Presbyterian Due Process:

A Scottish and American Recovery of Procedural Canons

By Stuart R. Jones

On this 300th anniversary of America's first Presbytery, a special facet of Presbyterian identity will be explored in this article, namely the Presbyterian concern with due process in formal disciplinary matters. This is a large subject worthy of a book. What will be attempted here is a sketch or large outline that might facilitate further study and reflection.

By due process, we mean that relatively fixed procedure is employed for establishing the truth or falsity of alleged wrong doing and that this process entails the use of formal accusations, hearing of witnesses or evidence, the right to offer a defense, due deliberation, etc. Employment of due process presupposes that a reconciliation process has not succeeded in resolving points of difference and so some fair method of resolving a dispute over factual allegations and/or points of doctrine or law is necessary.

The idea of employing the features of due process in church discipline cases is something that has been criticized. It has been alleged that proper church discipline has died because of Emperor Constantine's legacy. The correction of many offences has been left to the state and the church has copied "the state's pattern of dealing with offenders through legalistic machinery: filing charges, setting up courts, holding trials—in short, engaging in casuistry that obscures the spirit of the gospel."[1]

This criticism, while applicable to cases that might be resolved through informal counsel, repentance, and reconciliation, ignores the plain fact that not every case of pastoral dealing ends with an agreement about an alleged offense. Though the New Testament Community is called to forgive offenses where repentance is present, the prior question of whether an offense has been committed may not be casually assumed. As James Durham states:

> For when a person brings such an offense to a public judicatory, he must make out these two: [1.] that such a person has actually given offense; and [2.] that he has effectually admonished him, and he has not heard him, nor satisfied him.[2]

The need for an adequate means of probation in cases of alleged offenses is the point at which due process emerges as part of the disciplinary process. The following theses or points of examination are offered to suggest the relationship between Presbyterianism and due process:

1. Due process was provided for in the Old Testament where the discretion and mandate to forgive offenses was less in evidence.
2. Due process was a concern of the Church prior to the Reformation as it incorporated Roman Law into its Canon Law procedure.
3. The special concentration of judicial power in the church officers was a special matter of concern during the Reformation as this threatened arbitrary discipline at the expense of due process.
4. The Scottish Presbyterians reconstituted due process protections (probably from earlier canon law) over a period of time culminating in the *Form of Process* of 1707.
5. American Presbyterianism eventually incorporated and adapted much of the due process notions of the Scottish Church with two major developments coming in the disciplinary rules of 1788 and 1821.

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1. Marlin Jeschke, "Fixing Church Discipline: How Discipline Died," *Christianity Today* (August 2005) 31–32.

2. James Durham, *A Treatise Concerning Scandal* (Printed by Willaim Carron for John Cairnes, 1680); repr., ed. Christopher Coldwell and David C. Lachman (Dallas, Tex.: Naphtali Press, 1990) 62–63.

I. Old Testament Due Process

Little needs to be said about the subject of due process in the Old Testament since most readers of this journal will recognize that due process is incipiently present in such requirements as the need for two or three witnesses and the *lex talionis* applied to wrongful or malicious accusers (Deut. 19:15–21). Similar provisions have existed in other law codes including that of Hammurabi.[3]

Though the OT material on due process is mixed in with substantive laws and is arguably less developed than modern ideas about due process, it is noteworthy that natural and fair means of uncovering truth are given clear expression in the OT. Though some place for the use of lots is granted in uncovering Achan's transgression (Josh. 7:14ff), this is a unique redemptive-historical occurrence which receives prominence by its exceptional nature and God's particularized instruction. In general, the OT makes little use of the ordeal as a probative device.[4] One exception is in Numbers 5, but this provision lacks the cruelty of typical ordeals and has some affinity with the Lord's Supper warning (1 Cor. 11:29.30).

II. Roman-Canon Law

The New Testament emphasis on redemption and forgiveness and general freedom from the civil laws of Moses may disguise the need for due process in disciplinary matters; yet unless there is some modern equivalent of the Urim and Thummin or continued special revelation, the Church must have some wise and accessible means of settling allegations that are in dispute. Though canons for conducting trials or arbitration are not set forth in any detail in the NT, Paul's rebuke of the Corinthians in relying on secular courts includes an appeal to their wisdom rather than to extraordinary modes of judgment (1 Cor. 6:1–8).

The Church has carried out discipline from its earliest existence, but details of procedure in probative discipline appear to emerge more clearly with various treatises of the twelfth century onward. The expressions *de iudiciis*, *ordo iudiciorum*, and *ordo iudiciarius*, are cited in connection with this procedural literature.[5] It has been alleged that earlier, St. Augustine "maintained that no one could be condemned without a trial conducted according to the *ordo iudiciarius*."[6]

The insistence on a due process oriented method of probation was salutary in its rationality and prevention of the ordeal method. The rise of due process considerations in applying Roman Law to Canon Law could also be used as an obstruction to prosecution and the shielding of clergy from the secular tribunal.[7] It may be further noted that the same institution that gave definition to due process in canon law also developed the method of the Inquisition.

III. Reformation Concerns

Lutheranism

In the *Treatise on the Power and Primacy of the Pope* (attributed to Melanchthon, 1537), the following complaint is issued:

> **74]** It is certain that the common jurisdiction of excommunicating those guilty of manifest crimes belongs to all pastors. This they have tyrannically transferred to themselves alone, and have applied it to the acquisition of gain. For it is certain that the officials, as they are called employed a license not to be tolerated and either on account of avarice or because of other wanton desires tormented men and excommunicated them without any *due process of law* [italics supplied; *ordine iudiciorum* in Latin text of Triglotta]**.** But what tyranny is it for the officials in the states to have arbitrary power to condemn and excommunicate men without *due process of law!* [*ordine iudiciorum*] **75]** And in what

3. Cf. J. Pritchard, ed.; T. Meek, trans., *The Ancient Near East: An Anthology of Texts and Pictures,* 2 vols. (Princeton, N.J.: Princeton University Press, 1958) 1:139.

4. Pritchard, ibid. Hammurabi's code mentions the river ordeal. Oaths remain in modern secular courts, though consciousness of their self-maledictory nature are overshadowed today by concern with perjury penalties.

5. Linda Fowler-Magerl, *Ordines Iudiciarii and Libelli de Ordine Iudiciorum* (Turnhout, Belgium: Brepols, 1994) 20.

6. Fowler-Magerl, 20. This is said to be the first use of the expression, though Fowler-Magerl seems to be unsure about its attribution to Augustine.

7. Fowler-Magerl, 27. The Fourth Lateran Council forbade use of the ordeal in canon 18. Cf. Kenneth Pennington, *The Prince and the Law* (Berkeley and Los Angeles: University of California Press, 1993) 132–135. The earliest use of the literal term, "due process," is said to be from a statute of Edward the III in 1354 (Pennington, n. 9, p. 6 and n. 95, p. 145). A literal Latin translation might have been "servare ordinem iuris," though the basic idea is present in the norm of judicial procedure entitled the *ordo iudicarius* which some scholars found present in God's dealings with Adam and Eve (p. 142). Pennington also has material on line. Antonius Mathaeus, a Calvinistic lawyer, colleague of Gijsbert Voet, and elder of the Reformed Church in the Netherlands wrote that ordeals, besides tempting God, were an "assault on the secrets of Divine Providence." Cf. M.L. Hewitt and B.C. Stoop, trans., *On Crimes: A Commentary on Books XLVII and XLVIII of the Digest*, 4 vols. (Capetown: Juta & Co LTD, 1987–96 [based on 1761 Antwerp edition, first published in 1644]) 3.536.

> kind of affairs did they abuse this power? Indeed, not in punishing true offenses, but in regard to the violation of fasts or festivals, or like trifles! Only, they sometimes punished adulteries; and in this matter they often vexed [abused and defamed] innocent and honorable men. Besides, since this is a most grievous offense, nobody certainly is to be condemned without *due process of law* [*ordine iudiciali*].[8]

The precise deviations from due process of law are not specified. The "officials" referred to, appear to be vicars that were assigned duties, including judicial ones to relieve the bishops (Cf. Fowler-Magerl, *Ordo*, 83). This placed them in a position of power which could be abused for personal gain. The general point of the *Treatise* is that all pastors possess the power of jurisdiction—not just bishops. The fact that bishops were known to delegate their power to corrupt agents is a fact calculated to lower the mystique of the Episcopal office in this polity debate.

In the *Apology of the Augsburg Confession* (xxviii. 13–14) it is stated that:

> We like the old division of power into the power of the order and the power of jurisdiction. Therefore a bishop has the power of the order, namely, the ministry of the Word and sacraments. He also has the power of jurisdiction, namely the authority to excommunicate those who are guilty of public offenses or to absolve them if they are converted and ask for absolution. A bishop does not have the power of a tyrant to act without a definite law, nor that of a king to act above the law (Tappert, *Book of Concord*, 283).

At this point, the Lutheran confession differs—as is suggested above with regard to pastors—from the *Second Scots Book of Discipline* (1581). In this latter polity guide the power of jurisdiction is said to be a joint power of the elders and ministers. But there are two qualifications placed on the power of jurisdiction in the Lutheran confession. First, the sin in view is a public one. Secondly, the power is not arbitrary but censurable offences are defined in terms of some definite command in the Word of God.

When we turn to Martin Luther's discussion of the Keys of the Kingdom, we see another side to the issue. Luther argues against bans or excommunications that are passed before they are "punished first in a brotherly manner and finally established as such by the whole congregation."[9] A congregation cannot be expected to perform its duty in such a ban if it is not "sure of the reason it thinks him to be deserving of excommunication…." The congregation "should be consulted" because it "is not bound to put any faith in a slip of paper issued by an episcopal representative, nor need it be concerned about any bishop's letters." The congregation has "a place as a judge and helper." Luther further argues, correctly or not, that Paul was not willing to act without the congregation in the case of incest described in 1 Corinthians 5 (Bergendoff, 371–372). The same point is made in article 24 of the *Treatise on the Power and Primacy of the Pope* (Tappert, *Book of Concord*, 324).

Reformed Process

Luther's statements are remarkable because they demonstrate that he was not able to avoid a polity position despite a general tendency of his movement to subordinate questions of government to larger doctrinal concerns like justification and the sacraments. Providing a place for congregational consent is a check on arbitrary power and as such contains the due process element of openness in judicial dealing. Luther's position also suggests a possible link to early Reformed polity.

In 1560, John Knox's *Book of Discipline* sets forth a method by which the congregation was to be involved in a disciplinary matter. This formulary contained features that would be present in the French and Dutch discipline as well. Two general characteristics of these orders are: 1) the progressive nature of the process, and 2) the involvement of the congregation, particularly at the final stage of the process. The general assumption underlying the process is that a real offense has been committed but has not yet been repented of. The process aims at achieving this goal or removing the offending member. A gracious process where guilt is probable rather than due process is the main concern. However, in the involvement of the congregation there is an element of due process protection. The 1560 order puts the matter thusly:

> If the person malign, then the next day of public assembly, the crime and the person must both be notified to the Church, and their judgment must be required,

8. *Triglot Concordia* (Electronic Edition of Northwestern Publishing House, 1996 [CD developed from 1917 print edition]). Cf. T. Tappert, trans., *The Book of Concord* (Philadelphia: Fortress, 1959) 332–333.

9. Conrad Bergendoff, ed., "The Keys," *Luther's Works: Church and Ministry II,* 55 vols. (Philadelphia: Muhlenberg Press, 1958) 40: 370–371.

> if that such crimes ought to be suffered amongst them. Request also would be made to the most discreet and to the nearest friends of the offender to travail with him to bring him to a knowledge of himself, and of his dangerous estate….[10]

As with Luther, there is a place for congregational judgment in the process. In 1569 a more full form of excommunication was developed in Scotland in which various prayers and admonitions are added as liturgical aids in carrying out the disciplinary process before the congregation. The process of gradual exposure and congregational involvement in the disciplinary order is affirmed in the following words:

> Bot if he declair himself inobedient to the Session, then without delay the nixt Sunday aucht the cryme, and the ordor of admonitionis passed befoir, be publiklie declaired to the Church, and the person (without specificatioun of his name) be admonished to satisfie in publique that which he refused to do in secret….
>
> But lest that we shuld seme to usurpe power owir the Church, or to doe any thing without the knowledge and consent of the whole body, for this present we delay the sentence, willing, such as have any thing to object in the contrair, to propone the same the nixt Session day, or eles to signify the same to some of the Ministeris or Eldaris, that answer may be gevin thereto; and in the meane tyme we will call to God for the conversion of the impenitent.[11]

The "consent of the whole body" is again a concern as we shall see in the policies of the French and Dutch Churches.

The *French Discipline* began with approximately 40 articles in 1559 but these were supplemented over time. The Dutch Churches developed their first general polity articles at the Convent of Wesel in 1568 followed by the Synod of Emden. The following selections, with emphasis added, indicate the coinciding views and practices in discipline among these churches:

> 1565 Synod at Paris—The French Discipline[12]
> And these publick *Admonitions* and Denunciations shall be prosecuted *three several times, on* three several Lord's Days; on *the first of which the Sinner shall not be mentioned by Name*, that so in some sort he may be spared, though he already be too well known unto the People; but on *the two succeeding Sundays he shall be particularly named*. And if after all this he does not repent, nor become a Convert, but persisteth obstinately in his sinful Courses, then on the fourth Lord's Day, in the face and presence of the whole Congregation, such a one, mentioning him by Name, shall be declared and pronounced excommunicate and cut off as a rotten Member, from the Body of the Church; the Pastor declaring it authoritatively from the Word of God, in the Name, and with the *Consent of the whole Church*.
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> 1571 Synod at Emden—Dutch Church Order[13]
> Three admonitions shall be performed. [… drie varmaningen salmen doen]
>
> In the first the sinner shall not be named, to spare him somewhat. [In d'eerste en sal de Sondaer niet ghenoemt worden, to spare him somewhat opdat hem eenighsins verschoone].
>
> In the second he shall be named [In de tweede salmen hem noemen]. In the third it shall be announced to the congregation that he shall be excommunicated or ejected until he repents because he remains stiff necked, being cut off by tacit consent of the congregation. [In de derde salmen der Ghemeente aensegghen, datmen hem excommuniceren ofte uytsluyten sal, ten zy dat hy sick bekeerde, op dat hy, ist dat hy hartneckigh blijft, door stilswijhende verwillinghe der Ghemeente, afghesneden werde].

Similar patterns can be discerned in the 1578 *Book*

10. William Croft Dickinson, ed., *John Knox's History of the Reformation in Scotland,* 2 vols. (New York: Philosophical Library, 1950) 2.307.

11. *The Ordoure of Excommunication and of Publict Repentance* (Edinburgh: Robert Lekprevik, 1569) 448–449; 462. This order was evidently distilled from à Lasco's *Modus ac Ritus Excommunicationis*. Cf. Alexander Mitchell, *The Scottish Reformation* (Edinburgh: William Blackwood & Sons, 1890) 165. In 1544, Vermigli expresses the need for the whole church to be involved in an excommunication rather (versus the tyranny of an individual as in Romanism). Cf. "The Apostles' Creed," *Early Writings,* 5 vols (Kirksville, Mo.: Peter Martyr Library, 1994) 1.28.

12. John Quick, comp., *Synodicon in Gallia Reformata,* 2 vols. (London: T. Parkhurst and J. Robinson, 1692) 1.58,59. Quick also consolidates the various canons passed over time in his introduction.

13. P. Biesterveld and H.H. Kuiper, comps., *Kerkelijk Handboekje* (Kampen: J.H. Bos, 1905) 41. This selection is part of article 31 in the Emden Order. At Wesel a brief article was adopted to similar effect (chapter 8, §9) but without the well defined gradations of exposure. That article does speak of cutting one off as a "rotten member" or "verrot lid", cf. *French Disicpline* (*Synodicon*) above; also Calvin's "Articles concerning the Organization of the Church" (1537) in J.K.S. Reid, ed., *Calvin: Theological Treatises,* Library of Christian Classics, vol. xxii (Philadelphia: Westminster Press, 1954) 51.

of Discipline by Cartwright and Travers and the 1641 *Directory for Excommunication* composed by Alexander Henderson.[14] The consent of the congregation is called for in the *Directory for Church Government* which contained some disciplinary guidance and was a product of the Westminster Assembly that never received official status.[15]

IV. Scottish Presbyterian Due Process

General Call To Formal Process

In 1582 a reference is received from the Synod of Lawthian [Lothian] asking the General Assembly, "That ane universall order be taken and made be [by] the Generall Assembly, for excommunicatione, tryall, admissione, and ordination of ministers.[16] That this order specifically concerns the probative side of discipline is not stipulated. However, the same year two ministerial cases appear before the General Assembly. The case of Robert Montgomerie is of particular interest because Andrew Melville takes the role of formal accuser. The next General Assembly finds the process pursued against Montgomerie to have been orderly and proper.[17] A major question arises whether Montgomerie was aware of his suspension which he apparently had ignored. The King's interest in the case moved the Assembly to appoint a commission to answer any royal concerns (Peterkin, 248). It appears the church was under pressure to justify its discipline and thus, its process was a matter of concern. The Assembly further gave instruction to its presbyteries that, "The forme of proces[s] in weightie matters to be in wreit, at the discretioune of particular Presbyteries, *e re nata*; in other things verball (Peterkin, 250)."

In 1597 a similar sort of directive is given:

> In the Gen. Assembly at Dundie in May 1597, Sess. 7, it is appointed that all Sessions be elected with consent of their oune congregations; and that all Sessions, Presbyteries, and Provincialls [synods] use such forme in all their processes as may be found laufull and formall, and able to abide triall, &c.[18]

The expression "all their processes" may include more than judicial process but the disciplinary procedures to be followed certainly seem to fall within this order. Erastian pressures may have played a roll in tightening up due process probative discipline in the Scottish Church. Such pressure in disciplinary matters was present when the Parliament convened the Westminster Assembly.[19] The Parliament challenged the divines to produce a list of offenses that might merit exclusion from the Lord's Supper which impeded ecclesiastical discretion over higher censures (Paul, 494–501). This attempt to limit arbitrary discipline was arguably less flexible than insisting upon fair process and probably more of a gambit to hamstring ecclesiastical control over discipline.

James Durham's work, *Concerning Scandal*, was published posthumously and well after the Westminster Assembly. It is a work giving careful attention to disciplinary matters and achieved high reputation. Though it is not an official standard of discipline, its perspectives, coming from a son of the Church of Scotland, are informative in our study.

Regarding the variety of situations involved in disciplinary matters, Durham states:

> Therefore we suppose there is no peremptory determining of rules for cases here, but necessarily the manner of procedure in application of rules is to be left to the prudence and conscientiousness of church officers, according to the particular circumstantiate case (*Scandal,* 53).

Such an acknowledgment might support a more flexible church constitution such as the Dordt Order. Upon closer inspection, however, Durham's concern appears to be with application of discipline or censures to individuals already adjudged as culpable. In the prior sentence he states that what might humble one person would crush another. His controlling thought is that discipline, "is not to be applied equally unto all persons" and that this is not a matter of injustice, per se.

14. Cf. *The Reformation of the Church* (Carlisle, Pa.: Banner of Truth, 1987 [repr. from 1965]) 187, and Alexander Henderson, *The Government and Order of the Church of Scotland* (1641) 38–39.

15. Cf. C. Dennison & R. Gamble, eds., *Pressing Toward the Mark* (Philadelphia: Committee for the Historian of the Orthodox Presbyterian Church, 1986) 94.

16. A. Peterkin, comp., *The Booke of the Universall Kirk of Scotland* (Edinburgh: The Edinburgh Printing and Publishing Company, 1839) 226.

17. Peterkin, 231, 241. Fifteen articles are at issue and listed on pages 225 and 226, immediately prior to the synodical reference.

18. Robert Baillie, *Letters and Journals,* ed. David Laing (Edinburgh: Printed for Robert Ogle, 1841) 2.505. This is cited in a May 9, 1645 letter from George Gillespie, addressed to "the right Reverend Mr. Robert Morray, Minister at Methven; or, For Mr. Patrick Gillespie, Minister at Kirkaldy." The appendix in this volume of Baillie contains twelve letters by Gillespie while he was in London as a Commissioner to the Westminster Assembly. Cf. also Peterkin, *The Booke*, 459.

19. Cf. Robert Paul, *The Assembly of the Lord* (Edinburgh: T.&T. Clark, 1985) 422–424.

His work does not really address the question whether there should be flexible policies in how culpability is determined. Durham is not so concerned with a policy of forensic investigation and probation aimed at assessing culpability. At the same time, his language implies that a formal process of probation will be followed.

In the scope of a single paragraph he uses the terms, "processes," "delation," and the counter part "complaint." In the same paragraph he speaks of "public tabling of a scandal" (*Scandal,* 60). Such terms, taken in isolation, might not presuppose any technical process. Used in close proximity, the terms suggest recognized elements of a judicial process. Though Durham is anxious to avoid unnecessary "processes" or trials by having delations and complaints preceded by the confrontation order of Mathew 18, he is not repudiating delations, complaints, tabling scandals, and processes, per se. Most of these terms reappear later in the *Form of Process*.[20]

It is perhaps at this point where we begin to see the uniqueness of Scottish Presbyterian discipline emerge from the general common heritage it shares with other Reformed Churches. The *French Discipline* specified that, "All possible care shall be taken; that those formalities and terms which are used in Courts of Law, may be avoided in the exercise of Church-Discipline" (Quick, *Synodicon,* xxxi). At the same time, this list of Protestant canons—for so they are designated—does not really provide much guidance in addressing the forensic or probative side of alleged offenses. Whether the followers of the *French Discipline* might have approved of Durham's language or the subsequent developments in Presbyterian discipline is hard to say. Durham expresses the need to avoid the appearance of a civil court in the way in which a church pursues its discipline (e.g. on insisting on a formal accuser), so there is no major disagreement in principle. It may be observed that the *French Discipline* makes little or no provision for probative procedures, and may thus more easily avoid legal sounding forms and terms. Some followers of the *Dordt Order* have also expressed the view that their Church Order properly articulates only principles to be followed allowing a "maximum variability in its application, not a set of rules for constant application."[21]

A Common Order For Judicial Process

In the wake of the Glorious Revolution the Church of Scotland met in its General Assembly in 1690 and passed the following regarding their Commissions of Visitation:

> 7. That they be very Cautious of receiving Informations, against the late Conformists, and that they proceed in the matter of Censure, very Deliberately, so as none may have just cause to complain of their Rigiditie: Yet so as to omit[t] no means of Information. And that they shall not proceed to censure, but upon Relevant Libells and sufficient Probation.[22]

The requirement for "Relevant Libells and sufficient Probation" indicates a very specific and standardized due process rule in the life of the Church. Walter Steuart, Laird of Pardovan, provides the following definition:

> A libel is a law syllogism, consisting of the proposition or relevancy, which is founded on the laws of God or some ecclesiastical constitution agreeable thereto, as, whosoever is absent from public divine service on the Lord's day ought to be censured. The second part consists of the subsumption or probation, which condescends on a matter of fact, viz. but such a person did, upon such or such a Lord's day, absent unnecessarily from the public worship of God. The third part consists of the conclusion or sentence, which contains a desire that the profaner of the Lord's day, according to the laws and customs mentioned in the first part, may be censured (*Compendium*, 1:414 [Book IV, title III, §1]).

The first edition of Pardovan's work was in 1709 and his use of the words "relevancy" and "probation" are reflective of the language in the 1690 action of the General Assembly. As such, it may be reasonably inferred that Pardovan's definition of the libel as a legal syllogism

20. Cf. *Compendium of the Laws of the Church of Scotland,* 2 vols. (Edinburgh: Edinburgh Printing and Publishing Co., 1837) 1:405. Pardovan's *Collections*, Book IV supplies definitions and context for various terms found in the *Form of Process*. The *Form* does not use the term "tabling a scandal" but the phrase, slightly altered, appears in the heading at the beginning of Book IV in title I of Pardovan. In several places Pardovan appears to borrow from Durham (cf. *Compendium* 1:405). The term "scandal" is generally used in the sense of an offense, whether or not notorious. A delation is defined as "a verbal information or intimation made against some persons, for faults and offenses, unto members of a church judicature." It does not carry the same level of jeopardy as a formal accusation and the delator may, if not otherwise disqualified, act as a witness (p. 412 [Bk I, Tit. I, §. 14]). The term "complaint" generally seems equivalent to formal accusation, though it later acquires a second meaning closely akin to appeal (sometimes called a "dissent and complaint").

21. Martin Monsma, Idzerd Van Dellen, *The Church Order Commentary* (Grand Rapids, Mich.: Zondervan, 1941) 292.

22. *The Principle Acts of the General Assembly of the Church of Scotland Convened at Edinburgh the 16th Day of October 1690* (Edinburgh: Printed by George Mosman, 1691) 22. This act was passed on November 13, 1690.

reflects the thinking of the Assembly in 1690 when it required this rule to be followed by its commissions. From this we may conclude that a special concern for formalized due process in disciplinary matters was present in the Church from its earliest reestablishment after the Glorious Revolution.

The Church of Scotland reiterated its commitment to a due process discipline when it adopted the *Form of Process* in 1707. In the *Form of Process*, we have a nine chapter polity guide explicitly devoted to handling disciplinary matters. The first major front in this effort was a more ambitious proposal which may have roots as early as 1696. Overtures had been circulated regarding five chapters of a proposed plan of government and discipline. In the proposal as it was eventually edited and printed for the Assembly in 1705, the disciplinary processes of the church are integrated with the overall government platform contained in the five chapters. The overture material that was recorded is approximately five times as large as the *Form of Process* that was eventually adopted. Various committees had worked with the material and had revised the first three chapters. The last two were regarded as not yet considered and the work of a private individual. This individual may have been William Dunlop, brother in law and cousin to William Carstares.[23]

The more ambitious effort was stalled from official enactment under the following circumstances. First, the Assembly had passed the Barrier Act in 1697 which required that any major Acts that would become binding law on the presbyteries must secure the approval of a majority of the presbyteries.[24] The proposed overtures on the "book of discipline" were not voted on uniformly by all presbyteries. Some wished to add material, others to delete, others failed to respond over time. It was apparently impossible to get a simple up or down vote on the whole package. The General Assembly opened, as it were, a second smaller front in this struggle. In 1704 it requested that action continue on the larger overtures and that a *Form of Process* be put into shape for adoption by the Church. This more limited attempt to get a standard directly focused on disciplinary matters passed through the Barrier Act procedure and into church law in 1707.

Various committees were engaged in the effort that began near the end of the previous century with some members continuing to serve over time. In addition to including prominent ministerial members who had been moderators or were principals of the colleges, there were some prominent legal people who served as ruling elder constituents. The Lord Advocate of Scotland, Sir James Steuart, retained a place on the several committees charged with this work. Other individuals with prominent legal standing also served, particularly in 1703–1704.[25]

Some of the material from the five chapters was incorporated into the *Form of Process* (FP). The rest of the material languished. In both the overture material and the *Form of Process*, various legal terms emerge apart from those referred to in Durham's work, e.g. libel (FP 2.10,13; 7.5), assoilize (FP 2.13), alibi (FP 2.13), deposition (FP 2.14,15), and *fama clamosa* (FP 7.3). It is a reasonable speculation that the legal experts on the committees that worked with the overtures and *Form* may have influenced some of the terminology and that they were in turn influenced by Scottish, Roman, and Canon Law terms and ideas.[26] The *libellus* of accusation of Roman and Canon Law seems to be at the root of the Scottish concept of a libel that initiates judicial process against a defendant.[27]

With the publication of Walter Steuart's *Collections* in 1709, a very definite legal form is given to the government, worship and discipline of the Church of

23. A. Ian Dunlop, *William Carstares and the Kirk by Law Established* (Edinburgh: St. Andrews Press, 1967) 94. W. Dunlop had asked Carstares to peruse a draft book of discipline in 1696. "Book of discipline" probably refers to a larger platform of government inclusive of a process for censures rather than discipline narrowly defined. Also, John Carstares, William's father, edited almost all of James Durham's posthumous publications, and wrote one of the prefaces for *Concerning Scandal,* which Durham completed just prior to his death in 1658 (David Lachman, Introduction, *Scandal,* iii).

24. Dunlop, ibid. The same year the Barrier Act passed, a rare execution for blasphemy took place under the civil law when Thomas Aikenhead was found to have denied the Trinity. The Barrier Act was a precedent for the American Presbyterian constitutional order that began in 1788.

25. *Acts of the General Assembly of the Church of Scotland* (Edinburgh: Edinburgh Printing and Publishing Company, 1843) 272 [for 1698], 324 [for 1703], 336 [for 1705].

26. The last two chapters dealing with synods and the General Assembly do not, in the nature of the case, deal with original judicial processes. Thus little reason exists to suppose the terms libel or *fama clamosa* might be found there. Some technical Latin terms are used that are found in earlier chapters (e.g. *male* or *bene appellatum*). FP 5.6 speaks of the need to "assoilzie" a successful appellant which is not found in chapters four and five of the overtures. FP 5.9 does not seem to appear in the overture material (stipulating the same procedure of synods, etc.). "Purgation" by oath (FP 4.8) in cases where "pregnant presumptions" are present appears to be a relic of Canon (and Germanic) but not Roman Law (cf. definition of "compurgation,"e.g. http://reference.allrefer.com/encyclopedia/C/compurga.html).

27. Cf. Fowler-Magerl, *Ordo*, 49–50. This *libellus* was distinguished by the inscription which rendered the accuser liable to the penalties of the accused if the accusation was not proven. Thus there is a common conception among Old Testament, Roman, and Canon Law feeding into the Scottish formulation.

Scotland. In addition to the General Assembly's recommendation of this work to sessions (also in 1709), we have a testimony of Wodrow to this compilation. Wodrow helps establish biographical details about the Laird of Pardovan:

> To supply what I once designed to have given you, please to receive a book from the bearer, which, if you have not seen before this comes, will give the fullest view of our discipline and practice of anything I could think upon. It was writ by a gentleman, a relation of mine, who some months ago, died in this place, Mr Walter Steuart of Pardovan.[28]

Walter Steuart had been a member of the Scottish Parliament as a burgess commissioner for Linlithgow. In this capacity he voted against the 1707 Treaty of Union with England and several protests may be found recorded in his name in the acts of several parliament sessions.[29] He appears to have been an advocate and the son of Sir Archibald Stewart of Blackhall.[30] The material in his protests and Wodrow's letters, not to mention his *Collections*, indicates he had an ardent interest in the Church of Scotland.

In addition to Acts taken from the Church of Scotland, Pardovan includes material from civil law, canons of early church councils (e.g. Trullo, Laodocea, *et al.*) and the acts or canons of the French Reformed churches. In the fourth book of Pardovan's *Collections*, the details of disciplinary process are set forth, while the third book concerns the various offenses that deserve special attention in disciplinary process. The first two books deal with church government and worship respectively. This differs from the arrangement of the overtures that were considered by the Church of Scotland and printed in 1705 in which disciplinary policy was integrated with general material on church government. The five chapters of the overtures that were printed all take church judicatories as their starting point (judicatories in general, sessions, presbyteries, synods, and the General Assembly). Several reasons may explain the fourfold division adopted by Pardovan.

First, when the church enacted the *Form of Process* into its church law in 1707, it effectively separated the specific canons for ecclesiastical discipline from the rules and principles for governing judicatories that still were contained in the overtures but not enacted into a formal constitution.

Second, Pardovan quotes material from the *French Discipline* at various places in his *Collections*. This material had become more readily available by John Quick's translation and editing work which was published in 1692. There is similarity between the organization of the French canons (as brought together in Quick's introduction) and the first three books of Pardovan's *Collections*. The Church officers are discussed in Chapters one, three, and four of the *French Discipline*. The various assemblies of the church and their mutual relations are discussed in chapters five through nine. Matters related to worship are treated in chapters ten through twelve, with chapter thirteen pertaining to marriage. Chapter fourteen (the last), contains miscellaneous canons which can be generally described as substantive duties and prohibitions. This order of subjects is the same as Pardovan's first three books.[31]

Finally, the treatment of legal subjects in four books is not unique with Pardovan. In civil law, James Dalrymple of Stair followed this course in his second edition of his *Institutes*. Stair includes in the fourth book material from an earlier work entitled *Modus Litigandi or Form of Process*.[32] This section contains various "actions" in

28. Thomas M'Crie, ed., *The Correspondence of the Rev. Robert Wodrow*, 3 vols. (Edinburgh: Printed for the Wodrow Society, 1842, 1843) 2.463.

29. *The Acts of the Parliaments of Scotland,* 11 vols. ([Edinburgh], Printed by Command of his Majesty King George IV, 1814–1824) 11.404, 405. Cf. 11.25, 70 for early dissents and 11.313 for a later dissent.

30. Cf. L. W. Sharp, ed., *Early Letters of Robert Wodrow,* (Edinburgh: University Press, 1937) xxi. A letter of Wodrow to his father is referenced in which "Walter Steuart Blackhalls sone" is mentioned. The index entry specifies this Walter Steuart as "advocate, son of Archibald Stewart of Blackhall" (perhaps to distinguish this person from Walter Steuart the merchant). Pardovan appears not to have been a minister or Earl as supposed by some. He bears the title "Esq." after his name in his work and his father appears to bear the title "Sir" before his name if published genealogies may be trusted. Pardovan's death is indicated by Wodrow to have been about 1719. A dispute of Pardovan with the minister John Anderson in a paper before the General Assembly is referenced in a Wodrow letter to his wife in 1718 and Wodrow (who corresponded with both parties and addressed Pardovan as a "Laird," not a "Lord") reports that the paper of Pardovan put him "quite out of humour" (Wodrow, *Correspondence*, 2.382). Near the end of 1723 Wodrow sends a letter to "Lady" Pardovan informing her of the right to have an inscription placed on a wall across from her husband's final resting place. Catalogue information entered in the National Library of Scotland (cf. http://www.nls.uk for "Steuart, Walter") lists two individuals with death dates of 1721 and 1764, both having produced legal dissertations.

31. Pardovan's treatment of errors and offenses in the third book follows the order of the Decalogue to a considerable extent. In the first book, he treats of teachers in the place where the *French Discipline*, chapter two, treats of schools (between its treatment of ministers and elders).

32. Stair, *Institutions* (Introduction to 1981 edition) 44. Cf. the model of Justinian's *Institutes* and the 1917 RCC Code of Canon Law.

law. In a remote way, the Roman law division of persons, things, and actions may have contributed to Pardovan's organizational structure. In Pardovan's introduction, he describes the division of his work into four books and describes book two as dealing with the "the Worship of God and sacred *things*" (emphasis supplied). He groups books three and four as related to discipline, "the one concerning errors and scandals, and the other about the method of reclaiming and censuring the erroneous and scandalous" (*Compendium*, 1:186). American Presbyterian Church Orders have traditionally been divided into sub-units on government, discipline, and worship which may simply reflect natural organization or may also derive from Pardovan's divisions.

The fourth book in Pardovan's work advances beyond the *French Discipline* by focusing on the probative aspect of disciplinary process. The prior adoption of the *Form of Process* by the Scottish Church probably accounts for the advancement. Pardovan's *Collections* help explain the *Form of Process* while introducing an organizational distinction between specified errors or scandals and the process used to address such offenses.

We have seen above that evidence of canon law procedure in disciplinary cases predates Pardovan's work. Pardovan's *Collections* confirm the ability of the Scottish Church to appropriate and recontextualize some of canon law concepts within a Reformed polity. This is not a unique dynamic. A recent book dealing with the legal shift during the Lutheran Reformation in Germany provides an interesting study in the dilemma posed to a nation seeking to escape the tyranny of canon law but unable to completely jettison the elements of this massive edifice without avoiding anarchy.[33] Prior to the Reformation, a certain amount of procedural Canon Law involved recontextualized Roman Law (Cf. Fowler-Magerl, *Ordo*.).

Though we have dwelt on Pardovan's work at some length here, it is well to remember that the official guide to the Church of Scotland in disciplinary matters is the *Form of Process* of 1707. A brief consideration of its structure will highlight the special way in which the due process concern emerged in Scottish Presbyterianism after the Glorious Revolution. We noted previously a certain unity among the Scottish, French, and Dutch Reformed Orders in requiring various admonitions and a graded exposure of the offense and offender to the congregation. In each of these orders there is a concern to include the congregation in the judgment of excommunication which concern was also expressed by Luther.

When the *Form of Process* adopted a number of rules concerned with due process, the question arises, what becomes of the old process of admonitions, graded exposure, and tacit judgment by the congregation? This older process assumes the party in question is guilty. The newer process assumes we must first establish guilt by a just process before seeking repentance.

In the nine chapters of the *Form of Process*, the last two have a similar emphases and orientation to the older disciplinary orders. Chapter nine contains an order for absolving those previously excommunicated. Chapter eight contains provisions on how to proceed to the "censure of the greater excommunication." The order of these last two chapters is logical. They presume that the person in view is a proven offender. The Chapter eight, like the older orders, provides a method of confirming obstinacy (not original guilt, which is assumed) en route to excommunication (or the alternative of securing repentance).

Though the provision for gradual exposure is not set forth in the exact terms we saw in the sixteenth century, FP 8.9 specifies that *there should be three public admonitions*.... When these admonitions do not produce the desired result, FP 8.11 indicates that it is the presbytery that is to pass sentence. An appointed minister informs the congregation of this resolution and that the sentence will be pronounced in *the face of the congregation, unless either the party, or some one for him, signify some relevant ground to stop their procedure.* Even on the appointed day, the minister charged with pronouncing the censure, has discretion to suspend the action if the offender gives serious intimation that he is repentant (FP 8.16).

A different emphasis is found in the first seven chapters where the "process" is primarily defined in terms of assessing and weighing guilt. This new emphasis is given an official fixed form in a standard applicable to all judicatories. With the *Form of Process* of 1707, Presbyterian due process was given a definite and fuller form. One anecdote, however, suggests that this *Form of Process* did not eliminate all discretion from judicatories in pursuing the truth in judicial cases.

In 1709, the General Assembly of Scotland entertained a distinguished visitor. Edmund Calamy, one of several descended from the Westminster Divine of the same name, was an honored guest of the Assembly. He provided an interesting insight into a discipline case that was before that body on appeal. A William Law

33. John Witte, Jr., *Law and Protestantism* (Cambridge: University Press, 2002). The book is dedicated to Harold J. Berman who also has published a recent book with a similar subject: *Law and Revolution II* (Cambridge, Mass.: Harvard University Press, 2003).

(or Lawson) appealed the censure of suspension by the Synod of Aberdeen relative to doctrinal matters:

> [Upon] Law's appearing before the Synod of Aberdeen, a committee was appointed to draw up a considerable number of questions on the most noted heads of divinity, to which he was to give a direct answer. His answers were to be taken in writing, and a judgment formed from thence as to his fitness for the ministry. The majority of that Synod was against him; but he appealed to the General Assembly, where the exceptions were read, and also the questions (above one hundred in number), together with his answers. Some of these answers it must be confessed were weak. Others were as proper as would, I believe, have been returned offhand by many whose sufficiency was no way called in question.
>
> The Assembly seemed to be at a loss what to do with this man. The Moderator, stooping down and whispering me in the ear as the questions were read over, asked me what my apprehensions were. I frankly answered that we in England should reckon this way of proceeding, the Inquisition revived; at which he could not help smiling. Lord Forbes who sat on the bench above me, asked what passed between the Moderator [John Currie] and me, at which he smiled. I freely told him, and he immediately fell to laughing. The Lord President, who sat on the bench above him, inquiring what he laughed at, and he giving him an account, joined also in the laugh. At last, the Commissioner, who could not well help observing this, stooped down, and whispered the Lord President of the Session, and asked what was the occasion of all this laughing? Being told, he could not forbear joining. In short, it was whispered from one to another, till it went round the Assembly (*Life* ii.155).[34]

At the time, the Churchmen of Aberdeen were not so amused with Calamy's joke. A later Scotsman, Thomas M'Crie, son of the Knox biographer, also had difficulty with Calamy's jest, regarding it as a jab against the *Form of Process* adopted two years earlier rather than the particular method of proceeding that the Synod of Aberdeen had followed. The question turns on what is being referred to Calamy's words, "this way of proceeding."[35] The *Form of Process* contains no provision requiring a judicatory to compile a great number of doctrinal questions, answers, and exceptions, as the Synod of Aberdeen did at its own discretion.[36] Thus it would appear that the Assembly was amused by the alleged affinities of the Aberdeen process to Inquisition process rather than regarding the remark as critical of their own *Form of Process*. Besides providing comic relief for a hard subject, the incident illustrates several things. First, though the Synod of Aberdeen was bound to follow the *Form of Process*, there were aspects of the case that they may have legitimately viewed as not addressed by the *Form*. In absence of details, they felt free to supplement the guidance given in the *Form* with their own procedure. The Assembly was well aware of what the *Form of Process* contained. Their mirth at Calamy's frank appraisal when contrasted to the unhappiness of the "Aberdonians," suggests that it was indeed the super-added process that appeared Inquisitorial. The confusion of M'Crie—a recognized author of Scottish Church history—is evidence that the disciplinary processes of a church are not always properly understood by some of the best informed church members and officers, particularly with the passage of time.

V. American Presbyterian Discipline and Due Process

In 1706 the first presbytery met in America under the leadership of Francis Makemie. Coming a year before the *Form of Process* was finally adopted in Scotland we may wonder what sort of due process existed in the first presbytery during its early years.

The First American Presbytery And Synod

On the surface, nothing remarkable emerges in answer to the question posed. There is certainly orderly process and seriousness in the meetings, but as far as anything similar to standardized formal disciplinary process that came into the Church of Scotland after the Glorious Revolution, there is little.

In 1707 Samuel Davies' excuses for non attendance at "this and the preceding meeting" of presbytery are not sustained. If the "preceding meeting" was the first

34. John Warrick, *The Moderators of the Church of Scotland 1690 to 1740* (Edinburgh: Oliphant, Anderson, & Ferrier, 1913) 218, 219.

35. Thomas McCrie, *The Story of the Scottish Church* (Glasgow: Bell & Bain, Ltd., n.d.; repr. Free Presbyterian Publications, c.1988) 442. The preface indicates a probable date of 1874 for the issuance. Reprint information is not given but the forward points to 1988 and the dust jacket as Free Presbyterian Publications.

36. Chapter seven deals with ministers. A general rumor or scandal (*fama clamosa*) may require investigation or process per FP 7.3. In FP 7.8 a minister's doctrine is addressed. The Aberdeen procedure is neither forbidden nor suggested. *The Practice of the Free Church of Scotland,* 8th ed. (Edinburgh: Knox Press, 1995) is one modern source for this, cf. appendix, 191,192.

Presbytery meeting (1706), it is an interesting question as to what compelled an excuse. Whatever the solution to this question, there is an orderliness and expectation in place familiar to modern Presbyterians, though nothing that tells us much about how a judicial process should be handled.

By 1710 there is mention of "censure" in the cases of Messrs. David Evans and Walter Kerr. In the former matter, Evans had in his status as a layman, preached to Welsh settlers thereby "Invading ye work of the Ministry…." In the latter case, a Minister asked for advice in dealing with Kerr who had by report "defamed ye Presbry…." He was advised to "act either by private or publick Censure; as ye Nature of ye thing should appear to him, and yt [that] Report thereof be made next Meeting."

From these cases we see supervisory accountability. Further, the fact that Presbytery determines these actions implies possible deliberation before vote and determination. The Kerr case is suggestive of what has been called a "reference for advice" in Presbyterian practice. There is the suggestion of presbytery retaining jurisdiction or at least review jurisdiction in the case. But of a fixed written order uniformly requiring citations, pleadings, witnesses, trials, and so forth, we find none. The precise sense of what the censure is must be gleaned from context. In the case of Evans it seems to be a sort of rebuke that does not preclude him from pursuing licensure.

By 1712 a more serious and demanding case arises in which the probative limits of the early Presbytery come up against a man who denies the charge of bigamy. Van Vleck agrees to a suspension of his ministry while the matter continues to be investigated.[37] This *modus vivendi* relies on no pre-existing rule or precedent. The case continues until 1715 when he is reported to be a fugitive, though letters in the Presbytery letter book from late October of 1712 show the investigation was turning against Van Vleck (Klett, 82–83; cf. 79, September letter). The decision to proceed deliberately in the matter shows a due diligence being exercised without a formal policy in place.

We may conclude that in the time when only a Presbytery existed, a sense of order prevailed but no uniform rules as formally adopted policy. A similar thing can be said for the Synodical period that began in 1717. The language and actions take on a slightly more familiar sound to the modern Presbyterian and there may be more overt influence of the Church of Scotland in the style of the language and proceedings. There is correspondence carried on with [Edmund] Calamy in London and Andrew Sterling in Glasgow. The Americans had an established Presbyterian Church in Scotland for a model, but it is not clear that they tried to follow this model in any slavish fashion.

Early cases falling under the early Synod period include: Van-Dyke (1717, incest [Klett, 32]), Robert Cross (1720, fornication), John Clement (1721, interim suspension [p 45] and subsequent discovery of serious sins of violence and drunkenness [49]).

By 1722 the Synod toyed with a more formalized Act "for the better carrying on in the Matters of our Government and Discipline, …" (51). The same year, Synod expresses serious reservations about what may be summarized as due process lapses (e.g. the right to confront accusations/evidences) in the treatment of John Walton by the Presbytery of Maidenhead; yet Mr. Walton's deportment toward the presbytery wins him little support before the Synod (54, 55). Also the same year Henry Hook is dealt with in a manner that would be familiar to modern Presbyterians. In a very deliberative manner, some charges are dismissed, some sustained, and the degree of censure is debated. A choice between definite and indefinite suspension appears despite no formal rule or policy setting forth degrees of censure or types of suspension (56). Subsequently the Synod returned to dealing with the possibility of an Act that might regulate Government and Discipline. This created a controversy. Judging from the composure of differences that ensued, it seems that a universal policy was not to be more than advisory for all judicatories. The right of judicatories to decline from the use of "directories" upon what they may think good cause, was agreed upon (57).

In the 1758 Plan of Reunion, the first article mentions adhering to "the Plan of Worship, Government, and Discipline, contained in the Westminster Directory;…" (p. 341). Further, in article five it mentions "our known Rules of Judicial Tryal in Cases of Scandal." These "known rules" are not specifically referenced and may be assumed to be procedures followed by custom. Most particularly, this provision may reference the need to follow an orderly course in addressing perceived ills rather than to publishing sermons in which the Christian profession of others is called into question. Gilbert Tennent's sermon on an unconverted ministry was part of the backdrop for division and reunion. As early as 1743 an overture from the Presbytery of New York set forth a simple policy if ministers had a "Matter of

37. Guy S. Klett, ed., *Minutes of the Presbyterian Church in America 1706–1788* (Philadelphia: Presbyterian Historical Society, 1976) 14.

Complaint." This amounted to little more than following private conference with an offender before filing more formal complaint.[38]

One curious case took place in 1763 in which John Ewing files a protest because of inadequate witnesses being allowed to adversely affect the reputation of a church officer. He cites such secular authorities as Justinian, Grotius, and Puffendorf as well as reputable divines as persuasive authorities against the action that was taken or allowed. He further mentions that the woman who was at the heart of the alleged incident could not be a witness since she was not "disinterested in the Issue of the Cause." He adds that "our church Rules also require that Witnesses swear themselves free of Bribery, malice, & party council…" (Klett, 387). The specificity of this statement is of interest. *Form of Process* 2.11 states that, "Though there be no relevant objection, yet the witnesses are solemnly to be purged of malice, bribe, good deed done or to be done, and of partial counsel."

Ewing clearly is paraphrasing the *Form of Process* and/or Pardovan[39] at this point in his protest. This paraphrase is referred to as "our church Rules." Despite the absence of an earlier Act that specifically references these rules, Ewing's protest suggests that the Scottish rules were known and afforded some special dignity.

In 1770 a presbytery in South Carolina sends a query to the Synod "signifying their desire to unite with this Synod and asking the conditions on which it may be obtained." They are informed that ministers must adopt the Westminster doctrinal standards and "the directory as the plan of your worship and discipline." While the Church of Scotland is set forth as the pattern, the Synod states that

> …we have not as yet expressly adopted by resolution of our Synod or bound ourselves to any other Standing laws of forms of the Church of Scotland than these above mentioned intending to lay down such rules for ourselves upon Presbyterian principles in general as circumstances should from time to time shew to be expedient (Klett, 477, 478).

The terminology used in cases mentioned within the minutes edited by Guy Klett does not have frequent reference to libels or a *fama clamosa*. In a case arising in 1769, an Alexander Miller appeals his deposition from the ministry and speaks of the presbytery publishing and ordering "a libel to be publickly read against me" (Klett, 562). If this is speaking of formal charges (*libellus accusationis*) rather than a defamatory libel, it is still the language of an individual rather than the usual language of the recording clerk. The minutes generally speak of charges, accusations, or complaints when speaking of the initial action that sets a disciplinary process in motion. In 1786, we find the term *fama clamosa* used to describe an expedient by which the Dutch Churches or Presbyterian judicatories might be able to bring cases up for judicial consideration when no accuser prosecutes "in their own name *Cum periculo*" (606). When American Presbyterianism adopted its own *Forms of Process* in 1789, the same notion was provided for but called "common fame."[40] Perhaps a more thorough perusal of sessional and presbyterial records would uncover greater usage of the Scottish terms of art. The point to be observed is that on a denomination wide level, Colonial Presbyterians had their own favored terms and usages for discipline though in concept these were little different from the Scottish principles. When the time came to formally adopt standards for government, discipline and worship at a denominational level, the Scottish model was consulted and used as shall be seen presently.

In 1786, in response to a query from the Dutch Reformed Church, the American Presbyterian Synod of New York and Philadelphia stated which formulas they looked to as statements of their doctrine, worship, and discipline. The Synod referred to the *Westminster Confession* as well as "the directory for public worship & form of Church government recommended by the Westminster Assembly as in substance agreeable to the Institutions of the New Testament." Further, the Synod added,

> The Rules of our discipline, & the form of process in our Church Judicatures are contained in Pardovan's (alias Stewarts) collections, in conjunction with the Acts of our own Synod, the power of which we consider as equal to the power of any Synod or general Assembly in the world (Klett, *Minutes*, 604).

38. Klett, *Minutes*, 182–183. The overture failed and a further proposal was offered at the same meeting (184–185) with the same basic policy in handling offenses (point 7) which was refused by the estranged parties.

39. Cf. *Compendium*, 1.421 [IV.III.16]. Only the first edition of Pardovan (1709) which lacked the full appended *Form of Process* would have been available at this time.

40. A draft revision in 1819 makes more frequent use of *fama clamosa*. Cf. *Report of the Committee of the General Assembly appointed for Revising the Form of Government and the Forms of Process* (Philadelphia: Thomas and William Bradford, 1819) 22–23. This term was edited out of the finished 1821 revision. The text of the standards for various years is normally found under the title, *The Constitution of the Presbyterian Church in the United States of America*. The first edition containing the 1821 revisions is that by Anthony Finley (Philadelphia, 1821).

The question may be raised what is the specific object of, "contained in Pardovan's collections?" If the *Form of Process* of 1707 is distinctly being referred to, then the earliest edition of Pardovan where the *Form* is distinctly appended is the 1770 edition. The *Form* is only present in the 1709 edition as elements are mixed in with Pardovan's structure and commentary. It may also be that "form of process" in conjunction with "rules of our discipline" is being used in a generic sense and that no specific grouping of rules is in view. In any event, there is little prior evidence that the Synod had a formal constitutional commitment to specific disciplinary canons analogous to the Church of Scotland's adoption of the *Form of Process*.

More specifically, there is evidence that an entire presbytery was ready to withdraw from the Presbyterian Church when a formal constitution defining the government, discipline, and worship was about to be approved in 1788. The Presbytery of Suffolk, through the Church's committee, was persuaded to withdraw its petition of dismission (Klett, 633, 644).

Rules For Discipline in 1788 and 1821

The American Presbyterian Church may be said to have begun *de facto* in 1706 with the organization of a general or classical presbytery. In 1788 the Church acquired a firm *de jure* governmental status with the official adoption of a constitution for government and discipline. Prior to this time it may be said that they possessed a specific doctrinal constitution from 1729 and a general commitment to Presbyterian government defined by various Acts of their synods and the common understanding of substantially like-minded people who had associated through their judicatories. The 1786 query from the Dutch Reformed Church coincided with a decision to become more specifically committed to fixed polity canons.

In 1789, when the first General assembly met, the constitutional rules pertaining to discipline were very meager. Two chapters, forming a kind of appendix to the *Form of Government* were called, "*Forms of Process*." Apart from the plural "forms," this set of canons has some obvious connection to the Scottish *Form of Process* of 1707.[41] Yet it is extremely brief by comparison. There is nothing said about appeals. Categorized rules and suggestions for dealing with special cases like fornication or adultery are omitted. It seems that the 1789 disciplinary canons were focused on rules for formal discipline at the beginning of processes and avoided legislation on various extenuating circumstances. It was not a comprehensive formula. Appeals continued in the life of the new Church denomination, even though no specific provision was made in the canons under the *Forms of Process*. A kind of customary or common law still would guide the church in this respect.[42] Further, the legitimacy of appeals was implicit in the formal Presbyterian structure set forth in the *Form of Government*.

The term "libel" is not used in the 1789 *Forms of Process*. It speaks of "accusation" and "complaint or information." It states that in an accusation, "the times, places, and circumstances should be ascertained, if possible; that the accused may have an opportunity to prove an alibi…." This seems to contain the libel concept in substance but also in a more explanatory fashion. Eventually the *Book of Discipline* would articulate this in terms of charges and specifications where specifications are the factual assertions of the "legal syllogism." The language has changed but the libel concept is retained in substance.[43]

The *Forms of Process* were not the only part of the new canons where policy was set forth on disciplinary matters. Though the *Directory for Worship* was dealt with somewhat separately from the polity canons, it contained a chapter on the "Mode of Inflicting Censures." The logic for placing this chapter in the worship canons appears to have elements in common with the 1569 *Form* adopted in Scotland as a further guide to its 1560 *Book of Discipline*. Disciplinary actions taken within the privacy of a judicatory occasionally need to be shared in some fashion with the Congregation. Thus some liturgical guidance is given to decide what to say to the congregation, when it should be said, prayers to be offered, etc. It seems this chapter of the *Directory* contributed to delay in the production of a finalized *Directory*. On close inspection, some of the canons falling within the *Directory for Worship*, help define disciplinary policy. As such, some of the rules might just as easily have been placed within the *Forms*

41. The plural might have been used since the process for ministers is considered distinct from the process of other church members.

42. The 1821 revision of the *Book of Discipline* would remedy this omission. The Scottish Church would again function as a model with a considerable amount of material from Principal George Hill's work forming the basis for church law on Review and Control, Appeals. Complaints, and References.

43. Cf. *The Case Against Professor Briggs,* 2 vols. (New York: Scribners, 1893) 1.25–26. Briggs criticizes the form of charge against him by recourse to authoritative Scottish definitions of a libel. This was a few years after the 1884 *Book of Discipline* revision. The prosecuting committee was allowed to reframe charges as long as the substance of the case was not changed (1.171).

of Process. Of particular interest is the following canon on the 1787 "draught":

> The Minister shall, after the advice of the Presbytery has been obtained, at least two Lord's days before the excommunication, give the congregation a short narrative of the several steps which have been taken with the scandalous and obstinate brother, and inform them, that it has been found necessary to resolve to cut him off from their communion….[44]

This provision survived in substance (as Chapter X, Section VII) when a later draft more conformable to the desires of the Church was produced. The explicit requirement of advice from Presbytery would later be dropped from the *Directory* (at least by 1839, at which time a more ample and revised *Book of Discipline* governed disciplinary processes. "Advise and consent" of Presbytery for restoring the person was still in place at this time, however).

In the rule requiring sharing of information with the congregation, we see a relic of the sixteenth century rule which involved the congregation in the discipline of offenders. The manner of announcement could mean that the censure is a *fait accompli*. Conversely, the two Lord' day notice may imply that the matter is not a *fait accompli* and that further information from the congregation (or a responsive offender) might affect the final disposition of the censure. In any case, the advance notice guarantees the dissemination of knowledge of the censure so the members may respond appropriately to the one who is cut off.

On balance, the announcement probably should be seen as evidence that the excommunication is not a *fait accompli*. First, the rule in the *Directory for Worship* is concerned as much with how to engage the congregation as with policy. Second, the peculiar wording of the early draft of the rule speaks of "necessary to resolve to cut him off." This wording unnecessarily includes the words "to resolve" if a *fait accompli* is in view. Thirdly, the precedent of the Scottish *Form of Process* is arguably a larger context for interpreting this rule. If a major departure from the Scottish rule was in view, this could easily have been accomplished by making the further announcements after the excommunication has been pronounced or by specifying the singular reason for the advance announcement.

At the same time, the American policy has no order for progressive exposure of the offense and offender nor three specific public admonitions with the announcements. If the purpose of the announcement was implied and understood as allowing for a last minute objection or reprieve, it was not specifically enough stated to guard against later uncertainty about the full purposes of the announcement.

Functionally, the congregation's "need to know" place in the process and ability to interpose new information or objections does not require a policy exactly modeled after the one we noted that was followed in the sixteenth century policy. The censure of suspension may precede excommunication and may be announced to the congregation.[45] The objectives of the sixteenth century policy may also be ensured by making the formal trial a matter of public record and allowing trials to be held with open doors as much as practicable.[46] A trial that is open to the public is itself a recognized due process element that has parallels to Luther's concern to engage the congregation in a disciplinary judgment. The sixteenth century policy seems to have been animated by a combination of concern with Episcopal and Papal unilateralism in excommunication and the desire to apply the Matthew 18 provision of telling the matter "to the church." Exegetically, some Presbyterians have regarded the word "church" as potentially referring to the assembly of church governors rather than the congregation.[47] Even if this is an overly restrictive exegesis, the Presbyterian practice of due process is not irreconcilable with engagement of the congregation.

44. *Draught of the Form of Government and Discipline* of the Presbyterian Church in the United States of America (New York: S. and J. Loudon, 1787) 94. The previous printed draft in 1786 did not include a *Directory for Worship*. The 1786 and 1787 provisional drafts and the 1789 constitution are available in microfische from American Imprints (Evans 19935, 20658, 22079). Major revisions to the disciplinary rules of the *Forms of Process* (*Book of Discipline*) followed in 1821, 1884, and 1934. No attempt has been made here to pinpoint the time of the minor changes in the *Directory of Worship*. It is generally wise to examine the *Directory* for changes at the appropriate place whenever a revision to the *Book of Discipline* has taken place.

45. There is a discretionary element here since suspension does not have to precede full excommunication. The distinction between definite and indefinite suspension is also a discretionary factor which may affect the decision whether to announce the censure to the congregation. These are factors that have caused American Presbyterianism to develop some uniqueness with respect to official congregational involvement in the process.

46. In the 1789 *Forms of Process* I.9 it was specified that a "trial shall be *open*, fair, and impartial." The word "open," though included in an 1819 draft revision, was omitted in the 1821 revision (apparently without prejudice to the normality of an open trial). A later revision stipulated that the doors of a trial might be closed with a two thirds vote. A later attempt to mandate closed door trials failed to get in the 1934 revision. J. Gresham Machen, seemingly prescient of his future, denounced the idea of star-chamber tribunals in *Christianity Today* (December 1931) 6–7.

47. James Bannerman, *The Church of Christ,* 2 vols. (1869; repr.

From a strictly practical view point, some level of congregational engagement is required if they are, in good faith, to regard and treat the one excommunicated as a Gentile and tax collector.

Only a brief note on the 1821 American Presbyterian *Book of Discipline* is necessary to complete our sketch of due process in Presbyterianism. A comparison of the 1707 Scottish *Form of Process* and the 1789 American *Forms of Process* should suffice to demonstrate that American Presbyterians eventually looked back to their Scottish roots to find material for a fixed constitutional policy in probative discipline that would bind all judicatories. The 1821 *Book of Discipline* essentially supplied the 1789 rules with additional guidance in appeals, complaints and other matters. A comparison of the new material in the 1821 *Book of Discipline* with material published by Scots polity expert George Hill, demonstrates that conceptually, the new material was also taken in large part from the Church of Scotland.[48] There was debate prior to the revised *Book of Discipline* in 1884 that argued for the removal of some of this material on the following basis:

> This Section, so far as it is true, belongs rather to a treatise on Church Government than to a Book of Discipline. In fact, it is extracted almost verbatim from such a treatise (Hill's Theological Institutes [insertion original]); it never formed a part, as many suppose it does, of any law book of the Church of Scotland.[49]

The material objected to was a preface, but in fact much of the material beyond the preface dealing with General Review and Control, References, Appeals, and Complaints was very similar to Hill's treatment and in concept is quite arguably reflective of the practice of the Church of Scotland.

Concluding Thoughts

From the sketch presented, the American Presbyterian focus on a fixed and generally binding set of rules to ensure due process in the prosecution of formal discipline has its clearest precedent in the 1707 *Form of Process* in the Church of Scotland. In the nature of the case, this precedent did not formally exist when the first presbytery was formed in 1706. When the urge to provide a more uniform rule of due process took root, however, it was to the Scottish Church that American Presbyterianism looked for its model.

The Church of Scotland, to the degree she was the mother church of American Presbyterians, was a mother in search of her own direction after being reestablished in 1690. Though having a sixteen year head start in getting her policies together, the settlement on a uniform standard for formal discipline was something that did not happen overnight. Scotland had some legal talent among her ruling elders after the Glorious Revolution, but coming to agreement on a general disciplinary standard for the church still did not occur until 1707. What the reestablished Church of Scotland had available for precedents in Knox, Melville, and Westminster, the Americans also had available. But these standards offered little in the area of a direct policy on how to do formal discipline.

That 1707 is a key date for Presbyterian due process taking on a fixed and generally binding form we think has been shown. The question that remains is what developments caused it to take place at this time. That is beyond our ability to pursue further but is worthy of study. One factor in considering such a study is the curious relationship that existed between Church and State after the Reformation. Rather than having the Church try heretics and then turn them over to the severities of state justice as did the Romanists, the State sometimes undertook such prosecutions. Calvin's prosecution of Servetus was conducted under due process protections afforded by civil customs and laws. In an environment where the civil magistrate assumed responsibility for prosecuting crimes that today are primarily offenses against the Church, it may be that the urgency for due process rules in ecclesiastical discipline was retarded. In Knox's *First Book of Discipline* (cf. seventh head),[50] the

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Cherry Hill, N.J.: Mack Publishing Company, 1971) 2:311. This question is subsumed under the larger question of which bodies possess church power in the government of the church. Very generally, it may be said that Bannerman favors a view of balance between judicatories and the congregation, cf. 1.262–275. The target of Bannerman's concern is Independent congregationalism rather than continental reformed polity, though his comments may be applicable to the latter in some cases.

48. Cf. Samuel Miller Class Lectures of 1815, Princeton Theological Seminary Archives. Box 3, file 12 (April 10th lecture). The title in the finding aid is "3.12 Church Government, Appeals, Complaints (April 10, 1815). See "Samuel Miller Manuscript Collection: A Finding Aid (Index)," *The Confessional Presbyterian* (2005) 1.31. It appears that Miller took Hill's material up in his lectures to students and the same material was later incorporated into the 1821 Book of Discipline.

49. E.R. Craven, "III. The Revised Book of Discipline," *The Presbyterian Review* 4 (January 1883) 58. The material in view is found in the same *Compendium* containing Pardovan's work (1.459–494, esp. 478–482).

50. David Laing, ed., *The Works of John Knox* (Edinburgh: James Thin for The Wodrow Society; repr., New York: AMS Press, 1966) 2.227. Cf. William Croft Dickinson, 2.306.