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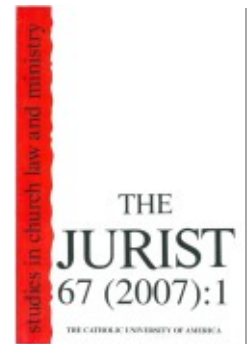
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FULL AND PARTIAL PROOF IN CLASSICAL CANONICAL PROCEDURE[†]

JAMES A. BRUNDAGE*

New methods for settling civil disputes and punishing crimes began to take shape in Western Christendom during the closing decades of the twelfth century. By the middle of the thirteenth century the main features of a new system of civil and criminal procedure, which contemporaries described variously as the *ordo iudiciarius*, *ordo iudiciorum*, or *ordo iuris*, had emerged.¹ Ecclesiastical and civil courts that followed the Continental *ius commune* employed it in every corner of Western Christendom. Although some of its features derived from the Roman law of late antiquity, the *ordo iuris* also drew heavily from ecclesiastical sources.² Accordingly it is sometimes described as romano-canonical procedure. Popes and church councils continued to modify its details through the latter part of the thirteenth and the early fourteenth centuries.

The appearance of the *ordo iuris* marked a radical shift away from practices, notably ordeals, that earlier medieval societies used to deal with dispute resolution and crime.³ Many of its fundamental features remain with us to this day. It must rank among the most long-lived and far-reaching changes in Western history.

[†] This is a lightly revised version of a paper presented at the annual meeting of the Renaissance Society of America in San Francisco on March 24, 2006.

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¹ For the history of the system's origins and early development Linda Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius: Begriff und Literaturgattung*, Ius commune, Sonderhefte, vol. 19 (Frankfurt: Vittorio Klostermann, 1984) is indispensable, as is her *Ordines iudicarii and Libelli de ordine iudiciorum, from the Middle of the Twelfth to the End of the Fifteenth Century*, Typologie des sources du moyen âge occidental, fasc. 63 (Turnhout: Brepols, 1994). I am greatly indebted to Dr. Fowler-Magerl as well for sharing with me a draft of her study, "Judicial Ordines and Their Circulation" forthcoming in volume 8, part 1, of the *History of Canon Law*, ed. Wilfried Hartmann and Kenneth Pennington. See also Kenneth Pennington, "Due Process, Community, and the Prince in the Evolution of the *Ordo iudiciarius*," *Rivista internazionale di diritto comune* 9 (1998) 9–47.

² On the Roman law of proof in the classical period see Giovanni Pugliese, "La prova nel processo romano classico," *Jus* 11 (1960) 386–424.

³ John W. Baldwin, "The Intellectual Preparation for the Canon of 1215 against Ordeals," *Speculum* 36 (1951) 613–626, and "The Crisis of the Ordeal: Literature, Law, and Religion around 1200," *Journal of Medieval and Renaissance Studies* 24 (1994) 327–353; Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986; repr. 1988), pp. 70–102; Paul Hyams, "Trial by Ordeal: The Key to Proof in Early Common Law," in *On the Laws and Customs of England: Essays in Honor of*

The *ordo iuris* wove into the fabric of Western thought some basic legal principles and concepts that we now take for granted—although perhaps we shouldn't. Among the most important of these are idea of due process of law,⁴ the presumption of innocence,⁵ the privilege against self-incrimination,⁶ and the belief that in a just society everyone, rulers and their agents as well as their subjects, must obey the law or be held responsible should they fail to do so.⁷ My purpose here is to sketch briefly just some of the innovations in the law of evidence that became current during the thirteenth century.

Samuel E. Thorne, ed. Morris S. Arnold et al. (Chapel Hill: University of North Carolina Press, 1981) 90–126. See also the criticisms of these views by Richard M. Fraher, "IV Lateran's Revolution in Criminal Procedure: The Birth of *Inquisitio*, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics," in *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*, ed. Rosalio Castillo Lara, *Studia et textus historiae iuris canonici*, vol. 7 (Rome: Libreria Ateneo Salesiano, 1992) 97–111.

⁴ Kenneth Pennington, *The Prince and the Law 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley and Los Angeles, 1993) 132–164, as well as his "Il diritto dell'accusato: L'origine medievale del regolare procedimento legale," in *La parola all'accusato*, ed. Jean-Claude Maire Vigueur and Agostino Paravicini Bagliani (Palermo: Sellerio, 1991) 33–41, and "Due Process, Community and the Prince"; Richard H. Helmholz, "The Character of the Western Tradition: Assessing Harold Berman's Contributions to Legal History," in *The Integrative Jurisprudence of Harold J. Berman*, ed. Howard O. Hunter (Boulder, CO: Westview Press, 1996) 29–50; Paul Hyams, "Due Process versus the Maintenance of Order in European Law: The Contribution of the *ius commune*," in *The Moral World of the Law*, ed. Peter Coss (Cambridge: Cambridge University Press, 2000) 62–90; Keith Jurrow, "Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law," *American Journal of Legal History* 19 (1975) 265–279.

⁵ Ecclus. 11.7; *Codex Theodosianus*, ed. Theodor Mommsen, 3 vols. (Berlin: Weidmann, 1905, repr. 1990) 9.40.1; Cod 7.16; Hostiensis, *Lectura* to X 5.34.16 §3 (Venice: Apud Iuntas, 1581; repr. Turin: Bottega d'Erasmus, 1965), fol. 94va; William Durand, *Speculum iudiciale* 3.1 *De inquisitione* §6 and *De accusatione* §1.28 (Basel: Apud Ambrosium et Aurelium Frobenios Fratres, 1574; repr. Aalen: Scientia, 1975) 2:42 and 8; Richard M. Fraher, "'Ut nullus describatur reus prius quam convincatur': Presumption of Innocence in Medieval Canon Law," in *Proceedings of the Sixth International Congress of Medieval Canon Law*, ed. Stephan Kuttner and Kenneth Pennington, *Monumenta iuris canonici*, Subsidia, vol. 7 (Vatican City: Biblioteca Apostolica Vaticana, 1985) 493–506. For the citation system to the texts of the *ius commune* and their *Glossa ordinaria* see James A. Brundage, *Medieval Canon Law* (London: Longman, 1995) 190–205.

⁶ Durand, *Speculum iudiciale* 2.2 *De positionibus* §7.40 (1:594–95); Richard H. Helmholz, "Origins of the Privilege against Self-Incrimination: The Role of the European *Ius Commune*," *New York University Law Review* 69 (1990) 962–990; M. R. T. MacNair, "The Early Development of the Privilege against Self-Incrimination," *Oxford Journal of Legal Studies* 10 (1990) 66–84.

⁷ Pennington, *The Prince and the Law*, 90–106; Brian Tierney, "Medieval Canon Law and Western Constitutionalism," *Catholic Historical Review* 62 (1966) 1–20.

A basic axiom of the *ordo iuris* held that no judge could lawfully punish a wrongdoer unless and until his guilt had been conclusively proved.⁸ The standard of proof that twelfth-century jurists required demanded a level of evidence that was extremely difficult to meet. Proof, they insisted, must be clearer than the light of day.⁹ A criminal conviction, they maintained, must rest either on a free confession of guilt by the accused or else on sworn testimony from two credible eyewitnesses to the crime, or evidence in two authentic documents, or some combination of oral and written evidence.¹⁰

While this standard of proof protected defendants from being convicted on slender evidence, perhaps furnished by a malicious accuser, it also made it extraordinarily difficult to convict perpetrators of what jurists described as occult crimes, that is, offenses that were unlikely to leave traces in formal documents and which offenders usually committed when no witness—much less two of them—were around.

Irregular sexual behavior by the clergy was one occult crime that thirteenth-century popes were especially eager to repress. Popes and councils during the previous century had made it legally impossible for clerics in major orders—subdeacons, deacons, priests, and bishops—to marry and categorically forbade them to engage in sexual relations of any kind with anyone, or for that matter any thing.¹¹ Despite this, clergymen, being human, now and again yielded to carnal temptations. Some

⁸ See especially Fraher, “Ut nullus describatur reus.”

⁹ Cod. 4.19.25 and Accursius, *Glos. ord. to v. luce clarior*; *Decretum Gratiani* C. 2 q. 8 c. 2; Geoffrey of Trani, *Summa super titulis decretalium* to X 2.19 De probationibus §1, fol. 102va; Hostiensis, *Lectura* to X 2.1.4 §9 v. *legitima probatione*, fol. 106vb.

¹⁰ Cod. Theod. 11.39.3 = Cod. 4.20.9; Antonio Metro, “Unus testis nullus testis,” in *Critical Studies in Ancient Law, Comparative Law and Legal History: Essays in Honour of Alan Watson*, ed. John Cairns and Olivia Robinson (Oxford: Hart Publishing, 2001) 104–16. Learned jurists showed off their ingenuity by distinguishing and subdividing the modes of proof. Johannes Teutonicus in his *Glos. ord. to C. 2 q. 1 c. 1 v. convictum* enumerated just four species of proof. Tancred, *Ordo iudiciarius* 3.5.6, in Pillius, *Tancredus, Gratia Libri de iudiciorum ordine*, ed. Friedrich Christian Bergmann (Göttingen: Vandenhoeck & Ruprecht, 1842; repr. Aalen: Scientia, 1965) 220, listed six, while Hostiensis, *Lectura* to X 2.19.15 §3, fol. 83rb–va, found nine of them and William Durand, *Speculum iudiciale* 2.2 De probationibus §3.1, came up with no less than twelve.

¹¹ First Lateran Council (1123) c. 7 and 21, Second Lateran Council (1139), c. 6–7, in *Decrees of the Ecumenical Councils*, ed. Giuseppe Alberigo et al., trans. Norman P. Tanner et al., 2 vols. (London: Sheed & Ward; Washington, DC: Georgetown University Press, 1990; hereafter DEC) 1:191, 194, 198; James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987) 220, 314–319, 342–343.

parishioners indeed demanded that their pastors take a concubine, in the hope that this would inhibit them from making lewd advances to the wives and daughters of members of their flock.¹²

Let us look at a not uncommon hypothetical situation: A parish priest keeps an unmarried woman to look after his domestic arrangements. She prepares his meals, does his housekeeping, and becomes his daily companion. Let us suppose that in the course of time she bears a child whose features remarkably resemble those of the priest. Under these circumstances suspicion that their relationship was not above reproach was likely to arise. Suspicion based on circumstantial evidence, however, no matter how plausible, was not proof, yet proof was essential for conviction and conviction in turn was required for punishment.¹³ Unless our hypothetical priest and housekeeper were rash enough to engage in sexual relations in the view of two witnesses, they could not be punished for misconduct under the two-witness standard, provided that they were prepared to deny the offense under oath.¹⁴ One leading authority declared that a judge could not even convict someone who committed a crime at high noon in the judge's presence, so long as the judge was not sitting in court at the time, the perpetrator denied the act, and no other witness came forward to testify against him.¹⁵

Similar problems arose, not surprisingly, with murder, heresy, simony, and usury, among other occult crimes. Both civil and ecclesiastical authorities found this situation unsatisfactory. As Pope Innocent III (r. 1198–1216) wrote in 1203 to the bishop of Lund, "it is in the public in-

¹² *De rebus Alsaticis* 1, in MGH, SS 17:232; Brundage, *Law, Sex, and Christian Society*, 315; Volkert Pfaff, "Das Kirchliche Eherecht am Ende des zwölften Jahrhunderts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* (hereafter ZRG, KA) 63 (1977) 73–117 at 90.

¹³ *Decretum Gratiani* C. 15 q. 8 c. 5. For its origins and subsequent history see Fraher, "Ut nullus describatur reus."

¹⁴ Rufinus, *Summa decretorum* to C. 32 q. 1 c. 2 v. *fornicatio*, ed. Heinrich Singer (Paderborn: F. Schöningh, 1902; repr. Aalen: Scientia, 1963) 476.

¹⁵ *Decretum Gratiani* C. 2 q. 1 d.p.c. 20 and *glos. ord. v. iudicis*; Jean-Philippe Lévy, *La hiérarchie des preuves dans le droit savant du moyen-âge, depuis la renaissance du droit romain jusqu'à la fin du XIVe siècle*, *Annales de l'Université de Lyon*, 3rd ser., fasc. 5 (Paris: Sirey, 1939) 40; see also Knut Wolfgang Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit: Iudex secundum allegata non secundum conscientiam iudicat*, *Münchener Universitätsschriften, Reihe der Juristischen Fakultät*, vol. 2 (Munich: C. H. Beck, 1967), and Richard M. Fraher, "Conviction according to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7 (1989) 23–88 at 24, 56–61.

terest that crimes not remain unpunished.”¹⁶ The challenge was to find some way to secure canonical condemnation without abandoning the two-witness rule, which was supported by so many scriptural passages and other venerable authorities that discarding it would have been extremely embarrassing.¹⁷

Teachers of Roman and canon law fretted about this problem for decades. The *Decretum Gratiani*, the fundamental textbook of canon law from the 1150's onward, did contain texts that could be read to suggest that a judge might properly find a defendant guilty of a crime on the testimony of a single witness, provided that the testimony was corroborated by a general belief in his guilt among virtually everyone in the community where the crime occurred.¹⁸ An anonymous commentator writing in the 1160's had elaborated further on this idea:

The voice of one [witness] is the voice of none. It is adequate to support a presumption, but not proof enough for a judicial conclusion. It can however be said that the testimony of one [witness] is enough if [the defendant] confesses or if common opinion [*fama*] supports it, if for instance everyone says that [two people] are blood relatives.¹⁹

¹⁶ X 5.30.35 (10 December 1203; Potthast 2038): “Respondemus quod cum prelati excessus corrigere debeant subditorum, et publicae utilitatis intersit ne crimina remaneant impunita et per impunitatis audiam fiat qui nequem fuerant nequiores non solum possunt, sed debent etiam superiores clericos, postquam fuerint de crimine canonice condemnati, sub arcta custodia detinere. . . .” See also Kenneth Pennington, Innocent III and the *Ius commune*, in *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, ed. Richard H. Helmholz et al. (Paderborn: Schöningh, 2000) 349–366 at 352–353.

¹⁷ E.g., Deut. 17:6 and 19:15; Matt. 18:16; John 8:17; 2 Cor. 13:1; Heb. 10:28.

¹⁸ *Decretum Gratiani* C 4 q. 3 c. 3 §28; Tancred, *Ordo iudiciarius* 3.5.6, ed. Bergmann, 221; Durand, *Speculum iudiciale* 2.2 De presumptionibus §2 (1:737); cf. Accursius, *Glos. ord. to Dig* 22.5.3 v. *confirmat*; Pennington, “Due Process, Community, and the Prince,” 23.

¹⁹ *Summa Parisiensis* to C. 35 q. 6 c. 4 v. *si duo*, ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Mediaeval Studies, 1952) 167; cf. Rufinus, *Summa* to the same canon v. *vel ipse forte confessi fuerint*, ed. Singer, 529, and Stephen of Tournai, *Summa* to C. 2 q. 1 c. 2 v. *per innocentes test.*, ed. Johann Friedrich von Schulte (Giessen: Emil Roth, 1891; repr. Aalen: Scientia, 1965) 156. On *fama* see also Francesco Migliorino, *Fama e infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII* (Catania: Giannotta, 1985); Edward M. Peters, “Wounded Names: The Medieval Doctrine of Infamy,” in *Law in Mediaeval Life and Thought* (Sewanee: University of the South, 1990) 43–89; *Fama: The Politics of Talk and Reputation in Medieval Europe*, ed. Thelma Fenster and Daniel Lord Smail (Ithaca, NY: Cornell University Press, 2003); Laura Ikins Stern, “Public Fame in the Fifteenth Century,” *American Journal of Legal History* 44 (2000) 198–222.

A presumption, according to leading authorities, was "an argument giving rise to a belief in one fact based upon proof of another fact."²⁰ Procedural writers around the beginning of the thirteenth century distinguished four species of presumption—rash, probable, violent, and necessary—and assigned different gradations of probative weight to each type.²¹ Thus, for example, if a witness discovered a man and a woman naked and alone in a private place, but did not actually see them having sexual relations, his testimony alone could not prove that they had done so. The circumstances, however, gave rise to a presumption—in this case a violent presumption—that they had either engaged in or intended to engage in sexual activity. Under the strict rules of evidence, however, such a presumption, however strong, did not count. By the 1190's, however, opinions had begun to change and jurists were starting to characterize violent and necessary presumptions as half-proofs (*probationes semiplenae*). This implied that if the testimony of one witness, which constituted half of a full proof, were put together with a presumption that carried the weight of a half-proof the combination should add up to a full proof.²² Azo (d. after 1229/1230) spelled this out explicitly not long after 1200 in his *Summa* on Justinian's Code.²³

In the context of these developments in juristic teaching Innocent III sought to make it easier to punish clerics who kept concubines. In answer

²⁰ Tancred, *Ordo iudiciarius* 3.14.2, ed. Bergmann, 258: "Praesumptio est argumentum ad credendum unum factum, surgens ex probatione alterius facti, puta, probatur coniacentia suspectarum personarum, praesumitur coitus intervenisse. . . ." See also Alessandro Giuliani, "Il concetto classico di prova: La prova come 'argumentum,'" *Jus* 11 (1960) 425–444.

²¹ Early writers distinguished only three species of presumption; *Ordo iudiciarius* "Scientiam," tit. 31, ed. Ludwig Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, vol. 2, pt. 1 (Innsbruck: Wagner, 1913; repr. Aalen: Scientia, 1962) 62–64; Bernard of Pavia, *Summa decretalium* 2.16.2, ed. E.A.T. Laspeyres (Regensburg: Josef Mainz, 1860; repr. Graz: Akademische Druck- u. Verlagsanstalt, 1956) 50–51. From Tancred's time onward it became usual to distinguish the four listed here; Hostiensis, *Summa aurea*, lib. 2 tit. *De presumptionibus* §§2–3, fol. 106ra-rb; Durand, *Speculum iudiciale* 2.2 *De praesumptionibus* §2.1–5 (1:737–39).

²² Bernard of Pavia, *Summa decretalium* 2.16.1, ed. Laspeyres, 50: "Praesumptio est argumentum movens aliquatenus iudicem ad credendum; distat autem a probatione, quia probatio facit plenam fidem, praesumptio semiplenam."

²³ Thus Azo, *Summa super Codicem* 4.1 (Pavia: Bernardinus et Ambrosius fratres de Rouellis, 1506; repr. Turin: Bottega d'Erasmus, 1966) 105: "Item si duo faciunt plenam probationem, ergo unus semiplenam probationem. . . ." as well as to Cod. 4.19 at p. 122; Azo finished his *Summa* between 1208 and 1210. See also Jean-Philippe Lévy, "Le problème de la preuve dans les droits savants," in *La preuve*, 4 vols., *Recueils de la Société Jean Bodin*, vols. 16–19 (Brussels: Éditions de la Librairie Encyclopédique, 1963–1965) 2:137–167 at 148–150.

to a question from Bishop Martin of Osimo, who asked whether it would be proper to take steps against a cleric who, according to reports from “good men” of the region, lived publicly with a concubine, even if no accuser had come forward to bring a formal accusation against him, Innocent replied in the decretal *Tua nos* on 11 May 1198:

If the crime is so public that it deserves to be called notorious, neither witness nor accuser is required since no cover-up [*tergiversatio*] could conceal a crime of this sort. If it is indeed public, not through evidence, but rather through common knowledge [*fama*], in that case a report alone is not enough for their condemnation, since judgment results not from reports but from witnesses. If suspicion about these clerics arouses scandal among the people, however, they are to undergo canonical purgation, even though no one appears to accuse them. If they do not wish to furnish it, or fail to do so successfully, you ought to punish them with a canonical reprimand.²⁴

Thus in order to make it easier to charge and convict clergymen suspected of sexual misbehavior, the pope was prepared to relax existing standards of criminal procedure and to permit a judge to commence a prosecution based upon notoriety. This stripped suspects of an important protection that the *ordo iuris* traditionally afforded them.²⁵ Innocent returned frequently to this problem and elaborated his procedural innovations further in subsequent decisions. Those decisions, like this one, entered the mainstream of canonical teaching through their incorporation in the decretal collections taught in the law schools.²⁶

²⁴ X 3.2.8 *Tua nos* (Potthast 698): “Nos igitur consultationi tuae taliter respondemus, quod, si crimen eorum ita publicum est, ut de merito debeat appellari notorium, in eo casu nec testis nec accusator est necessarius, quum huiusmodi crimen nulla possit tergiversatione celari. Si vero publicum est, non ex evidentia, sed ex fama: in eo casu ad condemnationem eorum sola testimonia non sufficiunt, quum non sit testimoniis, sed testibus iudicandum. Si de clericis ipsis talis habeatur suspicio, ut ex ea scandalum generetur in populo, licet contra ipsos non apperuit accusator, eis tamen est canonica purgatio indicenda. Quam si prestare noluerint, vel defecerint in praestanda, eos canonica debetis animadversione punire.” See also Lévy, *La hiérarchie des preuves*, 113.

²⁵ This move did have some prior authority. In his comments on a passage ascribed to St. Ambrose, Gratian had remarked that parts of the *ordo iuris* could be dispensed with when dealing with “manifest” offenses, namely those that could not readily be concealed (*nec tergiversatione propria crimen celatur*); *Decretum Gratiani* C. 1 q. 2 d.a.c. 15, c. 15, and d.p.c. 16. The idea also found some support in Roman law, as Azo pointed out in his *Summa* to Cod. 9.1 §2 (Pavia 1506) 326–327. See further Fraher, “‘Ut nullus describatur reus,’” 500–503.

²⁶ E.g. X 1.6.22 and 34; 5.1.21; 5.34.15.

Notorium as a category of evidence was a novel creation that had no real counterpart in Roman law.²⁷ It began to enter the vocabulary of canon lawyers through a passage in Gratian's *Decretum* that states that some crimes can be prosecuted without an accusation if "officials" denounce someone for a criminal offense.²⁸ Gratian's misunderstanding of a passage in Justinian's Code²⁹ led commentators on Gratian's work to speak of a special category of notorious crimes for which procedural safeguards might be relaxed.³⁰ Early writers on procedural law picked this up and developed it further.³¹ Law professors, however, had misgivings about this innovation and warned their students to be cautious about using it. Tancred (ca. 1185–1235 or 1236), the leading authority on judicial procedure in the first half of the thirteenth century, approached the matter gingerly. Tancred declared that the rules of the *ordo iudiciarius* still applied even in proceedings based on *notorium*. No responsible judge could find someone guilty of a notorious crime unless two credible witnesses were prepared to swear that all or virtually all members of the

²⁷ The emperor Gordian, in fact, expressly prohibited prosecutions based on *notorium*; Cod. 9.2.7. Medieval canonists, however, sometimes cited a passage from St. Paul concerning a case of flagrant sexual immorality at Corinth to justify their doctrine; 1 Cor. 5:1–5. See also Lévy, "Le problème de la preuve," 160–161, as well as John A. Crook, "Was There a 'Doctrine of Manifest Guilt' in the Roman Criminal Law," *Proceedings of the Cambridge Philological Society* 33 (1987) 38–52, and Rosalio Castillo Lara, "Los primeros desarrollos doctrinales del 'notorium' en la canonística clásica," *Salesianum* 22 (1960) 412–433 at 12–13.

²⁸ *Decretum Gratiani* C. 4 q. 4 d.p.c. 2: "Aliquando etiam sine inscriptione accusatio fieri potest. 'Ea que per officiales presidibus nunciantur, et citra solemnitas accusationem posse perpendi incognitum non est.'"

²⁹ Cod. 9.2.7.

³⁰ Rufinus, *Summa decretorum* to C. 4 q. 4 d.p.c. 2 v. *ea enim*, ed. Singer, 276; Stephen of Tournai, *Summa* to C. 4 q. 4 d.p.c. 2 v. *iure mariti* and *aut querelas deponens*, ed. Schulte, 201; Giovanni Minnucci, "Diritto et processo penale nella prima trattatistica del XII secolo: qualche riflessione," in "*Ins Wasser geworfen und Ozeane durchquert*:" *Festschrift für Knut Wolfgang Nörr*, ed. Mario Ascheri et al. (Cologne: Böhlau, 2003) 581–608 at 594–595.

³¹ *Tractatus criminum saeculi XII* (written between 1162 and 1164), title 1, ed. Giovanni Minnucci, *Archivio per la storia del diritto medioevale e moderno, Studi e testi*, vol. 2 (Bologna: Monduzzi, 1997) 9–10; *Ordo iudiciarius* "*Hactenus magister*," (after 1167), ed. Linda Fowler-Magerl in her *Ordo iudiciorum vel ordo iudiciarius*, 290–293 at 292; Hermann Kantorowicz, "Il 'Tractatus criminum,'" in his *Rechtshistorische Schriften*, ed. Helmut Coing and Gerhard Immel, *Freiburger Rechts- und Staatswissenschaftliche Abhandlungen*, vol. 30 (Karlsruhe: C. F. Müller, 1970) 273–285; André Gouron, "Zu den Ursprüngen des Strafrechts: Die ersten Strafrechtstraktate," in *Festschrift für Hans Thiele zu einem 80. Geburtstag*, ed. Karl Kroschell (Sigmaringen: Jan Thorbecke, 1986), also repr. with original pagination in Gouron's *Études sur la diffusion des doctrines juridiques médiévales* (London: Variorum, 1987), no. IX, 43–57, especially 44–45, 50, and 56

community believed that the defendant had committed the offense. The judge must summon the defendant to answer the charges against him and must allow him adequate opportunity to rebut them—a basic component of due process.³² Tancred further distinguished between *notorium iuris*, which meant a criminal conviction based on traditional proofs, and *notorium facti*, which referred to a widespread public knowledge of a defendant's guilt. He insisted that judges must be cautious in dealing with situations where a defendant's alleged guilt was based on *notorium facti*. They needed to make sure that people actually knew, not simply suspected, that the defendant was guilty. Mere rumors based on speculation or suspicion that circulated among the defendant's neighbors were certainly not enough to warrant action.³³

Later writers shared Tancred's reservations about *notorium* as proof. Cardinal Hostiensis (d. 1271) for one asserted that the testimony of an eyewitness plus common belief in the defendant's guilt and other circumstances were simply inadequate to justify finding a defendant guilty of a serious crime.³⁴ He was not the only one to hold this view.³⁵ It apparently prevailed in practice at least in England, since by the end of the thirteenth century church courts there had virtually ceased to accept proof by *notorium* as conclusive.³⁶

This does not mean, however, that *notorium* as a fixture in the law of proof was dead. Far from it. *Notorium* enjoyed a long, if not altogether admirable, career as one of the foundations for inquisitorial procedure.

³² Daan Asser, "Audi et alteram partem: A Limit to Judicial Activity," in *The Roman Law Tradition*, ed. A. D. E. Lewis and D. J. Ibbetson (Cambridge: Cambridge University Press, 1994) 209–223.

³³ Tancred, *Summula de criminibus*, ed. Richard M. Fraher, "Tancred's 'Summula de criminibus': A New Text and a Key to the Ordo iudiciarius," *Bulletin of Medieval Canon Law* 9 (1979) 23–35 at 29, as well as his *Ordo iudiciarius* 2.7.1, ed. Bergmann, 151–152.

³⁴ Hostiensis, *Lectura* to X 2.20.10 §3 v. *iudicasti*, fol. 86va: "Sed contra quia hic erat unus testis idoneus, ergo per ipsum et famam cum aliis adminiculis satis potuit constare de crimine et sic debuit condemnari, quia fama consentiens probat. . . . Solutio: Non est verum, quia in crimine probationes apertissime requiruntur." Cf. his *Lectura* to X 3.2.8 §§ 1, 3, and 9, fol. 7ra–va.

³⁵ E.g., Raymond of Penyafort, *Summa de penitentia* 2.24.8, 3.29.2, and 3.31.11, ed. Xavier Ochoa and Aloisio Diez, *Universa Bibliotheca Iuris*, vol. 1B (Rome: Commentarium pro religiosis, 1976) col. 664, 692, 722; Bernard of Parma, *Glos. ord.* to X 3.2.7 v. *notorium*; Durand, *Speculum iudiciale* 3.1 *De notoriis criminibus* §§ 1.1, 5.2 and 4, and 8.1–11, 20 (2:44, 48–50, and 51).

³⁶ On English court practice see Richard H. Helmholz, *Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, *The Oxford History of the Laws of England*, vol. 1 (Oxford: Oxford University Press, 2004) 604.

Before proceeding further the author must stress that criminal procedure *per inquisitionem* was by no means limited to the *inquisitio haeretice pravitatis*, that is to say what is usually, but erroneously, called "The Inquisition," with all the dreadful connotations of that term.³⁷ Inquisitors who specialized in the pursuit of persons suspected of holding unorthodox views on religious doctrine, to be sure, did employ inquisitorial procedure. But other judges in both ecclesiastical and civil courts used the same procedure to inquire not only into suspected criminal activity, but also into disputes over transactions between private parties.³⁸ Inquisitorial procedure originated as a method for investigating precisely the kind of situation that the author posited above in his hypothetical example concerning clerical incontinence.³⁹ It then blossomed into a fundamental, all-purpose method for prosecuting crimes of every sort. Its effectiveness in dealing with occult crimes, its efficiency in disposing of cases speedily, and its assumed value as a deterrent made it attractive to civil rulers as well as to church authorities.⁴⁰

Accusatory procedure was hobbled not only by the need for two credible witnesses to prove an accusation, but also because it required an accuser to come forward to lay a charge, perhaps against a friend or neighbor. Doing that was likely to make him enemies, possibly deadly ones; while at the same time it exposed the accuser to the potential danger that should he be unable to prove his charge he became liable to legal retribution for bringing a false accusation.⁴¹ The other traditional means for

³⁷ Richard Kieckhefer, "The Office of Inquisition and Medieval Heresy: The Transition from Personal to Institutional Jurisdiction," *Journal of Ecclesiastical History* 46 (1995) 36–61.

³⁸ A point often made, but also frequently ignored; see Adhémar Esmein, *A History of Continental Criminal Procedure*, trans. John Simpson, Continental Legal History Series, vol. 5 (Boston: Little, Brown, 1913) 81, and more recently Richard Fraher, "Conviction According to Conscience," "IV Lateran's Revolution in Criminal Procedure," as well as "The Theoretical Justification for the New Criminal Law of the High Middle Ages: 'Rei publicae interest, ne crimina remaneant impunita,'" *University of Illinois Law Review* (1984), 577–595; Henry Ansgar Kelly, "Inquisition and the Prosecution of Heresy: Misconceptions and Abuses," *Church History* 58 (1989) 439–51.

³⁹ X 3.2.7 and 3.2.8.

⁴⁰ Richard M. Fraher, "Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence," in *Popes, Teachers and Canon Law in the Middle Ages*, ed. James Ross Sweeney and Stanley Chodorow (Ithaca, NY: Cornell University Press, 1989) 212–233.

⁴¹ This was the so-called *Lex talionis*; Cod. Theod. 9.1.5, 8, 9, 11, 14, and 19; *Decretum Gratiani* C. 2 q. 3 c. 2–3 as well as C. 4 q. 4 c. 2 §1 and C. 5 q. 2 c. 3; Paucapalea, *Summa* to C. 2 q. 3 c. 3 v. *Qui non probaverit*, ed. Johann Friedrich von Schulte (Giessen: E. Roth, 1890) 59; Tancred, *Ordo iudiciarius* 2.7.5, ed. Bergmann, 157–158; Durand,

dealing with ecclesiastical crimes, denunciation, was even less effective than accusatory procedure in dealing with perpetrators of occult crimes. Denunciation began with an informal warning to a wrongdoer (*denunciatio evangelica*), calling upon him to mend his ways, as recommended in the Gospels.⁴² Should the miscreant fail to do so, the person who had delivered the admonition then laid a formal denunciation of the offender's failure to reform before a judge (*denunciatio iudicialis*); and the judge summoned the defendant to answer the complaint. The trial itself followed much the same procedure and employed the same strict standard of proof as a case brought by accusation.⁴³ The person who made a denunciation rather than an accusation, however, was not subject to the *lex talionis* if he failed to prove his case.⁴⁴

Winfried Trusen showed nearly twenty years ago that Innocent III sought from the start of his pontificate for alternative ways to punish infractions against canon law.⁴⁵ Before the close of his second year in office he had hit on the basic outlines for a new approach to criminal procedure called *inquisitio*.⁴⁶ On 2 December 1199 Innocent ruled in a case brought to him on appeal that "frequent outcries" and "public report" that someone had committed a criminal offence, entitled a judge to begin a judicial inquiry (*inquisitio*) to discover whether there was an adequate basis for holding the alleged offender guilty of the crime imputed to him.⁴⁷ Thus

Speculum iudiciale 3.1 *De accusatione* §6.24 (2:15–22). For descriptions of the problems see Paul Fournier, *Les officialités au moyen âge* (Paris: E. Plon, 1880; repr. Aalen: Scientia, 1984) 235–256, and Helmholz, *Canon Law and Ecclesiastical Jurisdiction*, 605–606.

⁴² Matt. 18:15; Luke 17:3–4; cf. Galatians 6:1.

⁴³ Durand, *Speculum iudiciale* 3.1 *De denunciatione* (2:23–26); Fournier, *Les officialités*, 256–262; Paul Hinschius, *System des katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland*, 6 vols. (Berlin: J. Guttentag, 1869–1897) 5:355–57.

⁴⁴ Durand, *Speculum iudiciale* 3.1 *De denunciatione* §2.16 (2:25). It was a matter of controversy whether this was true in proceedings *per inquisitionem*; Hostiensis, *Lectura* to X 5.1.21 §4 v. *sicut in accusationis*, fol. 8vb.

⁴⁵ Winfried Trusen, "Der Inquisitionsprozeß: Seine historischen Grundlagen und frühen Formen," ZRG, KA74 (1988) 168–230.

⁴⁶ X 5.3.31 = 3 Comp. 5.2.3; Potthast 888 (10 December 1199): "Ad corrigendos igitur subditorum excessus tanto diligentius debet praelatus assurgere, quanto damnabilius eorum offensas desereret incorrectas. Contra quos, ut de notoriis excessibus taceatur, etsi tribus modis procedi possit, per accusationem videlicet, denunciationem et inquisitionem ipsorum." Innocent had used the term *inquisitio* to describe a judicial investigation even earlier, in a letter dated 23 September 1198; Trusen, "Der Inquisitionsprozeß," 189–190.

⁴⁷ X 5.3.31: "[N]os, ut praediximus, frequentibus clamoribus excitati, ex officio nostro volumus inquirere de praemissis, omnes omnino monachos, qui vel cum ipso, vel contra ipsum abbatem accesserant, iuramenti adstringentes, ut de propositis plenam, quam scirent, exponerent veritatem."

notorium, not only constituted a half-proof, but could also provide the basis for initiating a criminal trial *per inquisitionem*.⁴⁸

Innocent's quest for a more efficient and effective system of criminal procedure initially found expression in a series of decretals.⁴⁹ Like many of his other reform initiatives, Innocent incorporated this one into the constitutions of the Fourth Lateran Council in 1215. The pope, no doubt in consultation with a small group of advisers, prepared the council's constitutions in advance. The 404 cardinals, archbishops, and bishops, as well as numerous abbots, priors, cathedral canons, representatives of religious orders, and of European monarchs who assembled at the Lateran on 11 November 1215 were there to ratify those constitutions, not to debate them, much less to amend them or to propose new ones. Discussions at the formal sessions of the council centered on a handful of the draft proposals that dealt with dogmatic issues. No evidence suggests that *Qualiter et quando*,⁵⁰ the constitution that solemnly integrated the use of inquisitorial process into the formal legal structure of the western church, was debated at all.⁵¹

Although *Qualiter et quando* made it easier both to initiate criminal charges and to secure a conviction on them, it preserved the most basic elements of the *ordo iuris*. The defendant must be summoned to appear; he must be informed of the charges and given an opportunity to defend himself. The constitution specified that he must be told who had testified

⁴⁸ Raymond of Penyafort, *Summa de penitentia* 3.31.4 and 3.32.9, ed. Ochoa and Diez, col. 715–16, 720–21; Bernard of Parma, *Glos. ord.* to X 5.1.24 v. *ad inquirendum*.

⁴⁹ On their history see Detlev Jasper and Horst Fuhrmann, *Papal Letters in the Early Middle Ages*, History of Medieval Canon Law, vol. 2 (Washington, DC: Catholic University of America, 2001).

⁵⁰ 4 Lat. c. 8 in *Constitutiones Concilii quarti Lateranensis una cum commentariis glossatorum*, ed. Antonio García y García, Monumenta iuris canonici, Corpus collectionum, vol. 2 (Vatican City: Biblioteca Apostolica Vaticana, 1981) 54–57; X 5.1.24 (= 4 Comp. 5.1.2); also (accompanied by a not altogether reliable English translation) in DEC 1:237–39.

⁵¹ A report of the proceedings written by a German participant in the spring of 1216 merely states that at the third and final session of the council on 30 November, "Then the lord pope's constitutions were read" (*Deinde leguntur constitutiones domini pape*). Once that was finished, a relic of the true cross was displayed, the pope intoned the *Te Deum*, blessed the members of the council with the relic, and sent them on their way; Stephan Kuttner and Antonio García y García, "A New Eyewitness Account of the Fourth Lateran Council," *Traditio* 20 (1964) 115–178 at 128, also reprinted in Kuttner's *Medieval Councils, Decretals, and Collections of Canon Law*, 2nd ed. (Aldershot: Variorum, 1992), no. IX, as well as Antonio García y García, "Introducción" to his edition in *Constitutiones Concilii quarti Lateranensis*, 10.

against him and what they had said. He must likewise be permitted to enter objections and rebut their evidence, "lest the suppression of the names of a hostile witness or the exclusion of exceptions present an insolent person with the chance to bear false witness."⁵²

Professors of canon law were naturally eager to incorporate the canons of the council into their curriculum as soon as possible so that their students would be up-to-date with the latest law when they began to practice in the courts. *Qualiter et quando* was especially important in this regard because mastery of procedure was (and is) a bread-and-butter skill for practitioners.

Johannes Teutonicus (ca. 1170–1245), a leading law teacher in Bologna, quickly composed a set of glosses on the Lateran constitutions and also put together for teaching purposes a collection of Innocent III's decretals that included virtually all of the council's constitutions.⁵³ Johannes' gloss apparatus on *Qualiter et quando* raised some interesting problems concerning methods of proof in *per inquisitionem* proceedings. Harking back to Innocent III's ruling in *Tua nos* referred to earlier, Johannes observed that if the evidence against a defendant amounted only to partial proof, then the defendant should have the opportunity to clear his name by canonical purgation. Purgation required the defendant to swear an oath denying the allegations made against him, supported by sworn statements from others attesting to his good name and credibility.⁵⁴

Even more intriguing was Johannes' treatment of the question of whether a defendant in a proceeding that the judge himself initiated *ex*

⁵² "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 prebeatur."

⁵³ The collection came to be known as *Compilatio quarta* and became part of the standard curriculum in the schools of canon law until it became obsolete with the publication of the *Decretales Gregorii IX* (or *Liber Extra*) in 1234, which incorporated all but a few of the canons in 4 Comp. See Stephan Kuttner, "Johannes Teutonicus, das vierte Laterankonzil und die *Compilatio quarta*," in *Miscellanea Giovanni Mercati*, 6 vols., Studi e testi, vols. 121–126 (Vatican City: Biblioteca Apostolica Vaticana, 1946) 5:608–634, repr. in his *Medieval Councils, Decretals, and Collections of Canon Law*, no. X, as well as his "Johannes Teutonicus," in *Neue Deutsche Biographie* 10:571–573.

⁵⁴ On this procedure see Richard H. Helmholz, "Crime, Compurgation and the Courts of the Medieval Church," *Law and History Review* 1 (1983) 1–26, repr. in his *Canon Law and the Law of England* (London and Ronceverte: Hambledon Press, 1987) 119–144.

officio should have the chance to produce witnesses to prove his innocence. If an opponent produced witnesses against him, Johannes said, then the defendant would certainly have the right to bring forward witnesses to rebut them. If a judge acting *ex officio* produced witnesses, however, the defendant had no right of rebuttal since the judge was presumed not to be his adversary. But, Johannes continued, what if the pope commenced an inquisitorial proceeding against someone on the basis of public reports and the defendant wished to prove that on the contrary he was of good repute? In that case, Johannes asserted, the relevant issue was not a crime but ill-fame. If the defendant could show that he was generally considered to be a reputable member of the community, he should have the chance to do so; and if he succeeded the judge must drop the action.⁵⁵

Let me raise one final point by way of conclusion. The speculations of medieval popes and lawyers about the evidential value that courts should assign to the kinds of partial proof that we have been discussing had long-term consequences of a kind that none of those involved could have foreseen. When Pascal (1623–1662) in the seventeenth century and Leibnitz (1640–1716) a generation later began to come to grips with the philosophical and moral problems involved in estimating the degree of likelihood that a particular action now would produce a predictable result in the future, they turned to legal terms and concepts that originated in medieval theories of proof. They likewise drew upon ideas that medieval lawyers developed to deal with the consequences of aleatory contracts. These were agreements concerning such matters as the likelihood of an insured cargo being lost at sea, the life expectancy of the beneficiary of an annuity, and other transactions whose outcomes depended on variables that could not be predicted with certainty. As a result many elements of modern probability theory rest in part upon foundations laid by medieval lawyers concerned with problems in the law of proof.⁵⁶

⁵⁵ Johannes Teutonicus, *Apparatus in Concilium Quartum Lateranensis*, ed. García y García, 200–201. For the views of some other contemporary commentators, see also Pier V. Aimone, "Il processo inquisitorio: Inizi e sviluppi secondo i primi decretalisti," *Apollinaris* 67 (1994) 591–634.

⁵⁶ James Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (Baltimore: Johns Hopkins University Press, 2001) develops this argument in detail.