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# Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof

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# Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof

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RICHARD M. FRAHER

One bright, sunny day in northern Italy, let us say in Bologna in the year 1275, a group of law students might have sat and listened to this case. A man named Seius slipped into a shed owned by his sworn enemy, Titius. A priest, a wealthy merchant, and a physician, all of them unimpeachable witnesses, saw Seius enter the shed with his sword drawn. A moment later they heard a man cry out. Then they clearly saw Seius, shaken and pallid, emerge through the doorway, bloody sword in hand. When Seius noticed the witnesses coming toward him, he fled. The witnesses found Titius in the shed, unconscious, dying from a sword wound. Upon investigation, the *podestà*, the magistrate charged with criminal investigations, discovered that Seius had recently sworn that he would kill Titius, and further, that everyone in town believed that he was guilty. The *podestà* ordered his arrest and, after a manhunt, Seius was captured before he could slip across the border to the neighboring city-state.

If a similar case had occurred in twentieth-century America, the rest of the story would be simple to tell. Seius would be charged with murdering Titius. The prosecutor would use circumstantial evidence to establish that Seius had the motive, the means, and the opportunity to kill Titius, and that nobody else could have done it. Even with no eyewitnesses, we would not find it remarkable if a jury found Seius guilty. To the modern western mind, proof beyond a reasonable doubt is readily seen as the product of inferences drawn from circumstantial evidence.

But in thirteenth-century Europe, it is not so clear that Seius could

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have been convicted. In fact, the crime committed without eyewitnesses was the paradigmatic “hard case” in thirteenth-century criminal procedure: no matter how obvious the circumstantial evidence, a defendant was not supposed to be convicted without proof “as clear as the light of day.”<sup>1</sup> Traditionally, this meant proof by the testimony of two unimpeachable eyewitnesses.

In the “good old days,” prior to the Church’s abolition of proof by ordeal, any doubts about the case against Seius could have been resolved by invoking divine judgment through an ordeal by hot iron or water.<sup>2</sup> But the Fourth Lateran Council in 1215 banned ordeals, creating a problem for anyone who wanted to see suspects such as Seius punished,<sup>3</sup> for the law of proof as taught in the faculties of civil and canon law was demanding and unyielding. Under its rules, only two forms of evidence could provide proof “as clear as the light of day”: uncontradicted testimony from two eyewitnesses, or confession by the accused.<sup>4</sup> Moreover, the *ius commune* insisted that a judge adhere strictly to the rules of law and acquit a suspect if the proof were imperfect: “the judge must decide according to the allegations and the laws, not according to his conscience.”<sup>5</sup> These rules, protecting criminal defendants from precipitous convictions, were justified by the statement that “it is better to let the guilty go unpunished than to punish the innocent.”<sup>6</sup>

Given these strict standards of proof, the legal system faced three alternatives when confronted with cases such as the murder of Titius. One alternative would have been acquittal. But this solution would not have produced a workable system of criminal law in any age, and it clashed with the wellspring of thirteenth-century criminal jurisprudence: “it is a matter of public interest that crimes not go unpunished.”<sup>7</sup> A second alternative would have permitted the judges to use torture to induce a confession. Indeed, one legal historian has suggested that the creation of a law of torture was precisely the scholastic jurists’ response to the abolition of the ordeal,<sup>8</sup> but this article will demonstrate that torture could not have been the whole story of how thirteenth-century Europe responded to the abolition of ordeals. There was a third alternative open to the medieval lawyers, and this was to develop more flexible rules of proof than the unworkable laws preserved in the learned tomes of Roman and canon law.

Experimentation with legal innovation came hard to a profoundly conservative profession, but medieval jurists were capable of adaptation. In this instance, their task was to articulate a standard of proof that would respect deeply seated notions of due process of law, while allowing the inquisitorial judge enough discretion to convict Seius, the obviously guilty defendant.

### Thirteenth-Century Procedural Treatises: The Key to the Puzzle

The thirteenth century was a watershed in the history of European criminal law. The pontificate of Innocent III (1198–1215) featured two innovations that reshaped criminal procedure throughout Christendom: the abandonment of trial by ordeal<sup>9</sup> and the adoption of inquisitorial procedures.<sup>10</sup> The ban on judicial ordeals committed the scholastic jurists and the courts, both ecclesiastical and secular, to reworking the law of proof.<sup>11</sup> The adoption of *ex officio* inquisitorial procedures, alongside or in place of the traditional accusatorial process, shifted the initiative from private plaintiffs to public magistrates, permitting both the Church and the secular states to launch public campaigns against crime.<sup>12</sup> These sweeping changes in criminal procedure and in the administration of justice were matched by a massive outpouring of scholastic commentary on criminal law and procedure.

Ironically, despite the fundamental importance of thirteenth-century developments, the 1200s have attracted comparatively little attention in the current wave of scholarship in criminal justice history.<sup>13</sup> Surviving archival records concerning the operation of criminal courts are sparse for the thirteenth-century, so there is an insufficient basis for statistical studies, even small-scale ones aimed at outlining the social history of crime prior to 1300.<sup>14</sup> In addition, the lush profusion of thirteenth-century scholastic jurisprudence concerning crime and criminal procedure remains only marginally accessible.

It is relatively easy for an historian to consult the great milestones of thirteenth-century proceduralist writing, and thus reconstruct the broad outline of the era's criminal law and procedure.<sup>15</sup> Tancred's *Ordo iudiciarius*, composed between about 1209 and 1215,<sup>16</sup> is a comprehensive picture of canonical procedure early in the 1200s and is available in an excellent modern edition.<sup>17</sup> The classic proceduralist handbook, which remained in use from the 1270s until the early modern era, was William Durant's *Speculum iudiciale*.<sup>18</sup> Originally published around 1270 and subsequently revised by the author, the *Speculum* received updates with commentaries by the great canonist Joannes Andreae and the eminent jurist Baldus de Ubaldis (+1400).<sup>19</sup> It was a favorite of publishing houses in the early decades of print and is available in a modern reprint.<sup>20</sup> Finally, there is Albertus Gandinus's *Tractatus de maleficiis* (*Treatise on Crimes*), which went through multiple versions before the author completed his last revisions at Siena in 1299. Gandinus's work, like the *Speculum iudiciale*, attained instant celebrity and remained influential into the modern era, when it was displaced

by sixteenth-century authors. The *Treatise on Crimes* is available in a first-rate modern edition by Herman Kantorowicz.<sup>21</sup>

But the relative accessibility of Durantis and Gandinus creates an almost overwhelming temptation for the scholar to read the *Speculum iudiciale* and the *Tractatus de maleficiis* as the final word on thirteenth-century criminal jurisprudence. The cost of relying exclusively on Durantis and Gandinus is that we ignore the intellectual ferment, the academic debates, the confrontation of conflicting opinions and values that lie beneath the surface of the two works. Neither Durantis nor Gandinus pretended to be an original scholar. They both borrowed juristic bits and pieces from their predecessors, smoothing over many of the conflicts among their sources.

Durantis had taught canon law at Modena and perhaps Bologna, but composed the *Speculum iudiciale* while he served as an appellate judge in the papal courts at Rome. He clearly intended the work to serve as a comprehensive handbook for judges and practitioners rather than as a piece of scholarly creativity or disputation.<sup>22</sup> There was nothing original in the *Speculum iudiciale*, nor was there supposed to be: Durantis simply digested the proceduralist lore of his predecessors and contemporaries, “down to the last comma.”<sup>23</sup> The same is true of the *Tractatus de maleficiis*, despite Kantorowicz’s dogged insistence that Gandinus composed the first European treatise on criminal law.<sup>24</sup> In reality, treatises on criminal law appeared as early as Tancred’s *Summula de criminibus*, dated about 1209, and the surviving manuscripts of the text that Kantorowicz regarded as the first recension of the *Tractatus de maleficiis* suggest that Gandinus’s work consists of an expansion upon an earlier and much shorter treatise by a Bolognese professor of civil law.<sup>25</sup>

Much suggests that Gandinus, like Durantis, simply created a digest of the current criminal law, basing it on pre-existing treatises on crimes, judicial torture, public fame, and a huge number of so-called *quaestiones disputatae*. These “disputed questions” were routine academic exercises, in which the Bolognese professors argued fine points of legal theory or its practical application. Gandinus, who was never a law professor, availed himself of the written accounts of these juristic disputes, sometimes citing his sources by name and sometimes not.<sup>26</sup> Like any practical handbook, however, and unlike classroom reports of *quaestiones*, the *Tractatus de maleficiis* recited these questions to provide the reader with the *correct* answer, not merely to acquaint him with all the dissenting opinions of the academics.

The synthetic works of Durantis and Gandinus present a misleading image of neatly fitted bits and pieces pulled together from disparate

but harmonious sources. Hence, our reliance on Durantis and Gandinus, and our hesitancy to plunge into the confused mass of manuscripts and lesser printed works that recorded the day-to-day disputes of the Bolognese masters deprive us of the divergent and contradicting theories that were debated by mainstream juristic opinion amid the rapid development of criminal law and procedure in the thirteenth century. A glimpse behind Durantis and Gandinus can tell us not only what the competing alternatives were, but, in some cases, why the scholarly consensus swung one way or the other.

The law of proof is a particularly interesting subject for this kind of enquiry, because the period that lies between the abandonment of proof by ordeal in 1215 and the publication of the *Speculum iudiciale* around 1270 was a time of major adjustment. The standard account is that the Church's ban on ordeals led the courts to adopt an alternative law of proof from the learned legal traditions as expressed in the *Speculum iudiciale*. But the rule governing proof in criminal cases was almost impossibly stringent: a criminal defendant could not be convicted without direct testimony from two eyewitnesses or a confession.

According to present-day opinion, the *ius commune's* standard for proof was adopted precisely because its stringency precluded any exercise of human discretion. John Langbein has argued that it was impossible for thirteenth-century people to accept human judgment in place of divine. Hence, the "overwhelming emphasis [in the law of proof] is upon the elimination of judicial discretion."<sup>27</sup> The *Speculum iudiciale* and all of the subsequent proceduralist literature suggests that medieval jurists were concerned about restraining discretion, but that the decision to do so was not easy. There was spirited debate, some jurists arguing for greater discretion as a means of promoting efficient punishment, others insisting upon strict adherence to the two-witness rule, and while the more traditional jurists might have gained the upper hand in the law schools, the efficiency-oriented reformers influenced the shape of Italian criminal statutes during the thirteenth and fourteenth centuries. That the debate took place at all challenges the assumption that people in medieval Europe were so steeped in traditional, magico-religious views of the world that they could not accept human judgment in criminal cases.

This article examines the works and ideas of a relatively unknown Bolognese professor of Roman law, Thomas de Piperata, whose *Tractatus de fama* was one among the many obscure thirteenth-century writings used by Albertus Gandinus. Few details are known about Thomas's life and work except for this treatise, but a close reading of the *Tractatus* makes it clear that it contains a theory of proof that

departed from the *ius commune*'s rule that required the testimony of two eyewitnesses or confession for conviction. Instead, Thomas proposed two alternate theories under which a magistrate could convict a defendant without the "full" or "legitimate" proof required in civil and canon law. First, there was statutory discretion (*arbitrium*), which empowered an urban magistrate to convict on the basis of proof that would have been insufficient under the *ius commune*. Second, even under Roman law, if the circumstantial evidence proved a defendant's guilt to a certainty, the judge could convict on the basis of the "undoubted *indicia*."

Thomas's treatise is not the only evidence of a long-lived scholastic debate concerning discretion and proof in the criminal process. The works of Albertus Gandinus, of the canonists William Durantis, Joannes Andreae, and Hostiensis, of the great civilian Bartolus, and of the fifteenth-century criminalist, Angelus Aretinus express a persistent, lively debate. These works, and Thomas de Piperata's *quaestiones disputatae* prove that the social and political context of the medieval Italian city-state encouraged the jurists to rely upon human judgment to resolve difficult cases.

Thomas's willingness to circumvent the strictness of the learned law of proof suggests that historians have long misunderstood medieval attitudes toward human discretion in the criminal process. The scholastic jurists articulated a stringent law of proof that restricted judicial discretion because they perceived palpable incentives for judges to abuse discretion in a criminal justice system that included few means of restraint. It is true that many jurists ultimately rejected Thomas de Piperata's theory that the *ius commune* permitted a judge to convict on the basis of circumstantial evidence, but they did so out of respect for the rule of law and not out of some irrational belief in human incapacity. In statutory law, where the jurists felt free to depart from the strictures of Roman law and the sacred canons of the early Church, scholastic jurisprudence recognized that magistrates routinely exercised broad discretionary power over the criminal process. Although mainstream jurists were disturbed at the erosion of due process, they agreed that the magistrate's statutory *arbitrium* extended to convicting defendants on the basis of evidence that was not full or legitimate proof in the *ius commune*.

We need to reformulate our notion of the shift in the law of proof that resulted from the abolition of ordeals in 1215. The decrees of the Fourth Lateran Council did not precipitate a psychological crisis that led thirteenth-century jurists to concoct an impossible standard of proof as a prophylactic against the exercise of human judgment.<sup>28</sup> The

difficulties of the two-witness rule were known at least a half-century before 1215, when some twelfth-century canonists tried to circumvent it to secure convictions without resorting to ordeal.<sup>29</sup> Using torture was one way to conform with the law of proof while producing a high rate of convictions; but every jurist knew that torture represented a dangerous investigative device, one that produced confessions regardless of the guilt or innocence of the accused. This reversed the traditional principle that “it is better to spare the guilty than to condemn the innocent.”<sup>30</sup> Thus, when the abolition of ordeals forced the courts and the jurists to fall back upon the Roman standard of proof, canonists, civil jurists, and communal legislators alike responded by trying to give the magistrate *more* latitude, not less. The canonists invented a whole new category of procedure based upon the notoriety of a crime, which was proved “by the very evidence of the thing.”<sup>31</sup> A minority of civil jurists followed Thomas de Piperata’s suggestion that a full proof could arise out of overwhelming circumstantial evidence, and many Italian statutes granted magistrates broad power to punish defendants without the full proof of Roman law.

Yet, there remained a dilemma that medieval jurists were unable to resolve. In an age that did not see individual rights as a pervasive check upon the powers of the state, the fairness of the legal process was guaranteed primarily by the “solemnities of the law.”<sup>32</sup> These “solemnities” consisted of time-honored principles that ostensibly guaranteed that the legal process would be an even playing field, declining “neither to the left nor to the right.”<sup>33</sup> But every concession that increased the inquisitorial judge’s discretion to prosecute crimes constituted an erosion of the rules of due process. If the jurists stubbornly defended the traditional rule of proof, and if many of them begrudged every marginal concession made in the interest of efficient prosecution and punishment, they did so out of reverence for the ancient solemnities of the law and awareness of the deeper values at stake—not out of abject fear of human judgment.

### **Thomas de Piperata: The Career of a Minor Thirteenth-Century Jurist**

The details of Thomas de Piperata’s life and career were quickly forgotten, even within the university at Bologna, where local lore about individual professors seems to have been handed down from master to student along with the curricular materials.<sup>34</sup> Within a century of Thomas’s death, the great Bartolus of Saxoferrato quoted at length and



with approval from Thomas's *Tractatus de fama* but referred to the author as "a certain Thomas de Piperata," suggesting that Thomas's fame had already faded.<sup>35</sup> By the sixteenth century, the antiquarian Diplovatatus, who preserved a large part of the medieval tradition concerning the Bolognese doctors of law, knew only that Thomas de Piperata had taught contemporaneously with Rolandinus de Romanciis sometime between 1256 and 1288.<sup>36</sup> In contrast, while the memory of Thomas faded away, his most significant scholarly work, the *Tractatus de fama*, circulated widely in manuscript, and remained at the center of a lively juristic debate concerning the problem of proof in criminal cases.<sup>37</sup> The explanation for this anomaly lies in a series of political events that abruptly terminated Thomas's academic career.

Unlike many of his more illustrious colleagues on the faculty of law, Thomas de Piperata was a native Bolognese. Foreign-born scholars, along with the entire corporate entity of the university, could decamp from Bologna during periods of war, pestilence, town-gown violence, or political strife.<sup>38</sup> For Thomas and the other native-born Bolognese professors, however, war and political strife were inescapable.

Bologna's leading families, like those of many thirteenth-century Italian communes, divided themselves into hostile factions vaguely affiliated with the Guelph and Ghibelline parties of the conflict between Pope and emperor.<sup>39</sup> This meant that even in the course of ordinary public business, the threat of civil discord ran just below the surface. In 1269, Thomas de Piperata and three other doctors of law gave expert opinions on a contract between Bologna and a Florentine coin-maker named Bitto de Tornaquincis.<sup>40</sup> The contract (for minting Bolognese money) specifically indemnified Bitto against any losses that might result from political strife in Bologna.<sup>41</sup> Thomas's entire adult life bore the imprint of the rivalry between Guelphs, led by the pre-eminent Geremei, and Ghibellines, led by the equally eminent Lambertazzi. Thomas's family, a politically powerful clan named Storlicti, had historically aligned itself with the Ghibellines. Thomas reaffirmed the existing arrangement of family status and loyalty when he married Bartolomea Lambertazzi in 1271.<sup>42</sup>

During his career as a jurist, Thomas was publicly identified with the Lambertazzi and their political fortunes. He first appeared as a professor of civil law in the Bolognese archives for the year 1265,<sup>43</sup> and at least one Bolognese chronicler would place Thomas's first steps toward public prominence after an outburst of civil strife in 1264, which was sparked by an illicit affair between Bonifacius Geremei and Imelda Lambertazzi.<sup>44</sup>

Whether or not there is any historical truth to this Romeo and Juliet

tale, the animosity between Bolognese Guelphs and Ghibellines was fueled by the commune's policy of allying Bologna with Guelph city-states and cooperating with Guelph factions in exile from Ghibelline-controlled communes such as Modena.<sup>45</sup> Thomas was drawn directly into the fray in 1272, when Bolognese foreign policy faced conflicting loyalties. The Guelphs, led by the Geremei, demanded that Bologna go to war against the Ghibelline faction that had seized the commune of Forli, rebelling against Bolognese sovereignty. The Ghibellines, led by the Lambertazzi, insisted that the commune should go to war against Modena, which had violated the terms of its alliance with Bologna by providing sanctuary to the Guelphs who had been expelled during the coup at Forli. The Geremei held the greater political power, but the Lambertazzi raised a legal objection, questioning the limits of the government's constitutional power to use force against subject states that broke their oaths.<sup>46</sup> Bologna's communal magistrates consulted four professors of law: Albertus Odofredus and Rolandinus de Romanciiis from the Geremei group, and Thomas de Piperata and Bonromaeus Duliolus from the Lambertazzi faction.<sup>47</sup> The jurists provided a plethora of legal arguments but no resolution: a clear legal decision would not have resolved the political impasse.

In 1273, the Guelph faction led Bologna to war with Forli despite the unresolved objections of the Ghibellines. The Lambertazzi faced the unpalatable choice of rendering cavalry service themselves, or of paying substitutes to fight against their political compatriots,<sup>48</sup> for failure to support one's commune in war was treason. To complicate an already vexed situation, the initial Bolognese campaign did not subdue the Ghibellines who controlled Forli, making the war more protracted and expensive than either faction had anticipated. Exasperated, the Lambertazzi and their supporters took up arms against the Geremei, and a bloody, full-scale civil war broke out in 1274.<sup>49</sup> After an interlude of violence and chaos, the Geremei regained control, and the Lambertazzi faction went into exile.

Thomas had acted in accord with his public loyalties. The Bolognese criminal archives record that he and his brother were charged with treason and exiled, the commune appropriating their goods.<sup>50</sup> One can perhaps find a trace of Thomas's expertise in a testamentary device concocted to protect his family's fortune from the disaster. When Thomas's father died in August of 1274, on the eve of civil war, the old man disinherited his sons and named his minor grandsons as his heirs.<sup>51</sup> The grandsons escaped the purge of 1275, so the family's real property remained intact during the factional strife, which ended in 1285. Thomas did not. He died in exile, in 1282, his personal goods

still held by the state, his name still listed among those condemned for treason, his academic career terminated by a reversal of political fortune, as capricious and devastating to a thirteenth-century jurist as it would be two centuries later to Machiavelli's prince.

### **The *Tractatus de fama***

Given the brevity of Thomas's career, it is not surprising that he seems to have produced only a handful of juristic works. The Bolognese records suggest that he wrote at least a small number of *consilia*, legal opinions, which have not been found.<sup>52</sup> Upwards of a dozen of Thomas's *quaestiones disputatae* were handed down in the so-called "Great Books" of questions debated by the civil jurists,<sup>53</sup> but these disputed questions need not concern us here, except insofar as they prove that Thomas's legal interests centered on criminal law and testamentary devices.<sup>54</sup> There is also a hint in the manuscript tradition that Thomas might have written three brief treatises on crimes, procedural exceptions, and torture,<sup>55</sup> but the weight of the evidence suggests that Thomas de Piperata wrote only one treatise, the *Tractatus de fama*.

Given that the Bolognese law professors, both civilian and canonist, are known to have suppressed the memory of colleagues who strayed from the consensus on legal doctrine or intra-faculty relations,<sup>56</sup> it is not too wild to suggest that Thomas de Piperata, the unrepentant exile, was proscribed unofficially by the jurists. His *Tractatus de fama* enjoyed some reputation, and his *quaestiones disputatae* circulated in the standard collections, but Thomas received no mention in the civilian glosses to the Digest's texts on *fama* and only one jurist approvingly cited him by name. Others borrowed Thomas's ideas, but always without identifying the source. He was a man with whom it was safe, and perhaps fashionable, to disagree.<sup>57</sup>

Nevertheless, the treatise on *fama* attracted a great deal of attention from Thomas's contemporaries and succeeding generations of scholastic jurists. Much of it was digested in Gandinus's *Tractatus de maleficiis*, though Gandinus mentioned Thomas by name only once, and that in disagreement.<sup>58</sup> In the 1340s, while composing the *Additiones* to Durantis's *Speculum iudiciale*, Joannes Andreae borrowed from Thomas's treatise in his discussion of notorious crimes.<sup>59</sup> The legendary Bartolus, in his commentary on the *Digest*, claimed to have relied exclusively on Thomas's treatise to explain the significance of *fama*.<sup>60</sup> Thomas's work was still influential at Bologna in the fifteenth century, even though its attribution had become confused: Angelus Aretinus used

Thomas's treatise, or a work derived directly from it, as a source for his *Tractatus de maleficiis* but claimed that he was quoting Bartolus.<sup>61</sup> Finally, with the advent of printing, the *Tractatus de fama* became one of the staples of printed collections of criminal law.<sup>62</sup>

The reason for the widespread circulation of the *Tractatus de fama* is not obvious from the text. Thomas offered only the most oblique claim concerning the relevance of his work, stating that he was writing the piece at the instance of another jurist, William of Cunh,<sup>63</sup> "because many uncertainties arise in the courts concerning *fama*, *indicia*, arguments, and presumptions."<sup>64</sup> Although Thomas devoted the majority of his attention to defining *fama* and exploring its effects, the theme that ties the discussion of *fama* together with the analysis of *indicia*, arguments, and presumptions is the question of sufficiency of proof. Thomas, a professor of civil law, would not have admitted that his topic's relevance originated in canon law and contemporary inquisitorial practice rather than classical Roman law. In actuality, even though classical Roman law had devoted considerable attention to *fama* as a determinant of an individual's legal status, the thirteenth-century relevance of *fama* derived from the new criminal procedures instituted by the Church under Pope Innocent III.<sup>65</sup> The inquisitorial process instituted by the Fourth Lateran Council permitted a magistrate to proceed *ex officio*, without any accusation being lodged, whenever public *fama* indicated that somebody had committed a crime.<sup>66</sup>

The canonists did not invent *fama*; they borrowed it from the Roman tradition where it had played a minor role in the law of proof. But by making *fama* the procedural threshold that had to be surmounted before the inquisitorial magistrate could institute criminal proceedings, Innocent made *fama* analogous to the common law theory of probable cause. Though *fama* played no significant part in twelfth-century debate, thirteenth-century canonistic literature is full of discussions of *fama* and its procedural significance.<sup>67</sup> The two central issues were how to establish the existence of *fama*, so that the judge would know when to proceed, and how far the judge could proceed on the basis of *fama*.

Thomas seems to have been the first civil jurist to devote himself to a detailed analysis of *fama* as a quantum of proof, and, unlike the canonists, Thomas did not bury his analysis in the marginal glosses to the authoritative corpus of law.<sup>68</sup> He decided to compose a separate treatise that could circulate independently.

But despite this new literary genre, the content held nothing new about *fama*. Thomas defined *fama* as "something that the people of any city, town, camp, village, or district commonly believe, asserting it in words or speech, but that they do not hold as certain and true or

manifest.<sup>69</sup> He then proceeded, in good scholastic form, to define the terms of the definition. "The people" of any city meant the majority of the populace, rather than "all the people." Unanimity of belief was not essential.<sup>70</sup> Next, Thomas turned to the relationship between the fact that *fama* alleged to be true and the population whose opinion was being consulted. One could not conduct a poll in the parish of St. Proculo at Bologna to establish the public *fama* that Lord Brancallo and Lord Castelleno had once been senators of Rome.<sup>71</sup> On the other hand, the majority belief of one parish in Bologna would be enough to establish *fama* if the question concerned the identity of the magistrates of certain villages in the Bolognese city-state.<sup>72</sup> *Fama* concerning major facts, such as rumors of civil war, required geographically widespread belief, while minor facts, such as an offense committed by some lower class citizen, could be established by *fama* arising in a small locale.<sup>73</sup> Like the canonists before him, Thomas argued that *fama* arose only from people who had reason to know what they were talking about.<sup>74</sup>

After a misguided attempt to show off his learning by explaining the etymological origins of the word *fama*,<sup>75</sup> Thomas reached the heart of his discussion. If *fama* was important as a procedural threshold in the criminal process, then the key issue was how to establish that *fama* existed. To this question, Thomas provided two possible answers. The existence of *fama*, he asserted, could be proved either by the testimony of two witnesses or by the judge's knowledge that its existence was "notorious."<sup>76</sup> Proof by two witnesses was the traditional Roman law standard for proof. The notion of a fact "proving itself" by its very notoriety, so that a judge could proceed as an inquisitor on the basis of his own knowledge, was a recent canonistic invention.<sup>77</sup>

Proving the existence of *fama* by eyewitness testimony was tricky, according to Thomas, because of the hearsay problem. The *ius commune*, like modern common law, limited a witness to testifying about events that he had perceived directly. Testimony based on the statements of other people had no evidentiary value. If the court asked the witness, "How do you know that there is *fama* about this matter?" and the witness responded that he heard it from other people, the testimony was not probative.<sup>78</sup> Hence, it was preferable for the court's clerk not to ask how the witness knew. Instead, a careful clerk would prompt the witness to say that the greater part of the populace believed such and such to be true, but that the witness had no idea about the origin of the belief.<sup>79</sup> In order to avoid hearsay, Thomas preferred to attribute *fama* to the facts themselves, rather than the person who initiated public discussion about the facts.<sup>80</sup> The structure of Thomas's argument may be alien to the modern reader, but modern laws of evidence have

not articulated a clear principle governing information that “everybody knows.”<sup>81</sup> Further, Thomas’s artful advice on coaching witnesses to avoid the technicalities of evidentiary law possesses a modern ring.

Finally, in his last and most interesting analysis, Thomas asked what was the effect of *fama* once it had been proved. The answer depended upon the procedural context in which *fama* was being offered. *Fama* alone could resolve certain questions of law; it could not resolve a disputed factual question.<sup>82</sup> In some situations, especially in civil litigation, *fama* could validate a prior legal transaction that had been subsequently challenged on the basis of facts that had been unknown to one or more of the participants at the time of the transaction. In such cases, *fama* could determine the outcome of litigation.<sup>83</sup> *Fama* played a less decisive role if one of the parties argued that people believed the alleged claim to be true.

Thomas provided a series of illustrations to explain the distinction. The first case involved a contract signed by two parties, both reputed to be competent to enter a binding agreement. If one of the parties, despite appearances, turned out to have been a *filiusfamilias*, a legal dependent under his father’s power, the contract was subject to challenge. If the creditor sued for repayment, the young man could offer an exception, a legal defense, based on his incompetence to contract without his father’s consent. But if the creditor proved that at the time of the contract’s formation there had been *fama* that the young man was legally independent, the contract was enforceable.<sup>84</sup> The same analysis applied if somebody had prevailed in a civil suit against a defendant who subsequently turned out to have been a *filiusfamilias*. Such a person would normally lack standing to sue or to be sued without his father’s consent and hence would be able to overturn an adverse judgment. But if it had been handed down in the belief that he was legally competent, then his attempt to quash the judgment would be prevented by the *fama* of his competence.<sup>85</sup> Similarly, in any legal proceeding in which the judge, arbiter, or witnesses had to be free, not servile, that one of the players was discovered to be a slave did not invalidate the prior proceeding, so long as *fama* had existed that the participant was a free man.<sup>86</sup> In all of these cases, *fama* operated to validate the legal effect that people had been trying to create.<sup>87</sup> *Fama* operated as an after-the-fact fix for legal transactions that had been formally flawed and hence protected the legitimate expectations of the parties.

A more difficult situation arose when one party wanted to use *fama* to establish the substance of a disputed claim of fact, instead of using it to overcome a technical flaw in an otherwise valid cause of action.

For example, what if a plaintiff sued for specific enforcement of a promise to convey goods, or for enforcement of a contract of sale, and proved that there was *fama* that the defendant had made the alleged promise?<sup>88</sup> Thomas was unequivocal in responding that substantive matters in litigation had to be proved by witnesses testifying about their own direct knowledge.<sup>89</sup> Thomas insisted that *fama* by itself contributed nothing to a party's factual assertion,<sup>90</sup> but where *fama* was added to the testimony of eyewitnesses, then *fama* had the effect of confirming what the witnesses said.<sup>91</sup> This was not legally significant in cases where the plaintiff's case was proved by the testimony of two unimpeachable eyewitnesses, but *fama* could have a confirmatory effect when they were not.

In the real world, witnesses were almost invariably impeachable, and many witnesses who were nominally incompetent to testify were given a hearing, although the probative value of their testimony was probably discounted.<sup>92</sup> Thus the judge, who was obliged to find the truth in any way that he could, might rely upon *fama* to tip the scales in favor of believing the witnesses. According to Thomas, using *fama* to confirm an otherwise flawed proof was analogous to two other common devices: bringing in a huge number of witnesses, all of whom might be exceptionable but whose sheer numbers added to their credibility,<sup>93</sup> and bringing in witnesses of high social stature, whose "dignity" might compensate for their exceptionable qualities.<sup>94</sup>

In civil matters, therefore, *fama* created a presumption of validity concerning any prior legal transaction whose formal correctness was being challenged. In questions of fact, where *fama* existed with other evidence or legal presumptions—such as, an individual who lived a hundred years ago is now deceased<sup>95</sup>—*fama* operated to overcome any shortcomings in the evidence, permitting a court to rule in favor of a plaintiff whose case was credible but formally imperfect.

Thomas took issue with Accursius's ordinary gloss to the *Digest's* text on *fama*. According to the gloss, *fama* by itself confirmed the naked assertion of a party to a suit.<sup>96</sup> Accursius claimed that he was following the opinion of Joannes, probably Joannes Bassianus.<sup>97</sup> Other jurists, according to Accursius, said that *fama* operated as proof when it conformed with the workings of nature, as in the assertion that Bulgarus was dead.<sup>98</sup> Finally, a third group of jurists taught that *fama* along with some other evidence operated as proof, so *fama* constituted a half-proof.<sup>99</sup> Thomas vehemently rejected the notion that Joannes Bassianus had ever suggested that *fama* alone could prove a party's assertion.<sup>100</sup> He also rejected the idea that *fama* amounted to half of a

complete proof.<sup>101</sup> But if Thomas intended to provoke heated discussion about the role of *fama* in civil cases, he failed.

*Fama*'s role in criminal procedure was a different matter, for here Thomas managed to stir up a debate that raged on long after he died. He began the discussion with a hypothetical case. What if a man were accused of homicide, and the accuser could prove nothing except that there was *fama* and a public outcry that the accused had committed the crime. Could the accused be condemned on the basis of this kind of proof?<sup>102</sup> The answer to this question was easy, because *fama* plus a party's assertion was insufficient even in a civil case, much less in a criminal case where the proof had to be "clearer than the light of day."<sup>103</sup> Therefore, *fama*, which was a sufficient basis for detaining a suspect and initiating criminal proceedings against him,<sup>104</sup> fell far short of the quantum of proof needed for conviction. The only effect of *fama* as regards guilt or innocence was that it could validate the testimony of witnesses whose character or testimony was not above exception.<sup>105</sup>

But there was an intermediate question. If *fama* was sufficient to institute an inquisitorial process but insufficient to support a conviction, was it sufficient for torture?<sup>106</sup> To answer this, Thomas began from two principles of Roman law. Torture could be used in a criminal matter, but a magistrate could not begin to torture a suspect unless there were *indicia* or arguments suggestive of the suspect's guilt.<sup>107</sup> Thomas based his argument on the fact that while Roman law required multiple *indicia* as a prerequisite to torture, *fama* constituted only a single *indicium*.<sup>108</sup> Thus, *fama* alone could not justify a magistrate's decision to torture, but *fama* accompanied by any other *indicium* would suffice. Other possible *indicia* included the testimony of a single witness, proven animosity and threats between the suspect and the deceased, the suspect's flight from the vicinity of the crime, or the defendant's commission of a similar crime.<sup>109</sup>

But all of this was according to Roman law or the *ius commune*. In reality, torture was commonly governed by Italian municipal statutes that varied from commune to commune. Bologna had enacted a municipal law limiting the use of torture to specific criminal cases, and even then requiring a higher threshold of proof before the *podestà* or his judges could subject a suspect to torture.<sup>110</sup> Instead of mere *indicia*, Bolognese law required the magistrate to establish "violent presumptions" before putting a defendant to the question.<sup>111</sup> Thomas defined "violent presumptions" as "great *indicia*," less than complete proof but greater than simple *indicia*.<sup>112</sup> Not all Italian communes imposed any restrictions on magistrates' power to use torture in criminal investi-



gations. It was more typical for communes to grant their magistrates extraordinary powers in criminal matters, under the rubric of full and free discretion: *plenum et liberum arbitrium*.<sup>113</sup>

Thomas had carefully qualified his conclusions about *fama* in criminal cases by arguing that they were “according to Roman law or *ius commune*.”<sup>114</sup> In contrast, if a *podestà* held statutory *arbitrium*, he was free to use torture on the basis of a single *indicium*, and *fama* alone would suffice.<sup>115</sup> By granting its magistrate unfettered *arbitrium*, Thomas argued that the municipality gave him the power to proceed as he saw fit and as his conscience dictated.<sup>116</sup> This was a rejection of the deeply felt Roman rule, “the judge must adjudicate according to the law and the evidence alleged, and not according to his conscience.”<sup>117</sup> According to Thomas, the statutory grant of *arbitrium* gave the *podestà* or the judge power that translated almost literally as “free rein.”<sup>118</sup> This grant, although it had the same name as the power held by a private arbitrator, amounted to a much greater power than the “discretion of a good man” to decide a single private dispute. *Arbitrium* was a grant of public power, to be exercised according to the magistrate’s best judgment,<sup>119</sup> and constrained by local customs rather than written law.<sup>120</sup> According to Thomas, the only constraints upon a *podestà* who held *arbitrium* under a municipal statute were that the judge had to have some *indicium* that inclined him toward belief that the accused was guilty before employing torture:<sup>121</sup> *arbitrium* gave a *podestà* power to omit some of the solemnities of the law, but not all of them.<sup>122</sup> Neither could a judge use his discretion to condemn a defendant solely on the basis of his conscience, *fama*, or the testimony of a single witness.<sup>123</sup> But *arbitrium* exempted the presiding judge from the traditional stringency of the law of proof. If the case against a defendant fell short of a *plena probatio*, Thomas concluded that the judge who possessed *arbitrium* could still find the accused guilty, so long as the magistrate’s conscience and mind concurred with the evidence.<sup>124</sup> If the judge acted with criminal intent or gross negligence, he could be held liable for pronouncing sentence.<sup>125</sup>

Thomas underscored his emphatic departure from Roman law and the *ius commune* by posing a hypothetical case. If a magistrate held *arbitrium*, and a criminal case came before him in which the evidence consisted of one unexceptionable witness’s testimony plus *fama* and public outcry, could the *podestà* find the defendant guilty? Not according to Roman law, responded Thomas, but because the magistrate possessed *arbitrium*, he could in good faith condemn the defendant.<sup>126</sup> Thomas did not mean that this case was “fully proven” in the technical sense.<sup>127</sup>

Rather, official discretion authorized the magistrate to ignore the formalities of the law of proof.

By liberating the magistrate from the stringencies of the two-witness rule, however, Thomas created a further question. If the *podestà* with *arbitrium* had the legal power to condemn a defendant whenever his conscience and mind concurred with the evidence, what quantum of evidence should be legally sufficient to convince the judge? Thomas believed that the judge should be convinced beyond a doubt, the *indicia* of guilt moving his mind toward belief that the accused had committed the alleged crime.<sup>128</sup> Some *indicia*, taken together, were so powerful that they left no room for doubt. Thomas called these “undoubted *indicia*” and concluded that they provided sufficient legal basis for a guilty verdict.<sup>129</sup>

He went on to provide three hypothetical cases as examples, cases which became more famous than their author.<sup>130</sup> The first was the case of a room with only one way in or out. A man is seen emerging from the room. He is pale and grasps a bloody sword in his hands. Immediately after his exit, a man slain by a sword is found in the room. Although the crime without eyewitnesses was the *bête noire* of Roman and canon law, Thomas said that the *indicia* in this case established an “undoubted proof of the crime,”<sup>131</sup> but he conceded that the kinds of *indicia* contained in the first hypothetical were rare.<sup>132</sup> More common was the situation illustrated by a second case: “Titius is killed in a vineyard, and Seius is accused of the crime. No witnesses testify that they saw Seius kill Titius, but there is proof of the following: Seius was Titius’s enemy; Seius once threatened Titius with a sword; Seius fled from the vicinity of the crime; and there is *fama* and public outcry that Seius killed Titius.”<sup>133</sup> Thomas conceded that no one of these *indicia*, or even two of them, would suffice to prove the case against Seius. But all four proved that Seius had committed the crime.<sup>134</sup> The final case concerned an accusation that Seius had arranged the killing of Titius. Once again, no witness testified to having seen or heard the conspiracy. But there was proof that Seius was Titius’s enemy; that Seius was near the scene of the crime when Titius was killed; that Seius sheltered the killer after the deed was done; that the killer was a member of Seius’s household; that Seius had sworn that he would have Titius killed; and that in the past there had been bad blood between Titius and Seius.<sup>135</sup> Thomas’s conclusion, once again, was that all of the evidence taken together constituted “undoubted *indicia*” that Seius had committed the crime.<sup>136</sup>

Thus, Thomas de Piperata proposed two solutions to the paradigmatic “hard case.” One way to circumvent imperfect proof was to defer to

the legislature's initiative. Statutory grants of *arbitrium* were a valid means of lowering the standard of proof required in criminal cases. Alternatively, one could interpret "proof as clear as the light of day" as including not only witnesses and confession, but also circumstantial proof beyond doubt.

### The Juristic Debate about Discretion and Proof in the Criminal Process

#### *Albertus Gandinus*

Thomas's ideas about proof triggered a dispute that lingered in the lecture halls of Bologna into the fifteenth century. Albertus Gandinus, who served a term as a judge in Bologna while Thomas was a professor of civil law, was first to take up the argument.<sup>137</sup> The structure of Gandinus's analysis is similar to Thomas's. In the *Tractatus de fama*, Thomas began with *fama* and then moved through *indicia*, arguments, and presumptions, covering the whole topic of proofs based upon inferences from evidence other than eyewitness testimony. Gandinus approached the problem of inferential approaches to proof in more or less the same fashion. The larger structure of the *Tractatus de maleficiis* was a discussion of each of the forms of criminal procedure: accusation, denunciation, inquisition, exception, and summary procedure for notorious crimes.<sup>138</sup> The last of these, the case of *crimen notorium*, raised the issue of inferential proof.

The essence of procedure *per notorium* lay in establishing the defendant's guilt, not by witnesses or confession, but by proving that the alleged commission of the crime was so widely known that "the truth could not be hidden by any tergiversation."<sup>139</sup> Because procedure *per notorium* raised the issue of the forms and the quantum of proof required for conviction, Gandinus made the transition from the first four forms of criminal procedure to the fifth form, *notorium*, with a parenthetical discussion of circumstantial proof.<sup>140</sup> Between procedure by exception and procedure by *notorium*, Gandinus explained *fama* and *infamia*, and the legal significance of rumor, secrecy, and manifest facts.<sup>141</sup> The conceptual glue that bound these topics together was the question of what was proof in a criminal case, and what procedural steps could result from which quantum of proof.

Although Gandinus's conceptual framework was similar to Thomas's, Gandinus was far from slavish in following Thomas's lead. Gandinus's lengthy discussion of *fama* ignored Thomas's ideas and began from

the more traditional Roman law definition of *fama* as a measure of status.<sup>142</sup> It took Gandinus several pages to get to the real issue, which was how *fama* operated as proof in a criminal case. Gandinus joined issue with Thomas under the rubric, “Concerning presumptions and undoubted *indicia* from which conviction can follow.”<sup>143</sup>

Gandinus, like Thomas, believed that theoretically a judge could condemn on the basis of “undoubted *indicia*.”<sup>144</sup> Gandinus followed Thomas’s example by using hypotheticals, beginning with a case that exemplified everyday experience.<sup>145</sup> Titius is found slain or wounded in a field or house. Nothing is known about the perpetrator, except that a certain Seius is blamed for the crime, and the following items have been proved against him by unexceptionable witnesses: first, that there is a public outcry and *fama*, arising from worthy people, that Seius committed the crime; second, that Seius was a serious enemy of Titius; third, that Seius alone was seen leaving Titius’s field or house, fleeing with a drawn sword in his hand, and that immediately thereafter Titius was found, slain or wounded, in the house or field. The question that Gandinus posed was whether all of these *indicia* taken together could be called undoubted *indicia*, on the basis of which sentence could be pronounced.<sup>146</sup>

There were four arguments in favor of condemning Seius on these facts. First, these *indicia* had no less authority or probative weight than witnesses or written documents, and a passage of Justinian’s *Code* equated proof by witnesses with proof by open and manifest *indicia*.<sup>147</sup> Second, the concurrent pieces of proof could be said to perfect one another and hence add up to a full proof.<sup>148</sup> Third, if one did not permit the multiplicity of half-proofs to count as a full proof, crimes would often go unpunished, which would violate the fundamental purpose of the criminal law.<sup>149</sup> Finally, there was direct authority in Roman law for the proposition that even a capital criminal case could be proved by inferences and presumptions, if eyewitness testimony were lacking.<sup>150</sup> On the other side, three arguments weighed in favor of acquitting Seius. First, there was an analogy with civil litigation involving extremely large sums. One of the *Novels* required proof by three witnesses in cases involving more than a pound of gold.<sup>151</sup> Pecuniary matters, no matter how great, lacked the importance of criminal prosecutions, which placed the defendant’s physical well-being at risk. Hence, in criminal cases, a higher standard of proof should be required, and sentence could not be passed based on the numerous half-proofs recited in the case at hand.<sup>152</sup> Second, there was direct textual authority in the *Code* and the *Digest* for the proposition that a criminal defendant could not be convicted on the basis of *indicia*,

no matter how manifest the circumstantial evidence.<sup>153</sup> Third, the facts as recited added up to a presumption that Seius was guilty, but not to the proof beyond doubt that defined “undoubted” *indicia*. If the proofs were doubtful or uncertain in a criminal case that threatened the defendant’s soul, it was better to release a guilty man unpunished than to condemn the innocent.<sup>154</sup> Having laid out both sides of the argument, Gandinus provided his own solution to the *quaestio*: Seius could not be convicted on the basis of the *indicia* in the hypothetical.<sup>155</sup> Gandinus did not object to the proposition that a criminal defendant could be convicted on the basis of undoubted *indicia*. He based his solution on the circumstantial evidence in the hypothetical: it weighed enough to create a presumption against Seius, but not enough to create proof beyond doubt. Although such a presumption could “prove” a civil case, criminal procedure required proof “clearer than the light of day,” because of the greater penalties that awaited the defendant if he were convicted.<sup>156</sup>

Gandinus solved the *quaestio* on its facts, but left a difficult issue dangling. He accepted the authority of the *Code*, which said that a criminal proof could consist of the testimony of two witnesses, or clear documentary evidence, or undoubted *indicia* that made a proof clearer than the light of day,<sup>157</sup> but what was the meaning of undoubted *indicia*? To answer, Gandinus launched into a detailed list. *Indicia* constituted a proof beyond doubt when they created an irrefutable presumption. Hence, *indicia* could be “undoubted” if a crime were genuinely notorious,<sup>158</sup> or if the defendant had confessed,<sup>159</sup> or if a presumption of law arising from uncontroverted facts contradicted the defendant’s assertions,<sup>160</sup> or if the physical evidence irrefutably established a legal conclusion concerning the essential elements of the case.<sup>161</sup>

Notably, the final three items in Gandinus’s list of examples of “undoubted *indicia*” were Thomas de Piperata’s three cases: the room with one exit, the body in the vineyard, and the hired assassin.<sup>162</sup> But Gandinus mentioned them only to refute Thomas’s analysis: “But according to all of the wise men whom I have seen at Bologna and elsewhere, and also as I have seen to be observed by custom, a person cannot be definitively sentenced with a physical penalty on the basis of such *indicia*.”<sup>163</sup> Nevertheless, Gandinus concluded, if the penalty for the crime were monetary rather than physical, then a defendant could be convicted just as Thomas had written, and in such a case it would not matter whether the *podestà* had *arbitrium* or not.<sup>164</sup>

The problem with Thomas’s analysis, according to Gandinus, was that Thomas was willing to call evidence “undoubted” when it was not. There are few circumstantial proofs that are so irrefutable that

nothing to the contrary can be suggested as a credible alternative. Gandinus was not willing to regard a probable proof as a conclusive one, except where the law recognized an irrefutable presumption.<sup>165</sup> In criminal procedure, the most important of such presumptions arose when a misdeed was tried as a *crimen notorium*, a notorious crime.

Thus, Gandinus rejected Thomas de Piperata's conclusion that a multitude of unrelated half-proofs could perfect each other to create a full proof, but he did not suggest that there was no other way around the two-witness rule. One practical dodge, which Gandinus considered common practice, was to punish an offense with a staggering fine or some other non-corporal sanction. It is clear that the city-states imposed fines and exile rather than corporal punishment, even for homicide. Possibly, this was to escape the stringency of the law of proof in criminal cases involving corporal sanctions, but it might have been that fines and exile were socially preferable to sanguinary punishments.<sup>166</sup>

There remained one last gambit for the legal theorist seeking to circumvent the two-witness rule: Gandinus conceded that a defendant could be condemned on the basis of undoubted *indicia*, where the crime were proved to be notorious. Gandinus, quoting Ubertino of Bobbio, stated that notoriety existed when the populace or a majority of the populace did not doubt that the deed had been committed.<sup>167</sup> The more common definition was in Innocent III's decretals, which permitted ecclesiastical judges to proceed in summary fashion *per notorium* when popular knowledge of the matter so thoroughly established the defendant's guilt that the truth could not be hidden by any tergiversation.<sup>168</sup> It was the essence of procedure *per notorium* that the judge did not need to unearth eyewitness testimony. The core of *notorium* was based on common knowledge of circumstantial evidence sufficient to convince the local populace.

In the case that produced the decretal defining *notorium*, Innocent had permitted a judge to convict clerics who were widely known to have had women living with them, but who had not been caught in the act of fornication.<sup>169</sup> In fact, reformers within the hierarchy had insisted since the first half of the 1100s that the need to punish deviant behavior demanded a lower standard of proof and a more efficient summary procedure—at least in cases where the miscreant's guilt was manifest or notorious.<sup>170</sup> On the other hand, since the 1140s, canonists and then civilians had been insisting that these procedural shortcuts undercut the rule of law. Procedure *per notorium* raised particularly acute concerns because it omitted the formalities meant to protect innocent defendants. The gloss to the decretals found it notable that in procedure *per notorium*, no direct proof of the crime was necessary.<sup>171</sup>

Gandinus had a quote that captured the essence of procedure *per notorium*: to follow the due process of law in cases of notorious crime meant not to follow the due process of law. Instead, the defendant whose crime was notorious was cited into court simply to hear sentence pronounced against him.<sup>172</sup>

If such summary procedures provided a large gain in the efficiency of criminal justice, they suffered from an inescapable flaw. A fact that was believed by the entire populace of any locale might or might not be true. If the meaning of notoriety was the traditional canon law notion that people “indubitably knew” the alleged fact, and if nothing in this world could be known to an absolute certainty, then notoriety tripped over the same stumbling block as “undoubted *indicia*.” If certainty of guilt were an alternative standard of proof, most of the jurists would demand absolute certainty, not merely proof beyond a reasonable doubt. Hence, some jurists gutted the notion of *crimen notorium* by arguing that a matter could never be notorious so long as the defendant denied the case against him.<sup>173</sup>

Gandinus thought that some crimes were genuinely notorious, but he required a very high standard of certainty; for example, if the crime were committed before the judge and many other witnesses.<sup>174</sup> Alternatively, if the judge had no firsthand impressions, the crime could still be proved to be notorious if there were enough witnesses to prove it.<sup>175</sup> At this point Gandinus departed from the logic of *crimen notorium* by demanding that the witnesses testify both that the matter was notorious and that they, the witnesses, had seen the crime being committed in a public place in daylight.<sup>176</sup> This standard of proof would make it harder to prove a crime *per notorium* than to prove it through the two-witness rule. Gandinus did concede that other jurists adhered to a lesser standard that did not require the witnesses to testify that they had seen the defendant committing the crime, but only that it was notorious because everybody knew that he had done it.<sup>177</sup>

Thus, Gandinus defended the traditional rules of law against Thomas de Piperata’s attempt to lower the standard of proof, concluding that the public interest in efficient prosecution did not outweigh the traditional rules of law protecting innocent defendants. However, he did not mechanically reiterate the scholastic rule that proof required two witnesses or a confession. Gandinus grudgingly conceded that undoubted *indicia* could lead to punishment, especially in the case of *crimen notorium*, but he was more comfortable in applying the lower standard to criminal cases that resulted only in pecuniary punishment.<sup>178</sup>

“Due process” constraints upon judicial discretion applied as long as the discussion was bounded by the principles of the *ius commune*.

Gandinus, like Thomas de Piperata, believed that the law of proof was different where local statutory law gave the *podestà* broad power to prosecute and punish criminal offenders. In his discussion of the law of torture, Gandinus raised the following case: Suppose that a homicide has been committed so secretly that nobody knows who was the perpetrator. Subsequently, public authorities capture an individual of low social condition and ill fame. A public outcry and *fama* arise, accusing him of the unsolved murder.<sup>179</sup> Clearly, according to the principles of the *ius commune*, such a defendant could not be tortured solely on the basis of *fama*. But if the *podestà* had been granted broad discretion (*liberum et generale arbitrium*), could he proceed to torture the defendant without any *indicia*?<sup>180</sup> Here Gandinus followed Thomas's arguments almost literally. *Arbitrium*, he wrote, gives the *podestà* free rein. To grant the magistrate *arbitrium* is to say that he may proceed according to his own conscience.<sup>181</sup> Hence, Gandinus, like Thomas, cast the statutory grant of discretion as a legislative rejoinder to the rule of law that "the judge must rule according to the law and not according to his conscience."<sup>182</sup> Therefore, the judge who possessed *arbitrium* was largely exempt from the learned law, but not from the fundamental *solemnitas iuris* that required some slight quantum of evidence before the judge could torture the defendant.<sup>183</sup>

Having stated that *arbitrium* liberated the judge from the rules of law with regard to the criminal process, Gandinus spelled out a limitation. Although a judge might omit many of the solemnities of the law, *arbitrium* did not allow him to omit them altogether;<sup>184</sup> according to the *Digest*, questions of fact lay within the judge's discretion, but the authority of the laws stood beyond it.<sup>185</sup> Even with the broadest grant of discretion, the *podestà* must take care not to convict on the basis of pure *arbitrium*, conscience, or the testimony of one witness, for in pronouncing on guilt or innocence, the judge must follow the laws.<sup>186</sup> Still, Gandinus reiterated Thomas de Piperata's conclusion: If the crime were not fully proven by two witnesses' testimony or by the defendant's confession, a judge with *arbitrium* could convict the defendant as long as his conscience and his intellect were in accord with the evidence.<sup>187</sup> The judge with *arbitrium* was not liable for convicting people on the basis of formally insufficient proof, as long as he acted in good faith.<sup>188</sup>

In sum, Gandinus's response to Thomas de Piperata was equivocal. Where the *Tractatus de maleficiis* subscribed to Thomas's idea about the breadth of judicial discretion under a grant of *arbitrium*, Gandinus neglected to mention his source, even though he quoted Thomas verbatim. Where Gandinus disagreed with Thomas on the extent to



which the *ius commune* permitted proof by circumstantial evidence, Gandinus quoted him by name, observing with some relish that none of the learned lawyers at Bologna agreed with Thomas's ideas about *indicia indubitata*.<sup>189</sup> To Gandinus, Thomas de Piperata was a jurisprudential pariah.

More importantly, Gandinus exemplified the jurists's ambivalent attitude toward human discretion in the criminal process. Nothing in the *Tractatus de maleficiis* suggests that its author lacked faith in human capacity to act or judge responsibly. On the contrary, Gandinus was aware that Italian city-states routinely granted their criminal judges extensive *arbitrium*, bounded only by the requirements of good faith and, perhaps, a measure of prudence.<sup>190</sup> Yet he was troubled by the fallibility and uncertainty of human judgment where a defendant's life and limbs were at stake, and he insisted that the "due process" of *ius commune* must not be watered down by slippery legal reasoning. Hence, exceptions to the two-witness rule could be carved out by legislative initiative,<sup>191</sup> or by careful interpretation of the corpus of Roman law,<sup>192</sup> but not by Thomas's device of calling circumstantial evidence "undoubted" when it was not. Gandinus was more scrupulous than Thomas de Piperata when it came to defending the rule of law, but neither he nor Thomas was a slave to mechanical rules of proof.

Finally, one can not pass over Gandinus's discussion of torture, nor the social attitude reflected there. First, it is clear that Gandinus was not "forced" into adopting torture as the only available means of producing convictions under the prevailing law of proof. It is true that witness-proof was difficult to establish, while confessions were easy to extract from defendants who had been tortured; it is true that despite the well-known risk of producing false confessions, the scholastic jurists took comfort from the fact that in the learned law, such confessions were full, legitimate proof. But the jurists, especially those who had presided over criminal courts, were aware of the perversity of torture as an investigatory device. They knew that the victim of torture would confess to whatever crimes the inquisitor suggested.<sup>193</sup>

Gandinus was far from squeamish about torture, but even his enthusiasm was tempered by the need for immoderately cruel judges to be restrained in the practice of torture.<sup>194</sup> Unfortunately, this is not clear from his example, a hypothetical case arising "every day in fact": A crime is committed, but it is not clear who committed it. After several days, somebody is arrested for the crime and hauled before the criminal court. The defendant is a man of low social condition and ill fame. After his arrest, a public outcry arises, accusing him of having committed the crime. There is no evidence against him except his own

bad reputation and the public *fama* which arose from unknown persons after the defendant had been captured. Can the judge proceed to torture the accused?<sup>195</sup> The legal answer should have been easy to determine in the negative, because *fama* by itself proved nothing, and the suspect's ill social condition proved nothing relating to the commission of the crime. But Gandinus argued that a person of ignoble status, who had led a life of ill fame, had no claim on the protection of the very laws that he habitually flouted.<sup>196</sup> Just as the judge under Roman law had had the authority to torture witnesses of ignoble status or ill fame, so Gandinus thought the medieval judge should torture a defendant who had made a bad example of himself, even if it were uncertain who had committed that particular crime.<sup>197</sup> If the judge employed the most terrifying tortures against such a defendant, it would be an example to deter others from wrongdoing.<sup>198</sup>

Two important inferences follow from Gandinus's solution to this hypothetical. First, it is clear that torture was not being used exclusively as an investigative tool. Among the justifications for torture, Gandinus recited the judge's duty to investigate the truth, but he did not care that the defendant who led a life outside the law might not have committed the particular crime of which he stood accused. Torture, then, was being used more or less consciously as a form of punishment and not just as a means of securing confessions. Second, Gandinus provides a significant clue about the incidence of torture in thirteenth-century Italy. A judge could not torture every criminal defendant even if there was clear circumstantial evidence: Citizens enjoyed certain protections, official and unofficial, against capricious judicial torture.<sup>199</sup> The foreigner, the person without a guild, and the poor person without extensive family connections faced the prospect of torture, conviction, and brutal corporal punishment. Conversely, even when they were guilty, citizens of moderately prosperous standing faced less risk to life or limb. The socially less divisive course was to permit them to go into exile.<sup>200</sup> If one can judge by Gandinus's work, torture was not employed as often as one would have expected if it were the only means of escaping the inefficiencies created by the scholastic law of proof.<sup>201</sup>

Beginning in the twelfth century, but especially after 1200, scholastically trained jurists were keenly aware of the issues concerning due process and the law of proof that were raised by Thomas de Piperata and Albertus Gandinus. The proceduralists from Durantis onward were concerned with the problem of standards of proof that might give an inquisitorial judge discretion to avoid the stringency of full, formal proof. But they all hesitated over moving too far from the traditional rules that protected the criminal defendant. For the proceduralists, the

conundrum was giving the magistrate discretion to weigh circumstantial evidence while realizing that no amount of *indicia* could ever create absolute certainty of guilt and thus satisfy the most demanding interpretation of the requirement that criminal proofs be “clearer than the light of day.”<sup>202</sup> For civil jurists such as Thomas de Piperata and Albertus Gandinus, who were immersed in the everyday affairs of the Italian city-state, the least painful means of escaping this dilemma was to look beyond the boundaries of the learned law. Legislative action gave what Roman law withheld: grants of *arbitrium* gave the *podestà* the “free rein” that the *ius commune* denied.

*The Canonists: William Durantis, Joannes Andreae, and Hostiensis*

The jurists trained in the canon law tradition who wrote about procedure in the ecclesiastical courts did not enjoy such a convenient escape from the problem of proof. From the twelfth century onward, they agreed that the ecclesiastical judge possessed *arbitrium* in several areas of criminal procedure,<sup>203</sup> but nowhere did the canons grant an ordinary trial judge the “full and free discretion” that was a routine feature of Italian statutory law. Given the Church’s emphasis on hierarchical control over an intricate appellate procedure, it is not surprising that the local ordinary exercised only a limited discretion, in contrast to the broad authority of a secular *podestà*. Theoretically, the ecclesiastical trial judge’s limited powers did not reflect indifference to the problem of catching and punishing malefactors. The hierarchy was as committed to criminal prosecution as the city-states were. After all, it was Pope Innocent III who reintroduced the ancient Roman notion that public interest demands that crime must be punished.<sup>204</sup> Innocent, and not the city-states, took the initiative in adopting the inquisitorial process to side-step the inefficiencies of the accusatorial procedure.<sup>205</sup> It was Innocent who provided the jurists with the concept of *crimen notorium* that could condemn a suspect summarily when the evidence was such that “the crime can not be concealed by any tergiversation.”<sup>206</sup> Nevertheless, given the hierarchy’s commitment to maintaining the honored and elite status of the clergy, there remained a powerful inducement to preserving the “due process” that protected clerics from harassment or embarrassment. The Church feared attacks upon the clergy as much as it feared deviant clerics, and the canonists feared scandal most of all.

The canonists who wrote on procedure walked a narrower line than did the civil jurists whose practical socialization took place in the courts of the city-states. For example, the evidence about a crime might be

so negligible that the matter was best labelled *occultum* or secret.<sup>207</sup> In such cases, judgment was reserved for the Almighty: “the Church does not judge hidden things.”<sup>208</sup> Alternatively, a crime could be nearly secret, or *pene occultum*, if only a handful of people knew the facts. If such a crime were a minor breach that posed no danger to the community, it was considered preferable to pass over the matter without prosecution to avoid scandal—even if there were enough witnesses to secure a full proof.<sup>209</sup> If the “nearly secret” crime was serious (a *crimen enorme*), or posed a social danger, then it would merit energetic prosecution.<sup>210</sup> Heresy was the paradigmatic example of the secret crime that was difficult to prove but demanded prosecution.

After *occultum* was the crime that was *manifestum*. A crime was manifest when there was a public outcry arising from certain knowledge of the facts and originating from known persons.<sup>211</sup> Some canonical authorities proposed that manifest crimes did not require legal proof,<sup>212</sup> but the proceduralists concluded that a *crimen manifestum* was distinguished by the ease with which it could be proved by witnesses, not by being an exception to the normal rules of proof.<sup>213</sup>

Beyond the *crimen manifestum* was the *crimen notorium*, which did not require witness-proof or confession. William Durantis defined notorious crime more elaborately than Innocent III. According to the *Speculum iudiciale*, there were three elements to notoriety: public outcry, circumstantial evidence sufficient to pre-empt any attempt to hide the truth, and public notice extending to most of the local populace.<sup>214</sup> Even if a crime met this definition of notoriety, however, the canonists were leery of any departure from the traditional rules of proof. So strictly did they define *notorium* that the judge who followed the letter of the *Speculum iudiciale* could employ the summary procedure *per notorium* only if the crime were committed in the presence of the judge himself, while he was acting in his official capacity,<sup>215</sup> and in the presence of a number of people large enough to establish public knowledge of the facts.<sup>216</sup> Unless these conditions were met, the defendant could escape from summary procedure *per notorium* simply by denying his guilt.

The canonists who wrote about procedure accorded the trial judge much less discretion than did Thomas de Piperata and Albertus Gandinus, the Romanists. This difference between canonists and civilians reflects the contrast between the ecclesiastical judge, who was constrained by a hierarchy jealous of its power to control subordinates through its appellate jurisdiction, and the secular judge, whose broad mandate to prosecute crime was subject only to a good faith interpretation of the law. The “due process” values that underlay the stringent

scholastic law of proof therefore fared better in the ecclesiastical courts—other than the Holy Office of the Inquisition—than in secular courts. While Gandinus claimed that a lawless man did not deserve the protection of the laws, and Thomas de Piperata that the *podestà* enjoyed free rein, the canonists, Hostiensis and William Durantis, fretted that the inquisitorial judge's power was getting out of hand.<sup>217</sup> Judges were defrocking clerics who had no opportunity to be heard in their own defense. According to Hostiensis, even a heretic must receive a legitimate opportunity to defend himself,<sup>218</sup> although in prosecuting heresy the canonists permitted many short-cuts, the Holy Office of the Inquisition in particular subverting the notion of fair process.<sup>219</sup>

Still, Hostiensis, who was not squeamish about employing short-cuts against the obviously guilty defendant, claimed it was the *podestà*, rather than the ecclesiastical judge, who commonly omitted the formalities of the law in doubtful cases and punished suspects without a fair hearing.<sup>220</sup> Hostiensis was expressing a conviction shared by all the canonists when he wrote that even though the judge presiding over a proceeding *per notorium* had the power to proceed with no citation and without proofs, it was better and safer to conduct a hearing, unless the delay would create scandal or grave public danger.<sup>221</sup> Unlike some canonists, Hostiensis believed that the trial judge did have the discretion to punish a notoriously guilty defendant without full proofs, in spite of the defendant's denial of guilt.<sup>222</sup> But a good, prudent judge would do nothing arbitrarily, safeguarding the truth rather than obeying the dictates of will.<sup>223</sup>

In such a tradition, Thomas de Piperata's ideas about discretion and the law of proof attracted little enthusiasm. Durantis wrote the *Speculum iudiciale* before Thomas composed his *Tractatus de fama*, so there is no trace of Thomas in the Speculator's great opus.<sup>224</sup> A generation later, when Joannes Andreae published his *additiones* to the *Speculum iudiciale*, he did mention Thomas, but not favorably. Joannes thought that Thomas's definition of *fama* was verbose,<sup>225</sup> and that his analysis was mixed up with *indicia*, arguments, and presumptions.<sup>226</sup> Although he summarized much of the *Tractatus de fama*, Joannes Andreae passed silently over Thomas's conclusions about the *podestà*'s discretion under a grant of statutory *arbitrium* and about fashioning a *plena probatio* from undoubted *indicia*.<sup>227</sup>

This silence cannot have resulted from ignorance of the canonists about secular experiments with criminal procedure. Durantis and Joannes Andreae were aware that the communes condemned defendants *in absentia* to exile and outlawry, contrary to the rules of learned law. According to Durantis, the criminal ban meant that a *podestà* could

legitimately condemn a defendant *in absentia*, without an opportunity to be heard. The ban arose if the defendant was accused of homicide and failed to respond to a summons. Under a typical Italian statute, a defendant who failed to respond to a capital charge within a year could be treated as if he had confessed and condemned *in absentia*.<sup>228</sup> If the defendant were subsequently captured, Durantis concluded that the exile could be executed without further ado.<sup>229</sup>

Joannes Andreae arrived at a conclusion more in keeping with the traditional Roman law. Despite a statute that permitted the magistrate to decapitate or hang a defendant who had been condemned *in absentia* and subsequently captured, Joannes maintained that the penalty was governed by the authority of the *ius commune* and could not lie within the discretion of the judge. Although the Italian practice was otherwise, Joannes insisted that as a matter of law, the defendant convicted *in absentia* must have an opportunity to prove his innocence, while his accuser must have the opportunity to prove the captive's guilt.<sup>230</sup> From this, it is clear that Durantis and Joannes Andreae knew about the secular magistrate's statutory powers. If Joannes neglected to discuss Thomas de Piperata's idea that *arbitrium* meant discretion to condemn on the basis of the judge's conscience, it was because Joannes had already made it clear that the judge was constrained to decide guilt or innocence according to the strict rules of law.

Thus, the thirteenth-century canonists' attitude toward judicial discretion ran counter to the expansive impulses of secular statutes and the Romanists. As Bonifacius Antelmi phrased it at the close of the thirteenth century, "judges should not presume to act according to their consciences, as many of them do, ignorant of justice and of the law, but according to the laws and the proofs offered to them."<sup>231</sup>

### *Bartolus*

The debate over discretion and the law of proof continued throughout the age of scholastic jurisprudence. The greatest of all the medieval jurists, Bartolus of Saxoferrato (+1357), supported the notion, found in the works of Thomas de Piperata and Albertus Gandinus, that the inquisitorial judge exercised broad discretion. In the inquisitorial procedure, wrote Bartolus, the judge has more free rein than you might think.<sup>232</sup> Bartolus might have acquired the phrase "free rein" from Thomas de Piperata. Discussing *fama*, the great jurist cited his obscure predecessor with approval that verged on enthusiasm: "Whatever Thomas said, I will say to you. The Speculator . . . also wrote about *fama* but not clearly."<sup>233</sup>

As it happened, Bartolus did not repeat whatever Thomas had said about *fama*, but he did share Thomas's central insight: criminal proof, in its essence, is the fact-finder's subjective certainty, and not an objective calculus. "A full proof," wrote Bartolus, "occurs when the judge on the basis of the evidence produced before him, is led to faith and credit concerning that which is litigated."<sup>234</sup> One could acquire certitude, Bartolus thought, through direct sensory experience, as witnesses did or through reasoning and demonstration.<sup>235</sup> The judge could attain such certainty only in cases involving permanent facts that he could ascertain by direct observation. With transient events, the highest level of certainty that one could reach after the fact was faith and credit.<sup>236</sup> To reach such certainty, the judge moved from ignorance of the whole case, to doubts prompted by the conflict between the parties' assertions, to suspicion, to opinion, and finally to firm belief. If the case presented by one party convinced the judge beyond any doubt, then there was a perfect proof.<sup>237</sup>

Bartolus believed that a judge enjoyed considerable latitude in arriving at his firm belief, but was bounded by the solemnities of the law. The trial judge, for example, had the power to decide whether to believe the witnesses' testimony or not.<sup>238</sup> A prudent judge who disbelieved a witness ought to record the basis of his skepticism. Moreover, in the real world, the judge's discretionary power to initiate proceedings or to employ torture, might be bound by the expectation that an inquisitorial judge ought to torture defendants, even if the evidence was flimsy.<sup>239</sup>

With regard to criminal proof, Bartolus was more concerned about dubious reasoning than accounting systems of fractional proofs and full proof. He resisted the notion that two half-proofs added up to a full proof in any case, civil or criminal, unless the half-proofs were of the same genus, such as two eyewitness accounts, and the partial proofs pointed to the same conclusion.<sup>240</sup> As for the rule of law that required criminal proofs to be "clearer than the light of day," Bartolus believed that presumptions and *indicia* could measure up to that standard. His authority was the Roman law presumption that a man was guilty of adultery if he were apprehended in another man's house in the owner's wife's company.<sup>241</sup> His rationale was that circumstantial evidence amounted to proof clearer than the light of day when it sufficed to convince the judge.<sup>242</sup>

Bartolus's theory that the judge's subjective certainty of guilt was enough to convict seemingly conflicted with the traditional rule that "the judge must rule according to the things alleged and proved, and not according to his conscience," but Bartolus perceived no conflict.

The rule prohibiting verdicts according to conscience, he wrote, forbade the judge to use information that he acquired as a private person. Bartolus expected the judge to decide each case on the basis of conscience, informed solely by the pleadings, the evidence, and the rules of law as presented to him.<sup>243</sup>

Thus, Bartolus relied more upon prudence than ironclad rules. On the subject of *indicia*, for example, he felt that it was impossible to articulate a firm doctrine, and that the threshold of circumstantial evidence required before torture could be employed was a matter best left to judicial discretion.<sup>244</sup> Nevertheless, despite the impossibility of forming a doctrine that would guide the judge in every case, Bartolus proceeded to try, through the device of a hypothetical. Suppose, he wrote, someone were accused of theft. The circumstantial evidence against him included the following: He was a man of low condition and ill fame, in the habit of committing similar crimes; he was at the scene of the crime; he knew the house, because he had spent time there; after the theft he had fled and hidden; subsequently he was found to have spent money, although previously he had been poor, and the source of his new wealth was unknown; and finally, some of the stolen property was found on his person.<sup>245</sup> For the reader familiar with Thomas de Piperata's work, this hypothetical has a familiar ring; it sounds like Thomas's cases of circumstantial proof beyond doubt. But Bartolus was more subtle than Thomas, and he was not ready to call these "special" *indicia* conclusive proof. There was still room for doubt, as long as the presumptions arising from even the most powerful circumstantial evidence could be rebutted by the suspect. For example, Bartolus wrote, if stolen goods were found in my possession, I could rebut the evidence of my guilt by identifying the person from whom I received the goods.<sup>246</sup> Therefore, Bartolus urged judicial restraint, in the form of hesitation to condemn on the basis of suspicion or presumption.<sup>247</sup> Moreover, where the penalty was death, Bartolus adhered to the traditional rule that a judge could not condemn an absent party.<sup>248</sup> This freed the judge from the unworkable restraints of the strict Roman law of proof by two witnesses or confession, but did not give him "free rein."

For Bartolus, proof to a standard of faith and credit implied a high level of certainty, backed up by a procedural rule that insured that in capital cases the defendant would have an opportunity to rebut the case against him. It was a concession to practicality that in quasi-capital cases, where the penalty was banishment and outlawry, a defendant could be condemned *in absentia*.<sup>249</sup> Although this violated



the formal rules of Roman law, it conformed to contemporary statutes, and for Bartolus, that was good enough.<sup>250</sup>

Since he was not enslaved by the two-witness standard, Bartolus was impatient with inventions meant to circumvent the traditional law of proof. The whole category of notorious crimes, he wrote, was an invention of the canonists, not of the civilians.<sup>251</sup> Moreover, transient facts could not be notorious; only “permanent” or long-lasting facts could be called notorious.<sup>252</sup> Although other jurists had tried to extend the scope of judicial discretion concerning *crimen notorium*, Bartolus asked, “What is there for a judge to determine?” The only fact that is genuinely notorious is one that, by its very nature, everybody knows or ought to know, so that one cannot claim to be ignorant of it without admitting that one’s ignorance amounts to negligence.<sup>253</sup> Bartolus was not enamored of procedure *per notorium* as an escape from the full and fair criminal process. He was more tolerant of the category of “manifest” crimes, probably because *crimen manifestum* was a creation of the ancient Roman law, and its legal consequences were less serious than those of *notorium*.<sup>254</sup> Hence, a thief who was caught in the act of theft or even in possession of stolen goods was a manifest thief, liable to a four-fold penalty.<sup>255</sup> Similarly, if a man were caught in someone else’s house with a pretty woman, he was a manifest adulterer.<sup>256</sup> Finally, if a man were seen fleeing with a drawn sword and someone were found slain at the scene, then the crime was a manifest homicide.<sup>257</sup>

This last hypothetical is reminiscent of one of Thomas’s cases illustrating proof beyond doubt by circumstantial evidence—the room with one exit.<sup>258</sup> Bartolus, however, used it to point to a different conclusion. The homicide in Bartolus’s hypothetical was “manifest,” but it was not proved, as Thomas might have argued, by “undoubted *indicia*.” Unlike Thomas, Bartolus might have permitted the judge to convict the accused only if the defendant could offer no credible explanation for the drawn sword.<sup>259</sup>

Among the medieval jurists, Bartolus displayed the least mechanical concept of legal proof. He did not enslave the judge to the two-witness rule, and he rejected the facile solutions of torturing a confession from every suspect or adding up fractional proofs to make a “full” proof. For Bartolus, the judge decided guilt or innocence according to his conscience as formed by the evidence. The judge, restrained only by a requirement of faith and credit in the evidence presented, held the power to decide according to conscience because the state gave him that power.<sup>260</sup>

*Angelus Aretinus*

A century later, Bartolus was being hailed as authority for the proposition that proof in criminal cases could be based upon *indicia indubitata*. Angelus Aretinus de Gambilionibus, author of the last major treatise on criminal law to appear before the age of printing, expressly supported the position that nobody could be condemned on the basis of *indicia* unless they were “undoubted.”<sup>261</sup> Angelus taught that an *indicium* was *indubitatum* or *plenum* (“full”), when the circumstantial evidence provided a clear explanation of the facts, through “sufficient signs,” so that the intellect was satisfied and did not care to inquire any further.<sup>262</sup> Angelus illustrated his point by providing an example of *indicia indubitata*—Thomas de Piperata’s hypothetical of the room with one exit.<sup>263</sup> Angelus did not mention Thomas. Instead, he named Nicholas de Matarellis, Baldus, and Salicetus as authorities for the proposition that *indicia* were undoubted “when the law desires that a conviction be based upon such evidence”: *indicia* that are undoubted in the eyes of the law ought to be undoubted to the judge.<sup>264</sup> If the *indicia* were not approved by the law, but were committed to the judge’s discretion, they could not be the basis for a conviction.<sup>265</sup>

It is not clear what legal restraint Angelus was trying to invoke here, because he went on to say that one could find an example of *indicia indubitata* wherever the quantity and the quality of the circumstantial evidence pointed out the truth in the mind’s eye of the judge, “just as a bright light shows the truth to one’s physical eyes.”<sup>266</sup> Angelus’s “bright light” metaphor was an unmistakable allusion to the Roman law rule that criminal proofs must be as “clear as light.”<sup>267</sup> Angelus was making the same claim Bartolus had made a century before: proof that convinced the judge beyond doubt satisfied the standard that demanded proof as clear as the light of day. Angelus was aware that he was following in the great jurist’s footsteps, and he cited Bartolus as the source of his hypothetical case. Suppose, wrote Angelus, that a person was seen entering Titius’s house. Immediately thereafter Titius was heard crying out. Then the suspect was seen leaving the house with a bloody sword, and Titius was found, wounded in the face.<sup>268</sup> These *indicia* taken together were beyond doubt, concluded Angelus, and the culprit could be convicted for the assault on Titius.<sup>269</sup> Bartolus, Angelus concluded, had so determined in similar examples.<sup>270</sup>

Strictly speaking, Angelus misstated the case when he claimed Bartolus as his authority. Bartolus might have decided that the assault on Titius was a manifest crime, but he would not have accepted the bare

facts of Angelus's hypothetical case as sufficient for conviction, because the presumption of guilt arising from even such powerful *indicia* was still rebuttable.<sup>271</sup> In fact, Girolamo Giganti, a sixteenth-century jurist, took Angelus to task on this point. Bartolus was not the source of Angelus's ideas about *indicia indubitata*, Giganti wrote, Thomas de Piperata was. Moreover, this doctrine had been rejected by the Bolognese law faculty.<sup>272</sup> Even by the sixteenth century, Thomas was still a pariah to most of the scholastic jurists. But while the memory of Thomas de Piperata was hazy and hostile, his ideas about judicial discretion and the law of proof retained the power to attract both support and spirited opposition.<sup>273</sup>

**The Jurist in Social Context:  
Thomas de Piperata and Thirteenth-Century  
Attitudes about Human Discretion**

The *Tractatus de fama* thus delivered much more than its title promised. Beginning from the procedural uncertainties about *fama*, Thomas surreptitiously moved to a potentially revolutionary conclusion about the law of proof in criminal cases. Thomas de Piperata was the first scholastic jurist to suggest expressly that the standard of proof in criminal cases should be that of certainty beyond doubt in the mind of a fact-finder who possessed wide discretion.<sup>274</sup> This idea represents a striking departure from traditional early medieval attitudes about the human capacity to discover truth, and from twelfth-century scholastic strictures concerning proof. Many medievalists have believed that thirteenth-century Europeans were not willing to make the leap from ordeal, or proof by divine judgment, to a system that depended on human discretion.<sup>275</sup> Thus, the abandonment of proof by appeal to divine judgment led to the adoption of a stringent, non-discretionary rule that in criminal cases, nothing short of the testimony of two eyewitnesses or confession by the accused would suffice for conviction.<sup>276</sup> Since covert crimes do not generate eyewitness testimony, and since no amount of circumstantial evidence could substitute for the testimony, John Langbein has argued that medieval civil and canon law turned to torture in order to satisfy the alternative requirement of confession.<sup>277</sup> The judge who administered the criminal process was "an automaton," according to Langbein, because ordinary people in thirteenth-century Europe found it difficult to accept human judgment in place of the divine judgment of ordeals.<sup>278</sup> Another version of the medieval judge is that of an accountant whose function was simply to total the fractions

of proof against a defendant, and then to condemn him only if the fractions added up to a “full proof,” or the legal equivalent of two unimpeachable witnesses’ testimony.<sup>279</sup> Even Charles Donahue, whose work on proof by witnesses in medieval church courts reflects a shrewd estimate of the inevitability of judicial discretion in weighing the admissibility and the credibility of testimony, subscribed to this notion that thirteenth-century Europeans could not bring themselves to replace the divine judgement with human.<sup>280</sup>

Thomas de Piperata’s *Tractatus de fama* and the subsequent juristic debate about discretion and proof suggest emphatically that thirteenth-century Europeans did not suffer from a critical lack of faith in human judgment. The image of the inquisitorial judge as an automaton captures only one side of a perennial scholastic debate about the scope of judicial discretion. That side of the debate expressed itself in several popular maxims: the judge must adjudicate according to the laws and the evidence, and not according to his conscience;<sup>281</sup> the proof in a criminal case had to be as clear as the light of day;<sup>282</sup> and nobody could be condemned unless he had been legitimately convicted by the testimony of two witnesses or by his own confession.<sup>283</sup> These arguments were not grounded in an inability to trust human discretion. Rather, the medieval debate concerning discretion featured problems that are relatively familiar to present-day jurists: how to accord the court enough flexibility to prosecute crimes efficiently without removing too many of the constraints that appear to ensure that the defendant will have a fair chance to prove his innocence.

Doubts about discretionary justice did not begin, as some have suggested, when the abolition of ordeals created a need to fashion a new law of proof.<sup>284</sup> Discretion had played a pivotal role in the old procedures that used ordeals, so much so that one of the major criticisms of ordeal was that the procedures were too easily manipulated.<sup>285</sup> If anything, scholastically trained jurists possessed increasing confidence in human judgment during the 1200s, when Aristotle’s theories of active human intellection, and of the natural origins of human society and its government permeated the study of arts, theology, and law.<sup>286</sup> William Durantis, Thomas de Piperata, and Albertus Gandinus lived in the intellectual milieu of Thomas Aquinas,<sup>287</sup> not the mystical one of Bernard of Clairvaux.<sup>288</sup> In urban culture, it would be anachronistic to cast the thirteenth-century man on the street as a superstitious bumpkin who trusted more in miracles and portents of divine or magical powers than in the works of man. As for the jurists, the native Bolognese professors who were born into the city’s ruling oligarchy were deeply involved in the quotidian problem of governing a city-

state through the exercise of discretionary political judgments. The scholastic jurists did not merely study Aristotelian politics; they lived them.

It is misleading to rely too much on the jurists' theoretical works, in which formal constraints upon judicial discretion loom large. Medievalists have been more scholastic than the scholastic jurists were themselves, emphasizing legal doctrine at the expense of social context. Thomas de Piperata pointed his reader in another direction when he liberated the *podestà* from the restraints of the scholastic law of proof with statutory grants of *arbitrium*. In thirteenth-century urban statutes, the grant of *plenum et liberum arbitrium* was a common means of defining the magistrates' authority to prosecute and punish crimes.<sup>289</sup> Thomas's own *quaestiones disputatae* provide evidence that the communal grant of *arbitrium* was perceived to be and intended as a public interest measure that exempted magistrates from some of the formal constraints of the *ius commune* so that they could punish crime more efficiently.<sup>290</sup> Statutes that confer broad official discretion to pursue a campaign against crime do not reflect widespread scruples about human judgment.

This is not to say that even reform-minded, non-traditional medieval jurists felt entirely comfortable with sweeping grants of discretionary power. In the *Tractatus de fama*, Thomas de Piperata relied heavily on statutory *arbitrium* to fashion his radical law of proof, but two of his *quaestiones disputatae* established the limits of statutory *arbitrium*.<sup>291</sup> The first of these *quaestiones* concerned the judge's power over individuals who offered surety for a criminal defendant.<sup>292</sup> The defendant did appear and was convicted, but he failed to pay the fine imposed by the court. The *podestà*, who held *arbitrium* in criminal cases, demanded that the sureties pay the fine for the defendant. Thomas concluded that the sureties had pledged security only for the appearance of the defendant at trial, and that the judge's discretionary power did not extend to making the sureties pay the defendant's fine. Thomas argued that the judge had discretionary power concerning crimes and criminals, but the obligation of the bondsman was not part of the criminal case.<sup>293</sup> This restriction was supported by a series of substantive arguments against extending the judges' discretionary power too far. Thomas explained that *arbitrium* was an iniquity, contrary to the *ius commune*,<sup>294</sup> and odious because some judges used it to condemn the innocent and absolve the guilty.<sup>295</sup> Hence, he believed, grants of *arbitrium* should not be extended beyond the narrowest definition of the criminal elements of the case.

In another question, Thomas posed a case that raised the issue of

the temporal limits of *arbitrium*.<sup>296</sup> In this case, a man who was wounded during a past *podestà*'s term died during the term of the present *podestà*, who possessed *arbitrium* to punish homicide.<sup>297</sup> The question was, which *podestà* had jurisdiction to prosecute and punish the crime? Strikingly, Thomas concluded that neither the past *podestà* nor the present one could prosecute the case.<sup>298</sup> The former *podestà*'s *arbitrium* to punish homicide did not apply because the crime of homicide was inchoate until the victim actually died, by which time the magistrate's *arbitrium* had ceased to exist.<sup>299</sup> Presumably, the former *podestà* could have convicted the assailant for some lesser crime, but not for a crime that had not yet occurred when the magistrate's term expired. Similarly, the present *podestà* lacked jurisdiction because only the consequences of the wrongdoing, and not the act, fell within the temporal limits of his *arbitrium*.<sup>300</sup> Thus, neither *podestà* had power to prosecute because the elements of the crime of homicide did not coalesce during the existence of either grant of *arbitrium*.

This result appears at first glance to be absurd. The inability to prosecute for homicide was expressly contrary to public utility, as it left a homicide unavenged.<sup>301</sup> Odder still, Thomas's analysis runs contrary to a famous case recorded in the *Digest*, a case which he must have known about.<sup>302</sup> This was the famous instance of the slave who was "killed twice." Having been mortally wounded by one assailant, he was dispatched by a second.<sup>303</sup> In that case, the Roman jurist Julianus had argued that both assailants were liable. The result was logically absurd, one death resulting in two separate crimes, but Julianus thought it would have been still more absurd to absolve both assailants or to condemn one rather than the other.<sup>304</sup> Thomas de Piperata analyzed the intervening events to produce just the opposite conclusion. The question is why he labored to come to a decision that departed from the opinion expressed in the *Digest* and left a homicide unpunished.

Thomas's curious conclusions about the temporal limits of *arbitrium* contain a key to understanding the jurists' attitudes, and perhaps the wider social perception of judicial power. It is clear that neither the authors of statutes that granted *arbitrium* nor the jurists who interpreted them as giving the *podestà* "free rein"<sup>305</sup> hesitated for a moment to permit judges in criminal cases to exercise wide discretion. For a number of jurists who followed Thomas de Piperata, this discretion extended even to the point of convicting defendants on the basis of proof that was less than formally perfect under Roman law. What frightened thirteenth-century Europeans was not the existence or the exercise of discretionary power, but its abuse. Thus, communes were

willing to grant extensive judicial discretion, but only for brief, discontinuous terms.

Thomas characterized *arbitrium* as odious because judges who possessed wide discretion could abuse it by condemning the innocent and absolving the guilty.<sup>306</sup> It was to be feared in the fractious, volatile city-state, where harsh criminal sanctions were periodically meted out against members of political factions that fell from power or failed to displace their rivals.<sup>307</sup> In such a setting, it was crucial to rotate public officers every half-year or year to prevent any incumbent from gaining enough power to become a tyrant. One consequence of this system of checks was that grants of criminal jurisdiction were conceived of as being wholly personal and discontinuous. The *arbitrium* that was granted to one *podestà* terminated with his departure from office, and his successor's *arbitrium* was created *ex nihilo*, as a wholly discrete grant of power. The office of a criminal judge did not exist continuously through the comings and goings of successive magistrates, but died with the departure of each incumbent. Thomas de Piperata's approach to judicial power reflected the social and political realities of thirteenth-century Italy. He argued that the public interest in punishing crimes required broad grants of discretion to urban magistrates, but that the suppression of crime could not justify any departure from the prudent policy of placing strict temporal limits upon grants of public authority.

Thomas de Piperata's writings point out that the medieval attitude toward judicial discretion was much more complex than expected. Clearly, he believed that human judges had the capacity to attain certainty beyond doubt, and that statutory grants of *arbitrium* permitted them to convict on the basis of such certainty, based on circumstantial evidence.<sup>308</sup> However, he did not portray *arbitrium* as wholly unfettered discretion. The judge had to observe at least some of the solemnities of the law, even if *arbitrium* permitted him to avoid the full stringency of the law of proof.<sup>309</sup> This reflects something similar to a "due process" mentality, a sense that public authority cannot legitimately impose criminal sanctions without giving the accused a chance of defense. Certainly this kind of "due process" mentality formed Bartolus's ideas about the limits of judicial discretion. In an age prior to the theory of individual rights against capricious search and seizure, self-incrimination, or cruel and unusual punishment, the only "due process" restraints were procedural ones: a "probable cause" threshold for initiating the criminal process,<sup>310</sup> a requirement that the defendant receive notice and have an opportunity to be heard,<sup>311</sup> and a requirement of a high standard of proof. Each of these procedural safeguards had its exceptions, but no jurist was willing to abandon them altogether. Even

Thomas was not willing to abandon all formal restraints upon the judge's discretion in the law of proof; he believed that the judge could condemn when the formal proofs were "a little deficient," but the circumstantial evidence added up to proof beyond doubt.<sup>312</sup> Finally, Thomas's most serious concerns about the limits of judicial discretion were political or constitutional ones; a judge might exercise "free rein" in criminal matters for six months, or for a year, but his power extended not one moment beyond the narrow temporal confines that had been erected to protect the Italian city-states from tyranny.

### Conclusion

The scholastic law of proof was not a mechanical response to the abolition of ordeals in 1215. During the thirteenth and fourteenth centuries, canonists and civilians engaged in a spirited debate about the role of discretion in the administration of criminal law. The conflict was, at its base, one that is familiar to modern jurists: efficiency calls for ever-greater judicial discretion in the interest of protecting society from criminals, while individualized justice demands strict adherence to the hallowed rules of law that guarantee "due process."<sup>313</sup> In the medieval debate, as in its modern counterpart, neither argument was able to drive its competitor completely from the field. Both the scholarly works of the medieval jurists and the statutory enactments of the Italian communes reflected an attempt to adhere to the solemnities of the law and, at the same time, to escape the strictures of an evidentiary law that would have required two witnesses' testimony or confession by the accused to sustain a conviction. Jurists and urban legislators circumvented the two-witness rule by adopting three expedients. Civil jurists, such as Bartolus, used pure juristic interpretation, citing the texts of the classical Roman law that permitted circumstantial proof, using them to argue that proof by *indicia* satisfied the principle that proof in a criminal case had to be "clearer than the light of day." This interpretation implied the existence of an alternative standard for sufficient proof: Bartolus suggested that the judge's subjective certainty beyond a doubt was the applicable standard of proof. The canonists used an entirely new form of criminal procedure, *per notorium*, that did not require full, formal proof in cases of notorious crime. The legislators used statutes to trump the strict law of proof. Some city-states granted their magistrates broad discretion that permitted criminal judges to ignore most of the technicalities of pleading and proof. Some statutes authorized conviction upon proof to some lesser standard, such



as *fama* plus the testimony of a single witness, but usually in specific cases, such as those involving only monetary penalties.

Upon consideration of these varieties of the law of proof, it seems fair to conclude that the rule requiring two witnesses or a confession for a "full proof" did not exercise the kind of absolute hegemony that legal historians have attributed to it. The two-witness rule was an important touchstone, but it did not dominate legal thinking or actual practice so far as to prevent the cultivation of alternative forms of proof.

This unexpected flexibility in the rules governing proof raises some questions about the relationship between the law of proof and the emergence of judicial torture. If the jurists and the legislators of the city-states found it easy to escape the two-witness standard of proof, then they cannot have seized upon judicial torture as the only device capable of producing the one acceptable alternative, that is, confession. Although the rise of judicial torture lies beyond the scope of this essay, it is clear that the reasons for its emergence must have been more complex than the impracticality of the two-witness rule. In the 1270s, for example, Albertus Gandinus saw judicial torture as an effective exemplary and punitive device, even though it occurred at the investigative stage of the inquisitorial process. It is also likely that there was a class bias in the use of torture, which operated to the disadvantage of the poor and the disenfranchised. Finally, one suspects that torture was adopted most rapidly in the prosecution of crimes that combined a nefarious quality with being virtually impossible to prove by any means other than confession. The Church's campaign against heresy, and the communes' equally fervent campaign against treason and sedition, probably explain the rise of investigative torture better than a theory of the inadequacy of the law of proof. The prosecution of crimes committed in the heart and mind led to the employment of devices that could investigate them while breaking the defendant's will to resist.

The emergence of judicial torture as an everyday aspect of inquisitorial process was more gradual than Langbein would suggest, and its use was functionally and demographically bimodal. If we can believe Gandinus, in the latter part of the thirteenth century, the man of ill fame and low condition, without respectable social connections, probably faced the prospect of punitive, or exemplary, torture that bore only a nominal relationship to the investigation of a particular crime. On the other hand, the socially respectable defendant probably faced a realistic possibility of being tortured only if charged with disloyalty to orthodox Christianity or to the state. The accuracy of these specu-

lations will not be known until archival research establishes who was actually tortured in the thirteenth and fourteenth centuries, and for what crimes.

On a more general level, this essay concerns legal evolution. Traditionally, one approach has stressed the intellectual, rational aspect of law, interpreting legal change as the unfolding of a reasoned ordering of rules and procedures. Robert Bartlett's recent study of ordeals exemplifies this approach: he maintains that the abolition of ordeals resulted from "the doubts and debates of an intellectual elite."<sup>314</sup> An opposing approach has developed among social and economic historians. They see the development of legal rules as a reaction to, rather than as a creative force behind, social developments. Paul Hyams spoke for this point of view when he argued that "legal change seldom emerged directly from positive, public decisions motivated by a driving desire for a higher rationality. Perhaps it never does."<sup>315</sup>

The development of the law of proof in the thirteenth and fourteenth centuries suggests that neither of these approaches standing alone provides an adequate explanation of the evolution of legal systems. Alan Watson's general theory of legal evolution is more satisfactory than Bartlett's or Hyams's particular theories about the disappearance of the ordeal.<sup>316</sup> The scholastic jurists used their professional discipline, their learning and skills, to mediate the tensions between the intellectual structure of the *ius commune* and the rapidly changing social perception of crime. Their conservative jurisprudence preserved the integrity and mythic significance of the authoritative legal sources, the mastery of which constituted the jurists' monopoly of expertise, while their innovative maneuvers permitted the adaptation of legal rules to pressing social needs. In the law of proof, this mediation involved both the preservation of rules that enshrined values and beliefs about fairness, and the interpretation of those rules to permit the efficient prosecution of crime. The law of proof, therefore, moved in response to the doubts and debates of an intellectual elite, but also in response to the perceived needs of society as they arose in immediate cases and contexts.

The medieval debate about judicial discretion was not merely an academic squabble about the fine points and technicalities of criminal procedure. As one reads the jurists' writings, the social and political concerns of the ecclesiastical reformers and the ruling elites of the Italian city-states keep reappearing in the mainstream of the legal debate. There is a temptation for academics, immersed in the learned tomes of scholastic jurisprudence, to become more scholastic than the medieval jurists were. It is important not to emphasize the neat pigeon-holes of legal doctrine so completely that we forget that legal debate,

then as now, reflected and responded to social context and social process.

#### NOTES

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1. For example, see Albertus Gandinus, *Tractatus de maleficiis*, in *Albertus Gandinus und das Strafrecht der Scholastik*, ed. H. Kantorowicz 2 vols. (Berlin, 1907–26), rubric *De presumptionibus et indicibus indubitatis, ex quibus condemnatio potest sequi: . . . quia in criminalibus causis intervenire debent et requiruntur probationes clariores luce*.

2. The most recent treatment of procedure by ordeal is R. Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford, 1986).

3. On the prohibition, see J. W. Baldwin, "The Intellectual Preparation for the Canon of 1215 against Ordeals," *Speculum* 36 (1961): 613–36.

4. This principle was encapsulated in a text that had been handed down from the *Lex Romana Visigothorum* 9.30. *interp. ad c.1* to the *Decretum* 2.1.2: The judge presiding over a criminal case cannot pronounce sentence before the defendant confesses that he is guilty or is convicted by unimpeachable witnesses.

5. K. W. Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit: Iudex secundum allegata, non secundum conscientiam iudicat* (Munich, 1967).

6. *Digest* 48.19.5.

7. R. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages: 'Rei publicae interest, ne crimina remaneant impunita,'" *Illinois Law Review*, 1984: 577–95.

8. J. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago, 1977), 3–8. Langbein's discussion of medieval developments relied heavily on P. Fiorelli, *La tortura giudiziaria nel diritto comune* 2 vols. (Milan, 1953–54).

9. Bartlett, *Trial by Fire and Water*, 100. For an insightful treatment of the social pressures to abandon ordeals, see P. Hyams, "Trial by Ordeal: The Key to Proof in the Early Common Law" in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, ed. M. Arnold et al. (Chapel Hill, 1981) 90–126.

10. A. Esmein, *A History of Continental Criminal Procedure*, The Continental Legal History Series, vol. 5 (Boston, 1913, repr. 1968), 80.

11. R. C. van Caenegem, "Methods of Proof in Western Medieval Law," *Mededelingen van de Koninklijke Academie voor Wetenschappen, Letteren, en Schone Kunsten van België*, 45 Klasse der Letteren (1983) 108–18.

12. R. Fraher, "Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence," in *Popes, Teachers, and Canon Law in the Middle Ages: Essays in Honor of Brian Tierney*, ed. S. Chodorow and J. Sweeney (Ithaca, N.Y., in press).

13. For example, see A. Soman, "Deviance and Criminal Justice in Western Europe, 1300–1800: An Essay in Structure," *Criminal Justice History* 1 (1980): 3–28; see subsequent volumes of *Criminal Justice History* for recent bibliography.

14. The problem may actually be a lack of catalogued records rather than a total absence of surviving records. S. Blanshei has found significant criminal court records dating from the late thirteenth century in Perugia and Bologna. See "Crime and Law

Enforcement in Medieval Bologna," *Journal of Social History* 16 (1982): 121–38; idem, "Criminal Law and Politics in Medieval Bologna," *Criminal Justice History: An International Review* 2 (1981): 1–30; idem, "Criminal Justice in Medieval Perugia and Bologna," *Law and History Review* 1 (1983): 251–75. Other Italian archives may yet yield significant court records from the 1200s. Another potential source of thirteenth-century criminal records is the relatively unexplored corpus of church court records.

15. The standard English-language works in this area are Esmein, *History of European Criminal Procedure*, and C. L. von Bar et al., *A History of European Criminal Law*, The Continental Legal History Series, vol. 6 (Boston, 1916). Much more broadly researched, and much less well known, is S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX* (Vatican City, 1935).

16. R. Fraher, "Tancred's '*Summula de criminibus*': A new text and a key to the *Ordo iudiciarius*," *Bulletin of Medieval Canon Law* 9 (1979): 23–35.

17. F. Bergmann, ed., *Pillius, Tancredus, Grazia, Libri de iudiciorum ordine* (repr. Aalen, 1965), 87–316.

18. The edition that I have used is Gulielmus Durantis, *Speculum iudiciale* 2 vols. (Basel, 1574; repr. Aalen, 1975). On Durantis's work, see J. Clarence-Smith, *Medieval Law Teachers and Writers, Civilian and Canonist* (Ottawa, 1975), 54.

19. Clarence-Smith, *Medieval Law Teachers*, 73, 84.

20. Durantis, *Speculum iudiciale*.

21. Gandinus, *Tractatus de maleficiis*.

22. F. Carl von Savigny, *Geschichte des Römischen Rechts in Mittelalter*, 2d ed. (1850) 5:539; Clarence-Smith, *Medieval Law Teachers*, 54–55.

23. Clarence-Smith, *Medieval Law Teachers*, 55.

24. Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik* 1, passim.

25. For Tancred, see Fraher, "Tancred's '*Summula de criminibus*,'" 23; Kantorowicz insisted that Gandinus wrote four different recensions of the *Tractatus de maleficiis*, beginning with an *opusculum* that occupied only three or four leaves in folio manuscripts, and culminating in a book-length treatise that occupies one hundred thirty-eight folios of Leipzig MS 1110. Several early manuscripts attribute the earliest, shortest version of the *Tractatus de maleficiis* to Guido de Suzaria or to Thomas de Piperata. Given that Gandinus borrowed extensively from a Bolognese treatise on torture that might have been Guido's work, and given that Gandinus incorporated material from Thomas's treatise on *fama*, there is no reason to suspect that Gandinus would have hesitated to borrow a pre-existing *tractatus de maleficiis*. Finally, Kantorowicz argued that the "second recension" of Gandinus's work referred expressly to an earlier version that Gandinus had composed at Perugia in 1286–87, and that this earlier recension must have been the very short text that Kantorowicz identified as the first recension of Gandinus's work, which survives in Leipzig Univ. Bib. MS 992, fols. 127–130 and in Oxford, Bodleian Can. Misc. 468, fol. 127–132. There is, however, a *tractatus de maleficiis* surviving in Tarazona MS 18, fol. 71–82, replete with references to thirteenth-century masters including Guido de Suzaria, Ubertino de Bobbio, Thomas de Piperata, Odofredus, and Albertus Papiensis. The Tarazona text, should it turn out to be the ancestor of Gandinus's "second recension," explains Gandinus's statement that he had revised an earlier version of his *tractatus de maleficiis*. One need not, therefore, challenge the scribes who copied the short *tractatus de maleficiis* preserved in Munich Clm. 12233, fol. 263–66, and in the Oxford MS, which attribute the authorship of the treatise to Guido de Suzaria.

26. For example, in the prologue to the *Tractatus de maleficiis*, Gandinus expressly conceded that his work was based on Odofredus's lectures and Guido de Suzaria's

writings. But in his discussion of judicial *arbitrium*, under the rubric *De questionibus et tormentis* § 38, Gandinus failed to cite his source, Thomas de Piperata's *Tractatus de fama*.

27. Langbein, *Torture and the Law of Proof*, 6.

28. Langbein, *Torture and the Law of Proof*, 5–8, suggests that the abolition of ordeals led to the creation of the *ius commune*'s law of proof. It is certainly more accurate to trace the emergence of a strict law of proof back to the second half of the eleventh century, when a revival of legal learning coincided with the Gregorian Reformer's campaign to re-impose clerical discipline. For the transmission into medieval jurisprudence of the Roman law requiring two witnesses or confession, see Fraher, "Preventing Crime in the High Middle Ages," n.17.

29. Early canonical efforts in this area consisted of arguments that "notorious" and "manifest" crimes could be punished without observing due process. See X.2.1 cc.15, 17, 21.

30. Dig. 48.19.5.

31. X.3.2.7 and X.3.2.8.

32. See, for example, Jacobus de Bellovisu, *Practica iudiciaria*, 4 *Tractatus universi iuris* (1584), rubric *De questionibus et qualitate tormentorum* § 42. The author argued that even if a judge had *arbitrium*, he could not torture a suspect without any circumstantial evidence against the defendant because it was a solemnity of the law that one had to produce legitimate *indicia* before one could proceed with torture.

33. Gandinus, *Tractatus de maleficiis*, rubric *Qualiter advocati circa accusationem se debeant habere*. Quod debeat esse iudex medius inter utramque partem et personam, non declinando a dextris, neque a sinistris, ut C. de fal. i. Ubi. Jacobus de Bellovisu, *Practica iudiciaria*, rubric *De questionibus et qualitate tormentorum* §§ 168–70, juxtaposed the legal principle that criminal proofs must be "clearer than the light at mid-day" with the prudent observation that a good judge was like a strong tree that would not bow to a strong wind coming from any direction, or like a balance scale that declines neither to the left nor to the right.

34. See especially Joannes Andreae, *Additiones in Speculum iudiciale* (1520–21) and idem, *Novella commentaria in V. lib. decretalium* (repr. Turin, 1963), preface, drawing upon the recollections of his master, Guido de Baysio.

35. Bartolus, *In ius universum civile commentaria* (Basel, 1562), Dig. 48.18.10 § *Plurimum*: De hoc etiam fecit unum tractatum in quo dixit modicum et bonum quidam qui est vocatus dominus Thomas de Piperata de Bononia.

36. T. Diplovatatus, *Liber de claris iuris consultis*, pars posterior, ed. I. Forchielli et A. Stickler, *Studia Gratiana* 10 (1968): 172: Thomas de Piperata floruit tempore dicti Rolandini, doctor Bononiensis illustris. Diplovatatus filled out his brief paragraph on Thomas by reciting the names of other authors who cited Thomas's *Tractatus de fama*: William Durantis, Joannes Andreae, Albertus Gandinus, Bartolus, and Albericus de Rosate.

37. G. Dolezalek, 4 *Verzeichnis der Handschriften zum römischen Recht bis 1600* (1972) listed sixteen extant manuscripts of the *Tractatus de fama*. By way of comparison, Dolezalek's work lists twelve manuscripts of Angelus Aretinus's *Tractatus de maleficiis* and eighteen manuscripts that contain copies of Gandinus's *Tractatus de maleficiis*. In contrast, Dolezalek listed only a single manuscript of Bonifatius de Antellinis's *Tractatus de maleficiis*.

38. For "secessions" from Bologna to Vicenza in 1204, to Arezzo in 1215, and to Padua in 1222, see H. Rashdall, *The Universities of Europe in the Middle Ages*, 2d ed. (1936), 2:10. During the Bolognese civil war that began in 1274, the Church officially

dispatched the canons of the Council of Vienne to the law faculty at Padua, instead of communicating them to the faculty at Bologna, as had been the custom since the first official decretal collections were transmitted to Bologna by the papacy at the beginning of the thirteenth century.

39. M. Sarti and M. Fattorini, *De claris archigymnasii Bononiensis professoribus a saeculo xi usque ad saeculum xiv*, 2d. ed. (Bologna, 1888–96), 1:189n.2 indicates that the division in Bologna dated back at least as far as 1218. On Guelphs and Ghibellines in thirteenth-century Italy, see B. Pullan, *A History of Early Renaissance Italy from the Mid-Thirteenth to the Mid-Fifteenth Century* (1973), 26–48; D. Waley, *The Italian City Republics* (1969), 200–218.

40. Sarti and Fattorini, *De claris . . . professoribus* 2:53–55 present the entire text of the Bolognese archival record of this contract, dated 9 and 10 February, 1269.

41. *Ibid.*: Item quod si civitas Bononie esset in aliquo rumore, quod Deus avertat, et tunc ipsi domino Bitto Bulgano vel suis sociis vel nunciis per forciam esset aliquid acceptum, quod Commune Bononie debeat ei vel eis satisfacere de omni eo, quod probaverit, vel probatum fuerit per vim sibi acceptum fore, ipsum vel ipsos conservare indempenem vel indempenes.

42. *Ibid.* 1:225n.3.

43. *Ibid.* 1:224.

44. *Ibid.* 1:189n.1, citing Ghirardacci's tale about the two lovers. Cf. Cherubino Ghirardacci, *Della historia di Bologna* (Bologna, 1596), Bk.7.

45. Waley, *Italian City Republics*, 218.

46. Sarti and Fattorini, *De claris . . . professoribus* 1:225.

47. *Ibid.* 1:189, citing the commune's *Liber reformationum* in the Bolognese public archives.

48. Waley, *Italian City Republics*, 211.

49. Sarti and Fattorini, *De claris . . . professoribus* 1:189: Cum autem Forolivienses fortiter resistissent et Bononienses bellum in eos majori studio instaurarent, ea re magis exasperati in Jeremienses Lambertaccii (Ghibellini scilicet in Guelphos) bellum civile excitarunt tam cruentem et atrox ut fere civitas eversa sit.

50. *Ibid.* 1:225: Thomas enim ejusque frater Castellanus perduellionis nomine patria pulsi et fortunis fere omnibus spoliati [sunt].

51. *Ibid.*: Sed in medio rerum discrimine, cum extremum diem ageret senex Piperata independentes suae calamitates animo prospiciens, non filios suos Thomam, Castellanium, ac Bartholomaeum . . . sed nepotes inpuberes, eorum filios, haeredes instituit . . . Non tamen innocios liberos eadem secum involverunt. Thomas had speculated about the relationship between testamentary devices and the criminal sanction of expropriation in a *quaestio disputata*, preserved in a Vatican MS, Arch. S. Pietro A.29, fol. 135v–136r. The text is partially edited in G. D'Amelio et al. *Studi sulle "Quaestiones" civilistiche disputate nelle universita medievali* (1980), 286.

52. He would have produced a *consilium* concerning the legality of the commune's contract for coinage, text found in Sarti and Fattorini, *De claris . . . professoribus* 2:53–5, and another concerning the legality of the magistrates' actions in trying to coerce Forli to remain subject to Bologna, *ibid.* 1:189n.1.

53. M. Bellomo, *Due "libri magni quaestionum disputatarum" e le "quaestiones" di Riccardo da Saliceto*, in *Studi Senesi*, 3d ser., 18, fasc. 2; for a partial edition of Thomas's *quaestiones*, see F. Martino, *Quaestiones civilistiche disputate a Bologna negli ultimi decenni del secolo XIII*, in *Studi sulle "Quaestiones"*, ed. G. D'Amelio et al. 225–96. Martino's partial transcription of the texts from Leipzig Univ. Bib. MS 992 needs to be compared with the texts preserved in another manuscript, Vat. Arch. S.

Pietro A. 29, which includes seventeen *quaestiones* attributed to Thomas de Piperata, eight of which do not appear in the Leipzig manuscript that Martino used.

54. MS Arch. S. Pietro A.29 contains five of Thomas's *quaestiones* that discuss criminal cases (fols. 98v, 100r, 120v, 128v, and 140v) and five that discuss testamentary succession or legacies (fols. 118v, 121r, 127r, 132r, and 135v).

55. See G. Callon's description of Tours MS 653 in *Catalogue général des manuscrits des bibliothèques publiques de France*, 37:522–3 (8th ser., 1886–1965). This manuscript, destroyed in 1940, contained a *tractatus de maleficiis* (fols. 1–6); a *tractatus de questionibus* (fols. 6–8), a *tractatus de exceptionibus* (fol. 8), and the *tractatus de fama*, all attributed to Thomas de Piperata. One would be tempted to dismiss these attributions, but for a mysterious catalogue entry concerning yet another lost manuscript, this one from Seo de Urgel. R. Beer, *Handschriftschatze Spaniens*, in *Sitzungsberichte der kaiserlichen Akademie der Wissenschaften*, Philosophisch-Historische Classe, 129:59 (1893) mentioned a manuscript volume including two treatises, one being the *Libellus fugitivus* of Nepos de Montealbano, and the second described as follows: *Secundus vero tractatus est maleficiorum puniendorum et questionum et maleficiorum faciendorum, compositus a Domino Thomato*. This faintly echoes the explicit of the Tours manuscript described above: *Explicit tractatus de fama et de maleficiis, compositus a domino Thomasio de Piperatis, legum doctore*. Since both manuscripts have been lost to scholarly use, there remains only a tantalizing hint that Thomas de Piperata might have written more than we know about.

56. S. Kuttner, "Bernardus Compostellanus Antiquus: A Study in the Glossators of the Canon Law," *Traditio* 1 (1943):308–9. The *glossa ordinaria* to Gratian's *Decretum* suppressed the memory of Bernardus and of Alanus Anglicus. Similarly, the decretalist Tancred acknowledged his dependence upon some of his predecessors while declining to mention others, such as Johannes Galensis. Among the civilians, the *nostri doctores*, including Bulgarus, Johannes Bassianus, Azo, Accursius, and their followers, suppressed the opinions of the *Gosiani*: Martinus Gosia, Placentinus, Pillius, and their followers. See H. Kantorowicz and W. Buckland, *Studies in the Glossators of the Roman Law* (1938), 87.

57. Augustinus Giganticus, *Commentaria*, in Angelus Aretinus, *Tractatus de maleficiis* (Venice, 1578), rubric *Comparuerunt dicti inquisiti*, no. 5; Jacobus de Bellovisu, *Practica iudiciaria*, rubric *De questionibus et qualitate tormentorum*, nos. 78–81.

58. Gandinus, *Tractatus de maleficiis*, rubric *De presumptionibus et indicibus indubitatus*, § 12, text at n.163.

59. Andreae, *Additio ad Speculum iudiciale*, rubric *Quid sit fama, vv. reprobatus, coarctemus, veniens*, text at nn.225–27.

60. Bartolus, *In ius universum civile commentaria*, Dig. 48.18.10 § *Plurimum*, text at n.233.

61. Aretinus, *Tractatus de maleficiis*, rubric *Quod fama publica procedente*, no. 18, text at n.264.

62. G. Ziletti, ed. *Tractatus criminales* (Venice, 1563) fol. 1–14; idem ed. *Tractatus universi iuris* (Venice, 1584) tom. 11, fol. 8–10; M. Freher, ed. *Tractatus de fama publica* (Frankfurt, 1598).

63. See S. Kuttner, "Analecta Iuridica Vaticana (Vat. lat. 2343)," in *Collectanea Vaticana in honorem Anselmi M. Cardinalis Albareda a Bibliotheca Apostolica edita* (Vatican City, 1962), 4 n.3.

64. Thomas de Piperata, *Tractatus de fama*, in *Tractatus universi iuris* (Venice, 1584) tom. 11: *Quoniam circa famam, indicium, argumentum, et presumptionem*

multas dubitationes oriri contingit in iudiciis . . . infrascripta super predictis redigere curavi.

65. For a discussion of the medieval jurists' treatment of *fama* as both a question of status and a quantum of proof, see F. Migliorino, *Fama e infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII* (Catania, 1985), especially the introduction. For Migliorino's opinion of Thomas de Piperata's contribution, see pp. 65–70.

66. Canon eight of the Fourth Lateran Council appears in the decretals as X.5.1.24: . . . verum etiam cum prelatus excedit, si per clamorem et famam ad aures superioris pervenerit . . . debet coram ecclesie senioribus veritatem diligentius perscrutari . . . non tanquam idem sit accusator et iudex, sed quasi denunciante fama vel deferente clamore officii sui debitum exsequatur.

67. See especially the *glossa ordinaria* at X.2.1.7 and X.2.1.8 concerning the relationship of *fama*, *manifestum*, and *notorium*; also the gloss at X.5.1.24.

68. Migliorino, *Fama e infamia*, 65: 'La prima e più celebrata opera dedicata quasi interamente alla fama. . .'

69. Thomas de Piperata, *Tractatus de fama*: Dicitur fama quod homines alicuius civitatis, villae, vel castri, vel vici, vel contratae alicuius communiter opinantur et existimant sive sentiunt, illud verbis sive loquella asserendo, non tamen habent pro certo et vero vel manifesto.

70. *Ibid.*: Quod autem dixi, homines alicuius civitatis, etc., non sic debet intelligi ut in omnibus partibus civitatis . . . oporteat esse opinionem sive existimationem predictam. Immo sufficit quod sit in maiori parte, quia refertur ad universos quod fit per maiorem partem.

71. *Ibid.*: Considerandum est quod sit factum de quo dicitur esse fama. Nam si tale sit sive ita magnum, quod per famam ab omnibus de civitate . . . scilicet a maiori parte ipsorum sciri debuerit vel sciri soleat, tunc non sufficit esse famam de facto predicto in aliqua contrata civitatis . . . Puta D. Brancallo et D. Castellanus de Andalotis olim fuerint senatores urbis Romane. Nunc est questio in civitate Bononie si fuerint senatores vel non. Ad probationem fame sufficit probare famam esse, de hoc quod fuerunt senatores urbis Romane, in quarterio Porte S. Proculi vel in contrata ipsorum? Certe non. The example is historically accurate. The degli Andalo were a Bolognese family of professional *podestà*. Brancaleone degli Andalo, Count of Casalecchio, was senator of the Romans from 1252 to 1254 and from 1254 to 1258. Pullan, *History of Early Renaissance Italy*, 123–24.

72. Thomas de Piperata, *Tractatus de fama*: Si vero duo populares fuerunt potestates aliquarum villarum civitatis Bononie, tunc sit questio super hoc. Nonne sufficeret ad famam probandam probare de hoc esse famam in contrata ipsorum? Certe sic.

73. *Ibid.*: Si questio sit de offensione facta alicui de maioribus civitatis, propter quam offensionem fuit magnus rumor in civitate Bononie, partes forte fecerunt tumultum et ad bellum se preparaverunt, si probatur famam esse de aliquo quod dictam offensionem fecerit, certe non sufficit probare famam esse de hoc in aliqua contrata. Immo probari oportet famam esse per civitates et loca similia. Si de offensione facta alicui parvo populari agitur, et fama sit probanda, sufficit probare famam contrate, et sic de similibus. Thomas's examples illustrate once more the ubiquitous theme of factional strife leading to violence.

74. Cf. X.5.1.24, in which Innocent III asserted that *fama* had to arise from *providis et honestis*, and not from *malevolis et maledicis*; X.3.2.8, in which Innocent taught that a cleric's cohabitation with a woman could be brought before the cleric's superiors



on the basis of informal complaints of “good men” among whom the cleric had his abode.

75. Thomas followed a fashion dating back at least as far as Isidore of Seville’s *Etymologies*. Like many of the scholastics’ linguistic ventures, Thomas’s etymological speculations were ludicrous. He claimed that the word *fama* was derived from the phrase *fides mentis* (with *fa-* standing for *fides* and *-ma* standing for *mentis*), meaning “mental belief.”

76. Thomas de Piperata, *Tractatus de fama*: Et quidem probatur [fama] per duos testes . . . nisi iudici constet de dicta fama, quia sit nota sibi ut notoria.

77. The canonistic definition of *notorium* was expressed in X.3.2.7 and X.3.2.8, under the title “On the cohabitation of clerics with women.” The canonists’ glosses to these decretals provided the basis for scholastic discussions of *notorium*, *manifestum*, *fama*, *occultum*, and related concepts. Cf. Bartolus, *In ius universum civile commentaria*, Dig. 48.16.6.3: Tractatum de notoriis criminibus non habemus in iure nostro, sed canonistes habent tractatum longum.

78. Thomas de Piperata, *Tractatus de fama*: Si dicat “nescio,” vel si dicat quod hoc audivit a tali et a tali, vel a x vel xx hominibus, non valet dictum ipsius aliquid.

79. Ibid.: Unde sapientes tabelliones querunt a teste deponente super fama, quid est fama; item quod homines faciunt famam; item unde habuit originem fama de quo deponit . . . Sed quid si respondeat testis interrogatus de origine fame, “nescio unde habuit originem?” Puto quod bene respondeat.

Si queratur a teste, “quomodo scis?”, debet respondere quia ita sentit maior pars populi civitatis. . . .

80. Ibid.: Si vero respondeat testis “originem habuit fama ab ipso facto de quo agitur vel de quo est fama,” puto responsonem optimam. Nam factum potest hominibus esse certum. . . .

81. J. Mansfield, “Jury Notice,” *Georgetown Law Journal* 74 (1985): 395; R. Fraher, “Adjudicative Facts, Non-Evidence Facts, and Permissible Jury Background Information,” *Indiana Law Journal* 62 (1986): 333.

82. Thomas de Piperata, *Tractatus de fama*: Sed quid operabitur fama probata, cum agitur ex contractu et petitur aliquid ex promissione, et probatur famam esse quod ille a quo petitur illud promisit? Vel quid si agatur rei vendicatione vel simili actione, et probatur famam esse quod res petita sit petentis? Vel agitur civiliter ex quacunque causa et actoris intentio approbatur per famam, nec probatur aliquid aliud? . . . fama sola non probat in casibus supradictis.

83. Ibid.: Et quidem fama probata aliquando operatur et habet effectum ut valet contractus celebratus cum aliquo, ut sic condemnari possit exceptione cessante, que alias si non probaretur.

84. Ibid.: Illa fama locum habet si mutuo filiofamilias de quo fama sit quod sit paterfamilias. Nam si pecuniam receptam ab ipso repetam et ipse nunc exceptionem opponat, et ego probavero famam fuisse tempore dati mutui quod est paterfamilias, cessabit exceptio supradicta et condemnabitur cum effectu.

85. Ibid.: Nam si fuero in iudicio cum filiofamilias sine consensu patris, cum esset fama quod dictus filiusfamilias esset paterfamilias, tenebit iudicium, quia in iudiciis quasi contrahitur . . . sed si non fuisset dicta fama nec probaretur, nec instantia iudicii nec sententia valeret regulariter.

86. Ibid.: Sic operatur circa iudicium, quod valeat iudicium et sententia et arbitrium, instantia et acta omnibus alicuius, ut si de iudice vel arbitro vel tabellione erat fama quod esset liber, et erat servus.

87. Ibid.: Sed in dictis casibus fama probata reddit id de quo agitur validum.

88. Ibid.: Sed quid operabitur fama probata, cum agitur ex contractu et petitur aliquid ex promissione, et probatur famam esse quod ille a quo petitur illud promisit?

89. Ibid.: Illud enim quod petitur ex contractu probari debet per testes qui de veritate et sua scientia testimonium perhibeant.

90. Ibid.: Fama sola non probat in casibus supradictis.

91. Ibid.: . . . verum est quod consentiens fama confirmat fidem rei de qua queritur quando preter famam sunt alie probationes. Que si quidem sint plene et sufficientes probant per se sine fama, nihilominus confirmat fama ibidem si non erant omni exceptione maiores, quod esse debent.

92. See C. Donahue, "Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law" in *On the Laws and Customs of England*, ed. Arnold et al., 143–55.

93. Thomas de Piperata, *Tractatus de fama*: Multitudo testium facit additamentum quoddam ad probationem faciendam per eos, que non fieret si non esset multitudo ipsorum, quia non erant omni exceptione maiores, et sic confirmat probationem faciendam per eos.

94. Ibid.: In secundo casu dignitas testium operatur, quod plenam faciant probationem quam non fecerent alias, cum forte non essent omni exceptione maiores vel quia erant amici producentis vel simili ratione, et sic dignitas testium supplet quod alios deficeret et confirmat probationem faciendam per eos.

95. Ibid.: Nam presumptione iuris non vivit homo ultra centum annos, cui statur nisi contrarium doceat.

96. Accursius, *glossa ordinaria* to Dig. 22.5.3 v. *Confirmat*: Dicitur fama confirmare, idest cum alio firmare: non quod per se fama non sufficiat; sed respectu assertionis partis, quam assertionem fama confirmat. Sufficit ergo per se.

97. Ibid.: Sufficit ergo per se . . . secundum Ioan.

98. Ibid.: Alii dicunt, quando consonant naturae, ut B. mortuum, et propter hoc dicit hic "alias consentiens," idest quandoque; sed alias non sufficit famam probare.

99. Ibid.: Alii dicunt quod [fama] cum alio firmat . . . Facit ergo secundum hos probationem semiplenam.

100. Thomas de Piperata, *Tractatus de fama*: Respondetur et inducetur in argumentum quod fama dicitur confirmare, non quod per se non sufficiat absque alia probatione, sed respectu assertionis partis, quam assertionem fama confirmat, et ita sufficit pro se absque alia probatione, allegavit dominus Accursius . . . et scriptum est in apparatu Accursii, posito in dicto paragrapho "Alias numerus" preter predicta "secundum Io.," quasi Io. predicta dixerit et conscripserit. Sed Ioan. excludo, quod predicta non scripsit, non dixit. Immo dixit totum contrarium, quod fama sola non probat in casibus supradictis, et hoc puto ipsam veritatem, quod fama probata in casibus supradictis non probat.

101. Ibid.: Non tamen per hoc sentio quod fama obtineat medietatem plene probationis.

102. Ibid.: Item quid operatur fama in maleficiis, ut puta accusatur quis de homicidio vel alio crimine, accusator non probat aliud nisi famam et vocem publicam esse quod accusatus aliquod maleficium commiserit de quo accusatus est, numquid ex tali probatione erit condemnandus?

103. Ibid.: In criminali enim debent esse probationes luce clariores.

104. The Fourth Lateran Council's decree *Qualiter et quando* had authorized prosecution by *ex officio* inquisition whenever "a clamor arose that could not be ignored without scandal or tolerated without danger" to law and order. Gandinus, *Tractatus de maleficiis*, rubric *Quomodo de maleficiis cognoscatur per inquisitionem*,

explained that *Qualiter et quando* had established six prerequisites to *inquisitio*: public outcry and *fama* that the suspect had committed the crime; personal jurisdiction over the suspect; a judge's awareness of the *infamia*; that the outcry not be a single instance, but a constant or repeated phenomenon; that the *fama* have arisen among honest and discreet persons; and that the *fama* not have arisen from malice, but out of a zeal for justice. If an *inquisitio* were undertaken against a particular individual, Gandinus believed that the procedural rules of *Qualiter et quando* should be followed, although a *generalis inquisitio*, or an investigation of a crime without a particular suspect, could be undertaken without any *fama*.

105. Thomas de Piperata, *Tractatus de fama*: Queritur quid operabitur fama in maleficiis? Respondeo quod confirmabit alias probationes aliorum testium qui non sunt omni exceptione maiores, ut supra dixi in causis civilibus.

106. *Ibid.*: Sed numquid operabitur [fama], ut torqueri possit accusatus secundum iura communia?

107. *Ibid.*: Nam ad veritatem maleficii inveniendi torqueri potest accusatus . . . precedentibus tamen indiciiis. A questionibus enim inchoandum non est, nisi precedant indicia sive argumenta.

108. *Ibid.*: Ex indicio vero non proceditur secundum iura communia ad questiones, sed ex indiciiis.

109. *Ibid.*: ut puta dictum unius testis . . . vel si constaret accusatum esse inimicum accusatoris . . . Idem si se iactasset accusatus de maleficio committendo . . . Idem si visus fuisset accusatus fugere de loco maleficii tempore maleficii commissi . . . Idem si alias maleficium perpetrasset in personam illius qui nunc dicitur offensus vel etiam alterius, quia qui semel fuit malus et nunc presumitur malus.

110. G. Fasoli and P. Sella, eds., *Statuti di Bologna dell' Anno 1288*, Bk. 4, rubric 17: *De tondolo et tormento*: Ordinamus quod nullus possit vel debeat modo aliquo vel ingenio tormentari . . . nisi in casibus infrascriptis . . .

111. *Ibid.*: Et in quolibet predictorum casuum cum violente presumptiones invente fuerint.

112. Thomas de Piperata, *Tractatus de fama*: Scio tamen quod Italici utuntur hoc vocabulo, quia dicunt quod est presumptio violenta, unde dicit lex municipalis Bononie quod nullus ponatur ad torculum sive tormentum nisi in certis casibus in quibus potest quis poni, videlicet si sint contra eum presumptiones violente. Que ergo dicantur violente presumptiones? Respondeo magna indicia, que sunt minus indiciiis indubitatis et plus indiciiis simplicibus. For a more refined discussion of violent presumptions, see Innocent III, *In V. Lib. Decretalium Commentaria* (Venice, 1610) at X.2.23.10 v. *verosimile*. Innocent claimed that *violentae presumptiones* constituted a sufficient basis for a condemnation, but cautioned that a judge should only rarely use such presumptions as proof and should mollify the penalty in such a case.

113. In the inaugural oath of the Bolognese *podestà*, *Statuti di Bologna*, Bk. 1, rubric 5, the magistrate laid claim to unfettered discretion except as regards torture: . . . et in his inquirendis habeam purum, merum, et liberum arbitrium, salvo semper . . . statuto quod loquitur de tondolo et tormento. In contrast, the Florentine statutes of the early fourteenth century gave the *podestà* and the *capitano del popolo* broad discretion to torture suspects who fled: . . . habeant arbitrium et liberam potestatem et teneatur cogere et ad tormenta ponere et omni alia via qui eis vel alteri eorum videbitur investigare quoscunque . . . qui pro eorum ministeriis publicis consueverunt recipere pecuniam . . . aufugientes et se absentes . . . Sed quando et quantum ponantur ad tormenta vel alia via tormentorum procedatur sit in arbitrio Potestatis et Capitanei qui tunc fuerint. *Statuto del Capitano del Popolo, 1322-1325* (Florence, 1910), Bk. 2, rubric 25.

For *plenum et liberum arbitrium* involving fraudulent behavior in litigation concerning debt, see *ibid.*, Bk. 2, rubric 28. Bk. 3, rubric 2 authorized the *capitano* to prosecute and convict anyone who attempted to corrupt a public official, and specifically established a lesser standard of proof: et sufficiat probatio per publica fama. In other criminal matters involving values of less than ten Florentine pounds, the statutes permitted the *Capitano* to proceed summarily, relying on proof by a single witness: et sufficiat probatio per unum testem. Bk. 2, rubric 1.

114. Thomas de Piperata, *Tractatus de fama*: Et ideo dixi “secundum iura communia” sive Romana, quod quando lex municipalis determinat quando sit ad tormenta procedendum, per potestatem vel iudicem secundum illam legem municipalem est procedendum et non aliter.

115. *Ibid.*: Et ideo dixi “secundum iura communia sive Romana” quia quando potestas habet arbitrium, etiam si non essent indicia plura sed unum tantum, posset ad tormenta procedere.

116. *Ibid.*: . . . quia dare arbitrium potestati nihil aliud est quam dicere quod bona fide procedat, ut sibi placuerit et ut sua conscientia sibi dictaverit.

117. Nörr, *Zur Stellung des Richters*.

118. Thomas de Piperata, *Tractatus de fama*: Nam arbitrium supradictum potestati vel iudici dat largas habenas, et hoc vult arbitrii interpretatio.

119. *Ibid.*: Unde cum datur arbitrium potestati, non dicat quis ad boni viri arbitrium reducendum arbitrium potestatis vel condemnatio ab eo factum. Aliud enim est privatos compromittere in arbitratore, quo casu arbitrium reduci debet ad arbitrium boni viri . . . Aliud est per legem municipalem vel reformationem populi sive decurionum dari arbitrium potestati, quo casu per arbitrium habet potestas quod dixi.

120. *Ibid.*: Item quid possit facere potestas sive iudex ex tale arbitrio sibi dato, potius capitur ex consuetudine terrarum quam ex iure.

121. *Ibid.*: . . . quia quando potestas habet arbitrium, etiam si non essent indicia plura sed unum tantum, posset ad tormenta procedere.

122. *Ibid.*: Item licet in procedendo et in maleficium cognoscendo possint omittere ordinem et solemnitatem iuris ex consuetudinaria et communi interpretatione arbitrii, non tamen prorsus non possunt vel debent omittere.

123. *Ibid.*: Item et cum ad sententiam pervenerint, caveant ne ratione arbitrii condemnent ex sola conscientia, vel ex sola fama, vel ex dicto unius testis, sed si inveniatur probatum maleficium tunc condemnent.

124. *Ibid.*: Idem si non sit omnino plene probatum, sed si ad probationem plenam ad modicum deficiat, forte ratione testium qui non sint omni exceptione maiores, nam tunc condemnent secure per arbitrium quod habent, si tamen conscientia et animus cum probatione concurrat.

125. *Ibid.*: Tenetur enim potestas qui habet arbitrium de dolo et lata culpa, iudicio meo, ut depositarius.

126. *Ibid.*: Sed quid si maleficium est probatum per unum testem omni exceptione maiorem, item per famam et vocem publicam, numquid poterit condemnare potestas? Respondeo quod non, secundum iura Romana et communia . . . Ex arbitrio tamen quod habet potestas bene poterit condemnare, et bona fide videtur procedere si condemnet.

127. *Ibid.*: Nec propter hoc intelligo plene probatum, quia famam non puto facere dimidium probationis plene.

128. *Ibid.*: Quis sit effectus indicii? Et certe iosius effectus est, ut moveat animus iudicis ad credendum accusatum de maleficii commississe maleficium.

129. *Ibid.*: Ista verto indicia aut sunt ad probationem indubitata aut sint dubitata.

Primo casu, quando sunt ad probationem indubitata, tunc ex iis proceditur ad sententiam condemnatoriam.

130. They were quoted by Albertus Gandinus, adapted by Bartolus of Saxoferrato, recited by Angelus Aretinus, who attributed them to Bartolus, only to be caught by Girolamo Giganti, who corrected the attribution and rejected the legal doctrine articulated by Thomas de Piperata. Finally, Thomas's three cases were quoted verbatim, without attribution, in Jacobus de Bellovisu's *Practica criminalia*, rubric *De questionibus et qualitate tormentorum* nos. 78–81.

131. Thomas de Piperata, *Tractatus de fama*: Est camera habens unum aditum et exitum, et non plures. De dicta camera exiit sive egreditur aliquis pallidus, cum gladio sanguinolento in manibus. Statim post eius exitum invenitur in dicta camera homo occisus cum gladio. Ista certa sunt indicia ad probationem maleficii indubitati.

It seems that Thomas de Piperata had never seen a thirteenth-century predecessor of Perry Mason establish a client's innocence, despite the client's having been caught with a "smoking revolver" in his hand, while kneeling over the body of his slain enemy.

132. *Ibid.*: Raro tamen inveniuntur talia indicia, unde subiciamus aliud exemplum de indicii ad probationem indubitatis que de facto possent venire.

133. *Ibid.*: Ecce, occiditur Titius in aliqua vinea vel fundo. Accusatus est Seius, quod dictum Titium interfecerit. Nulli testes deponunt quod Seius occiderit eum, sed probatur hoc, videlicet quod Seius erat inimicus Titii. Item dicunt testes quod viderunt Seium admenantem cum gladio contra Titium. Item probatur per testes quod Seius fugit tempore dicti maleficii de loco in quo fuit commissum dictum maleficium. Item probatur vox et fama quod dictus Seius occiderit istum Titium.

134. *Ibid.*: Certe omnia ista iuncta simul, etsi singula per se non sufficiant, vel duo ex eis, que tamen sunt quattuor, quorum quilibet indicat dictum Seium predictum maleficium commississe, bene probant Seium occidisse dictum Titium.

135. *Ibid.*: Ecce aliud exemplum: Accusatur aliquis, puta Seius, quod Titium fecit occi. Non sunt testes qui hoc dicent, sed probatur hoc contra Seium, videlicet quod erat inimicus Titii. Item quod dictus Seius tempore maleficii perpetrati erat prope locum maleficii. Item quod dictus Seius perpetrato homicidio receptavit homicidam. Item quod homicida erat domesticus et familiaris Seii. Item quod Seius iactabat se, quod faceret dictum Titium occi, et est homo de quo verosimile sit quod hoc faceret, et hoc facere possit. Item quod olim aliq̄ue offensiones facte fuerunt inter predictos Titium et Seium.

136. *Ibid.*: Ista certe satis videntur facere indicia indubitata quod ille Seius fecerit occidi predictum Titium.

137. Cf. Sarti and Fattorini, *De claris . . . professoribus* 2:53, no. 32, in which "Thomaxium domini Peverarii" appears as a jurisconsult and "domino Gandino iudice" appears as a witness.

138. Gandinus, *Tractatus de maleficiis*, preface: Circa cuius libelli correctionem et continentiam talem intendo ordinem observare: ante omnia premittendo, quod de maleficiis cognoscitur quinque modis, videlicet per accusationem, per denuntiationem, per inquisitionem et exceptionem, et quando crimen est notorium.

139. *Ibid.*, rubric *Quomodo de maleficio cognoscitur, quando crimen est notorium* § 4: Notorium vero facti habetur id crimen, in quo fama suum prebet adminiculum et ipsa evidentia rei protestatur, quod se prebet et se exhibet conspectui hominum omnium vel maioris partius alicuius loci, ut nulla possit tergiversatione celatur, ut extra de cohabitatione clericorum et mulierum c. Tua et c. Vestra et c. fin. Gandinus quoted verbatim from the decretals that he cited.

140. Ibid., rubric *Quid sit fama*: Restat nunc videre, quo modo cognoscitur, quando crimen est notorium. Sed quoniam fama, infamia, presumptiones et indicia sunt precedentia cognitionem dicti notorii criminis, et etiam quoniam pro investigatione et cognitione criminum plurimum operantur, ideo de eis omnibus videamus.

141. Ibid., rubrics *Quid sit fama; Unde aut a quo loco possit fama procedere; A quo vel a quibus personis possit fama incipere et ex quo tempore; Qualis et quantus sit fame effectus; De presumptionibus et indiciis dubitatis, quibus proceditur ad tormenta; De presumptionibus et indiciis indubitatis, ex quibus condemnatio possit sequi; De rumore, de occulto, et de manifesto.*

142. Ibid., rubric *Quid sit fama § 1*: Equidem fama est inlese dignitatis status, moribus et legibus comprobatus, et in nullo diminutus.

143. Ibid., rubric *De presumptionibus et indiciis indubitatis, ex quibus condemnatio possit sequi.*

144. Ibid., § 1: Sed licet ex ea sola probatione, que iuris est tantum, aliquis non possit vel debeat corporaliter diffinitive damnare, tamen ex ea sola presumptione, que iuris est et de iure, et ex quolibet alio indicio indubitato poterit contra aliquem diffinitiva formari sententia, quia talis presumptio, qui iuris est et de iure, probationem aliquam in contrarium non admittit . . . Item ex quolibet indicio indubitato poterit diffinitiva formari sententia . . . et merito, quia illa lege ultima (scil. Cod. 4.19.25) cavetur, quod accusatores eam rem, hoc est illud crimen, habent et debent in publicam notionem deferre, ut possit diffinitiva proferri sententia, quod crimen idoneis testibus sit munitum, saltem duobus . . . vel quod sit apertissimis documentis instructum . . . vel quod sit instructum indiciis ad probationem indubitatis, clarioribus luce expedita.

145. Ibid.: Et circa presentem materiam primo intendo formare quandam dubitabilem questionem, que tota die de facto potest subsistere.

146. Ibid.: Questio talis est. Quidam nomine Titius in domo vel agro reperitur occisus vel vulneratus, de malefactore autem aliter non constat, nisi quia quidam nomine Seius de dicto maleficio inculpatur; contra hunc Seium ista probantur per testes idoneos omni exceptione maiores: primo, quod publica vox et fama est ab idoneis orta personis, quod dictus Seius dictum maleficio commisit; secundo, quod ipse erat illius Titii capitalis inimicus; tertio, quod ille Seius visus fuit solus exire domum vel agrum Titii, cum gladio evaginato in manu fugere, in qua domo vel agro ille Titius repertus est occisus incontinenti vel vulneratus. Modo queritur, numquid ista omnia indicia simul iuncta et commixta sint et dici possint indicia indubitata, ex quibus possit ad condemnationem procedi?

147. Ibid.: Et primo videtur posse dici, quod sic, triplici ratione: prima quia sicut sufficit, quod quis sit testibus superatus vel propria voce confessus, ad hoc, ut possit capitalis sententia contra eum proferri . . . ita eodem modo debet ex dictis contra eum repertis sententia proferri, cum talia indicia non respuantur a iure . . . et cum talia indicia non videantur continere minorem auctoritatem et fidem probationis, quam testes vel instrumenta (citing Cod. 4.19.21 and Cod. 3.32.19) . . . Item tam testes quam aperta indicia et manifesta equiparantur, ut possit sequi diffinitiva sententia (citing Cod. 4.19.25).

148. Ibid.: Secunda ratione: quia quotiens circa idem plura auxilia eiusdem generis ex eodem factor descendunt simul commixta et iuncta concurrunt, dicuntur rem perficere et plenam probationem adducere . . . sic et a simili supradicta indicia simul coniuncta plenam probationem inducunt, ideo quod singula, que non prosunt, tamen simul iuncta coadiuvant . . .

149. Ibid.: Tertia ratione, quia in qualibet civili causa regulariter due semiplene probationes faciant unam plenam et possit causa civilis per indicia et presumptiones

probari . . . Plus tamen valere debent et operari tria vel plura auxilia quam duo. Nam ratio consistit, ut plus tribus quam duobus credatur. Pluralitati enim standum est . . . Ergo per locum a proportione maiori tria indicia seu tres semiplene probationes unam plenam probationem poterunt operari. Alioquin facile et frequenter remanerent maleficia impunita, quod in contrarium magna ratio suadet.

For the force of this argument, see Fraher, "Theoretical Justification for the New Criminal Law of the High Middle Ages," 577-95.

150. Gandinus, *Tractatus de maleficiis*, rubric *De presumptionibus et indiciis indubitatus*: Quarta ratione . . . Reperitur in iure, quod ipsa principalis causa criminalis per argumenta et per presumptiones dignoscitur et terminatur, quamquam liquido delictum probari non possit, ut ff. de re militari l. Non omnes § A barbaris, (Dig. 49.16.5.6) ibi: "et si hoc liquido probari non possit, argumentis tamen cognoscendum est," et tamen ibi capitalis causa agebatur.

151. *Ibid.*: E contra, videtur dicendum quod non possit ex dictis indiciis et presumptionibus diffinitive damnari, tribus rationibus. Prima, quia in civilibus questionibus maioribus una libra auri non minor quam trium testium exigatur probatio.

152. *Ibid.*: Multo fortius in qualibet criminali causa due vel tres presumptiones aut indicia probationem non poterunt operari . . . maxime cum quelibet causa criminalis sit maior qualibet pecuniaria . . . tamen in criminali causa ex dictis semiplenis probationibus non erit quis diffinitive damnandus, quia in causa criminali probationes debent esse apertissime . . . Strictius enim in eis proceditur, cum circa hominis salutem agatur.

153. *Ibid.*: Secunda ratione, quia, licet evidentiā rei habeatur pro quadam specie probationis . . . et etiam cum manifestum et apertum indicium habeatur aliquem inveniri in crimine et fore detentum et captum . . . et manifesta non indigeant probatione . . . tamen propterea non debet quis ex talibus indiciis diffinitive damnari, nisi aliter de maleficio convincatur, ut arg. ff. di ritu nuptiarum l. Palam § Que in adulterio (Dig. 43.2.23.12) et C. de defensoribus civitatum l. Defensores (Cod. 1.55.8).

154. *Ibid.*: Potest tertia etiam ratio assignari, quoniam ex testibus, ex instrumentis, ex indiciis indubitatis, non autem ex presumptione est diffinitiva sententia proferenda . . . In civili autem secus, ideo, quia in criminalibus causis maius periculum vertitur, ideo quia imminet periculum anime . . . Et in talibus dubiis et incertis probationibus melius est facinus impunitum relinqui nocentis, quam innocentem damnare, ut ff. de penis l. Absentem (Dig. 48.19.5).

155. *Ibid.*: *Solutio*. Videtur, quod ex predictis indiciis possit colligi tantum iuris presumptio contra predictum Seium . . . Et quamvis in causa civili ex iuris tantum presumptione possit diffinitiva sequi sententia . . . tamen in criminali causa vel in causa questionis predictae ex tali presumptione iuris tantum non debebit vel poterit quis damnari.

156. *Ibid.*: . . . quia in criminalibus causis intervenire debent et requiruntur probationes clariores luce . . . Quod videtur ea ratione procedere, quia in causis criminalibus perspicacius est consilium adhibendum, quia ibi maius periculum et detrimentum contingit.

157. *Ibid.*: Sed licet ex ea sola probatione, que iuris est tantum, aliquis non possit vel debeat corporaliter diffinitive damnari, tamen ex ea sola presumptione, que iuris est et de iure, et ex quolibet alio indicio indubitato poterit contra aliquem diffinitiva formari sententia . . . Item ex quolibet indicio indubitato poterit diffinitiva formari sententia, ut C. de probationibus l. ult (Cod. 4.19.25), et merito, quia illa lege ultima cavetur quod accusatores eam rem, hoc est illud crimen, habent et debent in publicam notionem deferre, ut possit diffinitiva proferri sententia, quod crimen idoneis testibus

sit munitum, saltim duobus, . . . vel sit apertissimis documentis instructum . . . vel quod sit instructum iudicii ad probationem indubitatis, clarioribus luce expedita.

158. *Ibid.*, § 6: Quartum habetur indicium indubitatum, quotiens constat, quod crimen, quod adversus aliquem oritur, ita est publicum et manifestum, ut merito possit et debeat notorium appellari, quo casu nec testes requiruntur nec etiam accusator.

159. *Ibid.*, § 4: Secundum est indicium indubitatum, quando constat, quod aliquis in iudicio de crimine sponte sit confessus vel in tormentis et perseveraverit.

160. *Ibid.*, § 3: Primum est indubitatum, quotiens contra aliquem est iuris et de iure presumptio.

For example, suppose that a man and woman have successfully defended their marriage against a challenge that the union was invalid on the ground of the couple's alleged consanguinity. Subsequently, the wife is charged with adultery. Her husband now claims to be her blood-relative because husbands are legally liable for failure to accuse an unfaithful wife, while a woman's kin have no responsibility to accuse her. The husband's claim to be the woman's blood relation is precluded by the legal presumption arising from the prior legal determination that they were man and wife.

161. *Ibid.*, § 7: Est etiam et quintum indubitatum indicium propter evidentiam et qualitatem facti.

For example, if the physical evidence established that the victim of an assault had lost an eye in the attack, the injury was "atrocious," and the assault became what we would call aggravated assault. Or again, according to Gandinus, if someone drew a sword against someone, or wounded someone, or killed someone, the very evidence of the fact established *mens rea* (quod hoc dolo fecerit et ex sua animi pravitate et ideo puniendus).

162. *Ibid.*, §§ 9, 10, and 11.

163. *Ibid.*, § 12: Ex predictis vero tribus iudiciis . . . scripsit dominus Thomas de Piperata posse ad condemnationem procedi . . . Sed omnes sapientes, quos Bononie vidi et alibi, dicunt, et etiam vidi de consuetudine observari, quod propter talia vel similia non possit quis diffinitive in persona damnari.

164. *Ibid.*: At si ex maleficio, ex quo essent talia indicia, deberet sequi pecuniaria pena, habeat potestas arbitrium vel non, posset locum habere quod scripsit dictus dominus Thomas . . . et ita vidi sepius observari.

165. *Ibid.*: Illud tamen in summa notandum est, quod omnia predicta indicia, de quibus habetur mentio . . . non adeo indubitata dicuntur, quin adversus ea non possit probari contrarium, preter quam in casu ubi est iuris et de iure presumptio contra aliquem de delicto . . . quoniam nihil est adeo indubitatum, quin quandam solitam dubitationem recipiat.

166. P. Pazzaglini, *The Criminal Ban of the Sienese Commune, Studi Sienesi* vol. 45 (1979), 6, suggests that Gandinus's generation advocated "stiffer fines for the rich and harsher corporal punishments for the poor." Pazzaglini's book includes a transcription of a Sienese criminal condemnation, dated December 16, 1225, in which a defendant named Giordanellus was fined 200 lire for homicide and was placed under a ban that was redeemable upon payment of 1000 lire. Pazzaglini also points out that Siena resorted to discounting such large fines, and permitting convicted malefactors to pay off their penalties at greatly reduced rates, when the commune desperately needed funds for its defense. *Ibid.*, 87.

167. Gandinus, *Tractatus de maleficiis*, rubric *Quomodo de maleficio cognoscitur, quando crimen est notorium* § 4: . . . quod notorium facti est, quod commissum vel factum non dubitatur a populo vel a maiore parte populi, ut dicit Ubertus de Bobbio.

168. *Ibid.*: Notorium vero facti habetur id crimen, in quo fama suum prebet



adminiculum et ipsa evidentia rei ita protestatur, quod se prebet et se exhibet conspectui hominum omnium vel maioris partis alicuius loci, ut nulla possit tergiversatione celari, ut extra. de cohabitatione clericorum et mulierum c. Tua et c. Vestra et c. fin. (X.3.2.8, 7, and 10).

169. See the *casus*, laying out the facts of the case in the gloss to X.3.2.8.

170. See Gratian's *Decretum*, Causa 2 quaestio 1, for an example of where the problem stood in 1140. I have treated this subject at greater length in "Preventing Crime in the High Middle Ages."

171. Gloss at X.3.2.8: Nota quod in notoriis facti non est necessaria probatio.

172. Gandinus, *Tractatus de maleficiis*, rubric *Quomodo de maleficio cognoscitur, quando crimen est notorium* § 9: In iis que sunt notoria iudici et aliis . . . nec requiritur actor vel denuntiator, nec datur libellus, nec lis contestatur, nec iuratur de calumnia vel de veritate dicenda, nec requiruntur testes nec aliqua probatio: immo tunc ordinem iudiciorum non servare est secundum ordinem iuris procedere; citabitur tamen criminosis ad sententiam audiendam.

173. *Ibid.*, § 4: Unde dixit dominus Ubertus quod si quis aliquem in platea coram omnibus interfecit, quod illud crimen non erit notorium, dicens quod potest esse quod hoc crimen non constat iudici, quis accusatus coram eo infitiat, et sic sit res dubia.

174. *Ibid.*, § 9: . . . iis que sunt notoria iudici et aliis, ut quia factum sunt presente iudice et tot aliis qui sufficiant ad notorium facti . . .

175. *Ibid.*, § 10: Si vero sit notorium aliis tantum et non iudici, tunc officialis seu denuntians auditur sine inscriptione . . . et in hoc notorio requiritur probatio . . .

176. *Ibid.*: . . . quod sit factum in loco publico de die et tot presentibus, qui faciant crimen esse notorium.

177. *Ibid.*, § 11: Alii vero dicunt sufficere, si testes probant alterum de duobus: vel crimen fore notorium vel se vidisse illud committi.

178. Pazzaglini, *Criminal Ban of the Sienese Commune*, 6, 87.

179. Gandinus, *Tractatus de maleficiis*, rubric *De questionibus et tormentis* § 37: Sed pone quod homicidium vel aliud maleficium fore commissum tam occulte quod de malefactore non constat; verum post aliquod tempus capitur quidam, contra quem insurgit publica vox et fama de maleficio predicto et qui alias sit homo male conditionis et fame.

180. *Ibid.* § 38: Postremo quero: ecce datum est potestati vel iudici liberum et generale arbitrium inquirendi et puniendi maleficia et excessus; numquid potestas sine aliquibus indiciis potest contra delatum de crimine procedere ad tormenta?

181. *Ibid.*: Videtur quod sic, quia dare arbitrium potestati nihil aliud est dicere, nisi ut cum bona conscientia procedat, secundum quod eius conscientia dictaverit. Nam arbitrium dat potestatibus largas habenas, et hec est huius arbitrii interpretatio.

182. Cf. K. Nörr, *Zur Stellung des Richters*, passim.

183. Gandinus, *Tractatus de maleficiis*, rubric *De questionibus et tormentis*: Potest itaque potestas et debet ex arbitrio ad tormenta procedere si aliquod aliud habeat indicium, per quod animus eius moveatur quod inculpatus de crimine sit torquendus, et non alias.

184. *Ibid.*: Nam licet in processu potestas possit ex suo arbitrio multa de iuris solemnitate omittre, non tamen potest prorsus omittre.

185. *Ibid.*: Nam facti questio in arbitrio est iudicantis, non autem iuris auctoritas, ut ff. ad municipalem l. Ordine § i. (Dig. 50.1.15.pr.).

186. *Ibid.*: Verum in ferenda sententia caveant potestates, ne condemnent ex solo arbitrio, conscientia, vel ex dicto unius testis vel ex sola fama, cum in ferenda sententia debeant iura servare.

187. *Ibid.*: Verum etiam, si maleficium non esset plene probatum, sed ad plenam probationem modicum deficeret—forte ratione testium qui non essent omni exceptione maiores—tunc potest potestas ex tali arbitrio condemnare secure, si eius conscientia et animus cum probatione concordet.

188. *Ibid.*: Tenetur enim potestas, qui habet arbitrium, solum de dolo et lata culpa ut depositarius.

189. *Ibid.*, rubric *De presumptionibus et indicis indubitatis*, § 12, text at n.163.

190. *Ibid.*, rubric *De penis reorum* § 8: Circa impositionem penarum diligenter attende et nota, quod iudex non debet subito et inconsulto calore delatum punire.

191. *Arbitrium* was the product of a legislative act, either in the form of a statute or in the form of a *reformatio*.

192. Cf. Gandinus's scrupulous parsing of the relevant passages of the *Digest* and the *Code*. *Tractatus de maleficiis*, rubric *De presumptionibus et indicis indubitatis*.

193. The notion that torture was a *res fragilis* became a juristic commonplace that was transmitted into early modern literature on criminal procedure, such as Sebastian Guazzini, *Tractatus ad defensam inquisitorum, carceratorum, reorum, et condemnatorum* (Geneva, 1664). "But let judges be on their guard against resorting to torture with facility, as it is an expedient which may prove fragile or perilous, and may play false to truth, because some persons have such an incapacity for the endurance of pain that they are more willing to lie than to suffer torments." translated in H. C. Lea, *Torture* (1973), 190.

194. Gandinus, *Tractatus de maleficiis*, rubric *De questionibus et tormentis*, proem.: Et ut iudicibus immodice sevientibus freni quedam temperies adhibita videatur, primo notanda sunt V. magistralia.

195. *Ibid.*, rubric *A quo vel a quibus possit fama incipere et ex quo tempore* § 5: Sed pone questionem, que sepe occurrit de facto. Aliquod delictum publicum vel privatum commissum est in civitate . . . in personam alicuius; tempore vero illius delicti de malefactore aliquo non patebat; post aliquot tamen dies criminis quidam ob causam dicti criminis captus fuit et ductus ante tribunal iudicis de ipso maleficio cognoscentis, qui captus et representatus erat alias homo male condicionis et fama; post hec sic acta clamor insonuit, quod iste erat conscius et culpabilis de maleficio antedicto, de quo crimine et maleficio nullus ante dictam captionem erat aliquatenus inculpatus; nunc vero adversarii huius duo nituntur probare, unum quod iste alias homo male condicionis est habitus et fame, aliud quod nunc per civitatem est clamor et fama publica contra eum; que per duos idoneos testes probantur; est tamen incertum a quo auctore super crimine contra eum processerit illa fama publica aut clamor. Queritur, numquid ex talibus presumptionibus et indicis possit iudex questionibus inquirere contra eum?

196. *Ibid.*: Ergo ut denotatus et male meritis hic, de quo queritur, non poterit ipsius civitatis . . . contra cuius mores commisit, pro se aliquod auxilium invocare, quia frustra iuris civitatis implorat auxilium, qui contra illud commisit.

197. *Ibid.*: Sed licet incertum sit, quis illud maleficium commiserit, tamen, cum de ipso detento et capto malum exemplum habeatur, dum se sua sponte constituit et se fecit hominem male fame, videtur quod iudex ex officio suo et de bono regimine possit de crimine occulto ad questiones procedere contra illum.

198. *Ibid.*: Et ideo videtur quod iudex animadvertendo in eundem ut iniuriosum et male meritum possit, ut terribilem se ostendens, de dicto crimine inquirere per tormenta et maxime, ut publice aliis ad terrenda maleficia sit exemplum.

199. *Statuti di Bologna dell' Anno 1288*, ed. Fasoli and Sella, Bk. 4, rubric 17: *De tondolo et tormento*.

200. Pazzaglini, *Criminal Ban of the Sienese Commune*, 27, points out that the procedure for summoning a criminal defendant varied according to his residence, his civil status, and the severity of the crime. Similarly, the increasing use of severe corporal sanctions and the escalation of monetary sanctions had more severe implications for the impecunious defendant than for the wealthy or aristocratic suspect, who could afford to wait in exile until the commune needed money badly enough to be willing to commute the criminal ban in return for a modest payment. *Ibid.*, 106. For the fourteenth century, see G. Ruggiero, *Violence in Early Renaissance Venice* (1980), 95ff., suggesting that the working class tended to be law-abiding, while socially marginal individuals, such as foreigners, were likely to be the victims of crime or of criminal justice.

201. This is contrary to the arguments of Langbein, *Torture and the Law of Proof*; J. P. Levy, *La hierarchie des preuves dans le droit savant du moyen age* (Paris, 1939); *idem*, "Le problème de la preuve dans les droits savants du moyen age" in *La Preuve: 17 Recueils de la Société Jean Bodin* 137-67; and most recently Bartlett, *Trial by Fire and Water*, 141, who repeats the contention that the *ius commune* forced the jurists to devise a system of judicial torture as a means of securing convictions and thus escaping the two-witness rule.

202. Classical Roman law had wrestled with the same problem. See Hadrian's rescript to Valerius Verus, preserved at Dig. 22.5.3.2: "In short, all I can reply to you is that a *cognitio* should not be tied at once to a single mode of proof. You must judge from your own conviction what you believe and what you find not proved."

203. Traditionally, priests exercised complete discretion with regard to penances imposed in the internal forum. Similarly, any ecclesiastical superior possessed the discretionary authority to impose a purgatory oath on any of his subject clerics who was suspected of wrongdoing. Although the ecclesiastical judge faced constraints about imposing certain kinds of "ordinary" penalties upon convicted miscreants, "extraordinary" penalties were discretionary. Finally, some canonists left it to the judge to determine how many witnesses were required to make a crime notorious.

204. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages," 578.

205. H. Maisonneuve, *Etudes sur les origines de l'Inquisition* 2d ed. (Paris, 1960); Esmein, *History of Continental Criminal Procedure*, 80-81.

206. X.3.2.8.

207. Durantis, *Speculum iudiciale*, pars iii, rubric *Quid sit occultum?*

208. S. Kuttner, "Ecclesia de occultis non iudicat: Problemata ex doctrina poenali decretistarum et decretalistarum a Gratiano usque ad Gregorium Papam IX," *Actus Congressus Iuridici Internationalis Romae, 12-17 Novembris 1934* 3: (1936) 225-46. Cf. Durantis, *Speculum iudiciale*, pars iii, rubric *Quid sit occultum?* Occulta enim soli Deo reservantur.

209. Durantis, *Speculum iudiciale*, pars iii, rubric *Quid sit occultum?* Dicitur pene, idest quasi, occultum quia id pauci sciunt, puto duo vel tres—ita tamen quod probari possit—vel etiam quinque.

210. See Hostiensis, *Summa aurea* (Venice, 1605) rubric *De accusationibus, denunciationibus, et inquisitionibus*: Gratia exempli dico tibi quod hec sunt capitalia crimina que depositionem inducunt: sacrilegium, homicidium, adulterium, fornicatio, falsum testimonium, rapina, sub qua continetur usura, furtum, superbia, invidia, avaritia, et si longo tempore teneatur iracundia, ebrietas si assidua sit . . . item dilapidatio . . . duplex contumacia . . . simonia . . . et demum publica crimina.

211. Durantis, *Speculum iudiciale*, pars iii., rubric *Quid sit manifestum*: Est autem

manifestum publica seu famosa proclamatio ex certa scientia et a certis autoribus proveniens.

212. *Decretum* 2.1.15, 17, and 21 preserved texts from Pope Nicholas I, Pope Stephen V, and St. Ambrose that supported this proposition.

213. Durantis, *Speculum iudiciale*, pars iii, rubric *Quid sit manifestum*: Licet aperta, idest manifesta, sit adversariorum reprehensio, iudex tamen debet ordinem iuris servare. Ex hoc probatur quod manifestum probari debet.

214. Ibid., rubric *Quid sit notorium*: Porro notorium facti est illud crimen in quo fama publica suum prebet adminiculum et ipsa rei evidentia protestatur, ita se exhibens omnium hominum vel maioris partis alicuius loci conspectui, ut nulla possit tergiversatione celari.

215. Ibid., rubric *De notoriis . . . criminibus*: Sed qualiter sciet iudex crimen alicuius notorium fore si id negatur? Responsum, secundum Tancredum et Vincentium: Per facti evidentiam si est illius loci habitator, quod verum est si fiat in conspectu eius pro tribunali sedentis, et non alias.

216. Ibid., rubric *Quid sit notorium*: Tot enim debent adesse quod eorum presentia faciat crimen notorium. Nec paucorum presentia, puta duorum vel trium vel v., sufficit ad aliquid notorium faciendum . . . Immo requiritur totius vicinie noticia, et quod omnes communiter crimen commissum fore acclament, secundum quosdam . . . Alii, ut Vincentius, dicunt quod sufficit scientia maioris partis eius . . . Quidam tamen, ut Ioannes, dixerunt x. hominum scientia sufficere . . . Quidam etiam dixerunt, et forte non male, quod arbitrio iudicis relinquatur quot homines faciant notorium, cum non sit in iure expressum.

217. Ibid., rubric *De notoriis . . . criminibus*: Hodie autem valde officium iudicum in hac inquisitione exuberat. Ipsi namque defensiones arctant, ut vere dici possit quod eorum officium latissime patet . . . Nonnunquam enim hominem inauditum et indefensum statim suspendunt. Sed certe quicquid fiat nulli est de iure legitima defensio deneganda.

Joannes Andreae noted, in a marginal addition to this passage, that Durantis had borrowed the text from Hostiensis.

218. Hostiensis, *Summa aurea*, rubric *De exceptionibus*: Quia cuilibet heretico et cuilibet excommunicato reservatur legitima defensio, ergo quantumcumque criminosus sit, potest defendere se.

219. Fraher, "Preventing Crime in the High Middle Ages."

220. Hostiensis, *Summa aurea*, rubric *De criminibus sine ordine puniendis*: Secundum leges et canones ad quemlibet iudicem pertinet excessus subditorum . . . etiam sine aliqua fama inquirere et punire. Hoc enim publice interest . . . Et proceditur in his de plano, sine aliqua solemnitate, ita quod iudex malos expellat et bonos admittat, alias in pecunia puniendo, aliquando corpus torquendo, vel excommunicando vel suspendendo, prout viderit expedire, quia hec omnia arbitrio suo committo . . . et sicut de facto servant iudices maxime seculares. Quicquid tamen facient in occultis, non puto de rigore iuris, quod sit legitima defensio deneganda. Sed in notoriis, cum nec possit haberi, legitima denegatur . . . Unde quantumcumque sit aliquis infamatus, semper ei legitima defensio reservatur.

221. Hostiensis, *Lectura in quinque Gregorii decretalium libros* (Paris, 1512), commenting on X.3.2.8: vel dicas quod generaliter in quolibet notorio potest procedi sine citatione et probationibus . . . sed melius est et tutius ut citatio fiat antequam procedatur, nisi forte scandalum vel magnum periculum reipublice sit in mora.

222. Ibid.: Et secundum illos qui hoc asserunt, quandocumque aliquid negatur notorium [esse], semper probandum est . . . et ubi tale notorium proponitur tanquam

accessorium, non proceditur super principali quousque sit probatum. Sed hoc nihil aliud est quam prolongare lites et circuitus inducere, unde dicendum est quod ubi non est locus inficiationi, potest iudex procedere et delinquentem punire quantumcumque inficietur. Et hoc est speciale in maleficiis, ne remaneant impunita.

223. *Ibid.*: Bonus enim iudex nihil arbitrio suo facit, sed vidit leges et iura, et sicut audit et se habet veritas iudicat et discernit. In iudicando tamen magis debet esse cordi custodia veritatis quam obedientia voluntatis.

224. T. Diplovatatus, *De claris iuris consultis*, 172, asserted that Durantis quoted from Thomas's *Tractatus de fama* in Durantis's *Speculum iudiciale*, rubric *De notorio crimine*. Sarti and Fattorini, *De claris . . . professoribus* 2:224, expanded the image to one of great reliance by Durantis upon Thomas. But a careful reading of the *Speculum iudiciale* produces no identifiable borrowing from Thomas's work.

225. Joannes Andreae, *Additio ad Speculum iudiciale*, rubric *Quid sit fama v. reprobatus*: . . . et adverte mihi placet descriptio [scilicet fame] Iacobi quia brevis. Thomas enim dixit, etc.

226. *Ibid.*, v. *coarctemus*: . . . est sciendum quod in tractatu de fama multa scripserit Thomas de Piperata legum doctor, satis miscendo de indicio, argumento, et presumptione.

227. Andreae's summary of Thomas's *tractatus* appeared in *ibid.*, v. *veniens*.

228. Pazzagliini, *The Criminal Ban of the Sienese Commune*, 12.

229. Durantis, *Speculum iudiciale*, rubric *De contumacia accusati*: Sed pone, A. fiat accusatus de morte T., citatus non venit se defendere, propter quod bannitus est et demum propter contumaciam condemnatus. Nunc captus est per curiam. Queritur an debet mori, et videtur quod sic. Nam videtur esse condemnatus . . . Debet enim propter contumaciam haberi pro confesso . . . Et hoc verum est. Debet ergo index facere quod de crimine constet.

230. Joannes Andreae, *Additio ad Speculum iudiciale*, rubric *De contumacia accusati v. cognitias*: Potestas contra illum contumacem tulit sententiam ad capitis truncationem, vel ut deberet furcis suspendi ita quod moreretur, habendo et condemnando ipsum pro confesso de illo crimine. Ille postea capitur. Adversarius petit executionem sententie . . . Captus allegans quod ultra relegationem non debuit puniri propter contumaciam dicit quod suam innocentiam vult probare . . . Item licet cause prosecutio vel facti questio in potestate sit iudicantis, pene tamen impositio reservatur auctoritate legis . . . Solvit, ut supra dixi eum de iure audiendum [esse] per leges hic allegatas, licet italica consuetudo servet contrarium.

231. Bonifacius de Vitalinis de Mantua, *Tractatus de maleficiis* (Lugduni, 1555), proemium: nec presumant iudicare secundum eorum conscientias, ut faciunt multi iuris et iustitie ignari, sed solum secundum leges et iura, et probationes sibi factas. For the correct authorship and date of this *tractatus*, see D. Maffei, "Intorno a Bonifacio Ammanati giurista e cardinale" 586 C.N.R.S. *Colloques internationaux* (Paris, 1980), 241.

232. Bartolus, *In ius universum civile commentaria*, Dig. 48.5.2.5.: . . . et sic iudex inquirendo habet magis largas habenas quam credatis.

233. *Ibid.*, Dig. 48.18.10 § *Plurimum*: De hoc [scilicet fama] fecit unum tractatum in quo dixit modicum et bonum quidam qui est vocatus dominus Thomas de Piperata de Bononia, et ubicumque ipse aliquid dicit, ego dicam vobis. Speculator etiam in titulo de notoriis criminibus etiam ponit de fama et modicum et non clare.

234. *Ibid.*, Dig. 12.3.31: Pro cuius declaratione primo oportet me dicere quando dicatur plene probatum. Respondendum breviter quando est facta iudici plena fides,

hoc est quando iudex per ea que sunt sibi ostensa est adductus ad fidem et credulitatem eius quod intenditur.

235. Ibid.: . . . ista scientia habetur duobus modis, uno modo, in rebus que sunt artis seu scientie alicuius, per rationes et demonstrationes . . . Secundo modo ista scientia habetur, in his que sunt facti, et tunc illud scire dicimur ad quod movetur per sensum, hoc est scientia, qua requiritur in teste.

236. Ibid.: Ad hanc autem scientiam iudex non posset perduci in his que habent actum transeuntem, sed bene posset perduci in his que sunt actus permanentis. Et inter ista duo extrema, scilicet nescientiam et scientiam, est quoddam medium, videlicet credulitas sive fides.

237. Ibid.: Ad istam autem credulitatem sive fidem pervenitur per quattuor gradus. Primo cum iudici res proponitur per actorem et per reum negatur, tunc iudex adducitur in dubitationem. Est enim dubitare quando quis non applicat magis animum suum ad unam partem quam ad aliam . . . Ista dubitatio non est gradus probationis . . . Post dubitationem autem potest iudex inclinare animum suum ad aliquam partem, et tunc si hoc facit ex aliquo levi indicio vel ex aliquo levi argumento, ista appellatur suspicio, que aequaliter movet animum iudicis, non tamen in totum removel dubitationem . . . Sed nec debet de suspicionibus aliquem damnari, et hic est primus gradus probationis seu credulitatis . . . Post istam autem suspicionem si iudici apparent argumenta fortiora, tunc iudex incipit opinari . . . Et hic est secundus gradus probationis . . . Post istam opinionem, si iudici appareat tantum quod firmiter adhereat uni parti absque aliquo dubio alicuius contrarii, tunc dicitur perfecta credulitas seu perfecta probatio.

238. Ibid., Dig. 22.5.3 v. *Testibus*: Nota quod potestati iudicis conceditur utrum debeat adhiberi fides testi vel non. Tamen quia acta quandoque sunt examinanda in causa appellationis, tutius est quod causa suspicionis propter quam fides testi minuitur iudex faciat apparere in actis.

239. Ibid., Dig. 48.18.20: Ideo dico hic, quod sunt quidam iudices stulti qui statim cum habent indicia contra reum, cogunt istum ad confitendum . . . Certe hoc non debet fieri, quia condemnarent eum ex indiciis et suspicionibus, sed debent adhibere tormenta cum moderamine et ex istis veritatem investigare. Et ita iam feci pluries, sed si habita tortura non inveniebatur verum, absolvebam eum, et hoc faciebam scribi in actis, "Habita tortura cum moderamine non reperi eum culpabilem." Et hoc ne tempore syndicus possit dici, "Tu debuisti eum torquere."

240. Ibid., Dig. 12.2.31 no. 48: Istis premissis quero utrum due semiplene probationes faciant unam plenam probationem? Et siquidem sunt due semiplene eiusdem generis, ut duo testes, non est dubium quod faciant plenam, sed si sunt due semiplene diversi generis, tunc videtur quod non faciant plenam.

241. Ibid., Dig. 47.2.3: Idem dico, si aliquis deprehenditur in domo alicuius, ubi pulchra mulier est, certe facit hunc adulterum manifestum; Ibid., Dig. 48.5.2 v. *Si simul*: Quero qualiter probabitur adulterium? Responsum non potest probari directo aliqua ratione, quia si videres in camera duos vel in lecto, nescires tamen quid facerent. Sed dico quod probatur ex presumptione.

242. Ibid., Cod. 4.19.25: In criminalibus exiguntur probationes luce clariore. Facit iste textus . . . quod maleficia possunt probari per instrumenta . . . Et videtur quod quis condemnatur ex presumptionibus, ut 1. Si quis adulterii, de adulterio. Dicit glossa quod hic fallit. Tu dic quod indicium facit probationem luce clariorem, quia iudicem reddit certum de adulterio.

243. Ibid., Dig. 1.18.6.1: Allegatur quod iudex debet iudicare secundum allegata et probata, non autem secundum conscientiam . . . Solutio: Aut id quod iudex habet in

conscientia est notum sibi ut iudici aut tanquam private persone. Primo casu conscientia sua iudicat informatus ex actis coram eo, et ita potest intelligi hic. Alias, si ut private persone est sibi notum, tunc non potest iudicare secundum conscientiam suam, sed secundum probationes sibi factas.

Bartolus interpreted this famous maxim as an exclusionary principle concerning evidence, rather than as a constraint upon the judge's exercise of discretionary power to determine guilt or innocence according to a standard of subjective certainty.

244. *Ibid.*, Dig. 48.18.20 no. 6: Non insisto sed quero utrum requirantur plura indicia an sufficiat unum iudicium ad torturam? Leges omnes videntur loqui in plurale . . . Glossa videtur loqui in singulari . . . Hoc stat in arbitrio iudicis.

245. *Ibid.*, no. 5: De hoc non potest dari certa doctrina, sed relinquitur arbitrio iudicis . . . Sed ego dabo doctrinam quam potero, et pone in terminis, aliquis accusatur de furto; contra eum possunt esse indicia, quod est homo male conditionis et fame, et consuetus facere similia . . . quod ipse erat vicinus, habebat notam domum. Nam quia conversabatur ibi . . . et quod ipse post furtum factum aufugit et se abscondit . . . et post furtum repertus est expendere pecuniam cum ante esset pauper homo, et nec reperitur unde habeat . . . Item quod res furtiva est reperta penes cum . . .

246. *Ibid.*, Dig. 48.18.20: Iste tamen presumptiones . . . possunt elidi, verbi gratia, si res furtiva reperiatur penes me, ostendo eum a quo habui.

247. *Ibid.*, Dig. 48.19.5: Hic habetis quod nemo debet damnari ex suspicionibus et presumptionibus.

248. *Ibid.*, no. 1: Dicitur hic quod in criminibus non potest damnari absens. Quero utrum hoc verum sit, sive sit absens post litem contestatam, sive ante? Quidam dicunt post litem contestationem posset damnari quis . . . Azo et Hug. dicunt indistincte absentem non damnandum.

249. Bartolus was aware that Cod. 9.47.21 was an ancient Roman law exception to the general rule of Dig. 48.19.5. See *ibid.*, Cod. 9.47.21 v. *Ne diu*: Hec lex ponit unum casum in quo contra absentes pervenitur ad condemnationem in crimine capitali. But the quasi-capital sentence of the criminal ban was interpreted as a less-than-capital punishment, equivalent to the Roman *relegatio*. Even under the rule of Dig. 48.19.5, an absent party could be sentenced to exile. Cf. Bartolus's comments at Dig. 48.1.10.

250. *Ibid.*, Dig. 48.8.1.1: Domini quicquid ipsi dicant, veritas est ista: per italiam maleficia puniuntur secundum statuta, non secundum leges.

251. *Ibid.*, Dig. 48.16.6 no. 3: Quero que dicantur crimina notoria? Tractatum de notoriis criminibus non habemus in iure nostro, sed canonistes habent tractatum longum.

252. *Ibid.*: Tamen quantum ad propositum nostrum . . . notorium dicitur proprie illud quod habet causam permanentem. Illud vero quod habet causam momentaneam dicitur magis manifestum quam notorium.

253. *Ibid.*, Dig. 11.7.4 no. 2: Sed quid arbitrabitur iudex? Dicas quod verum notorium est quando factum est tale de sua natura quod omnes sciunt vel scire eos verisimile sit, sic quod non possit allegare ignorantiam, quin sit supina, sicut si quis gerat se pro episcopo in aliqua civitate, vel si quis in veritate toto populo aspiciente occidit hominem.

254. *Notorium*, properly understood, meant a crime that was so well established that no formal trial was required. The summary procedure for *crimen notorium* was a product of canon law; cf. X.3.2.8. *Manifestum* was easily confused with *notorium*. Cf. Bartolus at Dig. 11.7.4: Quandoque tamen manifestum ponitur pro notorio . . . Unde ubi manifestum scribitur in aliqua materia que non requirit iudicalem indaginem nec probationem, propter quod exponitur manifestum, id est notorium, alioquin impropria

significatione reiecta, verba secundum subiectam materiam intelliguntur. . . . *Manifestum* was as old as the Twelve Tables, the earliest redaction of republican Roman law, and served to increase the sentence for theft four-fold. Cf. A. Berger, *Encyclopedic Dictionary of Roman Law* (1953) s.v. “furtum manifestum.”

255. Bartolus, *In ius universum civile commentaria*, Dig. 47.2.3: Ita vides hic si deprehenditur quis cum re furtiva, licet non fuerit visus furari, est manifestus fur. But he could still disprove his guilt, *ibid.*, Dig. 48.18.20.

256. *Ibid.*, Dig. 12.2.31.

257. *Ibid.*, Dig. 47.2.3 no. 48: Item si aliquis fuerit visus effugere cum gladio evaginato et reperitur aliquis mortuus, certe ex hoc est homicidium manifestum, quod talis fecit.

258. Thomas de Piperata, *Tractatus de fama*, text at n.132.

259. This reading of the procedure in a case of “manifest homicide” would be consistent with Bartolus’s discussion of presumptive proof based upon “special *indicia*,” *In ius universum civile commentaria*, Dig. 48.18.20, where Bartolus seems to suggest that even evidence that would constitute a manifest theft retains the limited character of a rebuttable presumption: *Ista tamen presumptiones . . . possunt elidi.*

260. *Ibid.*, Dig. 48.5.25 suggests that the inquisitorial judge received his power from the *ius commune* and from statutory law: *Et sic iudex inquirendo habet magis largas habenas quam credatis; et hoc de iure commune, sed de iure municipali in quibusdam terris sunt statuta quod indistincte iudex posset inquirere.*

261. On Angelus, see T. Diplovatatus, *De claris iuris consultis*, 374, and Clarence-Smith, *Medieval Law Teachers* § 132.

Angelus Aretinus, *Tractatus de maleficiis*, rubric *Comparuerunt dicti inquisiti*, no. 5: *Et quod dixi, quod ex indiciis nemo potest damnari, verum est nisi indicia sunt indubitata.*

262. *Ibid.*, rubric *Quod fama publica procedente*, no. 8: *Indicium vero plenum est dinumeratio rei per signa sufficientia, per que animus in aliquo tamquam existente quiescit et plus investigare non curat.*

263. *Ibid.*, no. 18. Angelus quoted Thomas’s case verbatim, but with attribution. For the text, see n.132.

264. *Ibid.*, rubric *Comparuerunt dicti inquisiti*, no. 5: *Et dicuntur indicia indubitata secundum Ni. de Ma., Bal., et Sal. . . . quando a lege sunt approbata adeo quod lex vult super illa indicia fieri condemnationem . . . quia cum ista sint legi indubitata, debent etiam esse iudici indubitata.*

265. *Ibid.*: *Secus si a lege non sunt approbata, sed iudicis religioni commissa sunt, quia ix illis solis non potest damnari, ut dicta lege Absentem (Dig. 48.19.5).*

266. *Ibid.*: *Et ponunt exemplum in indiciis indubitatis ubicumque ex qualitate et indiciorum multitudine indicatur veritas oculis mentis iudicis, sicut clara lux veritatem ostendit oculis corporis.*

267. Cod. 4.19.25. It may be worth noting that this snippet of Roman law, which was probably the most frequently cited authority for the proposition that criminal proofs must be “clearer than light,” in fact laid out three alternative forms of proof in criminal cases: reputable witnesses, irrefutable documents, or *indicia* “clearer than light” that are “undoubted as to proof.” Hence the original formulation of the standard of proof “clearer than the light of day” was specifically tied to circumstantial evidence, and not to witness proof.

268. Angelus Aretinus, *Tractatus de maleficiis*, rubric *Comparuerunt dicti inquisiti*, no. 5: *Quidam visus est intrare domum Titii cum gladio; postea auditus est Titius*



acclamasse; postea ille cum gladio sanguinolento visus est exire domum, et Titius reperitur in facie vulneratus.

269. Ibid.: Tunc ista sunt signa et indicia indubitata simul collecta, et ex his potest ille condemnari de vulnere.

270. Ibid.: Et hoc videtur determinasse Bartolus in similibus exemplis in lege secunda, ff. de furtis. (Dig. 47.2.2).

271. What Angelus seems to have had in mind was Bartolus's commentary at Dig. 47.2.3, text at nn. 241, 255. But elsewhere, at Dig. 11.7.4, Bartolus had been very careful to distinguish between the "manifest" cases illustrated by his examples in the commentary to Dig. 47.2.3, and other cases that were either "notorious" (Dig. 11.4.7) or "fully proved" by establishing undoubted belief in the mind of the judge (Dig. 12.2.31).

272. Augustinus Giganticus, *Commentaria*, rubric *Comparuerunt dicti inquisiti*, no. 5.

273. In contrast to Girolamo Giganti's impatient slap at Angelus Aretinus for having quoted Thomas's opinion about proof by undoubted *indicia*, see Jacobus de Bellovisu, *Practica iudiciaria*, rubric *De questionibus et qualitate tormentorum*, nos. 78–81, arguing that in many cases the law permits criminal cases to be determined by arguments and presumptions. This point was illustrated by three cases—the room with one exit, the body in the vineyard, and the assassination of Titius. Each of the hypotheticals is phrased in terms quoted from Thomas de Piperata's *Tractatus de fama*. The *Practica iudiciaria*, or *Practica criminalia*, universally attributed to Jacobus de Bellovisu, was actually an early sixteenth-century work whose publisher attributed it to a famous fourteenth-century jurist in order to enhance the work's credibility and circulation. See D. Maffei, "Giuristi medievali e falsificazione editoriale . . .," *Ius commune*, Sonderheft 10 (1979).

274. This is not to suggest that Thomas made a brilliant conceptual leap. He articulated expressly a theme that was implied in Roman law texts such as Cod. 4.19.25 and Dig. 22.5.3.

275. Langein, *Torture and the Law of Proof*, 3–8; Fiorelli, *La tortura giudiziaria*.

276. Ibid.

277. Langbein, *Torture and the Law of Proof*, 5–8.

278. Ibid., 6.

279. B. Shapiro, "To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600–1850," *Hastings Law Journal* 38:155.

280. Donahue, "Proof by Witnesses in the Church Courts of Medieval England," 133.

281. Nörr, *Zur Stellung des Richters*.

282. Thomas de Piperata, *Tractatus de fama*.

283. X.2.1.2.

284. Langbein, *Torture and the Law of Proof*, 5–8; Fraher, "Preventing Crime in the High Middle Ages," n.17.

285. Bartlett, *Trial by Fire and Water*, 70–83 gives a good, short account of the evidence suggesting that people suspected that ordeals could be brought to a crooked result. Bartlett himself thinks that theological and legal considerations were more important than social, practical concerns.

286. For the Aristotelian impact on doctrinal and intellectual developments in the university curriculum during the 1200s, see G. Leff, *Paris and Oxford Universities in the Thirteenth and Fourteenth Centuries: An Institutional and Intellectual History* (1975) 185–238; for the Aristotelian impact on political thought, a useful introduction is W.

Ullmann, *Law and Politics in the Middle Ages* (1975) Ch. 8, "The New Science of Politics."

287. See especially Aquinas's *Summa theologica*, the first part of the second part, questions 90 to 97, on the nature and effects of law. Available in an English translation in D. Bigongiari, ed. *The Political Ideas of St. Thomas Aquinas* (1953) 3–85.

288. For Bernard's world, the best introduction is J. Leclercq, *The Love of Learning and the Desire for God: A Study of Monastic Culture* (1961).

289. *Statuti di Bologna*, Bk. 1, rubric 5; *Statuti del Capitano del Popolo*, Bk. 2, rubrics 1, 2, and 28. Texts at n.113.

290. Thomas de Piperata, *Quaestio disputata. Incipit: Cavetur in statuto civitatis Bononie quod potestas habeat arbitrium in homicidiis suo tempore perpetratis*. Text preserved in Arch. S. Pietro, MS A.29 fol. 99v. Publica utilitas est quod presens potestas habeat arbitrium in dicto maleficio, ut sic puniatur. Nam rei publice interest mala puniri.

291. For a general discussion, see G. D'Amelio et al., *Studi sulle "Quaestiones"* 222–96. The two *quaestiones* at issue are the one mentioned supra in n.290, which is preserved only in manuscript form, and another, partially printed in *ibid.*, 248, *incipit: Statutum est in civitate Bononie si quis fuerit accusatus . . .*

292. *Ibid.*, 248–50.

293. MS Arch. S. Pietro A.29 fol. 99r: *Solutio: Dico dictos fideiussores non teneri ad dictam condemnationem solvendam . . . quia omnino separata sunt et diversa maleficio vel malefactor et fideiussor vel contractus, unde obligatio fideiussoris non est pars cause maleficii.*

294. *Ibid.*: Tertium [argumentum] est arbitrii supradicti iniquitas. Nam talia arbitria conceduntur potestatibus contra ius commune, et ideo extendi non debent.

295. *Ibid.*: Item [arbitria] sunt odiosa. Nam plerumque potestas ex arbitrio condemnatur absolvendum et absolvit condemnandum, et ideo debent restringi.

296. Thomas de Piperata, *Quaestio disputata*, text at n.290.

297. MS Arch S. Pietro A.29 fol. 99v: Contingit quod tempore preterite potestatis fuit quidam vulneratus. Moritur ex illo vulnere tempore presentis. Queritur numquid presens potestas habeat arbitrium in hoc homicidio, an non?

298. *Ibid.*, *Solutio: Dico preteritam potestatem non habuisse arbitrium nec presentem habere in dicto maleficio sive homicidio.*

299. *Ibid.*: Preteritam potestatem dico non habuisse arbitrium in dicto malo sive homicidio, quia dictum malum fuit suo tempore inchoatum, set non fuit suo tempore consummatum, et dicto "perperatis" requirit veram consummationem homicidii factam in suo tempore.

300. *Ibid.*: Set inchoatum alteris tempore fuit suo tempore consummatum. Ubi enim potestas habeat arbitrium in homicidiis, obtinet quod certo tempore, scilicet tempore sue regiminis sint totali perpetrata inchoando et consummendo. Verbum enim "perperatis" designat rem perfectam.

301. *Ibid.*: Sexta quia publica utilitas est quod presens potestas habeat arbitrium in dicto maleficio, ut sic puniatur. Nam rei publice interest mala punire.

Cf. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages."

302. Dig. 9.2.51. I suggest that Thomas must have known the text because it was a stock authority for one of his favorite themes, the public interest in criminal prosecutions.

303. *Ibid.*: "A slave who had been wounded so gravely that he was certain to die

of the injury was appointed someone's heir and subsequently killed by a further blow from another assailant."

304. *Ibid.*: "But if anyone should think that we have reached an absurd conclusion, let him ponder carefully how much more absurd it would be to conclude that neither should be liable under the *lex Aquilia* or that one should be blamed rather than the other."

305. On "free rein," see Thomas de Piperata, *Tractatus de fama*, text at n.118; Gandinus, *Tractatus de maleficiis*, text at n.181; Bartolus, *In ius universum civile commentaria*, text at n.232.

306. MS Arch. S. Pietro A. 29 fol. 99r., text at n.295.

307. Blanshei, "Criminal Law and Politics of Medieval Bologna."

308. Thomas de Piperata, *Tractatus de fama*, text at n.124.

309. *Ibid.*, text at n.122.

310. This is true if *fama*, the procedural prerequisite to an *inquisitio*, played a role analogous to that of probable cause.

311. This was the rule of Dig. 48.19.5, at least in capital cases.

312. Thomas de Piperata, *Tractatus de fama*, text at n.124.

313. The most recent expression of the same conflict in our own criminal process is *McCleskey v. Kemp*, 107 S.Ct. 1756 (1987).

314. Bartlett, *Trial by Fire and Water*, 70.

315. Hyams, "Trial by Ordeal," 125.

316. A. Watson, *The Evolution of Law* (1985). Watson believes that where a professional class of lawyers emerges in a society, the lawyers' traditions and professional concerns dominate other factors in the development of the law, particularly in private law. Social needs and functions then affect the evolution of the legal system less directly than in the earliest stages of legal development, before the emergence of a professional class of jurists.