) (22 *Lincoln Rec. Soc'y*) ("*purgavit se per iudicium acque*").

⁴⁷ Compare the version of the canon of the Council of Tribur (*Nobilis homo*) inserted in *DECRETUM GRATIANI, C. 2, q. 5, c. 15*, in 1 *CORPUS IURIS CANONICI, supra* note 27, at col. 459 ("*sed (sicut qui ingenuus non est) ferventi aqua vel candenti ferro se expurget*") with the same canon included in the *DECRETALES GREGORII IX Liber V, tit. 34, c. 1*, in 2 *CORPUS IURIS CANONICI, supra* note 27, at col. 869 ("*sed ei, sicut qui ingenuus non est, purgatio indicatur*"). The use of ordeals in Continental practice of the church courts is well attested. See Donahue, *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 134-35 (M. Arnold, T. Green, S. Scully, & S. White eds. 1981); Gaudemet, *Les ordalies au moyen age: doctrine, legislation et pratique canoniques*, in *LA PREUVE* 99, 117 (1965) (17 *Recueils de la Société Jean Bodin* (1965)).

⁴⁸ There are good reasons, however, for supposing that actual use of ordeals in the church courts was infrequent by the twelfth century, regardless of what appeared in the texts of the *Decretum*. See *DIE SUMMA DES STEPHANUS TORNACENSIS 171-72* (J. von Schulte ed. 1891).

⁴⁹ *DECRETUM GRATIANI, C. 2, q. 5, c. 15*, in 1 *CORPUS IURIS CANONICI, supra* note 27, at col. 459 ("*cum duodecim ingenuis se expurget*"). For a contemporary instance of a canonical purgation by 12 men, see *THE LETTERS AND CHARTERS OF GILBERT FOLIOT, supra* note 30, at 159 (letter no. 119 (1148-63)).

that public fame, and subsequent proof by means of a form of *purgatio*.

Similarities between presentment and *ex officio* procedure in the church courts can even be found in matters of lesser moment. For instance, compurgation continued to be used in royal court practice, despite the Assize of Clarendon's apparent requirement of the use of the ordeal.⁵⁰ Both court systems used reports by other officials to check and to augment presentments made in the ordinary course.⁵¹ Also similar is Glanvill's treatment of royal court practice when a specific accuser ("*certus accusator*") appeared: the presentment procedure was suspended and the accuser was given the opportunity of proving that the defendant had committed the crime.⁵² In this Glanvill has mirrored the canon law. It was a rule in the church courts that if a person objected to purgation of a person defamed, the objector was provided the opportunity affirmatively to prove his accusation.⁵³ Thus when a certain Amy Grigge was assigned canonical purgation by the diocesan court at Ely after denying the offense of being a "public defamer of her neighbors," the court suspended procedure when objection was made by John Cheseman, who asserted that "he wished to prevent the said purgation and to prove the truth of the fact at an appropriate time and place."⁵⁴ Something like this is exactly what Glanvill said happened in English common law practice.

When one reaches a date later than the twelfth century, from which the surviving evidence is fuller, parallels extended even to what one can only describe as matters of mere detail. For instance,

⁵⁰ See, e.g., THE EARLIEST NORTHAMPTONSHIRE ASSIZE ROLLS A.D. 1202 AND 1203, at 135 (D. Stenton ed. 1930) (5 Northamptonshire Rec. Soc'y) (entry no. 796 (1203)); SELECT PLEAS OF THE CROWN A.D. 1200-1225, at 39 (F.W. Maitland ed. 1888) (1 Selden Soc'y) (entry no. 82 (1200)). See also H. RICHARDSON & G. SAYLES, *supra* note 1, at 198-99 (arguing that compurgation remained an alternative to the ordeal as a method of proof under the Assize).

⁵¹ See B. WOODCOCK, *MEDIAEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* 49, 69 (1952); Langbein, *The Jury of Presentment and the Coroner*, 33 COLUM. L. REV. 1329 (1933).

⁵² THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 171-73 (G. Hall ed. 1965) (1st ed. ca. 1188) [hereinafter cited as GLANVILL]. See also the discussion in S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 406-09 (2d ed. 1981).

⁵³ *DECRETUM GRATIANI, Glossa Ordinaria*, at C. 2, q. 5, c. 13 (*Presbyter*) s.v. *suspendatur*, *supra* note 24 ("et si accusatores apparuerint, canonicè audientur . . . Si vero accusator non apparet et mala fama crebescit tunc episcopus vocatus ecclesiae senioribus procedat ad inquisitionem.").

⁵⁴ Cambridge University Library, EDR D/2/1, fol. 63 (1377): "asserens se velle ipsam purgacionem impedire et facti veritatem probare pro loco et tempore oportunis ut pro huiusmodi diffamacione canonicè puniatur."

the church court records produce references to the *billa vera*, the true bill that was a characteristic part of grand jury practice.⁵⁵ The use of presentment *eo nomine* was a regular feature of later medieval church court practice, as it was in royal and local courts.⁵⁶ Jurisdictional differences between the court systems existed according to the underlying matter presented, more than in the means of bringing that matter into court.

Of course, this is not to say that secular and ecclesiastical procedures were identical. They were not. In canonical practice, we have already noticed, the inquest was normally used only when the existence of public fame was in doubt.⁵⁷ Moreover, ecclesiastical practice always permitted individual questioning of members of the inquest, which differs from the royal courts' regular practice with grand jury members.⁵⁸ Thus although the evidence does not suggest that there were no differences between the two court systems, it produces enough parallels between canonical *ex officio* procedure and the English presentment system to require the historian of law to assess ecclesiastical evidence in evaluating the origins and development of the grand jury presentment system.

CONCLUSIONS

Three conclusions are suggested by this examination of the nature of *ex officio* procedure in the church courts. The first and most demonstrable conclusion qualifies Van Caenegem's argument that *ex officio* procedure inevitably led to vindictive action by ecclesiastical and royal officials. The canon law provided checks. Perhaps prosecutions were sometimes the products of bribery or vindictiveness; this seems to be a by-product of criminal law in almost every age. But surely it is wrong to conclude from isolated complaints that corruption was the norm, as it would also be wrong to assume that practice invariably mirrored the formal law. At least the record evidence shows that the canonical requirement of public fame, the use of inquests, and the opportunity for testing guilt or innocence through compurgation were regularly put into practice. The *ex officio* jurisdiction of the ecclesiastical courts did not oper-

⁵⁵ *E.g.*, Presentments from Diocese of Winchester, Hampshire Record Office, Winchester, C B 1, fol. 46r (1513).

⁵⁶ See *supra* note 38 and accompanying text; a fifteenth-century record of such presentments is found in Ely Diocesan Probate Records, Cambridge University Library, Liber B, fol. 8 (1473), for the parish of Newton.

⁵⁷ See *supra* notes 39-40 and accompanying text.

⁵⁸ See SELECT CANTERBURY CASES, *supra* note 37, at 58.

ate unfettered by requirements of law. It is therefore wrong to draw too sharp a distinction between the "old" and "fair" ecclesiastical system of communal accusation and the "wicked new method of impleading" of the twelfth century.⁵⁹

The second conclusion supports and amplifies Van Caenegem's argument that the canon law influenced the formulation of the Assize of Clarendon and hence of the early history of the grand jury. The parallels found by looking further into the canon law make this influence likely. They do not prove it absolutely. Not only are there differences as well as parallels, but much of the record evidence used here comes from after the twelfth century⁶⁰ and it is therefore less than entirely satisfying. Yet there are good reasons for using the later evidence. The *ex officio* procedure was clearly known and used by ecclesiastical tribunals during the time of the Assize, and the church courts in later years purported to be bound by the same formal system. Although there were refinements made in ecclesiastical procedure, there was no wholesale reform.

Moreover, ecclesiastical influence on the beginnings of the presentment procedure fits what is known about the other half of Henry II's legal reforms, the Assize of Novel Disseisin. It is now generally agreed that this fundamental provision of English land law was suggested by Roman law notions mediated through the canon law. The similarities between the principles of Roman law and the rules adopted by English law are too great, in the view of the most thorough and expert student of the subject, Professor Sutherland, to leave much doubt that there was an influence.⁶¹ It therefore makes some sense to suppose that a similar influence also affected Henry II's reforms of the criminal law.

A connection between ecclesiastical and secular procedures by no means implies an entire absence of continuity between the Assize of Clarendon and past English practices. That Henry II used past precedents is common ground for Miss Hurnard and Professor Van Caenegem, and it is not contradicted by any evidence put forward here. Ecclesiastical law had long played a role in shaping English law. The canonical system of penitential discipline had had a

⁵⁹ See Dahyot-Dolivet, *La procédure judiciaire d'office dans l'église jusqu'à l'avènement du Pape Innocent III*, 41 *APOLLINARIS* 443 (1968). The characterization of *ex officio* procedure as a "wicked new method of impleading" is found in Van Caenegem, *supra* note 16, at 61.

⁶⁰ See *supra* notes 29-31 and accompanying text.

⁶¹ D. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 21-24 (1973).

considerable effect on the law of Anglo-Saxon England,⁶² and it is likely that the law of the Church, or at least parts of it, had been used to fix criminal procedure in secular courts long before the late twelfth century. Canon law influence on the formulation of the Assize of Clarendon may therefore best be seen as another, though a particularly important, example of the canon law's traditional influence on English law and institutions.

The third conclusion required by examination of the *ex officio* ecclesiastical procedure is that no strict boundary can be drawn between criminal prosecution and the law of crimes enforced in the canon law and those in the English common law courts even during the later Middle Ages. Whatever one concludes about canon law influence in 1166, the parallels in procedure during the later period are unmistakable, and it is at least possible that ideas and practices percolated back and forth throughout the medieval period. Henry II himself evidently thought that much the same procedures should be followed in the courts of church and state,⁶³ and there is little doubt that the habits of mind that encouraged easy movement between legal systems continued. We meet parts of canonical collections in the *Leges Henrici Primi*⁶⁴ and in Glanvill's treatise.⁶⁵ Bracton borrowed his discussion of the law of homicide, and much else besides, from the canonist Bernard of Pavia.⁶⁶ The correspondence between *ex officio* procedure in the Church courts and much of the early history of English criminal procedure should therefore be no surprise. It fits within a habit of mind that saw no radical disjunction between the correction of secular and spiritual offenses. Differences between the legal systems there were. It would be foolish to ignore them. But the evidence fully supports Van Caenegem's theme of the relevance of the canon law in studying the origins and early history of the English grand jury.

⁶² T. OAKLEY, *ENGLISH PENITENTIAL DISCIPLINE AND ANGLO-SAXON LAW IN THEIR JOINT INFLUENCE* (1923).

⁶³ See Constitutions of Clarendon (1164) ch. 6, in W. STUBBS, *supra* note 1, at 165. An English translation appears in 2 *ENGLISH HISTORICAL DOCUMENTS*, *supra* note 1, at 720; 1 *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY*, *supra* note 1, at 75.

⁶⁴ *LEGES HENRICI PRIMI* c. 5, 27-28, at 94-95 (L. Downer ed. 1972).

⁶⁵ Hall, *Introduction to GLANVILL*, *supra* note 52, at xxxvii.

⁶⁶ See BRACTON AND AZO 225-35 (F.W. Maitland ed. 1900) (8 Selden Soc'y).