

The Abandonment of Ordeal by Fire and Water: Legitimacy of the Church and Concern for Power

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## **Introduction**

Ordeals by fire and water were one of the adjudicatory methods of proof during the medieval English period. Historians have asserted various theories regarding the abandonment of ordeals. Some scholars, such as Sir John Baker, attribute abandonment to prolonged intellectual debate regarding the ordeals' legitimacy as a means of adjudication. Other historians advance the position that to truly understand the reason for abandonment of ordeals one must look to the changes of society during the respective time periods. While each perspective has useful insights, ultimately, they fail to provide a comprehensive picture. I will argue that to truly understand why the Church prohibited clergy participation in ordeals, thereby constructively abandoning ordeals as a mean of adjudication, one must understand the root cause of the council's decision. First, I will provide a brief overview of the history of ordeals and how Sir John Baker and functionalists have grappled with the abandonment of ordeals. Secondly, I will critique both theories, ultimately concluding that each, while noteworthy, mistakenly applies a modern application of historical analysis instead of a retrofitted analysis and thereby provides only a partial account of ordeals' abandonment instead of a wholistic account. Third, because the Church acted like a governing entity and such role entails unique considerations, I will explore concerns about legitimacy. I will argue legitimacy concerns were an important cause of the Church prohibiting clergy participation. Lastly, I will introduce a formula, originally authored for political theory, to further explain that the Church could not effectively exercise control while simultaneously permitting clergy participation in ordeals without some threat to its legitimacy.

## **A Brief History and Account of the End of Ordeals**

Ordeals were a means of dispute resolution between two parties and adjudication of certain criminal accusations.<sup>1</sup> Premised on divine judgment, ordeals utilized purported divine intervention as the final abitur.<sup>2</sup> They were regularly used in a judicial framework that provided multiple means of adjudication.<sup>3</sup> However, ordeals were considered the last means of judging the guilt or innocence of a party.<sup>4</sup> This is evidenced by the twelfth century statement that “the ordeal . . . is not to be permitted except when the naked truth cannot otherwise be explored.”<sup>5</sup> Additionally, Glanvill held “it is the law of the realm that no-one shall be purged by ordeal” and “it is for the accused to choose whether he will submit to the burden of the ordeal.”<sup>6</sup> In England, ordeals were primarily conducted by fire or water.<sup>7</sup> In the case of fire, “a piece of iron was put into a fire and then in the party’s hand” or “the party had to plunge his hand into boiling water to retrieve a stone.”<sup>8</sup> The hand was then wrapped in cloth and inspected days later.<sup>9</sup> If the burn had become infected or septic as opposed to completely healing, God was said to have judged the party guilty because, the innocent would not be harmed.<sup>10</sup> Ordeals by cold water required the party to be lowered into a body of water.<sup>11</sup> If the individual sank, then the party was deemed innocent by God’s judgement. But if the party floated when lowered into the water, the party would be found guilty.<sup>12</sup> Most noteworthy, regarding the history of ordeals, is the lack of

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<sup>1</sup> Margaret H. Kerr, Richard D. Forsyth & Michael J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. of Interdisc. Hist. 573, 588 (1992) (noting examples of robbery, murder, and theft); X

<sup>2</sup> JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 7 (5th ed. 2019).

<sup>3</sup> ROBERT BARTLETT, *TRIAL BY FIRE AND WATER* 26 (1986).

<sup>4</sup> *Id.*

<sup>5</sup> Bartlett, *supra* n. 3, at 26 (citing FELIX LIEBERMANN, *PSEUDO-CNUT DE FORESTA* 622 (11.2 ed.) (noting the ordeals were only used when there was no others means, such as witnesses or proven circumstances)).

<sup>6</sup> GLANVILL 173, 175 (George D.G. Hall ed., trans. 1965) (1965).

<sup>7</sup> Baker, *supra* n. 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Baker, *supra* n. 2, at 7; Margaret H. Kerr, Richard D. Forsyth & Michael J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. of INTERDISC. HIST. 573, 588 (1992).

<sup>11</sup> *Id.*

<sup>12</sup> Kerr ET AL., *supra* n.1, at 588 (more eloquently stating if the party sank the party “was deemed to have ‘received him’ with God’s blessing, and he was fished out.”)

consensus among historians surrounding the abandonment of ordeals as a means of adjudication. As “legal scholars have explained the ordeal’s role in a number of ways,” so have they explained the cause(s) of its ending.<sup>13</sup> Officially, scholars generally agree ordeals ended after the Fourth Lateran Council of 1215 issued Canon 18 stating judicial tests or ordeals shall be prohibited.<sup>14</sup>

Historians such as Baker and Bartlett argue that ordeals had become “the subject of prolonged intellectual debate” regarding “its legitimacy and its efficacy.”<sup>15</sup> “It was not clear how God could be expected to answer human questions” and whether there were limitations regarding His intervention and or human knowledge about such alleged intervention.<sup>16</sup> Moreover, Baker argues that the abandonment of ordeals rested on the belief “that it was impious to believe that a constructed human test . . . could ‘force’ God to show his hand. That was testing God.”<sup>17</sup> Baker concludes that the prolonged intellectual debate regarding these fundamental questions and concerns, caused the Lateran Council to forbid clergy from participating in ordeals.<sup>18</sup> And because clergy participation was necessary to properly conduct ordeals, the removal of clergy suddenly ended the ordeal and brought forth “the introduction of the criminal trial jury.”<sup>19</sup> Functionalists, such as R.C. Van Caenegem, assert that ordeals were abandoned because of the rationalization of proof occurring in Europe.<sup>20</sup> As Europe was in the process of modernization, such process demanded “advanced social structures and higher intellectual levels” thereby rendering ordeals useless.<sup>21</sup> Other functionalists, such as Peter Brown and Paul Hyams, attribute

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<sup>13</sup> Kerr ET AL, *supra* n.1, at 588.

<sup>14</sup> c. 4 of the Lateran Council of 1215; see *Medieval Sourcebook: Twelfth Ecumenical Council: Lateran IV 1215*, FORDHAM UNI., <https://sourcebooks.fordham.edu/basis/lateran4.asp> (citing explicitly to “canon 18”).

<sup>15</sup> Baker, *supra* n. 2.

<sup>16</sup> *Id.*

<sup>17</sup> Baker, *supra* n. 2, at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Bartlett, *supra* n. 3, at 34 (explaining the term ‘functionalist’ to reference scholars that view history of ordeals against the backdrop of societal development occurring during the use of ordeals).

<sup>21</sup> *Id.*

the abandonment of ordeals to its specific tailoring to small communities and emphasis on consensus.<sup>22</sup> They argue that because communities were experiencing “the impact on faster communication and extensions of political units” “ordeals were progressively less useful.”<sup>23</sup>

### **Critique of Functionalist & Baker’s Argument**

Both functionalists and proponents of Baker’s view suffer from glaring oversight. The functionalist perspective fails by attempting to understand the history of ideas by using terms of the present while discounting the critical role the Church during the time-period. Baker’s view, however, prematurely ceases inquiry at the immediate preceding cause without attempting to completely trace the initial cause. Attempting to maintain the best logical order, I will first critique the functionalist approach then Baker’s conclusion.

Generally understood, the functionalists trace the abandonment of ordeals to an evolving society. Succinctly stated, abandonment of ordeals was a response to the changing needs and circumstances of England. But as Bartlett aptly notes, the functionalist approach “de-emphasize[s] the role of the clerical criticism which culminated in the 1215 canon against ordeals.”<sup>24</sup> Kings during the ninth century Carolingian period “defined and reinforced their kingship by their Christianity.”<sup>25</sup> This was done by kings simultaneously exercising their sovereign power over their subjects while in turn proclaiming their submission to God.<sup>26</sup> Subsequently, during the tenth and eleventh century English kings used ordeals thereby securing

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<sup>22</sup> Bartlett, *supra* n. 3, at 35; See generally Peter Brown, *Society and the Supernatural: A Medieval Change*, 104 MIT Press 133, 137, 138 (arguing the ordeal contained conflict within condensed small groups of which ‘waves’ of conflict were easily spread); See generally Paul R. Hyams, *Trial by Ordeal: The Key to Proof in Early Common Law*, in *On the Laws and Customs of England – Essays in Honor of Samuel E. Thorne* 92 (Morris S. Arnold et al. eds. U.N.C. Press 1981)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Bartlett, *supra* n. 3, at 36 (this culminated in what would be later referred to as ‘divine right’).

<sup>26</sup> *Id.*

ordeals as a means of adjudication.<sup>27</sup> Moreover, English law and religion were interconnected at a conceptual level and institutional level.<sup>28</sup> Conceptionally, the outcome of the ordeal was considered “the command of God.”<sup>29</sup> Institutionally, ordeals originally supported, endorsed, and promulgated by the Church.<sup>30</sup> The Church was the ‘custodian’ of instruments necessary to conduct ordeals and clerics were the keeper of the rites and prayers.<sup>31</sup> Additionally, ordeals “were conducted or supervised by the clerics.”<sup>32</sup> This evidence underscores the prominent role the Church played in legitimizing and substantiating the law. By minimizing or outright ignoring the Church’s prominent role and then analyzing the abandonment of ordeals through solely a functionalist framework is to deviate from “the paradigm through which a thing operated and by which the firm limits to his perception were set.”<sup>33</sup> In other words, by analyzing abandonment of ordeals through a sole emphasis of changing circumstances in society is to mistakenly disregard necessary inquiry into prominent institutions, like the Church, which thereby produces only a partial account of history. Essentially, the functionalist perspective fails to incorporate the integral role of the Church in society and the State and thereby ignores a key inquiry into the abandonment of ordeals as a means of adjudication. In relation to Baker, however, the functionalists do rightly consider factors other than the immediate cause. But as will be covered shortly, the functionalist approach, like Baker’s, fails to incorporate all relevant factors in the Church’s decision to prohibit clergy participation. Where the functionalists overemphasize societal factors, Baker overemphasizes what he deems to be the immediate cause.

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<sup>27</sup> *Id.*

<sup>28</sup> H. L. Ho, *The Legitimacy of Medieval Proof*, 19 J.L. AND RELIGION 259, 265 (2003).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Michael S. Roth, *Foucault’s “History of the Present,”* 20 HISTORY AND THEORY 32, 36 (1981).

Summarily, Baker points to the “prolonged intellectual debate” regarding “whether mortals had any right to invoke God’s miraculous intervention in mundane affairs” as the sole reason for the Lateran’s Council 1215 canon prohibiting clergy participation in ordeals which subsequently ceased ordeals.<sup>34</sup> This view echoes Bartlett’s view that a clerical elite was responsible for turning their “ideas and aversions into legislative prohibitions.”<sup>35</sup> Baker’s and Bartlett’s mistake, as echoed by functionalists, is failing to analyze the closely linked history of the ordeal with other methods of adjudication.<sup>36</sup> As Bartlett argued, ordeals were just one adjudicatory means in an interlocking system that influenced “the way the ordeal itself was regarded.”<sup>37</sup> Oaths, which required, “call[ing] upon God to witness the truth of one’s assertion” were another example of mortals attempting to invoke God in mundane affairs.<sup>38</sup> However, oaths remain prominent in the legal tradition while ordeals have long since been abandoned. Baker might attempt to justify the strange juxtaposition by arguing that oaths were of a more symbolic nature than ordeals. Such statement, however, is false because during the relevant time-period, “the fear of facing God’s wrath” by breaking the oath “was genuine and deep.”<sup>39</sup> Moreover, Baker might attempt to distinguish oaths and ordeals by citing the level of expected involvement by God. Participations in ordeals relied “entirely by His intervention” whereas intervention regarding oath takers would manifest “by making [the oath taker] falter as he tried to take the oath.”<sup>40</sup> “Despite these variations” oath and ordeals share the basic “presupposition and

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<sup>34</sup> Baker, *supra* n. 2, at 7-8; Bartlett, *supra* n. 3, at 42 (qualifying that there is a scant amount of evidence suggesting a ‘withering’ practice of ordeals in reference to other Christian territories).

<sup>35</sup> Bartlett, *supra* n. 3, at 100: See R.C. van Caenegem, *Reflexions on Rational and Irrational Modes of Proof in Medieval Europe*, 58 *Tijdschrift voor Rechtsgeschiedenis* 263, 270 (1990)

<sup>36</sup> Summarily stated, oaths and ordeals required the judgment of God. Although the Church is not directly implicated its participation in ordeals, which share the same basic premise, can be cited in justification. Baker and Bartlett fail to understand that even by way of implication some threat to legitimacy can be present.

<sup>37</sup> Bartlett, *supra* n. 3, at 68.

<sup>38</sup> Ho, *supra* n. 25, at 270.

<sup>39</sup> *Id.*

<sup>40</sup> Ho, *supra* n. 25, at 261.

characteristic,” immediate intervention by God.<sup>41</sup> Therefore, the emphasis of the prolonged debate lies not with man’s right to invoke divine intervention but something else entirely. Additionally, Baker prematurely stops inquiry into the abandonment of ordeals at the Lateran Council’s 1215 canon. Instead of attempting to understand why the prolonged intellectual debate caused the Lateran Council to outlaw clergy participation, he simply accepts such as the immediate cause. Upon a cursory understanding of the prevailing philosophy and theology of the time, while it is clear the Church was the authority on all theological matters, the innate nature of theology was considered merely a speculative science.<sup>42</sup> Since the practice of theology is a speculative science, Church leadership was *only* supposed to contemplate the truth of the Holy Bible as opposed to contemplating the truth and applying such conclusions to practical matters, such as sanctioning adjudicatory methods.<sup>43</sup> However, such speculation can be attributed as one of the indirect causes of abandonment of ordeals. Ultimately, it was the Church’s attempt at non-uniformly advocating for, or condemning ordeals, which led to the threat to their legitimacy and subsequently their power. Baker entirely misses this point either because of oversight or unfamiliarity with the prominent philosophy of the role of theology of the time.

While both perspectives offer significant insight into possible explanation of the abandonment of ordeals, I believe it is a combination of the two approaches that will provide a more holistic picture. As H. L. Ho, a legal scholar, aptly notes “we must recapture the worldview

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<sup>41</sup> Ho, *supra* n. 25, at 261; See Paul R. Hyams, *Trial by Ordeal: The Key to Proof in Early Common Law*, in *On the Laws and Customs of England – Essays in Honor of Samuel E. Thorne* 92 (Morris S. Arnold et al. Eds. S.U.N.C. Press 1981) (arguing unilateral ordeals, oaths, and duels all required God’s judgment); *Contra* Bartlett, *supra* n. 3, at 30 (arguing that God’s judgment will be eventual rather than immediate. One cannot categorically and consistently make this claim because this would be to advance the criticisms of the clerical elite in questioning *when* God acts. Rather, the only fact that can be known is that given the presupposition, God exists, it is only God that will know when He acts).

<sup>42</sup> Gaven Kerr, *Aquinas: Metaphysics*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://iep.utm.edu/aq-meta/>; See generally Ho, *supra* n. 25, at 283 (citing Aquinas because his perspective, that God’s judgment included an inseparable truth and justice, is the closest reflection of the prevailing philosophy of the time).

<sup>43</sup> See generally Kerr ET AL., *supra* n. 1.



of the medieval Western Europeans.”<sup>44</sup> To do this, I will examine their beliefs and their relationship to the Catholic Church. Ho has done an exceptional job in putting forth a holistic approach to understanding the legitimacy of medieval proof. By expounding on his work, I hope to replicate his holistic approach to understanding the rationale of the Catholic Church banning clergy participation in ordeals.

### Overview

Having provided substantive critiques of existing causation theories surrounding the abandonment of ordeals, I will now posit my theory explaining why ordeals were abandoned. First, I will lay groundwork positing that the Church was an entity akin to the State. As an entity akin to the State, secondly, I will argue that inherent in such status is the problem of addressing threats to legitimacy. As legitimacy is necessary in participants accepting the authority of an institution, such as the Church, the Church had an interest in curbing the threat of disputing factions regarding the sanctioning of ordeals. Lastly, I will utilize a republican political theory formula to demonstrate possible consequences to Church authority, had the Church not banned clergy participation in ordeals.

### Legitimacy

In medieval Europe, the Church occupied such a prominent position in affairs of state and individual affairs that the Church can be categorized as a governing political entity. One of the earliest statements on record supporting such a proposition was issued by St. Ambrose in c. 380, when he proclaimed, “palaces belong to the emperor, churches to the priesthood.”<sup>45</sup> “A century

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<sup>44</sup> Ho, *supra* n. 25, at 260.

<sup>45</sup> Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J.L. AND RELIGION 163, 167 (1987).

later Pope Gelasius declared” that “there are two means by which the world is chiefly governed, the sacred authority of the priesthood and the royal power.”<sup>46</sup> Moreover, the medieval Church “always insist[ed] that there was a whole sphere of human thought and action” that was “outside the legitimate power of the temporal government.”<sup>47</sup> The Church used their “monopoly over the supernatural belief system” “as weapons to receive benefits in its dealings with both Church members” and the secular political world. Cumulatively, the evidence reasonably leads to the conclusion that the medieval Church acted equivalently to the State and autonomously from the State. This position of duality afforded the Church a position alongside the State as opposed to subservient to the State. But such a position renders the Church an institution, which subsequently gives rise to State like concerns, namely legitimacy. Whereas the actions of monarchs could give rise to concerns of legitimacy of their right to rule, the Church would have been cognizant of threats of its legitimacy to act as an authority on and control religious matters.

Generally understood, “legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”<sup>48</sup> Or, more simply stated, “legitimacy is the perception that one ‘ought to obey’ another.”<sup>49</sup> Legitimacy is integral to institutions, like the Church, because “social norms and values become a part of people’s internal motivational systems” which “guide their behavior separately from the impact of incentives and sanctions.”<sup>50</sup> Consequently, one’s perception of “control by others” is replaced by a perceived “self-control.”<sup>51</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 377 (2006) (understanding that the conception of legitimacy is by no means easily defined. The definition and understanding of legitimacy are still debated).

<sup>49</sup> *Id.*

<sup>50</sup> Tyler, *supra* n. 41, at 378.

<sup>51</sup> *Id.*

Such a consequence leads to “voluntary deference to the directives of legitimate authorities and rules.”<sup>52</sup> Equally important, an institution’s “viability is enhanced when members view organizational rules and authorities as legitimate and entitled to be obeyed.”<sup>53</sup> Moreover, “people are found to believe authorities are more legitimate,” in the legal arena “when they view their actions as consistent with fair procedures.”<sup>54</sup> Because clergy were essential to ordeals, a method of adjudication, this meant that public perception of ordeals had influential power to either reinforce or remove the ordeal’s legitimacy, thereby affecting the Church’s legitimacy.<sup>55</sup> Additionally, because “people are influenced by what they are told others think about the allocator,” the threat of illegitimacy could not be contained.<sup>56</sup> This is especially true provided the prominent figures both in the Church and outside of it who greatly differed on the ordeal’s legitimacy. Pope Alexander II strictly forbade “that popular proof, which has no canonical sanction, namely hot water, cold water” or hot iron.<sup>57</sup> Ivo (d.1115), a bishop of Chartres and ambivalent authority on ordeals, was “an influential compiler of canon law.”<sup>58</sup> Ivo wrote letters on five different occasions, the most famous being to Hildebert, bishop of Le Mans, “attacking the practice of various ordeals” by writing “the ordeal of hot iron is not accepted by ecclesiastical custom . . . nor instituted by canonical authority” while also “on four other occasions” “condon[ing] or permitt[ing] the use of ordeals.”<sup>59</sup> This indecisiveness “was reinforced by the

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<sup>52</sup> *Id.*

<sup>53</sup> Tyler, *supra* n. 41, at 380.

<sup>54</sup> *Id.*

<sup>55</sup> FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I*, 599 (Cambridge Uni. Press eds. 2ed 1898) (1968) (noting that men were beginning to mistrust the ordeals of fire and water).

<sup>56</sup> Tyler, *supra* n. 41, at 383.

<sup>57</sup> *PL* 146, col. 1406, JL 4505, Ivo of Chartres, *Decretum*, 10.15, and *Panormia* 5.7-8, *PL* 161, cols. 695 and 1214-15, Gratian’s *Decretum* C.2, q.5, c.7.

<sup>58</sup> John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 against Ordeals*, 36 *UNI. OF CHI. PRESS* 613, 617 (1961).

<sup>59</sup> *Id.* at 618; *Epistola* 74, *PL* 162, cols. 95-96.

authority of the *Decretum* of Gratian.”<sup>60</sup> “Gratian assembled major authorities condemning ordeals” while simultaneously including authorities in support of ordeals.<sup>61</sup> *Decretum* then “became the standard text of canon law” to which canonists “devoted” their writings, comments, teachings, and development.<sup>62</sup> Summarily, the hesitations of Gratian would become the “hesitations of the canonists engendered by conflicting texts and contemporary practice.”<sup>63</sup> Maitland noted that William II and Henry II had condemned the ordeal.<sup>64</sup> Such uncertainty was a challenge to the Church’s legitimacy. Because the Catholic church relied “on the support of a large centralized system” it was imperative that there be a consensus regarding ordeals.<sup>65</sup> Failure to reach such a consensus could result in the Church facing challenges to its legitimacy.<sup>66</sup> The result of such crisis could have caused the Church “to lose [its] right to exist.”<sup>67</sup> Understanding the importance of public trust, it is likely the Church understood the consequences of mistrust would ultimately lead to their inability to assert influence and direction.

Underpinning the debate between canon authorities, which threaten the Church’s legitimacy, was the rise in intellectualism. To ensure the accounting of important aspects of the medieval worldview, discussion must begin at the source of canon law, the Bible. When facing intellectual questions that could threaten the Church’s legitimacy, canonists cite Ecclesiastes 3:17. The *Teacher*, Qoheleth, states “God shall judge the righteous and the wicked. For there is a

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I*, 599 (Cambridge Uni. Press eds. 2ed 1898) (1968) (“Henry II had declared that when an indicted man came clean from the water, he was none the less to abjure the realm”).

<sup>65</sup> Karoliina Malmelin & Nando Malmelin, *Faith-based Organizations and the Challenges of Public Legitimation*, 11 INT’L J. PUB. LEADERSHIP 166, 170 (2015).

<sup>66</sup> See Malmelin, *supra* n. 64.

<sup>67</sup> *Id.*

time there for every purpose and for every work.”<sup>68</sup> But understood against the backdrop of Ecclesiastes 3:1 “for everything there is a season, and a time for every matter under the Heaven,” Ecclesiastes can be said to be partly responsible for the debate surrounding the human invocation of God’s judgment.<sup>69</sup> By calling into question the divine sanctification of the ordeal, religious authorities opened it for criticism. The growth of criticism surrounding ordeals coincided with the practice of reason as an intellectual activity.<sup>70</sup> One such byproduct of this shift was Adelard’s of Bath twelfth century argument that thunderstorms should not be viewed as a message from God but rather as some natural event taking place.<sup>71</sup> Moreover, it was only because of the “mental climate” that irrational modes of adjudication could flourish. If rationality is understood as using human critical observation and intelligence, then it is a historical fact that in the twelfth century England moved away from irrational modes of adjudication to more rational modes.<sup>72</sup> Around 1150 theology and canon law became academic disciplines which resulted in unresolved or disputed questions becoming subject to “intense intellectual winnowing.”<sup>73</sup> As the legitimacy of ordeals as a mean of adjudication was still disputed, it was subject to this intense intellectual winnowing.

### **Influence & Direction**

<sup>68</sup> *Ecclesiastes* 3:17 (New King James Version) (the debate surrounding this passage centers around ‘for there is a time.’ It is ambiguous whether it is a call human’s make for divine judgment or God’s sovereign judgment of time).

<sup>69</sup> *Ecclesiastes* 3:1 (English Standard Version).

<sup>70</sup> Brown, *supra* n. 22, at 136 (arguing that “the withering of the ordeal is hailed as one feature of the emergence of Western civilization from the ‘tunnel’ of the Germanic Dark Ages and of the progress of rationality”).

<sup>71</sup> H. Howard Frisinger, *Early Theories on the Cause of Thunder and Lighting*, 46 BULL. OF THE AMERICAN METEOROLOGICAL SOC. 785, 786 (1965).

<sup>72</sup> R.C. van Caenegem, *Reflexions on Rational and Irrational Modes of Proof in Medieval Europe*, 58 TIJDSCHRIFT VOOR RECHTSGOESCHIEDENIS 263, 270 (1990).

<sup>73</sup> Bartlett, *supra* n. 3, at 83.

A threat of illegitimacy can greatly affect an institution's control. Control, as argued by political philosopher Philip Pettit, is achieved through influence and direction. Although Pettit uses the formula  $\text{Control} = \text{Influence} + \text{Direction}$  regarding how citizens can control the State, I will demonstrate that the same formula can be applied for an institution to exert control over its subscribers when it does not have the means of coercive force.<sup>74</sup> Ultimately, "legitimacy imposes a *pro tanto* moral obligation" on those who accept an institution as legitimate.<sup>75</sup> Otherwise stated, if one accepts an institution as legitimate, one accepts at least some of the norms, values, and beliefs into one's life and act accordingly. Therefore, the institution exerts some degree of control over individuals by having them act in accordance with adopted norms, values, and beliefs. Moreover, inherent in control is the notion of power. It is thus reasonable to conclude that the Church was concerned with its power status.

Theoretically, influence can be defined as making a difference in how something proceeds.<sup>76</sup> Simply put, assume that interfering would reach result *X*, while refraining from interfering would reach results *X* or *Y*. Direction can be defined as making "a designed difference" where there is an "identifiable end or goal."<sup>77</sup> As Pettit correctly notes, there can be influence without direction. Just because there is an alteration in process does not necessarily mean there was a recognizable pattern that such alternation gave rise to. To properly assert control therefore, both influence and direction need to be present. But a key component in analyzing this theoretical framework is understanding the relationship between the terms 'control' and 'power.' Simply stated, implicit in the conception of control is the notion of power.

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<sup>74</sup> Pettit's formula is not inherently related to the abandonment of ordeals. Rather, I think it provides the best possible framework for understanding how an institution, like the Church, establishes control and the varying prerequisites necessary to maintain control.

<sup>75</sup> Philip Pettit, *Legitimacy and Justice in Republican Perspective*, 65 OXFORD UNI. PRESS 59, 63 (2012).

<sup>76</sup> Pettit, *supra* n. 58, at 78.

<sup>77</sup> *Id.*

Power, of any degree, is necessary for control for the influence that achieves the desired result. While power obtained does not need to be extensive to control someone or some group, control means to have some power of some value over them. Thus, it can be properly inferred that if influence and direction are adopted and if the result intended by the influence is achieved, then some degree of power is also present. I will now explore this theoretical framework in the context of the Church.

As previously stated, the Church can rightly be considered a political institution which thereby renders it subject to the same “political considerations” that “would inevitably intrude,” such as influence.<sup>78</sup> However, because of the institutional structure of the Church, consistent influence over ordeals made enforcement of regulations of ordeals difficult to maintain. The “centralized long-term strategic policy” was promulgated in the Vatican whereas “day-today decision making” was largely left to the local clergy.<sup>79</sup> But the strategic policy originating at the Vatican was divided. Authorities held contrary views among themselves. This effectively translated to a cancellation of prevailing influence not only among the populace at large but also the clergy conducting the ordeals. Often ordeals were permitted in one case and not another, as evidence by the writings of Ivo and Gratian.<sup>80</sup> Such influence is likely to reach a result of either *X* or *Y* without one result being more favorable than the other. Furthermore, the conflict of influence can be examined on a micro-level by looking specifically at the wide discretion clergy had when conducting ordeals. With respect to cold water ordeals, “the duration of immersion in water was often not fixed.”<sup>81</sup> Regarding fire ordeals, the depth of the water in the cauldron and

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<sup>78</sup> Robert B. Ekelund ET AL., *The Political Economy of the Medieval Church*, in THE OXFORD HANDBOOK OF ECONOMICS OF RELIGION, 306, 307 (Rachel M. McCleary ed., 2011) (political is defined as having to relate to the governance of a particular area or State and the procedures associated with such).

<sup>79</sup> *Id.*

<sup>80</sup> Baldwin, *supra* n. 49, at 618.

<sup>81</sup> Ho, *supra* n. 25, at 268.

the weight and shape of the stone were not prescribed by law.<sup>82</sup> Such discretionary practices allowed for the influence of the clergy responsible for conducting ordeals. This is especially important when interpreting the results of ordeals.<sup>83</sup> Whether or not the hand displayed complete healing was “as open-ended as a Rorschach test.”<sup>84</sup> This allowed for conscious or unconscious human interference which ultimately was responsible for the influence on whether ordeals were viewed as legitimate adjudication means by the populous.<sup>85</sup> Maitland contends that William II scoffed when “of 50 men sent to the ordeal of hot iron all had escaped.”<sup>86</sup> Church structure gave way to a lack of uniformity among ordeals thereby resulting in competing influence among central authority figures as well as local clergy.<sup>87</sup> Thus, as a first necessary precondition, influence, was not met, it would not be possible for the Church to establish a direction regarding its opinion on ordeals.

To establish direction, the Church would have had to agree on some “preconceived or preferred pattern” by which to establish control over ordeals.<sup>88</sup> However, as previously discussed, the institutional organization of the Church made this particularly difficult. The “centralized long-term” “strategic” policy-making authorities disagreed on the legitimacy of the ordeal as a means of adjudication. Additionally, the Church’s personnel responsible for “day-to day decision making” was largely not uniformed. “Many aspects of the trial” which were conducted by local

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<sup>82</sup> *Id.*

<sup>83</sup> Ho, *supra* n. 25, at 268; See Pollock & Maitland, *supra* n. 61, at 599 (stating that “flagrant heresy and the consequent exacerbation of ecclesiastical law” as dealt with in the Fourth Lateran Council could have contributed to the abandonment of ordeals).

<sup>84</sup> Ho, *supra* n. 25, at 268.

<sup>85</sup> *Id.*

<sup>86</sup> Pollock & Maitland, *supra* n. 61, at 599 (Maitland argued that it “certainly looks as if some bishop or clerk had preferred his own judgment to the judgment of God”).

<sup>87</sup> Bartlett, *supra* n. 3, at 101 (arguing that the unanimity of clerical opinion against ordeals in the thirteenth century as compared to the twelfth century is an indication that unanimous influence is more persuasive toward achieving an end than divisive influence).

<sup>88</sup> Pettit, *supra* n. 58, at 78.



clergy “were not tightly regulated.”<sup>89</sup> It was only “where a prescribed rule is applicable, it had to be complied with to the letter.”<sup>90</sup> The wide latitude of discretion this afforded supervising clergy not only introduced a possibility of great influence but also a lack of direction. For example, there was not consensus among the clergy regarding if the hand “had turned clean.”<sup>91</sup> Moreover, as previously mentioned, the authoritative text surrounding ordeals was divisive. Therefore, where one clergy member may agree with permitting ordeals as non-contrary to testing God and thus carry them out to the fullest extent of his duty, another may so err on the side of caution as to liberally interpret the word healing. Additionally, because fear of the wrath of God was so prevalent at the time, it is likely that each clergy member justified his interpretation not only through his personal understanding of God’s commands but also through the Church’s authoritative texts. Such lack of consensus could never give rise to a controlling direction. Pettit states that “depending on how far the direction imposed on the process constrains the process.”<sup>92</sup> Direction, however, is dependent on how “far into the detail of the process the constraints run.”<sup>93</sup> And as seen previously, there were little to no constraints on how to interpret the results of individual ordeals, upon which is arguably more important than the procedure-focused approach the Church advanced.

Another way to view the lack of direction advanced regarding the Church’s position on ordeals is by examining clerical interests. By the twelfth century, strong and skillful arguments were advanced against ecclesiastical involvement in ordeals.<sup>94</sup> However, this would require that ecclesiastical authorities surrender their important right of conducting ordeals thereby

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<sup>89</sup> Ho, *supra* n. 25, at 268.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Pettit, *supra* n. 58, at 78

<sup>93</sup> *Id.*

<sup>94</sup> Bartlett, *supra* n. 3, at 90.

diminishing “the dignity of their jurisdiction.”<sup>95</sup> Moreover, conducting ordeals was considered “a form of property appurtenant” and thus, local churches had an interest in defending such customary rights.<sup>96</sup> Additionally, churches had an interest in continuing conducting ordeals because of the financial incentive. Ordeals were a revenue stream in that fines, confiscations, and fees were collected.<sup>97</sup> Such evidence was recorded in English Pipe Rolls stating, “five shillings and four pence to the priest for the ordeal of two men.”<sup>98</sup> The combination of power and financial incentive created an opportunity for local churches to decide that although prominent figures were calling for the abandonment of ordeals, it was in the local church’s best interest to continue conducting them. If they were to abandon the practice it would cost the local church both some of its power within its local jurisdiction and some revenue helping fund the church. Because there was no clear decree from the central authority of the church, which all relied, a direction was not formally established. This of course changed with the fourth Lateran Council.

As previously stated, the Church at this time already did not maintain a strong control over the conduct of ordeals. This is evidenced by a lack of uniformity of the practice during a time when clerics followed the letter of canon law. Additionally, as Maitland indicated, men began to mistrust ordeals as a means of adjudication. Importantly, during this time the Church was undergoing a period of reform. Such was likely to result in a hyperawareness and cognizance of any threats to its already tenuous control which would inevitably threaten its larger power.<sup>99</sup> For the Church could not continue to have growing criticism from both religious and secular sects regarding ordeals without its other involvements being subject to scrutiny.

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<sup>95</sup> Bartlett, *supra* n. 3, at 91.

<sup>96</sup> Bartlett, *supra* n. 3, at 92.

<sup>97</sup> Bartlett, *supra* n. 3, at 93.

<sup>98</sup> PIPE ROLL 14 HENRY II (Pipe Roll Soc. 12, 1890), p. 48.

<sup>99</sup> See generally Bartlett, *supra* n. 3, at 100.

However, the Church could not outright condemn ordeals as a means of adjudication due to its integral role in its employ only a year prior. Therefore, in a strategic move, the Church made a unilateral decision to abandon the practice, which would leave “the secular authorities no option” as they could not continue without the involvement of clerics and priests.<sup>100</sup> Critical evidence explaining the Church’s growing concern for power is the difference between popes of the ninth century and pope Innocent III.<sup>101</sup> The Church’s power did not face substantial threat in the ninth century. Therefore, popes of the ninth century did not have the basis for outlawing clergy participation in ordeals. In contrast, by the early thirteenth century enough consensus had built among ecclesiastical authority and secular authority to pose a true threat to the control of the Church. The conception of Church power is also evidenced by the enactment of secular policy regarding abandonment of the ordeal. Henry III of England “*cum prohibitum sit per ecclesiam Romanam iudicium ignis et aque.*”<sup>102</sup> After this declaration, ordeals in England were “virtually abolished at a stroke.”<sup>103</sup> However, in regions outside of England where the power of the Church was historically weak and centralized, ordeals continued to survive.<sup>104</sup> This dichotomy demonstrates that the Church was concerned mainly with regions in which if power was lost would have represented a threat to its legitimacy. Therefore, reforms were necessary to ensure the maintenance of power.

## Conclusion

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<sup>100</sup> Bartlett, *supra* n. 3, at 101.

<sup>101</sup> Bartlett, *supra* n. 3, at 100.

<sup>102</sup> PATENT ROLLS OF THE REIGN OF HENRY III 186 (H.C. Maxwell Lyte ed., H.M. Stationery 1216-1225) (1901) (<https://archive.org/details/patentrollsreig00sirgoog/page/186/mode/2up?q=ordeal>) (the ordeal of fire and water is prohibited by the Roman church).

<sup>103</sup> Bartlett, *supra* n. 3, at 101.

<sup>104</sup> *Id.*

Overall, historians have provided insightful theories regarding why ordeals came to an end. Bartlett and Baker have provided the necessary emphasis on the Church's role in ordeals and the intellectual tension among the clerical elite. Additionally, functionalists like Van Canegem and Hyams have provided useful insight regarding the conditions of society and an understanding of the predominate institutions during the time-period ordeals took place. But each account of the ordeals' abandonment suffers due to a lack of a more wholistic approach. By analyzing the role of the Church and clerics while also integrating important societal changes and attitudes a more wholistic framework to explain abandonment of ordeals arises. The framework I set forth aimed to demonstrate because of the Church's position, it was subject to concerns of legitimacy. Clergy participation in ordeals serve as some threat to the Church's legitimacy because the central Church lacked a unanimous position on clergy participation. Explained using Pettit's formula, the lack of a unanimous position regarding whether to permit clergy participation in ordeals or ban such participation does not give rise to a strong enough direction to prevent concern of challenge. Recognizing such potential to challenge, the Fourth Lateran Counsel of 1215 sought to unify the Church thereby centralizing control.