The Right to Remain Silent: Before and After Joan of Arc

By H. Ansgar Kelly

The beginning of the typical Miranda warning - "You have the right to remain silent. Anything you say can be used against you in a court of law"[1] - is also a fair statement of the medieval right to silence that can be deduced from the canonical rules of due process, and such a warning could and should have been given to arrestees in inquisitorial proceedings. In such proceedings the judge was obliged to give any detained or summoned person a precise statement of the charged crime, to explain the nature of the charges, to allow or provide counsel and other defenses, and to prove that the person was considered guilty of the crime by respectable members of the community before insisting on a response to the charges or to any questioning. If the judge ignored these preliminary procedures and proceeded to interrogation, and persisted even after protest, the defendant could refuse to cooperate by declaring himself or herself aggrieved and entering an immediate appeal.[2] Remaining silent before being formally charged was especially important in heresy cases, because one could be convicted not only for confessing a previously committed crime but also for expressing an opinion or belief that could be taken as a brand-new crime of false belief; it would become instantly notorious and require no further proof simply by being uttered in court.

In this study I wish to discuss the nature and implications of the right of refusal to answer questions before arraignment, and associated rights against self-incrimination, in connection with the case of Joan of Arc. Her case is particularly valuable because of the full, though biased, record of her condemnation trial in l43l[3] and the extensive formal review that led to her exoneration twenty five years later, which included the depositions of 116 persons.[4] The juridical deficiencies of the records of Joan's condemnation have not been discussed as thoroughly or perspicaciously as the veridical questions of the trial record.[5] Most objections against the trial procedure in the preliminary phases, both in the nullity trial and in our own era, center around the oppressive conditions of the interrogation, whereas the primary objection should have been against the interrogation itself.

In contrasting the inquisitorial system with Anglo-American traditions, I wish to claim somewhat more for the former than has ordinarily been given to it, since its beneficial aspects are frequently ignored or downplayed by historians. An example can be seen in Leonard Levy's study of the right against self-incrimination. He begins with the case of the priest John Lambert, who in a heresy inquisition in 1532 twice insisted that the principle "No man is bound to betray himself" was in the archbishop of Canterbury's own law, though he did not know precisely where; and he added that the principle "Cogitationis penam nemo patiatur" was also to be found there. Levy assumes that Lambert's "argument on illegality of the proceedings against him was founded on a system of trial that was antithetical to the inquisitorial system and older than Magna Carta."[6] But in fact Lambert was appealing to safeguards and defenses that were to be found in canon law,[7] and, as we will see, he was not objecting to the proceedings against himself, which he seems to have accepted as canonically regular, but to the practice of forcing persons to "detect" themselves in the absence of any proof or legally established infamy. Richard Helmholz has recently shown that many opponents of self-incrimination in later times made similar appeals to canonistic principles.[8] In what follows I will try to give an account of earlier theory and practice.

1. INQUISITION AND THE RIGHT TO PRIVACY

A restriction on unlimited inquiry was a fundamental principle of the new inquisitorial system set up by Innocent III at the Fourth Lateran Council in 1215; it was part of the "bill of rights," or guarantee of due process, that was then put in place, and it followed on the principle that "the Church does not judge secret matters."[9]

The pope designed the *inquisitio* to take the place of the procedure of *accusatio* in Roman civil law. In that older form of trial, an accuser brought a criminal charge against a certain individual and undertook to prove his guilt, agreeing to suffer the penalty of "retaliation" if he failed to offer sufficient proof: that is, he would undergo the same punishment that the accused

would suffer if found guilty. One can readily understand the awkwardness of having to depend on the volunteering of good citizens willing to risk their own livelihood or even lives in order to have criminals brought to justice. For the vulnerable accuser Pope Innocent substituted trustworthy informants who could testify to their *belief* that a certain person had committed a crime. This collective belief the pope called *fama*, "fame," and on its basis an ecclesiastical judge (a bishop, say) could summon the suspect and *inquire*, that is, "make inquisition," as to whether the fame was true. The pope considered the fame, or public outcry, to be the equivalent of the accuser in the older system; this is how he forestalled the objection that the judge was acting as both accuser and judge.[10]

The judge's first obligation, when implicated persons were summoned to his court, was to give them, in writing, detailed points (chapters, or articles) of the charges against them and to explain the charges, thereby enabling them to defend themselves. He was also to give them both the names and the testimony of all the witnesses against them, and they in turn were allowed to enter objections both to the substance and to the persons of the witnesses.

This system required a certain amount of preliminary investigation. The pope envisaged that a judge would first be alerted by reports from afar and then go to the scene of the crime to see for himself. He modeled this procedure of "general inquisition" on Genesis 18.21, where God says of Sodom and Gomorrah, "I will go down and see whether they have done according to the cry that is come to me." The general inquisition was institutionalized in the regular episcopal and archidiaconal visitations, in which the ordinary prelate would interview substantial members of the local parish, sometimes called "synodal witnesses," on the facts of crimes and abuses and their opinions on the identity of the perpetrators. He would also gather whatever proofs of guilt were readily available or at least note the names of likely witnesses.

As for the "specific inquisition," when an individual person was summoned to court, the judge could compel witnesses to testify both to the fame of the defendant and to his or her guilt.[11] Innocent himself would perhaps have considered it a violation of due process to force the defendant to respond directly to the question of guilt, whether under oath or not.[12] But as the thirteenth century proceeded, the self-inculpatory oath came to be justified both for accusatorial and inquisitorial processes, and it continued to be a feature of modern criminal procedure on the Continent.[13] Thus Cardinal Hostiensis in his *Summa Decretalium* (finished in 1253) wrote that the defendant should be forced to swear to tell the truth in an inquisition.[14] In the English common-law tradition, in contrast, charges were not answered under oath, and it was recognized that a plea of "Not guilty" could be made by a guilty person without perjury.[15]

In his *Commentary on the Decretals* (finished shortly before his death in 1271) Hostiensis maintained that the giving of chapters and the establishing of fame were absolutely essential to an inquisition and that a trial would be invalid if either procedure was omitted.[16] But Pope Boniface VIII in his *Liber sextus* of 1298 countered this position with two new laws. In *Postquam* he said that if you confess to a crime in an inquisition, you cannot invalidate your confession by claiming that you were never defamed of the crime or that charges were not presented to you.[17] In *Si is* he said that if you are summoned to an inquisition and the judge proceeds to the business of inquiring into the truth of the charges without first establishing fame, if you are present and do not object, you cannot later impugn the trial on that basis.[18]

This legislation turned out to be a sinister development, because the pope said nothing about the judge's obligation to carry out the procedures for presenting charges and establishing fame or for alerting the defendant to his or her rights to these procedures; and he prescribed no penalty if a judge deliberately concealed these rights from unwitting defendants or insisted on proceeding without them.

According to the fourteenth-century canonist John Andrew, who composed the Ordinary Gloss on Boniface's *Liber sextus*, ordinary judges (as opposed to delegated judges) did not have to establish fame before proceeding to make inquisition into the truth of the charges.[19] But in his later *Novella* (finished in 1338) he noted the recommendation of Hostiensis that the ordinary judge should make inquiry and receive witnesses on infamy in order to avoid appeals; -and this, he wrote, was the common practice in his own day.[20] He summed up by saying that when the defendant denies infamy but the infamy is notorious, the judge may omit the inquiry of fame and

proceed to the inquiry of truth, -though it would be safer to receive some witnesses to the infamy, because the defendant may in fact be wrongly defamed. Moreover, many things are said to be notorious which are not. Finally, if the defendant appeals, the process would be imperiled, because the judge would have to prove the infamy to his superior.[21]

As for the deliberate omission or postponing of formal charges, no responsible commentator justified the practice (I will note below that some writers of manuals for heresy inquisitors were exceptions). John Andrew noted that Hostiensis considered the defendant's silence about the omission of the fame process to be a sign of objection, but he said that such is not the case, and he invoked the rule of law that silence signifies consent.[22] However, it was an accepted principle that only an informed silence could be construed as consent;[23] and it does not seem to have entered the mind of Pope Boniface or any of the commentators on the *Sext* that defendants, and even defense attorneys, might be unaware of these rights. Presumably, they would all have admitted that the defendants had a right to know their rights-unlike American citizens before the *Miranda* ruIing[24] - but it is only in the sixteenth century that I have found an author who insisted upon it. I refer to Philip Probus in his 1535 edition of Cardinal John Monachus's *Glossa super Sexto* (1301), commenting on the cardinal's explanation of *Si is* that one can renounce a procedure introduced in one's favor.[25] (I should note in regard to the cited rule of silence in response to an action that a companion rule of law provided that silence in response to a question signified neither admission nor denial.)[26]

The required order of procedures in an inquisition was made clear by Eli as Regnier in his *Long Cases for the Sext and Clementines* (Poitiers, 1483), which was added to the Ordinary Gloss by John Chappuis in 1500. Although he limited his discussion of *Si is* to the case of an inquisition by a delegated judge initiated by his superior at the request of another person rather than ex officio, he explained *Postquam* as dealing with ordinary judges proceeding ex officio. In such cases there must first be infamy connecting a specific person to a specific crime; the person is then summoned, and the judge should give him chapters detailing the points on which he has been defamed. If he does not give him chapters, he is not bound to respond to the judge's interrogation.[27] If there is no antecedent infamy, he can say, "Lord judge, you cannot proceed against me by way of inquisition, because I have not committed such a crime; or granted but not admitted that I did commit the crime, you still cannot proceed against me because I have not been defamed of it."[28] If the judge fails to take notice of either of these objections and fails to give chapters or establish fame, the defendant should make an appeal on the spot.[29]

Regnier concludes by saying that the usual practice of his own day was in conformity with these procedures, which were mandated by the Fourth Lateran Council: that is, before a person is cited ex officio, the judge conducts a secret investigation, and if it appears that fame of the person's connection with the crime exists, he is cited to appear in court; if he appears, he is to be given chapters.[30] A common way for judges to fulfill their procedural obligations once an implicated person was summoned, whether he or she obeyed the summons or not, was to present chapters that incorporated claims both of fame and of truth, together with an offer to prove both, if denied by the defendant.[31]

The Spanish Inquisition, which was getting under way at the time that Regnier was writing, seems to have had, at least at the beginning, a similar concern for observing the rule of law. In the trials held in Ciudad Real from 1483 to 1485, the procedure was to bring an unconfessed suspect to court and give him detailed charges and to allow him to select a lawyer and a proctor before denying the charges.[32] Undoubtedly, abuses did develop, especially in connection with holding suspects for a long period of time in the hope of generating proofs; but the Grand Inquisitor, Thomas de Torquemada, took steps to stop such irregularities. In the *Instructions of Avila*, dated 25 May 1498, he insisted that suspects were not to be arrested unless proof of specific crimes had been assembled, and the arrestees were to be formally charged within ten days.[33] He was also aware of the privileged status of completely secret crimes. According to the *Instructions of Seville*, issued in 1484, persons who confessed secret crimes could be admitted to secret abjuration and penance.[34]

Since, therefore, the law and commentaries clearly indicated that defendants in an inquisition were to be charged before being required to respond to questions about criminal activity

publicly associated with them, and these requirements were carried out in practice, at least in some regions, how did it come about that Joan of Arc was forced to respond to an unlimited series of questions for' a month before being charged, and that the points on which she was finally convicted were taken from her responses, most of them dealing with matters hitherto entirely secret? An obvious answer is that her prosecutors deliberately violated her rights in order to make her incriminate herself. But this answer is not satisfactory, because it is clear that not only Peter Cauchon and his associates but also virtually all of Joan's sympathizers, both at the time and later, believed it to be standard procedure to question a suspect under oath before any charges were stated. How did this extraordinary oblivion regarding correct procedure come about?

2. PREARRAIGNMENT INTERROGATION AND INSTANT CRIMES OF THOUGHT

I have suggested elsewhere that such neglect or ignorance of the *ordo juris* was the result of an abuse first observable in the practices of papally appointed heresy inquisitors in southern France in the 1 250s: witnesses summoned to swear to their knowledge of the heretical activities of others were also forced to testify concerning themselves-a procedure that would be proper only in the cases of persons who had already confessed their involvement in heresy. A reference to such an oath appears in the decretal *Accusatus* of Alexander IV (1254-61), which was incorporated into the *Liber sextus.*[35] It became customary to make not only the witnesses but also the principal suspects themselves swear such an oath and then to interrogate them without any charges being named; they would be required to guess why they had been summoned and to respond to questions about what they believed on points of Christian doctrine. Their misstatements would then be taken as confessed crimes of heresy.[36] Such abuses were undoubtedly rationalized by the excuse that certain heresy inquisitors were allowed to use summary procedure, which according to some canonists permitted the exclusion of lawyers and of all rules of procedure. In 1298, in a decretal newly designed for the *Liber sextus*, Boniface VIII decreed that all heresy cases could employ summary procedure. In 1312, however, in the decretal *Dispendiosam*, Pope Clement V extended this privilege to many other kinds of cases) civil as well as criminal, and then, in 1314, at the urging of John Andrew, he issued the decretal *Sepe*, clarifying once and for all (supposedly) what could and could not be allowed under summary procedure; for one thing, no necessary proofs or defenses were to be excluded.[37]

The *Clementine Constitutions* was officially published by Pope John XXII in 1317, and the Dominican Bernard Guy, papal heresy inquisitor at Toulouse from 1306 to 1323, refers to one of the constitutions in the manual that he compiled in the early 1320's.[38] But he does not mention either *Dispendiosam* or *Sepe* when treating of summary procedure, which, according to his assertion, allows the inquisitor to reject all attempts by the defendants to make objections against witnesses, to demand a *libellus* (which he seems to take as an initial statement of charges), or to make appeals.[39] None of this was true, of course; heresy trials were privileged only in allowing the use of tainted witnesses (shared with cases of simony and *lesa majestas* - whatever that might be in an ecclesiastical court) and the suppression of the names of witnesses in cases where the defendant's knowledge of their identity would be likely to endanger them.[40] Guy did not eliminate all semblance of defenses for the defendant, however; he merely postponed them. Persons who are delated must first swear to tell the truth concerning themselves and others; if they confess, the judge proceeds accordingly. But if they refuse to tell the truth (Guy's assumption was that they are guilty), witnesses are received and chapters are culled from their testimony; these chapters, upon which they have been found culpable ("super quibus reperti sunt culpabiles"), are explained to the suspects and the witnesses' testimony given to them (without their names), and they are now given the ability to defend themselves, with objections and refutations allowed.[41]

The manual produced later in the century (1376) by Nicholas Eymerich, heresy inquisitor for Aragon, justifies a similar procedure, by referring, surprisingly, to Clement's *Sepe*. According to this constitution, he wrote, a *libellus* does not have to be submitted or the case contested. These are terms that refer to non-inquisitorial cases, where a plaintiff or accuser is present, but Eymerich said that it is the procedure to be used not only for persons who are accused (in an *accusatio*) but

also for those who are only suspected (that is, we are to conclude, in an *inquisitio*). He recommended a subtle approach for the preliminary interrogation, starting with general questions and leading up gradually to the matter at hand.[42]

What was the status of statements made by defendants before being charged in an inquisition? According to Hostiensis, as we have seen, they should be thrown out. But the legislation of Boniface VIII nullified this approach and made fair game out of every admission that could be construed as the confession of a crime, whether it had been obtained by fair means or foul, and even though the crime had been entirely secret beforehand - or even nonexistent, as in the case of a faulty explanation of an article of the Apostles' Creed teased out under interrogation. For it was a principle that any confession made in court became instantly notorious, meaning that no further proof was necessary. This point was noted by the commentators on Boniface's statutes. Guy of Baysio observed that testifying against oneself in this way would be stupid and foolish.[43]

But what was one to do when one's bishop insisted that one had an obligation to respond to his questions? St. Thomas Aquinas, writing at the same time as Hostiensis, explained that a judge has no right to prosecute a crime unless there is an accuser or public infamy, or unless he witnesses the crime himself.[44] When the judge requires an accused person to respond to a charge against him, he is bound to reply, if it Is done in accord with law, even though the response will convict him; his obligation to obey his superior overrules the obligation that he has against self-incrimination. However, if the question is asked against the rule of law, even though he may not answer with a lie, he is not required to answer at all; he may appeal or get out of it in some other licit way.[45] It is one thing to conceal the truth, and another to make false statements. No one is required to confess the whole truth but only what a judge can and should demand according to the rule of law: for example, when infamy or other clear evidence exists about a crime or even when a crime has been half-proved[46] (for instance, by the testimony of a single witness).[47]

One's only recourses, then, were deception by concealment or refusal to respond combined with a formal appeal. If the judge in turn refused to acknowledge or accept appeals and threatened punishment for failure to respond, one could either comply or accept the consequences of refusal, which, by right, should only have been conviction for contempt of court. Even the most unscrupulous judge could hardly have found a defendant guilty of unspecified crimes.[48] But any statements that defendants did make could and very likely would be used against them.

In a well-known series of heresy trials held in the diocese of Pamiers in southern France in the years 1318 to 1325 - in other words, just after the promulgation of the *Clementines* - the procedure followed was like that advocated by Bernard Guy rather than that specified by Clement V and John Andrew. The situation was much like Joan of Arc's a hundred years later: the main judge was the bishop, James Fournier (the future Pope Benedict XII, 1334-42), working in collaboration with the deputy of the papal heresy inquisitor. Suspects were routinely required as the first matter of business to take an oath to tell the truth about themselves as principals and about others as witnesses in response to questions about matters of the faith. In instances where the defendants refused to take such an oath,[49] Fournier proceeded to receive their statements unsworn, but these proved just as incriminatory as the sworn responses.

In one revealing case a defendant named Arnold Tesseyre, upon refusing to swear the oath, was asked simply to respond truthfully about those things of which he was accused, concerning both heresy and other misdeeds said to have been perpetrated by him. Arnold asked the bishop to tell him exactly what things were being said against him, and Fournier responded by listing the charges. However, he is said to have done it *de gratia*, as a favor, and not as giving the defendant something he deserved.[50]

Another case indicates that Fournier considered secret crimes to be within the province of inquisitorial proceedings. A carpenter's wife, Auda, who had come to have doubts about the Eucharist was summoned as publicly defamed of heresy;[51] but subsequent testimony indicates that the bishop summoned her as soon as he had been informed about her by a priest-infirmarian, who heard of it from a confidante of Auda's.[52] Auda's husband testified that when he first found out about her lack of faith, he was terrified and told her to go to confession, and he brought her to a priest for that purpose. Fournier then asked him why he had not reported his wife's words to him or to the heresy inquisitor. He responded that he thought she was raving because of illness, and

furthermore she confessed it immediately; therefore he considered her to be excused and without fault.[53] If the husband had informed the bishop and this was his only source of information, he could not legally have proceeded against her by way of inquisition; but she could have been prosecuted by way of accusation if the husband had been willing to stand as a formal accuser.

It is noteworthy in this case that Fournier first interrogated Auda "simply," that is, without oath. He asked her if, as had been reported to him, she had erred in the articles of the faith and the sacraments of the church.[54] She was later questioned under oath concerning her earlier responses: she was made to swear to tell the full and plain truth and to say the truth in response to questions.[55] However, both her husband and her confidante, Emengard, were administered a form of the oath usually given to defendants; in the case of the husband, he was to tell the truth about himself as principal and about Auda as witness concerning the foregoing matters.[56] The infirmarian and other witnesses swore only to tell the truth concerning the foregoing.[57] After being questioned about Auda, the husband was asked if he himself had had or still had any doubts about the articles or sacraments of the church, or if he had had any dealings with heretics. He responded negatively to both questions.[58] At the end of the case, after concurring with the majority of his assessors in sentencing Auda to penances that involved no humiliation,[59] Fournier announced that he retained the power to punish the female witnesses who had committed perjury during the course of the trial, and he passed a sentence absolving Auda's husband of any guilt in the affair.[60]

To sum up: if the practice noted in the previous section, of placing defendants in an inquisition under oath to respond to formal charges, led to procedural abuses, it was not nearly as detrimental as the practice that we have been studying here, of swearing in a suspect to answer questions before charges are explained and without any attempt to prove association with public crimes. Though post-arraignment oaths were never explicitly required by law, they did find justification and support among the canonistic commentators. But this was not true of prearraignment oaths and interrogations. Surprisingly, historians of self-incrimination, at least in the English tradition, rarely take note of the timing of inquisitorial proceedings but simply lump everything together under the rubric of "the oath ex officio." J. H. Wigmore notes that this frame of reference developed in Elizabethan and Jacobean England: the ex officio proceeding was "lawful enough on Innocent III's conditions about *clamosa insinuato* and *fama publica*," but later abuses "led to the matter being argued, in English courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful; though, in truth, by the theory of the canon law, it *might* be either, according to the circumstances of presentment."[61]

In addition to failing to distinguish between proper and improper timing of oaths in ex officio inquisitions, historians have mixed up these oaths with those taken by witnesses in inquisitions and other kinds of trials, by the parties (plaintiffs and defendants) in suits or "instance" cases, or by persons delated to the King's Council, and they have created a spurious conflict between papal tyranny and plucky English resistance. Thus Levy is not only mistaken in saying that the Fourth Lateran Council incorporated "a new oath that was self-incriminatory in nature,"[62] he is also mistaken to claim, drawing upon generations of misleading sources, that Cardinal Otto of Tonengo introduced the self-incriminating oath into England in 1236; that Robert Grosseteste as bishop of Lincoln first used it in 1246; that his use of it was opposed by Henry III; that Archbishop Boniface of Canterbury revitalized it in 1272; and that Parliament under Edward II (1307-27) outlawed it.[63] Otto in his legatine constitution - of 1237 - was simply ordering litigants in ecclesiastical courts to take the oath of calumny in civil cases, while litigants in spiritual cases were to take the oath of telling the truth: "Jusjurandum calumpnie in causis ecclesiasticis civilibus, et de veritate dicenda in spiritualibus, quo et veritas aperiatur facilius et cause celerius terminentur, statuimus prestari decetero."[64] As for Grosseteste, he was conducting general inquisitions on the status of churches. The prescribed method was given in Innocent III's decretal *Qualiter et quando* (1206): the clerics of a church are to swear "to tell the inquisitors the plain and full truth about reforms which they know or believe are needed, both in the head and in the members, except for secret crimes."[65] Henry III's specific objection was against the bishop's unheard-of practice of compelling lay persons to reveal, not their own crimes, but those of others, and specifically private sins that were not publicly purgeable.[66] But he may also have been objecting against compulsory testimony in general.[67] Boniface of Savoy's constitutions were issued in 1261, not 1272 (he died

in 1270); and, as William Lyndwood makes clear in his commentary (1430), he also was dealing with witnesses, not defendants: laymen can be forced to give sworn testimony in inquisitions.[68] Lyndwood says that in a general inquisition an oath should not be exacted from a person to reveal the hidden sin of someone; but in cases where crimes are brought forward for correction without an oath, the inquisitor can exact an oath concerning them.[69] That is, witnesses can be forced to testify to the fame and the truth of such crimes. Finally, the *Prohibitio formata de statuto "Articuli den"* of Edward II was simply another attempt to restrict the scope of church courts. It directed ecclesiastical judges not to permit the assembling of laymen to make recognitions by their oaths ("ad aliquas recognitiones per sacramenta sua facienda") except in matrimonial and testamentary cases.[70]

It turns out that the earliest evidence for the use of self-inculpatory oaths in England is to be found not in the ecclesiastical courts but in the King's Council under Edward II, where such oaths were imposed without any of the defenses of the inquisitorial system.[71] The council may have learned the technique from the papal heresy inquisitors who prosecuted the English Templars.[72] If so, there is no indication that the practice was carried over to the ecclesiastical courts, and the series of fourteenth-century statutes enforcing supposed Magna Carta guarantees of due process, culminating in that of 1368, were directed only towards the secular courts.[73]

The correct distinction between proper and improper oaths in inquisitorial proceedings was made by John Lambert in 1532, when he objected against judges who "sometimes, not knowing by any due proof that such as have to do before them are culpable, will enforce them, by an oath, to detect themselves, in opening before them their hearts." In such cases, he said, "I cannot see that men need to condescend to their requests." But it is otherwise when the proceedings are properly constituted: "I think it lawful, at the commandment of a judge, to make an oath to say the truth, especially if a judge requireth an oath duly, and in lawful wise; or to make an oath in any other case convenient; and that also for purgation of infamy, when any infamy is lawfully laid against a man."[74] By responding to the articles ministered against him, Lambert was presumably accepting the legitimacy of the process. But it is important to observe that in his case it was not simply a question of his denying that certain doctrines were preached or taught by him. To clear himself of the infamy that had been lawfully established against him, he was required to give his opinion on the doctrines, and he would be judged on the quality of his responses. This purgation procedure was used in the time of John Wyclif, for example in the actions against Philip Repingdon and others at Oxford in 1382.[75] It was carried over to the Council of Constance in the trial of John Hus, when he was first examined, not on his own views, but on Wyclif's doctrines.[76]

Lambert did not go so far as to say that judges were acting illegally in requiring prearraignment oaths. He moved from stating that the oaths were "enforced" to indicating that they were requested, and his point is that one does not have an obligation to comply with such requests. I should also note that modern historians have placed undue emphasis on the oath-taking process. The crucial point was the timing of the interrogation, with or without oaths, for even an unsworn confession of a crime would be witnessed by the judge and therefore rendered notorious. We have seen the results at Pamiers, under Bishop Fournier.

Proper inquisitional procedure was set forth and observed shortly before Lambert's trial in the papally commissioned inquisition against Henry VIII and Catherine of Aragon in 1529. One of the defendants, Catherine, exercised her rights of protest and appeal, and after her petitions were rejected by the inquisitors, Cardinals Campeggio and Wolsey, she refused to cooperate or respond (the trial was eventually stopped by an external appeal to the pope). Articles I were administered against both defendants *ex officio mero* on 25 June, and reference is made to the king's reply on 28 June. The prearranged schedule called for time to be given to the king to reply, and then for an oath to be administered to him and for him to be examined. Whether he did actually take such an oath is not stated in the court record prepared for the Rome appeal.[77] In the *causa inquisitionis ex officio mero* called by Archbishop Warham's successor, Thomas Cranmer, at Dunstable in 1533 on the same matter, responses to the articles were not made by Henry but by his proctor, without an oath, and without consulting Henry.[78]

3. BISHOP CAUCHON AND THE INTERROGATION OF JOAN OF ARC

Peter Cauchon (ca. 1371-1442), the chief instigator and executor of the trial against Joan of Arc, was trained as an ecclesiastical lawyer: he had an advanced degree - a licentiate - in canon law from the University of Paris, where he served as rector in 1397 and 1403.[79] When he was at the Council of Constance, he witnessed a number of "causes of the faith," or heresy proceedings, two of which he participated in himself. They show that he was very familiar with inquisitorial procedures and defenses long before he came to try Joan of Arc.

Cauchon set out for the council on 8 January 1415, as one of the ambassadors of John the Fearless, duke of Burgundy, and legal counsel for him in the case of the doctrines of John Petit,[80] which was debated throughout the duration of the council.[81] Commissary judges were appointed at the thirteenth session, held on 15 June 1415, to make inquisition into it,[82] and Cauchon was one of a team of lawyers who protested against an earlier sentence by the bishop of Paris and the deputy heresy inquisitor for France and who opposed its supporters at the council.

On 1 July 1415, Cauchon insisted that the "pretended writings" submitted by the council promotor Henry de Piro and by John Gerson "were and are false, mendacious, and fabricated in a false and deceitful fashion." He objected to the intervention of the promotor, since Gerson was a formal denunciator in the case and therefore the process was not an ex officio inquisition. The nine propositions, he asserted, had never been held or preached in this form by John Petit; if some words did appear to have been extracted from his work, the extraction was made in a false and truncated way by enemies of the duke. The sentence was null and void, because it was given in a cause of the faith in matters not condemned by the church; moreover, one of the affected parties (namely, the duke of Burgundy) had been allowed no voice in the trial, and the sentence was given by the bishop of Paris, who was a capital enemy of the duke and a participant in the war against him. The bishop in fact was plotting at the time to kill the duke, as was discovered from one of those whom he sent to Flanders for the purpose, who confessed to the crime and was decapitated. Furthermore, the trial was not held in a safe place, and university masters who were formal adversaries of the duke were admitted to the proceedings while others, motivated only by a zeal for justice, were repelled; the whole faculty of canon law was excluded, as was the Picardy and Savoy nation of the theology faculty, and the required approval of the faculty of medicine was not obtained.[83] In the following year, on 26 and 27 March, when it seemed that the judges were going to declare against the Burgundian position, Cauchon claimed grievances (reasons for appeal) and spoke of seeking the remedies of law.[84]

Other trials were held against the recalcitrant Pisan and Avignonese popes, John XXIII and Benedict XIII. In both cases formal charges were formulated and presented; some were supported by the testimony of witnesses, and others, especially the most outrageous, received no such support and were dropped.[85] As one of the witnesses against Benedict, referred to here by his prepapal name Peter de Luna, Cauchon was declared contumacious on one occasion for non-appearance. He did appear eventually,[86] as the trial proceeded in Benedict's absence. The sentence was read on 26 July, condemning him of numerous offenses including schism and heresy and violation of the article of faith *Unam sanctam catholicam ecciesiam* - which would also figure in the trial of Joan of Arc.[87]

The trial of John XXIII as well as that of Benedict XIII was conducted in his absence, and the proceedings concerning John Petit were posthumous, as were those dealing with the doctrines of John Wyclif. But the trials of the priest John Hus and his lay follower Jerome of Prague took place in their presence. And though many procedural irregularities can be detected,[88] the defendants' own explanations of their positions under interrogation, which were accompanied with denials of wrongdoing, do not seem to have have been construed as evidence of new crimes of thought, but at most as confirmations of previous offenses, proofs of which were ostensibly established by documentary evidence and witnesses.[89] But there seems to have been no question of their exercising their right to call witnesses in their own defense.

Between the end of the Council of Constance and the trial of Joan of Arc, one can see a procedurally correct heresy trial in England in the case of the Franciscan William Russell, tried in 1425 under Archbishop Chichele, with an appeal heard in Rome in 1426.[90] But in the diocese of Norwich heresy trials were conducted from 1428 to 23 March 1431 by the bishop, William

Alnwick, or his vicar general in his absence, which manifest some of the abuses observable in Cauchon's proceedings against Joan including blanket oaths and interrogation without charges.[91] AInwick served as one of Cauchon's assessors, being present at Joan's abjuration on 24 May 1431.[92] He was also one of three judges commissioned by Archbishop Chichele to hear the heresy and witchcraft trial of Eleanor Cobham, duchess of Gloucester, in 1441, but in this case the proper ordo juris was followed.[93]

Cauchon became bishop of Beauvais in 1420, and since Joan of Arc was captured in his diocese, on 23 May 1430, he claimed to be her ordinary judge. He asserted in his cover letter of 1435[94] that fame of her immodesty in wearing male clothes and of her making statements against the faith had arisen and grown in many circles, and that he accordingly decided to conduct an inquisition concerning her.[95] On the first recorded day of the trial, 9 January 1431, he shared his current information with assessors (advisers to a judge) and ordered further investigations to be made.[96] He appointed a promotor "of his office," John d'Estivet, to assist him; the promotor's duties were to submit articles, to introduce witnesses, and to accuse and denounce Joan and have her examined.[97] Notaries were appointed to hear and record the interrogations of Joan and of witnesses.[98]

Articles were ordered formulated on l3 January; they were read on 23 January but were not included in the record produced in 1435. A specially appointed commissary, John La Fontaine, was to interrogate witnesses.[99] Presumably the articles were intended to establish both Joan's ill fame and her culpability. The resulting depositions were read to Cauchon's assessors on 19 February, and all agreed that on the basis of this testimony she should be cited to an inquisition.[100] These depositions, or "informations," would often be referred to in the subsequent interrogations of Joan, but they were never exhibited to her or put in the later record.

According to the citation Joan was summoned to be heard on articles made against her and interrogatories put to her concerning the faith.[101] This is phrased to sound as if the right order would be followed: that is, charges would first be presented to her, and then she would be questioned on them. But when she was taken from prison and brought to court on 21 February,[102] Cauchon did not make detailed charges against her but told her only that she was there to answer questions. He explained that public fame had reported many of her deeds to be harmful to orthodox faith and that therefore it was incumbent on him to hold a trial concerning the faith. In the Latin proceedings he refers to "certain informations of which we made mention earlier." This is not to be taken to mean that he mentioned them to Joan; rather he is speaking from the retrospect of 1435. He told Joan that she had been "cited ex officio to respond truthfully to interrogatories in the matters of the faith to be proposed to her." (This, as we have seen, is not the way the actual text of the citation read, according to which articles were first to be given against her.) Accordingly, he charitably admonished her, "for the acceleration of the present case and the exoneration of her [or his own] conscience, that she tell the full truth about the things concerning the faith on which she would be questioned, not seeking subterfuges or defensive efforts to avoid confessing the plain truth."[103]

This is the closest that Cauchon comes to saying that he was using summary process. But it is questionable whether he was consciously making such a claim, and even questionable whether he was conscious of violating the law of inquisitorial procedure by making her respond to questions before charging her, since, as I have already noted, even her sympathizers seem to have been unaware that this was a breach of correct procedure. However, he can hardly have been unaware of violating other rules of procedure, for they were of the sort that he himself had thrown up against the John Petit proceedings at Constance. Much would be made of these violations in the nullification trial.

Cauchon's next step was to require her to take what he called, in the Latin text, the standard oath ('juramentum in forma debita"):[104] while touching the holy Gospels, she was to swear to tell the truth about these things (French: "all the things") that would be asked of her. Joan responded, "I don't know what you want to ask me about. Maybe you could ask me things that I will not tell you."[105]

We might be tempted to conclude from that that Joan was able to divine in her unschooled way that neither Cauchon nor any judge had the right to force her to respond to unspecified

questions and that she had a right to refuse to answer them. She clearly assumed, as we can tell from this response and some of her further answers, that there were certain questions pertaining to a trial of this sort that a judge did have the right to ask and that she had the duty to answer under oath, but she seems instinctively to have believed that she had a right to know what the questions were to deal with. However, it would be a mistake, I think, to suppose that she was primarily concerned with the question of her rights. Rather, she was concerned that the blanket oath being demanded of her would force her to violate previous oaths that she had made not to reveal certains aspects of her revelations.

Cauchon's response to her initial objection was not reassuring: "You will swear to say the truth about what will be asked you concerning the Catholic faith and concerning all other things that you know" (the Latin translation leaves out the "all other," making the statement somewhat less outrageous).[106] Joan replied that she would willingly swear to tell about her father and mother and what had happened since she came to France, but not about her secret visions or counsel; she would not reveal them even if her head were to be cut off. However, in eight days she would be able to say whether or not she should reveal them. The bishop then limited the oath to matters of the faith, and Joan swore to tell what she knew about what would be asked her concerning the faith, but would be silent about her revelations. [107] This oath in itself, which was much like the illegal oath of the heresy inquisitors, would undoubtedly have been enough to trap her into making dubious doctrinal statements, for instance about the precise meaning of her everyday prayers. But when Cauchon had quickly worked his way through questions about her parents and home and came to ask her to recite the Paternoster and Ave Maria, she stymied him by saying that she would recite them only in confession.[108] She thus showed that she was able to distinguish between the internal and external forums of the church.[109]

Cauchon concluded the first session by warning Joan not to leave the prison assigned to her under pain of conviction of the crime of heresy. She replied that she did not accept such a prohibition and that if she escaped she could not be accused of breaking her faith because she had never given it. When she complained about being held in chains and iron fetters, the bishop replied that it was because she had previously attempted to escape. She replied that it was licit for any incarcerated person to escape from captivity.[110] No response to this strong statement of prisoners' rights was recorded.

In the second session, of 22 February, at which forty-seven assessors were present in addition to La Fontaine and John Lemaistre, the deputy heresy inquisitor for Rouen, Cauchon required Joan to swear the oath that she swore on the previous day, but then he characterized it as an oath "to tell the truth about all that would be asked of her concerning the crimes and misdeeds of which she was accused and defamed."[111] This, of course, was much different from the terms that she had actually sworn to. The Latin makes it seem that she was required to swear the previous day's oath "and, in addition, to swear simply and absolutely to tell the truth to questions concerning the things about which she had been delated and defamed." The Latin adds, moreover, that she was required to swear under penalties of law.[112]

When Joan responded that her oath of the previous day should suffice, "she was once more admonished to swear absolutely to tell the truth concerning everything that would be asked of her, it being pointed out to her that not even a prince could or should refuse to take this oath to tell the truth in matters of the faith."[113] The Latin puts it in the active voice: "We again required her to swear; for no one, even a prince, who is required to swear an oath in a matter of the faith could refuse."[114] Joan replied, "I took it yesterday. You put too much of a burden on me."[115] But finally she took another oath in the form that she had used the day before (the Latin specifies rather that she finally swore to tell the truth in matters concerning the faith).[116]

This is the only time that Cauchon claims a special privilege for heresy inquisitions as opposed to other kinds of inquisitorial trials. There was certainly no justification in law for his statement, nor was such a privileged procedure in trials of the faith ever claimed, to my knowledge, in any of the manuals produced by heresy inquisitors, such as those of Bernard Guy and Nicholas Eymerich.[117] However, his claim was not contradicted in later proceedings.

A theologian named John Beaupere took over the questioning at this point. When he asked Joan if she would tell the truth, she replied that she would do so to some questions that he could

ask, but not to others. That is, as the Latin makes clear, she would make no reply at all to certain questions.[118] Her usual method of refusing a question was to say, "Pass on," as when she was asked whether she received the Eucharist at any feasts other than Easter. She had already volunteered her practice of Communion at Easter after answering affirmatively that she went to confession every year. Herbert Thurston draws from this, rightly, I think, the following conclusion: "She was asked whether she fulfilled her Easter duties in the way in which the law of the Church required, and she said yes. When questioned about other Communions, she gave her judges to understand that that was a matter between herself and God and was no concern of theirs."[119]

At the next session, on 24 February, Cauchon again tried to make Joan take a completely unconditional oath: he admonished her three times to swear absolutely and without condition to tell the truth. She repeated her objection that he might ask her something that she would not give a true answer to, specifically concerning her revelations; and she added that he could ask her to tell about something that she had sworn not to speak of, and then she would be perjured - which, she said, the bishop should not wish to happen. She warned him that in calling himself her judge he had taken on a great burden, and she complained again that he was burdening her too much.[120]

When Cauchon persisted, Joan told him that she believed that not all the I clergy of Rouen and Paris would know how to compel her if they had no right to do so.[121] This statement may have been intended as a claim that no ecclesiastics, especially those in territories hostile to her cause, could legally bind her to reveal her secrets. If she was referring to Cauchon and his clerical associates as enemies of Charles VII, he chose to miss her meaning, for he told her that she could consult with some of the assessors there present. When Joan ignored his offer, he took the tack of warning her that a refusal to swear would render her suspect.[122] When she still refused, he told her that she must swear under pain of being convicted of what was imputed to her (which, of course, he had not revealed to her). Joan responded, "I have sworn enough. Pass on." Finally Cauchon gave up his efforts to make her swear a wide-open oath, and he told her that she would expose herself to danger if she did not swear to tell the truth concerning whatever touched her process, that is, her trial, and she agreed.[123]

As the interrogation under Beaupere proceeded, she replied to a question concerning her voices, "I will not tell you everything, because I do not have permission, and besides my oath does not cover that matter. But I tell you that the voice is beautiful, good, and worthy; and I am not bound to respond concerning it." Then she asked to see in writing the points on which they intended to interrogate her.[124] From this request we can conclude that Joan came close to guessing what her rights were under the law: to have all the matters that had been alleged against her formally presented to her. And, of course, since it seems that she was not able to read, she was asking that they be explained to her, as was likewise required by law. She was also asking, in effect, for the help of a competent and sympathetic defense attorney, and this, too, was a requirement of the judicial process.

The French text is corrupt at this point,[125] which may be either a simple matter of scribal error or a sign of official skulduggery. The fact that the Latin translation radically changes the purport of her demand may incline us to the latter explanation. The text reads: "Again, she asked that she be given in writing those points on which she was not then responding."[126] In other words, instead of asking for all of the questions they were going to put to her, she was supposedly asking only for a reminder of the questions already asked but not answered, to which she was postponing her responses.

Joan's request was completely ignored (here the Latin and the French are in silent agreement), and another question was put to her: namely, did the voice from which she sought counsel have a face and eyes? She replied, "You won't have the answer to that yet"; and then she added a telling comment: little children had a saying that sometimes people were hanged for telling the truth.[127] When she was asked about this statement later, on 15 March (did she know of any crime or defect for which she could or should die?), she replied straight-forwardly, "No."[128]

On 1 March, when asked whether she knew by her revelation that she would escape from her present prison, she told them to put the question to her again within three months and she would tell them then. This response might sound like a joke on Joan's part ("If I am no longer

here, the answer is yes"). But the immediately subjoined demand makes it clear that she needed time to consult her voices: "Ask the assessors under their oath whether this touches the process."[129] The assessors were consulted, and all agreed that it did indeed touch the process. She then stated, "I have told you all along that you will not know everything. It must be that I will be freed one time. And I want to have permission, if I am to tell you. That is why I ask for a delay."[130] When asked whether the voices forbade her to tell the truth, she replied, "Do you want me to tell I you what concerns the king of France? There are many things that do not touch the process."[131] Two days later, when she was asked once again about escaping from prison, she asserted, in spite of the above opinion of the assessors, that it was not relevant to the case at hand: "That does not touch your process. Do you want me to speak against myself?"[132]

It turned out that in just under three months Joan did escape from her enemies once and for all by being put to death at their hands - which would be to their lasting ignominy and her lasting honor and glory.

4. CRITICAL AND UNCRITICAL REACTIONS

We saw above that Cauchon himself made the distinction in the Petit process that some topics were not the proper subject for a judicial cause of the faith, I and the fact that Joan's request was taken seriously and put to the assessors demonstrates the very point. Yet not only was there no complaint in the later nullification trial against Cauchon's forcing her to take an oath before being charged, there was also little objection to his making her swear new unconditional oaths to tell the truth on anything that would be asked of her. According to the notary, William Manchon, Cauchon himself clearly believed that, procedurely speaking, his handling of the trial was impeccable, and he was very much annoyed when he was told, probably on 17 March, that the distinguished canonist John Lohier considered the proceedings to be invalid. Lohier objected that the trial lacked the form of an ordinary process; that it was held under constraint, so that the assessors were not really free to make unbiased decisions; that, though it dealt with the honor of the king of France, no one from that quarter had a voice in the trial; that no *libellus* or articles had been submitted; and that no counsel had been provided to the defendant, who was a simple girl, to help her respond to questions posed by learned masters and doctors on difficult subjects. Privately, Lohier told Manclion that they were trying to trap her in her words, especially in asking about her apparitions. If only she would say, “it seems," rather than saying that she was certain, she would be in the clear. It was obvious that they were proceeding out of hatred for her, and therefore he refused to have anything more to do with the process.[133] Thomas Courcelles, one of the assessors, who was the author of the Latin translation of the proceedings, recalled in 1456 that Lohier's objection was that there had to be a preliminary process on infamy before there could be a formal process on the faith.[134]

According to Manchon, Cauchon said to some of his associates, including Courcelles, "Look here, Lohier wants us to decree some fine interlocutories in our process! He wants to calumniate everything, and he says that it's worth nothing. To believe him, we would have to begin all over, and everything that we have done would be worthless!"[135] Presumably, Lohier was saying that Cauchon should issue interlocutory sentences admitting judicial errors.

Manchon reported that the bishop was determined to continue the process as it had begun.[136] In the event, however, it is clear that some of Lohier's criticisms were taken very seriously, and the course of the trial was modified accordingly. On 18 March Cauchon consulted with a larger group of assessors on how to proceed. He had extracts from Joan's responses read to them, and on their advice he ordered articles to be compiled from the interrogatories and responses, and these articles were to be presented against her in court.[137] On 22 March, after further consultation, he ordered that the earlier extracts which had been made "from the register of Joan's confessions" be reduced to fewer articles, to be submitted to doctors and masters for their deliberation. On the question of whether she should be further examined, he would proceed in such a way that their process would suffer no defect.[138] Joan's original responses were read to her on 24 March, so that she could not deny anything later, and she took an oath to add nothing to

them except what was true. Furthermore, she agreed to accept what was read to her, except for any detail that she would contradict then and there, as true and confessed.[139]

It has been assumed that the articles commissioned on 18 March and 22 March were the same; but I believe that the 18 March order resulted in the seventy articles presented to Joan by the promotor on 27-28 March, and that the 22 March order resulted in the twelve articles upon which Joan was eventually convicted. The seventy articles do not draw extensively on her responses but are clearly based for the most part on wild hearsay; I take it that they incorporated the promotor's original interrogatory articles, which had been read to the court on 23 January. They are not addressed to Joan but to the two judges, Cauchon and Lemaistre. If Cauchon had proceeded according to canonical form, these original articles should have been presented to Joan as charges when she was first summoned.

Cauchon presented the twelve articles to the court on 2 April, claiming that they were compiled from Joan's responses to the seventy articles and the further questioning that ended on 31 March.[140] My supposition is that a draft of the articles had already been prepared, and that it was modified, especially in the first and twelfth articles on the question of submission to the church militant, to reflect her most recent responses. Joan was never shown these articles, which, unlike the seventy, are in the form not of charges but of reported confessions. They were submitted to faculty members of the University of Paris, and it was on the basis of their responses that she was found guilty.[141]

My reconstruction of what happened is as follows. Cauchon remedied Lohier's major objection, that they had proceeded without instituting an ordinary process with formal charges, by proceeding to initiate such a process on 26 March. He professed to be opening a new phase of the trial: what had preceded, he said, was an ex officio preparatory process; now he was opening an "ordinary process," in which the promotor would present against Joan certain articles that Cauchon had ordered to be compiled.[142] Cauchon has been wrongly interpreted as saying that the ordinary process was not ex officio. In fact, it would have been readily recognized that the promotor was a part of the ex officio process from the beginning and remained so to the end.[143]

On the next day, 27 March, the promotor asked that Joan be sworn to reply by *credit* or *non credit* to the articles. This was equivalent to asking that she swear *de calumnia vitanda*, as to her belief, rather than *de veritate dicenda*, as to her certain knowledge.[144] Cauchon thereupon asked the advice of the assessors present how to proceed. The twenty-eight responses, which are presented in the manuscript containing the French text of the interrogations but which were not included in the record prepared in 1435, reveal that there was considerable uncertainty about what the proper procedure should be: whether she should swear, and what kind of oath, how she was to answer on points of fact as opposed to law, how to respond if she was not certain, whether and what delays were to be granted or terms assigned for response, and so on.[145] Cauchon in the 1435 text says he decreed that she was to respond according to her knowledge to each of the articles, and if she requested a delay for any of her responses, it was to be given to her.[146]

Therefore, even though the promotor proceeded to swear an oath of calumny - asserting that he was acting in good faith and not out of any favor, rancor, fear, or hatred - Joan was told to take an oath of truth. She had to tell the truth concerning those things that touched on "fact." Cauchon then offered her the counsel of any of the assessors present that she wished to choose, or, if she wished, he would appoint some of them himself.[147] The 1435 text says that Joan was told that she had to take an oath before making her responses concerning fact; and this accords with Joan's response in the French text. She first thanked the bishop for the offer of counsel but said that she had no intention of abandoning the counsel of Our Lord; then she said, "As for the oath you want me to take, I am prepared to tell the truth concerning that which touches on your process." And this is how she was sworn.[148] The contents of the articles were explained to her, not by the promotor, but by Courcelles, a point omitted by Courcelles in preparing the 1435 text.[149]

By offering Joan counsel, Cauchon was paying lip service to another of Lohier's complaints, but it did not answer the latter's fundamental objection (perhaps unmentioned to Cauchon) that he and his assessors were enemies of Joan. Therefore, the offer of counsel from among her enemies was harmful rather than helpful. There was no attempt to meet the objection

that there had been no process on fame, but in the final articles fame was asserted. Article 66 claimed that she had, at the instigation of the devil, offended God and the church in committing the above crimes and that she was scandalous and notoriously defamed of them (Joan responded that she was a good Christian, and as for the charges noted in the article, she referred herself to the Lord). Article 67 claimed that she committed all these things in the diocese of Beauvais and elsewhere (Joan simply denied the article). Article 68 stated that, because of clamorous insinuation, public fame, and information gathered, the judges found Joan suspect and vehemently defamed (Joan said that this article concerned the judges). Article 69 asserted that Joan had been and still was vehemently suspect and notoriously defamed among good and grave men and that she refused to correct herself in spite of charitable exhortations from the bishop and other notable clerics and honest persons (this is clearly the way in which her month-long interrogation was characterized; no other reference was made to it, except for the next article; Joan replied by denying all of the crimes the promotor attributed to her, saying that she did not believe that she had done anything against the Christian faith). Article 70 claimed that all of the previous articles were true, notorious, and manifest; that the public voice and fame had labored and still labored over them; and that she had confessed them both judicially and extra judicially (Joan denied everything except what she had in fact confessed).[150] In other words, fame was simply asserted and not proved, even though denied by Joan. As for the truth of the charges, there was never any question of bringing in witnesses, since her own statements of her actions and beliefs were taken as confessions of crimes - and unrepented crimes, because in affirming her actions and beliefs she denied that she had done anything wrong.

Of all of the lawyers and consultants who attacked Cauchon's proceedings in the nullification trial, only one, a prominent ecclesiastical jurist and judge named John de Montigny,[151] censured the initial procedures on which everything else was based; but even he did not object to the fact that Joan was interrogated before she was charged. He noted that there was no preparatory process on infamy, as required by Boniface VIII's decretals *Postquam* and *Si is*. Joan was also judicially aggrieved in the exaction of the oath: first, because she was compelled by oath to respond to all subjects of inquiry, even the most occult ("ad omnia inquisita, etiam quecunque et quantumcunque occulta"), and she was compelled to respond generally and absolutely to all the things that were to be asked of her, whereas she should have been forced to reply by oath only concerning those points on which she had been defamed or found suspect in the faith; and, second, she was forced to swear repeatedly, whereas, according to law, the oath to tell the truth should be given only once.[152]

To recall Boniface's legislation: the decretal *Postquam* provided that a defendant who confessed immediately could not later invalidate the confession by claiming that he or she was not defamed of the crime, or that no articles of charges had been given; *Si is* stated that a judge could proceed without establishing fame if the defendant did not object. The corollaries noted by the commentators were that defendants who insisted on knowing the charges and seeing proof of fame had legitimate grievances if the judge proceeded without complying. I have argued that Joan's repeated desire to know the scope of the trial ("Is that part of your process?" and so on) constituted a demand to have the charges explained to her. Perhaps Montigny assumed that a process on fame could not be held without first giving chapters of charges.[153] But the fact that he does not mention the delay in presenting the chapters (the seventy articles) may indicate that he saw nothing irregular in the preliminary interrogation except its excessively broad scope, and that he did not fault Cauchon for the delay in spelling out the charges, but only for not holding a process on fame when Joan denied the final chapters that asserted fame and notoriety. But by then, as we have seen, all of Joan's responses to the previous interrogations were officially notorious, by virtue of the fact that she had made them under oath in open court.

Besides Montigny, two other consultants noted that Cauchon was at fault for questioning Joan on occult matters, namely, Robert Ciboule, who had studied and taught theology at the University of Paris, became rector of the university in 1437, and served as chancellor of Notre-Dame-de-Paris in 1451, and William Bouille', master of theology and dean of the cathedral of Noyon, who became successively provisor of the College of Beauvais at Paris, procurator of the Nation of France, and rector of the university in 1439.[154] Ciboule cited some Scripture texts to

establish his point,[155] and Bouille' invoked the principle that the church does not judge occult matters.[156]

In the beatification proceedings held for Joan of Arc beginning in 1892, the promotor of the faith, or "devil's advocate," Agostino Caprara, ridiculed all three of these authorities, Montigny, Ciboule, and Bouille. He cited their opinions privileging occult matter from the scrutiny of the church as examples of defenses that were worse than Joan's crimes.[157] The postulator in his reply seems in effect to have agreed with his adversary; he said that he did not consider it necessary to defend the consultants' position on one's right to withhold occult matters from ecclesiastical judgment, since in fact Joan had offered to submit herself to the pope and a general council. In the case of Montigny, he says that it would have been better for him to have pointed out that Joan had not refused to explain her signs to the archbishop of Reims, and that by refusing to submit to the bishop of Beauvais she was not refusing the judgment of the church but the judgment of one wicked man.[158]

Thus we see that, by her strenuous objections to swearing blanket oaths and being required to answer all sorts of questions to unspecified charges, loan showed herself to be a better lawyer than all, or almost all, of her legally trained defenders subsequently. We can conclude that the right to keep one's private thoughts and affairs to oneself, which was set forth clearly in the original rules of procedure for inquisitions, and repeated in later laws and commentaries and manuals of judicial order, was often badly neglected and lost sight of. But in the case of Joan of Arc, although her private thoughts were made the means of her condemnation and execution, we can rest assured that even if she had known the full extent of her rights, refused to respond, and appealed to Cauchon's immediate superior, the archbishop of Reims, or to the pope,[159] it would have done no good; her appeals on these grounds would have been rejected, as were her other implicit and explicit appeals. Even if there had been an attempt to follow the correct procedure at the beginning, thus foreclosing a ready supply of confessed material, Cauchon and his English paymasters would have found some other way to get rid of her.

Furthermore, we can take comfort in knowing that the extorted self-testimony, considered incriminating by her prosecutors, provided the chief means for laying open her heroic virtues to the judges in the final trial that opened in 1892. Her responses weathered the objections of successive promotors of the faith,[160] and she was beatified by St. Pius X on 11 April 1909 and canonized by Benedict XV on 9 May 1920. Herbert Thurston, writing in 1924, said, "If proof had been forthcoming that she surrendered herself unconditionally to the guidance of her voices, rejecting the authority of a properly constituted ecclesiastical tribunal, she would certainly never have been canonized."[161] This is no doubt true. That is) the cardinals and popes who judged her doubtless believed, like Thurston himself, it seems (at least for the moment), that an ecclesiastical tribunal could legitimately require the faithful to submit their private experiences to public examination; but this attitude went against both law and tradition.[162] For, even though persons who believed themselves to be receiving private revelations would be urged to confide in a competent spiritual director, they were not under an obligation to tell anything to anyone, except for thoughts or desires that they believed to be mortal sinful; and these were to be confided, not to the external forum of the church courts, but to the internal forum of confession in the sacrament of penance. We recall that Joan made this distinction when asked to recite the Lord's Prayer and the Hail Mary. This fundamental right to privacy extended to secret actions as well, actions like fornication, adultery, abortion, theft, and murder. Even when one was obliged to make amends to injured parties, one could do so secretly; there was no obligation to turn oneself in to the church or civil authorities.

Thomas More has been taken jo be the patron saint of our Fifth Amendment, which guarantees the right against self-incrimination, because of his refusal to speak his mind in court without a promise of immunity.[163] He also insisted upon the nonincriminating nature of silence, saying that there was no law in the whole world that permitted a person to be put to death for silence, and he appealed to the rule of law "Qui tacet, consentire videtur."[164] But even though More accepted that only God could be judge of what was secret in one's own heart,[165] and also indignantly denied that any convictions for heresy in England had been obtained on the basis of deceptive questioning or ambiguous charges,[166] he defended the Star Chamber use of preliminary

interrogations to elicit confessions of unknown crimes.[167] I suggest that an even better patron for the right against self-incrimination and for a global right to privacy is St. Joan of Arc. She was not principally concerned about defending her rights, of course, and one could hardly suppose that she managed to evolve a prototype of the Fifth Amendment; rather she was motivated by the need to protect personal loyalties and obligations. That is, she was not worried so much about self-incrimination as self-betrayal in the sight of God and the saints. Nevertheless, her legal rights were violated, and the self-testimony that was extorted from her in spite of her heroic efforts constituted a judicial rape that resulted in her death. Therefore, even though the church honors her not as a martyr but rather as a confessor of the faith, she can be considered a martyr in the cause of civil rights.

A note on texts and names: Punctuation and capitalization are my own. In Latin texts I revert to the medieval spelling of *e* when editors use the classicized *ae* and *oe* (thus, for *Andreae* and *coelum* I put *Andree* and *celum*), and for both Latin and vernacular texts I use *j* and *v* for consonantal *i* and *u* (*juris* and *vobis* rather than *iuris* and *uobis*), to reflect the fact that medieval Latin was pronounced like the vernacular of the user, and also to remind present-day scholars not to adopt classical pronunciation (formulated specifically for the period 50 B.C.-A.D. 50) for postclassical Latin. See my "Lawyers' Latin: *Loquenda ut vulgus*?" *Journal of Legal Education* 38 (1988), 195-207. As for the rendering of names of medieval persons, one common method is to keep first and second names in the same language. This has the virtue of internal consistency but the drawback of external inconsistency, for it mixes classicized or medieval Latin names with modern English forms and medieval or modern versions of European vernacular names. For instance, one finds Ioannes or Johannes Andreae alongside John XXII and Jehan or Jean Le Moyne. I prefer another method, which has a long tradition in English historiography and hagiography: namely, rendering first names wherever possible into modern English, even when second names are left in another language: thus, Christopher rather than Christophorus Columbus and Charles rather than Carlo Borromeo. When second names in Latin texts are genitive patronymics, as in Johannes Andree, Bernardus Guidonis, and Gulielmus Duranti, I use the noninflected form seen in names like Augustus John, Samuel Daniel, and Dylan Thomas; thus, John Andrew, Bernard Guy, William Durant.

[1] This is the version that was adopted by the Phoenix Police Department; see Liva Baker, *Miranda*: *Crime, Law and Politics* (New York, 1983), pp. 177-78. Some recent variants of the second sentence are contrary-to-fact as they stand; for instance, the version currently used by the Los Angeles Police Department (dated March 1977) reads: "Anything you say can *and will* [my italics] be used against you in a court of law." A qualifying phrase like "if necessary" needs to be added. The U.S. Supreme Court opinion in the case of *Miranda v. Arizona*, 13 June 1966, did not give a formula to be followed by arresting officers but only a statement of what procedural safeguards were to be employed: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" (Baker, p. 142).

[2] I should note that when medieval jurists speak of a defendant's or litigant's rights they do not limit themselves to the term *jus*. Thus, when Innocent III in the Fourth Lateran Council refers to the *facultas defendendi se ipsum* in an inquisition (see n. 10 below), the Ordinary Gloss speaks of the *ordo juris* (ad v. *presens*: "Ordo juris servandus est in inquisitione facienda") and the *casus* to this paragraph (*Debet*) speaks of *defensio* ("Omnis defensio sibi reservatur"): *Corpus juris canonici*, 3 vols. (Rome, 1582; repr. Lyons, 1606), 2:1598. When John Monachus discusses one of these rights, commenting on *Sext*. 5.1.2 (see n. 25 below), he refers to it as an *ordo introductus in favorem illius contra quem mandatur inquiri* and as a *defensio*; he says that it can be voluntarily renounced, or it can be lost if not used in its proper *ordo*, that is, in its stipulated procedural sequence ("Ille qui defensione suo ordine non utitur illam perdit"); and Monachus's sixteenth-century editor, Philip Probus or Lepreux, in commenting on his statements, speaks of such a right as a *beneficium.* For the ordo juris or ordo judiciarius in the older form of criminal proceedings, the accusatio, see Kenneth Pennington, The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition (Berkeley, 1993), p.143. According to the earliest formulation, that of Stephen of Tournai, ca. 1165, the accused was to be properly summoned before a judge who had jurisdiction over him or her, legitimate delays were to be granted, the accusation was to be in writing, and legitimate witnesses were to be produced, so that sentence would be given only against a defendant who confessed or who was convicted. The sentence was to be in writing, except in brief cases and (especially) when the parties were "vile" persons.

[3] Pierre Tisset, ed., with Yvonne Lanhers, Proces de condamnation de Jeanne d'Arc, 3 vols. (Paris, 1960-71). The French text survives partially in the d'Urfe manuscript, from the second half of the fifteenth century; it begins midway through the testimony of 3 March

1431(1:94). Some of the earlier material is covered by the Orleans manuscript, which is derived from the d'Urfe' text but is the work of a faulty scribe (1:xxi-xxvi).

[4] Pierre Duparc, ed., Proces en nullite de La condamnation de Jeanne d'Arc, 5 vols. (Paris, 1977-88), rejects the term rehabilitation and substitutes, as is clear from his title, "nullification of the condemnation," to correspond to the juridical, effect of the second trial (see the preface by Pierre Marot, 1:vii-viii). However, the sentence not only nullified the earlier processes but also expunged from Joan and her kin all marks of infamy that came from them (2:610).

[5] The notarized Latin form, called Instrumentum sententie, was compiled around 1435, that is, four years or so after Joan's execution; it consists in large part of a translation and adaptation of the original French text of the examinations of Joan. It was made by Thomas Courcelles, working with the principal notary, William Manchon, for the chief judge, Peter Cauchon, and cast in the form of a long official letter or public instrument in Cauchon's name and that of the deputy heresy inquisitor for France, John Lemaistre. But the first-person plural normally refers only to Cauchon: "Nos vero, episcopus predictus," etc. (Tisset, 1:2). Both Cauchon and Courcelles are highly suspect (Courcelles, who was rector of the University of Paris in 1430 and 1431, was one of only three assessors to urge that Joan be tortured; see Tisset, 2:394-95), but Manchon seems to have been conscientious and not inimical to Joan, and therefore some concerns about the record's accuracy can be allayed. We will see below, however, that we must be on our guard at all times.

[6] Leonard W. Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (New York, 1968; repr. with new preface, New York, 1986), pp. 3-4, citing John Foxe, *Acts and Monuments*, 4th ed., ed. Josiah Pratt (London, 1877), 5:184, 221. For Lambert's trial, see below, nn. 74, 166. On p. 19 Levy characterizes the English criminal system in the middle of the fifteenth century thus: Of course, trial by the local community could be trial by local prejudice, but at least the prisoner knew the charges against him, confronted his accuser, and had freedom to give his own explanation as well as question and argue with the prosecution's witnesses. He suffered from many disadvantages-lack of counsel, lack of witnesses on his own behalf, lack of time to prepare his defense-yet the trial was supremely fair, judged by any standard known in the western world of that day." But a few pages later he admits that the inquisitorial system, as still practiced in the ordinary episcopal courts, included a right to be informed of the charges, to know the names of the prosecution's witnesses and to have copies of their depositions, to have counsel, and to dispute and challenge charges and witnesses (p.25).

[7] The axiom "Cogitationis penam nemo patiatur" was added to Gratian's *Decretum, De penitencia* 1.14, from Justinian, *Digest* 48.19.18: Emil Friedberg, ed., *Corpus iuris canonici* (Leipzig, 1879-81), 1:1161. The Latin version of the other adage, "Nemo tenetur prodere se[ipsum]," which is given by Foxe, is to be found in the Ordinary Gloss to the *Decretales Gregorii IX* 2.20.37, s.v. *de causis* (Roman ed., 2:736), as is pointed out by R. H. Helmholz in the article cited in the next note, p. 967. The glossator, Bernard of Parma, takes it to be the equivalent of Chrysostom's statement "non tibi dico ut te prodas in publicum," in Gratian, *De penitencia* 1, dictum post c. 87, § 1 (Friedberg, 1:1184). Levy knows of Gratian's citation but assumes that the sentiment found no echo in later canonistic works (pp. 21, 70, 453 n. 40).

[8] R. H. Helmholz, "Origins of the Privilege against Self-Incrimination: The Role of the European *Ius commune," New York University Law Review* 65 (1990), 962-90.

[9] Stephan Kuttner, "Ecclesia de occultis non judicat," *Acta Congressus iuridici internationalis...Romae...1931*, 5 vols. (Rome, 1935-37), 3:225-46.

[10] *Qualiter et quando, Decretales Gregorii IX* 5.1.24: Innocent III, canon 8 of the Fourth Lateran Council (Friedberg, 2:745-47); for the relevant text, see H. A. Kelly, "Inquisitorial Due Process and the Status of Secret Crimes," *Proceedings of the Eighth International Congress of Medieval Canon Law*, ed. Stanley Chodorow, Monumenta luris Canonici, Series C: Subsidia, 9 (Vatican City, 1992), pp. 407-27, esp. p.410 n. 7.

[11] Decretales Gregorii IX 2.21.8 (Innocent III, Super his, 1203): "Ceterum volumus et...mandamus ut super inquisitionis articulis, tam de fama electi quam literis contra eum sub nomine longe majoris et sanioris partis capituli destinatis, cogatis testes, qui nominati fuerint, perhibere testimonium veritati." The crime in this case was taken by commentators to be a case of counterfeiting letters (Friedberg, 2:343).

[12] However, in Innocent's decretal Cum dilecti, 1205, he rehearses with approval a case where frequens clamor against a bishop was investigated by papal legates who bound both the bishop and his canons by oath to tell the truth (or to answer questions) about the state of the local church (Decretales 5.1.18, Friedberg, 2:739-40).

[13] The history of this development is given by Adhe'mar Esmein, "Le serment des inculpe's en droit canonique," Bibliotheque de l'Ecole des hautes etudes, Sciences re'ligieuses 7 (1896), 231-48.

[14] Hostiensis, Summa aurea (Venice, 1574; repr. Turin, 1963), De inquisitionibus, § Et qualiter no. 6 (p.1478), cited by Esmein, "Serment," p. 245.

[15] "Not guilty" therefore means nothing more than "Volo contendere." Cf. the plea "Nolo contendere," which began to be used in American criminal proceedings in the early 1870s: it subjects a defendant to conviction in a trial without admitting guilt and without precluding him from denying the truth of the charges in a different proceeding. The earliest citation of the plea of "Not guilty" given in the Oxford English Dictionary, s.v. Plead (v.), 7d, is from 1344 in the Law French form "plaider de rien coupable," and in English from 1454; but the Dictionary of Medieval Latin from British Sources, s.v. acquietare, 8, gives Latin examples from 1255 and 1315; the latter reads, "Acquietavit se quod non est culpabilis." Later in the fourteenth century' the standard formula is, "Dicit quod ipse est in nullo inde culpabilis," as in some of the raptus cases from 3 Richard II (1380-81) referred to by Christopher Cannon, "Raptus in the Chaumpaigne Release and a Newly Discovered Document Concerning the Life of Geoffrey Chaucer," Speculum 68 (1993), 74-94, esp. p. 83 n. 46; the plea is to be found in the five citations from KB 29/32 (mm. 25, 8d, 32d, 38d, 61d). I should add that "Guilty" seems not to have been recognized as a plea until the seventeenth century (the first citation in the OED, s.v. Guilty and Plead, is 1681); before that, if a guilty person wished to admit guilt, he was simply said to confess.

[16] Hostiensis, Commentaria in Decretales Gregorii IX (Venice, 1581; repr. Turin, 1965), on 5.1.17 (5:5A-6, DOS. 4-6) and 5.1.24 (5:I1A, no. 15).

[17] *Sext*. 5.1.1 (Friedberg, 2:1069): "Postquam coram eo qui contra te super certis criminibus inquisitor fuerat deputatus eadem crimina fuisti confessus, frustra confessionem tuam, quo minus puniaris ex ea prout justitia suadebit, eo pretextu impugnare contendis quod super eisdem criminibus non fueras antea diffamatus, vel quod per eundem inquisitorem capitula super quibus contra te volebat inquirere tibi tradita non fuerunt."

[18] *Sext*. 5.1.2 (ibid.): "Si is cui contra te commissa fuerat simpliciter inquisitio super certis criminibus facienda processerit, te presente nec reclamante aut quicquam super hoc excipiente, infamie inquisitione omissa, ad veritatem eorundem criminum inquirendam, processum hujusmodi ex eo, quod non fuit de infamia primitus inquisitum, ulterius impugnare nequibis."

[19] John Andrew, Ordinary Gloss to *Sext*. 5.1.2, ad v. *fuerat* (col. 610): "ad petitionem alicujus; quia Si Papa proprio motu committit inquisitionem criminum alicujus, jam ilium approbat infamatum, cum episcopus et metropolitanus procedant etiam ad inquisitionem, omisso tali art[iculo]"; see also his *Novella* on *Decretales* 5.1.24 (1581; repr. Turin, 1963), 5:15A, no. 15: "Sed quandoque fit inquisitio debito officii urgente, etsi nulla fama precedat, ut cum agitur de matrimonio contrahendo corporali....vel spirituali;... idem ubicunque ex mero et puro officio procedit judex, in his maxime in quibus vertitur periculum animarum."

[20] John Andrew, *Novella*, loc. cit., 5:1 7A, no. 36: "Consuluit tamen Hostiensis ibi [in *Decretales* 5.1.19] ordinarium, ut appellationes evitet, quod inquirat et testes prius recipiat super infamia; et sic communiter servatur."

[21] Ibid.: "Si negat utrunque, scilicet crimen et infamiam, vel solam infamiam, Si notoria est infamia, potest procedere ad inquisitionem veritatis, non laborando tunc circa inquisitionem fame *(De accusationibus, Evidentia* [*Decretales* 5.1.9]), licet tutius sit aliquos testes ad cautelam recipere, Ut est dictum: turn quia 'dictum [unis] facile sequitur multitudo' (infra, *De purgatione canonica, Curn in juvenlute* [5.34.12], §1); tum quia sequitur quod infamatus sit apud bonos et graves, nec ortum habuerit a malevolis, ut hic; turn quia multa dicuntur notoria que non sunt: Ergo ad cautelam testes recipiat *(De electione, Bone* [1.6.23]); alias, si appellaretur, in periculo esset processus, cum sit necesse coram superiore probari infamiam negatam, ut dixi."

[22] John Andrew, Ordinary Gloss to Sext. 5.1.2, ad V. *reclamante* (cols. 610-11), referring to *Regula juris* 43, Sext. 5.12 (Friedberg, 2:1123): "Qui tacet, consentire videtur." See Christoph Kranipe, "'Qui tacet, consentire videtur': Uber die Herkunft emer Rechtsregel," in *Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft: Festschrift zum 65. Gebrutstag van Paul Mikat*, ed. Dieter Schwab et al. (Berlin, 1989), pp. 367-80.

[23] See William Lyndwood, Provinciale (1432; Oxford, 1679, repr. Farnborough, 1968), 2.1.3, ad v. Aut permissionem (p. 86 note b), dealing with alienation of property: "Absens namque et ignorans non videtur consentire; . . . imo nec quandoque sciens, maxime Si sit absens. . . . Imo etsi presens esset, sciens et intelligens rem suam vel sue custodie commissam auferri, per solam taciturnitatem non videretur consentire." He cites Roman civil laws to make his points.

[24] So Levy, Origins of the Fifth Amendment, new preface (1986), p. xiii.

[25] Philip Probus, ed., Glossa aurea Johannis Monachi Cardinalis super Sexto decretalium (Paris, 1535; repr. Aalen, 1968), fols. 342v-343r (= pp. 804-5), on Monachus's statement "cum quisque renunciare valeat his que pro se introducta sunt"; for the text of Probus's arguments, see Kelly, "Inquisitorial Due Process," pp. 412-13.

[26] Regula juri 44: "Is qui tacet non fatetur, sed nec utique negare videtur."

[27] Elias Regnier, addition to the Ordinary Gloss to Sext. 5.1.1, headnote: "Judex debet exhibere capitula super quibus vult inquirere, ita quod ille contra quem proceditur non tenetur respondere ad interrogationem judicis nisi prius sibi traditis capitulis super quibus fuit diffamatus."

[28] Ibid.: "Si judex procedat per viam inquisitionis contra aliquem non diffamatum, potest ille contra quem proceditur per inquisitionem dicere, 'Domine judex, non potestis procedere contra me per vi am inquisitionis quja non commisi tale crimen; et posito et non confesso quod tale crimen commisissem, adhuc non potestis procedere contra me, quia de tali crimine non sum diffamatus.'"

[29] Ibid., *casus*: "Antequam judex me interrogasset, debebam ista proponere, et Si me noluisset me admittere, debebam appellare."

[30] Ibid., notes after the *casus*: "Hodie communiter prius aliquis citatur ex officio super crimine et fit inquisitio, et [*lege* fit] examinatio sive informatio secreta, et factis informationibus, Si constet judici quod taus est diffamatus super jib crimine, judex precipit Ut citetur ad comparendum personaliter; et Si compareat, debent illi tradi capitula super his super quibus debet fieri inquisitio." See Kelly, "Inquisitorial Due Process," pp. 421-22.

[31] Kelly "Inquisitorial Due Process," p.423.

[32] Ibid., p.421 n. 50, citing Haim Beinart, *Records of the Trials of the Spanish Inquisition in Ciudad Real, 1: The Trials of 1483-1485* (Jerusalem, 1974), pp. 163-80: case of Juan de Chinchilla. In his introduction Beinart speaks of confessions of defendants made in pretrial examinations (p. xxiv), but he gives no details, and none of the cases documented in this volume demonstrates any such procedure; perhaps he is speaking of cases in which the defendants are willing to confess. The Chinchilla case shows what happened when the defendant did not wish to confess but rather to maintain innocence.

[33] *Instructions of Avila*, 25 May 1948, ed. Ernst Schafer, "Die alteste Instruktionen-Sammlung der spanischen Inquisitionen," *Archiv fur Reformationsgeschichte* 2 (1904-5), 109-14, 123-24, no. 3 (p. 110); text in Kelly, "Inquisitorial Due Process," p. 421.

[34] *Instructions of Seville*, 29 November 1484, ed. Schafer, pp. 1-55, 109-77, no. 5 (p. 17); text in Kelly, "Inquisitorial Due Process," pp. 419-20.

[35] *Sext*. 5.2.8, §3 *Licet* (Friedberg 2:1072). The pope says that the testimony of perjured witnesses in heresy cases can sometimes be admitted when their later "corrected" testimony implicates them-selves as well as others: "Licet vero peijuri a testimonjo etiam post penitentiam repellantur, Si tamen ii qui coram inquisitoribus jurantes tam de se quam de allis super facto heresis dicere veritatem eam celando dejerent et postmodum velint corrigere dictum suum contra se ac alios suos complices deponendo,. . . in favorem fidel, nisi aliud obsistat, stari debet tam contra se quam contra reliquos attestationibus eorundum." There is no comment on the form of the oath in John Andrew's Ordinary Gloss or his *Novella* or in the commentaries of the Archdeacon (Guy of Baysio) or Elias Regnier.

[36] H. A. Kelly, "Inquisition and the Prosecution of Heresy: Misconceptions and Abuses," *Church History* 58 (1989), 439-51, esp. pp. 447-49.

[37] Ibid., p. 443; see Sext. 5.2.20 (Boniface's *Statuta*), *Clem.* 2.1.2 (*Dispendiosam*) and 5.11.2 (*Sepe*). John Andrew's Ordinary Gloss to the *Clementines*, published in 1322, describes his role in getting the pope to act in the matter (*Corpus juris canonici*, Lyons, 1606, 3/2:332, ad V. *Sepe contingit*). For a recent account of the provisions of *Dispendiosam* and *Sepe*, see Pennington, *Prince and the Law*, p. 189.

[38] Bernard Guy, *Tractatus de pratica officii inquisicionis heretice pravitatis*, ed. C. Douais, *Practica inquisitionis heretice pravitatis auctore Bernardo Guidonis* (Paris, 1886), Pt. 1, chap. 34 (p. 28): he gives a sample form letter dated August 1319 conforming to the constitution *Multorum* (*Clem.* 5.3.1), which requires papally delegated heresy inquisitors to work in conjunction with local bishops. Later on, in Pt. 4, he complains of the inconveniences caused to the papal inquisitors by the constitution (pp. 174, 187-88). I take the title of Guy's treatise from his preface (p. 1). Pt. 5 of the treatise is edited and translated into French by Guillaume Mollat, *Manuel de l'inquisiteur*, 2 vols. (Paris, 1926-27).

[39] Bernard Guy, *Tractatus*, Pt. 4 (p. 212).

[40] Kelly, "Inquisition and Heresy," pp. 443-46.

[41] Guy, *Tractatus*, Pt. 4 (p. 229). See Mollat, 1:xliv-li, esp. p. xlvii, on the preliminary interrogation (he does not give any account of the actual procedure to be followed after the questioning; see p. xlix).

[42] Nicholas Eymerich, *Directorium inquisitorum*, ed. Francis Pena (Rome, 1578), Pt. 3, §70 (p. 285) and §74 (p. 286).

[43] Kelly, "Inquisitorial Due Process," p. 411 n. 13, citing John Andrew, the Archdeacon, John Monachus, and Dominic of San Gemignano.

[44] Thomas Aquinas, *Summa theologie* 2-2.67.3 ad 2.

[45] Ibid. 2-2.69.1 corpus; ad 1. This article is cited by John Andrew in his *Additiones* to the *Speculum judiciale* of William Durant (Durandus), lib. 2, pt. 2, *De positionibus*, §7: *Positiones quibus modis reprobentur, et de cautelis circa eas*, no. 40, note *a* (vol. 1, p. 594 of the Basel 1574 edition of the *Speculum*; repr. Aalen, 1975).

[46] Aquinas, op. cit., 2-2.69.2 corpus: "Aliud est veritatem tacere, aliud est falsitatem proponere. Quorum primum in aliquo casu licet. Non enim aliquis tenetur omnem veritatem confiteri, sed illam solum quam ab eo potest et debet requirere judex secundum ordinem juris: puta, cum precessit infamia super aliquo crimine, vel aliqua expressa indicia apparuerunt, vel etiam cum precessit probatlo semiplena." It is interesting to note that in his response to the first objection Thomas says that there are many divine laws that have no punishment assigned to them by human jaws, "sicut patet in simplici fornicatione." However, in England simple fornication was punished in the ecclesiastical courts.

[47] See Jean-Philippe Levy, "Le probleme de Ia preuve dans les droits savants du moyen age," *Recuejis de Ia Societe Jean Bodin* 17 (1965), 137-67, esp. pp. 156-59. Torture could be applied at this stage; for a recent study of the use of torture in heresy cases, see Johannes Fried, "Wille, Freiwilligkeit und Gestandnis urn 1300: Zur Beurteilung des letzten Templergrossmeisters Jacques de Molay," *Historisches Jahrbuch* 105 (1985), 388-425. We should recognize that torture was considered allowable in a wide variety of cases; see the extensive statement by John Teutonicus (ca. 1215) in the Ordinary Gloss to Gratian, *Decretum* 2.16.5, dictum ante C. 1, *Quod vero* (col. 1080).

[48] Helmholz, "Origins of the Privilege against Self-Incrimination," p. 983, likens medieval defendants to modern ones who face a "cruel trilemma," that is, "the unhappy choice among peijury, contempt, or conviction that faces all required to give evidence against themselves." He does not refer to the safeguards allowed defendants at the beginning of the inquisitorial process or the ability of defendants to enter an appeal each time that a prescribed procedure was not followed. I should note that Durant deals with the refusal to respond to questions in the context of noninquisitorial trials where there are two parties and there is a *litis contestatio*, as in civil suits and criminal accusations, and both parties have sworn to respond to "positions," or points of inquiry. See bc. cit. in n. 45 above, §9: *De pena non respondentis vel falso respondentis*, nos. 1-3, p. 596, and the accompanying additions of John Andrew; and see John Andrew's Ordinary Gloss to Boniface *VIII's Si post, Sext*. 2.9.2 (col. 346): a refusal to answer positions after swearing the

"oath of calumny" is to be taken as a confession of the points asked, unless there is a reasonable cause for refusal (such as, John Andrew says, when the answer would entail the revelation of a hitherto unknown crime). Durant, in no. 2, cites Roifred, who says that, in an extrajudicial situation, one has no obligation to respond, but when one is silent *in judicio,* one is contumacious; however, Azo and others say that such silence or an obscure reply is equivalent to confession. But in no. 3, Durant cites Tancred as saying that a silent person neither confesses nor denies and therefore can only be punished as contumacious. In §7, no. 14 (p. 591), Durant says that one cannot be forced to reply when one is in doubt about one's rights or when the response would prove prejudicial to oneself: "Non est cogendus respondere quandiu dubi tat de jure suo et quando cx responsione potest ei prejudicari."

[49] See the case of Raymond de Costa, *Le registre d'inquisition de Jacques Fournier, eveque de Parniers (1318-1325),* ed. Jean Duvernoy, 3 vols. (Toulouse, 1965; *Corrections,* 1972), 1:40-41, 48, 54, 106-7: he refused to swear on the grounds that oaths were prohibited. Another defendant refused because once when he was sick he had sworn not to take any oaths (1:511).

[50] Ibid., 2:204; text partially in Kelly, "Inquisitorial Due Process," pp. 424-25 n. 58.

[51] Ibid., 2:82.

[52] Ibid., 2:87-89.

[53] Ibid., 2:86.

[54] Ibid., 2:82.

[55] Ibid., 2:84.

[56] Ibid., 2:85; Emengard swore "super prernissis de Se Ut principalis et de aijis Ut testis purarn et meram dicere veritatem."

[57] Ibid., 2:89-92, 97, 100.

[58] Ibid., 2:86.

[59] Ibid., 2:101-5.

[60] Ibid., 2:105.

[61] John Henry Wigmore, "The Privilege against Self-Incrimination: Its History," *Harvard Law Review* 15 (1901-2), 610-37, esp. p. 617; this article is repeated largely unchanged in Wigmore's *Evidence in Trials at Common Law,* 8, last revised by him in 1940; in the revision by John T. McNaughton (Boston, 1961), see pp. 267-95, esp. p. 276. Later criticisms of Wigmore, noted by McNaughton on pp. 267-69, are largely unjustified.

[62] Levy, *Origins,* p. 20; cf. p. 23.

[63] Ibid., pp. 46-48.

[64] *Councils and Synods with Other Documents Relating to the English Church,* ed. F. M. Powicke and C. R. Cheney, 1/2 (Oxford, 1984), p. 256. Cf. the somewhat different but still intelligible text in the first appendix to the Oxford 1679 edition of William Lyndwood's *Provinciale,* where the legatine constitutions of Otto and Ottobono are given with the gloss of John Acton (ca. 1345); see esp. P. 60.

[65] *Decretales* 5.1.17: "quod super his que sciunt vel credunt esse in sua ecciesia reformanda tam in capite quam in membris, exceptis occultis criminibus, meram et plenam dicant inquisitoribus veritatem" (Friedberg, 2:739).

[66] *Close Rolls of the Reign of Henry III, 7* (London, 1927), pp. 224-25 (1252): "Et insuper, quod inauditum est, eos jurare compellunt predicti scrutatores vestri de privatis peccatis aliorum que non Sunt, ut dicitur, publica cohercione purganda."

[67] For Grosseteste's visitations, beginning around 1238, and royal opposition to the procedure of the sworn inquest of laymen, see *Councils and Synods,* pp. 261-65. Sworn testimony in trials did not become a part of the common-law system until the time of Elizabeth I. See Charles M. Gray, "Prohibitions and the Privilege against Self-Incrimination," in *Tudor Rule and Revolution: Essays for C. R. Elton from His American Friends,* ed. DeLloyd J. Guth and John W. McKenna (Cambridge, Mass., 1982), pp. 345-67, esp. p. 346.

[68] For the original text, see the second appendix to Lyndwood, p. 21, and *Councils and Synods,* pp. 678-79, no. 14; as given by Lyndwood, pp. 109-10, the text is a summary paraphrase. His first sentence reads, "Statuimus quod laid, ubi de subditorum peccatis et

excessibus corrigendis per prelatos et judices ecclesiasticos inquiritur, ad prestandum de veritate dicenda juramentum per excommunicationis sententias, Si opus fuerit, compellantur."

[69] Lyndwood, *Provinciale*, p. 109. note r, ad v. *compelluntur*, citing John Andrew and Guy of Baysio on *Sext*. 3.20.1, §4: Innocent IV's 1245 decretal *Romana ecelesia* (in the Roman edition of John Andrew's Ordinary Gloss to this decretal, col. 570, ad v. *coactiune*, a negative is missing; it should read: "A principio [non] exigetur juramentum per quod occultum prodere constringatur").

[70] *Statutes of the Realm*, 1 (London, 1810), p. 209. See *Councils and Synods*, p. 470, nos. 7-8, for the bishops' complaints in 1253 against similar efforts to limit their jurisdiction.

[71] See Levy, *Origins*, pp. 50-51.

[72] There is also a chance that the council was inspired by those inquisitors' use of torture; on this subject, see H. A. Kelly, "English Kings and the Fear of Sorcery," *Mediaeval Studies* 39 (1977), 206-38, esp. pp. 210 (n. 10), 212-13, 231, 233-37.

[73] See Levy, pp. 52-53, citing 25 Edward III (1352), St. 5, chap. 4; 28 Edward III (1354), chap. 3; 37 Edward III (1363), chap. 18; and 42 Edward III (1368), chap. 3; *Statutes of the Realm*, 1:321, Levy repeats the statement of Mary Hume Maguire, "Attack of the Common Lawyers on the Oath *Ex officio* as Administered in the Ecclesiastical Courts in England," in *Essays in History and Political Theory in Honor of Charles Howard McIlwain* (Cambridge, Mass., 1936), pp. 199-229, esp. Pp. 207-8: "We read a series of petitions from the Commons to the Crown referring to the distasteful practice of ecclesiastical courts of proving the case against the defendant by 'fishing interrogatories *viva voce*,'" but in a note (p. 450 n. 13) he points out that her references are to complaints made in 1347 and 1352 only against council practices and without any such language about interrogatories.

[74] Foxe, *Acts and Monuments*, 5:221. See n. 6 above. Levy, *Origins*, p. 62, might seem to be giving an accurate account of Lambert's position when he says: "Lambert, it should be remembered, meant only that he should not be compelled to detect himself or reveal crimes that were either unknown or unproved; he believed that one should answer under oath if properly accused by due process of law." But by "due process of law" Levy means only the English common-law system, for he thinks Lambert was objecting to the process that was being applied to him: "He was the first person on record who, charged with heresy, objected to the oath procedure on ground that it was illegal to force a man to accuse himself" (p. 62). Rather, by responding to the charges against him, Lambert was acknowledging that infamy had lawfully been laid against him. See n. 166 below. Levy is also mistaken in his characterization of the confrontation between Archbishop Arundel and the priest William Thorpe in 1407, which was recorded by Thorpe himself. It was not a formal inquisitorial proceeding, and there was no demand that he swear "to answer truly"; nor did Thorpe want "to know what he would be asked" before he would swear, as Levy thinks (*Origins*, p. 59). Rather, Arundel, who claimed to "know well" that Thorpe had been sowing false doctrine for twenty years, wanted him to take an oath to submit to his correction by renouncing specific opinions attributed to the Lollards: "I will shortly that now thou swear here to me that thou shalt forsake all the opinions which the sect of Lollards hold and is slandered with, so that after this time, neither privily nor apertly, thou hold any opinion which I shall (after thou hast sworn) rehearse to thee here"; from Bale's 1544 reprint of the ca. 1530 edition of *The Examination of Master William Thorpe*, in *Select Works of John Bale*, ed. Henry Christmas, Parker Society 36 (Cambridge, Eng., 1849), pp. 60-133, esp. pp. 70, 74-75. Anne Hudson has edited Thorpe's account for the Early English Text Society (O.S. 301) from an early-fifteenth-century manuscript: *Two Wycliffite Texts* (Oxford, 1993); see p. 34 for Arundel's statement: the Middle English text differs only slightly from the sixteenth-century modernization. Hudson discusses a partial Latin translation that Bale made of the modernization (pp. xxxi-xxxii) but does not mention his edition of the complete English text in 1544.

[75] Foxe, *Acts and Monuments*, 3:24-36.

[76] We are told that at first Hus refused to respond, but complied when told that his refusal might be regarded as a confession of guilt; see Matthew Spinka, *John Hus: A Biography* (Princeton, 1968), p. 236. Spinka does not cite his source for the specifics of the first day of interrogation, 6 December 1414, when Hus began his imprisonment in a Dominican friary. See

also Spinka's *John Hus at the Council of Constance* (New York, 1965), p. 117 n. 21. David S. Schaff, *John Huss: His Life, Teachings, and Death, after 500 Years* (New York, 1915), says that according to John of Jesenice (the lawyer who had defended Hus in Rome), "Huss had committed a technical error in making any reply whatsoever as a prisoner" (p. 184, citing no source).

[77] H. A. Kelly, *The Matrimonial Trials of Henry VIII* (Stanford, 1976), pp. 89-95. For the directions to the proceedings, see *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, 21 vols. (corrected reprint, Vaduz, 1965), vol. 4, nos. 5613 and 5695.

[78] Kelly, *Matrimonial Trials*, pp. 205-7.

[79] Tisset, 2:388.

[80] See Alfred Colville, *Jean Petit: La question du tyrannicide au commencement du XVe siecle* (Paris, 1932; repr. Geneva, 1974), p. 512. In John Dominic Mansi, *Sacrorum conciliorum nova et amplissima collectio*, vols. 27-28 (Venice, 1784-85), his name is usually mistranscribed as "Canthon" (e.g., 27:819, 4 Feb. 1416). See Phillip Stump, "The Official Acta of the Council of Constance in the Edition of Mansi," in *The Two Laws: Studies in Medieval Legal History Dedicated to Stephan Kuttner*, ed. Laurent Mayali and Stephanie A. J. Tibbetts (Washington, D.C., 1990), pp. 221-39, who says that Mansi in spite of his misprints reproduces a text in some ways better than that in vol. 4 of Hermann von der Hardt, *Magnum oecumenicum Constantiense concilium*, 6 vols. (Frankfurt, 1697-1700, 1742). Stump does not point out that Mansi (or his sources) eliminates most of the rubrics of Hardt's edition and does not include other supplementary material. For a partially fictionalized account of the council, see Pale mon Glorleux, *Le concil de Constance au jour le jour* (Tournai, 1964), told through the eyes of John Gerson's secretary. See also Glorieux's edition of Gerson's *Oeuvres completes*, 10 vols. (Paris, 1960-73), esp. vol. 10, *L'oeuvre polemique*, pp. 511-30 ("Autour du tyIrannicide"), with a chronological "Dossier" on pp. 164-70; and see the "Table chronologique" on pp. 583-98; pertinent documents are given on pp. 516-52.

[81] Heinrich Finke, *Acta concihi Constanciensis*, 4 vols. (Munster, 1896-1928), 4:239-40.

[82] Hardt, 4:335. The rubric reads: "Petiti judices commissaril pro inquisitione aliarum causarum fidei, presertim doctoris theologi Johannis Parvi, Galli, nuper defuncti, Burgundie ducis consiliarii" (not in Mansi, 27:729). One of the judges was Cardinal Peter d'Ailly, who was immediately recused by Burgundy's main lawyer, Martin Poree, bishop of Arras (Hardt, p. 336; not in Mansi). See Gloneux, *Concile*, pp. 87, 90-91; he reports Cauchon as also recusing d'Ailly on 17 June.

[83] Finke, 4:264-66. Cauchon presented more arguments on 7 or 8 July (pp. 268-69) and on 9 July (pp. 269-71).

[84] Mansi, 28:835-36.

[85] This was especially true in the case of John XXIII.

[86] Hardt, 4:1271, 1275-76, 1306; Mansi, 27:1100, 1102,1115.

[87] Hardt, 4:1373-77; Mansi, 27:1141A2; see Tisset, 1:278, 96, where the same form is used. It seems that in both cases the form of the Constantinopolitan-Nicene Creed used at mass has been unconsciously substituted for that of the Apostles' Creed (in which there is no *unam*).

[88] I wish to amend the statement I made in "Inquisitorial Due Process," p. 425, that the requisite forms of procedure were observed in the trials that took place at the Council of Constance; they were notably lacking in the cases of Hus and Jerome. Space does not permit me to document my summaries of these trials, but I hope to do so elsewhere.

[89] According to the anonymous *De vita Magistri Jeronimi de Praga* (ed. Va'clav Novotny, *Fontes rerum Bohernicarum* [Prague, 1932], 8:335-38), Jerome was convicted of all the articles by witnesses: "Centum septem articuli... de novo fuerunt producti et subsequenter per sufficientes testes probati" (p. 335). "In quibus omnibus articulis...fuit omnino per testes convictus" (p. 336).

[90] *The Register of Henry Chichele, Archbishop of Canterbury*, 1414-1443, ed. E. F. Jacob, 4 vols. (Oxford, 1937-47), 3:126 if.; see Kelly, "English Kings," pp. 213 (n. 18), 225 (n. 75).

[91] P. Tanner, ed., *Heresy Trials in the Diocese of Norwich, 1428-1431* (London, 1977), analyzed by Kelly, "Inquisitorial Due Process," pp. 425-26. The documents edited by Anne Hudson in "The Examination of the Lollards," in *Lollards and Their Books* (London, 1985), pp.

125-40, may show a degeneration in proper procedure. What seems to be the earliest *modus procedendi*, which was added to the register of Bishop Clifford of London (1407-21), has no interrogatories (pp. 127, 129, 132, 139); the next, from the register of Bishop Polton of Worcester (1426-33), has interrogatories placed at the point at which the defendant has been charged and has denied the charges, and after witnesses have been received (pp. 132-37); the latest, in MSS Harley 2179 and Balliol College 158, gives the interrogatories at the beginning (pp. 132-35, 140). The interrogatories seem to have been formulated at the Canterbury Convocation of 1428 (see pp. 128-29).

[92] Tisset, 1:385.

[93] See Kelly, "English Kings," pp. 219-29; cf. Ralph A. Griffiths, "The Trial of Eleanor Episode in the Fall of Duke Humphrey of Gloucester," *Bulletin of the John Rylands Library* 51 (1969), 381-99.

[94] See n. 5 above.

[95] Tisset, 1:1-2.

[96] Ibid., p. 3.

[97] Ibid., pp. 18-19. On the nature of the promoter, see n. 143 below.

[98] Ibid., p. 20.

[99] Ibid., p. 21.

[100] Ibid., pp. 25-26. The Orleans manuscript of the French text begins here (see n. 3 above).

[101] Tisset, 1:34: "citandam et audiendam super articulis et interrogatoriis contra earn dandis et sibi faciendis fidei materiam concernentibus."

[102] Her request to hear mass first was denied, in view of the crimes of which she had been defamed, and because of the male dress in which she still appeared.

[103] Ibid., p. 37: "Caritative monuimus et requisivimus ut, pro acceleracione presentis negocii et exoneracione proprie consciencie, plenam veritatem super hus diceret de quibus in materia fidei interrogaretur, non querendo subterfugia vel cautelas ab ipsius veritatis confessione divertentes." According to the Orleans manuscript of the French text (which even in its original form may not have been an accurate record of the proceedings, but which, unlike the Latin, was at least contemporary with the proceedings), Cauchon told her that she was widely reputed to be accused of heresy and that she was delivered to him to have her "profess" in matters of the faith. Then the promotor told the bishop that at his request she had been cited to respond in matters of the faith, as would appear from letters and acts that he would exhibit presently, and he "requested that Joan be sworn to tell the truth and interrogated on the points that he would put to her" ("suppliant qu'elle fust adjuree de dire verite et interroguee sur les parties qu'il bailleroit," p. 36). The request was granted, and the bishop made the said Joan come to him, and he charitably admonished her and prayed her to tell the truth about things that would be asked of her, "tant pour l'abbreviacion de son procez que pour la descharge de sa conscience, sans querir subterfuges ne cautelles" (pp. 36-38).

[104] Ibid., p. 38; not in the French, which reads (continuing the sentence quoted in the previous note): "et qu'ellejurast sur les sainctes Euvangilles de dire verite de toutes les choses sur lesquelles elle seroit interroguee."

[105] Ibid.: "Je ne scay sur quoy vous me voullez interroguer. Adventure me pourriez-vous demander telles choses que je ne vous diray point" ("Nescio super quibus vultis me interrogare. Forte vos poteritis a me talia petere que non dicam vobis").

[106] Ibid.: "Vous jurerez de dire verite' de ce que vous sera demand [e'] qui concerne Ia foy catholicque et de toutes aultres choses que scaurez" ("Vosjurabitis dicere veritatem de hus que petentur a vobis fidei materiam concernentibus et que scietis").

[107] Ibid., pp. 38-39.

[108] Ibid., pp. 40-41.

[109] When she was asked later (on 12 March) how she could call herself a daughter of God and yet would not freely say the Paternoster, she replied that she did say it willingly, but when she refused, it was because she wanted to go to confession to the bishop (p. 126).

[110] Ibid., p. 42. The French text has nothing of this exchange.

[111] Ibid., pp. 44-45: "Jhenne premierement fut admonnestee et requise de faire le serment qu'elle avoit faict le jour precedent de dire verite' de tout ce qui luy seroit demande' sur les crimes et malefices de quoy elle estoit accusee et diffamee."

[112] Ibid.: "Johannam … requisivimus et monuimus, sub penis juris, de faciendo juramentum
quod die precedente prestiterat, quodque simpliciter et absolute juraret dicere veritatem ad ea que interrogarentur in materia de qua delata erat et diffamata."

[113] Ibid., p. 45: "Et derechef fut admonestee qu'elle jurast absolutement de dire verite de tout ce qui luy seroit demande, en luy remonstrant qu'il n'y a prince qui peust ne deust refuser a faire ledit serment de dire verite en matiere de foy."

[114] Ibid.: "I terum requisivimus quod juraret; nam quicumque, eciam princeps, requisitus in materia fidei non posset recusare facere juramentum."

[115] Ibid.: "Je le feis hier. Vous me chargez trop." Cf. the translation: "Ego feci heri vobis juraI
mentum; bene debet vobis sufficere. Vos nimium oneratis me."

[116] Ibid.

[117] Cauchon's assertion is noted by Esmein, "Serment," p. 246 n. 1, but he does not advert to the crucial difference between swearing to answer charges truthfully and swearing to answer global interrogatories, nor does he point out that Cauchon was claiming a special exemption for heresy cases. According to J. Duncan M. Derrett, "The Trial of Sir Thomas More," *English Historical Review* 79 (1964), 449-77, repr. in *Essential Articles for the Study of Thomas More*, ed. R. S. Sylvester and G. P. Marc'hadour (Hamden, Conn., 1977), pp. 55-78, 591-96, esp. p. 65, Thomas More at his interrogation in the Tower on 3 June 1527 agreed with the lord chancellor, Thomas Audeley, that bishops could compel alleged heretics to say whether they believed the pope to be the supreme head of the church. He is referring to More's report of the confrontation: *The Correspondence of Sir Thomas More*, ed. Elizabeth Frances Rogers (Princeton, 1947), no. 216, pp. 555-59, esp. Pp. 557-58. It would be more accurate to say, not that More agreed, but that he did not disagree and proceeded to make another point. In his detailed defense of the ex officio *inquisitio*, specifically as employed against suspected heretics, in *The Apology*, ed. J. B. Trapp, Complete Works of St. Thomas More (New Haven, 1979), esp. chap. 40, pp. 129-35, More made no such claim for the judges but described the procedures in strict accord with canon law.

[118] Tisset, 1:45-46.

[119] Herbert Thurston, *Some Inexactitudes of Mr. G. G. Coulton* (London, 1927), p. 7. Thurston is responding to Coul ton's assumption that Joan went to communion only once a year.

[120] Tisset, 1:55.

[121] Ibid., p. 56: "Et croy que tout le clerge' de Rouen et de Paris ne m'y sauroyent contraindre se ilz ne avoyent tort." The Latin translation renders *contraindre by condempnare*, "condemn": "dicens ulterius quod totus clerus Rothomagensis vel Parisiensis nesciret earn condempnare nisi haberent in jus."

[122] Perhaps he was referring to heresy cases of the sort dealt with by Bishop Fournier (see above, N. 49), in which a refusal to swear indicated a belief that taking oaths was sinful.

[123] Tisset, 1:56-57.

[124] Ibid., p. 62: "Respond: 'Je ne vous dys pas tout, carje n'en ay congie; et aussi mon serment ne touche pas cela; maisje vous dy qu'il y a voix bel, bonne, et digne; et n'en suis point tenue d'en respondre.'" The text is mistakenly interrupted at this point by the next interrogation; then Joan's previous response is continued, but now in indirect discourse, and with something plainly missing at the beginning: "Pour ce qu'elle demanda a veoir par escript les poins sur lesquelz on Ia vouloit in terroguer."

[125] See the previous note.

[126] Ibid.: "Item petivit ut sibi darentur in scriptis illa puncta in quibus tunc non respondebat."

[127] Ibid.: "A quoy elle respond, 'Vous ne l'avez pas encoire'; item dit que le dict des petis enfans
est que on pend bien aulcunes foys les gens pour dire verite."

[128] Ibid., p. 164.

[129] Ibid., p. 86: "Respondit: 'Loquamini mecum infra tres menses; ego de hoc respondebo vobis.' Dixit ultra: 'Petatis ab assistentibus sub juramento suo an istud tangat processum.' There is no extant French text at this point to check the Latin against.

[130] Ibid.: "Ego semper bene vobis dixi quod vos nescietis totum. Et oportebit semel quod ego sim liberata. Et volo habere licenciam Si ego dicam. Ideo peto dilacionem."

[131] Ibid.: "Vultis vos quod vobis dicam id quod vadit ad regem Francie? Sunt multa que non tangunt processum."

[132] Ibid., p. 92: "Cela ne touche point vostre procez. Voulez vous que je parie contre moy?" ("Hoc non tangit processum vestrum. Vultis vos quod ego loquar contra me?")

[133] Paul Doncoeur and Yvonne Lanhers, *La rehabilitation aejeanne la Pucelle*, 1: *La enquete ordonnee par Charles VI en 1450* (Paris, 1956), pp. 48-49.

[134] DuParc, 1:356. Tisset, 3:69-70, 213, mistakenly says that Manchon also mentioned this point.

[135] Doncoeur and Lanhers, p. 49: "Vela Lohier qui nous veult bailler belles interlocutoyres in flostre proce's! Il veut tout calornpnier, et dit qu'il ne vault riens. Qui le vouldroit croire, ii nous fauldroit tout commencer, et tout ce que nous avons fait ne vouldroit riens."

[136] Ibid. Manchon also testified in 1452 and 1456 about Lohier's objections: Duparc, 1:216,418-19.

[137] Tisset, 1:179-80.

[138] Ibid., p. 180.

[139] Ibid., p. 181.

[140] Ibid., p. 289.

[141] The twelve articles are given on pp. 290-96 and the deliberations of the Parisian masters on pp. 297-327. One of the masters was Nicholas Midi (p. 297), who, according to Thomas Courcelles's surmise, was the actual author of the articles (Duparc, 1:357).

[142] Tisset, 1:184.

[143] Tisset mistakenly says that the process changed from ex officio to *cum promovente* (3:59-60). A *promovens* was an interested outside party to an inquisition, whereas Estivet was a *promotor officii judicis*, a promoter of the judge's office or assistant to the judge (see the letter of appointment, 1:18-19: "repperimus necessarium et conveniens esse habere promotorem generalem officii nostri in causa seu materia hujusmodi," etc.). See Kelly, "Inquisition and Heresy," p. 446 n. 34; idem, *Matrimonial Trials of Henry VIII*, pp. 23, 81, 89-90; and Adhemar Esmein, *A History of Continental Criminal Procedure with Special Reference to France*, trans. John Simpson (Boston, 1913), pp. 86-88 (the original version of Esmein's work, *Histoire de Ia procedure criminelle en France et specialement de Ia procedure inquisitoire depuis le XIIIe siecle jusqu 'a' nos jours* [Paris, 1882], does not contain this discussion; one should note, however, that the Latin texts in the English version are riddled with errors). Tisset is right to state that only when articles are formally denied are witnesses to be produced to prove them; that is, in ordinary circumstances, depositions taken earlier cannot be used (3:61-62) - except for a defendant's self-incriminating testimony, which Boniface VIII allowed unless the defendant protested (which, of course, Joan did). But Tisset is mistaken in saying that in special cases it was not necessary to proceed as Lohier insisted, with a *libellus* of articles (3:62-63 n. 3); he cites Innocent IV (p. 60 n. 2), but whatever Innocent had had to say on the subject of summary process was superseded by Clement V's *Sepe* (see above, p. 1001).

[144] Tisset, 1:186 (Latin text). See Lyndwood's comment on Archbishop Boniface's constitution (above, n. 68), p. 109 note p, expanding on John Andrew's Ordinary Gloss to Sext. 2.1.1, ad v. *dicenda* (col. 309), for the distinction between the two oaths.

[145] Tisset, 1:187-88.

[146] Ibid., pp. 188-89.

[147] Ibid.

[148] Ibid., pp. 189-90.

[149] Ibid., p. 190.

[150] Ibid., pp. 283-85.

[151] According to Duparc, 5:56, Montigny had studied at the University of Paris and taught canon law there from 1426 on (he obviously was not one of the masters consulted by Cauchon in 1431). In 1440 he became official of Paris, that is, the chief ecclesiastical judge under the bishop of Paris, and he was admitted as a doctor of canon law. Duparc says that he became dean in 1445, presumably meaning dean of Paris, but he goes on to characterize him as canon of Paris (a lesser title than dean). He was also a counselor for the secular high court, the Parlement of Paris.

[152] Duparc, 2:293-94.

[153] See the order insisted on by Hostiensis, at n. 16 above: first, chapters are given, and then the fame is proved.

[154] Duparc, 5:57.

[155] Ibid., 2:387-88.

[156] Ibid., 2:334.

[157] *Sacra Rituum Congregatione, Eminentissimo ac Reverendissimo Domino Card. Lucido Maria Parocchi relatore: Aurelianen.: Beatzfication is et canonizationis servae Dei Ioannae de Arc, Puellae Aurelianensis nuncupatae: Positio super introductione causae* (Rome, 1893), part 5 (= fifth pagination): *Animadversiones R. P. D. Promotoris Fidei super dubio, An sit signanda Commissio introductionis Causae, in casu et ad effectum de quo agitur*? §61-63, pp. 44-46. A complete set of the canonization proceedings of Joan of Arc is to be found in the Cardinal Wright collection of the Boston Public Library.

[158] Ibid., part 6: *Responsio ad animadversiones Promotoris Fidei*, §275-77, pp. 155-56. The response is "signed" by two postulators, Ilano Mibrandi and Giovanni Battista Minetti, but only one of them seems to have written it; see, e.g., §273, p. 154.

[159] Pope Martin V died suddenly on 20 February 1431, the day before Joan first appeared in court; his successor, Eugene IV, was elected on 3 March.

[160] The first of these, Caprara, noted above, compared her to Christopher Columbus, whose cause for sainthood had recently been stalled. His conclusion was that she was a very fine woman up to the time that she was captured and subjected to judicial questioning; but then her greatness of mind failed, the splendor of divine revelations disappeared, and grave faults obscured her previous virtues: "Duo ergo stadia in puellae nostrae vita secernenda videntur; primum gloriosum, et admiratione plenum, usque ad suam captivitatem...At, ubi capta illa fuit, et iudicialibus quaestionibus subiecta, defecit ea animi magnitudo, splendor ille divinarum revelationum disparuit, ac praegressas virtutes, quaecumque demum eae fuerint, graves culpae obscurasse visae sunt" (§70, pp. 52-53). In 1901 the promoter of the faith was Giovanni Battista Lugari: *Sacra Rituum*, etc., *Positio super virtutibus* (Rome, 1901), vol. 2, part 2: *Animadversiones R. P. D. Promotons Fidei*; and in 1903 it was Alessandro Verde: *Nova positio super virulibus* (Rome, 1903), part 1: *Novae animadversiones R. P. D. Promotoris Fidei*; and *Novissima positio super virtutibus* (Rome, 1903), part 2: *Novissimae animadversiones R. P. D. Promotoris Fidei*. The rest of the beatification and canonization proceedings concerned not her virtues but the modern miracles attributed to her intercession.

[161] Herbert Thurston, "Bernard Shaw on Saint Joan," *Studies: An Irish Quarterly Review* 13 (1924), 395-407, at p. 402.

[162] Regarding Thurston, we should recall his later statement made in response to G. G. Coulton that Joan had a right to keep some matters between God and herself (see above at n. 119).

[163] Richard Marius, *Thomas More* (New York, 1984), p. 462: "More made the legal point that was finally to be written into the Fifth Amendment of the United States Constitution: 'If I may not declare the causes without peril, then to leave them undeclared is no obstinancy'" (citing More's letter of ca. 17 April 1534 to his daughter Margaret Roper, *Correspondence of Sir Thomas More*, no. 200, pp. 501-7, esp. p. 505).

[164] Derrett, "Trial of Sir Thomas More" (n. 117 above), pp. 62-63. Derrett is mistaken in indicating (p. 593 n. 40) that Aquinas, *Sum. theol*. 1-2.71.5, supports the idea that silence is no crime; Thomas at this point is dealing with sins of omission, cases in which remaining silent would indeed be a crime; but see the passage quoted from Aquinas in n. 46 above. More invoked the rule that silence implies consent (see n. 22 above) to make the point that his refusal to take the statutory oath of supremacy could not be taken to signify his disapproval of the king's legislation. He could

also have appealed to the rule that silence in response to questioning signifies neither affirmation nor denial (n. 26 above).

[165] Thomas More, *The Debellation of Salem and Byzance*, chap. 15, ed. John Guy et al. (New Haven, 1987), p. 86.

[166] More, *The Apology*, chap. 45, p. 148: "And he shall find whomsoever he will name, that hath been either punished or abjured, that the matters which have been layed unto them they have not been by any subtle questions induced to confess them, but they have been both well proved against them, and neither have been slight, nor light, nor so strange articles and unknown as they might therein of ignorance or simplicity so sore overshoot themself." For More and inquisitorial procedure, see n. 117 above. More no doubt had in mind articles like the forty-five that were ministered against John Lambert (above, nn. 6, 74), given by Foxe, together with Lambert's answers, in *Acts and Monuments*, 5:181-225. Foxe notes that it was More who had Lambert arrested. He suggests that he was released mainly because of Archbishop Warham's death. When Lambert got into trouble later, in 1538, Henry VIII himself sat in judgment on him and condemned him to death (pp. 227-36). An example of a question designed to entrap, based on no previous report or infamy, can be seen in the query put to Anne Askew after More's time, in 1545, by the mayor of London, namely, "whether a mouse eating the host received God, or no?" She says that she made no answer, but only smiled. See John Bale, *Examinations of Anne Askew* (1548), in *Select Works of John Bale* (n. 74 above), pp. 135-248, esp. p. 154. See Stephen Greenblatt, "The Mouse Trap," in *Objects and Subjects*: *Reconstructing Renaissance Culture*, ed. Margreta de Grazia et al. (Cambridge University Press, forthcoming). When a similar question was put to her later, she responded with a refusal: "Seeing ye have taken the pains to ask this question, I desire you also to take so much pain more as to assoil it yourself; for I will not do it, because I perceive ye come to tempt me" (p. 158). For earlier discussions of the host-eating mouse, see the Ordinary Gloss to Gratian, *Decretum* 3.2.94 (*Qui bene*), and references to it in the glosses on 2.1.1.54 (*Detrahe*) and 3.2.92 (*Accesserunt*); in the latter, the text should read, "Arg. hic quod mus non potest accipere corpus Christi." In the Roman edition (1606 reprint, col. 1963), "quod mus" has become "quauis," i.e., "quamvis. "See Gary Macy, "The 'Dogma of Transubstantiation' in the Middle Ages," *Journal of Ecclesiastical History* 45 (1994), n. 58; see also nn. 101-2 for a case prosecuted by Nicholas Eymerich, *Directorium inquisitorum*, Pt. 1, p. 33 (see Pena's discussion in the appendix, scholion 14, p. 13).

[167] More, *Debellation*, pp. 105-6. He is defending the practice in ex officio inquisitions of not revealing who the original delators were: "But why shall he not know them forthwith, when he is first convented? For it were not well done he should, no more than the King's Council, that many times call malefactors before them upon secret information first, use alway there by-and-by to disclose who told them the matter and what; which if they should, and by-and-by bring him forth, then though the suspect would confess haply some things thereby the sooner, yet should it be but that thing which he thought the tother knew; whereas while the thief knoweth not who hath given the information and yet thinketh by his examination that among his many fellows, though they be thieves all, yet some false shrews there be, he misguesseth among and weneth it were one where in deed it was another, and so in stead of one felony, to light there cometh twain." Perhaps we are to take it from this that similar preliminary interrogations of suspected heretics were in fact conducted by the bishops. Foxe notes that Lambert was first examined at Lambeth before being tried before the archbishop at Otford (p. 181); but it is likely that if any prearraignment interrogation had been attempted, Lambert would have alluded to it in his published responses. After the examinations of Anne Askew noted above, Edmund Bonner, bishop of London, examined her privately and asked her opinion about the matters laid against her and also urged her to utter the secrets of her heart, promising her immunity; but she declined, preferring to await the arrival of her friends (Bale, p. 163). She was eventually consigned to death by the King's Council, which she considered not a proper trial: "And so we were condemned, without a quest" (p. 213). Criminal procedure in matters of heresy was up in the air after 1534; see Levy, *Origins*, pp. 69-73.