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EXCOMMUNICATION IN TWELFTH CENTURY ENGLAND

*Richard H. Helmholz**

John Noonan was my teacher some twenty-five and more years ago. I was then a graduate student at the University of California, trying to discover enough about the history of the law of the Church to write something sensible about it. He took me under his wing. He suggested a subject, and he taught me—at least he showed me—the possibility of seeing larger themes in the details of legal and historical research. Attention to the details was essential, but no less important was thinking about their background and their implications. It was a lesson I might have learned in law school. Apparently I had not. This lesson came back to me forcefully when, in more recent days, research on the development of ecclesiastical jurisdiction in England raised the subject of the place of excommunication in the subject's early history. Excommunication, dealing as it does with the complex interrelationships between legal doctrine and human behavior, is a subject about which Judge Noonan might have written a wonderful book.¹

Under the classical canon law, excommunication was the most serious sanction the Church had to wield against those who disobeyed its laws. Gratian's *Decretum* (c. 1140), which contained the basic texts of the canon law, described excommunication as equivalent to "handing a person over to the Devil."² Later medieval canonists echoed and amplified this sentiment in their descriptions of the consequences of the sanction.³ It cut the excommunicate off from the Church's sacraments and from most contacts with other Christians. Moreover, in many European countries, excommunication also entailed the loss of important civil

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1. See, for example, John T. Noonan, *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia* (Belknap Press of Harvard U Press, 1972). I recall that Professor Noonan suggested the subject of "Sanctions under the Canon Law" to one of the students in the seminar he was then teaching, in which I was also enrolled. I do not recall what, if anything, came of the suggestion.

2. See C 11 q 3 c 21 and *glossa ordinaria* ad id. ("Et dicuntur homines tradi Satanae, cum a tota ecclesia separantur.").

3. See, for example, Henricus de Susa (Hostiensis), 8 *Lectura in libros decretalium* X 5.6.6. (Ita quorundam) (repeating and expanding slightly on Gratian's characterization).

rights. In England one could even be imprisoned for standing obdurately excommunicate for more than forty days.⁴

In the eyes of medieval canonists, these consequences made it appropriate and even necessary that imposition of the sentence of excommunication be hedged about with safeguards. As a result, the law adopted a series of procedural requirements for the valid imposition of the sanction. Sentences of excommunication could be imposed only by a proper official, acting in his judicial capacity, normally the bishop of the diocese where the person lived or that bishop's deputy.⁵ Excommunication required proper citation of the persons involved and provision for them to be heard in their own defense, roughly the equivalent of what we think of as due process of law.⁶ Finally, imposition of the sentence had to be accompanied by certain prescribed formalities. For example, its validity required judicial deliberation and a written document.⁷ Although there were exceptions and amplifications to each of these requirements, as indeed there were in many parts of the medieval Church's laws, and although the evolving canon law left room for automatic excommunication in special circumstances,⁸ nonetheless it is true that the canon law's rules about excommunication embodied a vital and important principle that was never lost sight of by the canonists. Excommunication was a sanction to be imposed with circumspection and regard for protection of the legal rights of the accused.

EXCOMMUNICATION AS FOUND IN TWELFTH CENTURY SOURCES

What was the reality? Despite a fine recent book on the subject,⁹ and an impressive collection of older scholarship,¹⁰ examination of the contemporary sources demonstrates that something

4. F. Donald Logan, *Excommunication and the Secular Arm in Medieval England: A Study in Legal Procedure from the Thirteenth to the Sixteenth Century* (Pontifical Institute of Mediaeval Studies, 1968).

5. See, for example, *glossa ordinaria* at C 24 q 3 c 17 s v *episcopale*: "quod excommunicatio spectat tantum ad officium episcopale, nam mucro episcopi dicitur." For fuller discussion of this point, together with the many legal complexities ignored here, see Paul Fournier, *Les officialités au moyen âge* 134-39 (1880).

6. See Gratian *dictum post* C 2, q 1, c 20, made dramatic in the *glossa ordinaria* ad id, by the case where an offence had been committed before the judge's eyes; if the person accused denied it, even then "ordo juris servari debet licet iudex et alii multi sciant."

7. See Gratian, C 2 q 1 c 9 (cited in note 6) and *glossa ordinaria* ad id.

8. See Petrus Huizing, *The Earliest Development of Excommunication latae sententiae*, 3 *Studia Gratiana* 279 (1955).

9. Elizabeth Vodola, *Excommunication in the Middle Ages* (U of California Press, 1986). See also Petrus Huizing, *Doctrina Decretistarum de excommunicatione usque ad*

important remains to be said about the subject during the course of the twelfth century. It also suggests the account of what happened during the twelfth century should be of wider interest to historians of the law, because it so well illustrates the process of fundamental legal change. Looking at the evidence from the early chronicles, letter collections, and cartularies, rather than the texts of the canon law itself, presents a somewhat different picture than that found in the work of the canonists. In the latter, we see the process of distinguishing among various kinds of excommunication and an orderly working out of ideas either stated or implicit in earlier canonical texts. However, this picture masks the complexity of the process by which the canon law was made effective in fact. It is possible to be "beguiled" by the canonists.¹¹ Their task was to bring harmony out of dissonance,¹² and if we look only at their works we may not fully see the struggles, the partial successes, and the downright failures that also occurred.

The twelfth century sources show the existence of competition, sometimes amounting to real struggle, between two quite different conceptions of excommunication. The one was a judicial sanction; the other was a powerful curse. The former of these opposing conceptions had come to predominate by the end of the century, but its victory was not immediate or unqualified. There are of course examples of considered use of the sanction all along. However, the kind of excommunication one finds most often in the sources from the first, and indeed well into the second half of the twelfth century was not at all the careful sanction of the classical canon law described above, the sanction imposed only for contumacy and designed to bring the offender to obedience to the Church's decrees. It was an excommunication commonly issued without judicial citation or other formality, and dependent for its efficacy upon the spiritual power of the person who issued it, as well as upon the

Glossam ordinariam Joannis Teutonic (1952); J. Zeliauskas, *De Excommunicatione vitata apud Glossatores (1140-1350)* (Pas Verlag, 1967).

10. See, for example, Franz Kober, *Der Kirchenbann nach den Grundsätzen des canonischen Rechts* (Laupp, 2d ed, 1863); B. Schilling, *Der Kirchenbann nach kanonischem Rechte* (1859); Eugène Vernay, *Le 'Liber de Excommunicatione' du Cardinal Bèrenger Frédol précède d'une introduction historique sur l'excommunication et l'interdit en droit canonique* (A. Rousseau, 1912); Petrus Huizing, *Doctrina Decretistarum de excommunicatione usque ad glossam ordinariam Joannis Teutonic* (1952).

11. See Gervase Rosser, *Parochial Conformity and Voluntary Religion in Late-Medieval England*, 1 *Transactions of the Royal Historical Society* 174 (6th ser 1991).

12. See generally Stephan Georg Kuttner, *Harmony from Dissonance: An Interpretation of Medieval Canon Law* (Archabbey Press, 1960).

justice of his cause. This sort of excommunication was more like the anathema that appears at the end of many Anglo-Saxon charters.¹³ It was like the terrible curses of the early Irish saints,¹⁴ or the fearsome monastic maledictions familiar in the ninth and tenth centuries.¹⁵ This sort of excommunication was the "sword of the Holy Spirit, more piercing than any two-edged blade."¹⁶ It was literally a weapon to be unsheathed and wielded against one's enemies.

A dramatic example of this kind of excommunication appears in a narrative from across the Channel: Galbert of Bruges' account of the quarrel over the countship of Flanders. This dispute, which occurred during the 1120s, led to what Galbert described as the "War of Anathemas" in his "Murder of Charles the Good."¹⁷ During this "War," priests on either side of the quarrel fulminated a series of mutually contradictory sentences of excommunication against their opponents. Then they waited for results. At least according to Galbert's account, "In this interchange, . . . , the anathema of our priest prevailed." "It is marvelous," he reflected, "that a priest can cast a spell on God in such a way that, whether God wishes it or not, William will be thrown out of the countship."¹⁸ "Fulmination" is certainly the right word to describe what was happening here. The requirements of judicial process did not come into the consciousness of the participants in the slightest, and an excommunication's success was measured by its physical results.

Modern readers commonly find the "War of Anathemas" either ridiculous or blasphemous (or both), as did the Bollandist fathers who suppressed it from their seventeenth century edition of

13. See, for example, the charter of King Ethelred (d 1006) in Dorothy Whitelock, ed, 1 *English Historical Documents* c 500-1042, 123 (Oxford U Press, 1955) ("May Almighty God and his holy Mother and Ever-Virgin Mary, . . . despise him in this life and destroy him, despised, in the future, world without end.").

14. See the discussion and examples in C. Plummer, ed, 1 *Vitae Sanctorum Hiberniae* clxxiii-clxxiv (Oxford U Press 1910).

15. See Lester Little, *Formules monastiques de malédiction aux IXe et Xe siècles*, 58 *Revue Mabillon* 377-99 (1975).

16. Letter of Thomas Becket from 1166, in James Robertson, ed, *Materials for the History of Thomas Becket, Archbishop of Canterbury*, 67:5 Rolls Series, No 360 at 1875-85 (Longman, 1875-85) [hereinafter cited as *Materials*, Becket].

17. Henri Pirenne, ed, *Histoire du meurtre de Charles le bon, comte de Flandre* par Galbert de Bruges 1127-28 (A. Picard, 1891).

18. Becket, *Materials* at No 113 ("Et mirum est quod sacerdos ita Deum incantare possit ut, velit nolit Deus, Willelmus a comitatu ejiciatur.") (cited at note 16).

Galbert's work.¹⁹ But the sort of *ex parte* excommunication involved in it is in fact found in many twelfth century writings, some of quite saintly pedigree. For example, on one occasion two monks from the house of St. Bernard of Clairvaux (d 1153) came upon another monk cultivating a vineyard, an action they took to be incompatible with the monastic vocation. Unable to persuade the erring monk to desist by exhortation or shame, the brethren proceeded to "excommunicate" the vineyard itself. In consequence, we are told, the vineyard shriveled and ceased to produce grapes until, after the death of the monk, it was finally absolved by Saint Bernard.²⁰ A second *Vita* of St. Bernard recounts that a similar use of the sanction by the saint himself. While dedicating a new monastic oratory, Bernard found that his discourse could scarcely be heard because of the din being made by "an incredible multitude of flies."²¹ Unable to hit on any other remedy, he finally uttered an excommunication against them. The next morning, the flies were found dead on the ground, victims of the saint's anathema.²²

English sources from the twelfth century contain equally dramatic accounts of such uses of the sword of excommunication.²³ The *Magna Vita* of St. Hugh, bishop of Lincoln from 1184, for instance, contains several examples, all without the slightest sign of self-consciousness on the part of Hugh or his biographer that there was anything uncanonical about what he was doing. A barren couple pretended that the woman had given birth to a child in order to cheat a certain knight out of his rightful inheritance.²⁴ Confronting the couple, but without anything like citation or trial, St. Hugh excommunicated the man. The next day the man was found

19. See Galbert of Bruges, *The Murder of Charles the Good*, at x, note 5 (Columbia U Press, James Bruce Ross trans, 1960).

20. *Vita S. Bernardi auctore Joannis Eremitae*, Lib 11, c 10 in Jacques-Paul Migne, ed, *Patrologia Cursus Completus: Series Latina* 185:1, col 546 (Garnier, 1958): "Fratres tui excommunicaverunt eam, et deinceps fructuum non fecit."

21. *Vita S. Bernardi auctore Guillelmi S. Theoderici*, c 11, no 55 in Migne, *Patrologia* 185:1, col 256 (cited in note 20). For a clear treatment of St. Bernard's attitude towards the canon law, a subject of lively recent debate, see Brundage, *St. Bernard and the Jurists*, in Michael Gervers, ed, *The Second Crusade and the Cistercians* at 25 (St. Martin's Press, 1992).

22. Migne, *Patrologia* (cited in note 20), "Nullo igitur occurrente remedio, dixit sanctus, 'Excommunico eas' et mane omnes pariter mortuas invenerunt." See also the 1120 excommunication of caterpillars by the bishop of Laon, described in Charles Desmaze, *Les pénalités anciennes* 31 (H. Plon 1866).

23. See those collected in J. Hagen, ed, Gerald of Wales, *Gemma ecclesiastica*, c 53, translated as *The Jewel of the Church* at 121-23 (J. Brill, 1979).

24. Decima Douie & Hugh Farmer, eds, *2 Magna Vita sancti Hugonis* 20-25 (Nelson, 1961-62).

lifeless in bed, struck dead by the saint's anathema. On another occasion, St. Hugh rebuked a woman who had deserted her husband. She spat in the bishop's face. He excommunicated her at once, and three days later she too was discovered dead—"strangled by the devil," Hugh's biographer informs us.²⁵ Again, the saint's curse had done its work.

Even in matters which involved legal issues and something like a legal contest, one finds the same sort of immediate and "extra-judicial" use of the sanction of excommunication in many twelfth century English sources. A dispute arose between Geoffrey, archbishop of York, and the dean and chapter of York minister over the right to appoint to the archdeaconry of Cleveland. The matter had reached an impasse when, in the words of the chronicler Roger of Hovedon, "Because the archbishop was not able to proceed in the matter according to his wishes, he excommunicated [the other candidate]."²⁶ There was no citation mentioned, no trial, no formality of any kind. Similarly, when Gerald of Wales, as archdeacon of Brecon, found himself at odds with the bishop of St. David's about who held spiritual jurisdiction over a parish church, when initial efforts at mediation failed, Gerald found himself excommunicated by the bishop, together with other canons and archdeacons who had taken his side. At least as Gerald tells it, they were "suddenly and unadvisedly excommunicated, neither summoned, nor cited; neither confessed nor convicted."²⁷ Again there seems to have been no judicial process at all involved. Excommunication was serving as a weapon rather than a legal sanction.

The famous martyr and archbishop, Thomas Becket, was himself the source of several such immediate and canonically questionable excommunications, even leaving aside the fulminations involved in his dispute with King Henry II that led to his death and

25. Id at 31-2. See generally Karl J. Leyser, *The Angevin Kings and the Holy Man*, in Henry Mayr-Harting, ed, *Saint Hugh of Lincoln* 19 (Oxford U Press, 1987).

26. William Stubbs, ed, *Chronica Magistri Rogeri de Hovedene*, 51:4, Rolls Series, 158 (1201) (1868-71) ("Cumque archiepiscopus pro voluntate sua in his procedere nequisset, excommunicavit Hugonem Murdac."). See also E. Blake, ed, *Liber Eliensis*, Lib III, c 1, 112 Camden Society 3d ser 245 (1962) ("Unde quia episcopali timori nullam servabant reverentiam, gladium bis acutum ad eos domandos exercuit.").

27. Giraldus Cambrensis, *De rebus a se gestis*, in J. S. Brewer, ed, *Giraldi Cambrensis Opera*, 21:1, Rolls Series, at 54 (Longman, 1861-91) ("non vocatos non citatos non convictos aut confessos, impetuose et insonsulte quosdam suspendere et alios excommunicare praesumpsit"); see also Avon Saltman, *Theobald, Archbishop of Canterbury* at 120-121 (Athlone Press, 1956).

canonization.²⁸ Early in Becket's episcopate at Canterbury, for example, he sought to reclaim the property rights belonging to his see, which rights he claimed had been alienated by his predecessors contrary to canonical rules. One such alienated possession was the right to nominate a parson for the church of Eynsford, and when the church fell vacant, the archbishop quickly installed his own nominee. Becket did this without any judicial process to establish the validity of his rights (or the invalidity of the previous alienations), confident in the validity of his claim. It should not have been a total surprise to him, however, when the man who had been granted the right of nomination by one of Becket's predecessors objected and himself expelled the archbishop's nominee from the church. Becket's immediate reaction to this act, however, was nonetheless to excommunicate all those who were responsible for this act in opposition to his own actions.²⁹ Becket must have conceived that right was on his side and that this ensured that use of the weapon of excommunication would bring effective results against his opponents. He did not regard procedural requirements of law as an impediment to action. He wielded the sword of excommunication as if it were in fact a weapon.

TWELFTH CENTURY DEVELOPMENTS

It is against this background that one must evaluate the developments in the use of excommunication that took place from the middle of the twelfth century onwards. And there were important developments. The canon law was increasingly being studied and put to use in twelfth century England.³⁰ Indeed papal decretals defining what due process required before sentences of excommunication could be imposed were being issued and they were being studied with interest and frequency. Lawyers, it seemed, were seizing the initiative from the saints.

28. See notes 30-34.

29. See William fitz Stephen, *Vita sancti Thomae*, in *Materials*, Becket, at 43, Vol 67:3 (cited in note 16). See also William Stubbs, ed, *The Historical Works of Gervase of Canterbury, Chronicle of the Reigns of Stephen, Henry II, and Richard I*, 73:1 Rolls Series 54 (Longman, 1879-80) (the archbishop's excommunication of the monks of Canterbury for appealing to the Roman court against his actions); William Stubbs, ed, *Epistolae Cantuarienses*, 38:2 Rolls Series (1864-65) (objections to the archbishop's sentence of excommunication, that "sententia hujusmodi contra juris ordinem prolata, et post interpositam appellationem, nec timenda aliquatenus esset nec timenda.").

30. See, for example, David Knowles, *The Episcopal Colleagues of Archbishop Thomas Becket* at 50-52 (Cambridge U Press, 1970); text accompanying notes 50-54.

One of the consequences of these developments was that greater emphasis in practice was coming to be laid upon employing the sanction of excommunication in the ways the canon law texts required. As noted, there were canonical texts being produced, most of them emanating from the papacy, stressing the point. The rule, under which excommunication became more largely "judicialized" and thereby subjected to effective legal restraints, was making headway against the older, heroic form of the sanction. It is not too much to say that there was a struggle between the old and the new conceptions of excommunication during the twelfth century, and that by the beginning of the thirteenth, the sanction had very largely been "tamed" by acceptance of the emerging canon law's requirements.

The famous controversy between Archbishop Thomas and King Henry II provided the occasion for one chapter in this struggle. One aspect of that great controversy involved the Archbishop's repeated use of the sanction of excommunication without prior warning to the persons being excommunicated. Protests and appeals were repeatedly made against this by the victims. Most notably at Vézelay in 1166, Thomas seems to have acted contrary to canonical precepts, and objection was duly taken to his action. There in exile, the archbishop had mounted the pulpit to preach. After a fairly conventional beginning and much to the surprise of his hearers, Becket suddenly began to excommunicate his enemies. He excommunicated ten of them by name. None had been cited or warned in advance.³¹ In other words, Thomas had launched something like an "old style" anathema against them. As his most recent modern biographer notes, this action seriously disturbed distinguished contemporary canon lawyers,³² and the result was an appeal to Rome against the validity of the Archbishop's action. The lack of canonical citation gave them this opening. English bishops complained to Pope Alexander III that Thomas had issued the sentence against men who had been "neither cited, nor con-

31. See Henry Hewlett, ed, *Roger of Wendover, Liber qui dicitur Flores historiarum* 40-41 84:1 Rolls Series, (Eyre and Spottiswoode, 1886-89) ("[S]ed ipsi absentes et non vocati nec convicti, ut dicebant, excommunicati . . . appellaverunt et ecclesiam intraverunt.").

32. Frank Barlow, *Thomas Becket* 184 (U of California Press, 1986) ("None of these ten seems to have been specially warned or cited, which enraged Gilbert Foliot and his friends and seriously disturbed other distinguished canon lawyers like Baldwin, archdeacon of Totness.").

victed, [and] who had neither confessed nor been convicted." They were able to cite texts from Gratian's *Decretum* in support.³³

This incident at Vézelay was not the last occasion for such a contest testing the legality of Thomas' anathemas, and it is likely that some of the bitterness of Gilbert Foliot, bishop of London and Thomas' most implacable episcopal enemy, stemmed from the seeming incongruity of the archbishop's impulsive and doubtfully canonical excommunications and his claim to be upholding the purity of the church's law. Foliot's sense of propriety was offended. Thomas and his supporters of course defended their actions. They replied that there were "diverse ways" of excommunicating under the canon law, and a specific citation or warning was not in every instance required.³⁴ That much was true enough. There was something to be said on both sides. Nonetheless, Foliot had a point when he complained that the Archbishop's habit had been "to condemn first, judge second."³⁵ To Foliot, as to many other contemporaries, Becket's actions seemed contrary to standards of canon law, and therefore the legitimate subject for objection and appeal.

Gerald of Wales was later to take up this same substantive theme in dealing with excommunication in his *Gemma ecclesiastica*. He complained that some prelates had been in the habit of issuing sentences of excommunication "with little discretion, and too frequently without just reasons and warnings."³⁶ In his view, neglect of the canon law's requirements had brought the sanction into disrepute. It is unlikely that he was referring to Becket specifically, for these words were written years after the archbishop's death, when martyrdom had papered over Becket's faults. But the problem illustrated by the archbishop's excommunications was one on which Gerald had very definite, and negative, opinions. Gerald had studied the canon law on the Continent. For him, imposition

33. 67:5 *Materials*, Becket, No 204 (cited in note 16). See also Bishop Jocelin of Salisbury's complaint about his own excommunication, in id, No 206 ("non tertio, non secundo, sed nec semel citatum, ut predictum est, absentem, indefensum, non confessum, non victum, condemnasse").

34. *Materials*, Becket, No 223 ("quia diversis modis excommunicantur diversi") (cited in note 16).

35. Don Adrian Morey and C.N.L. Brooke, eds, *The Letters and Charters of Gilbert Foliot* 167 (Cambridge U Press, 1967) ("Ordo iudiciorum novus hic est, hucusque legibus et canonibus, ut sperabamus, incognitus: damnare primum, et de culpa postremo cognoscere."). See also a similar characterization of the archbishop's actions in Frank Barlow, ed, *The Letters of Arnulf of Lisieux*, No 54a, 61 (Camden Society 3d ser 1939).

36. *Gemma ecclesiastica*, c 53, at 122 (cited in note 22).

of the sanction required "mature deliberation."³⁷ On that score, at least before his martyrdom, Becket's actions had seemed impetuous and uncanonical.

Men like Gerald and Foliot, familiar with the canon law even when they had not actually been schooled in it, were working an important change in the practice of excommunication during these years of the later twelfth century. It was achieved not only by issuing exhortations such as Gerald's. Rather, it was the appeal to the papal court against wrongful use of the sanction that constituted the most important means by which the change was effected. The appeals by Becket's enemies against the archbishop's sentences of excommunication are only the best known of the many similar appeals against wrongful excommunication. Recourse to the Roman court by a person who could allege that he had been excommunicated *extra iuris ordinem* is in fact a familiar feature in letters and narrative accounts of the period. When, for instance, the prior of Ewenny in Wales was "suddenly" excommunicated by his bishop in a dispute over burial rights, he invoked papal jurisdiction at once.³⁸ The prior's argument upon the consequent appeal would challenge the validity of the original sentence under the formal canon law; he would allege with plausibility that he had been in no way contumacious, and he would stress that contumacy was required before a sentence of excommunication could legally be imposed.

This and similar appeals would have objected to the excommunication as invalid under the canon law. What had happened would therefore have seemed something like a relic of the days before the sanction had been subjected to judicial process. Subsequent process before the papal court or papal judges delegate would have turned around this legal question. Mostly, as in this particular case, we do not know how such appeals against allegedly unlawful excommunication actually fared at the Roman court. For the most part, the narrative sources fail us. But the appeals themselves, and the issues they raised, we see clearly and frequently enough.³⁹

37. Id. On Gerald's knowledge of the canon law, see M. Richter, ed, *Introduction to Giraldus Cambrensis, Speculum duorum*, lii-lvii (U of Wales Press, 1974).

38. Morey and Brooke, eds, *Letters and Charters of Gilbert Foliot* (cited in note 35).

39. Examples are found in: William Stubbs, ed, *Epistolae Cantuarienses*, 38:2 Rolls Series No 83 1187 (Longman, 1864-65); R. Foreville and G. Ker, eds, *The Book of St. Gilbert* 134-5 (Longman, 1987); Henry Mayr-Harting, ed, *Acta of the Bishops of Chichester, 1075-1207*, No 67 (1174 x 1180) (Devonshire Press, 1964); William Stubbs, ed, *Ralph of Diceto, Ymagines historiarum*, 68:2 Rolls Series, 72-73, (1189)(Longman, 1876); William

To the prelate or priest who issued an "old-style" anathema and was consequently subjected to an appeal, the experience must have brought home the wisdom of following stricter procedural rules before imposing excommunication. It was becoming necessary to follow the *ordo iuris*, if one were to avoid such an annoying and expensive appeal. The growth and persistence of such appeals in late twelfth century England would thereby have spread this lesson more broadly among the English episcopate. Appeals from England to the papal court in relatively minor cases were novelties in the second half of the twelfth century. But there were beginning to be many of them,⁴⁰ and quite apart from their constitutional role in making papal jurisdiction fully effective in England, appeals also served as a powerful means by which the canon law of excommunication worked its way into English practice.

The results were important for the history of ecclesiastical jurisdiction in England. By the first decades of the thirteenth century, the older and more informal ecclesiastical procedure, which left room for sudden and *ex parte* excommunications, issued without formal citation or judicial process, was coming to seem, in the words of Gerald of Wales, "both antique and antiquated."⁴¹ The Council of Westminster, convoked in 1200 to carry out the goals of the Third Lateran Council (1179), had enacted a canon forbidding any issuance of a sentence of excommunication, "unless a canonical monition precedes it."⁴² By 1200, this canon stated a rule that was widely accepted as a correct statement of the way things should stand. The day was at hand when issuing a sentence of excommunication in violation of canonical procedural rules would itself be a remediable offense. It was becoming possible to invoke

Stubbs, ed, *Benedict of Peterborough, Gesta regis Henrici secundi*, 49:2 Rolls Series, 211-12 (1191)(Longman, 1867); N. Adams and C. Donahue, eds, *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200-1301*, A4 (1203-05), 95 Selden Society 11-14 (1981); R.M. Thompson, ed, *Chronicle of the Election of Hugh, Abbot of Bury St. Edmunds and later Bishop of Ely* 46-47 (1214)(1974).

40. See Jane Sayers, *Papal Judges Delegate in the Province of Canterbury 1198-1254*, at 3-5 (Oxford U Press, 1971).

41. J. Brewer, ed, *Giraldi Cambrensis Opera*, 21:1 Rolls Series, 227-28 (Epistolae)(Longman, 1861-91) ("antiquo, sed et antiquato more").

42. Dorothy Whitelock, et al, eds, C 7 in 1:2 *Councils & Synods With Other Documents Relating to the English Church*, 1064 (Clarendon, 1981). Compare C 5 of the legatine Council of London (1151), id at 825. See also Marion Gibbs & Jane Lang, *Bishops and Reform 1215-1272* 124 (Frank Cass & Co., 1934).

ecclesiastical jurisdiction against clerics who had imposed the sanction unlawfully.⁴³

Signs of effective challenge to older excommunication practices appear in some quite disparate historical sources towards the close of the twelfth century. There is, for example, a decline in the frequency with which immediate and ex parte anathemas are found in the narrative sources. Priests who might once have uttered an excommunication when abused or angered more often turned their grievance instead into a complaint at law.⁴⁴ The sanction is found mentioned in many of these narratives, but it becomes unusual except within a judicial context or as part of either the promulgation or the enforcement of a general sentence of excommunication *latae sententiae*.⁴⁵ The terrible anathemas also largely disappear from episcopal and monastic charters and acta over the course of the twelfth century.⁴⁶ Instead, documents issuing from their writing offices begin to lay heavy, perhaps excessive, emphasis on exact compliance with the *ordo iuris*.⁴⁷ One finds papal privileges regularly being sought and issued to by monastic houses which purport to guarantee that their interests could be challenged only by judicial

43. For example, *Gilbert of London c. Alexander of Fakenham* (Diocese of Canterbury 1294), Canterbury Cathedral Library, Ecclesiastical Suit No 176 (the plaintiff alleged that the defendant, as vicar of Blackburn, had excommunicated him "non monitum non confessum non convictum nec absentem per contumaciam . . . minus iuste absque causa rationabili contra statuta generalis concilii.") Prosecutions appear fairly regularly in the act books of the ecclesiastical courts which survive from the later Middle Ages; see, for example, *Ex officio c. Vicar of Halling* (Diocese of Rochester, 1446), Kent Archives Office, Maidstone, MS DRb Pa2, fol 42v (proceeding "super eo quod suspendidit parochianum suum propria auctoritate.").

44. See, for example, the abuse suffered by the chaplain attempting to conduct services in the church of Leverton (diocese of Lincoln) c. 1202. His reaction was to bring a complaint before the chapter held by the rural dean of Holland. See the document taken from "Christ Church Letters" in the Canterbury Dean and Chapter muniments, printed as an appendix to Christopher Cheney, *From Becket to Langton* 196 (Manchester U Press, 1956).

45. See, for example, S. G. Little, ed, *Thomas Eccleston, Tractatus de adventu Fratrum Minorum in Angliam* 69, 81, 96 (Manchester U Press, 1951); Henry Luard, ed, *Annales Monasterici Oseneia*, 36:4 Rolls Series, at 83-84, 135 (1869). And compare the *Vita of St. Richard, Bishop of Chichester*, 1244-53, in *Acta Sanctorum*, 3 April, at 285-308 with that of St. Hugh of Lincoln (cited in note 25).

46. Compare, for example, English Episcopate Acta VI, Norwich 1070-1214, No. 40 (1136 x 43) with id, C. Harper-Bill, ed, No 184 (1180 x 82) (1990). See also Avron Saltman, *Theobald Archbishop of Canterbury 1121-13* (Athlone Press, 1956).

47. See, for example, Edward Bond, ed, *Chronica monasterii de Melsa*, 43:1 Rolls Series (1197-1210)(1866-68) 292-96 ("ordine iuris in omnibus observato"); H. E. Salter, ed, *Cartulary of Oseney Abbey*, 90 Oxford Historical Society, No 782 (1176)(1929); R. Timson, ed, *Cartulary of Blyth Priory*, 27 Thoreton Society, No 319 (early 13th century)(1973).

actions following the same *ordo*.⁴⁸ These changes were all reflections of the same change in attitude that was "taming" the sword of excommunication by associating it with judicial proceedings.⁴⁹

The closer connection between compliance with the *ordo iuris* and excommunication also appears in contemporary documents in exactly the opposite way—in express renunciations of the right to canonical due process before a sentence could be issued. During the thirteenth century it became accepted form to add a term to agreements between ecclesiastics, specifying that unless the obligation were faithfully kept, the party in breach could be excommunicated immediately and without judicial process. The promisor simply renounced all procedural rights, doubtless one part of the price for concessions in the negotiations that had led to the agreement.⁵⁰ Such renunciations would have made much less sense one hundred years before. Then, the *ordo iuris* would not have been worth renouncing. Renunciations made sense only once it had been established that, without express agreement, the excommunication of a specific individual could be issued only as part of a judicial process. By the thirteenth century, that had in fact been established.

There is of course a close and obvious connection between this change and more general canonistic development in England. The second half of the twelfth century was a great age of canonical scholarship and activity in England. Evidence of this has been unearthed and described by many scholars: the Anglo-Norman canonists discovered by Stephan Kuttner and Eleanor Rathbone;⁵¹ the regular collecting and systematic compilation of papal decretals examined by Charles Duggan;⁵² the implementation of the system of

48. See, for example, Aelred Watkin, ed, *The Great Chartulary of Glastonbury*, Somerset Record Society, 59, No 176 (1174–76) (1947); Walter Holtzmann, 1 Papsturkunden in England, 185 (privilege for Order of Sempringham, 1159–81) (1931).

49. See the comments of Mary G. Cheney, *Roger, Bishop of Worcester 1164-1179* 166 (Oxford U Press, 1980) (By the death of Alexander III in 1181, there had been "a rapid development, a change so dramatic as to appear as a revolution.").

50. See, for example, A. Webb, ed, *Cartulary of Burscough Priory*, 18 Chetham Society No 59 (1232–50)(1970); W. Peckham, ed, *The Chartulary of the High Church of Chichester*, 46 Sussex Record Society, No 254 (1260)(1943); L. Fleming, ed, *Chartulary of the Priory of Boxgrove*, 59 Sussex Record Society, No 251 (1225–1250)(1960); E. Mason, ed, *The Beauchamp Cartulary: Charters 1100-1268*, 43 Pipe Roll Society NS, No 78 (1252)(1980).

51. See *Anglo-Norman Canonists of the Twelfth Century*, 7 *Traditio* 279 (1949-51).

52. Charles Duggan, *Twelfth-century Decretal Collections and their importance in English History* (Athlone Press, 1963).

papal judges delegate described by Jane Sayers and others;⁵³ the more exact attention to the canon law growing out of the Becket controversy explored by Richard Fraher;⁵⁴ the compilation and spread of *ordines iudicarii* collected, printed and analyzed by Ludwig Wahrmund.⁵⁵ All these were part of a movement, which also helped effect the change in the use of excommunication. It is no accident that the sanction began to be more carefully used in closer conformity with the dictates of the canon law during the same second half of the twelfth century.

The change was also part of a broader movement in the law within England itself. More than the spread and development of canon law was taking place during these pivotal years. English legal historians have long drawn attention to the great advances in judicial procedure that took place within the common law courts in this same period. The procedural reforms of Henry II laid the foundation for the growth and sophistication of the common law. There has seemed to be good reason to describe the results as a fundamental "judicialization" of past informal practices,⁵⁶ and even to speak of it as an "Angevin leap forward."⁵⁷ From a broader perspective, something like the same kind of development can be said to have happened on the ecclesiastical side. Though of course it had nothing to do with the Angevins, a similar development oc-

53. *Papal Judges Delegate in the Province of Canterbury, 1198-1254* (1971). See also Adrian Morey, *Bartholmew of Exeter, Bishop and Canonist 44-78* (Cambridge U Press, 1937); Walter Holtzmann and E.W. Kemp, eds, *Papal Decretals Relating to the Diocese of Lincoln in the Twelfth Century*, 47 *Lincoln Record Society* (1954).

54. *The Becket Dispute and Two Decretist Traditions*, 4 *Journal of Medieval History* 347 (North Holland Publishing Co., 1978). See also Charles Duggan, *The Becket Dispute and the Criminous Clerks*, 35 *Bulletin of the Institute of Historical Research* 1 (Longman, 1962).

55. See L. Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter* (5 vols 1905-31); see also Logan, *An Early Thirteenth Century Papal Judge-delegate Formulary of English Origin*, 14 *Studia Gratiana* 75 (Institutum Iuridicum Universitatis Studiorum, 1967).

56. This is the important theme of the introduction to R.C. Van Caenegem, *Royal Writs in England from the Conquest of Glanvill*, 77 *Selden Society*, (1958-59), reiterated and amplified in some of the author's later works. See, for example, R.C. Van Caenegem, *The Birth of the English Common Law* (Cambridge U Press, 2d ed, 1990).

57. This is the influential formulation in Doris Stenton, *English Justice between the Norman Conquest and the Great Charter 1066-1215*, 22-53 (G. Allen & Unwin, 1964). For similar treatment in a less specialized work, see Wilfred L. Warren, *Henry II 317* (U of California Press, 1973) (The practice of English law was transformed in Henry II's reign). But compare H. Richardson & G. Sayles, *The Governance of Mediaeval England from the Conquest to Magna Carta 189* (Edinburgh U Press, 1963) (the authors' conclusion that already under Henry I (1100-35), the system of royal justice was "already in an age of sophistication.").

curred in the way in which the Church's principal sanction was applied. There was a "judicialization" of excommunication, something like a "canonical leap forward."

LIMITATIONS IN THE OUTCOME

This "judicialization" of excommunication occurred, and its existence is certainly the principal conclusion to be drawn from examination of the narrative and epistolary sources of the period. However, it is not the whole story revealed in them. There are two, or perhaps three, points of qualification or amplification to be made. The most obvious of these is that this particular legal reform was not *wholly* successful in subsequent practice. Perhaps none ever is. Examples of abusive, *ex parte* excommunications can be found from the later Middle Ages, in England as elsewhere.⁵⁸ They were "outliers" rather than typical of the system itself, and they should not keep us from recognizing the real change that did occur. But they existed and they should not be ignored.

The other two points about the changing use of excommunication are of equal, or greater, interest and importance for understanding the climate in which a working system of ecclesiastical justice was created in twelfth and thirteenth century England. The first, and perhaps most immediately visible in the contemporary narrative sources, is that the restrictions on the use of excommunication that grew from greater emphasis on the *ordo iuris* did not win the unanimous praise of contemporaries. The biographer of St. Hugh of Lincoln recounts that one of the saint's most admirable qualities had been his ability to seize immediately upon the truth of matters brought before him, ignoring if need be the exact requirements of the law.⁵⁹ Others also saw that the most exact compliance with the *ordo iuris* could in fact become a cloak for injustice.⁶⁰ For

58. See, for example, Clark, ed, *Liber Memorandum Ecclesie de Bernewelle* 26-27 (Clarendon Press 1907) (In 1287 the bishop of Norwich, enraged by a remark of the prior "cum furore recedens excommunicavit omnes inhabitantes." However, the next morning he must have thought better of it, because he then quickly relaxed the sentence); R.M. Thompson, ed, *Chronicle of the Election of Hugh Abbot of Bury St. Edmunds and Later Bishop of Ely* 16-17 (Clarendon Press 1974) ("Unde venerabilis A. supprior premeditatem super eos intulit excommunicationis sententiam, quam, ut postea in pleno capitulo ad presentiam coram eisdem ductus, penituit se dedisse.").

59. *Magna Vita sancti Hugonis* at 150 (cited in note 24).

60. See, for example, *Book of St. Gilbert* at 76-77 (cited in note 39) (of the wrongful accusers of St. Gilbert, the author says, "et ut cautius hoc probaret iuris ordinem et iusticie processum servavit in lite.").

them, there was a price to be paid for the advance and some of them thought the price was too high.

Some of these complaints, of course, grew simply from anti-lawyer sentiment, familiar in every age and attributable largely to ignorance of the limitations inherent in any legal system. But perhaps not all. John of Salisbury spoke for many thoughtful men of his age when he asked whether anyone could arise chastened and made whole from study of the *leges et canones*.⁶¹ To him, imposing procedural requirements on the sanction of excommunication was actually leading to another and perhaps worse sort of abuse: the perversion of judicial process. Delay and chicanery would prevail over the dictates of the Gospel. Compliance with standards of due process may eject one kind of injustice, but it can invite another to enter.

Anyone reading accounts of how judicial excommunication was sometimes misused during the later Middle Ages will have to concede that this danger was more than imaginary.⁶² Excommunication may have been subjected to effective procedural requirements, but its imposition for trivial and unworthy ends did not come to a halt. Indeed in some ways the very "judicialization" of the sanction invited a greater abuse.⁶³ It made possible tying up one's opponents in the labyrinthine complexities of litigation, subjecting them to the disadvantages excommunication entailed when their only fault had been failure to master those complexities. It sometimes seemed that the Church and society in general would be better served without having always to be concerned with the *scrupulum iuris*.⁶⁴ To the "judicialization" of excommunication

61. See W. Millor and C.N.L. Brooke, eds, II *The Letters of John of Salisbury: the Later Letters* (1163-1188), No. 144 (1165) (1979). See also his defense of Becket's excommunications, id No 289 (1169).

62. See, for example, the purely formal compliance, almost to the extent of burlesque, in the 1282 excommunication of the bishop of Hereford. See R.C. Finucane, *The Cantilupe-Pecham Controversy*, in Meryl Jancey, ed, *St. Thomas Cantilupe Bishop of Hereford* 106 (Friends of Hereford Cathedral, 1982).

63. See, for example, the characterization of this period in Robert Ian Moore, *The Formation of a Persecuting Society* (Basil Blackwell, 1987).

64. See, for example, the equivalence between scrupulous observance and the *ordo iuris* and fraud in a 1235 agreement between the abbot of Battle Abbey and the bishop of Chichester contained in W. Peckham, ed, *The Chartulary of the High Church of Chichester*, 46 *Sussex Record Society*, No 274 (1943). See also L. Fleming, ed, *Chartulary of the Priory of Boxgrove*, 59 *Sussex Record Society*, No 68 (1185-93)(1960) (Confirmation of the rights of the monks, "forbidding that anyone presume to molest or harm the monks . . . either unjustly or by legal process.").

and the government of lawyers, some would have preferred the older regime of the saint's curse.

The second limitation is that the canon law itself never wholly gave up the use of non-judicial excommunication, though at least in English practice, this did not amount to a continuation of the older form of the sanction. Excommunication *latae sententiae*, mentioned above, imposed the sanction automatically upon a person who committed any one of a specified number of prohibited acts. Striking a cleric was both one of the first, and remained one of the best examples, of the kind of unlawful action that rendered the offender *ipso facto* excommunicate.⁶⁵ Canonical theory held that the offender had already been sufficiently warned by the promulgation of a general sentence of excommunication against their misdeeds. This was not pure legal fiction. In England the parochial clergy was required to make a quarterly public denunciation of these offenses to making such warning a reality,⁶⁶ and evidence from the court records shows that this admonition was observed in fact. English pulpits were used to make such denunciations. Potential offenders were regularly told that they would be subjected to such automatic excommunication. Thereby was some warning given.

The number of offenses entailing *latae sententiae* excommunication grew larger over the course of the Middle Ages—no doubt the all too natural reaction on the part of law makers to a perceived failure to stem the tide of unlawful behavior. Increasing the sanctions has often been regarded as a sensible answer to the problem of persistently unlawful behavior, and the medieval Church enjoyed no immunity from the temptation.

It might be thought, therefore, that the exceptions to the law's requirements of canonical due process in time became more important than the requirement itself, and in consequence that excommunication might well have become a judicial sanction in theory only. At least in England, that would not be true. In order to become effective in any particular case, a sentence of excommunication *latae sententiae* had to be specifically denounced.⁶⁷ The

65. A rule enacted by the Third Lateran Council of 1179. See *Decretum Gratiani*, C 17 q 4 c 29 (*Si quis suadente*).

66. See the *Council of Reading's* (1279) admonition in F.M. Powicke & C. R. Cheney, *Councils & Synods with other Documents Relating to the English Church II*, 848 (Clarendon Press 1964).

67. See *Glossa ordinaria* ad X 3.49.4 (Non minus) s v commoniti ("Admonito enim semper precedere debet vindictam, xii q ii indigne [C 12 q 2 c 21] et nisi se correxerint per admonitionem sunt ipso iure excommunicati").

sentence itself was treated simply as stating the rule, and in actual court practice, before the sentence could become effective in any particular case, the person involved was routinely cited and warned, just as happened in ordinary litigation.⁶⁸ The difference between judicial and automatic excommunication was thus considerably narrowed in English practice. Offenders were summoned to "show cause why they should not be declared excommunicate" under the terms of a general sentence of excommunication,⁶⁹ but they were not treated as excommunicate without being cited to appear at such a hearing. This means that the change towards making excommunication a judicial sanction, limited by procedural requirements, actually was more successful than the formal canon law seemed itself to require. The effective "judicialization" of the sanction that was accomplished in Angevin England thus occurred even for excommunication *latae sententiae*.

CONCLUSION

The history of the developments in the use of excommunication in ecclesiastical practice during the twelfth century thus contains both positive and negative aspects. The move to make certain that excommunication was used within a legal context grew out of a great movement of growth in the canon law that occurred during the period in England as throughout Western Europe. It represented a step forward in securing basic rights of due process to persons subject to the canon law. This step forward was also final. There was to be no going back to the "heroic" age of the saints, when the anathema had been a holy man's curse as often as it had been a deliberate judicial sanction. In the changing use of excommunication, one sees a fundamental change in legal culture.

However, this was not a simple or a total victory. Not everyone applauded it. Nor did it end misuse of the sanction. In the years to come, there would again be complaints about the uses being made of the Church's great sanction of excommunication. Most of these complaints would, however, turn out to be different

68. Denunciations in English medieval practice are noticed in Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* 94, esp note 4 (Oxford U Press, 1952). For practice with regard to violence against clerics, see '*Si quis suadente*' (C 17 q 4 c 29): *Theory and practice*, in P. Linehan, ed, *Proceedings of the Seventh International Congress of Medieval Canon Law* 425, 432-37 (1988).

69. For example, *Ex officio c Randell* (Diocese of Norwich 1509), Norfolk Record Office, Norwich ACT/1 s d 5 December (Defendant summoned "ad dicendam causam rationabilem quare non deberet excommunicari").

in kind from the criticisms than had been leveled at the anathemas and excommunications familiar in the period before 1200. They would be objections to excommunication's use for trivial, secular, or even wholly illegitimate ends.⁷⁰ They would not be objections that the sword of excommunication had been wielded rashly and unadvisedly, without fairness or judicial process. They would instead be that the Church's legal system had lost its connection with the spiritual purposes that had called it into being.

70. Such criticism was made by canonists and other men familiar with the canon law; see, for example Jean Gerson (1363-1429), *De potestate ecclesiastica*, Cons IV, in 6 P. Glorieux, ed, *Oeuvres Complètes* 218 (Desclee, 1960); Stephanus de Avila (1549-1601), *De censuris ecclesiasticis tractatus*, Pt II, c 5, disp 2 (1608) and references to the opinion of other canonists found therein.