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Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause

FRANK R. HERRMANN, S.J., AND BROWNLOW M. SPEER*

I. INTRODUCTION¹

When Sir Walter Raleigh demanded to meet the witness against him “face-to-face” at his trial for treason in 1603, the English court

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1. Other than the English readings of the Greek texts provided by Fr. Madigan, all translations in this Article are the work of the authors. English language translations which they have consulted are: of the cited works of Cicero and Quintilian, the translations accompanying the texts in the respective Loeb Classical Library editions; of the Theodosian Code, The Theodosian Code and Novels and the Sirmundian Constitutions (Clyde Pharr trans., Greenwood 1969) (1952) [hereinafter *The Theodosian Code*]; and of Justinian's Digest, The Digest of Justinian (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 4 vols. 1985).

Volumes in the series of *Monumenta Germaniae historica* and *Monumenta iuris canonici* are cited as MGH and MIC, respectively. Volumes in the series *Patrologiae cursus completus*, edited and published by J.P. Migne (Series Latina, 221 vols., Paris 1844-1864; Series Graeca et Orientalis, 165 vols., Paris 1857-1886), are cited as *Patrologia Latina* and *Patrologia Graeca*, respectively. Volumes in the standard modern edition of the *Corpus Iuris Civilis* are cited as CIC.

rejected his request as having no foundation in the common law.² Conventional wisdom marks Raleigh's rejected demand as the starting point of the history of the Sixth Amendment's Confrontation Clause,³ which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"⁴ It was over the course of the remainder of the seventeenth century that the right of criminal defendants to confront the witnesses against them slowly took root in English jurisprudence.⁵

In fact, the right of confrontation, in the sense of an accused person's right to be present while accusers and accusing witnesses are physically produced at trial, reaches back far beyond Raleigh's trial. The United States Supreme Court recently noted its antiquity. In *Coy v. Iowa*,⁶ the Court quoted an English-language version of Acts of the Apostles (Acts) 25:16 as providing

indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."⁷

Papal documents prior to 1198 are cited by the number assigned to each in *Regesta pontificum Romanorum* (photo. reprint 1956) (Philip Jaffé ed., Wilhelm Wattenbach rev., 2 vols., 2d ed., Leipzig, Veit 1885). JK is prefixed to documents to the year 590 edited by Ferdinand Kaltenbrunner; JE is prefixed to documents from the years 590 to 882 edited by Paul Ewald. The symbol JK† indicates that the document is a forgery. See *infra* notes 122-27 and accompanying text. Decretals of Pope Innocent III are cited with the prefix Po. and the number assigned to each in *Regesta pontificum Romanorum* (photo. reprint 1957) (August Potthast ed., 2 vols., Berlin, Rudolf de Decker 1874).

2. Trial of Sir Walter Raleigh, 2 T.B. Howell, State Trials, cols. 1, 15, 18 (1603).

3. *California v. Green*, 399 U.S. 149, 156-57, 157 n.10 (1970); *id.* at 176-78 (Harlan, J., concurring).

4. U.S. Const. amend VI.

5. See 5 John H. Wigmore, Evidence § 1364, at 22-26 (James H. Chadbourn ed., 3d ed. 1974). The decisive case so holding, see 5 *id.* at 25 & n.52, was *Rex v. Paine*, 87 Eng. Rep. 584 (K.B. 1696).

6. *Coy v. Iowa*, 487 U.S. 1012 (1988).

7. *Id.* at 1015-16. Acts was composed between the years 80 and 90. See Richard J. Dillon, Acts of the Apostles, in *The New Jerome Biblical Commentary* 722, 723 (Raymond E. Brown et al. eds., 1990). The proceedings involving Paul and Festus took place c. 60. See *id.* at 762. For an account of the background of the case, see Henry J. Cadbury, Roman Law and the Trial of Paul, in 5 *The Beginnings of Christianity*, pt. 1, at 297, 299-309 (F.J. Foakes Jackson & Kirsopp Lake eds., 1933).

In *Coy*, the question for decision was whether a defendant had been denied his Sixth Amendment right of confrontation when a screen was placed in the courtroom to shield alleged child abuse victims from seeing him as they testified before the jury.⁸ The Court held that this procedure violated the Confrontation Clause because the defendant had been denied his right to a "face-to-face" encounter with the complaining witnesses.⁹

The dissenting Justices in *Coy* saw no Confrontation Clause violation because "confrontation" at common law was essentially synonymous with cross-examination of adverse witnesses.¹⁰ However, the *Coy* majority emphasized a defendant's right to have accusing witnesses physically produced before him or her. The Court held this right to be a core value of the Confrontation Clause, wholly independent of cross-examination.¹¹ It asserted "that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"¹²

The Supreme Court in *Coy* presumed on the basis of Acts 25:16 that the defendant's right to require the presence of accusing witnesses must be ancient.¹³ The Court was entirely correct. In fact, a historical inquiry will demonstrate that the justice of bringing accusing witnesses before the accused has been acknowledged for at least 1,500 years.

The principle of confrontation, in the sense of the right of defendants to have accusing witnesses produced before them, developed along three main lines, each originating in Roman law. First, legislation of the Emperor Justinian in the year 539 provided the normative foundation of the right of witness confrontation. This norm derived from preexisting practice and was based on the heightened necessity for accurate fact-finding in criminal cases.¹⁴ Second, Pope Gregory I emphasized the guarantee of fundamentally fair procedures to an accused person when he applied Justinian's legislation in the year 603.¹⁵ Finally, the great pseudoisidorean forgeries of the mid-ninth century initiated a third

8. *Coy*, 487 U.S. at 1014-15.

9. *Id.* at 1019-21.

10. *Id.* at 1028-29 (Blackmun, J. & Rehnquist, C.J., dissenting).

11. *Id.* at 1017 (citing *Green*, 399 U.S. at 157).

12. *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

13. See *id.* at 1015-16.

14. See *infra* Part III.

15. See *infra* Part IV.

line of development by creating a powerful defense tool to ward off unfair accusations and unreliable testimony.¹⁶

These lines of development came to a halt in the thirteenth century with the advent on the European continent of inquisitional procedure and the accompanying practice of examining witnesses in secret. However, as this Article will illustrate, even then, outside of the notorious heresy prosecutions, a kernel of face-to-face confrontation persisted.

II. THE ROMAN LAW BACKGROUND

Roman criminal procedure, like that of the United States, was accusatorial.¹⁷ An individual accuser (*accusator*) generally undertook the prosecution of a defendant (*reus*) and bore the burden of proving the charge.¹⁸ The testimony of witnesses provided a principal means of proof.¹⁹ These and other broad structural similarities to U.S. proceedings,²⁰ however, should not lead to assumptions idealizing Roman criminal justice. Torture of both defendants and witnesses became increasingly common under the emperors,²¹ and

16. See *infra* Part VI.

17. See generally Max Radin, *Handbook of Roman Law* 467-69 (1927) (discussing the character of Roman public and criminal law).

18. See A.H.M. Jones, *The Criminal Courts of the Roman Republic and Principate* 61-65, 116-17 (1972); Wolfgang Kunkel, *Prinzipien des römischen Strafverfahrens*, in *Kleine Schriften* 11, 23, 25 (Hubert Niederländer ed., 1974). This statement must be qualified by the fact that, from the first century on, the prosecution of criminal cases seems to have been increasingly the function of public officials rather than private accusers. See Mario Lauria, *Accusatio-Inquisitio*, 56 *Atti della Reale Accademia di Scienze Morali e Politiche* 304, 329-35, 364-69 (Società Reale di Napoli, 1933); Ernst Levy, *Von den römischen Anklägervergehen*, 53 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 151, 231-32 (1933) [hereinafter ZRG, Rom. Abt.]; Theodor Mommsen, *Römisches Strafrecht* 346-51 (Leipzig, Duncker & Humblot 1899). For a discussion of cases and legal texts illustrating prosecution in the absence of an *accusator*, see Jehan Dahyot-Dolivet, *La procédure pénale d'office en droit romain*, 41 *Apollinaris* 89, 95-105 (1968), and for a clear description of non-accusatorial procedure, see Jones, *supra* at 113-14, 116. The accusatorial principle, however, always remained one of critical significance in Roman criminal justice. See Mariagrazia Bianchini, *Le formalità costitutive del rapporto processuale nel sistema accusatorio romano*, 30 *Studi urbinati di scienze giuridiche ed economiche* 161, 228-29, 274-79 (1961-1962).

19. See Jones, *supra* note 18, at 71.

20. For a concise summary of the main theoretical similarities, see Radin, *supra* note 17, at 475 & n.28. For a detailed overview of the Roman law of evidence, see C.A. Morrison, *Some Features of the Roman and the English Law of Evidence*, 33 *Tul. L. Rev.* 577, 579-81 (1959).

21. In criminal cases, the testimony of slaves was obtained under torture. See 2 Emilio Costa, *Cicerone giureconsulto* 147 (2d ed. 1927); 1 Piero Fiorelli, *La tortura giudiziaria nel diritto comune* 33-34 (1953); A.H.J. Greenidge, *The Legal Procedure of Cicero's Time* 491-93 (photo. reprint 1971) (1901). Originally, free persons were exempt from torture. See 1

no concept of "equal protection" existed under Roman criminal law. The procedural rights a defendant might have had in any given case depended largely on the accused's social status and the nature of the charges.²²

Nonetheless, Roman criminal procedure consistently demanded that defendants have the opportunity to be present at the proceedings against them.²³ The Romans viewed this rule as a guarantee against any unjust conviction of the innocent. For example, the early third century jurist Ulpian, in his *De officio proconsulis*, quoting imperial rescripts²⁴ of the preceding century, links the rule directly to the principle that "it is better that the crime of a guilty person remain unpunished than that an innocent person be convicted."²⁵

Fiorelli, *supra*, at 38; Greenidge, *supra*, at 481. However, around the turn of the second century, torture began to be applied to non-slave defendants and witnesses, especially those of inferior social status. See 1 Fiorelli, *supra*, at 38-39; Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* 213-16 (1970); P.A. Brunt, *Evidence given under Torture in the Principate*, 97 *ZRG, Rom. Abt.* 256, 261 (1980). By the fourth century, the practice was so common that it is frequently referred to in the imperial laws of that period. See Gonzalo Martínez Díez, *La tortura judicial en la legislación histórica española*, 32 *Anuario de Historia del Derecho Español* 223, 225-29 (1962).

22. See Garnsey, *supra* note 21, at 95-100.

23. "Roman procedure had at all times a strong objection to condemnation in absence," though if the defendant contumaciously failed to appear, trial against him might proceed. Greenidge, *supra* note 21, at 462; see also 2 Costa, *supra* note 21, at 141-42 (guaranteeing the presence of the accused at civil trials). Proper summoning of the defendant to appear was required. See Mommsen, *supra* note 18, at 332-33. In the second or third century, trial of absent persons, at least in capital cases, came to be prohibited. See Moriz Wlassak, *Anklage und Streitbefestigung im Kriminalrecht der Römer*, 184 *Sitzungsberichte, Kaiserliche Akademie der Wissenschaften in Wien, Philosophisch-historische Klasse, Abhandlung* 1, at 57-61 (1917) [hereinafter *Sitzungsberichte Wien*]. A "capital" case was one in which the penalty upon conviction was death, forced labor in the mines, or deportation to an island. J.A.C. Thomas, *The Institutes of Justinian* 334 (1975).

24. The emperor's power to make law by his *constitutiones* was recognized from the middle of the second century. See generally H.F. Jolowicz & Barry Nicholas, *Historical Introduction to the Study of Roman Law* 365-73 (3d ed. 1972) (discussing *constitutiones* as a source of Roman law). These *constitutiones* included his "rescripts" (*rescripta*), which were written opinions on questions of law presented to him for decision. See *id.* at 368-70; Tony Honoré, *Emperors and Lawyers* viii (1981).

25. The entire quote reads:

The deified [Emperor] Trajan wrote to Julius Fronto that in criminal cases, an absent person should not be convicted. The deified Trajan wrote to Adsidius Severus that no one should be convicted on the basis of suspicions, for it is better that the crime of a guilty person remain unpunished than that an innocent person be convicted. (Absentem in criminibus damnari non debere divus Traianus Iulio Frontoni rescripsit. Sed nec de suspicionibus debere aliquem damnari divus Traianus Adsidio Severo rescripsit: satius enim esse inpunitum relinqui facinus nocentis quam innocentem damnari.)

Roman law also required that the *accusator* be present in court to state the charge and to produce the evidence.²⁶ Thus, a defendant had the opportunity for a personal encounter with the accuser in court. This right is the one to which the Roman governor Festus refers in Acts of the Apostles.²⁷ Although "no Roman legislative text reaching us formulates in precise terms the juridical prescription expressed by Festus . . . , the declaration of Festus excellently conveys the constant practice of Roman procedure."²⁸

Cicero's Verrine Orations (Orations) provide the clearest corroboration of the accuracy of Acts 25:16 as a statement of procedural requirements.²⁹ The Orations concern Cicero's prosecution of Gaius Verres, governor of Sicily, on various charges of malfeasance in office. Among the instances of misconduct Cicero advanced were Verres' acts while sitting as judge in the prosecution of one Sthenius, first on a charge of forgery and, subsequently, for a capital offense. Verres had arranged for both trials to take place in Sthenius' absence and found him guilty on both occasions, even though the *accusator* failed to appear at the second trial. Cicero asserted that Verres had thereby violated both the requirement that a defendant be given the opportunity to be present at his trial and the requirement that his accuser be present: "[t]he one he had made a defendant in his absence, he convicted in the absence of the accuser."³⁰

Roman imperial *constitutiones*³¹ of the second and third centuries repeatedly assert the defendant's right to be present at trial.³²

Ulpian, *De officio proconsulis*, bk. 7 (211/17), Dig. 48.19.5.pr. (533), in 1 CIC 864 (Theodor Mommsen & Paul Krueger eds., 22d ed. 1973) (citation omitted) (quoting rescripts of Emperor Trajan (98/117)). For the passage of Ulpian in the context of the reconstructed work, see 2 *Palingenesia Iuris Civilis*, cols. 966, 974, para. 2189 (Otto Lenel ed., Leipzig, Bernard Tauchnitz 1889) [hereinafter *Palingenesia*].

26. See 2 Costa, *supra* note 21, at 135, 140-41; Gustav Geib, *Geschichte des römischen Criminalprocesses bis zum Tode Justinian's* 270 (Leipzig, Weidmann'sche Buchhandlung 1842); Mommsen, *supra* note 18, at 396-98, 408-09.

27. Acts 25:16.

28. Jacques Dupont, *Aequitas romana. Notes sur Actes 25, 16, 49 Recherches de science religieuse* 354, 373 (1961); see also *id.* at 362-64, 372-82 (compiling examples of Roman procedural practices found in Festus' declaration).

29. For the following discussion of the Orations see Cicero, *The Second Speech Against Gaius Verres: Book 1* (70 B.C.E.), reprinted in 1 Cicero, *The Verrine Orations* 382, 391-401 (L.H.G. Greenwood trans., 1928).

30. "[Q]uem absentem reum fecerat, eum absente accusatore condemnat." *Id.* at 400.

31. See *supra* note 24.

32. See, e.g., Ulpian, *supra* note 25 (quoting Rescript of Emperor Trajan to Julius Fronto) ("In criminal cases an absent person should not be convicted." ("Absentem in criminibus damnari non debere.)); Rescript of Emperor Antoninus (Caracalla) to

Further, the requirement that the accuser be present in court along with the defendant appears in the *Sententiae* attributed to the early third century jurist Paulus: "In a capital case³³ no absent person is convicted, nor can an absent person accuse, through another, or be accused."³⁴ This authoritative formulation³⁵ does not, however, expressly state that the accuser and the accused must be present in

Rusticus (211), Code J. 9.40.1.pr. (534), in 2 CIC 388 (Paul Krueger ed., 15th ed. 1970) ("When serious criminal charges are alleged, and the defendant is absent, it is not the practice to rush to judgment." ("Cum absenti reo gravia crimina intentantur, sententia festinari non solet.")); Rescript of Emperor Gordian to Avidianus (Apr. 2, 243), Code J. 9.2.6.pr. (534), in 2 CIC, supra, at 369 ("That an absent person cannot be accused of a capital crime . . . is an old rule." ("Absentem capitali crimine accusari non posse . . . vetus ius est.")); Rescript of Emperors Diocletian and Maximian to Aelia Matrona (Sept. 1, 287), Epitome Codicvm Gregoriani et Hermogeniani Wisigothica 10.1 (506), in 2 Fontes iuris romani antejustiniani 656, 664 (S. Riccobono et al. eds., 2d ed. 1940) [hereinafter Fontes iuris] ("That a judgment against the absent and undefended . . . lacks any force is a most well-known rule." ("Sententiam aduersus absentes et indefensos . . . nullas vires obtinere notissimi iuris est.")); Rescript of Emperors Severus and Antoninus Magnus (Caracalla) (198/211), quoted in Marcian, De iudiciis publicis bk. 2 (211/17), Dig. 48.17.1.pr. (533), in 1 CIC, supra note 25, at 861 ("Let no absent person be punished; we follow the rule that absent persons ought not to be convicted, for considerations of equity do not permit anyone to be convicted in a case unheard." ("[N]e quis absens puniatur: et hoc iure utimur, ne absentes damnentur: neque enim inaudita causa quemquam damnari aequitatis ratio patitur.")). For the passage of Marcian in the context of the reconstructed work, see 1 Palingenesia, supra note 25, cols. 675, 678, para. 205.

Note also that a defendant's right to be present at trial is regarded as an essential component of the Sixth Amendment right of confrontation: "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (citing *Lewis v. United States*, 146 U.S. 370 (1892)).

33. See supra note 23.

34. "In causa capitali absens nemo damnatur neque absens per alium accusare aut accusari potest." Julius Paulus, *Sententiae* 5.5^A.9 (211/17), in 2 Fontes iuris, supra note 32, at 319, 393. Paulus was a jurist of the early third century whose "reputation in later times and . . . influence were immense." Jolowicz & Nicholas, supra note 24, at 392. For a concise survey of his works and the basis for the dating of the *Sententiae* given here, see Henry J. Roby, *An Introduction to the Study of Justinian's Digest at cci-cciii* (Cambridge, Cambridge Univ. Press 1884). The *Sententiae* "are now generally held to have been a collection of passages from different works by [Paulus]," Jolowicz & Nicholas, supra note 24, at 392, 457, composed not long before 300 and including alterations made by different authors. See Ernst Levy, *Pauli Sententiae vii-viii* (photo. reprint 1969) (1945). The words *per alium accusare aut* in the *Sententia* quoted here may be an early interpolation designed to stress the necessity of the presence of the accuser as well as the accused at a criminal trial. See Wlassak, supra note 23, at 60, 62. With those words removed, the correspondence of the *Sententia* in question to other expressions of the same principle in early third century legal literature and imperial *constitutiones* is very close. See supra note 32 and accompanying text.

35. The *constitutiones* of the Emperors Constantine in 327 and Theodosius in 426 declared the *Sententiae* of Paulus to be authoritative. See Jolowicz & Nicholas, supra note 24, at 452 & nn.5-6; Roby, supra note 34, at lxxxiv-lxxxv; Adolphe Tardif, *Histoire des sources du droit français* 43-44 (Paris, Alphonse Picard 1890).

court at the same time. It was the apparent intention of a late fourth century imperial *constitutio* to close that gap by denying any effect to an accuser's statement not made in the presence of the accused: "It is improper for whatever is said against an absent person, by him alone who is accusing, immediately to be considered as true, as if against one who is present and even convicted."³⁶ This *constitutio* is particularly significant because it is included in the first official collection of Roman laws,³⁷ the Theodosian Code of 438.³⁸

These statements, by their terms, apply only to a requirement that the *accusator*, as prosecutor, be present before the defendant. They do not apply to the prosecution's witnesses. In Cicero's time (106-43 B.C.E.) and at least through the first century C.E., either the prosecution or defense could produce testimony in writing to the court without producing the witness personally.³⁹ When witnesses were present, however, they testified on direct examination and were subject to cross-examination by the adverse party.⁴⁰ Indeed, Quintilian, in his *Institutio oratoria* (c. 95), gives extensive advice to practitioners on the conduct of both direct and cross-examination of witnesses in criminal cases.⁴¹ Although Quintilian is explicit on the point that written testimony from absent witnesses is admissible—testimony "is stated either in writing or by persons who are present,"⁴²—he advises that the fact-finder is

36. "Non oportet in absentem, quasi in praesentem atque convictum, verum statim putari, quidquid ab eo solo dicitur qui accusat." Rescript of Emperors Gratian, Valentinian, and Theodosius to Florentius (Dec. 20, 384), Code Th. 11.39.9 (438), in 1 Theodosiani libri XVI cum constitutionibus Sirmondianis et Leges novellae ad Theodosianum pertinentes 659 (Th. Mommsen & Paulus M. Meyer eds., 1905) [hereinafter 1 Theodosiani libri XVI].

37. See Jolowicz & Nicholas, *supra* note 24, at 464-65.

38. See 1 Theodosiani libri XVI, *supra* note 36, at 659.

39. See 2 Costa, *supra* note 21, at 145; Jones, *supra* note 18, at 71-72; Mommsen, *supra* note 18, at 411, 432; 2 James L. Strachan-Davidson, *Problems of the Roman Criminal Law* 115-18 (1912); Salvatore Messina, *La testimonianza nel processo penale romano*, 73 *Rivista Penale* 278, 299 (1911).

40. See 2 Costa, *supra* note 21, at 144-45; Jones, *supra* note 18, at 71; Geib, *supra* note 26, at 340-41; Mommsen, *supra* note 18, at 430-31; 2 Strachan-Davidson, *supra* note 39, at 114-15; Messina, *supra* note 39, at 297; Giovanni Pugliese, *La Preuve dans le procès romain de l'époque classique*, in 1 *La Preuve* 277, 318 (Recueils de la Société Jean Bodin No. 16, 1964).

41. See Quintilian, *Institutio oratoria* 5.7.1-32 (c. 95), in 2 *The Institutio Oratoria of Quintilian* 168-87 (H.E. Butler trans., 1921).

42. "Ea [testimonia] dicuntur aut per tabulas aut a praesentibus." *Institutio oratoria* 5.7.1, *supra* note 41, at 168.

likely to give much more credence to the testimony of live witnesses.⁴³

This preference for the testimony of witnesses present in court is clearly reflected in an oft-cited rescript of the Emperor Hadrian (117-138). Once, while sitting as judge,⁴⁴ Hadrian rejected an attempt to enter written testimony against a criminal defendant:

Alexander brought criminal charges against Aper before me, and because he was not proving [the charges] nor producing witnesses [*testes*] but wanted to use written statements [*testimoniis*],⁴⁵ which have no place before me (for it is my practice to examine the witnesses themselves), I sent him back to the provincial governor so that he would inquire into the credibility of the witnesses

. . . .⁴⁶

“[T]he Roman law about the evidence of witnesses seems to owe a great deal to Hadrian in person.”⁴⁷ In fact, the rescript quoted here arguably marks the beginning in Roman legal history of the requirement that accusing witnesses appear personally in court.⁴⁸

Hadrian’s rescript, which appears to assume that it is for the judge alone to examine the witnesses, may also signal the demise of cross-examination by the parties. Although Quintilian, in his *Institutio oratoria*, treated methods of cross-examination with the sophistication of an accomplished trial practitioner,⁴⁹ that practice

43. See *id.*

44. The emperor’s role as judge is described in Honoré, *supra* note 24, at 5-6. Hadrian enjoyed a reputation as an enlightened and conscientious judge. See *id.* at 9-11.

45. The word *testimonia* originally signified all means of proof, including the oral testimony of witnesses (*testes*). See 2 Costa, *supra* note 21, at 144 & n.5. In the rescript quoted here, Hadrian refers to *testimoniis* as written depositions and *testes* as live witnesses present to testify before the court. The two terms had come occasionally to be used in this contrasting sense around the time in question. See Fabio Lanfranchi, *Il diritto nei retori romani* 541-42 (1938).

46. “Quod crimina obiecerit apud me Alexander Apro et quia non probabat nec testes producebat, sed testimoniis uti uolebat, quibus apud me locus non est (nam ipsos interrogare soleo), quem remisi ad prouinciae praesidem, ut is de fide testium quaereret” Rescript of Hadrian to Junius Rufinus (117/38), quoted in Callistratus, *De cognitionibus*, bk. 4 (198/211), Dig. 22.5.3.3 (533), in 1 CIC, *supra* note 25, at 328. For the passage of Callistratus in the context of the reconstructed work, see 1 Palingenesia, *supra* note 25, cols. 81, 88, para. 28 § 3.

47. Honoré, *supra* note 24, at 9.

48. See Pugliese, *supra* note 40, at 320-21; Ugo Zilletti, *Sul valore probatorio della testimonianza nella “cognitio extra ordinem,”* 29 *Studia et documenta historiae et iuris* 124, 134-37 (1963). Inferior judges, however, were not bound to follow the Emperor’s example. See Messina, *supra* note 39, at 299.

49. See Quintilian, *Institutio oratoria* 5.7.22-31 (c. 95), *supra* note 41, at 180-87.

disappears without comment or explanation in the surviving contemporary legal sources. Nonetheless, the Romans appear to have considered the two other elements of the modern right of confrontation as significant components of their criminal procedure: the right of a defendant to be present at trial and the right to encounter an accuser personally in court.

III. JUSTINIAN'S NEW *CONSTITUTIO* ON WITNESSES

One of the major events in the Western legal tradition is the promulgation of the Emperor Justinian's Code in 529. This document, along with Justinian's earlier Digest and Institutes, collected and codified the entire corpus of Roman law then in force.⁵⁰

It is generally accepted that, by the time of this codification, the usual practice required witnesses to be personally present in court to give their testimony in the presence of the adverse party.⁵¹ For example, a mid-fifth century note in a summary of the Theodosian Code of unknown authorship⁵²—perhaps a compilation of a law teacher's notes⁵³—states unequivocally: "Whatever statements may have been made against an absent person are of no effect."⁵⁴

Justinian's Code seems to assume that witnesses testified before the adverse party. For instance, Code J. 4.20.19 set time limits within which witnesses summoned to testify in any case had to be examined.⁵⁵ But nowhere did the Code expressly mandate the presence of witnesses in criminal cases, or assure a defendant the right to be present when a witness testified.

50. See generally Jolowicz & Nicholas, *supra* note 24, at 478-96 (discussing the construction of the Code, Digest, and Institutes). Both the Digest and the Institutes were promulgated in 529. See *id.*

51. See Geib, *supra* note 26, at 631-33; Max Kaser, *Testimonium*, in 9A *Paulys Real-Encyclopädie der classischen Altertumswissenschaft* cols. 1021, 1059-60 (Wilhelm Kroll & Karl Mittelhaus eds., 1934); Messina, *supra* note 39, at 299. See generally 2 M.A. von Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung* 276-79 (Bonn, Adolph Marcus 1865) (discussing the historical development of civil law).

52. This summary is printed in Carlo Manenti, *Antiqua summaria codicis Theodosiani*, 3 *Studi Senesi* 259 (1886), 4 *Studi Senesi* 141 (1887), and 5 *Studi Senesi* 203 (1888), and extensively analyzed in Detlef Liebs, *Die Jurisprudenz im spätantiken Italien 177-88* (1987). Liebs deduces its place of origin to be one of the cities of Sicily. See *id.* at 179.

53. See Liebs, *supra* note 52, at 182.

54. "[I]n absentem quaecunque dicta fuerint non ualere." Note on Code Th. 11.39.9 (c. 450), in Manenti, 5 *Studi Senesi*, *supra* note 52, at 222. The provision of the Theodosian Code here summarized is the imperial *constitutio* of 384 of the Emperors Gratian, Valentinian, and Theodosius quoted in pertinent part *supra* note 36 and accompanying text.

55. See Code J. 4.20.19 (529), in 2 *CIC*, *supra* note 32, at 160 (incorporating the *constitutio* of Emperor Justinian of Mar. 21, 530).

However, the need to safeguard these procedures must soon have become apparent to Justinian and his legal advisers. On October 1, 539, five years after the issuance of the Code, Justinian's new *constitutio* on witnesses, *Novel 90*, delineated these requirements.⁵⁶ This *constitutio* is of critical significance in the history of the right of confrontation. In its fifth and ninth chapters, it sets out the legislative foundation of the requirements that, in a criminal case, prosecution witnesses had to be produced in court before the fact-finder and that the defendant had to have the opportunity to be present when the accusing witnesses were produced.⁵⁷

Chapter 5 of *Novel 90* provided a procedure, in civil cases, by which testimony of a witness could be taken in the province where the witness resided when the case was pending in another province.⁵⁸ In such a situation, the testimony was given before a judge in the witness's province, transcribed, and then sent to the trial judge. The chapter concluded, however, with the statement that its provisions did not apply to criminal cases. In criminal cases, "in which there is danger concerning great things, by all means witnesses are to be present [to testify] before the judges" who were the fact-finders.⁵⁹

56. Novel 90 is printed in 3 CIC 445-53 (Rudolf Schöll & Wilhelm Kroll eds., 10th ed. 1972), with the original Greek in the left-hand columns and a Latin translation in the right-hand columns. The translation is that of the collection of Justinian's Novels in Latin known as the Authenticum. Perhaps dating from the sixth century, but unknown in western Europe until the late eleventh or early twelfth century, the Authenticum became the standard Latin text for study and citation of the Novels in the later Middle Ages. See Friedrich A. Biener, *Geschichte der Novellen Justinian's* 243, 262-64 (Berlin, Ferdinand Dümmler 1824); Jolowicz & Nicholas, *supra* note 24, at 497-98; Nino Tamassia, *Per la storia dell'Autentico*, 56 *Atti del Reale Istituto veneto di scienze, lettere ed arti* 535, 588-91, 606-15 (Venice, 1897-1898). Because its translations are "word-for-word . . . from the Greek[,] the result is a barbaric, not infrequently incomprehensible Latin." H. J. Scheltema, *Subseciva*, 31 *Tijdschrift voor Rechtsgeschiedenis* 275, 275 (1963).

The Novels were known in western Europe in the early Middle Ages only through the *Epitome Juliani* (555), an abridged Latin translation by Julianus, a professor at Constantinople. See Biener, *supra* at 232-37; 1 Max Conrat, *Geschichte der Quellen und Literatur des römischen Rechts im früheren Mittelalter* 58 (Leipzig, J.C. Hinrichs 1889); Jolowicz & Nicholas, *supra* note 24, at 497. A shortened version of Novel 90 appears as *Iuliani Epitome* 83, in *Iuliani Epitome latina Novellarum Iustiniani* 110-11 (Gustav Haenel ed., Leipzig, Hinrichs 1873) [hereinafter *Iuliani Epitome*].

57. See Nov. 90.5, 90.9, in 3 CIC, *supra* note 56, at 450-51, 452-53.

58. See Nov. 90.5, in 3 *id.* at 450.

59. [I]n criminal [matters], in which there is danger concerning great things, by all means witnesses are to be present before the judges and inform of those things that are known to them, where there will be time, for instance, for tortures and any other observation. ([I]n criminalibus enim, in quibus de magnis est periculum, omnibus modis apud iudices praesentari testes et quae sunt eis cognita edocere, ubi et tormentorum forsitan erit tempus et alius omnis observationis.)

Chapter 9 of *Novel 90* governed the taking of what would now be called depositions to preserve testimony. It provided that the judicial official before whom the testimony was to be given had to advise the adverse party “to be present and to hear the testimony.”⁶⁰ If, after having received such notice, the adverse party failed to be present when the testimony was taken, the testimony would be treated “as if made with him present” and, therefore, could be used against him.⁶¹ The express purpose of the chapter was to prevent a party from rendering deposition testimony against it “of no effect” by wilfully absenting itself from the testimony’s taking.⁶² The chapter’s broader significance, however, lies in its

Nov. 90.5.1 (version of Authenticum), in 3 *id.* at 451.

As to the torturing of witnesses in Roman criminal procedure, see *supra* note 21 and accompanying text. It is worth noting that the reference to torture of witnesses is omitted in the version of Novel 90.5 of the *Epitome Iuliani*. See *supra* note 56. There, no reason is given for the requirement of the presence of witnesses in criminal cases:

Let these things [i.e., provisions for taking the testimony of witnesses before a court not having jurisdiction of the case], however, obtain in pecuniary [civil] cases; for in criminal [cases] the very persons of the witnesses are necessary. (Haec autem in pecuniariis causis obtineant; nam in criminalibus ipsae personae testium necessariae sunt.)

Iuliani Epitome 83.326.3 (555), in *Iuliani Epitome*, *supra* note 56, at 111.

60. Nov. 90.9 (version of Authenticum), in 3 *CIC*, *supra* note 56, at 452-53; see *infra* note 62.

61. *Id.*

62. [S]o that it may not in the future be objected against them [i.e., those producing witnesses before a judicial official prior to the commencement of litigation] that these things were done by one party, it is fitting that he [the prospective adverse party] living in the city in which the testimonies are given, be advised by the judge or defensor to be present and to hear the testimony. If indeed he does not wish to come, but declines, so that from this the testimony will be given by one party, and according to him will be of no effect [*inutilia*], we ordain that testimony of this sort will be held as if made not by one party, but as if made with him [the adverse party] present. If indeed he should decline and be unwilling to come and hear the depositions (even though they are published) and it is not through some inexcusable necessity that he cannot attend, he shall be like one who does come, and no advantage shall accrue to him from his impudence, but the proofs shall indeed be deemed made, but whatever [objections] are fitting to him for disputing these [proofs], he shall be allowed to use them, provided only that the fact that they appear to be one-sided on account of his obstinacy cannot [be used to] oppose the testimonies by reason of the fact that through audacity he did not come . . . ([U]t non in posterum opponatur eis, quod ab una parte gesta sunt, oportet et illum in ea civitate constitutum in qua testationes dantur, admonitum a iudice sive defensore praesentem esse et audire adtestationes. Si vero noluerit advenire, sed respuerit, ut ex hoc ab una parte testimonia dentur, ut secundum hoc ipsum inutilia esse, sancimus huiusmodi testationes ita tenere ac si non ex una parte constitutae sint, sed tamquam eo praesente factae sint. Si enim recusaverit et advenire noluerit et audire depositiones (etenim publicabuntur) et non per inexcusabilem aliquam necessitatem deduci non possit, similis adveniendi erit, et nullum iuvamen ex sua protervitate ei efficietur, sed videantur quidem

assumption of a general rule that “the production of witnesses before [a judicial official] is not valid unless [the] adverse party is present”⁶³

IV. POPE GREGORY’S ADOPTION OF *NOVEL 90*

From early times, the Church was involved both in settling disputes among its members⁶⁴ and in disciplining clergy.⁶⁵ It patterned its proceedings upon the accusatorial model of the secular state.⁶⁶ After the legal establishment of Christianity throughout the Roman Empire in the first half of the fourth century, secular accusatorial procedure came to govern the disciplinary proceedings of the Church as a matter of law.⁶⁷ These proceedings included

probationes factae, quaecumque vero competierint ei ad disputandum de his, licebit his uti, solummodo quod videntur esse ex una parte propter eius proterviam, quasi propter audaciam minime advenientis, testationibus opponere non valente)

Nov. 90.9 (version of Authenticum), in 3 CIC, supra note 56, at 452-53.

The “defensor” referred to in this passage is the *defensor civitatis*, an important provincial official with various administrative and judicial duties. Adolf Berger, *Encyclopedic Dictionary of Roman Law*, 43 Transactions Am. Phil. Soc’y 428 (1953).

63. The rule is stated in this positive fashion not in Nov. 90.9 itself, but in the abridged version of chapter 9 appearing in the *Epitome Iuliani*:

The production of witnesses before judges, or defensors, or the master of the census, is not valid unless each adverse party is present or contumaciously not coming However, one who was absent from necessity is not deemed to be contumaciously absent (Testium productio apud iudices, vel defensores, vel magistrum census, non aliter valeat nisi praesente quoque adversaria parte, vel contumaciter non veniente Contumaciter autem non videtur abesse, qui ex necessitate abfuit)

Iuliani Epitome 83.330.7 (555), in *Iuliani Epitome*, supra note 56, at 111.

The *magister census* was a high municipal official principally concerned with taxation, but exercising some police functions also. Berger, supra note 62, at 386, 570.

64. See Giulio Vismara, *Episcopalis audientia* 6-10 (Pubblicazioni della Università Cattolica del Sacro Cuore No. 54, 1937); Vratislav Bušek, *Episcopalis audientia, eine Friedens- und Schiedsgerichtsbarkeit*, 28 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 453, 459-60 (1939) [hereinafter ZRG, Kan. Abt.]; Georg May, *Anklage- und Zeugnisfähigkeit nach der zweiten Sitzung des Konzils zu Karthago vom Jahre 419*, 140 *Theologische Quartalschrift* 163, 188 (1960).

65. See Stephen W. Findlay, *Canonical Norms Governing the Deposition and Degradation of Clerics* 3-5 (Catholic University of America Canon Law Studies No. 130, 1941).

66. See Robert B. Clune, *The Judicial Interrogation of the Parties* 10-11 (Catholic University of America Canon Law Studies No. 269, 1948); see also 4 Paul Hinschius, *Das Kirchenrecht der Katholiken und Protestanten in Deutschland* 758-59 (Berlin, I. Guttentag 1888); James A. Hughes, *Witnesses in Criminal Trials of Clerics* 19-20 (Catholic University of America Canon Law Studies No. 106, 1937); Artur Steinwenter, *Der antike kirchliche Rechtsgang und seine Quellen*, 23 ZRG, Kan. Abt. 1, 29-30, 46-51 (1934).

67. See Georg May, *Der Schutz des Klerus vor verleumderischen Anklagen im staatlichen und kirchlichen Gericht nach zwei kaiserlichen Konstitutionen aus den Jahren*

charges of clerical violation of the secular criminal laws.⁶⁸ Thus, the Church exercised criminal jurisdiction, and the criminal procedure of its canon law became substantially similar to that of the state.⁶⁹ The ecclesiastical procedure, however, differed from that of the state in that it eschewed both torture⁷⁰ and capital punishment.⁷¹

Long before Christianity became the state religion of the Empire, the Church, which rejected many of the values of the secular state, recognized that bringing the accuser and accused together in an adjudicatory forum, based on the model of the secular courts, was essential to doing justice.⁷² For example, the *Didascalia*, a disciplinary writing of unknown authorship from the first half of the third century,⁷³ cautions those judging disputes among Church members not to “hear only one person, with the other not present and not defending himself against the allegation”⁷⁴

378 und 412, 11 *Österreichisches Archiv für Kirchenrecht* 288, 295-96 (1960). After Christianity became legally established in the Empire, the ecclesiastical courts were incorporated into the imperial legal system as arbitral forums. See John J. Król, *The Defendant in Contentious Trials* 21 (Catholic University of America Canon Law Studies No. 146, 1942); May, *supra* note 64, at 188-89.

68. See Findlay, *supra* note 65, at 9-10.

69. See 4 Hinschius, *supra* note 66, at 770 n.3. An imperial *constitutio* of 355 precipitated this development. The *constitutio* conferred on the ecclesiastical courts exclusive first instance jurisdiction over secular criminal charges against bishops. See 4 *id.* at 794 & n.6; May, *supra* note 64, at 189-91.

70. See Théophile Huc, *Influence du droit canonique sur la législation criminelle*, 13 *Revue critique de législation et de jurisprudence* 441, 459-60 (1858).

71. See A.M. Stickler, *Il “gladius” negli atti dei concili e dei RR. Pontefici sino a Graziano e Bernardo di Clairvaux*, 13 *Salesianum* 414, 423 (1951). The Church imposed spiritual penalties, including deposition of clergy from office, excommunication of any member from fellowship, and a variety of penances. See Findlay, *supra* note 65, at 12-23; Huc, *supra* note 70, at 463-64. In the early sixth century, seclusion in a monastery for life was established as the penalty for clergy convicted of the most serious crimes. See Findlay, *supra* note 65, at 41-42; Huc, *supra* note 70, at 464-65. Detailed information about the penalties imposed on clerics by the Church is set out in 4 Hinschius, *supra* note 66, at 726-38.

72. See Franz X. Funk, *Die Apostolischen Konstitutionen* 32 (Rottenburg am Neckar, Wilhelm Bader 1891).

73. See Jean Gaudemet, *Les Sources du droit de l'Église en Occident du II^e au VII^e siècle* 24 (1985).

74. [I]t is not just to make one-sided judgments. For if you hear only one person, with the other not present and not defending himself against the allegation, and, without taking counsel or investigating, hastily pronounce judgment and condemn immediately after lying words which you have credited, since you will have condemned him who was not present or defending himself, you will be found responsible for the destruction and complicit with the accuser before God, the just judge, and afflicted along with him by God. (Εἴπομεν δέ, ὅτι κρίσεις οὐ δίκαιον μονομερεῖς ποιῆσθαι ἐὰν γὰρ τοῦ ἐνδὲς προσώπου ἀκούσητε, μὴ

A famous colloquy between Emperor Constantius and Pope Liberius in the year 355 demonstrates how earnestly the Church adhered to this principle.⁷⁵ The Emperor demanded that the Pope endorse the judgment of a Church council against Athanasius, the Bishop of Alexandria. Liberius adamantly refused. Athanasius, he said, had not been present to be tried. Therefore, in condemning him, the council had not followed the norms of traditional ecclesiastical procedure. Threatened with exile by the Emperor, Liberius responded that the ecclesiastical laws were more important to him than staying in Rome.⁷⁶

Athanasius himself wrote with regard to the judgment against him: "No man is unaware that items of business which are done when one party is absent do not have the slightest force. For this is prescribed even by divine law" ⁷⁷ In support of this proposition, he quoted Acts 25:16 which reads: "It is not the custom among the Romans casually to deliver any man to die before he has his accusers facing him and receives opportunity for defense to clear himself of the charges."⁷⁸

Later ecclesiastical records show the persistence of this theme in the developing canon law. For example, Pope Damasus (366-384), according to a contemporary, "ordained that nothing be decided against the absent and unheard."⁷⁹ Similarly, the minutes of the

παρόντος τοῦ ἑτέρου μηδὲ ἀπολογησαμένου πρὸς τὸ ἐπιφερόμενον ἔγκλημα, καὶ προπετῶς ἐξενέγκητε ψῆφον κατακρίσεως, ἔνοχοι τῆς ἀναιρέσεως καὶ συμπερισταὶ τῷ συκοφάντῃ παρὰ θεῶ εὐρεθήσεσθε τῷ δικαίῳ κριτῆϊ.)

Apostolic Constitutions 2.51.1 (c. 380), in 1 *Didascalia et Constitutiones apostolorum* 149 (Franz X. Funk ed., 1905) [hereinafter *Didascalia*]. The text is adapted from the much older *Didascalia* 2.51.1 (c. 230). See Franz X. Funk, *Prolegomena to 1 Didascalia*, supra, at i, xviii; Gaudemet, supra note 73, at 21. The original Greek version of the *Didascalia* is now lost, but the text has survived in other languages. See Funk, supra, at vi; Gaudemet, supra note 73, at 24. For the text of *Didascalia* 2.51.1 in an early Latin translation, see 1 *Didascalia*, supra, at 148.

75. For the following discussion of the colloquy see Johannes Herrmann, *Ein Streitgespräch mit verfahrensrechtlichen Argumenten zwischen Kaiser Konstantius und Bischof Liberius*, in *Kleine Schriften zur Rechtsgeschichte* 321, 321, 329-30 (Gottfried Schieman ed., 1990).

76. See id. at 324-27.

77. "Ὅτι μὲν οὖν τὰ πραττόμενα κατὰ μονομέρειαν οὐδεμίαν ἔχει δύναμιν, οὐδεὶς ἐστὶν ὃς ἀγνοεῖ τῶν πάντων ἀνθρώπων. Τοῦτο γὰρ καὶ ὁ Θεὸς νόμος κελεύει" Athanasius, *In Apologiam contra Arianos* c.82 (c. 357), in 25 *Patrologia Graeca* cols. 239, 396.

78. "Οὐκ ἐστὶν ἔθος Ῥωμαίοις χαρίζεσθαι τινα ἀνθρώπων, πρὶν ἢ ὁ κατηγορούμενος κατὰ πρόσωπον ἔχει τοὺς κατηγοροῦς, τόπον τε ἀπολογίας λάβοι περὶ τοῦ ἐγκλήματος." Id. (quoting Acts 25:16). The words of this verse are individually analyzed in Dupont, supra note 28, at 358-71.

79. "[P]raeceptoras, ne quid in absentes et inauditos decerneretur." Priscillian, *Liber ad Damasum episcopum* (380/85), in *Priscilliani quae supersunt* 34, 35 (Georg Scheps ed.,

Council of Chalcedon show bishops assembled for a disciplinary proceeding asserting that “[n]o one condemns an absent person.”⁸⁰ The *Statuta Ecclesiae antiqua*, the work of an unknown compiler in southern Gaul,⁸¹ also includes the precept: “Let the ecclesiastical judges beware of pronouncing judgment in the absence of him whose case is being heard, because it will be invalid”⁸² Moreover, Pope Pelagius I (556-561) declared that “the laws do not allow” accusations to be made “with the adversary absent.”⁸³

Against this background, it is easy to see that the customary criminal procedure of the Church corresponded to the Roman secular laws. Thus it is understandable that canon law came to incorporate the language of chapter 9 of Justinian’s *Novel 90* within a century of its issuance, namely its guarantee to a criminal defendant of the right to encounter opposing witnesses in court.

This incorporation was accomplished by Pope Gregory I (590-604), one of the foremost papal legislators.⁸⁴ The occasion was an appeal to the Pope in 603 by Stephen, a Spanish bishop.⁸⁵ Stephen complained that he had been deposed from his see by other bishops on the basis of false charges and without a fair hearing. Gregory ordered an on-the-scene investigation into the fairness of the

Corpus Scriptorum Ecclesiasticorum Latinorum No. 18, Vienna-Prague-Leipzig, F. Tempisky, G. Freytag 1889). The reference is to a response by the Pope to action contemplated by several Spanish bishops, at a provincial synod held in Zaragoza in 380, against the adherents of an ascetic sect founded by Priscillian. See 1 Erich Caspar, *Geschichte des Papsttums* 217 (1930).

80. “Ἀπόντα οὐδεὶς κατακρίνει.” Council of Chalcedon, Actio 10, para. 3 (451), in 1 *Concilium universale Chalcedonense* pt. 3, 375, 376 (Edvardvs Schwartz ed., 1935).

81. See Charles Munier, *Les Statuta Ecclesiae antiqua* 209, 234 (1958). The Statuta date from c. 476/85.

82. “Caveant iudices ecclesiae ne, absentante eo cuius causa ventilatur, sententiam proferant, quia irrita erit” *Id.* at 73, 88. Munier demonstrates conclusively, see *id.* at 139, that the rule as thus formulated in c. 53 of the Statuta was drawn by the compiler from Apostolic Constitutions 2.51.1, see *supra* note 74.

83. “[T]he laws do not allow that the deeds which he alleged to us be recited with the adversary absent.” (“[Q]uia aduersario absente, gesta quae nobis recensuit facta leguntur, talia leges non recipiunt.”) Letter from Pope Pelagius I to Sindual, Master of the Soldiers (JK 990), in *Pelagii I papae epistulae quae supersunt* 87, 87 (Pius M. Gassó & Columba M. Batlle eds., 1956) (559).

84. Gregory’s knowledge of an important provision of the secular law of procedure followed naturally from his own background. His education had almost certainly included studies in the law. See 2 Caspar, *supra* note 79, at 346 (1933); 1 F. Homes Dudden, *Gregory the Great* 78-79 (1905). And, before entering a monastic order, he had served, in 573, as prefect of the city of Rome, i.e., as the highest administrative and judicial official of the city. See 1 *id.* at 101-03.

85. See 1 Dudden, *supra* note 84, at 413-14; Jeffrey Richards, *Consul of God* 210 (1980).

proceedings.⁸⁶ He prepared to send John the Defensor to Spain to conduct the inquiry.⁸⁷

Gregory provided John with a detailed letter of instruction (*commonitorium*)⁸⁸ so that John could evaluate whether the process against Stephen had been properly conducted (*ordinabiliter est habitum*).⁸⁹ In particular, Gregory directed John to determine “if the testimony against him was spoken under oath with him present, or if it was done in writings, or if he had license to respond and defend himself.”⁹⁰ Later in his *commonitorium*, Gregory quoted chapter 9 of *Novel 90* directly to establish that Stephen had a right to be present when witnesses gave testimony against him:

If what the bishop [Stephen] says is true, that some witnesses of the worst sort were presented with him absent, it must be acknowledged to be of no moment in the law, under the *constitutio* of the Novel which speaks about witnesses. [Here Gregory quotes from Novel 90.9].

Thus the adversary must always be advised, so that he may come to hear the witnesses. If that was omitted here, it is necessary that what was done against the laws cannot stand.⁹¹

86. See 1 Dudden, *supra* note 84, at 413-14; Richards, *supra* note 85, at 210.

87. John was a close associate of Gregory. See 1 Dudden, *supra* note 84, at 245; Richards, *supra* note 85, at 71. On this mission to Spain, he also was to investigate the case of another bishop and a priest. See Albert Gauthier, *L'utilisation du droit romain dans la lettre de Grégoire le Grand à Jean le Défenseur*, 54 *Angelicum* 417, 420-21 (1977). “Defensor,” in this context, seems to signify a representative of the Church in its legal affairs. *Id.* at 419.

88. See 1 Conrat, *supra* note 56, at 8-9. The letter has been preserved in three separate parts. Gauthier, *supra* note 87, at 418.

89. Letter of instruction (*commonitorium*) from Pope Gregory to John the Defensor going into Spain (JE 1912) (Aug. 603) [hereinafter Gregory, *Commonitorium*], Register 13.47, in 2 *Gregorii I papae Registrum epistolarum* 410, 411 (Paul Ewald & Ludwig M. Hartmann eds., MGH *Epistolae* No. 2, Berlin, Weidmann 1899) [hereinafter *Registrum*].

90. “[D]iligenter quaerendum est . . . si eo praesente sub iureiurando contra eum testimonium dictum est seu scriptis actum est vel ipse licentiam respondendi et defendendi se habuit.” *Id.*

91. Quod autem dicit idem episcopus, quia se absente aliqui vilissimi sunt testes exhibiti, hoc si verum est, nullius esse momenti lege noscendum est, constitutione Novellae, quae de testibus loquitur

Ecce ammonendus est semper adversarius, ut ad audiendos testes adveniat. Quod quia hic omissum est, necesse est, ut, quod contra leges actum est, firmitatem non habeat.

Gregory, *Commonitorium*, Register 13.50, in 2 *Registrum*, *supra* note 89, at 414, 417-18.

The version of Novel 90.9 quoted by Gregory here is not that of the Authenticum, see *supra* notes 56, 62, or the Epitome Juliani, see *supra* notes 56, 63. It is from another Latin version of the Novels now lost. See Biener, *supra* note 56, at 230, 458. To judge from the

Gregory's *commonitorium* is of critical significance in the history of the right of confrontation. It provided the normative basis in the development of canon law for the requirement that an accused must have the opportunity to encounter accusing witnesses in court.⁹² The *commonitorium* cast this requirement in the new context, unreflected in *Novel 90* itself, of a fundamental right of an accused individual. And it established that any violation of that right rendered a judgment against the accused a nullity.

The development of canonical trial procedure is grounded in Gregory's *commonitorium*.⁹³ Hincmar, Archbishop of Rheims (845-882), who was "incontestably the most significant jurist of his time,"⁹⁴ regarded the *commonitorium* as the vehicle by which the Roman law of procedure was effectively adopted in the canon law.⁹⁵ Hincmar quotes from it in his own writings.⁹⁶ In his seminal

passage quoted by Gregory here, the lost version was far superior to the Authenticum in the quality of its language; it has "a greater propriety of style, a surer interpretation of the text, and a more reasonable deference to the method of literal translation [from the Greek]." Tamassia, *supra* note 56, at 595.

92. The requirement of Gregory's *commonitorium* that testimony against a defendant must be "spoken under oath with him present," see *supra* note 90 and accompanying text, appears in C.2 q.1 c.7 of the *Decretum* of Gratian (c. 1140), the first definitive compendium of canon law. See *infra* text accompanying notes 163-65. For the text, see 1 *Corpus Iuris Canonici* col. 440 (Emil Friedberg ed., Leipzig, Bernhard Tauchnitz 1879).

Gregory's quotation in his *commonitorium* of the pertinent portion of *Novel 90.9*, and his formulation of its rule, are included in *Compilatio prima* (the first of five major collections of papal decretals appearing in the late twelfth and early thirteenth centuries, see Knut W. Nörr, *Die Entwicklung des Corpus iuris canonici*, in 1 *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* 835, 839-41 (Helmut Coing ed., 1973) [hereinafter *Handbuch*]), and in the *Decretales* (issued by Pope Gregory IX in 1234), see *Comp. I* 2.13.3 (1188/91), in *Quinque Compilationes Antiquae* 1, 16 (Emil Friedberg ed., Leipzig, Bernhard Tauchnitz 1882); *X* 2.20.2 (1234), in 2 *Corpus Iuris Canonici*, *supra*, at cols. 315-16 (1881).

93. On the importance of Gregory's *commonitorium* as a foundation of the later canonical procedural literature, see Linda Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius* 9-10, 18-22, 28 (*Ius Commune Sonderhefte* No. 19, 1984).

94. Heinrich Schrörs, *Hincmar Erzbischof vom Reims 389* (Freiburg im Breisgau, Herder 1884). Hincmar's knowledge of both secular and canon law was comprehensive. See generally J. Devisse, *Hincmar et la loi 72-92* (*Université de Dakar, Faculté des Lettres et Sciences Humaines* No. 5, 1962) (discussing Hincmar's views regarding the law). For an overview of his thinking on procedural questions, see Fowler-Magerl, *supra* note 93, at 16-19.

95. Hincmar's opinion was that "Gregory . . . composed the *commonitoria* [to John the Defensor] afresh from the imperial laws which he judged ecclesiastical." ("Gregorius . . . *commonitoria ex integro de imperialibus contexit legibus, quas ecclesiasticas iudicavit.*") Hincmar of Rheims, *De praedestinatione Dei et libero arbitrio* c.37 (859/60), in 125 *Patrologia Latina* cols. 65, 403.

96. See Hincmar of Rheims, *De presbyteris criminosis* c.12 (876/77), in 125 *Patrologia Latina* cols. 1093, 1098 (quoting requirement of the *commonitorium* that testimony against defendant be spoken under oath in his presence); Hincmar of Rheims, *Opusculum LV*

procedural treatise *De presbyteris criminosis*,⁹⁷ Hincmar writes, referring specifically to Gregory's requirement that a defendant be present when accusing witnesses testify against him, that "Gregory . . . in the *commonitorium* . . . demonstrates how judgment is to be reached by the judicial process and with integrity"⁹⁸

V. A NINTH-CENTURY CRIMINAL TRIAL IN A CHURCH COURT

The "judicial process" to which Hincmar referred was a feature of the church courts of his day, but not of the secular courts. With the disappearance of Roman Empire in the West, Roman criminal procedure based on rational proofs had, outside the ecclesiastical courts, given way gradually in much of western Europe. In its place, Germanic procedures based on irrational proofs—ordeals, oath, and battle—came to be used to resolve criminal accusation.⁹⁹ The "ordeals" were important among all the Germanic peoples, including the Franks, as the means by which persons accused of a crime might be required to prove their innocence by showing that supernatural forces intervened to protect them.¹⁰⁰ However, if an accused person enjoyed a good reputation and was a freeman rather than a serf, and the proof against him was not conclusive, he

Capitulorum adversus Hincmarum Laudunensem c.28 (870), in 126 *Patrologia Latina* cols. 282, 401, 403 (repeating Gregory's quotation and summary of Novel 90.9).

97. The treatise is dated 876/77. For the importance of this work in the history of canonical trial procedure, see Emil Ott, *Die rhetorica ecclesiastica*, 125 *Sitzungsberichte Wien*, Abhandlung 8, at 80 (1892).

98. Gregory . . . in the *commonitorium* to John the Defensor going into Spain, demonstrates how judgment is to be reached by the judicial process and with integrity, saying: "It is to be diligently inquired of, first, whether the trial was properly conducted Thereafter . . . whether the testimony against [the defendant] was spoken under oath with him present, whether it was done in writings, or the defendant personally had license to respond and defend himself." (*Qualiter autem sententia ordine judiciario et cum integritate proferenda sit, . . . Gregorius . . . in commonitorio Joanni Defensori eunti in Hispanias dato demonstrat dicens: "Diligenter quaerendum est, primum, si iudicium ordinabiliter est habitum Deinde . . . si eo praesente sub iurejurando contra eum testimonium dictum est, si scriptis actum est, vel ipse accusatus licentiam respondendi et defendendi se habuit."*)

Hincmar of Rheims, *De presbyteris criminosis* c.12, supra note 96, col. 1098.

99. See Robert Bartlett, *Trial by Fire and Water* 6-12, 24-26 (1986); 2 Heinrich Brunner, *Deutsche Rechtsgeschichte* 406-19, 437-41 (Leipzig, Duncker & Humblot 1892); Eugene J. Moriarty, *Oaths in Ecclesiastical Courts* 15 (Catholic University of America Canon Law Studies No. 110, 1937).

100. See Hermann Nottarp, *Gottesurteilstudien* 15-28 (2d ed. 1956); J.J. Thonissen, *L'organisation judiciaire, le droit pénal, et la procédure pénale de la loi salique* 503-13 (Brussels-Paris, Bruylant-Christophe, Marescq, 2d ed. 1882); Raoul C. van Caenegem, *La Preuve dans le droit du moyen âge occidental*, in 2 *La Preuve* 691, 694-97 (*Recueils de la Société Jean Bodin*, No. 17, 1965).

would normally be allowed to clear himself of the accusation by giving an oath as to his innocence, usually supported by the oaths of others (oath-helpers, *cojuratores* or *compurgatores*).¹⁰¹

The Church, however, disapproved of the Germanic "ordeals," to which canonical jurists referred collectively as "vulgar purgation" (*purgatio vulgaris*).¹⁰² The Church followed the Roman law trial procedure of rational proofs by witness testimony, which was fundamentally opposed to the primitive irrationality of the "ordeals."¹⁰³ An actual example of rational "judicial process" as applied by the Church has been preserved in certain directives given by the Second Council of Douzy in 874.¹⁰⁴ Probably drafted by Hincmar himself,¹⁰⁵ the Council's directives provide detailed instructions as to how the prosecution of a criminal defendant was to be conducted.¹⁰⁶ As explained below, these directives clearly show that accusing witnesses had to testify in open court before a defendant asserting innocence as a prerequisite to his conviction.

The case which the Council addressed in 874 was that of one Huntbert, a priest accused of adultery.¹⁰⁷ Its background is complex. Duda, a nun, had engaged in a power struggle with her abbess for control of the monastery. Huntbert had been her con-

101. See Bartlett, *supra* note 99, at 30-33; 2 Brunner, *supra* note 99, at 377-91; J. Ph. Lévy, *La hiérarchie des preuves dans le droit savant du Moyen-Age 14-15* (Annales de l'Université de Lyon No. 5 [3d ser.], 1939); Moriarty, *supra* note 99, at 13-15; François-Louis Ganshof, *La Preuve dans le droit franc*, in 2 *La Preuve*, *supra* note 100, at 71, 75-79.

102. Though, for secular proceedings, the Church initially tolerated them and priests participated in their rituals. See Lévy, *supra* note 101, at 149-50; Moriarty, *supra* note 99, at 15-16; E. Vacandard, *L'Église et les Ordalies*, in 1 *Études de critique et d'histoire religieuse* 189, 191-92, 202-07 (5th ed. 1913). The Church also adopted the Germanic practice of allowing an accused person to purge himself of the accusation by his own oath, perhaps supported by the oaths of *compurgatores*. As applied in the ecclesiastical courts, this procedure was called *purgatio canonica*. See Lévy, *supra* note 101, at 141-45; Moriarty, *supra* note 99, at 17; Paul Fournier, *Les officialités au moyen âge* 265-66 (Paris, E. Plon 1880); Édouard Beaudouin, *Remarques sur la preuve par le serment du défendeur dans le Droit franc*, 8 *Annales de l'Université de Grenoble* 407, 495-503 (1896).

103. See Lévy, *supra* note 101, at 13-14, 163-64; Jean Gaudemet, *Les Ordalies au moyen âge: doctrine, législation et pratique canoniques*, in 2 *La Preuve*, *supra* note 100, at 99, 99-100.

104. 17 *Sacrorum Conciliorum Nova et Amplissima Collectio* col. 288 (Joannes D. Mansi ed., Venice, Antonio Zatta 1772) [hereinafter Mansi]. Douzy is the present-day Douzy-les-Prés, a town near the Belgian border in Ardennes, France.

105. 4 Charles J. Hefele & H. Leclercq, *Histoire des conciles d'après les documents originaux* 639 (1911). The background of the case is set out in 17 Mansi, *supra* note 104, cols. 288-90.

106. See *infra* notes 107-21 and accompanying text.

107. For the facts of Huntbert's case summarized here see 17 Mansi, *supra* note 104, cols. 288-92.

federate in this process. On Duda's behalf, he drafted letters against the abbess, inferentially accusing her of misconduct, for Duda to send to various recipients. Ultimately, Huntbert formally presented Duda's charges against the abbess to a church synod, which rejected them.

The course of events then took an unusual turn. Duda became pregnant and gave birth. Someone, by his relations with Duda, obviously had committed a serious criminal offense. Suspicion, naturally, fell on Huntbert. Moreover, Duda appears to have indicated that he was the father of her child. Huntbert, however, emphatically denied his guilt and wished to purge himself by oath. The Council of Douzy was called upon to determine how proceedings in the matter were to be carried out.

The Council declared that Huntbert could not purge himself by oath. Having previously brought the false accusation against the abbess, he was deemed guilty of the offense of "calumny" (*calumniatoris crimen*)¹⁰⁸ and, therefore, had forfeited the right to clear himself by oath.¹⁰⁹ Thus, the Council, alluding to Pope Gregory's writings on judicial procedure,¹¹⁰ set out the method by which the truth of the accusation against Huntbert could be determined "rationally" (*rationaliter*).¹¹¹

First, according to the Council's directives, a synodal court was to be convened at the monastery. It was to be composed of ecclesiastical judges joined by royal officials (*missi*).¹¹² Before any court proceedings began, Duda and two other nuns, Erpreda and Berta (who allegedly participated in the offense in some way), were to be interrogated separately from each other.¹¹³ They were to be exhorted to tell the truth as to what they knew. Duda was to be

108. 17 *id.* col. 289. The Latin *calumnia* is defined, especially at law, as "false accusation" or "malicious prosecution." Cassell's Latin Dictionary 86 (Macmillan 1977) (1959).

109. It was a principle of canon law that one guilty of calumny incurred "infamy" and thereby became incompetent to testify under oath in the future. See Georg May, *Die Infamie im Decretum Gratiani*, 129 *Archiv für katholisches Kirchenrecht* 389, 394, 398, 403 (1959-1960).

110. 17 *Mansi*, *supra* note 104, col. 288.

111. 17 *id.*

112. 17 *id.* col. 290. In the Frankish realm, a criminal charge against a cleric was tried in a synodal (ecclesiastical) court. If the defendant was found guilty and sentenced to degradation from his clerical office, the royal officials could thereupon, without any further trial, impose a secular penalty on him for the offense of which he had just been convicted. See Anton Nissl, *Der Gerichtsstand des Clerus im fränkischen Reich* 127-31 (Innsbruck, Verlag der Wagner'schen Universitäts-Buchhandlung 1886).

113. 17 *Mansi*, *supra* note 104, col. 290.

cautioned sternly to avoid accusing Huntbert if he was not, in fact, the father of her child. It is plain, however, that the Council assumed that the "truth" would establish Huntbert's guilt. Then Huntbert was to be interrogated.¹¹⁴ If he was ready to confess his guilt, he, Duda, Erpreda, and Berta would be brought together before the congregation of the monastery where all four would make their public confessions in turn.¹¹⁵

If, however, Huntbert persisted in denying his guilt, trial would commence in the synodal court before the judges, the *missi*, and the congregation of the monastery (including the abbess).¹¹⁶ Duda, Erpreda, and Berta would come into court and "refute" (*revincant*) Huntbert with the details of his offense.¹¹⁷ This would represent Huntbert's last chance to confess and obtain some leniency in the penalty meted out to him.¹¹⁸ If he continued to maintain his innocence, then Duda, Erpreda, and Berta would be put under oath, and each would state her testimony against Huntbert to the court.¹¹⁹ As a result, Huntbert would be convicted by three witnesses,¹²⁰ deposed from the clergy by the ecclesiastical judges, and exiled for life to some remote place by the royal *missi*.¹²¹

The directives of the Second Council of Douzy clearly demonstrate the importance attached in the canon law of the ninth century to the physical production of accusing witnesses before a criminal defendant. From a defendant's standpoint, however, the directives leave much to be desired. In particular, they remained silent as to any opportunity for the accused to defend himself against the charge. However, some twenty years earlier, a remarkable occurrence in the history of the canon law—the pseudoisidorean forgeries—had begun to fill this gap. The forgeries' development would establish the production in court of accusers and witnesses as the cornerstone of a defendant's opportunity for defense. For the next 300 years, until nearly the close of the

114. 17 id. col. 291.

115. 17 id.

116. 17 id.

117. 17 id.

118. 17 id.

119. 17 id.

120. 17 id. Here there seems to be an implicit allusion to the requirement under canon law, deriving ultimately from the Mosaic law, of more than one witness for the proof of a fact. See H. van Vliet, No Single Testimony 2-6 (*Studia Theologica Rheno-Traiectina* No. 4, 1958); Ulrich Mosiek, Der Grundsatz "Unus testis nullus testis" und seine Geltung im kanonischen Recht, 26 *Revue de Droit Canonique* 371, 371 (1976).

121. 17 Mansi, *supra* note 104, cols. 291-92.

twelfth century, the pseudoisidorean forgeries would impart to canon law criminal procedure what, in modern terms, would be called a strong "due process" orientation.

VI. THE FORGERIES OF PSEUDO-ISIDORE

In the mid-ninth century, between 847 and 852 in what is now France, an unknown group of clerics undertook a vast project of forgery of legal texts.¹²² The forgers, whose enterprise might be characterized as one of history's greatest hoaxes, wished to secure the fundamental independence of bishops so that they would be subject only to the Pope and be free from interference by lesser ecclesiastical authorities or powerful lay magnates.¹²³ Because the extant canonical texts lent insufficient support to their position, the forgers employed the not uncommon medieval expedient of creating their own authorities.¹²⁴ Their climactic and most influential product was a massive collection of decretals¹²⁵ (now called the False Decretals) ascribed to early popes by name, identifying Isidorus Mercator as the compiler.¹²⁶ For this reason, the forgers, since the conclusive detection of the forgery early in the seventeenth century, are collectively called "Pseudo-Isidore" or the "pseudoisidoreans."¹²⁷

The significance of the pseudoisidorean corpus to the present study lies in the forgers' repeated emphasis on the procedural pro-

122. For the leading studies of the forgeries, see 1 Paul Fournier & Gabriel Le Bras, *Histoire des collections canoniques en Occident depuis les Fausses Décrétales jusqu'au Décret de Gratien 127-201* (1931); Emil Seckel, *Pseudoisidor*, in 16 *Realencyklopädie für protestantische Theologie und Kirche* 265 (Albert Hauck ed., 3d ed. 1905). A useful summary in English is E.H. Davenport, *The False Decretals* (1916). The influence of the forgeries on subsequent canonical collections to and including the *Decretum* of Gratian is comprehensively analyzed in Horst Fuhrmann, *Einfluss und Verbreitung der pseudoisidorischen Fälschungen* (MGH Schriften No. 24, 3 vols. 1972-1974).

Rheims is the likeliest site of the forgeries' production. See Schafer Williams, *Codices Pseudo-Isidoriani* 121 (MIC Series C: Subsidia No. 3, 1971); Seckel, *supra*, at 277-79.

123. See Davenport, *supra* note 122, at 30-36; 1 Fournier & Le Bras, *supra* note 122, at 121-24, 130-33; Seckel, *supra* note 122, at 279, 281-82.

124. On the medieval penchant for forgery, see 1 Fuhrmann, *supra* note 122, at 66-80 (1972); Horst Fuhrmann, *Einladung ins Mittelalter 195-221* (3d ed. 1988).

125. "Decretal" (*epistola decretalis* or *littera decretalis*) is the term for a written papal response to an ecclesiastical judge's request for advice on a point of law, or a written papal announcement of the law to be applied in the context of an individual case. C. Duggan, *Decretals (epistolae decretales, litterae decretales)*, in 4 *New Catholic Encyclopedia* 707, 707 (Catholic University of America ed., 1967) ("A given decretal may have universal or limited application, or indeed be restricted to its single immediate context.").

126. See 1 Fournier & Le Bras, *supra* note 122, at 172-74, 177-79; Seckel, *supra* note 122, at 270-72, 284.

127. See Seckel, *supra* note 122, at 293; Williams, *supra* note 122, at 105.

tections due a bishop or any other cleric who was the subject of an ecclesiastical disciplinary proceeding.¹²⁸ Those protections included the requirements that the accused, the accuser, and the accusing witnesses be personally present at such a proceeding, with full opportunity for the accused to defend against the charge. The pseudoisidoreans extensively set forth these protections in one of their earliest projects, the False Capitularies,¹²⁹ which purported to be authentic proclamations of Frankish law issued by the monarchs Charlemagne (771-814) and Louis the Pious (814-840) and compiled by one Benedict Levitas.¹³⁰ These were soon accepted as genuine and became the subject of citation.¹³¹

The pseudoisidoreans' method of forgery was extraordinarily clever. They excerpted key phrases from authentic ancient texts, rearranged them in various combinations to serve their purposes, and inserted them into wholly spurious documents of their own composition.¹³² Thus the educated reader, in perusing a pseudoisidorean text, would experience a false sense of recognition and accept the document as genuine.

In the False Capitularies,¹³³ the pseudoisidoreans drew mainly on four sources to express the principle that accusers and witnesses must appear personally in court before a defendant. These were:

128. See Davenport, *supra* note 122, at 26-27; Seckel, *supra* note 122, at 280-81.

129. See Seckel, *supra* note 122, at 301. "Capitulary" (*capitulare*) was a term used in the Frankish realm, beginning in the late eighth century, to designate a royal legislative or administrative order, the text of which was divided into separate articles (*capitula*). See F.L. Ganshof, *Recherches sur les capitulaires* 3-6 (1958).

130. See 1 Fournier & Le Bras, *supra* note 122, at 146-47; Seckel, *supra* note 122, at 296-97.

131. See 1 Brunner, *supra* note 99, at 387 (1887); Hubert Mordek, *Karolingische Kapitularien*, in *Überlieferung und Geltung normativer Texte des frühen und hohen Mittelalters* 25, 36 (Hubert Mordek ed., 1986).

The fact that the False Capitularies include many provisions of a purely ecclesiastical character presented no obstacle to their being accepted as authentic statements of secular law. The governances of Church and State in the Frankish empire were closely intertwined, and there are numerous instances of royal legislation regulating ecclesiastical affairs. See D. Lambrecht, *De kerkelijke wroegingsprocedure in de Frankische tijd. Genese en eerste ontwikkeling*, 49 *Tijdschrift voor Rechtsgeschiedenis* 47, 49, 61-65 (1981). "[W]ith Charlemagne and Louis the Pious, the secular and ecclesiastical domains are unified to such an extent that they can be distinguished but not separated." *Id.* at 98.

132. The method has often been described as a "mosaics" style of composition. See, e.g., Seckel, *supra* note 122, at 272; 1 Fournier & Le Bras, *supra* note 122, at 179.

133. The sources of the individual chapters of the False Capitularies are traced in Emil Seckel, *Studien zu Benedictus Levita* (pt. 1), 26 *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde* 37 (Hahn'sche Buchhandlung 1985) (1901) [hereinafter *Neues Archiv*]; (pts. 2-5), 29 *id.* 275 (1904); (pt. 6), 31 *id.* 59 (1906); (pt. 7), 34 *id.* 319 (1909), 35 *id.* 105, 433 (1910); (pt. 8), 39 *id.* 327 (1914), 40 *id.* 15 (1915), 41 *id.* 157 (1916).

first, the *Lex Romana Visigothorum*, a compendium of Roman law issued by the Visigothic king Alaric II in 506;¹³⁴ second, the Latin Vulgate version of Acts 25:16;¹³⁵ third, a chapter of the Visigothic law of 654;¹³⁶ and fourth, the major seventh century collection of

134. Drawn largely from the Theodosian Code, see *supra* text accompanying notes 36 and 38, and including the *Sententiae* of Paulus, see *supra* note 34, the *Lex Romana Visigothorum* applied to the Roman subjects of the Visigoths, contained for most of its component parts *interpretationes* drawn from preexisting materials, and remained in force in the Visigothic kingdom of Spain until 654. See Jolowicz & Nicholas, *supra* note 24, at 466-67. It had wide influence in Gaul, see J. Gaudemet, *Survivances romaines dans le droit de la monarchie franque du Vème au Xème siècle*, 23 *Tijdschrift voor Rechtsgeschiedenis* 149, 174-75 (1955), and was the main vehicle by which principles of Roman law were disseminated throughout the Frankish empire, see 1 Brunner, *supra* note 99, at 360-61 (1887); 1 Conrat, *supra* note 56, at 41-44.

Of particular interest here is an annotation to Code Th. 11.39.9 (438), see *supra* note 36, and translation in accompanying text, probably deriving from a commentary on the Theodosian Code written prior to the fall of the Roman Empire in the West in 476, see Alvaro d'Ors, *La territorialidad del derecho de los visigodos*, in 1 *Estudios Visigóticos* 91 app. at 148-50 (Cuadernos del Instituto Jurídico Español No. 5, 1956); Franz Wieacker, *Lateinische Kommentare zum Codex Theodosianus*, in *Symbolae Friburgenses in honorem Ottonis Lenel* 259, 265-67, 291-98, 310-12 (1935), and included as the *interpretatio* to the corresponding part of the *Lex Romana Visigothorum*. It casts a defendant's right to encounter his accuser in court in language more forceful and direct than that of the underlying imperial *constitutio*: "Whenever any accuser suggests anything about his adversary in his absence, he should not be fully believed prior to examination of both parties." ("Quoties quilibet accusator aliquid de adversario suo eo absente suggesserit, ei ante discussionem utriusque partis penitus non credatur.") *Interpretatio* to *Lex Rom. Vis.* 11.14.4 (506), in *Lex Romana Visigothorum* 232 (Gustav Haenel ed., Leipzig, Teubner 1849).

135. "[I]t is not the custom of the Romans to condemn any man, before he who is accused has accusers present and receives opportunity for defense to clear himself of the charges." ("[N]on est Romanis consuetudo damnare aliquem hominem, prius quam is, qui accusatur, praesentes habeat accusatores, locumque defendendi accipiat ad abluenda crimina.") Acts 25:16 (Vulgate, c. 400). For the original Greek and English translation, see *supra* note 78 and accompanying text.

The Vulgate rendering of Acts 25:16 mainly follows an older Latin translation, but replaces the earlier version's bland concluding clause ("and receives opportunity for excuse regarding the charge" ("et locum excusationis accipiat de crimine")) with the vigorous opportunity-for-defense language which more faithfully reflects the original Greek. 3 *Biblorum Sacrorum latinae versiones antiquae seu Vetus Italica* 582 (photo. reprint 1976) (Pierre Sabatier ed., Rheims, Reginald Florentain 1743) (texts of Acts 25:16 in both Vulgate and older, pre-Vulgate, Latin translation).

136. Visigothic law (*Lex Visigothorum*) here refers to the collection of laws of the Visigothic kingdom of Spain comprising the *Liber Iudiciorum* organized on the model of Justinian's Code and promulgated in 654 by King Reccesvind. See Rafael de Ureña y Smenjaud, *La Legislación gótico-hispana* 446-61 (2d ed. 1906).

The Visigoths were a highly Romanized people. See d'Ors, *supra* note 134, at 105-07. Roman law, including that bearing on proof by witnesses, strongly influenced Visigothic legislation. See Adolf Helfferich, *Entstehung und Geschichte des Westgothen-Rechts* 132-34 (Berlin, Georg Reimer 1858). The chapter referred to here (*Lex Vis.* 2.4.5) is a law on witness testimony of King Chindasvind (642-653), issued probably in 643 or 644. See Ureña, *supra*, at 435-37. It provides:

canons known as the *Hispana*.¹³⁷ The pseudoisidoreans excerpted language from these four sources to convey the principles of concern here.

As to the presence of the accused, the False Capitularies borrowed the following language from among these four sources: (a) "It is accepted that there shall be no trial of absent persons. If this is done, the judgment pronounced shall be invalid."¹³⁸ (b) "Let the ecclesiastical judges beware of pronouncing judgment in the absence of him whose case is being heard, because it will be invalid"¹³⁹ (c) "In a capital case, no absent person is convicted. Nor can an absent person accuse through another or be accused."¹⁴⁰

Witnesses shall not give testimony by letter, but shall be present and not silent about the truth they know, nor shall they give testimony about matters other than those they know were done in their presence (Testes non per epistulam testimonium dicant, sed presentes quam noverunt non taceant veritatem nec de aliis negotiis testimonium dicant, nisi de his tantummodo, que sub presentia eorum acta esse noscuntur)

Lex Visigothorum 2.4.5 (654), in *Leges Visigothorum* 98 (Karl Zeumer ed., MGH *Leges Sectio I* No. 1, 1902). Passing through the False Capitularies and False Decretals into the canonical collections of the eleventh century, and ultimately into the *Decretum* of Gratian (at C.3 q.9 c.15), see *infra* text accompanying notes 163-67, this was to become the standard formulation of the rule against hearsay in the Romano-Canonical trial process.

137. As this collection incorporated the *Statuta Ecclesiae antiqua*, see *supra* text accompanying notes 81-82, it includes the rule of *Stat. Ecc. ant. c.53*, barring conviction of the absent. See *Hispana* 15.30 (633/36), in 3 *La Colección Canónica Hispana* 35, 345, 360 (Gonzalo Martínez Díez & Félix Rodríguez eds., *Monumenta Hispaniae Sacra, Serie Canónica* No. 3, 1982).

138. "Placuit, ut adversus absentes non iudicetur. Quod si factum fuerit, prolata sententia non valebit." *Ben. Lev.* 1.311 (847/52), in *Benedicti Capitularia* (F.H. Knust ed.), in 2 *MGH Leges* pt. 2 at 17, 63 (Hannover, Hahn 1837). The same rule is contained in *Ben. Lev.* 1.391, *supra*, at 69; *Ben. Lev.* 2.360, *supra*, at 91; and *Ben. Lev.* 2.399, *supra*, at 95. The immediate source of the passage, see Seckel, *supra* note 133, at 31 *Neues Archiv* 107, is the so-called *Epitome Aegidii*, an abridgment of the *Lex Romana Visigothorum* of unknown authorship composed in Gaul sometime in the eighth century, see Jean Gaudemet, *Le Bréviaire d'Alaric et les Epitome*, in *Ius Romanum Medii Aevi* pt. 1.2.b.α.β, at 41-43 (*Société d'histoire des droits de l'antiquité* ed., 1965). For the text, see *Epit. Aeg. Lex Rom. Vis. Cod. Greg.* 12 (750/800), in *Lex Romana Visigothorum*, *supra* note 134, at 451 ("Adversus absentes . . . sententia iudicata non valebit."). For the ultimate source, an imperial rescript of 287, see *supra* note 32.

139. "Caveant iudices ecclesiae, ne absente eo, cuius causa ventilatur, sententiam ferant; quia irrita erit" *Ben. Lev.* 2.363 (847/52), *supra* note 138, at 91. The same rule is contained in *Ben. Lev.* 3.219, *supra* note 138, at 116. The immediate source of the passage, see Seckel, *supra* note 133, at 35 *Neues Archiv* 476, is either the *Statuta Ecclesiae antiqua c.53* or the *Hispana* 15.30. See *supra* note 137.

140. "In causa capitali absens nemo damnetur. Neque absens per alium accusare aut accusari potest." *Ben. Lev.* 3.354 (847/52), *supra* note 138, at 124. The same rules are contained in *Ben. Lev.* 3.204, *supra* note 138, at 115. The immediate source of the passage, Seckel, *supra* note 133, at 40 *Neues Archiv* 111, is a *Sententia* of Paulus, see *supra* note 34 and translation in accompanying text, as appearing in the *Lex Romana Visigothorum*, *Lex Rom. Vis. Pauli Sent.* 5.5.9 (506), in *Lex Romana Visigothorum*, *supra* note 134, at 420.

The False Capitularies also adopted language that guaranteed the presence of the accuser at trial: (a) "There is no authority to try or convict any cleric before he has accusers present and receives opportunity for defense to clear himself of the charges."¹⁴¹ (b) "No one shall be tried or convicted before the accuser is present; and the accused shall receive ample opportunity for defense to clear himself of the charges."¹⁴²

As to the presence of the accused and the accuser simultaneously, the False Capitularies required that "[w]henver any accuser suggests anything about his adversary in his absence, he should not be fully believed prior to examination of both parties."¹⁴³

Finally, concerning the presence of the witnesses, the forged text reads: "Witnesses shall not be absent nor give testimony by letter; but shall be present and not silent about the truth they know and saw. Nor shall they give testimony about matters other than those they know were done in their presence."¹⁴⁴

Expressing the same principles in their later False Decretals,¹⁴⁵ the pseudoisidoreans not only used the sources previously incorpo-

141. "Non est auctoritas, quemquam clericorum iudicare vel dampnare, antequam accusatores praesentes habeat, locumque defendendi accipiat ad abluenda crimina." Ben. Lev. 2.381, para. 9 (847/52), supra note 138, at 94. The same rule is contained in Ben. Lev. 1.392, supra note 138, at 69. The source of the passage, see Seckel, supra note 133, at 35 Neues Archiv 496, is Acts 25:16 (Vulgate), see supra note 135.

142. "Nemo debet iudicari aut dampnari, priusquam accusator praesens habeatur, et spatium non modicum defendendi accipiat accusatus ad abluenda crimina." Ben. Lev. 3.184 (847/52), supra note 138, at 114. The source of this passage, Seckel, supra note 133, at 39 Neues Archiv 400, is also Acts 25:16 (Vulgate), supra note 135.

143. "Quociens quilibet accusator aliquid de adversario suo eo absente suggesserit, ante discussionem utriusque partis penitus non credatur." Ben. Lev. 3.238 (847/52), supra note 138, at 117. The source of the passage, see Seckel, supra note 133, at 39 Neues Archiv 420, is the *interpretatio* to Lex. Rom. Vis. 11.14.4, supra note 134.

144. "Testes non absentes neque per epistolam testimonium dicant; sed praesentes quam noverunt et viderunt non taceant veritatem. Nec de aliis testimonium dicant, nisi de his tantummodo, quae sub praesentia eorum acta esse noscuntur." Ben. Lev. 2.147 (847/52), supra note 138, at 80. The source of the passage, see Seckel, supra note 133, at 34 Neues Archiv 373, is Lex. Vis. 2.4.5, supra note 136.

145. The standard modern edition of the False Decretals is *Decretales Pseudo-Isidorianae et Capitula Angilramni* (Paul Hinschius ed., Leipzig, Bernhard Tauchnitz 1863) [hereinafter *Decretales*]. Each "false decretal" referred to infra at notes 146-52 is cited by the name of the Pope to whom it is attributed by Pseudo-Isidore (with the abbreviation "Ps." for "Pseudo" prefixed to the papal name), the chapter of the decretal containing the passage in question, the JK number, see supra note 1, assigned to the decretal, and the pages in *Decretales* at which the decretal begins and the passage in question appears.

For the location of the passages in the False Decretals cited here, and their later use, the authors have utilized the *Stellenverzeichnis* in 3 Fuhrmann, supra note 122, at 784-1005 (1974).

rated into the False Capitularies,¹⁴⁶ but they also drafted their own statements to the same effect: (a) "An accuser shall not be heard when the adversary is absent" ¹⁴⁷ (b) "No one's accusation shall be received through written instruments, but in his own voice, . . . of course with the person whom he desires to accuse present" ¹⁴⁸ (c) "One should not be heard without the other" ¹⁴⁹ (d) "In every matter or place, everything done or adjudged against the absent shall be entirely void" ¹⁵⁰ (e) "No absent person shall be adjudged, because the divine and human laws prohibit this." ¹⁵¹ All of these elements are joined in a lengthy passage ascribed by Pseudo-Isidore to Pope Damasus writing to the Italian bishops:

It has been reported to the Apostolic See that you receive accusations of the brothers through written instruments without a legitimate accuser. Henceforth, by our apostolic authority, we prohibit this from happening, and ask you to correct what has recently been done without any delay and not first to examine through written instruments the case of those who are accused unless, through the procedures of making complaint, they, having been

146. See Ps.-Eleutherus c.5 (JK† 68), *Decretales* supra note 145, at 125, 126; Ps.-Felix I c.5 (JK† 142), *Decretales* 197, 198; Ps.-Julius I c.12 (JK† 196), *Decretales* 464, 470 (ecclesiastical judges not to pronounce judgment in absence of party concerned); Ps.-Stephanus I c.8 (JK† 131), *Decretales* 183, 185; Ps.-Felix I c.13 (JK† 143), *Decretales* 200, 202 (no absent person can accuse or be accused); Ps.-Marcellus c.9 (JK† 161), *Decretales* 226, 227; Ps.-Julius I c.17 (JK† 196), *Decretales* 464, 472-73; Ps.-Damasus I c.19 (JK† 243), *Decretales* 502, 505 (no one to be tried or convicted without accusers present and opportunity for defense); Ps.-Telesphorus c.4 (JK† 34), *Decretales* 109, 111-12; Ps.-Julius I c.12 (JK† 196), *Decretales* 464, 468 (accuser's suggestion of case in adversary's absence not to be credited); Ps.-Calixtus I c.17 (JK† 86), *Decretales* 137, 141 (witnesses must be present and testify from own knowledge).

147. "Absente vero adversario non audiatur accusator . . ." Ps.-Felix I c.13 (JK† 143), *Decretales*, supra note 145, at 200, 202.

148. "Per scripta enim nullius accusatio suscipiatur, sed propria voce, . . . praesente videlicet eo quem accusare desiderat . . ." Ps.-Stephanus I c.8 (JK† 131), *Decretales*, supra note 145, at 183, 185. This passage appears also at Ps.-Calixtus I c.17 (JK† 86), *Decretales* 137, 141, where Pseudo-Isidore, using the word "Similarly" (*Similiter*), links to it the requirement that witnesses be personally present and testify from their own knowledge. See supra note 144.

149. "[U]nus absque altero audiri non debet . . ." Ps.-Felix I c.12 (JK† 143), *Decretales*, supra note 145, at 200, 202.

150. "Omnia ergo que adversus absentes in omni negotio aut loco aguntur aut iudicantur, omnino vacuentur . . ." Ps.-Cornelius c.6 (JK† 115), *Decretales*, supra note 145, at 172, 174.

151. "Absens vero nemo iudicetur, quia et divinae et humane hoc prohibent leges." Ps.-Zepherinus c.4 (JK† 80), *Decretales*, supra note 145, at 131.

canonically called to the synod, come and personally present truly acknowledge and understand what is alleged. . . . [T]he secular laws demand that accusers be present and not through written instruments absent. The canonical *constituta* of the Fathers, not once but very often, declare that no accusations nor any testimony whatever can proceed through written instruments, and that none shall give testimony about matters other than those of which they learned in their presence. Similarly whoever chooses to accuse someone shall accuse while personally present and not through another, . . . and no one ever shall be judged before he has lawful accusers present and receives opportunity for defense to clear himself of the charges.¹⁵²

The False Decretals greatly influenced collections of canon law that appeared over the course of the next three centuries.¹⁵³ Many of the passages quoted above appear, for example, in the *Collectio Anselmo dedicata* (882/89),¹⁵⁴ the *Decretum* of Burchard of Worms

152. Relatum est enim ad sedem apostolicam vos accusationes fratrum per scripta suscipere absque legitimo accusatore. Quod deinceps in omni orbe terrarum fieri apostolica auctoritate prohibemus et quod nuper factum est absque ulla retardatione corrigere rogamus, nec umquam prius per scripta eorum qui accusantur causam discutere, nisi per quaerellantium institutiones vocati canonicae ad synodum veniant et praesens per praesentem agnoscat veraciter et intellegat quae ei obiciuntur. . . . [L]eges enim saeculi accusatores praesentes exigunt, et non per scripta absentes. Unde canonica patrum constituta non semel, sed saepissime clamant nec accusationes nec testimonia ulla per scripta posse proferre, nec de aliis negotiis quicumque testimonium dicant, nisi de his quae sub praesentia eorum esse noscuntur. Similiter et qui accusare alium elegerit, praesens per se et non per alium accuset, . . . neque ullus umquam iudicetur, antequam legitimos accusatores presentes habeat locumque defendendi accipiat ad abluenda crimina.

Letter of Ps.-Damasus to the Italian bishops (JK† 245), in *Decretales*, supra note 145, at 519, 519-20. Note that Pope Damasus (366-384) is reported by a contemporary, Priscillian, to have "ordained that nothing be decided against the absent and unheard." See supra note 79 and accompanying text.

153. See 2 Fuhrmann, supra note 122, at 408-11 (1973).

154. See *Collectio Anselmo dedicata* (882/89) 3.47 (accuser's suggestion of case in adversary's absence not to be credited); 3.66 (accuser not to be heard in adversary's absence; no absent person can accuse or be accused); 3.105 (accuser must make accusation orally in presence of accused; no absent person can accuse or be accused); 3.128 (one not to be heard without the other); 3.186 (everything done or adjudged against the absent entirely void); 3.187 (ecclesiastical judges not to pronounce judgment in absence of party concerned). The texts can be examined by locating, from the beginning and concluding lines for each chapter given in the outline of the *Collectio Anselmo dedicata* in Jean-Claude Besse, *Histoire des Textes du Droit de l'Église au Moyen-Age de Denys à Gratien: Collectio Anselmo Dedicata* (1960), the full passage appearing in the decretal cited therein as printed in *Decretales*, supra note 145, as follows: 3.47 (Besse 18, *Decretales* 111-12);

(1008/12),¹⁵⁵ the Collection in 74 Titles (1050/76),¹⁵⁶ the *Collectio canonum* of Anselm of Lucca (1081/86),¹⁵⁷ the *Liber canonum* of Deusdedit (1087),¹⁵⁸ and Ivo of Chartres' *Decretum* (c. 1094)¹⁵⁹ and

3.66 (Besse 18, Decretales 202); 3.105 (Besse 19, Decretales 185); 3.128 (Besse 20, Decretales 202); 3.186 (Besse 21, Decretales 174); 3.187 (Besse 21, Decretales 198).

155. See Burchard of Worms, *Decretum* (1008/12), in 140 *Patrologia Latina* col. 537, c.1.171, at col. 599 (accuser must make accusation orally in presence of accused; witnesses must be present and testify from own knowledge); id. c.1.177, at col. 601 (accuser must make accusation orally in presence of accused; no absent person can accuse or be accused); id. c.16.13, at col. 911 (divine and human laws prohibit trial of absent person); id. c. 16.14, at col. 911 (ecclesiastical judges not to pronounce judgment in absence of party concerned).

156. See Collection in 74 Titles (*Diversorum patrum sententie*) (1050/76), in *Diversorum patrum sententie siue Collectio in LXXIV titulos digesta* c.48, at 46 (John T. Gilchrist ed., MIC Series B: Corpus Collectionum No. 1, 1973) (accuser must make accusation orally in presence of accused; witnesses must be present and testify from own knowledge); id. c.52, at 48 (accuser must make accusation orally in presence of accused; no absent person can accuse or be accused); id. c.55, at 49-50 (accuser not to be heard in adversary's absence; no absent person can accuse or be accused); id. c.89, at 65 (one not to be heard without the other); id. c.103, at 71-72 (ecclesiastical judges not to pronounce judgment in absence of party concerned); id. c.109, at 74 (no one to be tried or convicted without accusers present and opportunity for defense).

157. See Anselm of Lucca, *Collectio canonum* (1081/86), in 1 *Anselmi episcopi Lucensis collectio canonum una cum collectione minore lib. 3*, c.7, at 122 (Friedrich Thaner ed., 1906) (accuser not to be heard in adversary's absence; no absent person can accuse or be accused); id. c.13, at 124 (accuser's suggestion of case in adversary's absence not to be credited); id. c.28, at 130 (ecclesiastical judges not to pronounce judgment in absence of party concerned); id. c.47, at 139-40 (lengthy passage from Ps.-Damasus); id. c.53, at 142 (accuser must make accusation orally in presence of accused; witnesses must be present and testify from own knowledge); id. c.54, at 143 (accuser must make accusation orally in presence of accused; no absent person can accuse or be accused); id. c.56, at 143 (one not to be heard without the other); id. c.57, at 144 (everything done or adjudged against the absent entirely void); id. c.58, at 144 (divine and human laws prohibit trial of absent person); id. c.88, § 4, at 158-59 (one not to be heard without the other; accuser not to be heard in adversary's absence; no absent person can accuse or be accused); id. c.88, § 21, at 161 (no accused cleric to be tried or convicted without accusers present and opportunity for defense); id. c.89, § 23, at 165 (ecclesiastical judges not to pronounce judgment in absence of party concerned).

158. See Deusdedit, *Liber canonum* (1087), in 1 *Die Kanonensammlung des Kardinals Deusdedit lib. 4*, c.298, at 558 (Victor Wolf von Glanvell ed., 1905) (direct quote from Acts 25:16); id. c.319, at 562-63 (witnesses not to proffer testimony in writing, must testify from own knowledge); id. c.322, at 565 (no absent person can accuse or be accused); id. c.330, at 567 (accuser's suggestion of case in adversary's absence not to be credited); id. c.333, at 568-69 (no one may bring accusations or testimony through writing, nor testify other than from own knowledge).

159. See Ivo of Chartres, *Decretum* (c. 1094), in 161 *Patrologia Latina* col. 59, 5.245, at col. 398 (divine and human laws prohibit trial of absent person); 5.248, at col. 400 (one not to be heard without the other; accuser not to be heard in adversary's absence; no absent person can accuse or be accused); 5.289, at col. 411 (accuser must make accusation orally in presence of accused; witnesses not to proffer testimony in writing, must testify from own knowledge); 5.293, at col. 413 (accuser must make accusation orally in presence of accused; no absent person can accuse or be accused); 6.315, at col. 509 (accuser's suggestion of case

Panormia (1094/96).¹⁶⁰ In addition, Alger of Liège quotes many of these passages in his tract *De misericordia et iustitia* (1095/1121)¹⁶¹ and, in his own words, precisely summarizes the pertinent rule: "Accusers and witnesses must be present to accuse and testify *viva voce* and the accused must always be present to be tried" ¹⁶²

The pseudoisidorean formulations of this principle, as channeled through the various canonical collections of the ninth, tenth, and eleventh centuries, ultimately obtained authoritative and universal recognition, largely from their inclusion in the definitive compendium of medieval canon law, the *Decretum* of Gratian.

VII. THE *DECRETUM* OF GRATIAN AND THE REVIVAL OF ROMAN LAW

The significance of the *Decretum* of Gratian in the development of the canon law cannot be overemphasized. Composed about 1140 at Bologna, apparently on the private initiative of a monk and legal scholar named Gratian, the *Decretum* "became the working

in adversary's absence not to be credited); 6.319, at col. 510 (ecclesiastical judges not to pronounce judgment in absence of party concerned); 6.325, at col. 512 (everything done or adjudged against the absent entirely void); 6.328, at col. 512 (accuser must make accusation orally in presence of accused; no absent person can accuse or be accused); 6.331, at col. 513 (accuser not to be heard in adversary's absence; no absent person can accuse or be accused); 6.347, at col. 516 (no cleric to be tried or convicted without accusers present and opportunity for defense); 6.348, at col. 517 (no one to be tried or convicted without accusers present and opportunity for defense).

160. See Ivo of Chartres, *Panormia* (1094/96), in 161 *Patrologia Latina* col. 1037, lib. 4, c.53, at col. 1193 (accuser must make accusation orally in presence of accused; no absent person can accuse or be accused); *id.* c.54, at cols. 1193-94 (accuser not to be heard in adversary's absence; no absent person can accuse or be accused); *id.* c.55, at col. 1194 (accuser's suggestion of case in adversary's absence not to be credited); *id.* c.57, at col. 1195 (one not to be heard without the other); *id.* c.93, at col. 1201 (witnesses must be present and testify from own knowledge); *id.* lib. 5, c.16, at col. 1216 (no absent person can be accused by any accuser).

161. See Alger of Liège, *De misericordia et iustitia* (1095/1121), in Robert Kretzschmar, Alger von Lüttichs Traktat "De Misericordia et iustitia" 187 (1985), 2.53, at 302 (no cleric to be tried or convicted without accusers present and opportunity for defense); 2.57 canon a, at 304-05 (accuser must make accusation orally in presence of accused; witnesses must be present and testify from own knowledge); 2.57 canon d, at 305 (no absent person can accuse or be accused); 2.57 canon e, at 305 (everything done or adjudged against the absent entirely void); 2.57 canon f, at 305-06 (ecclesiastical judges not to pronounce judgment in absence of party concerned); 2.57 canon g, at 306 (divine and human laws prohibit trial of absent person).

162. "Quod accusatores et testes presentes viva voce accusare vel testificari debent et accusatus semper presens iudicari . . ." Alger of Liège, *supra* note 161, rubric to 2.57, at 304. In the text which this rubric introduces, Alger formulates the rule as being that "one who is present must be accused by one who is present" ("presens a presente debet accusari"). *Id.* 2.57 dictum d, at 305.

material of the nascent ecclesiastical jurisprudence. It superseded the earlier [canonical] collections."¹⁶³ Gratian's work was quickly recognized as the definitive textbook of the canon law,¹⁶⁴ and, as a practical matter, it also nearly attained the status of law: "In a formal legal sense the *Decretum* never acquired the force of law, but its effect would have been essentially no different if it had been proclaimed in a legislative act, especially since it was frequently regarded as a certified ecclesiastical codification analogous to the Roman *Corpus Iuris Civilis*."¹⁶⁵

Gratian gave close and extensive attention to questions of criminal procedure. He devoted a lengthy section of his *Decretum*¹⁶⁶ exclusively to the requirement that accusers and witnesses be produced before a defendant personally.¹⁶⁷ His authorities for that principle were drawn largely from the pseudoisidorean materials. Gratian's own formulation of the rule was that "[a]n accuser is not to be heard unless the defendant is present."¹⁶⁸ In the body of the section, this rule was plainly linked to a defendant's right to "receive[] opportunity for defense to clear himself of the charges."¹⁶⁹

The clarity of the principle is manifest in twelfth-century commentaries on this section of the *Decretum*: (a) "[S]tatements of accusation and testimony produced against the absent are not

163. Nörr, *supra* note 92, at 838.

164. For a comprehensive analysis of the *Decretum*'s critical significance in the history of Western jurisprudence, see Harold J. Berman, *Law and Revolution* 144-48 (1983).

165. 2 Fuhrmann, *supra* note 122, at 564 (1973). *Corpus Iuris Civilis* was the term medieval legal scholars employed to encompass the Code, the Digest, the Institutes and the Novels of Justinian. See Mauro Cappelletti et al., *The Italian Legal System* 18-19 (1967).

166. See C.3 q.9, in 1 *Corpus Iuris Canonici*, *supra* note 92, cols. 529-34. Selected canons or *capitula* of C.3 q.9, and the introductory dictum of Gratian with English translation, are reproduced in the Appendix to this Article. Other passages of Gratian's *Decretum* of special interest here are C.2 q.1 c.7 § 3, in 1 *id.* at col. 440 (from commonitorium of Pope Gregory the Great); C.2 q.8 c.5, in 1 *id.* at col. 503 (accuser must make accusation orally in presence of accused, see *supra* note 148 and translation in accompanying text); and C.5 q.2 c.3, in 1 *id.* at col. 546 (lengthy passage from Ps.-Damasus, see *supra* note 152 and translation in accompanying text).

167. Gratian set out a hypothetical case (*causa*), in which persons seek to submit testimony and accusations against a defendant by letter, and posed the question (*quaestio*) "whether accusers or witnesses may validly present statements of accusation or testimony against an absent person?" ("an accusatores uel testes in absentem uocem accusationis uel testificationis exhibere ualeant?") C.3 q.9, in 1 *Corpus Iuris Canonici*, *supra* note 92, col. 504, 505.

168. "Nisi reo presente accusator non audiatur." Gratian, rubric to C.3 q.9 c.1 (c. 1140), in 1 *id.* at col. 529.

169. See C.3 q.9 c.5, in 1 *id.* at col. 530; C.3 q.9 c.6, in 1 *id.*; C.3 q.9 c.8, in 1 *id.* at col. 531.

valid, unless they are contumaciously absent”¹⁷⁰ (b) “Against those who contumaciously absent themselves, accusations and also testimony are received . . . , but concerning him who is absent from necessity and not willingly, are wholly rejected.”¹⁷¹ (c) “Those who are absent from necessity cannot be convicted by the statement of an accuser or witness”¹⁷² (d) “In civil cases absent persons present testimony, for example [by deposition] when they cannot appear But in criminal cases absent persons never give testimony, except against the contumacious when the case has already commenced.”¹⁷³

One identifiable purpose of the *Decretum* was to harmonize the criminal procedure of the Church with the criminal procedure of Roman law, apparently with the aim of constructing uniform rules of procedure applicable in both ecclesiastical and secular courts.¹⁷⁴ Toward the end of the eleventh century, with the rediscovery of Justinian’s Digest, the Glossators at the University of Bologna revived the study and teaching of Roman law.¹⁷⁵ The Roman law,

170. “[I]n absentes vocem accusationis vel testificationis exhibere non valeant, nisi per contumaciam absentes sint” Paucapalea, *Summa on C.3 q.9* (1144/48), in *Die Summa des Paucapalea über das Decretum Gratiani* 67 (photo. reprint 1965) (Johann F. von Schulte ed., Giessen, E. Roth 1890).

171. “Adversus eos, qui se contumaciter absentant, accusationes ac testificationes recipiuntur . . . , quod de eo, qui necessitate non voluntate absens est, penitus improbat.” Rolando Bandinelli (later Pope Alexander III), *Stroma on C.3 q.9* (1144/48), in *Die Summa Magistri Rolandi* 19 (photo. reprint 1962) (Friedrich Thaner ed., Innsbruck, Wagner’sche Universität 1874).

172. “Qui ex necessitate absente sunt, voce accusantis vel testificantis condemnari non possunt” Rufinus, *Summa on C.3 q.9* (1157/59), in *Die Summa Decretorum des Magister Rufinus* 269 (Heinrich Singer ed., 1902).

173. “In civili causa absentes perhibent testimonium veluti illi qui non possunt venire. Mittitur enim ad eos, audiuntur, examinantur et postea secundum depositiones attestationum suarum judicantur. Sed in criminali causa numquam absentes ferunt testimonium nisi contra contumacem quando jam actitatum est de causa.” *Summa “Magister Gratianus in hoc opere” on C.3 q.9* (c. 1160 or 1170), in *The Summa Parisiensis on the Decretum Gratiani* 123 (Terence P. McLaughlin ed., 1952). To the same effect is the *Summa “Elegantius in iure diuino” 6.52* (1169), in *2 Summa “Elegantius in iure diuino” seu Coloniensis 128-29* (Gérard Fransen & Stephan Kuttner eds., MIC Series A: Corpus Glossatorum vol. 1, 1978). The distinction between civil and criminal cases in this regard was grounded on the fact that a criminal defendant could not be found guilty except upon “proof clearer than light” (*probatio luce clarior*). See Code J. 4.19.25, in *2 CIC*, supra note 32, at 157. The written depositions of absent witnesses were not viewed as meeting this standard; only “live testimony” (*vox viva*) from “live witnesses” (*testes vivos*), i.e., from witnesses present in court, would suffice. See Lévy, supra note 101, at 86-87, 101-03 & n.76.

174. See Adam Vetulani, *Gratien et le droit romain*, 24-25 *Revue historique de droit français et étranger* 11, 33, 39 (4th ser., 1946-1947).

175. See Berman, supra note 164, at 123-31; Cappelletti et al., supra note 165, at 13-21; Jean Gaudemet, *Le droit romain dans la pratique et chez les docteurs aux XI^e et XII^e*

as set out in the lawbooks of Justinian, was thus on its way to becoming the *ius commune* on the continent of Europe.¹⁷⁶ It was also gradually being revived as the living law applied in the courts of the municipalities of northern Italy.¹⁷⁷

As a result, the secular criminal procedure of the revived Roman law appears to have been substantially the same as that set out for the ecclesiastical courts in the *Decretum* of Gratian. The similarity is reflected in one of the earliest medieval Roman law procedural treatises, the *Summa "Olim"* (1177/90) attributed to the Bolognese glossator Otto of Pavia.¹⁷⁸ This treatise, citing chapter 5 of *Novel 90*, states the rule that "in criminal [matters] . . . the presence of the witnesses is required."¹⁷⁹ It also bars hearsay testimony: "More-

siècles, 8 Cahiers de civilisation médiévale 365, 370-71 (1965). A vivid description of this historical development for the general reader is contained in James Burke, *The Day the Universe Changed* 33-35 (1985).

The "Glossators" were the first teachers and scholars at the University of Bologna. See Cappelletti et al., *supra* note 165, at 18. "[T]hey were interpreters and adapters of an ancient text considered to be living law. Their typical literary form was the gloss, explanations written between the lines and in the margins of the text." *Id.* at 19.

176. "[T]he important characteristics of the Continental *ius commune* are that it transcends political boundaries and that it is taught in the universities. . . . Broadly, the *ius commune* is anything that has to do with university teaching of law, be it Roman law or canon law . . ." Charles Donahue, Jr., *Ius Commune, Canon Law, and Common Law in England*, 66 *Tul. L. Rev.* 1745, 1746 (1992). "[I]n the absence of local law, the courts [at least in some places on the Continent] would look to the *ius commune* for an authoritative statement of the law." *Id.* at 1749.

177. See Heinrich Himstedt, *Die neuen Rechtsgedanken im Zeugenbeweis des oberitalienischen Stadtrechtprozesses des 13. und 14. Jahrhunderts* 1-8 (1909). Note that the Glossators gave specific attention to chapters 5 and 9 of *Novel 90*, appending them as authentic amendments (*authenticae*) to provisions of Justinian's Code. See *Authentica "Si quis ab aliquo"* [Nov. 90.9] post Code J. 4.20.19 (c. 1150), in 2 *Corpus Juris Civilis* 240 (Emil Herrmann ed., Leipzig, 4th ed., Baumgärtner 1848) (Albert Kriegel & Moritz Kriegel eds., 1843); *Authentica "Apud eloquentissimum"* [Nov. 90.5] post Code J. 4.21.18 (c. 1150), in 2 *id.* at 243.

Authenticae were excerpts from the Novels appended by the Glossators to *constitutiones* of Justinian's Code and treated by them as amendments of those *constitutiones*. They were cited by medieval jurists as parts of the Code itself. See 1 Enrico Besta, *L'opera d'Irnerio* 111-39 (Turin, Ermanno Loescher 1896); 4 Friedrich C. von Savigny, *Geschichte des Römischen Rechts im Mittelalter* 39-50, 55-56 (Heidelberg, J.C.W. Mohr 1826); Peter Weimar, *Die legistische Literatur der Glossatorenzeit*, in 1 *Handbuch*, *supra* note 92, at 129, 161.

178. As to the authorship of the *Summa "Olim"*, see Fowler-Magerl, *supra* note 93, at 76-78. A modern edition of it by Johanne Tamassia and Johanne Baptista Palmerio is printed in 2 *Bibliotheca Iuridica Medii Aevi* 229-48 §§ 218-686 (Augustus Gaudentius ed., Bologna, Pietro Virano 1892) [hereinafter *Bibliotheca Iuridica*], but must be read in conjunction with the corrections of it appearing in Emil Seckel, *Ueber neuere Editionen juristischer Schriften aus den Mittelalter*, 21 *ZRG, Rom. Abt.* 212, 306-22 (1900).

179. "[I]n criminalibus [negotiis] . . . opus est presentia testium . . ." *Summa "Olim"* § 401, in 2 *Bibliotheca Iuridica*, *supra* note 178, at 237.

over they must swear that [what they testify to] is absolutely so, that they saw and heard it, and that it was done in their presence."¹⁸⁰ Citing chapter 9, it further requires that one have opportunity to be present when opposing witnesses are sworn: "They must also swear in the presence of him against whom they are produced, or with him summoned by the judge and thus contumaciously absent so that their testimony shall be valid in the same manner as if it had been spoken with the party present."¹⁸¹ And the treatise is unequivocal as to a party's right to be present when the testimony of an adverse witness is given: "It is permitted moreover to a party or his counsel to be present when the witnesses of the adverse party are presenting testimony and to hear their attestations"¹⁸²

Thus, near the close of the twelfth century, Gratian's *Decretum* and the renascent Roman law seemed to have secured a criminal defendant's right to see all the witnesses presented against him and to hear them testify in open court.¹⁸³ Because a defendant could be represented by counsel, it would seem logical that these rights would naturally have led to the reappearance of cross-examination and the evolution of an evidentiary process not unlike that of the modern common law. However, this did not occur. Instead, a new mode of examining witnesses—in secret and by the judge alone—took hold in Romano-canonical procedure.

VIII. "DANIEL AND SUSANNA" AND THE REDUCTION OF THE RIGHT TO SEE OPPOSING WITNESSES

In the late twelfth century, it became the practice in both secular and ecclesiastical courts for the judge to examine each witness in secret, out of the presence of the parties. Other than the judge and

180. "Iurare autem debent prorsus ita esse et se vidisse et audisse et sub presentia sua factum fuisse" *Id.* § 402.

181. "Iurare debent etiam eo presente contra quem producuntur, vel eo a iudice citato, sicque contumaciter absente, ut perinde valeat eorum testimonium ac si parte presente dictum fuisset" *Id.* § 398.

182. "Licitum autem est parti vel eius advocato interesse ubi testes adverse partis perhibeant testimonium et eorum attestaciones audire" *Id.* § 417. This section concludes with the phrase "and he is not for that reason barred from producing witnesses; which the words of [Nov. 90, in cc.4 & 5] sufficiently indicate" ("nec ea ratione impeditur producere testes; quod satis innuunt verba eiusdem Authentici, ut in Auth. eod. § quia vero § et quoniam"), an indication that by the late eleventh century some judges had begun to bar defendants from presenting defense witnesses if the defendant had heard the prosecution witnesses testify.

183. See Hughes, *supra* note 66, at 25-27; Erwin Jacobi, *Der Prozess im Decretum Gratiani und bei den ältesten Dekretisten*, 3 ZRG, Kan. Abt. 223, 262-64 (1913).

the witness, only the notary was present to take down the testimony.¹⁸⁴ Under this new procedure, the examination of witnesses took place somewhere in the courthouse, usually on the day of their production in court. The parties could submit to the judge, in writing, questions for the judge to ask of each witness, but the judge was not bound to put the questions as requested.¹⁸⁵ The parties would learn what the witnesses had said when the testimony was published. "Publication" (*publicatio*) occurred after all witnesses had been examined and when their transcribed testimony was read aloud in open court by the notary.¹⁸⁶

The exact time and place of the emergence of this new procedure, as well as the reasons for its development, are unknown. It probably arose in Bologna towards the end of the twelfth century,¹⁸⁷ and gradually spread to courts in other parts of western Europe.¹⁸⁸ Because secret examination prevented parties from telling their own witnesses what other witnesses had said, legal scholars of the day claimed that the procedure provided the best means to obtain truthful testimony from witnesses. The biblical

184. See Erich Genzmer, *Eine anonyme Kleinschrift de testibus aus der Zeit um 1200*, in 3 *Festschrift Paul Koschaker* 376, 381-84, 391-92 (1939); Adolphe Tardif, *La procédure civile et criminelle aux XIII^e et XIV^e siècles* 104-06 (Paris, Alphonse Picard, Larose & Forcel 1885); Giuseppe Salvioli, *Storia della procedura civile e criminale*, in 3 *Storia del diritto italiano* pt. 2, at 424-26 (Pasquale Del Giudice ed., 1927).

185. See Himstedt, *supra* note 177, at 64, 70, 72.

186. See *id.* at 79-80; Fournier, *supra* note 102, at 191-92.

187. See Genzmer, *supra* note 184, at 381-83.

188. The procedural treatise *Sapientiam*, probably written in France in the late twelfth or early thirteenth century, see Jean-Marie Carbasse, *L'ordo iudiciorum "Sapientiam affectant omnes,"* in *Confluence des droits savants et des pratiques juridiques* 13, 23-27 (A. Giuffrè, 1979), states that witnesses:

must testify in the presence of the party against whom they are produced, if he wishes to be present. . . . There are those who say that the witnesses must testify with only the judge and his assistants present. And this is observed at Bologna. (*testificari debent ea parte presente contra quam producuntur, si adesse uoluerit. . . . sunt qui dicunt quod testes debent testificari solo iudice presente et eius assessoribus. et hoc obseruatur bononie.*)

Ordo "Sapientiam" (1192/1215), quoted in Knut W. Nörr, *Päpstliche Dekretalen in den ordines iudiciorum der frühen Legistik*, 3 *Ius Commune* 1, 7 (1970).

A treatise originating in France several decades later, perhaps written by a former student of the author of *Sapientiam*, see Carbasse, *supra*, describes what it indicates to be a minority view: "some say, that the witnesses must be examined in the presence of the party against whom they are produced, if he wishes to be present." ("*quidam dicunt, quod praesente parte illa, contra quam inducuntur testes, debent examinari, si velit interesse.*"). Gualterus, *Ordo "Scientiam" c.29 (1235/40)*, in 2 *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, Heft 1, at 52 (Ludwig Wahrmund ed., 1913) [*herein-after Quellen*].

story of Daniel and Susanna¹⁸⁹ served as the authority to justify the new procedure.¹⁹⁰

In the biblical narrative,¹⁹¹ Susanna spurns the advances of two elders, who in revenge falsely report that they have seen her committing adultery with a young man in an orchard. Susanna is put to trial on the charge of adultery before the assembly of the people, who initially believe the elders and condemn Susanna to death. At this point, Daniel is moved by the spirit of God to intervene. He asks, and is permitted, to examine each of the accusing witnesses separately and out of the presence of the other. To each he puts the question, under what kind of tree did he observe Susanna and her supposed lover? The first replies, a mastic tree. The second replies, an oak tree. The discrepancy convinces the assembly that the two are lying and Susanna is saved.

Important writings on procedure of the thirteenth century¹⁹² regularly refer to "Daniel and Susanna" as the foundation for the secret examination of witnesses outside the presence of the parties.¹⁹³ In fact, the story does not justify the exclusion of parties from witness examinations. Instead, the story makes the quite different point that examination of witnesses by the adverse party is the best means of bringing the truth to light. It supports the

189. Daniel 13:1-63 (new rev. standard version, Catholic ed. 1966).

190. See A. Esmein, *Le jugement de Daniel*, 31 *Nouvelle Revue historique de droit français et étranger* (3d ser.) 729, 751-54 (1907); Hughes, *supra* note 66, at 16-17; Genzmer, *supra* note 184, at 381-84, 391-92; Salvioli, *supra* note 184, at 424. For the historical background of the story, see Bernard S. Jackson, *Susanna and the Singular History of Singular Witnesses*, 1977 *Acta Juridica* 37, 38-40.

191. See Daniel 13:1-63.

192. For comprehensive overviews of the procedural literature of the period, see Charles Donahue, Jr., *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: Essays in Honor of Samuel E. Thorne* 127, 127-34 (Morris S. Arnold et al. eds., 1981); Antonio Pérez Martín, *El ordo iudiciarius "Ad summariam notitiam" y sus derivados* (pt. 1), 8 *Historia. Instituciones. Documentos* 195, 198-213 (1981); A.M. Stickler, *Ordines iudicarii*, in 6 *Dictionnaire de droit canonique* cols. 1132, 1135-43 (R. Naz ed., 1957). For details of all procedural writings of the twelfth and early thirteenth centuries, see Fowler-Magerl, *supra* note 93, at 33-251.

193. For examples in the thirteenth century procedural literature, see Damasus, *Summa de ordine iudicario* c.67 (1210/15), in 4 *Quellen*, *supra* note 188, Heft 4, at 49 (1926); Tancred, *Ordo iudiciarius* 3.9.2 (1216), in Pillius, *Tancredus, Gratia libri de iudiciorum ordine* 89, 237 (photo. reprint 1965) (Friedrich Bergmann ed., Göttingen, Vandenhoeck & Ruprecht 1842); Gratia Aretinus, *De iudicario ordine* 2.6.1 (c. 1245), in Pillius, *Tancredus, Gratia libri de iudiciorum ordine*, *supra*, at 319, 371; Guillelmus Durantis, *Speculum iudiciale* 1.4.De Teste.7.pr. (1st ed. 1271/76, 2d ed. 1289/91), in 1 *Wilhelm Durantis, Speculum Iudiciale* 324 (photo. reprint 1975) (Gul. Durandi Episcopi *Speculum Iuris*, Basel, Froben 1574).

sequestration of witnesses from one another to prevent tailoring of testimony, but not their examination in secret. Nothing in the story suggests that Susanna was not present to see her false accusers confounded.

The "Daniel and Susanna" story had been used earlier for yet other purposes. In the ninth century, Agobard of Lyon, an early and vehement critic of trial by battle and ordeal,¹⁹⁴ had advanced the story in support of the proposition that "the utility of trials consists in the examination of cases and the exactness of investigations."¹⁹⁵ And, in the twelfth century, the glossator Placentinus had noted it merely as authority for judicial examination of witnesses.¹⁹⁶ Neither of these writers suggested that the story supported excluding the parties from the examination. Quite apart from the story, judges in the municipalities of northern Italy, motivated perhaps by a desire to keep the lawyers from complicating and slowing down the process, had begun to bar parties and their lawyers from hearing witness testimony.¹⁹⁷ The "Daniel and Susanna" story may have been the closest authority that thirteenth century jurists could find to justify a practice already in place.

It is plain that the "Daniel and Susanna" procedure, as so developed, conflicted with the requirement of *Novel 90's* chapter 9, that all parties have a right to be present when a witness gives testimony against them. Medieval jurists resolved the conflict by interpreting chapter 9 to require only that a party have the opportunity to be present when an adverse witness was received in court to be sworn.¹⁹⁸ The rule in this truncated form is reflected in numerous

194. See John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 Against Ordeals*, 36 *Speculum* 613, 626 (1961). For the background of Agobard's writings against trial by battle and ordeal, see Egon Boshof, *Erzbischof Agobard von Lyon 38-54* (*Kölner historische Abhandlungen* No. 17, 1969). A detailed summary of those writings is set out in S. Grelewski, *La Réaction contre les Ordalies en France depuis le IX^e siècle jusqu'au Décret de Gratien 23-46* (1924).

195. "[U]tilitas iudiciorum constat in discussione causarum et subtilitate inuestigationum." Agobard of Lyon, *Aduersus legem Gundobadi* c. 10 (817/22), in *Agobardi Lugdunensis Opera omnia* 17, 25 (*Corpus Christianorum, Continuatio mediaevalis* No. 52, L. van Acker ed., 1981).

196. See Genzmer, *supra* note 184, at 381-82, 391.

197. See Himstedt, *supra* note 177, at 81-82. At this point in history, lawyers, and especially litigators, were becoming prosperous and powerful, but they were not at all well-liked. See James A. Brundage, *The Medieval Advocate's Profession*, 6 *Law & Hist. Rev.* 439, 439, 444-46, 454 n.1 (1988).

198. [W]itnesses are to be received with the other party present or contumaciously absent . . . by which I understand that the parties to the litigation are to be present at the taking of the oath by the witness, not however at the hearing of his narration, because they would thus learn of what was testified, and could not

procedural treatises of the period.¹⁹⁹ Coupled with the requirement of chapter 5 of *Novel 90* that, in criminal cases, witnesses be personally present before the court,²⁰⁰ this rule at least provided a criminal defendant with the right to see the witnesses against him and to know who they were. In the words of Azo, the leading Bolognese glossator of the early thirteenth century, “in criminal [cases] witnesses are absolutely compelled to appear. . . . [They take the] oath in the presence of each party But the testimony is given before the judge alone, separate from other witnesses and unheard by any party, as was introduced through Daniel.”²⁰¹

thereafter produce witnesses. ([T]estes altera parte praesente vel contumaciter absente sunt recipiendi . . . quod ita intelligo, ut praesentes sint litigatores ad iuramentum testis recipiendum, non autem ad eius narrationem audiendam, quia sic discerent testificata nec possent postea producere testes.)

Bernard of Pavia, *Summa Decretalium* 2.13.7 (1191/98), in *Bernardi Papiensis Faventini episcopi Summa Decretalium* 47 (photo. reprint 1956) (E.A. Theod. Laspeyres ed., Regensburg, Josef Manz 1860) (citations omitted). The citations include *Novel 90.9* and the commonitorium of Pope Gregory I appearing in *Comp. I* 2.13.3. See *supra* note 92.

199. For examples in the thirteenth century procedural literature, see Arnulphus, *Summa minorum* c.39 (c. 1250/54), in 1 *Quellen*, *supra* note 188, Heft 2, at 37 (1905); Gratia Aretinus, *supra* note 193, 2.6.1, at 371; Damasus, *supra* note 193, c.67, at 49; Guillelmus Durantis, *supra* note 193, 1.4.De Teste.7.pr., at 324; Martinus de Fano, *Ordo iudiciorum* (1250/70), in 1 *Quellen*, *supra* note 188, Heft 7, at 11 (1906); Gualterus, *supra* note 188, c.29, at 52; *Ordo “Quia causarum decisio” (Parvus ordinarius), De testibus* (1221), in Ludwig Wahrmund, *Der “Parvus ordinarius”* (pt. 2), 81 *Archiv für katholisches Kirchenrecht* 195, 207 (1901); Tancred, *supra* note 193, 3.8.2, at 235.

200. For statements of this requirement in the procedural literature of the period, see Ricardus Anglicus (Richard de Mores), *Summa de ordine iudiciario* c.30 (1196), in 2 *Quellen*, *supra* note 188, Heft 3, at 45 (1915); Bencivenne of Siena, *Ordo “Invocato Christi nomine”* c.44 (1198), in 5 *Quellen*, *supra* note 188, Heft 1, at 107 (1931) (as to authorship, see M. Caravale, Bencivenne da Siena, in 8 *Dizionario biografico degli Italiani* 215, 215 (1966) [hereinafter *Dizionario*], and authorities cited, *id.* at 216; Fowler-Magerl, *supra* note 93, at 120-21); Guillelmus Durantis, *supra* note 193, 1.4.De Teste.3.25, at 309; “In testibus recipiendis ordo talis servatur” § 8 (1185/1210), in Genzmer, *supra* note 184, at 398, 400-01; Tancred, *supra* note 193, 3.8.2, at 233.

201. “Nam in criminalibus [causis] praecise cogendi sunt testes venire. . . . Et subitur hoc iusiurandum utraque parte presente Sed testimonium feretur soli iudici, separatis aliis testibus, nulla partium audiente, ut per Danielelem inductum est.” Azo, *Summa Codicis 4.de Probationibus*.9 nos. 18, 22 (1208/10), in *Azonis Summa* fol. 323 (Venice, sub signo Angeli Raphaelis 1581). This work was “the most influential text-book of the Roman law.” Hermann Kantorowicz & W.W. Buckland, *Studies in the Glossators of the Roman Law* 132 (1938). The view expressed here by Azo—that witnesses are to be examined out of the parties’ presence after having been produced before them—effectively became the law by its adoption in the *Magna Glossa* or *Glossa ordinaria* of Accursius (the “Accursian Gloss”).

The Accursian Gloss was regarded, from the mid-thirteenth century on, as the definitive interpretation of the *Corpus Iuris Civilis* in the law schools and in the courts. See Cappelletti et al., *supra* note 165, at 20. In his “gloss” on *Novel 90.9*, Accursius construes its rule that adverse parties must have the opportunity to be “present” when witnesses testify against them to mean:

Although a defendant's right to meet opposing witnesses in court was severely reduced after the rise of "Daniel and Susanna," it was not wholly eliminated. The residual right of a defendant at least to see the witnesses against him when they took the oath was taken seriously by medieval jurists, to the degree that its violation could be argued as the ground for reversing a judgment.²⁰²

The rule, in its reduced form, was also the subject of comment in the great medieval treatise on criminal law and procedure, the *Tractatus de maleficiis* (1301) of Albertus Gandinus,²⁰³ the "father of criminal jurisprudence."²⁰⁴ Gandinus was a criminal court judge in Bologna and other Italian cities in the last two decades of the thirteenth century.²⁰⁵ It is clear that the rule was followed in his court, because the dockets at Bologna during that period occasionally bear the notation that an absent defendant had been summoned to appear "to see the witnesses swear."²⁰⁶ Gandinus in his *Tractatus* indicates that the rule was mandatory. He states that if "witnesses . . . have deposed without being sworn or have sworn

that they should hear the attestations, that is, the oath, when [the witnesses] swear . . . and also can put questions . . . [they can] not, however, hear the answers, but it must be said to the judge in secret with the adversary and other witnesses absent, as was introduced through Daniel. (quod testationes debeant audire, id est sacramentum, quando iurant . . . et etiam facere quaestiones possunt . . . non tamen responsiones audire: sed in secreto iudici debet dici absente aduersario et aliis testibus: ut per Danielelem inductum est.)

Accursius, Glossa ordinaria gl. "Praesentem" on Nov. 90.9 (1228/60), in *Novellae Constitutiones Divi Caesaris Iustiniani* 250 (Venice, Nicolo Bevilacqua 1569).

202. See, e.g., Arnulphus, *Summa minorum* c.42 (c. 1250/54), supra note 199, at 43 (ground of opposition to testimony that witnesses "were received with the other party absent and not through contumacy, therefore it is not valid" ("recepti fuerunt altera parte absente et non per contumaciam, ergo non valet")); Aegidius de Fuscarariis, *Ordo iudiciarius* c.75 (c. 1262/66), in 3 *Quellen*, supra note 188, Heft 1, at 135 (1916) (ground for vacating judgment that "witnesses were received with the party absent and not through contumacy" ("parte absente et non per contumaciam fuerint testes recepti"))).

203. It is printed in 2 Hermann Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik* (1926). Gandinus' first version of his *Tractatus de maleficiis* was written in 1286/87, when he was a criminal court judge in Perugia. He produced a greatly expanded version of it in 1299 and a final, slightly revised, version in 1301, when he was a high judicial official in Siena. Kantorowicz's modern edition is based on the final version. See 2 *id.* at xiv-xvi.

204. 2 *id.* at xvi.

205. See 1 *id.* at 56 n.1 (1907).

206. 1 *id.* at 101 ("the said defendant being absent, but lawfully summoned today by messenger [name], [the case] was continued to see the witnesses swear" ("absente dicto accusato, tamen legitime citato per [name] nuntium, ut continue esset ad videndum iurare testes")). A deadline date was set for the defendant to appear "ad videndum testes iurare." 1 *id.* at 117.

with the other party absent and not summoned . . . their statements are as a matter of law a nullity.”²⁰⁷

The benefit that accrued to the defendant from this minimal right to have witnesses against him produced in his presence lay in the opportunity to make “reproach” (*reprobacio*) of or “objection” (*objectio*) to the witnesses; that is, to seek to bar the reception of their testimony.²⁰⁸ In contrast to the function of the modern jury in common law proceedings, the judge, according to medieval Romano-canonical procedure, did not weigh the whole evidence or “find facts” on the basis of the testimony put before him. He either accepted or rejected each witness proffered as competent to testify. If competent, the witness’s testimony was partial proof of the fact of the matter asserted.²⁰⁹ But the witness could be ruled incompetent to testify for a wide variety of reasons, including enmity towards the defendant or association with, and therefore presumed partiality towards, the accuser.²¹⁰ Knowledge of the identity of the witness testifying against him afforded a criminal defendant his only opportunity to prevent his conviction on the

207. “[P]onamus, quidam testes . . . deposuerunt non iurati vel iuraverunt parte absente et non citata, . . . ita quod eorum dicta ipso iure sunt nulla.” Albertus Gandinus, *Tractatus de maleficiis, De falsariis et falsitatibus* § 26 (1301), in 2 Kantorowicz, *supra* note 203, at 335. The context is Gandinus’ explanation for why such witnesses, even though they may have “spoken false testimony knowingly and maliciously” (“*scienter et dolose dixerunt falsum testimonium*”), 2 *id.* at 335, cannot be convicted of perjury, see 2 *id.* at 335-38.

208. See P. Guilhaumez, *Enquêtes et procès 80-82* (Paris, Alphonse Picard 1892).

209. See Lévy, *supra* note 101, at 8, 68-70. The theory of the procedure was that its purpose was to establish objectively the truth of the matter and, thus, the judgment required as a matter of law, not to persuade the judge personally one way or the other. See *id.* at 23-24. “The eventual decision was regarded as the concrete realization of justice which, in order to be true, had to be based upon fully established facts.” Walter Ullmann, *Medieval Principles of Evidence*, 62 *Law Q. Rev.* 77, 78 (1946).

The judge, however, had considerable discretion in determining whether to accept or reject the testimony of each witness proffered, though his discretion was controlled by established criteria for evaluation of the competence of witness testimony. See Himstedt, *supra* note 177, at 98-99, 122, 124 n.7. Because the judge had to weigh the credibility of each witness and reject as a witness anyone who was testifying falsely, he was supposed to pay close attention to the demeanor of the witness while testifying. See Ullmann, *supra*, at 83-84; Lévy, *supra* note 101, at 71-72, 103; Salvioli, *supra* note 184, at 471.

210. See Himstedt, *supra* note 177, at 122-38; Ullmann, *supra* note 209, at 81-82; Salvioli, *supra* note 184, at 427-28; Fournier, *supra* note 102, at 247-48. A comprehensive list of the specific objections a criminal defendant might make to the witnesses against him is set out in Giorgio Zordan, *Il diritto e la procedura criminale nel Tractatus de maleficiis di Angelo Gambiglioni* 358-60 (Pubblicazioni della Facoltà di Giurisprudenza dell’Università di Padova No. 77, 1976). For a detailed study of the grounds of rejection and acceptance of witnesses for and against a criminal defendant, see Bernard Schnapper, *Testes inhabiles, Les témoins reprochables dans l’ancien droit pénal*, 33 *Tijdschrift voor Rechtsgeschiedenis* 575, 578-94 (1965).

basis of testimony of biased witnesses. Thus, the right to see adverse witnesses sworn might be of critical importance to a defendant. This right was perceived to be so fundamental that it was preserved even in the fearsome process of "inquisition," which began to take root on the continent of Europe during the thirteenth century.

IX. INQUISITION, TORTURE, AND A DEFENDANT'S RIGHT TO SEE OPPOSING WITNESSES

The thirteenth century was marked in the realms of both Church and State by an increasing emphasis on the detection and punishment of crime. The major instrument of the crackdown was a new, inquisitorial criminal procedure.²¹¹ Because many viewed the accusatorial criminal procedure under Romano-canonical law as inadequate, "the learned lawyers of the thirteenth century responded by tightening the screws—literally and figuratively—in the name of the public interest."²¹²

Today the very word "inquisition" stands for the antithesis of fair accusatorial procedure. It calls to mind a picture of secret interrogation of a defenseless suspect who is the target of unknown accusers, and the extraction from him of a confession by trickery, pressure, or torture.²¹³ That picture, if somewhat oversimplified,²¹⁴ is not far off the mark. But even so repressive a prosecutorial system did not wholly extinguish the notion that fundamental fairness requires that a defendant have an opportunity to meet accusing witnesses in court.

The continental jurisprudence of the late Middle Ages regarded a defendant's confession as the "queen of proofs" (*regina probationum*) in criminal cases.²¹⁵ Torture, which the Roman law authorized, was the legally sanctioned method of obtaining such a confession.²¹⁶ From these facts, it might appear that inquisitorial

211. See Richard M. Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages: "Rei Publicae Interest, Ne Crimina Remaneant Impunita,"* 1984 U. Ill. L. Rev. 577, 581, 585-88.

212. *Id.* at 585.

213. See, e.g., *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (discussing various torture techniques used during the inquisition).

214. For a qualified defense of inquisitorial procedure, see Walter Ullmann, *Some Medieval Principles of Criminal Procedure*, 59 *Jurid. Rev.* 1, 27-28 (1947).

215. See 2 Fiorelli, *supra* note 21, at 103-17 (1954).

216. See 1 *id.* at 243-50. Although torture was not a creation of inquisitorial procedure, its application expanded with the spread of that procedure and became closely identified with it. See A. Esmein, *Histoire de la procédure criminelle en France* 93-100 (Paris,

procedure dispensed entirely with in-court testimony of witnesses to prove a defendant's guilt. In fact, however, this was not so. It is a remarkable paradox that in inquisitional proceedings, except in the special situation of the inquisition against heresy,²¹⁷ the barbarity of torture coexisted with a careful observance of a defendant's basic right to meet his accusers in court. An outline of the origin and early development of *inquisitio* will demonstrate how this came about.

The word *inquisitio* means "investigation." At its root lies the classical Latin *quaero* (seek).²¹⁸ The core idea of the term *inquisitio*, in the context of criminal procedure, is that the judge himself can act on his own, by virtue of his office (*ex officio*), to investigate the circumstances of a crime and gather the evidence pointing to the probable perpetrator.²¹⁹

Inquisitio had its inception as a discrete procedure in the decretal legislation of a great lawyer-pope, Innocent III (1198-1216).²²⁰ At the beginning of his papacy, Innocent faced the situation of a Church broadly tainted by internal corruption.²²¹ The accusatorial criminal procedure mandated by the *Decretum* was too cumbersome in its operation, too protective of a defendant's rights, and too reliant on the initiative of an individual *accusator* to serve as an efficient tool for the punishment of misconduct by high-ranking clergy.²²² Thus, the Pope developed the procedure of *inquisitio* as the means by which his delegated judges could investigate the rumor (*fama*) of such misconduct.²²³

Larose & Forcel 1882); Winfried Trusen, *Der Inquisitionsprozess. Seine historischen Grundlagen und frühen Formen*, 74 ZRG, Kan. Abt. 168, 230 (1988).

217. See *infra* text accompanying notes 268-74.

218. See Joaquín Cerdá Ruiz-Funes, *En torno a la pesquisa y procedimiento inquisitivo en el derecho castellano-leonés de la edad media*, 32 *Anuario de Historia del Derecho Español* 483, 493 & n.37 (1962).

219. See Fraher, *supra* note 211, at 585-86; Ullmann, *supra* note 214, at 12-16.

220. See Friedrich A. Biener, *Beiträge zu der Geschichte des Inquisitions-Processes und der Geschworenen-Gerichte* 38-42 (Leipzig, Karl Knobloch 1827); Esmein, *supra* note 216, at 66, 74-75; Fournier, *supra* note 102, at 262, 266-69. For the immediate precursors of inquisitional procedure as developed by Innocent III, see Jehan Dahyot-Dolivet, *La procédure judiciaire d'office dans l'Église jusqu'à l'avènement du Pape Innocent III*, 41 *Apollinaris* 443, 453-55 (1968).

221. See Raymonde Foreville, *Latran I, II, III et Latran IV*, at 237-38 (*Histoire des Conciles Oecuméniques* No. 6, 1965); Trusen, *supra* note 216, at 188, 203-05.

222. See Fraher, *supra* note 211, at 586-87, 593-94; Trusen, *supra* note 216, at 184-85.

223. See Biener, *supra* note 220, at 45-49. As to the concept of *fama*, see Richard M. Fraher, *Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof*, 7 *Law & Hist. Rev.* 23, 33 (1989).

Pope Innocent set out the procedure of *inquisitio* in his decretals *Ut nostrum*,²²⁴ *Inter sollicitudines*,²²⁵ *Licet Heli*,²²⁶ and *Qualiter et quando*.²²⁷ He envisaged the procedure as civil, not criminal, in nature.²²⁸ He aimed to remove misbehaving clergy from their clerical offices, but not otherwise to punish them.²²⁹ Perhaps for this reason, the Pope omitted any mention of a suspect's right to be present at proceedings against him or to present a defense.

An influential scholar of the time, the Bolognese canonist Vincentius Hispanus, sharply criticized the absence of these procedural guarantees.²³⁰ Commenting around 1210 on the decretal *Qualiter et quando*, Vincentius stressed the unreliability of a procedure that did not assure a defendant an opportunity to defend himself:

Query, whether an inquisition can take place against a person who is absent, as is accepted by many canonists [*magistri*]. But I have learned through experience that this is pernicious. If he were present, he would prove that on such-and-such a day he was not present when it is said that he killed so-and-so, and he would prove that the *fama* had its origin from his enemies in his absence; and although I would make inquisition, I would still hear him afterwards in his defenses.²³¹

224. Po. 377, X 3.12.1 (Sept. 23, 1198); see Trusen, *supra* note 216, at 189-90.

225. Po. 693, X 5.34.10 (May 7, 1199); see Trusen, *supra* note 216, at 191-92.

226. Po. 888, X 5.3.31 (Dec. 2, 1199); see Trusen, *supra* note 216, at 194-99.

227. Po. 2672, X 5.1.17 (Jan. 29, 1206); see Trusen, *supra* note 216, at 205-08.

228. In his decretal, *Per tuas*, Po. 2134, X 5.3.32 (Feb. 20/25, 1204), the Pope, expounding on the decretal *Licet Heli*, stated that any non-accusatorial disciplinary proceeding in the Church was a civil, not a criminal, action. For analyses of the legal import of *Per tuas*, see Peter Landau, *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria* 105-06 (Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht No. 5, 1966); Charles Lefebvre, *Une application de l'équité canonique: la décrétale "Per tuas" et l'admission des témoins criminels contre les simoniaques*, 6 *Revista Española de Derecho Canónico* 469, 486-87 (1951).

229. See Biener, *supra* note 220, at 51-52; Fournier, *supra* note 102, at 274.

230. Vincentius was a well-known, influential professor of canon law at the University of Bologna from about 1200 to 1220. See Javier Ochoa Sanz, *Vincentius Hispanus, Canonista boloñés del siglo XIII* 31, 58-62, 73-74 (Cuadernos del Instituto Jurídico Español No. 13, 1960). He "did not fear to dissent from the *opinio communis* when he thought it unsupported or unfounded, or to criticize the opinions of the most authoritative scholars." *Id.* at 61.

231. *Quaeritur, an absente aliquo posset inquisitio fieri super eodem et concedunt hoc plerumque magistri: ego tamen experimento didici fuisse damnosum. Si enim esset praesens, probaret, quod tali die non erat praesens, cum talis dicitur ab eo esse interfectus et probaret, unde fama habuit ortum, quia ab inimicis suis in*

The Pope apparently responded to Vincentius' criticism in his decretal *Inquisitionis negotium*.²³² There, Innocent directed that the names and statements of accusing witnesses were to be furnished to an inquisitional defendant.²³³ Plainly the Pope meant to assure such a defendant's right to a fair proceeding. Three years later, in its *constitutio* 8, the Fourth Lateran Council of 1215 repeated the protections of *Inquisitionis negotium* and expanded them to include a defendant's rights to be present, to have notice of the charges, and to present a defense:

He against whom the inquisition is made shall be present, unless he contumaciously absents himself. And the charges which are the subject of the inquisition must be set forth to him, so that he may have the ability to defend himself, and not only the statements, but also the very names, of the witnesses must be furnished to him, so that it may be apparent what was said by whom, and his legitimate exceptions and responses must be admitted, lest boldness in defaming be afforded by the suppression of names and in deposing falsehood by the exclusion of exceptions.²³⁴

absentia, et licet facerem inquisitionem, tamen audirem eum postea in excusationibus.

Vincentius Hispanus, gloss on decretal, *Qualiter et quando* (1210/12), quoted in Biener, supra note 220, at 50 n.26.

Vincentius often used the term *magistri* to denote canonists collectively. See Ochoa, supra note 230, at 53.

232. Po. 4628, X 5.1.21 (Dec. 20, 1212).

233. See infra note 235 and translation in text accompanying note 234.

234. Debet igitur esse presens is contra quem facienda est inquisitio, nisi se per contumaciam absentauerit. Et exponenda sunt illi capitula de quibus fuerit inquirendum, ut facultatem habeat defendendi seipsum, et non solum dicta, set etiam ipsa nomina testium sunt ei, ut quid a quo sit dictum appareat, publicanda, necnon exceptiones et replicationes legitime admittende, ne per suppressionem nominum infamandi, per exceptionum uero exclusionem deponendi falsum audacia prebeat.

Conc. IV Lat. const. 8 (1215), in *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* 41, 54, 56 (Antonio García y García ed., MIC Series A: Corpus Glossatorum No. 2, 1981) [hereinafter *Constitutiones Concilii*]. *Constitutio* 8 was subsequently included in the *Decretals of Gregory IX* (1234). See X 5.1.24, in 2 *Corpus Iuris Canonici*, supra note 92, cols. 745-47.

There is no "legislative history" of *constitutio* 8 to be had in the proceedings of the Fourth Lateran Council. The drafts of the *constitutiones* promulgated by the Council were apparently prepared in advance, probably by Pope Innocent himself, and read to the Council for its approval at its final session on November 30, 1215. See Antonio García y García, *Introducción a Concilii quarti Lateranensis Constitutiones*, in *Constitutiones Concilii*, supra, at 3, 6-8.

Despite the obvious efforts of the Pope and the Council to guarantee fair process during *inquisitio*,²³⁵ neither addressed the question of whether a defendant had the right actually to see the accusing witnesses.

Inquisitional procedure spread rapidly into the secular law, initially in the legislation of Frederick II for the kingdom of Sicily.²³⁶ His legislation, like that of the Fourth Lateran Council, also left in doubt an inquisitional defendant's right to the production of opposing witnesses. With the *Constitutions of Melfi* (1231), Frederick promulgated for Sicily the first territorial code of law known to medieval Europe.²³⁷ In his subsequent *constitutio*, *De inquisitionibus faciendis* (1244), Frederick established detailed regulation of inquisitional procedure.²³⁸ The *constitutio* also provided, with a few exceptions, that the defendant would be furnished with the

235. The portion of the passage quoted above closing with the words "ability to defend himself" ("facultatem . . . defendendi seipsum") established a defendant's right to be present at an inquisitional proceeding against him, and was recognized by contemporary commentators to be entirely new. See, e.g., Johannes Teutonicus, Apparatus on Conc. IV Lat., gl. const. 8 (1215/16), in *Constitutiones Concilii*, supra note 234, at 187, 201 ("This alone is new, and it is not expressly to be found elsewhere." ("Hoc solum nouum est nec alibi hoc ita expresse inueniebatur.")); Damasus, Apparatus on Conc. IV Lat., gl. const. 8 (1216/20), in *Constitutiones Concilii*, supra note 234, at 419, 422 ("That is newly added." ("Istud adicitur de nouo.")); Vincentius Hispanus, Apparatus on Conc. IV Lat., gl. const. 8 (1215/17), in *Constitutiones Concilii*, supra note 234, at 287, 299 ("[T]hat he against whom inquisition is made must be present is now expressed in this chapter . . . and I always thought so, although others did not." ("[Q]uod presens debeat esse ille contra quem fit inquisitio, hodie expressum est in hoc capitulo . . . et semper idem sensi, licet alii sentirent contra.")).

The remainder of the passage quoted above is taken verbatim from the decretal *Inquisitionis negotium*. Po. 4628, X 5.1.21 (Dec. 20, 1212); see Innocent III, *Regesta sive Epistolae* 15.191, in 216 *Patrologia Latina* at cols. 715, 716. The rest of *constitutio* 8 derives largely from Innocent III's decretal *Qualiter et quando*, Po. 2672, X 5.1.17 (Jan. 29, 1206); see Biener, supra note 220, at 47-48.

236. See Fritz Zechbauer, *Das mittelalterliche Strafrecht Siziliens nach Friedrichs II. Constitutiones regni Siciliae und den sizilischen Stadtrechten mit einem Excursus über Herkunft und Wesen des sizilischen Inquisitionsverfahrens 168-71* (1908). This "legislation" took the form of *constitutiones*.

237. See Hermann Conrad, *Die Gesetzgebung der normannisch-staufischen Herrscher im Königreich Sizilien*, in Hermann Conrad et al., *Die Konstitutionen Friedrichs II. von Hohenstaufen für sein Königreich Sizilien* at xxxv, xxxvii-xxxviii (Studien und Quellen zur Welt Kaiser Friedrichs II. No. 2, 1975); Armin Wolf, *Die Gesetzgebung der entstehenden Territorialstaaten*, in 1 *Handbuch*, supra note 92, at 517, 553, 698-700.

238. See Const. Reg. Sic. 1.53 (1244), in 4 *Historia diplomatica Friderici Secundi* 192-94 (J.-L.-A. Huillard-Bréholles ed., Paris, Plon 1854). This *constitutio* "speaks of inquisition as of a preexisting institution." Salvioli, supra note 184, at 366 n.2. It is patterned at least in part after the canonical inquisition instituted by Pope Innocent III. See Zechbauer, supra note 236, at 206-11; Hermann Dilcher, *Die sizilische Gesetzgebung Kaiser Friedrichs II.* 225-26 (Studien und Quellen zur Welt Kaiser Friedrichs II. No. 3, 1975).

names and statements of the witnesses against him, although it did not provide that these witnesses would be physically produced before him.²³⁹

The spread of inquisitional procedure in the thirteenth century into the secular criminal law is also apparent in the *Siete Partidas* (1263/65), the great code compiled at the direction of Alfonso X, king of Castille, to set out in the vernacular the principles of Roman and canon law.²⁴⁰ With regard to inquisitional proceedings, it adopted the right-of-defense provisions enacted by the Fourth Lateran Council:

The inquisition having been made . . . , the king, or the judges, shall have transmitted to those whom the inquisition concerns, the names of the witnesses and their statements; so that they can defend according to their right, speaking against the persons of the inquisition or their statements; and shall have all the defenses which they would have against other witnesses.²⁴¹

239.[I]f he against whom the inquisition has been made is not proven to have been of unstable [*levis*] life and bad associations or is not proven a wrongdoer by whatever persons, the list of the names and statements of the witnesses [*inquisitionis copia*] shall be furnished to him. (([S]i quidem is contra quem inquisitio facta fuerit, levis vite et male conversationis fuisse non probabitur vel per quoscunque maleficus non probetur, inquisitionis ei copia tribuatur.)

Const. Reg. Sic. 1.53 (1244), supra note 238, at 193. Additionally, a defendant charged with treason was denied the names and statements of the witnesses against him, unless the king himself ordered that they be furnished. *Id.*

For the interpretation of the phrase *inquisitionis copia* as used in this context, see Zechbauer, supra note 236, at 219 & n.3; Dilcher, supra note 238, at 172, 231.

240. See Alfonso García Gallo, *Nuevas observaciones sobre la obra legislativa de Alfonso X*, 46 *Anuario de Historia del Derecho Español* 609, 640-41 (1976); Pedro Gómez de la Serna, *Introducción histórica to Las Siete Partidas*, in 2 *Los Códigos Españoles concordados y anotados* at i, vi, x-xii (Madrid, La Publicidad 1848) [hereinafter *Códigos*]; Sebastián Martín-Retortillo y Baquer, *Notas para un estudio de la prueba en la tercera Partida*, 6 *Argensola* 101, 108-11 (1955). It was reedited several times in the thirteenth and fourteenth centuries, see Alfonso García Gallo, *El "Libro de las leyes" de Alfonso el Sabio*, 21-22 *Anuario de Historia del Derecho Español* 345, 446-48 (1951-1952), and did not actually acquire the force of law until 1348. See Wolf, supra note 237, at 673-74.

241. *Seyendo la pesquisa fecha . . . , dar deue el Rey, o los Judgadores, traslado della a aquellos a quien tanxere la pesquisa, de los nombres de los testigos, e de los dichos dellos; porque se puedan defender a su derecho, diziendo contra las personas de la pesquisa, o en los dichos dellos; e ayan todas las defensiones que aurian contra otros testigos.*

Partida 3.17.11 (1263/65), in 3 *Códigos*, supra note 240, at 184 (1849). Names and statements of inquisitional witnesses were not to be revealed, however, if the inquisition concerned *conducho tomado*. *Id.* This was feudal payment in kind received by lords from vassals, and inquisition might be ordered to determine if more had been taken than was due. See José Muro Martínez, *Fuero Viejo de Castilla, Fuero Real, Leyes del Estilo y*

This text reflects the same ambiguity concerning the physical production of witnesses. Its silence is particularly noteworthy in light of the fact that a separate title of the *Partidas*, addressing issues outside the context of inquisitional procedure, directly affirms a criminal defendant's right to have accusing witnesses produced in court²⁴² and to be present when those witnesses take the oath.²⁴³

The inquisitional legislation of the Fourth Lateran Council, the Sicilian *constitutiones*, and the *Siete Partidas* all fail to address the requirement of *Novel 90* that adverse witnesses be produced in court in the presence of the defendant. The omission of this principle in the Sicilian legislation of Frederick II appears to have given rise to the question of whether such a requirement existed under the new secular inquisitional procedure. That it did can be inferred with some confidence because, at the close of the thirteenth century, Albertus Gandinus squarely addressed the issue in his *Tractatus de maleficiis*.²⁴⁴ There, indicating a division of opinion on the matter and asserting his own position, he noted the significance of "whether the criminal judge is inquiring against a particular named individual, or whether he is inquiring generally about a crime and who may have committed it."²⁴⁵

And if he is inquiring against a particular individual, then the process propounded by [X 5.1.24, the locus in the

Ordenamiento de Alcalà at xxiii, 107 v. Conducho (Mariano Muro Lopez Salgado ed., Valladolid, Cavia & Zapatero 1874).

242. Witnesses residing at a distance from the trial court could give their testimony before a judge in their locality, for forwarding in writing to the trial judge,

unless the case is such that it could result in death, or loss of limb, or dispossession of land. In that event . . . the judge who is to adjudicate the case, and not another one, shall himself receive the witnesses. (fuera ende, si el pleyto fuere atal, de que podiesse nacer muerte, o perdimiento de miembro, o echamiento de tierra. Ca entonce . . . el Juez que ha de judgar el pleyto, el por si mismo reciba los testigos, e non otro.)

Partida 3.16.27 (1263/65), in 3 Códigos, supra note 240, at 167.

243. Witnesses must be sworn before testifying,

[a]nd this oath must be taken before him who is the party against whom they are produced, he having been given prior notice and apprised of the day on which to come to see how they swear. ([e] esta jura deue tomar, seyendo la parte delante contra quien son aduchos, faziendogelo ante saber, e señalandole el dia a que venga veer como juran.)

Partida 3.16.23 (1263/65), in 3 Códigos, supra note 240, at 164.

244. See supra note 203.

245. "[H]oc est bene notandum . . . utrum iudex de maleficio inquirat contra aliquam singularem et specialem et nominatam personam, an inquirat generaliter de maleficio, quis illud maleficio fecerit." Albertus Gandinus, *Tractatus de maleficiis*, Quomodo de maleficiis cognoscatur per inquisitionem § 5 (1301), in 2 Kantorowicz, supra note 203, at 39.

Decretals of Gregory IX (1234) of const. 8 of the Fourth Lateran Council of 1215]²⁴⁶ must be observed, and he shall cause to be summoned that named person and shall exhibit to him the charges about which he is inquiring, and the names of the witnesses must be furnished to that person, and his exceptions and responses are saved, both against the persons of the witnesses as well as their statements, so that false matter spoken by those witnesses may be excluded. [Citations]. But whether in the introduction of the witness the inquisitor shall cause to be summoned that person against whom he is inquiring by name? I say yes, for otherwise the proceeding will be a nullity. [Citations]. But Emperor Frederick, questioned by learned scholars, said at Bologna²⁴⁷ that a judge on his own can inquire about a crime without the party, if public rumor and many people in the area say that someone is of bad reputation or a criminal, and [Frederick said further] that in such circumstances the *inquisitio* should not be published, and thus no list of witnesses on the inquisition²⁴⁸ is to be made for him who is a criminal and otherwise of bad reputation. But this would not be so if someone were to say that he [i.e., the person of bad reputation] had committed some specific particular crime.²⁴⁹

246. See supra note 234.

247. Gandinus' source for his account of a colloquy between Frederick and the scholars at Bologna is unknown; if it took place, it would have been in October, 1220, when Frederick was in Bologna. See Dietrich Oehler, *Zur Entstehung des strafrechtlichen Inquisitionsprozesses*, in *Gedächtnisschrift für Hilde Kaufmann* 847, 857-58 nn.32 & 34 (Hans J. Hirsch et al. eds., 1986).

248. See generally supra note 239 (discussing *inquisitionis copia*).

249. Et si quidem inquirat contra aliquam specialem personam, tunc servandus est ordo traditus . . . , et tunc debet facere citari illam nominatam personam et eidem debet exhibere articulos seu capitula, super quibus inquirat, et nomina testium eidem sunt edenda, et exceptiones et replicationes eidem salve sunt, tam contra personas testium quam contra eorum dicta, ut eis testibus false dicendi materia amputetur. . . . Sed numquid in introductione testium faciet inquisitor citari illum, contra quem nominatim inquiratur? Dic quod sic, alias autem processus nullus erit. . . . Sed dominus Fredericus imperator, interrogatus a doctoribus, Bononie dixit, quod iudex per se de maleficio inquirere poterat absque parte, si fama publica et multi de terra dicerent aliquem male fame vel malefactorem, et quod in eis talibus non debeat inquisitio publicari, et sic non fiet ei copia inquisitionis qui est malefactor et alias male fame. Secus, si quidam diceret, eum commisisse aliquod speciale et singulare maleficium.

Albertus Gandinus, *Tractatus de maleficiis, Quomodo de maleficiis cognoscatur per inquisitionem* § 5 (1301), in 2 Kantorowicz, supra note 203, at 39-40 (citations omitted). The last sentence appears to express the opinion of Gandinus in opposition to the position

Gandinus completes his discussion of the point by concluding that, where the inquisitor is inquiring about a crime *in generali*, and not about a specific suspect, he does not summon anyone to be present at the introduction of the witnesses.²⁵⁰

But when the general inquisition has been completed, if the inquisitor shall have found someone inculpated in that crime, he shall cause that person to be summoned to him and shall furnish to him . . . the names of the witnesses whom he [the inquisitor] intends to examine about that crime, and he shall cause to be summoned to the swearing of those witnesses him who was so inculpated in the first and general inquisition.²⁵¹

According to Gandinus, therefore, an inquisitional defendant who did not confess guilt could not be convicted unless the witnesses necessary for proof of his guilt were produced before him and took the oath in his presence. This rule, however, easily could have been evaded by the use of torture to obtain a confession from the defendant before any witnesses against him were produced. Gandinus' *Tractatus* leaves open the question as to whether the rule could be effectively nullified in that fashion.

This question was settled in the first half of the fourteenth century on the vast authority of Bartolus (Bartolo da Sassoferrato, 1314-1357), whose commentaries on the Roman laws were looked upon by courts, scholars, and practitioners of his time, and for almost two centuries thereafter, as definitive.²⁵² Bartolus, writing

attributed to Frederick at Bologna. It is worth noting that Gandinus cites Novel 90.9, in the form of the Authentica assigned to Code J. 4.20.19, as one of the authorities for his conclusion that, if the defendant does not have opportunity to be present when the prosecution witnesses are introduced, "the proceeding will be a nullity."

250. See *id.* § 6 at 40.

251. *Sed hac generali inquisitione completa, si ipse inquisitor invenerit aliquem de ipso crimine infamatum, faciet illum ad se citari et edet sibi . . . nomina testium, quos super illo crimine examinare intendit, et ad iuramentum illorum testium faciet citari istum in prima et generali inquisitione taliter infamatum.*

Id.

252. See Woldemar Engelmann, *Die Wiedergeburt der Rechtskultur in Italien* 233-36 (1938); J. A. Clarence Smith, *Medieval Law Teachers and Writers* 81-82 (Collection des travaux de la Faculté de Droit de l'Université d'Ottawa, Monographies juridiques No. 9, 1975); F. Calasso, *Bartolo da Sassoferrato*, in 6 *Dizionario*, *supra* note 200, at 640, 664-65 (1964); Norbert Horn, *Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts*, in 1 *Handbuch*, *supra* note 92, at 261, 270.

in 1341 or 1342,²⁵³ addressed the issue in the context of the question of whether an individual inculpated in a general inquisition may be put to torture to obtain from him a confession of the alleged crime.²⁵⁴ On the ground that a defendant cannot be prejudiced by the testimony of witnesses whom he has not yet had opportunity to see, Bartolus answered in the negative. Therefore, if there are to be further proceedings against him, the witnesses must testify again, this time after the defendant has been given the opportunity to have them produced in his presence.

Query, whether evidence received on the general inquisition prejudices the defendant, so that he may be tortured when there is a special inquisition or accusation? I think not, because those witnesses were not examined after he himself [the defendant] was summoned, and he himself was there to speak in opposition, therefore they do not prejudice him. [Citation]. Thus they must be examined a second time²⁵⁵

Bartolus' assertion of the rule was followed by the leading criminal law scholars of continental Europe over the next two centuries. Accordingly, Angelus Aretinus (Angelo Gambiglioni), in his *Tractatus de maleficiis* (1438/44),²⁵⁶ asserts:

witnesses examined on the general inquisition do not prejudice the malefactor against whom inquiry is later

253. These are the dates of Bartolus' lectures on the *Digestum Novum* (books 39-50 of Justinian's *Digest*) as a professor at the University of Pisa. See Calasso, *supra* note 252, at 642.

254. A defendant could not legally be put to torture unless a certain quantum of competent evidence of his guilt was presented. See Walter Ullmann, *Reflections on Medieval Torture*, 56 *Jurid. Rev.* 123, 125-28 (1944). For an excellent short summary of the law of torture, see John H. Langbein, *Torture and the Law of Proof* 12-16 (1977).

255. "Quaero, an indicia habita super generali inquisitione praeiudicent reo, ut possit torqueri, quando fit inquisitio vel accusatio specialis? puto quod non, quia illi testes non fuerunt examinati ipso citato, et ipso existente contradictore, ergo non praeiudicant sibi. . . . Vnde debebant iterum examinari" Bartolus, In *Secundam Digesti Novi Partem* on Dig. 48.18.22(21) no. 9 (1341/42), in 6 *Bartoli à Saxoferato Omnium Iuris Interpretum Antesignani Commentaria* fol. 183v (Venice, Giunta 1602) (citation omitted). The authority cited by Bartolus is Code J. 4.20.19.

256. By this work, Angelus Aretinus effectively replaced Gandinus as the principal authority on criminal law in continental Europe. See Engelmann, *supra* note 252, at 231, 237-38. In his *Tractatus*, Angelus sets out a single hypothetical criminal case from start to finish (from the crime to the judgments of conviction). He raises in this context as many questions of law as possible, and summarizes the opinions of the most authoritative commentators on each question. See Zordan, *supra* note 210, at 13-27. Thus, his *Tractatus* was both a "nuts-and-bolts" procedural manual for lawyers and judges and a compendium of contemporary criminal law scholarship.

made specially, if the malefactor was not summoned when the witnesses swore in the general inquisition [A]nd if he denies [guilt], they [the judges] examine the witnesses again with the defendant summoned and coming into court, so that he sees the witnesses swear and he or his counsel can then make interrogatories.²⁵⁷

A hypothetical case set out in Angelus' *Tractatus* shows that accusing witnesses were produced before the defendant at the outset of the proceedings on the merits.²⁵⁸

Hippolytus de Marsiliis, citing Angelus Aretinus and Bartolus as authorities in his *Practica causarum criminalium* (1528), states that if a defendant denies guilt, the judge is to give him a written summary of the evidence against him and set a term within which he may refute it; if by the end of the term the defendant has failed to

257. [T]estes examinati super inquisitione generali, non praeiudicant malefactori, contra quem specialiter postea inquiritur, si malefactor non fuit citatus, quando testes iurauerunt in inquisitione generali. . . . [E]t si negat iterato examinant testes reo citato et in iudicium veniente vt videat iurare testes, et potest tunc ipse vel eius aduocatus interrogatoria facere. . . .

Angelus Aretinus, *Tractatus de maleficiis, Quod fama publica praecedente et clamosa*, no. 11 (1438/44), in *Angeli Aretini De Maleficiis Tractatus* fol. 73rv (Venice, Cominum de Tridino Montisferrati 1573) (citations omitted). The "interrogatories" referred to are written questions submitted to the judge. See *supra* text accompanying note 185.

258. The case is set out in Angelus, *supra* note 257, *Inquisitio & Forma sententiae*, fols. 1v-3r, quoted in Zordan, *supra* note 210, at 14-17 n.57. It concerns the death by stabbing of Titius on the steps of a church. In that regard, as described by Angelus, the criminal judge of Bologna and his assistants held a general inquisition into the crime on November 24, 1437. This produced testimony that Sempronius hired Caius to wound Titius, and that Caius carried out the assault with the aid of Andraeus. On November 25, the judge filed written charges (*libellus inquisitionis*) against the three, and on the following day a court messenger served each with a copy of the *libellus* and an order to appear before the judge on December 3 to answer to the charges. On that date, the defendants failed to appear and were declared in contempt. On December 14, they appeared and answered the charges. The judge allowed them ten days to prepare their defenses and ordered Caius held in custody. On December 25, the defendants submitted the names of prospective defense witnesses. On January 2, the prosecution witnesses appeared in court to be examined, the defendants having previously been summoned "to see the witnesses swear" ("ad videndum iurare testes"). On January 5, the testimony of the witnesses was read in open court. The judge gave the defendants four days in which to make their oppositions to the testimony, and on January 8, a hearing was held on the defendants' oppositions. On January 12, the chief judicial officer (*podestà*) of Bologna, on the report of the criminal judge, pronounced judgment against all three defendants. Sempronius, who had the benefit (*beneficium*) of having confessed, was fined 300 Bolognese pounds. Andraeus was fined 1,000 pounds, with the provision that if his fine was not paid within ten days, he was to have a hand amputated. Caius was sentenced to be decapitated. He claimed an appeal. The judge and *podestà* rejected it as "frivolous" (*frivolae*), and Caius was executed on the same day.

do so, he will be put to torture.²⁵⁹ However, according to Hippolytus, the prerequisite to the order for torture is that the previously examined accusing witnesses be summoned to testify a second time, this time taking the oath in front of the defendant.²⁶⁰

[T]he judge must have the defendant summoned and brought before him and similarly have before him those witnesses whom he first examined for the taking of evidence and tender to them the oath in the presence of the defendant himself, and recall and examine them again; otherwise, unless he shall first have done this, the judge may not proceed to torture on the strength of the first deposition of the said witnesses, since the defendant himself was not summoned to see the witnesses against him swear, as is required. And as a consequence, their statement effects nothing.²⁶¹

In addition, Julius Clarus, in his *Practica crimina* (1568), writes that if the defendant inculpated by the general inquisition denies guilt,

the judges . . . examine the witnesses a second time, with him [the defendant] having been summoned to see them swear And a judge would very gravely err who would proceed to torture or conviction having omitted such a repetition of the witnesses; for witnesses received before the joinder of the issue create no credible evidence against a defendant, since they were examined without him being summoned²⁶²

259. See Hippolytus de Marsiliis, *Practica causarum criminalium, Nunc videndum*, fols. 26r-29r (Lyon, A. Vincent 1542) (1528).

260. *Id.*

261. [I]udex debet facere citare reum et eum ducere coram se et similiter habere coram se illos: testes quos primo examinavit pro indiciis habendis et eis deferre iuramentum in presentia ipsius rei et eos iterum repetere et examinare alias nisi primo hoc fecerit non posset iudex procedere ad torturam vigore prime depositionis dictorum testium eo quia ipse reus non fuisset citatus ad videndum iurare testes contra eum: vt requiritur. et per consequens dictum eorum nihil operaretur.

Id. fol. 29r.

262. [I]udices . . . iterato examinant, testes, eo citato ad videndum eos iurare, etc. . . . Et valde grauiterrime erraret iudex, qui ommissa tali repetitione testium procederet ad torturam, vel condemnationem, nam testes recepti ante litis contestationem nullam fidem faciunt contra reum, cum sint examinati ipso non citato

An event in the legal history of the principality of Liège, in what is now Belgium, a jurisdiction that did not follow this rule, underscores its importance. From the late fourteenth century, Liège employed a procedure of "general inquisition" to take witness testimony about any crime in which the perpetrator was unknown to the victim.²⁶³ A suspect could be arrested on the basis of the testimony heard by the inquisitors. If the general inquisition testimony was deemed sufficient to prove his guilt, he was convicted by reason of it alone, without any recall of the witnesses; and if the testimony was insufficient to prove his guilt, but raised a strong suspicion of it, he could be put to torture in an effort to make him confess.²⁶⁴ However, in an order issued on October 20, 1530,²⁶⁵ the Emperor Charles V rejected the use for these purposes of testimony taken prior to the defendant's arrest.²⁶⁶ "[W]e do not wish," decreed the Emperor, "testimonies of this sort, given extrajudicially for the sole purpose of incarceration, to generate any prejudice in the principal case, or that it be possible on the pretext of these testimonies to proceed against an incarcerated person to torture or conviction"²⁶⁷

Julius Clarus, *Sententiae receptae* bk. 5 (*Practica criminalis*) § *Fin. Pract. Crimin.*, qu. 45, no. 13 (1568), in *Iulii Clari Patritii Alexandrini . . . Liber Quintus Receptarum Sententiarum* Integer 214 (Frankfurt a. M., Nikolaus Basse 1582) (citations omitted).

263. See Edmond Poulet, *Essai sur l'histoire du droit criminel dans l'ancienne principauté de Liège* 442-44 (Brussels, F. Hayez 1874).

264. See *id.* at 446-48.

265. *Diplôme of Emperor Charles V confirming imperial privileges previously granted to Liège* (Oct. 20, 1530) [hereinafter *Diplôme*], in 1 *Recueil des ordonnances de la principauté de Liège*, 2d ser. 76, 78 (L. Polain ed., Brussels, Gobbaerts 1869) [hereinafter *Recueil des ordonnances*].

266. Liège was a sovereign state, ruled by a prince-bishop, but it also was a dependency of the Holy Roman Empire. See 2 Paul Harsin, *Études critiques sur l'histoire de la principauté de Liège 1477-1795*, at 127-29 (1955).

267. "[H]ujusmodi testimonia extrajudicialiter ad solum effectum carceris praemissa, nullum volumus causae principali generare praejudicium, neque illorum testimoniorum praetextu posse contra incarcerationem ad quaestionem vel condemnationem procedi" *Diplôme*, in 1 *Recueil des ordonnances*, supra note 265, at 78. The disapprobation of the practice follows a recital of various other practices observed in the administration of criminal justice in Liège which the Emperor specifically approved and confirmed. See *id.* at 77-78; Poulet, supra note 263, at 548-49.

This order was issued at Augsburg, Germany, see 1 *Recueil des ordonnances*, supra note 265, at 76, where the Emperor was presiding over the Diet of Augsburg, a critical event in the history of the Reformation, attempting to resolve the religious division of Germany, see 2 Harsin, supra note 266, at 160. The prince-bishop of Liège, Érarde de la Marck, was also in Augsburg at this time; he attended the Diet from June to November of 1530. See 2 *id.* at 160, 426. Presumably the Emperor conferred with the prince-bishop about the wording and content of the imperial order quoted here. The order refers to the prince-

X. AN EXCEPTION TO THE GENERAL RULE: THE INQUISITION AGAINST HERESY

There existed one great exception to the requirement of production of accusing witnesses before a defendant. Over the course of the thirteenth century, in the special procedure established for an inquisition against heresy (*inquisitio haereticae pravitatis*), it became standard practice not to produce accusing witnesses before a defendant. Indeed, their very identities were kept secret from him.²⁶⁸ The only defense left to the defendant was that the inquisitors would ask him if he had any "enemies." If any of the individuals he named in response were among the witnesses against him, their testimony might be excluded.²⁶⁹ In the words of a renowned modern historian of the inquisition against heresy, "the crowning infamy of the Inquisition in its treatment of testimony was withholding from the accused all knowledge of the names of the witnesses against him."²⁷⁰

The theory underlying this exception was that heresy was so serious that an accusing witness's safety would be endangered if the defendant knew the witness's identity. This exception was originally meant to apply on a case-by-case basis. However, the exception quickly swallowed the rule.²⁷¹ As a result, the essence of proceedings in the inquisition against heresy was to subject a defendant to prolonged secret interrogation concerning anonymous accusations, with the aim of obtaining a confession from him.²⁷² The details of the tricks and pressure tactics the inquisitors employed are well known because they are preserved in a famous

bishop as "Erard, . . . our friend, prince, and counsellor . . ." ("Erardo, . . . amico principi et consiliario nostro . . ."). *Diplôme*, in 1 *Recueil des ordonnances*, supra note 265, at 77.

268. 2 Fiorelli, supra note 21, at 55-56 (1954); Fournier, supra note 102, at 279; Charles Molinier, *L'Inquisition dans le midi de la France* 343-44 (Paris, Sandoz & Fischbacher 1880); L. Tanon, *Histoire des tribunaux de l'inquisition en France* 326-28, 389-92 (Paris, L. Larose & Forcel 1893); Albert C. Shannon, *The Secrecy of Witnesses in Inquisitorial Tribunals and in Contemporary Secular Criminal Trials*, in *Essays in Medieval Life and Thought Presented in Honor of Austin Patterson Evans* 59, 61-63 (John H. Mundy et al. eds., 1955).

269. See Fournier, supra note 102, at 280; Molinier, supra note 268, at 349-57; Tanon, supra note 268, at 385.

270. 1 Henry C. Lea, *A History of the Inquisition of the Middle Ages* 437 (New York, Harper & Bros. 1888).

271. See 1 *id.* at 437-39; Francis Darwin, *The Holy Inquisition: Suppression of Witnesses' Names* (pt. 1), 125 *Church Q. Rev.* 226, 241-42 (1937-1938); G. Mollat, Introduction to 1 Bernard Gui, *Manuel de l'inquisiteur at v*, *xlvi-xlix* (G. Mollat ed. & trans., *Classiques de l'histoire de France au Moyen Age* No. 8, 1926); Tanon, supra note 268, at 391-92.

272. See 1 Lea, supra note 270, at 408-16; Tanon, supra note 268, at 358-59.

manual for inquisitors, the *Directorium inquisitorum* (1376) of Nicolas Eymeric,²⁷³ a Dominican theologian.²⁷⁴

It is one of history's ironies that the terms "confront" and "face-to-face," now so inseparably attached to the concept of due process, first made their appearance in their modern legal sense in the repressive context of Eymeric's notorious *Directorium*. Eymeric writes that, when the inquisitors suspect an accusing witness of testifying falsely against an alleged heretic, they should arrange for the accused to "be confronted" (*confrontari*) with the suspected false witness.²⁷⁵ In another passage, Eymeric suggests that occasions may arise when, to obtain a confession from a resistant suspect, the inquisitor may wish to "affront [him] face to face" (*facie ad faciem affrontare*) with the witnesses against him.²⁷⁶ Writing two centuries later, Eymeric's commentator, Francisco Peña,²⁷⁷ noted that the phrase *facie ad faciem affrontare* "beautifully

273. The standard edition, annotated by Francisco Peña, is *Directorium inquisitorum Nicolai Eymerici, cum scholiis seu annotationibus Francisci Pegnae Hispani* (Rome, in aedibus pop. Rom. 1578) (1376) [hereinafter *Directorium*]. It is accessible in a modern French translation in Nicolau Eymerich & Francisco Peña, *Le manuel des inquisiteurs* (Louis Sala-Molins trans., *Le savoir historique* No. 8, 1973). For the "tricks and pressure tactics" referred to above, see *id.* at 130-33.

274. See E. Mangenot, Nicolas Eymeric, in 5 *Dictionnaire de théologie catholique* cols. 2027, 2027-28 (A. Vacant & E. Mangenot eds., 1913).

275. He recommends inquisitors to advise the false witness that "we caused you to be summoned, and brought into our presence, and you and the aforesaid [defendant, by name] to be confronted before us . . ." ("te citari, et ad nostram praesentiam adduci, ac praedictum talem coram nobis fecimus confrontari . . .") *Directorium* pt. 3, *Forma puniendi ac condemnandi falsos testes* (1376), *supra* note 273, at 339.

276. [I]f the inquisitor should see that the heretic or accused does not wish to reveal his error, and insists on denying it, and [the accused] knows himself to be convicted by witnesses, because the inquisitor reads, or causes to be read, to him the statements of the witnesses with the names suppressed, in such a way that he may understand that he is convicted by witnesses and not know who the deponents are, when danger might threaten the deponents; otherwise he [the inquisitor] can display [them] and affront [the accused] face to face, so that thus by his blushing and shame he may acknowledge the truth . . . ([S]i videat inquisitor haereticum siue delatum nolle detegere errorem suum, et stare in negativa; et scit ipsum per testes conuictum, quod inquisitor legat, uel legi faciat sibi dicta testium suppressis nominibus, taliter, quod cognoscat se conuictum per testes, et non intelligat qui sunt deponentes, ubi periculum deponentibus possit imminere: alias explicari potest, et facie ad faciem affrontare, ut sic rubore et uerecundia ueritatem fateatur . . .)

Id. pt. 3, *Cautelae inquisitorum decem contra haereticorum cauillationes et fraudes*, no. 101 (1376), at 292.

277. As to Peña's edition of the *Directorium*, see Louis Sala-Molins, *Introduction to Eymerich & Peña*, *supra* note 273, at 16-17.

expresses the matter in the voice of the people" ("uoce uulgari rem pulchre expressit").²⁷⁸

XI. "CONFRONTATION" AND "FACE-TO-FACE" AS TERMS OF ART

The word "confrontation," in the sense of the physical production of an accusing witness before a criminal defendant, first came into general use in late medieval France, where one of the most oppressive of all criminal regimes was in place. For the prosecution of serious crimes, France by the mid-fifteenth century was following the so-called procedure *extraordinaire*, an inquisitional procedure stressing secrecy and torture.²⁷⁹ In this procedure, the noun *confrontation* and verb *confronter* came to be used to designate the act of physically producing accusing witnesses before a defendant.²⁸⁰ In this context, these terms appear in a judgment of 1458 recording the conviction of Jean duc d'Alençon of treason.²⁸¹ The judgment makes particular reference to the fact that one

278. Francisco Peña, Scholion 28 on Directorium inquisitorum (1578), in Directorium, supra note 273, at 138.

279. See Esmein, supra note 216, at 114-17, 125-26, 132-33, 137; cf. Tardif, supra note 184, at 150-51 (procedure in use by the end of the fourteenth century). So fearsome was the procedure *extraordinaire* that Esmein writes "its name alone strikes the spirit." Id. at 116. See also 2 Félix Aubert, Histoire du parlement de Paris de l'origine à François I^{er} 218 (Paris, Alphonse Picard 1894). If the crime charged did not involve a potential penalty of death, loss of limb, or other corporal punishment, the procedure *ordinaire*, i.e., normal accusational procedure, would be followed. Albéric Allard, Histoire de la justice criminelle au seizième siècle 336-37 (Ghent-Paris-Leipzig, H. Hoste, A. Durand & Pédone Lauriel, Alphonse Durr 1868).

280. See Allard, supra note 279, at 237-40. Confrontation was regarded as one of three component parts of the procedure *extraordinaire*, the others being the interrogation of the defendant and the *récolement* of the witnesses against him. See infra note 288; Allard, supra note 279, at 215. A prosecution could be "converted" from procedure *extraordinaire* to *ordinaire* if the judge decided that the case was less serious than initially thought; because procedure *ordinaire* was essentially identical to civil procedure, a prosecution so converted was said to have been "civilized" (*civilisé*). See id. at 337. Differences of opinion existed as to whether, in a prosecution thus converted to procedure *ordinaire*, it was necessary to produce before the defendant the witnesses whose testimony had been taken in the investigative stage of the proceeding. See id. at 338. Thus, although confrontation might be ordered in a procedure *ordinaire*, see 2 Aubert, supra note 279, at 216-17, it was regarded as peculiarly a feature of the procedure *extraordinaire*, see Esmein, supra note 216, at 160 n.1.

In a prosecution commenced by procedure *ordinaire*, the defendant had the right to be present to see the witnesses against him sworn (*ad videndum jurare testes*), but in practice the right was often waived. See Guilhiermoz, supra note 208, at 69-70 & nn.2-3.

281. Judgment of the court of peers of Oct. 10, 1458, against the duc d'Alençon, in 9 Recueil général des anciennes lois françaises 341 (Isambert & Decrusy eds., Paris, Belin-Leprieur, Verdrière 1825) [hereinafter Recueil général].

Galet, an important prosecution witness, had been “confronted” (*confronté*) with the defendant.²⁸² At its conclusion, the judgment mentions that “confrontations of witnesses” with the defendant (“confrontations des tesmoings faictes à l’encontre dudit d’Alençon”) took place.²⁸³ The term²⁸⁴ must have come into use in this sense in France in that decade because, five years earlier, a royal decree of 1453 exhaustively regulating the administration of justice²⁸⁵ did not use it, but referred only to the customary requirement that a party had to have an opportunity “to see . . . the witnesses swear” (“veoir . . . jurer les tesmoings”).²⁸⁶

The procedure of *confrontation*, as applied in France, was minutely regulated in the famous *Ordonnance* of King Francis I issued at Villers-Cotterets in 1539:²⁸⁷

(153) When the witnesses appear in order to be confronted, they shall forthwith be presented with their prior depositions [*récollés*]²⁸⁸ by the judges, and under oath, in the absence of the accused; and those who persist in their allegations against the accused, shall forthwith be confronted with him, separately and apart, and one after the other.

(154) And to make the confrontation, both the accused and the witness shall appear before the judge, who shall have each of them take an oath in the presence of the other to tell the truth: and after he does this, and before reading the deposition of the witness in the presence of

282. 9 *id.* at 351.

283. 9 *id.* at 352.

284. For other uses of the term *confrontation* in French judicial orders of this period, see Judgment of the court of parlement of Mar. 24, 1488, against Philippe de Commines, in 11 *Recueil général*, supra note 281, at 177, 178 (Isambert et al. eds., 1827); Judgment of a commission of court of parlement of Feb. 9, 1505, against René de Rohan, in 11 *Recueil général*, supra note 281, at 446, 446 (Isambert et al. eds., 1827).

285. *Ordonnances ou Établissements pour la réformation de la justice* (Apr. 1453), in 9 *Recueil général*, supra note 281, at 202.

286. *Id.* § 97 at 241.

287. *Ordonnance sur le fait de la justice* (Aug. 1539) [hereinafter *Ordonnance*], in 12 *Recueil général*, supra note 281, at 600 (Isambert et al. eds., 1827). A detailed analysis of this legislation is contained in John H. Langbein, *Prosecuting Crime in the Renaissance* 223-48 (1974).

288. The reference is to the procedure called *récolement*. The witnesses, during the investigative stage of the case, had given their depositions to delegates of the judge called *enquêteurs*. At this point in the proceeding, they appeared before the judge himself to confirm, under oath, the contents of their prior depositions. See 2 Aubert, supra note 279, at 105 & n.2; Esmein, supra note 216, at 132. In Italian inquisitional proceedings, this procedure was called *repetitio testium* (*ripetizione*). See Salvioli, supra note 184, at 537-38.

the accused, he [the judge] shall ask him [the accused] if he has any reproaches against the witness there present, and enjoin him to state them promptly: which it is our will that he [the accused] be bound to do: otherwise they shall not be received, of which he shall be expressly advised by the judge.

(155) And if he [the accused] does not allege any reproach, . . . there shall proceed the reading of the deposition of the said witness, for confrontation, after which the accused shall no longer be received to state or allege any reproaches against the said witness.²⁸⁹

The word "*confrontation*," as the French had begun to use it, carries within itself the idea of "facing" an accuser. Its roots are Latin: "the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)."²⁹⁰

In the first half of the sixteenth century, practitioners must have begun to use the phrase "face-to-face" to capture the essence of a

289. (153) Quand les tesmoins comparoistront pour estre confrontés, ils seront incontinent récollés par les juges, et par serment, en l'absence de l'accusé; et ceux qui persisteront en ce qui sera à la charge de l'accusé, lui seront incontinent confrontés séparément et à part, et l'un après l'autre.

(154) Et pour faire la confrontation, comparoistront, tant l'accusé que le tesmoin, pardevant le juge, lequel, en la présence l'un de l'autre, leur fera faire serment de dire vérité: et après icelui fait, et auparavant que lire la déposition du tesmoin en la présence de l'accusé, lui sera demandé s'il a aucuns reproches contre le tesmoins [sic] illec présent, et enjoint de les dire promptement: ce que voulons qu'il soit tenu de faire: autrement n'y sera plus reçu, dont il sera bien expressément adverti par le juge.

(155) Et s'il n'allègue aucun reproche, . . . sera procédé à la lecture de la déposition dudit tesmoin, pour confrontation, après laquelle ne sera plus reçu l'accusé à dire ne alléguer aucuns reproches contre ledit tesmoin.

Ordonnance, supra note 287, at 631-32.

290. *Coy*, 487 U.S. at 1016. "*Confrontation*" is not an ancient word. Its Latin equivalent (*confrontatio*) was wholly unknown to the Romans. It does not appear in the Latin language until late in the eleventh century. Then it is used, not in its current sense, but with the meanings "abutment" (in the sense of two properties bordering one another) or "comparison" (in the sense of comparing one document against another). See 2 Charles Du Fresne sieur Du Cange, *Glossarium mediae et infimae Latinitatis* 536 v. *confrontatio* (G.A.L. Henschel ed., Paris, Didot 1842) (1678). It is possible that *confrontatio* in the modern sense is a Latinized rendering of the Spanish noun *careo*, which means the same thing and has at its root the word *cara* ("face"). Speculation to that effect seems reasonable in light of the fact that *cara* is also the root of the medieval words *accarratio* (Latin) and *acarement* (French), both of which are synonymous with *confrontatio* and *confrontation* in the sense of bringing accusing witnesses before a criminal defendant. See 1 *id.* at 40-41 v. *accarratio* (1840); François Ragueau & Eusèbe de Laurière, *Glossaire du Droit François* 144 v. *confronter* (L. Favre ed., Niort, L. Favre 1882) (1704).

defendant's right to confrontation. The time of this development can be inferred with some certainty. In Joos de Damhouder's *Praxis rerum criminalium* (Practice in Criminal Matters), published in 1554, the author remarks that "we call" the practice of producing witnesses before a defendant "confrontation, as a received word rather than one coming from the Latin, that is, face to face" ("quod nos recepto magis quam Latino vocabulo vocamus confrontationem, quasi fronte ad frontem").²⁹¹ Damhouder's *Praxis*, however, was a plagiarism of a then-unpublished work written some forty years earlier, the *Practijcke criminele* (c. 1510) by Philips Wielant, a Flemish jurist.²⁹² Because Damhouder's parenthetical interpolation does not appear in the corresponding chapter of Wielant's work,²⁹³ it must have been in the interval between the two that the phrase "face-to-face" came into general use to describe confrontation.

XII. A RETURN TO THE ROOTS OF CONFRONTATION: THE RADICAL VISION OF PIERRE AYRAULT

By the mid-sixteenth century, the criminal procedure of continental Europe had established that, except in heresy prosecutions, a defendant had a right to "confront" the witnesses against him and to meet his accusers "face-to-face" in court. However, this right did not include the cross-examination of the accusing witnesses, or even hearing the witnesses while they testified. This was far from the practice of Rome in Cicero's day, when accusing witnesses testified in open court before the defendant and were subjected to cross-examination by the defendant's counsel. The discrepancy between the ancient practice and the minimal procedural right of the Middle Ages is sharp. It was toward this discrepancy that a profound commentator on criminal justice, Pierre Ayrault, turned his attention near the close of the sixteenth century.

291. Joos de Damhouder, *Praxis rerum criminalium* 47 (De confrontatione) at 126 (Antwerp, Joannes Beller 1554). Here the suggestion is that the use of the word in this sense is a colloquialism of legal practitioners. See Johann O. Tabor, *De Confrontatione* 3 (Giessen, Joseph D. Hampel 1663).

292. See Eg. I. Strubbe, Joos de Damhouder als criminalist, 38 *Tijdschrift voor Rechtsgeschiedenis* 1, 24-26 (1970); Eg. I. Strubbe, Philippe Wielant, in 27 *Biographie Nationale* cols. 279, 291-92 (Établissements Émile Bruylant ed., 1938). Damhouder added learned commentary of his own to his Latin version of Wielant's text. See Strubbe, *supra*, at 30. Wielant's work did not appear in print until 1872. See *infra* note 293.

293. See Philips Wielant, *Practijcke criminele* 46 (Van confronterene), at 69 (Aug. Orts ed., Ghent, Annoot-Braeckman 1872).

Ayrault (1536-1601) viewed the criminal justice system of his day from within. Ayrault was a prominent lawyer who later became a criminal judge in the city of Angers.²⁹⁴ His contemporaries remembered him for his rigorous severity, or, as the epitaph on his tombstone read, for being “the terror of the guilty” (“l’effroi des coupables”).²⁹⁵ However, they also remembered him for his wide knowledge of the criminal law, his conscientiousness in applying it, and his ability to safeguard the rights of the accused.²⁹⁶ In a massive treatise, entitled *Ordre, formalité et instruction judiciaire*,²⁹⁷ Ayrault took a searching look at the contemporary French criminal procedure and disliked much of what he saw.

Ayrault began his consideration of the requirement of “confrontation” by stating why confrontation was “necessary” and what it comprised.

And in truth it seems that it is natural and consequently common to all men that the accused be heard; and that the witnesses who are charging him be brought before him, to sustain face to face the crime of which they are accusing him, in order that if he has something to say against them, he may say it; and that the witnesses may see and recognize the person about whom they are deposing.²⁹⁸

As thus circumscribed, suggested Ayrault, the right proved too limited to serve the truth-finding purpose of a criminal trial, because it did not encompass any right of the defendant to hear the witness’s testimony when given, nor did it provide an opportunity for the defendant to question the witness.²⁹⁹ The ancient Romans, by contrast, left the interrogation of witnesses to the parties, “[f]or the interrogation, to be good, must be done captiously and subtly; . . . now in heat, now gently: which are all matters for the adver-

294. Victor Jeanvrot, Notice biographique sur Pierre Ayrault, in Pierre Ayrault, *Ordre et instruction judiciaire* at xciv (Paris, A. Cotillon, A. Chevalier-Marescq 1881).

295. *Id.* at xcvi.

296. See *id.* at xcvi-xcviii.

297. Pierre Ayrault, *Ordre, formalité et instruction judiciaire* 1.5 (1588), in Ayrault, *supra* note 294.

298. Pour quoy la confrontation est nécessaire. Et à la vérité il semble qu’il est naturel & conséquemment commun à tous hommes que l’accusé soit ouy; & que les temoings qui le chargent, soient amenez devant luy, pour soustenir face à face le crime dont ils l’accusent, afin que s’il a à dire quelque chose contre eux, il le die; & que les tesmoings voient & reconnoissent celui dont ils déposent.

Id., in Ayrault, *supra* note 294, at 7.

299. See *id.* 3.43 at 197-203.

sary, . . . not the judge These interrogations cannot be well suited to him who must be neutral or impartial between the accuser and the accused”³⁰⁰

Ayrault found the ancient Roman practice preferable to that of his time. He embraced the idea of leaving the questioning of witnesses to the parties, rather than to the judge. He asserted that this practice provided for a more searching interrogation and allowed the judge to retain his “gravity and authority.”³⁰¹

[W]e have taken one of the extremes: and in formally removing from the parties this faculty of interrogating, hearing, and examining their witnesses, we have attached it to the judge in such a way that it seems that today the poor parties are in wardship, and more blind in their proceedings than those who fence at full midnight.³⁰²

Finally, Ayrault stressed that the process of confrontation of witnesses that he advocated should be carried out in public in order to achieve its truth-finding goal. In classical antiquity, he pointed out, all trial proceedings, including the confrontation of witnesses, took place “outdoors and in public, in the presence of the people, with all the judges and parties present.”³⁰³ This practice, he said, should be resumed: “It is easy, behind closed doors, to adjust or diminish [the evidence], to effect intrigues or pressures. The audience, by

300. “Car l’interrogatoire, pour estre bon, se doit faire captieusement & subtilement; . . . maintenant en cholère, maintenant doucement: qui sont toutes questions d’adversaire, . . . non de Iuge . . . Ces interrogatoires ne peuvent pas bien convenir à celuy qui doit estre neutre ou mitoyen entre l’accusateur & l’accusé” *Id.* at 197-98.

301. [T]he [Roman] judge in leaving to the parties the questions most probing and most subtle, more tart and more importunate, easily retained gravity and authority ([L]e Iuge en relaisant aux Parties les demandes les plus curieuses & les plus subtiles, plus aigres & plus importunes, retenoit aisément la gravité & autorité)

Id. at 200.

302. Mais nous avons pris l’une des extrémitez: & ostant formellement aux Parties ceste faculté de s’interroger, ouyr & examiner leurs tesmoings, nous l’avons tellement attachée au Iuge, qu’il semble que les povres Parties soient aujourd’huy en curatelle, & plus aveugles en leurs procez que ceux qui escrivent en plain minuict.

Id. at 201.

303. “[A]nciennement à Rome & en la Grèce, toute cette instruction, audition, recolement, confrontation, & iugement se faisoit à huys ouvert & en public, présent le Peuple, tous les Iuges & Parties présentes.” *Id.* 3.70, at 244.

contrast, is the rein on the passions. It is the scourge of bad judges."³⁰⁴

Ayrault's vision was remarkable. He was espousing the right of confrontation in its modern dimensions, as the Sixth Amendment has been held to protect it. Yet he had no contemporary models to guide him. The expanded right he envisioned was unknown not only in the legal systems of continental Europe, but in the common law of England as well. The trial of Sir Walter Raleigh, the point of departure for the development of the right in Anglo-American criminal procedure, was still fifteen years in the future.³⁰⁵

XIII. CONCLUSION

As the Supreme Court observed in *Coy*, the right of confrontation " 'comes to us on faded parchment,' . . . with a lineage that traces back to the beginnings of Western legal culture."³⁰⁶ From that parchment, one can discern that the core of the right lies in the simple act of producing accusing witnesses in court in the defendant's presence.

What the parchment fails to disclose is the reason why the Romano-canonical legal system insisted upon this act in all cases, except for the canonical inquisition against heresy. The sources are not forthcoming on this point. Certainly it was not for the sake of cross-examination of the witnesses by the defendant, because, by the time Roman law began to require the presence of accusing witnesses in a criminal case, the practice of cross-examination had already gradually begun to disappear.

Yet the requirement persisted. It was rigorously adhered to even in the later Middle Ages, when it consisted solely of an opportunity for defendants to see the witnesses against them as the witnesses took the oath. Medieval commentators indicate that this requirement enabled a defendant to respond to a witness's testimony and to have questions put to the witness. This does not explain, however, why many believed it so important to have the accusing witness physically produced in court in the defendant's presence. These purposes could have been achieved simply by providing the

304. "Il est facile à huys clos d'adiouster ou diminuer de faire brigues ou impressions. L'audiance, au contraire, est la bride des passions. C'est le fléau des mauvais Iuges." *Id.* 3.74, at 248.

305. See *supra* text accompanying notes 2, 3, and 5.

306. *Coy*, 487 U.S. at 1015 (quoting *Green*, 399 U.S. at 174 (Harlan, J., concurring)).

defendant with the names of the witnesses against him and their statements.³⁰⁷

It was the particular genius of Ayrault to have realized that confrontation, to fulfill its truth-seeking function, had to include cross-examination of accusing witnesses in open court. But Ayrault also perceived that the production of the witness in court, face-to-face with the accused, was in itself fundamental.³⁰⁸

One may share Wigmore's enthusiasm for cross-examination as "the greatest legal engine ever invented for the discovery of truth."³⁰⁹ But, at the same time, one might question his dismissal of the production of the witness in the sight of the defendant as serving only "the idle purpose of gazing upon the witness, or of being gazed upon by him."³¹⁰ The *Coy* court saw that "something deep in human nature"³¹¹ calls for this act of production. "[T]hat face-to-face presence may . . . confound and undo the false accuser"³¹²

The power of the act of production in itself, and the correctness of the *Coy* court's perception of it, are borne out by the history of the origin of the right of witness confrontation in England. Through the fifteenth century, no suggestion of any such right existed in the English common law because witness testimony was not a feature of criminal trials. Criminal charges were determined by the jury on the basis of its personal knowledge of the facts and its out-of-court inquiries.³¹³ In the sixteenth century, witnesses began to testify before juries in court.³¹⁴ This procedure, however, was a matter of prosecutorial convenience—not a right of the defendant. The deposition testimony of absent prosecution witnesses was admissible in evidence in a criminal trial.³¹⁵ Raleigh's

307. That is what Pope Innocent III and, subsequently, the Fourth Lateran Council of 1215 guaranteed to an inquisitional defendant. See *supra* text accompanying note 232-34. Gandinus in his *Tractatus de maleficiis* cited that guarantee and added to it the right of the defendant actually to see the witnesses as they took the oath. See *supra* text accompanying notes 244-51.

308. See *supra* note 298 and accompanying text.

309. 5 Wigmore, *supra* note 5, § 1367, at 32.

310. 5 *id.* § 1395 at 150.

311. *Coy*, 487 U.S. at 1017.

312. *Id.* at 1020.

313. See 5 Wigmore, *supra* note 5, § 1364, at 12-15.

314. See 5 *id.* at 12-13.

315. See 5 *id.* at 20-23; P.R. Glazebrook, *The Reign of Mary Tudor*, 1977 *Crim. L. Rev.* 582, 585. For an enlightening account of this aspect of English criminal procedure in the course of transition in the second half of the sixteenth century, see Langbein, *supra* note 287, at 26-31.

trial in 1603 is significant because, there, the defendant demanded “face-to-face” production of the witness against him as a matter of right.³¹⁶

Raleigh was on trial for treason. The evidence about his alleged treasonous acts came from an out-of-court deposition by an alleged accomplice named Cobham. Raleigh did not demand that Cobham be subject to cross-examination. He did not even request that questions be put to Cobham by the judges. He merely asserted that he had a right to have Cobham produced before him in court: “[L]et Cobham be here, let him speak it. Call my accuser before my face, and I have done.”³¹⁷ The judges refused Raleigh’s request, saying that the law of England did not require that it be granted and that Cobham’s deposition was probative (“forcible”) evidence against him.³¹⁸ Why they were so adamant in refusing to have Cobham produced was revealed by one of them in a moment of candor: “I marvel, sir Walter, that you being of such experience and wit, should stand on this point My lord Cobham hath, perhaps, been laboured withal; and to save you, his old friend, it may be that he will deny all that which he hath said.”³¹⁹

The right demanded by Raleigh to meet Cobham “face-to-face” in court was nothing more than the right which had been in place in the Roman and canon law for at least a thousand years. The reason given by the judge for denying it speaks volumes for its potency.

316. See *supra* text accompanying note 2.

317. Trial of Sir Walter Raleigh, 2 T.B. Howell, at col. 16.

318. See *id.* cols. 15-16.

319. *Id.* col. 18.

APPENDIX

Decretum of Gratian (c. 1140)³²⁰
Pars II, Causa 3, quaestio 9

Concerning accusers and witnesses, it is clear from many authorities that they shall not be able to raise the voice of accusation or testimony against an absent person.³²¹

c.1. *An accuser is not to be heard unless the defendant is present.* We decree that an accuser who suggests the case in the absence of the adversary is not to be believed at all prior to a just examination of each party.³²²

c.2. *It is not permitted to enter judgment in the absence of the adversary.* Let the ecclesiastical judges beware of pronouncing judgment in the absence of him whose case is being heard, because it will be invalid; on the contrary, they shall hold the case in the synod for consideration. Let neither the calumny nor the voice of a betrayer be heard.³²³

De accusatoribus uero uel testibus, quod in absentem uocem accusationis uel testificationis exhibere non ualeant, multorum auctoritatibus liquet.

c.1. *Nisi reo presente accusator non audiatur.* Accusatori omnino non credi decernimus, qui absente aduersario causam suggerit, ante utriusque partis iustam discussionem.

c.2. *Absente aduersario sententiam ferri non licet.* Caueant iudices ecclesiae, ne absente eo cuius causa uentilatur, sententiam proferant, quia irrita erit; imo et causam in sinodo pro facto dabunt. Proditoris uero nec calumpnia, nec uox audiatur.

320. Reprinted here are portions of the text of Gratian's *Decretum* (c. 1140), including both the Latin text of C.3 q.9 cc.1-21 found in 1 *Corpus Iuris Canonici*, supra note 92, cols. 529-34, and its English translation.

321. C.3 q.9 dict. ante c.1, in 1 id. at col. 529.

322. Gratian attributes this canon to Pope Telesphorus. The actual source is pseudoisidorean and the ultimate source is the *interpretatio* to *Lex Rom. Vis. 11.14.4*. See supra notes 134, 143, 146.

323. Gratian attributes this canon to Pope Eleutherus. The actual source is pseudoisidorean and the ultimate source is the *Statuta Ecclesiae antiqua* c.53. See supra notes 82, 139, 146.

In translating the words *pro facto* as "for consideration," the authors have followed the translation of c.103 of the Collection in 74 Titles, see supra note 156, appearing in The

c.3. *An accuser is not to be heard in the absence of the defendant.* With him absent whom one wishes to accuse, nothing is to be credited to the accuser, who is received with difficulty without a writing, but is never to be received through a writing; because no one can be accused through a written instrument, but let everyone make his accusation in his own voice, and with him present whom he wishes to accuse.³²⁴

c.4. *Those things which are done against the absent are to be entirely void.* In every matter or place, everything done or adjudged against the absent shall be entirely void, since no one judges, and no law condemns, an absent person.³²⁵

c.5. *One who is not accused or convicted while he is present is not to be adjudged.* It is improper to try or convict anyone before he has lawful accusers present and receives opportunity for defense to clear himself of the charges.³²⁶

c.3. *Absente reo accusator non audiatur.* Absente eo, quem accusare uoluerit, quicumque accusatori non credatur, qui sine scripto difficile, per scriptum autem numquam recipiatur; quia per scripturam nullus accusari potest, sed propria uoce, et presente eo, quem accusare uoluerit, suam quisque agat accusationem.

c.4. *Que in absentes geruntur omnino euacuentur.* Omnia, que aduersus absentes in omni negotio aut loco aguntur aut iudicantur, omnino uacuentur, quoniam absentem nullus addicit nec ulla lex dampnat.

c.5. *Non iudicetur qui presentialiter non accusatur uel conuincitur.* Non oportet quemquam iudicari uel dampnari prius, quam legitimos habeat presentes accusatores, locumque defendendi accipiat ad abluenda crimina.

Collection in Seventy-Four Titles: A Canon Law Manual of the Gregorian Reform 126 (John Gilchrist trans., *Mediaeval Sources in Translation* No. 22, 1980).

324. Gratian attributes this canon to Pope Calixtus. The actual source is pseudoisidorean. See supra note 148.

325. Gratian attributes this canon to Pope Cornelius. The actual source is pseudoisidorean. See supra note 150.

326. Gratian attributes this canon to Pope Marcellus. The actual source is pseudoisidorean and the ultimate source is Acts 25:16 (Vulgate). See supra notes 135, 146.

c.6. Concerning the same.

Let refuge also be had in the decrees of the holy Fathers that it is not canonical to try or condemn any priest before he has present accusers who have been canonically examined and receives opportunity for defense, that is, ecclesiastical adjournments, to clear himself of the charges etc.³²⁷

....

c.8. Concerning the same.

Whoever chooses to accuse someone shall accuse while personally present and not through another, an inscription having of course been submitted. And no one ever shall be judged before he has lawful accusers present and receives opportunity for defense to clear himself of the charges.³²⁸

c.6. De eodem.

Habetur quoque in decretis sanctorum Patrum sancitum, non fore canonicum quemquam sacerdotum iudicare uel dampnare ante, quam accusatores canonicè examinatos presentes habeat locumque defendendi accipiat, id est inducias ecclesiasticas ad abluenda crimina etc.

....

c.8. De eodem.

Qui accusare alium elegerit, presens per se, et non per alium accuset, inscriptione uidelicet premissa. Neque ullus umquam iudicetur ante, quam legitimos accusatores presentes habeat, locumque defendendi accipiat ad abluenda crimina.

327. Gratian attributes this canon to Pope Damasus. The actual source is pseudoisidorean and the ultimate source is Acts 25:16 (Vulgate). See supra notes 135, 146.

328. Gratian attributes this canon to Pope Damasus. The actual source is pseudoisidorean. See supra note 152. The first sentence combines language from the *interpretatio* to Lex Rom. Vis. 9.1.9 (438/76), see Lex Romana Visigothorum, supra note 134, at 172, and Lex Rom. Vis. Pauli Sent. 5.5.9, see supra note 140. The ultimate source of the second sentence is Acts 25:16 (Vulgate). See supra note 135.

The "inscription" was, in Roman law, "the essential part of a formal accusation . . . [T]he charge of accusation was formally drawn up in writing. This was the *inscriptio libelli* or *libellus accusationis*, which was signed by the accuser. . . [who thereby] became liable to . . . penalties . . . if he failed to convict the accused person or . . . abandoned the action . . ." The Theodosian Code, supra note 1, at 573, 585 v. inscription (*inscriptio*).

c.9. Concerning the same.

It is fitting that no life of an innocent person be stained by the perniciousness of an accuser; therefore whoever is incriminated by anyone whomsoever, having been accused, is not to be given over to punishment before the accuser is present, and the requirement of the laws and canons is examined. But if a person is found unfit to accuse, there shall be no adjudication on the basis of his accusation.³²⁹

....

c.11. An absent person cannot be accused or adjudged.

An accuser is not to be heard when the adversary is absent, and a judgment given by a judge with the other party absent shall have no force.³³⁰

c.9. De eodem. Dignum

est, ut uita innocentis nulla maculetur pernicie accusatoris; ideo quisquis a quolibet criminatur, non ante accusatus suplicio detur, quam accusator presentetur, atque legum et canonum sententia exquiratur. Quod si indigna ad accusandum persona inuenitur, ad eius accusationem non iudicetur.

....

c.11. Absens nec accusari, nec iudicari potest. Absente aduersario non audiatur accusator, nec sententia absente parte alia a iudice dicta ullam obtinebit firmitatem.

329. Gratian attributes this canon, correctly, to a seventh century ecclesiastical council held in the Visigothic kingdom of Spain, the Sixth Council of Toledo. The original text of the canon is in substantially the same language as that appearing in c.9 C.3 q.9, but concludes with the clause "except when the case turns on a charge of treason" ("nisi ubi pro capite regiae maiestatis causa versatur"). Concilio Toledo VI c.11 (638), in *Concilios visigóticos e hispano-romanos* 233, 241 (José Vives et al. eds., 1963).

As is clear from the reference to "treason" in the original text, canon 11 of the Sixth Council of Toledo, although promulgated by an ecclesiastical assembly, was intended to govern secular criminal proceedings. In 633, at the Fourth Council of Toledo, the Church in Spain had undertaken a constitutional role in the governance of the Visigothic kingdom, including the guaranteeing of procedural rights to criminal defendants. See José Orlandis, *Los concilios en el Reino visigodo católico*, in José Orlandis & Domingo Ramos-Lissón, *Historia de los Concilios de la España romana y visigoda* 161, 292-96 (1986). Canon 11 of the Sixth Council of Toledo "established new procedural guarantees, following a guideline marked by . . . the Fourth Council . . . and attempting now to prevent an innocent person from suffering as a result of false accusations." *Id.* at 315.

330. Gratian attributes this canon to Pope Felix. The actual source is pseudoisidorean. See *supra* note 147.

c.12. A definitive judgment is not to be rendered with the other party absent. In truth he is not a just mediator who, with one litigating and the other absent, does not shun deciding issues emerging from both. Such things having been permitted, we desire and warn by our apostolic authority that if the priest concerned wants to approach the apostolic see after his excommunication, no one is to presume to impede his journey.³³¹

c.13. Judgment is not to be entered against an absent person. No absent person shall be adjudged, because both the divine and human laws prohibit this.³³²

.....

c.12. Altera parte absente diffinitiva sententia non feratur. Reuera iustus mediator non est, qui uno litigante et altero absente amborum emergentes lites decidere non formidat. His ita premissis, uolumus et auctoritate apostolica moneamus, ut, si presbiter, de quo agitur, post excommunicationem suam apostolicam sedem adire uoluerit, nullus iter eius impedire presumat.

c.13. In absentem non est ferenda sententia. Absens nemo iudicetur, quia et diuinae et humanae leges hoc prohibent.

.....

331. As cited by Gratian, the source of this canon is a letter of Pope Nicholas I to Wenilon, Archbishop of Sens (JE 2780) (858/65). See Nicolai I papae epistolae no. 119 (Ernst Perels ed.), in 6 MGH Epistolae 257, 637-38 (1912).

332. Gratian attributes this canon to Pope Zephyrinus. The actual source is pseudoisidorean. See supra note 151. In a dictum following c.13, Gratian writes: "Unless he shall have been absent from contumacy. For contumacy causes him to be deemed present." ("Nisi fuerit absens ex contumacia. Pro presenti namque contumacia eum haberi facit.")

*c.15. Witnesses shall not give testimony about matters other than those they know from having been present. Witnesses shall not present testimony through any writing whatever, but shall be present and state testimony truthfully about those matters they know and saw. Nor shall they state testimony about affairs and matters other than those they know were done in their presence.*³³³

....

*c.18. An absent person cannot accuse or be accused. An absent person cannot accuse through another or be accused, nor is a related witness to be admitted.*³³⁴

*c.19. With the defendant absent, a bill of accusation is offered in vain. The written charges which Lucidius gave us would have been valid if at that time his adversary had been present there. But the laws do not allow that the deeds which he alleged to us be recited with the adversary absent.*³³⁵

....

c.15. Testes non dicant testimonium, nisi de his, que presentialiter nouerunt. Testes per quamcumque scripturam testimonium non proferant, sed presentes de his, que uiderunt et nouerunt, ueraciter testimonium dicant. Nec de aliis causis uel negotiis testimonium dicant, nisi de his, que sub eorum presentia acta esse noscuntur.

....

c.18. Absens nec accusare, nec accusari potest. Absens per alium accusare aut accusari non potest, nec affinis testis admittatur.

c.19. Reo absente libellus accusationis frustra offertur. Cartae, quas dedit nobis Lucidius, si illo tempore aduersarius ipsius illic presens fuisset, ualidae erant. Sed quia aduersario absente gesta, que nobis recensuit, facta leguntur, talia leges non recipiunt.

....

333. Gratian attributes this canon to Pope Calixtus. The actual source is pseudoisidorean and the ultimate source is Lex Vis. 2.4.5. See supra notes 136, 144, 146.

334. Gratian attributes this canon to Pope Felix. The actual source is pseudoisidorean, and the ultimate source of the first clause is Paulus, Sententiae 5.5^A.9. See supra notes 140, 146.

335. As cited by Gratian, the source of this canon is a letter of Pope Pelagius I to Sindual, Master of the Soldiers (JK 990) (559). See supra note 83.

c.21. The accuser and the accused must be present at the same time. It is necessary according to the documents of sacred scripture and the scales of justice that the accused and accuser be present at the same time, and that one party, however great and of whatever quality may be the authority vested in him, be so fully heard that no prejudice accrues to the other party.³³⁶

c.21. Accusator et accusatus simul debent adesse. Necessesse est secundum sacrarum scripturarum documenta ac secundum iustitiae trutinam, et accusatum et accusatorem simul adesse, et unam partem, quantacumque et qualicumque predita sit auctoritate, sic prorsus audiri, ut alteri parti nullum prejudicium inrogetur.

336. As cited by Gratian, the source of this canon is a letter of Pope Nicholas I to Hincmar, Archbishop of Rheims (JE 2838) (858/67). See Nicolai I papae epistolae, supra note 331, no. 128, at 649.