Public Justice and the Criminal Trial in Late Medieval Italy

Reggio Emilia in the Visconti Age

Joanna Carraway Vitiello

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To Jill and Deb

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Stinnett; my aunt and dear friend, Barbara Carraway (†2010); my brother, Eric Miller; my cousin, Julia Harrell; Antonia's godmother, Tina Baceski; and my dear parents-in-law, Clara Alfano and Catello Vitiello. My father, Byrle Macon Carraway (†1999), left this world far too soon, long before this project began, but he has been with me every step of the way.

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Abbreviations

ASB	Archivio di Stato di Bologna
ASRe	Archivio di Stato di Reggio Emilia
ASRe, *Comune*	ASRe, Archivio del Comune
ASRe, *Comune*, Registri	ASRe, *Comune*, Registri dei decreti e delle lettere
ASRe, *Giudiziario*	ASRe, Archivi giudiziari, Curie della città
ASRe, *Giudiziario*, Libri delle denunzie	ASRe, Giudiziari, Libri delle denunzie e querele, delle inquisizioni, degli indizi, dei costituti, delle difese e d'altri atti criminali
ASRe, *Giudiziario*, Sentenze e condanne	ASRe, *Giudiziario*, Podestà, Giudici, Governatore. Sentenze e condanne corporali e pecuniarie
BSR	La Biblioteca del Senato della Repubblica
n.d.	No date.
RIS	Rerum Italicarum Scriptores, L.A. Muratori, ed. (Milan: 1723–1751)
RIS II	*Rerum Italicarum Scriptores*, L.A. Muratori, ed.; revised and corrected by G. Carducci and V. Fiorini (Città di Castello: S. Lapi, 1900–1917)

A Note on the Latin Transcriptions

Throughout this study, I chose to transcribe in the notes the Latin text that my interpretations rest upon. I did this because the vast majority of sources used in this study are unpublished documents that would not be accessible to the interested reader. It seemed better not to standardize the Latin of the documents, given the large number of documents I consulted, which contain an endless variety of spellings and occasional vocabulary that is specific to the Latin of Emilia-Romagna. I chose to respect the spelling used by the various notaries and authors of the documents. Therefore the reader will find a variety of Latin spellings, particularly including redoubled consonants. I made use of

the traditional [*sic*] only in circumstances that could be especially perplexing to the reader. In the same way, I transcribed names as I found them in the documents, leaving them in their Latin forms, and I use these forms in the text of the study, changing them only to shift them to the nominative case, or when the spellings varied inside the same document. In the few cases in which a document was damaged or a word was illegible, the symbol [. . .] has been inserted.

Introduction

Justice, Procedure, and Context

> *Justice is the constant and perpetual will to give each man his due.*
> Institutes of Justinian, 1.1[1]

∴

Medieval public justice was characterized by its inherent tensions: tensions between a system designed for crime control and a society accustomed to self-help, and tensions between an ideal of public justice and a culture of private retribution. Criminal jurisdiction served as a primary marker of political authority, and the late medieval criminal court became a nexus of power at many levels—signorial, communal, and judicial. It was also a place where the lives of people from all walks of life came into direct contact with the results of the high medieval legal revolution, which yielded inquisition procedure.[2] In the late middle ages, the dynamic created by these fundamental tensions would transform the history of criminal justice.

Inquisition procedure developed as an alternative to an older process of private accusation, in which the parties in conflict shouldered the burdens of investigation and prosecution. The inquisition process offered an avenue for justice that conceptualized crime as a public matter.[3] The adoption of

1 "Iustitia est constans et perpetua voluntas ius suum cuique tribuens." Inst. 1.1.1.

2 Vendetta and the culture of retribution was a basic component of medieval city life, not a tool only of the elite. Rather, "vendetta and feuding were practices within the reach of anyone who could afford them, regardless of social origin" and very frequently involved non-noble families. Andrea Zorzi, "Legitimation and Legal Sanction of Vendetta in Italian Cities from the Twelfth to the Fourteenth Centuries," in *The Culture of Violence in Renaissance Italy*, eds. Samuel K. Cohn Jr. and Fabrizio Ricciardelli (Florence: Le Lettere, 2012), 35–37; Andrea Zorzi, "La cultura della vendetta nel conflitto politico in età comunale," in *Le Storie e la memoria: In onore di Arnold Esch* (Florence: Firenze University Press, 2002), 138. On hatred and medieval society, see Daniel Smail, "Hatred as a Social Institution in Late-Medieval Society," *Speculum* 76 (2001): 90–126.

3 Henry Ansgar Kelly, "Inquisitorial Due Process and the Status of Secret Crimes," in *Monumenta iuris canonici, Series C: Subsidia* 9, 407–427. Reprinted in *Inquisitions and other trial procedures in the Medieval West*, Variorum Collected Studies Series (Ashgate: Variorum, 2001), 409.

inquisitorial procedure in secular criminal courts created a powerful and theoretically impersonal justice system as "man's relational existence gave way to a concern with maintaining social order."[4] But this change was undeniably contrary to deeply held ideas of private retribution and self-help, and there were no neat divisions between public justice and the private sphere. In the court at Reggio Emilia, parties maintained active roles even in public inquisitorial trials, while the Podestà and judges who were charged with implementing public justice themselves belonged to the world of noble violence and the vendetta.

This work examines the practice of criminal justice at the end of the fourteenth century, using as a case study the city of Reggio Emilia in northern Italy. This is not a study of criminality, which would require an entirely different methodology.[5] Rather it is an effort to explore the operation of public justice inside a late medieval city on the contested and expanding border of the Visconti dominion. Profoundly scholastic and, in its deep reliance on public perceptions of facts and people (*fama*), profoundly communal, inquisitorial procedure reflected the epistemological reality of the late middle ages.

Inquisition, Authority, and Adaptation

As a tool of public justice and as the most important development in criminal law of the medieval legal revolution, the development of inquisitorial procedure at the beginning of the thirteenth century brought a new dimension to questions of public justice and public authority.[6] In 1215 at the Fourth Lateran Council, Pope Innocent III articulated a new criminal process that

4 Karl Blaine Shoemaker, "Criminal Procedure in Medieval European Law: A Comparison between English and Roman-Canonical Developments after the IV Lateran Council," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte—Kanonistische Abteilung* 85 (1999): 174–202.

5 Trevor Dean used a variety of source types to explore the questions of the evolution of crime and justice in late medieval Italy, showing the great local variety of both process and conception of crime, and demonstrating the layers of narrative inherent in studies of criminal justice. Trevor Dean, *Crime and Justice in Late Medieval Italy* (Cambridge: Cambridge University Press, 2007). See the historiographical survey in the introduction for an overview of the question.

6 Edward Peters, "Wounded Names: The Medieval Doctrine of Infamy," in *Law in Medieval Life and Thought*, eds. Edward B. King and Susan J. Ridyard (Sewanee: Press of the University of the South, 1990), 70–73. Inquisition procedure had earlier precedents in the Carolingian practice of *inquisitio* and in Norman law, as well as in ecclesiastical inquiries, but it was in the thirteenth century that this process developed into a procedure of public justice.

characterized crime as a matter of public, not private, interest.[7] This idea of public interest in criminal law is generally connected to Innocent III's decretal, *Ut fame*, which demands that crimes must be punished as a matter of public utility: *rei publicae interest, ne crimina remaneant impunita* ("it is in the public interest that crimes not remain unpunished.")[8]

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7 This basic model of a shift from irrational proofs to rational proofs informed most classical legal histories, including Adhémar Eismen, *A History of Continental Criminal Procedure with Special Reference to France*, trans. John Simpson (Boston: Little, 1913), and Antonio Pertile, *Storia del diritto penale*, vol. 5, *Storia del diritto italiano dalla caduta dell'Impero romano alla codificazione*, 2nd ed. (Bologna: Arnaldo Forni Editore, 1966). The idea that criminal procedure in the high middle ages underwent an evolution, more or less linear, from supernatural proof (trials by ordeal, in which verdicts were reached ultimately by divination) to rational proof (accusation and especially inquisition), and from private justice (accusation) to public justice (inquisition) has been widely challenged in new investigations, which question how clear these lines of development were. For considerations of the ordeal and its rationality, see for example Rebecca Coleman, "Reason and Unreason in Early Medieval Law," *Journal of Interdisciplinary History* 4 (1974): 571–591; Paul Hyams, "Trial by Ordeal: The Key to Proof in the Early Common Law," in *On the Laws and Customs of England. Essays in Honor of Samuel E. Thorne*, eds. Morris S. Arnold et al. (Chapel Hill: University of North Carolina Press, 1981), 90–126; H.L. Ho, "The Legitimacy of Medieval Proof," *Journal of Law and Religion* 19 (2003–2004): 259–298, and Ian C. Pilarczyk, "Between a Rock and a Hot Place: The Role of Subjectivity in the Medieval Ordeal By Hot Iron," *Anglo-American Law Review* (1996): 87–112; for a different view of the trial by ordeal and of the question of its decline, see Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (New York: Clarendon Press, 1986). The perspective of inquisition as a repressive hallmark of state justice is expressed in Herman U. Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik*, vol. 1, *Die Praxis* (Berlin: J. Guttentag, 1907), and vol. 2, *Die Theorie: Kritische Ausgabe des "Tractatus de maleficiis" nebst textkritische Einleitung* (Berlin: Walter De Gruyter, 1926). This view has been recently thoroughly challenged by Massimo Vallerani, "Come si costruisce l'inquisizione: 'Arbitrium' e potere a Perugia," in *La giustizia pubblica medievale* (Bologna: Il Mulino, 2005), recently republished in English translation. Vallerani, "How the Inquisition is Constructed: Arbitrium and Power in Perugia," in *Medieval Public Justice*, trans. Sarah Rubin Blanshei (Washington, D.C.: The Catholic University of America Press, 2012), 228–271.

8 For a discussion of this maxim and its origins, see Richard Fraher, "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* 3 (1984): 577–595, and more recently, Kenneth Pennington, "Innocent III and the *ius commune*," in *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, eds. Richard Helmholz, Paul Mikat, Jörg Müller, and Michael Stolleis (Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft, NF 91) (Paderborn: Verlag Ferdinand Schöning, 2000), 349–366. Pennington discusses an earlier decretal, the "*inauditum*," in which an incipient version of the maxim made famous in the later "*ut fame*" was written. "*Ut fame*" has some significant differences from the earlier "*inauditum*", including reference to the public "*crimina*" instead

Created for use in the ecclesiastical courts, the inquisition process was quickly incorporated into municipal criminal courts to try major felony crimes. Revolutionary as the development was, the inquisition process, with its greatly expanded judicial authority, was never intended to be the ordinary trial process for felony crimes. It was designed not as a replacement for, but as a complement to, an older trial process of *accusatio*, in which the judge had a very limited role. Accusation procedure conceptualized crime as a private matter, not a public concern, and thus the offended party was responsible for pursuing charges, gathering evidence, and paying expenses for the prosecution, and potentially for the defense.[9] The judge could not seek testimony or compel witnesses, nor did he have the authority to initiate a trial *ex officio*. Inquisition procedure was an extraordinary remedy, to be applied in cases of occult or hidden crimes, where the accusation process was not a practical tool for prosecution. It opened the door for consideration of new kinds of proof,[10] and it alleviated the need for a private party to stand as an accuser willing to shoulder the risks of prosecution.[11] But municipal criminal courts quickly adopted the process, and by the end of the fourteenth century, in many cities including Reggio Emilia, *inquisitio* had essentially replaced *accusatio* as the regular trial procedure for major felonies.[12]

If such new and wide judicial authority made for a more efficient criminal justice system, it was also open to abuse. Theoretically, as Mario Sbriccoli observed, it could reduce the three-party system of *accusatio*, where the accuser

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of the more general "*maleficia*." Framers of the statutes at Reggio seemed to have reference to both.

9 Sarah Rubin Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna, secoli XIII–XVII. Parte I. La procedure penale in età comunale e signorile," in *I costi della giustizia nel medioevo ed età moderna*, ed. Armando Antonelli (forthcoming). These expenses were significant, and ranged widely: Blanshei found examples as low as 11 lire and 17 soldi, and as high as 145 lire and 12 soldi. In the late thirteenth century in Bologna, this include court fees, the cost of any commissioned *consilia sapientis*, and a host of smaller fees, including notarial fees for various instruments, days of work lost, and potentially the costs of imprisonment.

10 Laura Ikins Stern, "Public Fame in the Fifteenth Century," *The American Journal of Legal History* 44 (2000): 198–222.

11 Walter Ullmann, "Some Medieval Principles of Criminal Procedure," *Judicial Review* 59 (1947): 1–28, reprinted in Walter Ullmann, "Some Principles of Medieval Criminal Procedure," in *Jurisprudence in the Middle Ages* Variorum Collected Studies Series (Ashgate: Variorum, London: Variorum Reprints, 1980), 11.

12 The idea that inquisitorial proceedings could be used to prosecute all crimes, not just infamous ones, was proposed by Nicolaus de Matarellis and further developed by Bartolus; Ullmann, "Some principles," 20.

and the defendant presented their cases before the judge, to a two-party system, as the judge took on a prosecutorial role, and finally to a one-party system, as judicial torture could be used to force the defendant to support the prosecution's case.[13] The judge could investigate and initiate proceedings *ex officio*, he had judicial torture in his arsenal when obstinate defendants refused to confess, and he could sentence defendants on charges that he, for all intents and purposes, prepared and prosecuted. This implies what Richard Fraher and others have said directly, that through the implementation of inquisition procedure, the idea of public interest was used "to chip away at defendants' rights and procedural guarantees that had been fixtures of the Romano-canonical tradition."[14] In this view, inquisitorial justice was not only repressive, but could even be dangerous.[15]

This dark picture has been greatly moderated in recent years. Archival research has proven an important corrective, showing the implementation of the process and the limits of *ex officio* judicial power. In Florence, the system contained important safeguards to protect the integrity of the trial process.[16] In Perugia, the statutes gave the Podestà the power to investigate and to punish but these powers were curtailed by the city council, and the breadth of the Podestà's *ex officio* power was far from limitless.[17] The thirteenth-century criminal judge Albertus Gandinus set forth a wide view of judicial authority in

13 Mario Sbriccoli, "Legislation, Justice and Political Power in Italian Cities, 1200–1400," in *Legislation and Justice*, ed. Antonio Padoa-Schioppa (Oxford: Clarendon Press, 1997), 51–52; Mario Sbriccoli, "'Tormentum idest torquere mentem': Processo inquisitorio e interrogatorio per tortura nell'Italia comunale," in *La parola all'accusato*, eds. Jean-Claude Maire Vigueur and Agostino Paravicini Bagliani (Palermo: Sellerio, 1991), 23.

14 Fraher, "Theoretical Justification," 584–585.

15 An older historiographical view painted a dark picture of the process, as for example Pollock and Maitland, who compared inquisitorial justice to the jury system, much to the disadvantage of the former: "Every safeguard of innocence was abolished or disregarded; torture was freely used. Everything seems to be done that can possibly be done to secure a conviction. This procedure, inquisitory and secret, gradually forced its way into the temporal courts; we may almost say that the common law of Western Europe adopted it." Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1911), 2: 654. More recently scholars have explored the very real problems with the wide latitude sometimes given to judicial authority in inquisition; Edward Peters, *Inquisition* (New York: Free Press, 1988). These studies are usually focused on ecclesiastical inquisitions against heresy.

16 On the structure and function of the Florentine justice system, Laura Ikins Stern, *The Criminal Law System of Medieval and Renaissance Florence* (Baltimore: Johns Hopkins University Press, 1994).

17 Vallerani, "How the Inquisition is Constructed," 232 and 241–246.

his procedural manual, but Guilelmus Durantis in his *Speculum iuris*, which was probably the most influential work on legal procedure in the late middle ages, was rather more cautious, limiting the circumstances under which inquisitorial procedure could be used, and recognizing the dangers of judicial corruption.[18] There was never a consecutive, linear shift from private to public justice, or from "private honor to public security."[19]

The concentration of power in the hands of an investigating magistrate was a change undeniably contrary to ideas of private retribution and self-help, which were part of the fabric of medieval society. Sbriccoli concluded that "public and official justice ultimately absorbed and developed the characteristics of a consensual justice, and often those of a type of justice not alien to vendetta or reprisal."[20] And Sarah Blanshei found that in early fourteenth-century Bologna, justice was actually neither public nor impersonal: "Criminal justice, which had been depersonalized in theory, but not in practice . . . became an even more manipulated and personalized system in both theory and practice in the early fourteenth century."[21] Public justice itself, as she has recently argued, changed over time depending on the capacity of the state to take the initiative for ensuring law and order.[22] As the use of inquisition procedure to try major crimes in municipal courts grew, at Reggio Emilia, inquisition procedure became a hybrid of old accusatorial processes, which emphasized the active participation of parties in conflict, and the new *inquisitio*, which centered authority in the figure of the judge. This change whereby—to borrow Sbriccoli's distinctions—'hegemonic justice' came to incorporate features of 'negotiated justice' needs explanation.[23]

Local Variations in Criminal Procedures

How did private or political interests enter this system of public justice? The mechanisms that created flexibility inside inquisition procedure largely

18 Guilelmus Durantis, *Speculum iuris* (Venice, 1576). Durantis is cautious in his allowance of procedures that abbreviate the right to defense, as in the case of notorious crimes.

19 Dean, *Crime and Justice*, 51.

20 Sbriccoli, "Legislation, Justice, and Political Power," 43.

21 Sarah Rubin Blanshei, "Crime and Law Enforcement in Medieval Bologna," *The Journal of Social History* 16 (1982): 129.

22 Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming).

23 Mario Sbriccoli, "Giustizia negoziata, giustizia egemonica: Riflessioni su una nuova fase degli studi di storia della giustizia criminale," in *Storia del diritto penale e della giustizia: Scritti editi e inediti*, vol. 2 (Milan: Giuffrè, 2009), 1236–1240.

developed not inside procedural treatises, which were in general circulation, but inside local municipal statutes. Therefore, while the broad outlines of inquisitorial and accusatorial criminal processes looked the same everywhere, localized norms which governed the details of the processes varied widely, and these made all the difference in the way a criminal trial functioned. Imagine, for example, that a crime has been committed, the defendant has been cited and has appeared, and the trial has proceeded by inquisition. The judge is now hearing witness testimony. At this moment, if aggressor and victim enter into a formal peace agreement, does the trial stop, or does the judge continue to a verdict? What might seem at first glance like a procedural detail was at its root a fundamentally important question: do the parties in conflict have the power to stop an inquisition? The answer would determine how much risk people incurred when they brought their disputes to the criminal judge for adjudication. A low-risk process might encourage the use of the courts as an airing ground for personal enmities, or for the pursuit of vendetta, while a high-risk process might discourage these uses. And conceptually, the difference was enormous: the older accusatorial process had viewed punishment in the interest of the offended party, *interest alcui*, but the inquisitorial trial was based on the idea of public interest: *interest civitati ne crimina remaneant impunita*.[24] If a peace agreement between two private parties could halt a trial or mitigate a penalty, was this an action made in the public interest, or was it something more personal?

The answer to the question of how peace agreements affected an ongoing trial varied widely: the peace agreement could abrogate a trial in Florence,[25] and also in Perugia, but only for certain crimes;[26] in Milan, these agreements did not stop the trial but they freed the defendant from a portion of the fines;[27] similarly at Reggio Emilia, they mitigated a penalty by one quarter but could not stop an inquisition. The answers to other equally important questions also varied widely. Who can legally be tortured, and who is protected? How much discretion does the judge have in sentencing? Is it possible to return from

24 Sbriccoli, "Legislation, Justice, and Political Power," 50.

25 Stern, *Criminal Law System*, 27.

26 Massimo Vallerani, "Peace Accord and Trial in the Judicial System: The example of Perugia," trans. Sarah Rubin Blanshei (Washington, D.C.: The Catholic University of America Press, 2012), 186–187. The Podestà and the Capitano could not carry out sentences for crimes when the parties had made peace within eight days, except in certain cases, like homicide, breaking a truce, and highway robbery.

27 Ettore Verga, "Le sentenze criminali dei podestà milanesi," *Archivio storico lombardo* 28 (1901): 117–118.

the criminal ban, and if so, under what conditions? If justice, as Justinian's *Institutes* famously begin, means giving each man his due, inquisitorial procedure gave new and wide authority to the judge to determine exactly what that might be. But local statute law shaped the powers of the criminal judge and the agency of the parties who appeared before him.

Therefore, while on the surface, the broad outlines of criminal procedures appear to have been fairly uniform across northern Italy in the late Middle Ages, local variation on specific points shaped the criminal process and the relationship between the court and the parties in conflict. Local norms limited or augmented judicial power, controlled or increased the parties' risk, and encouraged or discouraged extra-judicial settlements. The localized nature of the criminal inquisition made the procedure highly adaptable to local needs and political conditions. This is perhaps why it was so successful.

Although these variations developed inside municipal law, we cannot answer our questions with a comparative study of statute law. Statutes are notoriously difficult to interpret, and their apparent simplicity masks a minefield of interpretive issues. How closely were they followed in practice? Who could interpret them? How much change could occur between redactions? Whose agenda shapes them? How strictly were they enforced? Moreover, by the late fourteenth century, statutes could sometimes be more symbolically than legally important, perhaps even becoming at times "an expression of identity, rather than a normative reality."[28] Medieval jurists were deeply aware of the limitations of statutes: in the thirteenth century, the great jurist Guilelmus Durantis bewailed the frequent disregard for statutory rules on the procedures for dealing with notorious crimes,[29] while two centuries later, Nellus da San Gimigniano expressed great frustration with the mass of contradictory statute law on the criminal ban, a subject about which "statutes and other ordinances . . . arise every day," to the extent that he found it very difficult to generalize.[30] For understanding the development and use of criminal procedure, statutes are necessary, but not sufficient.

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28 Mario Ascheri, *The Laws of Late Medieval Italy, 1000–1500: Foundations for a European Legal System*, trans. Anabel Thomas and Sara Elin Roberts (Leiden: Brill, 2013), 342.

29 Durantis, *Speculum iuris*, Book III, part I *De notoriis criminibus*, §1.13, p. 45: "Hodie autem valde officium iudicium in hac inquisitione exuberat: ipsi namque adeo defensiones arctant, ut vere dici possit, quod eorum officium latissime patet . . . non numquam enim hominem inauditum et indefensum statim suspendunt. Sed certe quicquid fiat, nulli est de iure legitima defensio deneganda . . .".

30 Nellus da San Gimignano, *De Bannitis*, in *Tractatus Universi Iuris* XI, part 1 (Venice: 1584), fol. 357r.

Late Medieval Justice: A Case Study

This book offers a case study of the logic and process of the criminal trial, resting on the rich judicial sources of Reggio Emilia at the end of the fourteenth century. A case study provides a useful method for considering the relationship between courts, procedures and individuals. Given the highly localized nature of many procedural elements, this method allows us to follow the trial process without generalizations that might obscure important features of the trial. As an expression of political power, and also a quotidian part of municipal life, the work of the criminal court shaped relationships between people, solidified perceptions of marginal or minority groups, and reinforced social rules and norms together with the legal ones. A case study, as opposed to an institutional history or a thematic study, considers the political together with the personal, and the mundane together with the extraordinary, in order to construct a holistic picture of justice in operation.

Trevor Dean has observed that justice in urban centers and in principalities tended to be perhaps more repressive, while in rural contexts, courts were more focused on dispute resolution.[31] Inquisitorial justice may have functioned best—or at least, most powerfully—in urban environments with strong government centers and interaction and communication between government bodies.[32] Studies of late medieval criminal courts have centered on cities like Venice,[33] Bologna,[34] Siena,[35] Perugia,[36] and Florence[37] both because of their

31 Dean, *Crime and Justice*, 51.

32 Stern, *Criminal Law System*, 46.

33 For example, Guido Ruggiero, *Violence in Early Renaissance Venice* (New Brunswick: Rutgers University Press, 1980); Guido Ruggiero, *The Boundaries of Eros: Sex Crime and Sexuality in Renaissance Venice* (Oxford: Oxford University Press, 1985).

34 Most recently, Sarah Rubin Blanshei, *Politics and Justice in Late Medieval Bologna* (Leiden: Brill, 2010).

35 William M. Bowsky, *A Medieval Italian Commune: Siena under the Nine, 1287–1355* (Berkeley: University of California Press, 1981); Mario Ascheri, "La pena di morte a Siena (Sec. XIII–XV): tra normativa e prassi," *Bullettino senese di storia patria* 110 (2004): 489–505; Enzo Mecacci, *Condanne penali nella Siena dei Nove: tra normative e prassi* (Siena: Università degli Studi di Siena, 2000).

36 Sarah Rubin Blanshei, *Perugia: 1260–1340: Conflict and Change in a Medieval Italian Urban Society*. Transactions of the American Philosophical Society (Philadelphia: American Philosophical Society, 1976); "Criminal Justice in Medieval Perugia and Bologna," *Law and History Review* 1 (1983): 251–275; Vallerani, "How the Inquisition is Constructed," 211–246.

37 Stern, *Criminal Law System*; Andrea Zorzi, *L'amministrazione della giustizia penale nella repubblica fiorentina: Aspetti e problemi*, Biblioteca Storia Toscana 23 (Florence, Leo S. Olschki, 1998).

obvious importance and because these cities boast significant archival holdings. For Milan, and indeed for the territories under Visconti control, judical evidence is sparse. Antonio Padoa-Schioppa examined Milanese justice at the end of the thirteenth century,[38] and Ettore Verga investigated surviving criminal sentences from the late fourteenth and early fifteenth century from Milan.[39]

At Reggio Emilia, a rare confluence of sources, including trial records and statutes, offers a window into the administration of justice in the Visconti territories. Trial records from the criminal court of the Podestà survive from 1373–1408, albeit with lacunae.[40] Records of condemnations also exist for part of this period, approximately eleven years, with lacunae.[41] Other evidence is also preserved, though less systematically, including fragments of testimony, denunciations, occasional medical consilia, and other miscellaneous documentation generated by the courts.[42] There is also a particularly rich collection of municipal statutes, redactions of which for the period under consideration survive from 1335, 1392 and 1411, as well as a partial revision in 1404.[43] A consideration

38 Antonio Padoa-Schioppa, "La giustizia milanese nella prima età viscontea (1277–1300)," in *Ius Mediolani: Studi di storia del diritto milanese offerti dagli allievi a Giulio Vismara*, Pubblicazioni dell'istituto di storia del diritto italiano 20 (Milan: Università degli studi di Milano, 1996), 1–46.

39 Verga, "Le sentenze criminali dei podestà milanesi," 98–142.

40 ASRe, *Giudiziario*, Libri delle denunzie e querele, delle inquisizioni, degli indizi, dei costituti, delle difese e d'altri atti criminali, 1373–1408 (hereafter ASRe, *Giudiziario*, Libri delle denunzie). Surviving trials from this period date from July 8, 1373 to June 12, 1408, with significant lacunae. For the years 1383–4, 1394, 1399–1401, no trials survive.

41 ASRe, *Giudiziario*, Podestà, Giudici, Governatore: Sentenze e condanne corporali e pecuniarie (hereafter ASRe, *Giudiziario*, Sentenze e condanne). Condemnation records survive for the years 1385–96 and 1401–1403. Again, these records have lacunae. For years that do not have surviving records of condemnation, it is still usually possible to learn the outcome of a trial process from marginal notes in the record of the proceeding.

42 ASRe, *Giudiziario*, Atti e processi civili e criminali (hereafter ASRe, *Giudiziario*, Atti e processi). Particularly for the years 1394–1407, the documents in this fondo are chronologically organized but unnumbered. When there is a folio number, I have included it in the citation, but the date is generally the most reliable reference.

43 ASRe, *Comune*, Statuti del 1335/1371; ASRe, *Comune*, Statuti del 1392; ASRe, *Comune*, Statuti del 1404. A manuscript of the 1411 redaction is held at the Archivio di Stato di Reggio Emilia, but the book of criminal law is badly damaged; ASRe, Archivio del Comune di Reggio, *Statuti*, 10. Therefore in this study I have used the manuscript housed in the Biblioteca del Senato della Republica (Biblioteca del Senato della Republica, Statuti ms. 77; hereafter BSR, Statuti, ms. 77). None of these redactions has been edited, though the rubrics of the statutes from the thirteenth to the sixteenth centuries have been published by Antonella Campanini in Campanini, *I rubricari degli statuti comunali di Reggio Emilia*

of justice in Reggio Emilia may therefore offer some insight into the entrenchment of power in the expanding territorial state, reflecting the "political adaptability and dynamism of the new regional states in imposing order."[44]

It has now been long established that Renaissance "states" were not formal, centralized administrative units, and signorial powers used many tools that might be mistaken for misrule or corruption, in order to solidify or create power networks. Indeed, as Giorgio Chittolini observed more than twenty years ago, viewing the state as "tidily planned institutions, hierarchies of power, and actions of magistrates and officials" is wholly inadequate to describe the nature of power.[45] He suggested that we might better think of the state "simply as an arena for the mediation and political organization of various forces, of differing actors and interests . . . without necessarily implying that its powers and its sovereignty conferred any special quality or efficacy."[46] Public justice had an important function in establishing the boundaries of this power, and the right to wield the sword of criminal jurisdiction was a coveted marker of autonomy. Criminal justice was deeply political and it played a role in defining or legitimating new power structures.[47] But the growth of public justice (in the form of inquisition procedure) did not indicate a growing centralized power of the "state" at Reggio. Here, as inquisition procedure developed to allow the participation of private parties as accusers, public justice was not even necessarily all that public. Inquisitorial procedure and its use at Reggio reflects the tensions and insecurities of its environment.

The first chapter of this study outlines the administration of justice at Reggio, including the greater political context of Reggio at the end of the fourteenth century, the primary officers of the court, and the question of jurisdiction and its assertion. The institutional framework of the city and its court was in its broad outlines similar to most other northern Italian cities, but economic and political concerns ultimately entangled the foreign rectors in the world

(*secoli XIII–XVI*), Fonti e saggi di storia regionale 7 (Bologna: Università degli studi di Bologna, dipartimento di paleografia e medievistica, 1997). The only edited redaction from medieval Reggio is the 1265 redaction with its additions up to 1273, in Pietro Sella and Emilio Anderloni, eds., *Corpus Statutorum Italicorum*, old series no. 16, new series no. 6 (Milan: U. Hoepli, 1933).

44 Julius Kirshner, "The State is Back In," in *The Origins of the State in Italy*, ed. Julius Kirshner (Chicago: Chicago University Press, 1997), 5.

45 Chittolini, "The Public, the Private, and the State," in *The Origins of the State in Italy*, ed. Julius Kirshner, 42.

46 Chittolini, "The Public, the Private and the State," 47.

47 Andrea Zorzi, "Justice," in *The Italian Renaissance State*, eds. Andrea Gamberini and Isabella Lazzarini (Cambridge: Cambridge University Press, 2012), 513.

of municipal politics. An understanding of the preliminary processes of the investigation of crime helps frame the work of the inquiring judge. Chapter Two considers the initiation of inquisition trials at Reggio Emilia, exploring the role of *ex officio* public justice, and considering the involvement of private parties in the criminal process. Both trial initiation and proofs were fundamentally invested in the idea of *fama*, or reputation, and the role of *fama* in the criminal process is the subject of Chapter Three. Chapter Four investigates the nature of proof considered by the criminal judge, judicial presumptions, and the construction of defenses. Chapter Five explores the relationship between crime control and dispute resolution in this late medieval court through a consideration of penalties, mitigation and clemency.

A case study of justice in Reggio Emilia allows us to deeply explore the criminal process while also opening a small window into life in the contested borderlands. In this world of shifting political tides, economic and demographic crises, war and famine, we seek to draw a picture of justice in one city, and explore the role of criminal procedure in shaping the practice of law and order. Situated precariously in a buffer zone contested by the great houses of Ferrara and Milan, torn by internal conflict and shaped by political strife, Reggio Emilia offers a window into life and justice outside the major urban centers of late medieval Italy.

CHAPTER 1

Power, Jurisdiction, and Criminal Investigation

Reggio Emilia was the seat of a diocese, which stretched northwest towards the Po, and south into the Apennines, where it was bounded by a series of mountain passes. The western boundary was partially marked by the river Enza and the eastern was largely marked by the river Secchia. In the central part of this long and narrow territory, Reggio lay on the via Emilia, which bisected the diocese. The history of the city of Reggio has been the subject of some important studies. In the early twentieth century, Natale Grimaldi made a careful study of Reggio Emilia during the rule of Barnabò Visconti.[1] More recently, Andrea Gamberini's rigorous examination of political identity at Reggio during the Visconti age has revealed political tensions and internal conflict.[2]

In the thirteenth century, Reggio Emilia had been a prosperous town of about 17,000 inhabitants,[3] with perhaps another 25,000 in the 2,500 kilometers of territory under its jurisdiction.[4] The largely agricultural economy rested on the produce of the surrounding lands, which included grains, rice, grapes, mulberries, and other products.[5] During the period of communal rule, the city was home to a law school,[6] and even a mint. But the fourteenth century Reggio Emilia faced a difficult series of economic, political, and especially demographic changes, as the population was reduced to approximately 3,000

1 Natale Grimaldi, *La signoria di Barnabò Visconti e di Regina della Scala in Reggio (1371–1385): Contributo alla storia delle signorie italiane* (Reggio Emilia: Cooperativa Lavoranti Tipografi, 1921).

2 Andrea Gamberini, *La città assediata: poteri e identità politiche a Reggio in età viscontea* (Rome: Viella, 2003). On medieval Reggio Emilia, see also the essays collected in Gino Badini and Andrea Gamberini, eds., *Medioevo Reggiano: studi in ricordo di Odoardo Rombaldi* (Milan: FrancoAngeli, 2007).

3 Andrea Gamberini, "Una città e la sua coscienza comunitaria," in *Oltre le città: Assetti territoriali e culture aristocratiche nella Lombardia del tardo Medioevo* (Rome: Viella, 2007), 85.

4 Grimaldi, *La signoria di Barnabò Visconti*, 127.

5 Girolamo Tiraboschi, *Dizionario topografico-storico degli Stati estensi*, vol. 2 (Modena, 1725), 244.

6 Rashdall called this school, together with that at Modena, "the most formidable of Bologna's younger rivals." Hastings Rashdall, *The Universities of Europe in the Middle Ages*, eds. F.M. Powicke and A.B. Eden, vol. 2, new edition (Oxford: Oxford University Press, 1951), 6–7.

inhabitants in the city, with a possible 4,500 to 5,000 in the district.[7] In part this was due to the plague,[8] which arrived at Reggio Emilia in March of 1348, an epidemic "horrible and enormous" as the chronicler of Reggio Emilia remembered: ". . . concerning this disease I cannot describe the horrors, and cruelties, and darkness."[9] Public health efforts failed,[10] and recurrent epidemics were accompanied by famine, as in 1373–4, when "a measure of flour cost by the Cremonese measure five imperial pounds, and beans cost four. So cruel a famine, from which many perished of hunger, was never heard of or seen before."[11]

The political landscape was also shifting. By the mid-fourteenth century, the continual ascendance of the Visconti family of Milan was reshaping northern Italian politics. After the death in 1354 of their uncle, the Archbishop Giovanni Visconti, the brothers Galeazzo and Barnabò Visconti shared control of the Milanese territory. Galeazzo controlled the western half, including Genoa, keeping his residence after 1359 at Pavia, and Barnabò held the eastern half, including Parma, Piacenza, and for a brief time, Bologna, with his administration settled in Milan.[12] Soon after the death of Giovanni, Genoa regained independence, while the papacy retook control of Bologna. The desire to regain control of these cities shaped the policies of their reigns.[13]

Reggio Emilia's geographic position, strategically convenient for eastward expansion to Bologna, made it an attractive acquisition to both the Visconti and the Este of Ferrara. Since 1359 Reggio had been under the control of Feltrino Gonzaga, but his unpopular rule was already falling to pieces

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7 Gamberini, *La città assediata*, 91.

8 On the Black Death at Reggio, see Corrado Corradini, "Davanti alla morte in tempo di peste a Reggio Emilia (1348): aspetti religiosi" in *Medioevo reggiano: studi in ricordo di Odoardo Rombaldi*, eds. Gino Badini and Andrea Gamberini (Milan: FrancoAngeli, 2007).

9 Sagacius et Petrus de Gazata, *Chronicon Regiense*, in *RIS* 18, col. 66: "Isto anno usque ad Festum omnium sanctorum . . . fuit morbus horribilis, et tremendus. Qui conversabatur cum infirmo, moriebatur . . ." Gazata, *Chronicon Regiense*, col. 66: "De hoc morbo non possem scribere horribilitates, et crudelitates, et obscuritates, que fuerunt."

10 For example, in 1371, the Podestà, Julianus Spinolle, and the captain of the city, Balzarius de Pusterla, ordered the public crier to make a proclamation forbidding anyone from lands infected with plague to come to Reggio Emilia. ASRe, *Comune*, Registri dei decreti, reg. 1372–1375, September 25, 1373.

11 Gazata, *Chronicon Regiense*, col. 83. "Valuit starium frumenti ad mensuram Cremonae libras quinque imperialium et faba libras quatuor imperialium. Numquam audita, nec visa fuit tam crudelis caristia, unde multi fame perierunt."

12 D.M. Bueno de Mesquita, *Giangaleazzo Visconti: A Study in the Political Career of an Italian Despot* (Cambridge: Cambridge University Press, 1941), 6–7.

13 Bueno de Mesquita, *Giangaleazzo Visconti*, 7.

during the 1360's as the feudal families of the Reggiano largely disregarded his authority.[14] Ultimately the Este of Ferrara hired the notorious mercenary leader, Lutz von Landau, in their bid to take the city, and the mercenaries carried out a destructive rampage that lasted for twenty days.[15] Niccolò d'Este, the author of that disaster, was still remembered with anger years later by the chronicler of Reggio, who wrote on the occasion of his death, "He was always a weak man, and a cruel lord, and he was very bad for the city of Reggio: for it was he who brought [our city] to destruction and despoliation."[16]

When Feltrino saw that the Este soldiers had taken the city, he offered to sell it to Barnabò Visconti for the price of 50,000 florins in an effort to save himself.[17] The treaty was completed on May 17, 1371, and Barnabò paid the soldiers of Landau's company 25,000 florins to leave.[18] Barnabò himself employed the company of the famous English mercenary, John Hawkwood, together with his illegitimate son, Ambrogio Visconti, and he quickly took possession of the city.[19] Weakened by a long term of inept Gonzaga government, devastated by

14 Grimaldi, *La signoria di Barnabò Visconti*, 17–21. Feltrino had little local support. In theory, his rule was under the protection of the papacy, but in reality he was isolated. The Gonzaga abandoned him too—when initially the Este believed they would take possession of Reggio from Feltrino and informed the Gonzaga of Mantua, they responded with congratulations. Francesco Cognasso, "Istituzioni comunali e signorili di Milano sotto Visconti," in *Il ducato visconteo e la repubblica ambrosiana (1392–1450)*, Storia di Milano 6, eds. Giuseppe Martini et al. (Milan: Fondazione Treccani, 1955), 465–466.

15 The loyalties of the nobility of the Reggiano were divided. The Este commanded the loyalty of some important noble families like the Fogliani, Manfredi, Roberti, and Reteglia, as well as a large part of the city's inhabitants. The Visconti claimed loyalty from other families of the contado, among them the Pico della Mirandola, the Pio di Carpi and the Canossa. Grimaldi, *La signoria di Barnabò Visconti*, 21–24; Cognasso, "Istituzioni comunali e signorili di Milano sotto Visconti," 465. The siege and the damage inflicted by the soldiers on the inhabitants of Reggio Emilia is described in detail in the *Chronicon Estense, cum additamentis uque ad annum 1478*, ed. Muratori, RIS, vol. 15 (1729), col. 495–497.

16 Gazata, *Chronicon Regiense*, col. 96: "MCCCLXXXVIII die XXIII. Octobris moritur Dominus Nicolaus de Este Marchio Ferrariae, & Dominus Ferrariae ac Mutinae. Hic fuit homo semper infirmus, et crudelis Dominus, et malus pro Civitate Rhegii; nam fuit ille, qui eam posuit in exterminio, et spoliatione."

17 Grimaldi, *La signoria di Barnabò Visconti*, 5.

18 Cognasso, "Istituzioni comunali e signorili di Milano sotto Visconti," 466.

19 Grimaldi, *La signoria di Barnabò Visconti*, 21. But his own mercenary forces brought further discord to Reggio and especially towns like Guastalla. William Caferro, *John Hawkwood: An English Mercenary in Fourteenth-Century Italy* (Baltimore: Johns Hopkins University Press, 2006), 141–142.

the brutality of Landau's soldiers, the inhabitants of Reggio Emilia found themselves situated precariously on the border as animosity between the Este and the Visconti grew. The Este leader recognized his defeat, but, as one Bolognese chronicler reported, he "remained cheated, and was a worse neighbor than before."[20] The conquest brought a new political reality to Reggio.

Barnabò's wife, the formidable Regina della Scala, administered Reggio Emilia from soon after its acquisition until her death in 1384.[21] In June of 1372, Barnabò wrote to the Podestà, the captain, and other officials, instructing them to write to Regina, not to him, for all their concerns,[22] and during the first twelve years of Visconti control in Reggio, it was Regina who made appointments, decided appeals, and administered affairs. Together with her husband, Regina visited Reggio Emilia in 1372 and was, according to the author of the *Chronicon Regiense*, deeply moved by the devastation of the city:

> Lord Barnabò with his wife came to Reggio at the twentieth hour, and rode around the walls, which along with the gates he greatly admired because of their oak; but when he rode through the city, he was deeply

20 Matthaeus de Griffonibus, *Memoriale Historicum de rebus bononiensium Matthaei de Griffonibus*, RIS II, vol. 18 part 2 (1902), 69: 28.

21 On the technical nature of her power, see F.E. Comani, "Sui domini di Regina della Scala e dei suoi figli: indagini critiche," *Archivio storico lombardo* 29 (1902): 211–248. Reggio was not her only property: during the course of her 40-year marriage to Barnabò, she held many lands from him. At the time she acquired Reggio Emilia, for example, she had already controlled lands near Besciano for almost sixteen years. The letter of concession of these lands, dated Feb. 12, 1366, is printed in Caterina Santoro, *La politica finanziaria dei Visconti: Documenti*. Vol. 1, Settembre 1329–Agosto 1385 (Milan, 1976). At Reggio, the first surviving letter addressed to her from officials of the city is dated April 21, 1372; see Grimaldi, *La signoria di Barnabò Visconti*, 86. For a full discussion of her properties, see Comani, "Sui domini di Regina della Scala," 230–239. Lands of the bishopric of Luni were also sold to her, as was Reggio, though the record of the sale has not survived. F.E. Comani, "Usi cancellereschi viscontei," *Archivo storico lombardo* 27 (1900): 153. In addition, she administered fiefs in Lunigiana, Parmigiano, and the Riviera de Salò. Erskine D. Muir, *A History of Milan under the Visconti* (London: Methuen, 1924), 202.

22 ASRe, *Comune*, Provvigioni dei deputati sulle entrate, reg. 1372–75, fol. 46, quoted in Grimaldi, *La signoria di Barnabò Visconti*, 87: "... and thus you should do everything she orders you, and ... you should give notice to all the vicars and officials of our district of Reggio, so that they serve this in the same way." ("Volumus quod de omnibus necessariis et omnibus que occurent in terris cure vestre commissis: de cetero aliquid nobis non scribatis. Sed omnia que scribenda habebitis scribatis Illustri Domine consorti nostre: et sic faciatis omnia que ipsa vobis mandabit: et de predictis noticiam faciatis omnibus vicariis et officialibus districtus nostri egii ut illud idem servent.")

> saddened by the devastation of the homes, and even more so was his wife. The citizens visited him in the evening, whom he kindly received; but he wondered at the paucity of men, which he would scarcely believe, had he not made inquiries. He gave them great encouragement, promising that they should be strong in mind, since he would quickly restore their city, and he said that they might send to Parma after him, and anything they should wish from him, he would concede with a happy heart.[23]

Contemporary accounts agree that the city was in full demographic crisis, one claiming that "when Lord Barnabò secured [Reggio], there were not in this city twenty men of the city . . ."[24] The scarcity of doctors of law in the region meant that few civil cases could be tried,[25] and the city also lacked other professionals, like physicians. Very soon after the acquisition of Reggio, the Podestà asked for permission to salary a doctor to keep him in the city. It was not unusual for Italian cities to provide public salaries for physicians, who rendered public services like crime reporting or the provision of public health measures. But the Podestà wanted to salary the physician so that he would stay, fearing that if

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23 Gazata, *Chronicon Regiense*, col. 77: "[1371] Die XXI. Octobris Dominus Barnabòs cum eius uxore venit Rhegium hora vigesima, et equitavit circum muros, quos cum portis eius plurimum est admiratus propter robur eius, sed cum per Civitatem equitavit, valde condoluit de domorum vastatione, et magis eius uxor. Cives illum vespere visitarunt, quos benigne suscepit; sed admiratus est paucitatem hominum, quod vix credere poterat, nisi de paucitate perquisivisset. Ipse hortatus est eos plurimum, promittens, ut essent forti animo, quia in brevi eam restauraret, dixitque, quod Parmam post eum mitterent, et quidquid ab ipso vellent, eis gratanti animo concederet."

24 "Et quando [dominus Bernabovis] ipsam fulcivit, non erant in ipsa civitate viginti homines ipsius civitatis." *Memoriale potestatum Regiensium, RIS*, vol. 8 (1726), col. 1176, quoted in Gamberini, 90 n. 41. Andrea Gamberini has found further reference to Reggio's poor state even in a commentary on the Divine Comedy by Benvenuto da Imola, who wrote of the example of "the noble city of Reggio in Lombardy, whose citizens are thus dispersed through Italy . . ." See Gamberini, *La città assediata*, 90–91 n. 42: "Today we have as a clear example before our eyes the noble city of Reggio in Lombardy, whose citizens are thus dispersed through Italy; just as the Jews are continuously *spread out* throughout the whole world, so also has this miserable spectacle come to pass for these *wanderers*." ("Sicut est hodie evidens exemplum habemus prae oculis nobilem civitatem Reginam Lombardia, cuius cives ita sunt dispersi per Italiam, sicut Judaei per universum et continuo consumuntur, ita ut miserabile spectaculum fit pertranseuntibus.")

25 Grimaldi, *La signoria di Barnabò Visconti*, 93.

he left, "no other medical doctor would then be in this your city, and indeed it should not be hoped at the present time that another will return."[26]

In the years immediately after the city fell to Visconti rule, some halting steps towards recovery were attempted. Regina della Scala took measures to ensure basic provisions, ordering a "certain quantity of flour" to be sent to Reggio, which she wished to have "sold and distributed" amongst the citizens and inhabitants of the city of Reggio.[27] And while in 1372, the Podestà feared that no physician would take up practice in Reggio, within the next four years, the presence of at least three surgeons is attested in surviving records,[28] at least one of whom was also receiving a public salary by 1373. But the slow and painful nature of the recovery is still clear from the pleas of the Podestà for different and more lucrative appointments,[29] and perhaps there was no recovery at all: in 1371, when it met to confirm Barnabò as the signore of Reggio Emilia, the council numbered 600 men, which must have included most of the adult men still living in the city. In later years, the number declined to 350 men present in the general council in 1382 and only 247 in 1394, though it is difficult to say whether this was because the population was in decline or whether people lost interest in serving on a council whose power was eroding.[30] Recovery was not helped by new sources of unrest: almost immediately, Barnabò began a

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26 ASRe, *Comune*, Registri dei decreti, reg. 1371–72, September 10, 1371: "Item dignetur ob salute civium vestrorum et forensium habitantium et in civitate vestre prefacta providere quod magister Paulus physicus qui stetit octo annis elapsis salarium a dicto Domino Feltrino in civitate predicta non recedat de prefacta civitate cum nullus alius medicus physicus sit in dictam vostram civitatem nec etiam expetiet de presenti aliquis reversurus. Responsio Domini: contentamus quod sibi provideatur per commune Regii per modum quod dictus medicus ibi stet."

27 ASRe, Proviggioni, May 11, 1372, vol. 2, 6v.

28 The three surgeons are Magister Antonius de Cassinariis, Nicoloxius Spander de Alamania, and Gabrielis de Medicis de Reggio ASRe, *Comune*, Registri dei decreti, reg. 1372–1375, November 19, 1373, 57v (Antonius de Cassinariis); ASRe, *Giudiziario*, Libri delle denunzie, June 11, 1374, vol. 11, fol. 118r (Nicoloxius Spander de Alamania, and Gabrielis de Medicis de Reggio).

29 Grimaldi, *La signoria di Barnabò Visconti*, 93.

30 Gamberini, *La città assediata*, 92 and 92 n. 48. David Chambers suggested that in early fifteenth century Mantua, the slack attendance at mandatory council meetings may have been likely due "not so much to tyranny [of the Gonzaga] as to public apathy and contentment with the regime." David S. Chambers, "The Gonzaga Signoria, Communal Institutions and 'the Honour of the City': Mixed ideas in Quattrocento Mantua." in *Communes and Despots in Medieval and Renaissance Italy*, eds. John E. Law and Bernadette Paton (Farnham: Ashgate, 2010), 111.

bloody war to acquire Modena (1371–1375).[31] His interest in Bologna meant continuous conflict with the papacy, for which Reggio, and perhaps especially its clergy, would pay a price. The papacy struck back, suspending the offices of clergy loyal to the Visconti, and Barnabò in turn placed new restrictions on all the clergy in his lands. All of this ultimately encouraged a brief revolt in Reggio, which once again found itself a battleground,[32] and tensions remained high throughout 1373 and into 1374, when a tentative peace was reached.[33] Civic religion was not a cohesive influence at Reggio, and the church itself was subsumed inside local politics.[34] In addition to the obvious destabilizing effects of this violence, the longer-term consequences included the disorder caused by the omnipresent mercenary companies and all the issues that accompanied housing them.[35]

During the 1370s and early 1380s, Reggio remained under the control of Barnabò and Regina. After Regina died in 1384, her properties reverted to Barnabò, but in 1385, in a bloodless coup that sent shockwaves through northern Italy and even north of the Alps, his nephew Giangaleazzo Visconti seized control of his uncle's territories and united the Visconti state under one ruler.[36] Barnabò died later that year in prison, and Reggio, together with the rest of

31 Grimaldi, *La signoria di Barnabò Visconti*, 4–5.

32 Caferro, *John Hawkwood*, 154–155 and 154 n. 50.

33 Bueno de Mesquita, *Giangaleazzo Visconti*, 8–9.

34 The rural nobility formed alliances not just with ecclesiastical instutitons in their own territories but also with those in the city, hence the association of the Roberti with the monastery of Santa Chiara, the da Sesso with the monastary of San Tomaso, and the Cannosa with San Raffaele. Gamberini, "Una città e la sua coscienza comunitaria," 92.

35 The same register of decrees from 1371 includes a request to Barnabò to aid those inhabitants of Reggio who were forced from their homes to accommodate these hired soldiers, or *stipendiarii*, and foreign officials. Emphasis is placed on the circumstances of inhabitants of Reggio who had fled under the Gonzaga because of the bad state of the city (*propter mallum* [sic] *statum civitatis*) and their concerns with their property, ASRe, *Comune*, Registri dei decreti, reg. 1371–72, September 10, 1371, 11r; and also on the concerns of citizens and inhabitants whose homes had been confiscated or damaged by the *stipendiarii*. ASRe, *Comune*, Registri dei decreti, reg. 1371–72, September 10, 1371, fols. 11r–12r.

36 Perhaps fearing for his own autonomy, Giangaleazzo rode with his usual bodyguard to Milan, with, as the chronicler of Reggio described, "many arms hidden under his clothes," (Gazata, *Chronicon Regiense*, col. 92: "Dominus Comes Virtutum . . . simulavit, se velle adimplere votum ad Sanctam Mariam super Comum, et venit Mediolanum cum multis armatis sub vestibus . . .") claiming that he wished to pay his respects to his uncle but was afraid to enter the gates of the city. Barnabò met his nephew outside Milan without protection, and was immediately taken captive and imprisoned.

his territories, passed into the control of Giangaleazzo Visconti for the next seventeen years.

Giangaleazzo keenly sought to avoid the stigma of tyranny and to seek legitimacy through a ducal title granted by the Emperor.[37] His conception of the state was strong and unified,[38] and he instituted important reforms in the subject cities. In Reggio Emilia, he made new appointments to the most powerful offices—Podestà, Capitano, and Referendario—and he centralized financial admistration, over which he exerted a close control. His interest in maintaining order in the countryside was apparent, as he instituted a new office to control the dangerous rural territory and fortified the castles and military outposts. But many of his reforms had antecedents in Barnabò's rule, and, as Gamberini observed, it is difficult to describe the new age at Reggio under Giangaleazzo as a strong break with the past.[39]

Yet his consolidation of the formerly divided Visconti dominions drove other northern Italian powers to form new coalitions against the Visconti. The dominating conflict was with Florence, with which Giangaleazzo was at war from 1390. A powerful recurrence of plague in 1399–1400 prevented Giangaleazzo from raising money through taxation to support his ongoing campaigns, and trade was compromised as roads and mountain passes became increasingly unsafe. His willingness to offer pardons to outlaws willing to return to his dominion, and to pardon convicted criminals in return for three months of military service, may be symptoms of the new economic and demographic problems he faced.[40] The death of Giangaleazzo in 1402 from illness gave new fuel to the internal disorders and external enemies Giangaleazzo had worked to suppress, and "Visconti ascendancy would now be tested almost to destruction."[41] Giangaleazzo's young son Giovanni Maria inherited the ducal title, and under the duchess Caterina, a ruling council was established. But the ensuing disorder left the door open for leading families to make efforts to seize power, and for the loss of territories.[42]

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37 See Jane Black, "Giangaleazzo Visconti and the Ducal Title," in *Communes and Despots in Medieval and Renaissance Italy*, eds. John E. Law and Bernadette Paton, 119–130.

38 Gamberini, *La città assediata*, 267.

39 Gamberini, *La città assediata*, 266–7.

40 Bueno de Mesquita, *Giangaleazzo Visconti*, 293–296.

41 Jane Black, *Absolutism in Renaissance Milan* (Oxford: Oxford University Press, 2009), 72.

42 On this transition and especially on the fate of the ducal title during this period, see Black, *Absolutism in Renaissance Milan*, 72–78.

At Reggio, power would come to the hands of Ottobuono Terzi, a *condottiero* who, at the time of Giangaleazzo's death in 1402, commanded a large force involved in the Visconti war with Florence. Accounts of Ottobuono have left an historical impression of a bloody and ruthless tyrant, but this black legend has recently been greatly moderated.[43] Unlike other *condottieri*, who left Visconti service for Florence, Ottobuono maintained close ties to the Visconti even after Giangaleazzo's death, and by July of 1403, he was *commissario ducale* in Reggio, Parma, Piacenza, and several other cities.[44] Slowly—and more or less legitimately, through agreements with Milan—he built a signorial regime. In 1404, he was proclaimed *dominus* in Reggio in the general council, as he was also at Parma and then at Piacenza.[45] In short order he revised the statutes, most importantly, removing references to Visconti decrees.[46] His rule shows that the "collapse of the Visconti edifice does not signify the collapse of the form of the 'state' in the Padane region."[47] But his efforts to expand eastward, especially to Modena, were interpreted as acts of open aggression by the Este of Ferrara, who, together with the Malatesta, the Gonzaga, and with wavering support from Giovanni Maria Visconti, ultimately united in their consideration of Ottobuono as a public enemy.[48] Ultimately, almost five years to the day after seizing power at Parma, Ottobuono was killed on May 9, 1409 at Rubiera by Niccolò d'Este.[49] With his death, the city was once again brought under the control of an ascendant power, as it was absorbed into the territories of the Este.

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43 Andrea Gamberini, "Un condottiero alla conquista dello Stato. Ottobuono Terzi, conte di Reggio e signore di Parma e Piacenza," in *Medioevo reggiano: studi in ricordo di Odoardo Rombaldi* (Milan: Franco Angeli 2007), 282–305.

44 Andrea Gamberini, "Principi in guerra: Ottobuono Terzi e i suoi nemici," in *Oltre la città: Assetti territoriali e culture aristocratiche nella Lombardia del tardo medioevo* (Rome: Viella, 2009), 141.

45 Gamberini, "Un condottiero alla conquista dello Stato," 295.

46 ASRe, *Comune*, Statuti del 1404; Gamberini, "Un condottiero alla conquista dello Stato," 296.

47 Gamberini, "Un condottiero alla conquista dello Stato," 296–7.

48 See Gamberini's analysis in "Un condottiero all conquista dello Stato," 291–292.

49 *Historiae Parmensis fragmenta ab anno MCCCI usque ad annum MCCCLV*. RIS, vol. 12 (1728), col. 752: "1409. A die 9. di Maggio Otto Terzo fu morto a Rubera da Nicolao da Este, essendo andato per trattare di pace con quello, il quale era suo compadre. Et il prefato giorno Nicolao Estense entrato in Parma, hebbe di quella il dominio."

The *Signore* and the Law at Reggio Emilia

The authority held by the Visconti in their territories was theoretically complete. The grant of the imperial vicariate—which had cost Giovanni, Matteo and Barnabò Visconti 150,000 florins in 1355—carried with it immense power. Barnabò, upon receiving the title, understood himself as "pope and emperor as well as *signore* in all my lands. Not the emperor, not even God, can do anything in my territories unless I wish it."[50] The right of the Visconti to wield *plenitudo potestatis* was supported by such jurists as Baldus degli Ubaldi: effectively there were no restraints on the power of the *signore* to act contrary to the law, and fourteenth-century legal theory of the *plenitudo potestatis* tended to reflect the actions and practices of the *signori*.[51] In general, the Visconti, by virtue of their *plenitudo potestatis*, were not bound to uphold statute law and were able to supersede these laws at will.[52]

In practice, however, the degree to which signorial authority ultimately displaced communal authority remains a difficult question. According to Grimaldi, the Visconti, "... by rendering inactive and superfluous the institutions of communal government, and gathering into their own hands absolute power, destroyed the substance and in large part also the form of republican government, substituting in the commune the political and administrative forms of the Principality."[53] This may perhaps be an overstatement in that much of the external structure of communal government appears to survive into the signorial age. However, certainly the force of those institutions did change: the city councils, for example, still met but they could be convened or

50 Black, *Absolutism in Renaissance Milan*, 52. The grant of the vicariate was for life to the brothers and to their heirs, but only as long as they remained loyal to the empire, and it was suspended in 1372 after a rift developed between the Visconti and the new emperor Wencenslaus. Yet Barnabò and Galeazzo continued to use the title and claim the privledges associated with it, and only Giangaleazzo would attempt to gain a limited renewal of the grant, first in 1380, and then finally a full grant in 1396. Jane Black, "The Visconti in the Fourteenth Century and the Origins of their *Plenitudo Potestatis*," in *Reti Medievali Rivista* 5 (2004): 7–8. On Giangaleazzo's 1395/1396 investiture, see Black, "Giangaleazzo Visconti and the Ducal Title," 119–130.

51 Black, *Absolutism in Renaissance Milan*, 35.

52 Black, *Absolutism in Renaissance Milan*, 48.

53 Grimaldi, *La signoria di Barnabò Visconti*, 85: "... i Visconti nella seconda metà del XIV secolo, rendendo inattivi e superflui gli organi propri del governo comunale, accentuando nelle loro mani il potere assoluto, distruggono la sostanza e in gran parte anche la forma del governo repubblicano, sostituendo al comune le forme politiche e amministrative del Principato."

dismissed by an order of the *signore*, and assemblies could not be held without a general or special license.[54]

Perhaps most importantly for the purposes of this study, Barnabò revolutionized the hierarchy of laws in his domain. Traditionally during the communal period, municipal statutes were the first level of authority. In cases where the statutes were inadequate, recourse could be made to the *ius commune*.[55] The local statutes, therefore, embodied a great deal of power, and the processes by which they could be changed or altered were controlled, in the communes, by municipal councils. But under Barnabò, this changed: now the first law to be consulted was that of the signorial decree, then the municipal law, and lastly the *ius commune*.[56] This was in keeping with other signorial regimes, which, as Vallerani observed, "... presented themselves as 'freed' from the law, but maintained an ambiguous relationship with the urban normative picture and with the encumbering *ius commune* of imperial origin."[57]

Municipal Statutes

The vast political changes described above resulted in redactions of the municipal statutes. The processes of the criminal court and the penalties for crime developed in these statutes and in signorial decrees. It was common practice in territories under Visconti rule for the statutes to be reissued.[58] Barnabò did not order a full redaction of the statutes, and the statutes of 1335 were reissued in 1371 and remained in force until 1392.[59] Municipal law, however, was a living organism, and Barnabò allowed the *Consiglio della città* to form a committee

54 Grimaldi, *La signoria di Barnabò Visconti*, 84.

55 However one needs to exert caution when interpreting the medieval hierarchy of laws. As Paolo Grossi commented: "Non vi sono giuridicità di grado superiore e inferiore; non v'è un ordinamento più valido: il diritto universale, il diritto collaudato nei secoli, il diritto scientifico, può cedere di fronte alla piccola emersione locale. Non è una gerarchia delle fonti, è invece un gioco di rapporti fra ordinamenti che, convivendo e covigendo, si comprimono nella relatività della vita giuridica." Paolo Grossi, *L'ordine iuridico medieval* (Bari: Editori Laterza, 1995), 233–234.

56 Gamberini, "La forza della comunità," in *Lo stato visconteo: Linguaggi politici e dinamiche costituzionali* (Milan: Franco Angeli, 2005): 146.

57 Massimo Vallerani, "The Petition to the Signore and the Power of Mercy," in *Medieval Public Justice*, trans. Blanshei, 308.

58 Black, *Absolutism in Renaissance Milan*, 115.

59 Grimaldi, *La signoria di Barnabò Visconti*, 81. Book I was revised because it dealt with the relationships of the Gonzaga to the *feudalità*.

which, together with a representative of the *signore*, could make reforms or changes to the statutes. The statutes would finally be redacted under Giangaleazzo as part of his broader administrative reforms, which aimed at achieving unity in the disparate lands of the Visconti state. He appointed two jurists, Paolo de Arzonibus and Giovanni de Carnago, both members of the *Collegio dei giudici* in Milan, to redact the statutes of Reggio Emilia, and the two-year-long project was completed in 1392.[60]

Concerning the criminal law, the 1392 redaction brought some changes, largely additions. Perhaps most importantly, the *ex officio* power of the judge appears to have been increased.[61] Most penalties remained unchanged, though a few were expanded, and a new penalty for sodomites was institute in the statutes.[62] Other changes included a series of new *capitula* that dealt with a variety of concerns, such as forbidding the Podestà and his judges to incarcerate anyone for crimes that did not merit corporal sentences.[63]

It is unknown whether—or how closely—these jurists worked with the city council.[64] They certainly were not obliged to work with any form of representation from Reggio at all. The Lord of Milan could "with or without the council of the city of Reggio, establish, make interpret and declare decrees, *reformationes*, ordinances and statutes."[65] If, in the communal period, city councils had been the ultimate arbiters of power, under signorial regimes, these bodies were generally not dismantled but their authority was greatly curtailed by new innovations. The authority to call them to meet, for example, could be appropriated by *signori*, together with the authority to override their decisions.[66] At Reggio, the general administrative body was the Council of the Twelve convened by

60 Gamberini, "La forza della comunità," 138–139.

61 Gamberini, "La forza della comunità," 141. However we may wonder about the practical results of this provision, and how much of a departure it represented from current practice; see below in Chapter Two.

62 ASRe, *Comune*, Statuti del 1392, fol. 156v. The new penalty was death by burning. The 1335/1371 redaction had no specific penalty.

63 ASRe *Comune*, Statuti del 1392, fol. 156v.

64 Gamberini, "La forza della comunità," 140, and 140 n. 9.

65 ASRe, *Comune*, Statuti del 1335/1371, fol. 3r, quoted in Gamberini, "La forza del comunità," 138; cf. Grimaldi, *La signoria di Barnabò Visconti*, 84. "[Dominus] possit cum consilio et sine consilio civitatis Regii decreta, reformationes, ordinamenta et statuta condere, facere, interpretari et declarare."

66 Grimaldi, *La signoria di Barnabò Visconti*, 112. At Reggio, one of the most important functions of the Twelve was the election of the *sindaco* and the *avvocato del comune*, but the naming of these officers had to be confirmed by the Signore.

either the Podestà or his vicar.[67] Its members comprised the most elite of the citizens, a "minoranza nella minoranza."[68]

In the balance of power between *signore* and city, local statutes were of great significance, not only legally but also symbolically, showing as they did a line of historical autonomy. They gave voice to matters of civic concern, kept alive urban self-government, and perhaps even placed some limits on princely authority.[69] At Reggio, Barnabò's reordering of the hierarchy of laws meant that the statutes took second place to signorial decrees. But the community did not adhere to demands to insert these decrees into the book of statutes, and kept them in a separate volume instead—a defiant act that Gamberini has interpreted as a last resistance to the interference of the *signore* in the municipal law.[70]

Foreign Rectors

During the Visconti age, the most important officials of the city were the Podestà, the *referendario*, and the Capitano della Città. The office of the Capitano—which, in other cities, sometimes held parallel or even overlapping jurisdiction with the criminal judge of the Podestà[71]—at Reggio held primary responsibility for defenses, also controlling the more or less continuous flow of

67 Grimaldi, *La signoria di Barnabò Visconti*, 111. The presence of oligarchies inside the governments of city-republics was not uncommon; Daniel Waley, "The Use of Sortition in Appointments in the Italian Communes," in *Communes and Despots in Medieval and Renaissance Italy*, eds. John E. Law and Bernadette Paton, 27.

68 The power of the Twelve was concentrated in the hands of between thirty and forty men who were continuously re-elected to their seats, a group of men Gamberini calls an "open oligarchy." The members of the Twelve changed every month, with four men chosen from each district of the city. These men came from families whose social standing grew during the fourteenth century and who also held important positions within the church; there were some new names among the men holding office, men who were apparently "self-made." The citizen assemblies, the Twelve and the Forty, were not restricted to the old noble families of Reggio; Gamberini, *La città assediata*, 90–94.

69 Diego Quaglioni, "La legislazione del principe e gli statuti urbani nell'Italia del Quattrocento," in *Principi e città alla fine del medioevo*, ed. Sergio Gensini (Pubblicazioni degli Archivi di Stato 41) (Comune San Miniato: Pacini Editore, 1996), 3–4 and 15–16.

70 Gamberini, "La forza della comunità," 143–145 and 144 n. 23–25.

71 In Florence, the office of the Capitano underwent a "transition from parochial responsibilities to general competence," and by 1415 he exercised general authority in criminal matters; Stern, *Criminal Law System*, 230. After 1376 in Bologna, the restored office of the Capitano del Popolo shared criminal jurisdiction with the Podestà, though the Capitano

mercenaries, who constituted one of the marked features of the Reggian landscape at the end of the fourteenth century. He exerted some jurisdiction over the *stipendiarii* and he also took responsibility for maintaining order in the countryside, at least during the reign of Barnabò.[72] The Podestà and Capitano were closely linked and served in place of the other, if one were ill or incapacitated.[73] The primary figures of the criminal justice system were the foreign Podestà and his criminal judge, who, during the Visconti age, were appointed to renewable terms of service by Milan. If Reggio maintained the practice of other communes, the public importance of the Podestà would have been underscored by the manner in which he swore his oath of office, publicly and in stages, in a sort of *adventus* ceremony.[74]

1 *Office of the Podestà at Reggio Emilia*

The Podestà and his criminal judge were vested by the *signore* with the *merum et mixtum imperium* for the terms of their office, exercising full criminal and civil jurisdiction over Reggio Emilia and its territories.[75] Theoretically, the use of a foreign Podestà ensured that the law was enforced by someone without local feudal associations or vested interests in urban politics.[76] The institution had evolved from the magistrates sent by Emperor Frederick I to oversee judicial

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dealt particularly with cases of treason or conspiracy. Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming).

72 The duties and powers of the "Capitaneus et custos civitatis Regii" are expressed in the appointment of Galeaz de Porris; ASRe, *Comune*, reg. dei decreti, 1389–1404, fols. 20v–21v.

73 Gamberini, *La città assediata*, 259–261.

74 The adventus of the Podestà was designed to emphasize the honor of the city, and also his neutrality. Christoph Dartmann, "Writing and Political Communication in Italian City Communes," in *The Medieval Legal Process: Physical, Spoken and Written Performance in the Middle Ages*, eds. Marco Mostert and P.S. Barnwell (Turnhout: Brepols, 2011), 206; cf. Dartmann, "*Adventus* ohne Stadtherr—'Herrschereinzüge' in den italienischen Stadtkommunen," *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 86 (2006), 64–94.

75 Local officials judged minor infractions, particularly in cases of trespass and minor property damage. The court that oversaw such claims was presided over by a local judge, referenced in the records of the court not as *iudex* but as *officialis* (though the statutes refer to his position as *iudex*). The records for the court of *dani dati* survive from 1398 and from 1404 (ASRe, *Archivi Giudiziari*, Curie della città, Libri dei Danni dati o delle accuse). Book Three of the 1392 redaction and Book Four of the 1335/1371 redaction concern the rules and regulations of this bench. ASRe, *Comune*, Statuti del 1335/1371, fols. 40r–49r; ASRe, *Comune*, Statuti del 1392, fols. 157v–165r.

76 Since at least the twelfth century, foreign governors and judges administered important affairs of communal politics and justice in northern Italian cities, traveling from city to

institutions, but it could actually serve as a vehicle for the expansion of municipal autonomy if the city retained the freedom to choose the Podestà.[77] Thus, as signorial regimes kept and repurposed this convenient tool, they sometimes appropriated from the city councils the authority to appoint men to these positions, using their own appointments to create a tool that extended their reach into subject territories. Even before the signorial period, it is doubtful that the system of foreign rectors ever really provided neutral, uncommitted tribunals. If Gandinus envisioned the "'unrivaled judge' . . . who seeks truth and the punishment of crimes . . . in reality, the communal cities were divided internally, assigned diverse jurisdictions and roles to the foreign judges, imposed tortuous processes on the trials, distributed privileges to local *cives*, and granted to local jurists the power of intervention and enormous control over judicial events under the guise of the *consilium sapientis*."[78]

Under signorial regimes, the Podestà and his court sometimes occupied a nebulous political space between the authority of the *signori* who appointed them, and the municipal councils, whose policies directly affected their work. At Ferrara, the *savi* of the commune exerted control over legal procedure and amended civil and criminal law,[79] though the commune's participation in issues of law and order declined by the fifteenth century. At Reggio, as we have seen, the *plenitudo potestatis* held by the Visconti meant that procedures and

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city to hold limited terms of office, usually of six months. Daniel Waley, *The Italian City-Republics*, 2nd ed. (London: Longman, 1978), 32.

77 Stern, *Criminal Law System*, 77.

78 Massimo Vallerani, "How the Inquisition is Constructed," 232. At Reggio, it is unclear how much control the *consilium sapientis* offered jurists, though there were clearly some advantages to using them. The *consilia sapientis* (unlike *consilia pro parte*) were solicited by the criminal judge and could protect him from rendering a politically inconvenient judgment. *Consilia pro parte*, however, tended to support the party that commissioned them. Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming.) In Reggio, references to such *consilia* are extremely rare, perhaps because of influence from Milan, where efforts had been made to forbid them in the criminal process by the 1340s. Padoa-Schioppa, "La giustizia milanese," 19–25. Giangaleazzo also banned them, because they could be used to avoid or reduce criminal penalties. Dean, Crime and Justice, 108. However, Jane Black has recently shown that efforts to forbid their use were not successful. Black, *Absolutism in Renaissance Milan*, 4. In Bologna, Sarah Blanshei found them frequently used in trials against alleged magnates, where sometimes as many as nine *sapientes* were consulted. Blanshei, *Politics and Justice*, 215–216. For a discussion of the problem of the use of *consilia sapientis* in the criminal courts, see Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming).

79 Dean, "The Commune of Ferrara," 192.

laws of the statutes could be superseded at the will of the lord of Milan. And one critical means of influence remained the oversight of the Podestà's salary.

The salary of the Podestà in independent communes was generally set by the governing city councils. At Ferrara during Este rule, while the Podestà was chosen by the *signore*, the commune still made critical decisions that influenced the Podestà's office, such as his salary.[80] This should be contrasted with the structure of the Podestà's salary at Reggio, which was set by the *signore* and over which the *anziani* of the commune had no direct control. When municipal councils became oligarchical, as at Siena, this ability to set the terms of office lent great power to the elites who held positions on these councils, and they maintained in this way control over the foreign offices. It was perhaps for this reason that Giangaleazzo would restructure the Podestà's salary at Reggio, ending the *anziani*'s direct control over it.[81] In 1386, he decreed that a third of the Podestà's salary should come from convictions. His reasoning, at least ostensibly, was so that "in our cities which have been newly acquired, these Podestà [should] show themselves to be ready and solicitous to punish wrongdoings, which before truly went unpunished."[82]

Linking the Podestà's salary to condemnations was not by itself unusual: certainly similar arrangements existed elsewhere.[83] But in a place where the salary was already limited, as was the population and thus the potential pool of convictions, these arrangements left the Podestà little choice but to borrow money. Though it was illegal to do so, the Podestà at Reggio borrowed from those same local elites that served on the councils. These financial arrangements tied the Podestà at Reggio to the interests of the elites of the city.[84] This posed an obvious problem for signorial control, and our limited evidence may suggest an increasing concern with the issue: a public announcement, was given on the last day of July, 1372, that no one should lend money or credit to any one from the *familiares* of the lord Podestà, under the penalty of ten

80 Trevor Dean, "The Commune of Ferrara under Este Rule," in *City and Countryside in Late Medieval and Renaissance Italy: Essays Presented to Philip Jones*, eds. Trevor Dean and Chris Wickham (London: Hambledon Press, 2003), 192–193.

81 Gamberini, *La città assediata*, 30 n. 16.

82 ASRe, *Comune*, Registri dei decreti, reg. 1385–89, July 17, 1386, 44v: ". . . in civitatibus nostris noviter aquisitis quia cognitum ex ipsis ipsos potestates se prontos et solicitos exibere ad delicta punienda que antea bene transibant inpunita."

83 For example, at Siena under the Nine, the Podestà received a fixed sum for condemnations and arrests in addition to his salary. Bowsky, *Siena under the Nine*, 31.

84 Gamberini, *La città assediata*, 27–32.

gold florins per offence.[85] The same warning, given again ten years later on April 28, 1382, shows the penalty changed to the remission of the illegally lent money or item, as well as further punishment determined by the *arbitrium* of the Podestà.[86] (One wonders how the Podestà would use his discretion in such a case!)

If these financial realities blurred the separation between the foreign rectors and the city they served, surely the extremely long terms of office that some of these men held reduced that separation even further. Podestà appointed in the first years of Visconti rule held their positions the longest. Thus Julianus Spinola was Podestà from 1372–1374; Barnardo de Madiis from 1374–1381;[87] and Johannes de Garzonibus from at least the beginning of the first semester of 1382 until the end of the first semester of 1383. It was not at all uncommon for the same Podestà to serve for two or three semesters, though lengthy terms like that of Barnardo are exceptional. These long terms of office may have been a way to make efficient the establishment of the new rule, particularly because the Visconti directly appointed the Podestà without a need for communal sanction of the choice. For example, in Bologna during the Visconti period, the same Podestà held office for three semesters during the first years, after which the rotation returned to normal.[88] This may have been an efficient way of organizing a new Visconti administration in the conquered cities. It may also have been a reflection of a general practice for the offices to be filled at the time that seemed appropriate to the *signore*; indeed also at Milan in the same period, the time and duration of the appointments of the Podestà did not closely follow statutory norms. Many Podestà served more than one term, sometimes remaining in office for two or more years.[89] Yet ultimately the Podestà, who might reasonably have been expected to serve as a conduit for Visconti control, or as a mouthpiece of the *signoria* on the periphery of the state, in fact became

85 ASRe, *Comune*, Provvigioni, July 31, 1372, vol. 3, 4r, and also ASRe, *Comune*, Provvigioni, July 31, 1372, vol. 4, 6v.

86 ASRe, *Comune*, Provvigioni, April 28, 1382, vol. 6 1382–86, fol. 2r.

87 While the office of Podestà was held by the same man for at least six years, the office of the *Iudex Maleficorum* had slightly more turnover. The notary appointed to the office of the *Iudex Maleficorum* also remained fixed during these years. I have found Bernardo named as Podestà in the books of inquisition trials from the second half of 1374 through 1380; I suspect he was also Podestà in 1381, as the *Iudex Maleficorum* remained the same for that year.

88 I am grateful to Sarah Blanshei for this observation.

89 Verga, "Le sentenze criminali dei podestà milanesi," 103.

less a direct representative of Milan and more a key connection between city and lord.[90]

About the men who held this office, we know very little. At Reggio Emilia throughout the Visconti period, men from the noble families of Liguria and Piedmont figure prominently in official capacities in Reggio Emilia, as do, of course, the Milanese.[91] A branch of the Spinola family of Genoa, for example, provided three Podestà during the Visconti period: Julianus Spinola, appointed 25 April 1372 and in the office until the end of the first semester of 1374; Oppicino Spinola, who was Podestà from the first or second semester of 1398 until at least 1399, and possibly 1400; and Julianus Spinola, possibly the grandson of the earlier Julianus, who served most likely beginning in 1401 but definitely in the first semester of 1402, and was appointed again in the second semester of 1403.[92] The office may have served as a stepping-stone to more illustrious appointments: Arrighino de Rivolla, Podestà at Reggio in 1385, was probably that same Arrighino de Rivolla who served as Podestà in 1393 in Milan.[93] While the Podestà remained the chief magistrate through the fourteenth and early fifteenth centuries, under the Visconti, as under other signorial regimes at the end of the fourteenth century, the Podestà's authority decreased, and "the functions which he exercised under the Visconti were mainly judicial."[94]

The Podestà was responsible for overseeing the appointment of other officials, whose work was critical to the courts, including the judges of the commune and the notaries appointed to various offices of the commune.[95] In major

90 Ultimately, Gamberini concluded that the city seemed to regard the Podestà "non come al rappresentante di un potere lontano, da constrastare, ma al contrario come ad un importante elemento di mediazione nei suoi rapporti con l'esterno, in grado di dare autorevolmente voce alle istanze della comunità e soprattutto di tutelarne l'interesse." Gamberini, *La città assediata*, 32.

91 Grimaldi, *La signoria di Barnabò Visconti*, 95–96.

92 ASRe, *Comune*, Registri dei decreti, reg. 1371–72, April 25, 1372, fol. 31v. The appointment of Julianus Spinola to the office of the Podestà in 1372 identifies him as "Dominus Julianus Spinulla de Luchulo, civis Janue."

93 See Verga's list of Milanese Podestà; Verga, "Le sentenze criminali," 136.

94 Bueno de Mesquita, *Giangaleazzo Visconti*, 50.

95 Eight notaries served the Podestà's retinue in total, four of which were assigned to the lieutenant of the Podestà, the judges of the commune, and the Knight of Justice. Also appointed were two notaries for the court whom oversaw issues of criminal damage and property damage. The elections were done by lot in the general council, before April in the first semester and before October in the second. Signorial power, however, could override such municipal elections, or cancel them altogether if the officials in question were to "retain their office by the will of the Lords." ASRe, *Comune*, Statuti del 1335/1371, fol. 13r: "... Et si ero potestas sive rector ad kalendas Ianuarii usque ad kalendas Iulii facere eligi

cities like Genoa and Milan, the Podestà had many foreign judges in his court, appointed to civil and criminal cases, and he traveled with judges, notaries, police, and servants, all of whom he was responsible for paying out of his salary. Usually one of these judges also held the title of *vicarius*, which meant that the judge substituted for the Podestà if he were unable to be present for his duties.[96] At Reggio, the Podestà's retinue was small. His *vicarius* was his criminal judge, the *Iudex Maleficorum*. This judge's responsibilities, evident in his oath of office, included overseeing the protection of the city, its property and its inhabitants. He was obligated to ensure that cases were decided according to municipal law.

2 *The Criminal Judge*

The criminal judge, or *Iudex Maleficorum*, a key figure in the Podestà's retinue, was the cornerstone of the criminal justice system. Unlike other cities like Bologna, where criminal jurisdiction was shared between the Capitano and the criminal judge,[97] at Reggio, only one judge was appointed to major criminal matters.[98] His particular importance at Reggio Emilia is underscored by the fact that he was also designated as the *vicarius*, who would step in should the Podestà be unable to fulfill his duties. The *iudex maleficorum* could intervene in any criminal matter unless specifically prohibited by the Podestà, who had the power to remove cases from his purview.[99] He was sworn to "attend and observe each and every statute and ordinance of the commune of Reggio, and to render decisions for all claimants [*petentibus*] according to the form of these statutes, and the good customs of this city of Reggio." He was apparently salaried by the Podestà directly, as he pledged "not to receive anything from the commune of Reggio for my salary," and part of his role was to support

officiales infrascriptos in conscilio [sic] generali ad sortem ante medium mensis Aprilis. Et si ero potestas sive rector ad kalendas Iulii usque ad kalendas Ianuarii facere eligi eosdem officiales ante medium mensis Octobris et nisi remanserit voluntate dominorum."

96 Caterina Santoro, *Gli offici del Comune di Milano e del dominio visconteo-sforzesco (1216–1515)* (Milan: Guiffrè, 1968), 227.

97 The office of the Capitano del Popolo, originally formed to govern cases concerning the *popolo* class, sometimes held an overlapping jurisdiction with the *Iudex Maleficorum* of the Podestà. Dean, *Crime and Justice*, 11; see above, n. 117.

98 The Capitano della Città had jurisdiction over mercenaries stationed at Reggio, but ultimately jurisdiction over crimes committed even by mercenaries went to the jurisdiction of the Podestà if the offense merited a blood penalty. See ASRe, *Giudiziario*, Libri delle denunzie, Nov 16, 1402, vol. 19. fols. 11r–14v, where the Capitano unsuccessfully challenged the right of the Podestà to try an assault case involving mercenaries.

99 Grimaldi, *La signoria di Barnabò Visconti*, 103.

and advise the Podestà.[100] His oath underscores the intention that the foreign rectors, but perhaps especially this judge, should be separate from the community and not financially dependent on it. His salary was not directly tied to condemnations, though after 1386, it probably was indirectly, as he was paid by the Podestà.

There was no right of appeal from a sentence imposed by the criminal court, as Giangaleazzo made clear in 1387.[101] But the court of the *signore* did function as a sort of supreme tribunal, to which those people who believed they had been victims of injustice could appeal.[102] This was certainly not an appeals court in any technical way, and cases were not retried before the signorial court. In theory, the hope that the signorial court would overturn a conviction was open to all. Most people could not afford the expense of the trip or the legal costs of such an appeal, but they could deliver this complaint to the Podestà, who was obliged to send it to Milan within fifteen days of its receipt. Barnabò even took the unusual step of providing boxes where the inhabitants of Reggio could leave petitions to the *signore*.[103] Probably the importance of the practice was as much symbolic as it was real, serving as a propagandistic, public statement of authority that made clear the overarching structure of signorial power in the justice system.[104]

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100 ASRe, *Comune*, Statuti del 1335/1371, fol. 13r–v (see ASRe, *Comune*, Statuti del 1392 and BSR ms. 77, fol. 12r, with no substantial changes): "De juramento et officio iudicis Domini Potestatis et quis modus servandus sic in ratione reddenda. Iuro ego Iudex Potestatis civitatis Regii attendere et observare omnia et singula statuta et ordinamenta communis Regii et facere rationem omnibus petentibus secundum formam ipsorum statuorum et bonarum consuetudinum ipsius civitatis et ubi ipsa statuta et consuetudines deficerent secundum formam legis communis excepto quod non possim nec debeam aliquid recipere a communi Regii pro salario meo et bona fide consulam Potestati civitatis Regii et operam dabo quod Potestas adimplebit officium et sacramentum quod iuravit furtum de avere communis non faciam nec facienti consentiam . . . Et possim ego Iudex qui ero deputatus ad maleficia intromittere me de causis ordinariis si michi expressum non fuerit inhibitum a Poteste vel Rectore."

101 ASRe, *Comune*, Registri dei decreti, reg. 1385–1425, February 21, 1387: ". . . nullus a sententiis criminalibus latis valeat appellare pro lege et decreto nostro servando et servari decreto faciendo facias in locis consuetis iurisdictionis tibi comisse publice divulgari et in volumine aliorum nostrorum decretum ad perpetuam rei memoriam inscribi et describi."

102 Grimaldi, *La signoria di Barnabò Visconti*, 116–117: "La Camera del Signore funzionò per tanto come un supremo tribunale, al quale tutti coloro che ritenevano per qualche speciale ragione di essere stati trattati con ingiustizia, avevano diritto di appellarsi. Il Signore poteva rivedere i giudizi, cancellare le condanne, trasformare e ridurre le pene."

103 Gamberini, *La città assediata*, 110.

104 Black, *Absolutism in Renaissance Milan*, 119–120. This direct intervention in justice was a feature of Barnabò's rule that was developed also by Giangaleazzo. During their reigns, as

If we know little about the men who held the office of the Podestà, we know still less of the men who served as the criminal judges. While generally, the criminal judge was one of the officials who accompanied the Podestà and was selected by him, at Reggio Emilia under the Visconti, we might question the autonomy of the Podestà in making this decision. In the Visconti state it was common that judges came from the same town or city of origin as the Podestà,[105] which perhaps tends to explain how the Podestà selected his court. But this was often not the case at Reggio. For example, two of the three criminal judges who served under the first Julianus Spinola hailed respectively from Parma and Trento (it is unclear where Aluysius de Beneditis came from), while Julianus himself was Genoese. Lanzaroti de Regnis of Milan, Podestà in 1390 and 1391, had a criminal judge from Parma. The second Julianus Spinola's criminal judge was from Cremona. In short, when it is possible to tell the cities of origin of these men, they do not seem to be connected. No criminal judge appears to serve under more than one Podestà, so it seems reasonable to assume that the Podestà still selected the criminal judge; however the disparate origins of the Podestà and judges may suggest that the candidates were recommended by Milan.

The criminal judges were deputized by the Podestà, usually together with other foreign officials. In a letter to the city announcing the appointment of a new Podestà, the lords of Milan required the "commune [of Reggio] and the men of our city" to concede to the *Iudex Maleficorum, vicarius*, and other judges "that jurisdiction and power which belongs to the office to which the Podestà would deputize them".[106] A list from 1382 shows the Podestà Johannes de Garzonibus deputizing five judges, among which was Bartholinus de Camiziis de Cremona, deputized *vicarius*.[107] Deputizing, however, is not selecting, and it is unclear how the individuals were chosen.

Black observed, justice was grounded on their power to overturn laws and rights, which supported an image of the *signore* as the champion of the poor and disenfranchised.

105 Santoro, *Gli offici del Comune di Milano*, 227.

106 As found in the appointment letter of Arrighino de Rivolla in 1385: "... facimus, actimus et creamus mandantes comuni et hominibus dicte nostri civitatis quatenus ipsi Arighino ibidem nostro viro potesti in omnibus et singulis spectantibus dicte potestarie [sic] officio que nostra sint honoris ei status tamquam nobis pareant et intendant concedentesque iudici maleficorum vicarii et aliis iudicibus iurisdictionem omnimodam et potestatem ad illa condicenda officia ad que dictus nostra potestas ipsos deputabit." ASRe, *Comune*, Registri dei decreti, reg. 1385–89, fol. 4v.

107 The *Iudex rationis* was also appointed (also *iurisperitus*), together with three other officials, respectively from Cremona, Parma and Modena; ASRe, *Comune*, Provvigioni, 1382–1386, 20r.

The men who held this office had legal training, though the level of their training varied and the notaries of the criminal court were sometimes inconsistent in the titles they attributed to the judges. There was no fast rule defining the legal background required for the practice of law: in Bologna, a five year course of study was necessary for one seeking a position as a communal judge, but in Padua, a person desiring to serve as a judge was only required to possess legal books, *libri legales*, and a basic familiarity with the law.[108] At Reggio, judges had varied legal backgrounds. The above-mentioned Bartholinus was described by the notary of the criminal judge as *iurisperitus*. In 1388, the criminal judge was Antonius de Pontremulo, who is sometimes designated in the records of the criminal court as *licentiatus in iure civili*,[109] and other times as *legum doctor*.[110] In much the same way, Ludovicus Pagana de Montericco, criminal judge in 1396 and 1397, was indicated sometimes as *in iure civile publice licentiatus*[111] but in the next year, the notary listed him as *in utroque iure licentiatus*.[112] Other *Iudices Maleficorum* are listed as *iurisperiti, legum doctores*, or even as *doctores utriusque legis*. The men who held this office came from various parts of the Visconti state, including Cremona, Valentia, and Parma.

Like the Podestà, the judges often held longer terms of office than the statutes proscribed. Rolandino de Zamoreis de Parma, for example, held office for at least four and a half years beside Bernardo de Madiis, who served as Podestà for at least six long years, from 1374 to 1380, and possibly 1381. But frequently, the Podestà who held long terms of office had more than one criminal judge during their tenure. At least three different men held the office of criminal judge during the seven consecutive semesters of the first Julianus Spinola, from 1372 to 1374,[113] while Antonius de Tremilicio, Podestà from the second semester of 1391 until the end of the second semester of 1392, had three different judges, one in each semester of his appointment.

On the basis of this admittedly sparse evidence, one could suggest that on the whole, criminal judges were highly educated, not infrequently holding the doctorate of laws, or even the highest title of *doctor utriusque iuris*, though

108 Ascheri, *Laws of Late Medieval Italy*, 325.

109 ASRe, *Giudiziario*, Libri delle denunzie, n.d. 1388, vol. 10, fol. 1r, *passim*, as designated by the notary Guido de Bebbio.

110 ASRe, *Giudiziario*, Libri delle denunzie, 1388, vol. 11, fol. 1r., *passim*; ASRe, *Giudiziario*, Libri delle denunzie, 1388 n.d. vol. 12. fol. 18r, *passim.*

111 ASRe, *Giudiziario*, Libri delle denunzie, October 25, 1396, vol. 16, fol. 3r, *passim*.

112 ASRe, *Giudiziario*, Libri delle denunzie, 1397, vol. 17, fol. 1r, *passim.*

113 This is clear from the surviving trial records, where two of the names are found, and more clearly from the record of syndication of his terms, in which all five men are clearly named. ASRe, *Giudiziario*, Atti e processi, 1374, fol. 65v.

the conflicting titles sometimes recorded by the notaries are of concern. Particularly those judges holding the doctorate of laws—of whom there were at least five in the years under consideration—must have been from families of considerable wealth. Four of these five highly educated judges held the office only for one semester, suggesting that perhaps this appointment was part of a *cursus honorum* leading them to other, presumably more lucrative or prestigious, offices elsewhere. The men all came from some part of the Visconti dominion, but usually they hailed from different places of origin than the Podestà and their terms did not always match closely with the Podestà. The Podestà deputized the judges, but may not have had much autonomy in selecting them.

3 *Notaries of the Criminal Court*

Not to be overlooked is the position of the notaries appointed to the criminal judge—after all, it is they who, in a very literal way, controlled the narrative of the court's function, and it is they who provided the evidence that this and every other archival study rests upon. At Reggio, the foreign notaries of the criminal judge were appointed directly by the *signore*. Regina della Scala appointed, for example, Gasperolus de Robiate, a citizen of Milan, to replace Rugerius de Bichignis as the notary appointed to the criminal judge at the same time she appointed Julianus Spinola as Podestà. Gasperolus swore his oath of office on 29 April, 1372, before Johannes de Baldichivis, the *vicarius* and presumably also the *Iudex Maleficorum*.[114] It was Regina who revoked Rugerius's appointment and conceded it to Gasperolus, naming him to a one-year term. The notaries' terms of office were therefore not tied to those of the Podestà, and sometimes they served under more than one judge or Podestà. The criminal judge Rolandino de Zamoreis de Parma kept the same notary for at least two of the years he served in office—Aluysino de la Frixeria de Cremona was the notary for the *Iudex Maleficorum* from 1375 to 1378, having served also under Rolandino's predecessor, Nicolino de Carienus de Cremona.

This practice may reflect a concern with corruption. Certainly many communes instituted systems designed to ensure the accuracy and veracity of notarial accounts, having multiple foreign notaries appointed to the same bench, for example. The statutes did call for two notaries to be appointed to the criminal judge, but it is not clear if this always happened at Reggio—the appointment letters that survive name only one notary, and the surviving

114 ASRe, *Comune*, Provvigioni, 1372, vol. 4, fol. 1v.

registers seldom overlap.[115] When the notary was syndicated at the end of his term, the Podestà appointed the judge who would do so.

4 *Other Foreign Officials*

At Reggio under the Visconti, more and more offices were filled by foreign officials. These foreigners were advocates, bookkeepers, notaries, constables, and members of many other professions.[116] They held offices that were traditionally not open to locals as well as new positions. Barnabò Visconti created a new foreign *racionator*, who worked together with a local *racionator*[117] to examine the commune's bills and submit copies to the Milanese court every month. They also supervised the calculation of the salaries of the military, including the *stipendiarii* and the *cavalieri*, and validated and paid the other bills of the commune, coming in time to supersede the earlier office of the *massario*.[118] Another new office was that of the *referendario*, the supervisor of the general administration of the commune, who represented the *signore* and his interests, and was responsible for making reports to Milan.[119] Indeed his close supervision was equivalent to supervision of municipal matters by the *signore*.[120]

The concept was always the same, filling important positions with men who owed their appointments to Milan in an effort to keep control over the major administrative functions of subject territories without restructuring. The creation of new foreign officers to aid Milan's supervision of municipal affairs lends perhaps added significance to the decision to directly appoint notaries to the criminal court rather than leaving that decision to the Podestà.

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115 For example see ASRe, *Comune*, Registri dei decreti, reg. 1371–72, fols. 31v–32r; ASRe, *Comune*, Registri dei decreti, reg. 1372–75, fol. 41v, ASRe, *Comune*, Provvigioni 1376, vol. 4, fol. 1 r–v.

116 Grimaldi, *La signoria di Barnabò Visconti*, 96.

117 The local *racionatores* were usually citizens elected in the general council. Grimaldi, *La signoria di Barnabò Visconti*, 98–99.

118 *Massarii* did continue to serve a broader role in some of the smaller communes under Reggio's jurisdiction throughout the fourteenth century; for example, in 1394, Augustus Rangnus served as consul and *massario* of the commune of Bianello, which was under Reggio's jurisdiction. ASRe, *Giudiziario*, Atti e processi, October 18, 1394, unnumbered folios.

119 Grimaldi, *La signoria di Barnabò Visconti*, 101.

120 Federico Del Tredici, "Lombardy under the Visconti and the Sforza," in *The Italian Renaissance State*, eds. Gamberini and Lazzarini, 160.

The Lords of the Contado and the Question of Jurisdiction

Control could not be established solely by appointing foreign officials. The feudal nobility of the contado played an important role in framing jurisdictional questions outside the city. Reggio had at least a hundred functioning, armed castles in its diocese at the end of the fourteenth century, only about ten of which were actually held by the Visconti.[121] Strong local families controlled the dangerous, isolated roads and passes that were necessary to connect the territories. Rural communes, represented to the city by their elected consuls, could serve as "the vehicle used by local élites to establish dominance over their neighbours,"[122] and the rural landscape provided possibilities for the acquisition of power. Control over highways, control over waterways, canals and aqueducts—in short, control over the resources that made the city functional—often required negotiations with the powerful families of the contado. The family da Roteglia, through whose land the Secchia river flowed, forced concessions from the commune in exchange for uninterrupted supply of water.[123] Likewise, the Dallo held the mountain passes in the southern part of the territory, and their control over these important crossings into the Garfagnana and into Tuscany gave them a great deal of power, if not *imperium*.[124]

For the *signori* of Milan, simply appointing officials to oversee the highways or the dispensation of justice in these areas was a weak solution. The Capitano della Città, it is true, was charged with maintaining some order in the territory, and the later creation of an office of the Capitano del Devieto to patrol the highways and rural areas shows efforts to keep the peace. But to maintain control, the cooperation of rural lords needed to be coopted, and this was done by means of grants that formalized and legitimized control of their territories. Men and connections could be exchanged for privileges and autonomy, offering "the lesser power an ambiguous position somewhere between allegiance and subjection."[125] Giangaleazzo would ultimately come to use the fief as an instrument of government, delegating jurisdictions in return for subordination, and seeking to both entwine his interest with these lords while also

121 Gamberini, *La città assediata*, 110.

122 Chris Wickham, "Rural communes and the City of Lucca," in *City and Countryside in late Medieval and Renaissance Italy*, eds. Trevor Dean and Chris Wickham (London: Hambleton Press, 1990), 11.

123 Gamberini, *La città assediata*, 220–221 and 221 n. 238.

124 Gamberini, *La città assediata*, 181–185.

125 Federica Cengarle, "Lordships, Fiefs, and 'Small States,'" in *The Italian Renaissance State*, eds. Gamberini and Lazzarini, 290–291.

limiting their autonomy.[126] The families perhaps viewed these grants as progress towards an ultimate goal of full autonomy, but from the perspective of the *signori*, too much autonomy in the contado would isolate the cities, so it was a fine line to walk.[127]

Possessing a castle did not necessarily imply jurisdiction. Jurisdiction was exercised by the criminal court of the Podestà at Reggio throughout the diocese except in the territories of lords who had received concessions of *merum et mixtum imperium*. Categories of *imperium* are distinguished in the *Digest*, where simple ("merum") is criminal jurisdiction,[128] and the *merum et mixtum imperium* was the pinnacle of power and autonomy.[129] At different times and in different areas, some of these families, like the Canossa, or the Gonzaga, or the Correggio, did have the full concession of *merum et mixtum imperium* in the lands immediately surrounding their castles.[130] But in practice the boundaries of the jurisdictional questions outside the city could be shadowy.

The famous case of Gabriotto da Canossa, which is well attested in the sources and analyzed by both Grimaldi and Gamberini, serves as an excellent example of some of these problems. Gabriotto held *merum et mixtum imperium* in his lands.[131] His murder in 1385 resulted in a contentious trial in which the city of Reggio Emilia stalled the condemnation of his assassin, perhaps as a result of an outright collusion of the city with the murderers to get rid of this locally powerful figure.[132] Ultimately it took direct intervention by Giangaleazzo Visconti to have the culprits executed. Yet three years later

126 Cengarle, "Lordships, Fiefs, and 'Small States,' " 296–297.

127 Gamberini, *La città assediata*, 177–178.

128 Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Delft: Eburon Academic Publishers, 2007), 153–154. The *mixtum imperium* refers to civil matters concerning property. The Bolognese jurist Odofredus equated jurisdiction with the *merum imperium*.

129 Giorgio Chittolini, "Infeudazioni e politica feudale nel Ducato visconteo-sforzesco," in his *La formazione dello Stato regionale e le istituzioni del contado: secoli XIV e XV* (Turin: G. Einaudi, 1979), 38.

130 Gamberini, *La città assediata*, 196 and 210.

131 Gamberini, *La città assediata*, 171–174. The Canossa decended from a vassal of Matilda, who died without direct heirs. In 1185, Frederick I conceded fiefs to them at Canossa and Bianello, among other places. Eventually the Canossa, who held jurisdiciton from Enza to Crostolo in the base of the Appenines, would divide into separate branches of the family. Among the places that Gabriotto held were Canossa and Bianello, as well as the *villae* of Caviano, Bibbiano, Corniano, Calinzano, Castione, Sassoforte and Roncolo.

132 About this process, and the idea of collusion, see Chapter Three. For an analysis of the trial and its implications see especially Gamberini, *La città assediata*, 40–51, and also Grimaldi, *La signoria di Barnabò Visconti*, 148–152. The record of the trial is found in

in the Villa de Castelis (in the territory of Gabriotto's heirs at the castle of Montevetro) when Benevenuta, wife of a certain Marcocius, was murdered by her husband in her home,[133] the municipal court was very quick to claim jurisdiction and the subsequent trial became a vehicle to contest the heirs' claims to inherit their father's *imperium*. Marcocius objected that the court at Reggio could not proceed against him because he was a man "accustomed to obey and used to obey the late lord Gabriotto, and now obedient to his sons." The castle of Montevetro was in the jurisdiction of Gabriotto's sons, and thus the court should not proceed further.[134] Various evidence was introduced, including a concession of *imperium* from Carlo IV of Luxembourg, but the problem was that while Gabriotto's *imperium* could be proven at Canossa, the status of the castle of Montevetro—which Gabriotto himself had built only thirty years earlier—was not clear.

Gamberini analyzed the tortured logic that summed up the city's argument for jurisdiction at Montevetro. The argument flew in the face of Giangaleazzo's explicit acknowledgments of the rights of Gabriotto's heirs. The jurist writing a *consilium* on behalf of the city's claims could not ignore the decree of the lord of Milan, so instead he paraphrased Giangaleazzo's letters with the innocuous statement, "[the heirs complain] that they have been treated badly; the Lord orders that they should be treated well."[135] Perhaps not surprisingly, the case would ultimately be settled once again with intervention from Milan to stop the process, and the city's bid for jurisdiction failed. Whatever happened to Marcocius, murderer of his wife, is unknown; Benevenuta's death became a pretext for an argument over jurisdiction. This episode reveals the difficult position of the court of the Podestà at Reggio, which was empowered by the *signore*, but entangled in the interests of the city.

Given the importance of the exercise of jurisdiction as a statement of power, one wonders how inhabitants of contested areas understood authority. The witness testimony from Marcocius's trial may give us some sense of how jurisdictional power was identified. The judge, trying to establish whether Gabriotto had been accustomed to exercise the *merum et mixtum imperium* at Montevetro, questioned witnesses on a series of behaviors that would indicate whether he in fact held it. Jurisdiction as defined by the observation of contemporaries provides a particular perspective on jurisdiction. In the words of

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ASRe, *Giudiziario*, Libri delle denunzie, November 13, 1385, 7.82r–83v. The incident is also recorded in the *Chronicon Regiense* (Gazata, *Chronicon Regiense*, col. 92).

133 ASRe, Libri delle denunzie, 12.35–45, June 22, 1388.

134 Gamberini, *La città assediata*, 46.

135 Gamberini, *La città assediata*, 49; ASRe, *Giudiziario*, Libri delle denunzie, 1388, 12.35r–45v.

witnesses like the notary Jacobus de Castellis, Gabriotto collected fines and everyone obeyed him; the witness did not use the terms for *imperium* but he described the behaviors of those who wielded it. Another witness, Bartonius de Castagneto, was asked

> if he ever saw [Gabriotto] exercise anything of the *merum imperium*. He responded that in the time when Lord Barnabò was lord of Reggio, one person had been hanged there [at Montevetro]. Asked [for what reason] he was hanged, he responded that [the man who was hanged] had been already there [at Montevetro] [in Gabriotto's employment] and he had fled, and it was said to Lord Gabriotto that [this man] wanted to betray him. Asked if he was condemned by any judge, [the witness] said that he did not see any judge but he saw very well the man taken from Montevetro and led to the gallows and hanged.[136]

Another witness recounted another hanging, but also recounted an episode in which Gabriotto sent two of his vassals (*vasalibus*) who had committed a crime to be tried by the Podestà of Parma. The judge in the interrogation used the terms *iurisdictio* or *iurisdictio cum sanguine* and *merum imperium* interchangeably.

Even among those lords who had *merum et mixtum imperium*, it was not necessarily always convenient to assert it. Gabriotto sent his own men to be judged in Parma. Similarly, in 1397, Guido da Fogliano, of the powerful family that once had even held the *signoria* of Reggio, chose to send the murderer of one of his retainers to be tried at Reggio.[137] Guido wanted the matter decided at Reggio, and went so far as to hide an official behind a curtain to listen while Guido, with a false offer of peace, elicited a confession.[138] The peace offer was contingent upon the willingness of the murderer to execute one of his accom-

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136 ASRe, *Giudiziario*, Libri delle denunzie, August 22, 1388, vol. 12, fol. 39r.: "Interrogatus si vidit unquam aliquid meri imperii exercere respondit quod tempore quo Dominus Barnabòs erat dominus Regii fuit ibi suspensus unus. Interrogatus quare fuit suspensus respondit quod iam ibi fuerat ad stipendum et fugerat et dictum fuit dicto Domino Gabrioto quod voluerat ipsum prodire. Interrogatus si fuit condemnatus per aliquem iudicem, respondit quod non vidit aliquem iudicem sed vidit bene ipsum extraheri de Montevetri et duci usque ad furcas et suspendi. Interrogatus si vidi nec audivit fieri aliquam alia iusticia respondit quod non . . ."

137 On the Fogliano family, see Gamberini, *La città assediata*, 227–242.

138 ASRe, *Giudiziario*, Libri delle denunzie, September 10, 1397, vol. 17, fol. 9v. This episode is discussed further in Chapter Four (on torture) and Chapter Five (on peace agreements).

plices in the homicide. As Guido said during the staged negotiations, "I cannot do justice for you, who killed my man." Guido told Antonius that he would prefer to make peace with him rather than to send him to judgment in Reggio, because "if I cause you to be hanged, there is nothing [in it for me], and I will not be enriched at all."[139] Antonius relented and entered into the negotiations, and with testimony to this conversation as the central piece of evidence, the judge in Reggio ultimately ordered Antonius to be executed.

We might wonder why Guido said that he could not render judgment himself on someone who killed "his man", while Gabriotto was ready to hang a man he suspected of plotting against him, even while he sent others to judgment at Parma. Trevor Dean analyzed Guido's case in terms of friendship and enmity, and it is certainly clear that Guido's fake negotiations involved coercing Antonius to kill one of Guido's enemies, transforming Antonius into "a tool of private vengeance."[140] This clearly seemed reasonable to Antonius, who accepted the proposition without any indication of surprise at the terms, but even if Guido seemed in Antonius's eyes to have the right to settle the case this way, Guido himself went to great lengths to have the case tried by the criminal judge in Reggio. It certainly is not surprising that people without legal training had difficulty distinguishing between the concepts of the *ius castri* and the *merum imperium*.

The very people who exercised political power in the contado were those same people who served as Podestà and judges in cities. The machinations of Guido da Fogliano and Gabriotto da Canossa were possible becaues they both exercised political power in the contado, and because they belonged to the class that held the offices of foreign rectors described above. Therefore Guido da Fogliano knew to carefully connive to acquire the appropriate amount of evidence to persuade an urban judge, while Gabriotto da Canossa—formerly Podestà at Cremona, Brescia, and even Milan,[141] in which role he presumably maintained the strict procedural requirements of the statutes—led a man to hanging without a trial in the isolated realm of the castle that he himself built. Jurisdiction and *imperium* were carefully defined legal concepts that conferred

139 ASRe, *Giudiziario*, Libri delle denunzie, September 10, 1397, vol. 17, fol. 9v.: "... qui Guido dixit si facerem te suspendi nec aliud esset et nichil essem lucratus. ..."

140 Trevor Dean, "'It's a fine thing trusting in you, Guido!' Dissimulation in a Criminal Interrogation, Reggio, 1397," in *Mantova e il Rinascimento italiano: Studi in onore di David S. Chambers* (Mantua: Sometti, 2011), 296.

141 Gamberini, *La città assediata*, 117.

very real power and had a wide range of uses, but legal ideas of jurisdiction were not necessarily interchangeable with the recognition of authority.

Criminal Jurisdiction and the Reporting of Crime

Because of the importance of public exercise of the *merum imperium*, reporting major crimes to the foreign judge was obligatory. The public *nuncio* was obligated to make regular announcements in "customary public places" about the duty of neighborhood captains and consuls in the contado to inform the criminal judge "about homicides, assaults, quarrels, fights and whatever other crimes which happen to be committed and done in their borders . . ."[142] These announcements surely also served as public assertions of jurisdiction.

The officials charged with reporting crime were local citizens, not in the direct employ of the criminal judge. The election process for the neighborhood captains is not described in the statutes, however the occurrences of names in the court records would suggest that these men held month-long terms. Though the office rotated frequently, the same men tended to hold the position repeatedly (similar to the rotation of seats on the city councils). Of the sixty-four cases initiated by the captain of the neighborhood of Maior Ecclesia for a period of seventeen years only twenty men held that position.[143] Outside the city, the obligation to report crime generally fell to consuls or *massarii* of the communes. These men could adjudicate less serious conflicts themselves, but they did not have the authority to hear major felonies.[144]

Probably because reporting crime, perhaps especially in the contado, underscored the jurisdiction of the municipal court over the territories, the neglect of this duty constituted a serious criminal offense.[145] For all officials, urban or rural, whether consuls, *massarii*, or neighborhood captains, failure to denounce crimes within four days of their commission meant punishment "with a fine of a hundred soldi Reggian lire (hereafter *R.L.*) for every instance, to

142 ASRe, *Giudiziario*, Atti e processi, April 25, 1383, fol. 431r–v.

143 The sixty-four cases are trials by inquisition dating from July 8, 1374 to January 10, 1390. On the oligarchical nature of the councils, see Gamberini, *La città assediata*, 90–94.

144 ASRe, *Comune*, Statuti del 1335/1371, fols. 22v–23r: "Quod consules villarum districtu Regii teneantur venire semel in anno et securitates prestare Domino Potestati, et quod ius non reddent in suis comunis, et de compromissis non fiendis extra civitatem."

145 ASRe, *Comune*, Statuti del 1335/1371, fol. 30r, and 1392, 150v: "De pena consulis vel massarii alicuius terre non denunciantis maleficium in terra sua."

be paid from his own wealth."[146] Accusations of neglect against these officials are rare, and when they occur, they often seem connected to political conflict. Failing to denounce crime to the municipal court could be an implicit claim of criminal jurisdiction, and rebellion against the jurisdiction of the city was a strategy in a never-ending game for political autonomy.[147] Charges of neglect involving personal liability were more common for the private officials of the jail than for neighborhood captains of the city or the officials of the contado, like the *massarii* or consuls of rural communities under Reggio's jurisdiction.[148]

When the inhabitants of Reggio and its territory were victims of crime, the captains and consuls provided the most obvious mechanism by which criminal activity might be denounced. Yet this still rested on the willingness of individuals to seek recourse from formal, municipal justice, and so "it very often happens that many crimes are committed about which the Lord Podestà has no notice . . ."[149] Therefore, in a shift that reflects the growing reliance upon the opinions of doctors of medicine in northern Italy, reporting was also made obligatory during the fourteenth century for medical professionals, or for

146 ASRe, *Comune*, Statuti del 1392, fol. 150v: "Item, si aliquod enorme malleficium fuerit perpetratum in aliqua terra districtus Regii et consul vel massarius eiusdem terre dictum malleficium non denunciaverit potesti vel eius iudici vel militi infra quatuor dies post comissum malleficium quod statuimus et ordinaminus ipsum denuntiari debere puniatur dictus consul vel massarius si consul non esset pro qualibet vice de suo proprio avere in soldis centum Rexanorum et idem servetur in massariis seu capitaneis vicinorum civitatis et burgorum." The last provision of this statute which institutes a penalty for neighborhood captains was added in the 1392 redaction—no penalty was set forth in the 1335/1371 redaction for neighborhood captains, but this obvious oversight was then corrected. ASRe, *Comune*, Statuti del 1335/1371, fol. 30r.

147 For example, in 1389, the consul of Correggio was placed under ban for his negligence and subsequent contumacy. ASRe, *Giudiziario*, Libri delle denunzie, February 11, 1389.

148 ASRe, *Comune*, Statuti del 1335/1371, fol. 30r, and 1392, 150v: "De pena consulis vel massarii alicuius terre non denunciantis maleficium in terra sua."

149 BSR, Statuti, ms. 77, fols. 67v–68r. The full text of the statute reads: "Quoniam rei publice interest ut malleficia non remaneant impunita et sepissime contingit quod multa malleficia committuntur de quibus Dominus Potestas nullam habeat noticiam statutum est quod quilibet medicus et barberius speciarius et quis alia persona que se impedit de medicando vulneratos teneatur et debeat sub pena librarum viginti Rexanorum pro quolibet et qualibet vice denuntiare Domino Potestati vel iudici malleficorum omnes illos vulneratos sive percusos quos medicaverint ea die vel sequenti qua inceperint medicare si fuerint in civitate et si in episcopatu vel districtu infra quinque dies et quod Dominus Potestas teneatur in principio sui officii amonere omnes medicos barbarios et spiciarios [sic] de presenti statuto et eis sacramentum deffere de denunciato quoscumque medicaverint."

anyone who treated suspicious wounds.[150] It was not uncommon for physicians in northern Italian cities to provide some service to the state, or to provide assistance to the criminal court,[151] though the obligations of physicians to denounce suspicious injuries or deaths was still by no means universal. The late medieval Florentine statutes do not compel physicians to denounce crime, for example,[152] while in Venice, physicians were expected to act as informants to police powers. At Reggio Emilia, a statute requiring physicians to report injuries is lacking in the 1335/71 and 1392 redactions of the statutes but appears in the redaction of 1411 under the rubric, "That doctors and surgeons are bound to denounce those whom they treat."[153] The obligation to report the suspicious injury was immediate, either on the day of treatment or the next day, with five days allowed to those reporting from outside the city.

While the 1411 redaction postdates Visconti control at Reggio, it is possible that this provision was in effect long before, as physicians were already in public employ at Reggio and undertaking many other public duties, like plague control. Physicians at Reggio were already involved in post-mortem examinations and in the provision of medical *consilia* to the criminal judge during the Visconti period.[154] This insistence on denunciation from medical professionals indicates increasing concern with the prosecution of crime, and further emphasizes the recognized importance of professional, disinterested denouncers.

The statute requiring medical practitioners to report suspicious wounds begins with the maxim, "it is in the public interest that crimes not remain unpunished . . .", clearly linking physicians' obligations to the criminal court with the larger agenda of inquisitorial justice. The concern was a serious one, and the Podestà was obligated at the beginning of his office to warn all "doctors,

150 BSR, Statuti, ms. 77, fols. 67v–68r, quoted above at n. 149.

151 Venetian physicians, in return for a public salary, in addition to reporting crime and offering medical consilia to the criminal court, also offered free services to the public and advice to the city on plague control. Guido Ruggiero, "The Cooperation of Physicians and the State in the Control of Violence in Renaissance Venice," *Journal of History of Medicine and Allied Sciences* 33 (1978): 156–66.

152 Katherine Park, *Doctors and Medicine in Early Renaissance Florence* (Princeton: Princeton University Press, 1985), 96.

153 BSR, Statuti, ms. 77, fols. 67v–68r: "Quod medici et barberii teneantur denunciare illos quos medicant."

154 For a full consideration of physicians' activities in the criminal court at Reggio Emilia, see Joanna Carraway Vitiello, "Forensic Evidence, Lay Witnesses, and Medical Expertise in the Criminal Courts of Late Medieval Italy," in *Medicine and Law in the Middle Ages*, eds. Wendy J. Turner and Sara M. Butler (Leiden: Brill, 2014), 133–156.

surgeons and apothecaries" about the law, and "to have from them an oath concerning the denunciation of those whom they treat."[155] Failure to make a denunciation was penalized by a fine of 20 pounds *R.L.* for each occurrence, a significant penalty, though not as severe as the penalties imposed upon negligent neighborhood captains or consuls. This difference underscores the particular concern that captains or consuls neglecting to denounce felonies to the criminal judge may have been engaged in other attempts to usurp jurisdiction, something that seems an unlikely motivation for a physician.

The role of the officials who reported crime—neighborhood captains, *massarii*, and consuls—was also investigative. Officials presented the judge not simply with names of suspects to investigate, but with the necessary *substantialia* of the crime. This would become the foundation of the narrative denunciation, or statement of charges, which began the inquisition. While these men worked with the Podestà's court, they were not agents of it. Their role was something of a mixture between incipient public prosecutors and police.

The criminal judge clearly expected that crime reporting would entail initial investigative legwork. In 1394, Augustus Rangnus, consul and *massario* of the commune of Bianello in the jurisdiction of Reggio Emilia, appeared before a deputy of the *Iudex Maleficorum* to present a denunciation of a theft. He himself had learned of the theft through hearsay (*audivit dici*), and though he had gone as far as preparing an estimate of the damages, he could not identify a culprit.[156] The judge therefore ordered him to go back to his territory to conduct further inquiry, allowing him a week for this task,[157] but when he returned on the appointed day, he was still unable to identify a suspect. The judge sent him away, telling him to return and make a denunciation if in the future he managed to discover the guilty party. On that same day, the victim of the crime, Christoforus de Cosselis, also appeared, and, when asked under oath if he knew who committed this crime, he responded that he did not know.[158]

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155 BSR, Statuti, ms. 77, 67v–68r.

156 ASRe, *Giudiziario*, Atti e processi, October 13, 1394, unnumbered folios. The notification was produced in writing and in fact, it was referred to as a denunciation, though it notified the court of a crime, not a suspect.

157 ASRe, *Giudiziario*, Atti e processi, October 13, 1394, unnumbered folios: "... cui Augustino praesens dictus iudex precepit quatenus vadat ad inquirendum si potest reperire patratores huius furti et quod die sabbati proxima futura que erit dies xx presentis mensis octobris debeat comperarere coram eo ad referendum quicquid invenerit de furto praedictio."

158 ASRe, *Giudiziario*, Atti e processi, October 13, 1394, unnumbered folios: "Die superscripta. Constitutus coram superscripto Domino Vicario et Iudice Mallificorum superscriptus Christoforus de Cosselis occaxione superscripti Ancutini eidem furati et interrogatus per superscriptum dominum vicarium et iudicem *mallificorum* per eius sacromentum si scit

The judge then ordered *the victim himself* to go and make his own inquiry, and if he discovered a guilty party, to report this to the court. The judge's order to the victim to investigate the matter further is very unusual, but his order to the consul underscores the investigative function of that office.

The judge's role in investigation usually began when he took up the denunciation made by his officials which *already included* the basic facts at hand, and then carried out an inquiry to examine the facts in more detail. When, in 1382, a corpse was discovered outside the town of Albinea, the discoverer, "greatly disturbed, sad and afraid" at his discovery, "announced this thing to the consul of [Albinea]... and to the castellan, which castellan sent (some) from his men to guard the cadaver that night, and who afterwards carried the cadaver to the church."[159] The local men identified the body as that of a man named Zanardus. They remembered one snowy night nearly a month before, Zanardus had been gambling in the tavern. He left to borrow some money from the Bishop, but he never returned.

The consul would later send notice to the judge at Reggio that a corpse had been discovered, but it was the judge who interrogated the witnesses to determine whether the deceased had met with foul play. He interviewed at least five witnesses who had viewed the body when it was laid out in the church, and the witnesses gave specific testimony about the damage done to the corpse, testifying that to them, it appeared that the damage to Zanardus's body had been done by animals. The witnesses were of the opinion that Zanardus had wandered off, quite drunk, and had frozen to death in the snow.[160] The judge's questioning was designed to test that conclusion, and he focused on four points: the condition of the corpse; whether Zanardus had any enemies; whether anyone had mysteriously disappeared from Albinea after Zanardus went missing; and whether any of the witnesses harbored any suspicion of foul play.[161] The local men were convinced that the death was an accident; the judge played a sort of 'devil's advocate' to test the strength of their conclusions.

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quis eidem furtiverit dictum Ancutinem suo sacromento dixit se nescire et si scieret bene denunciaret cui Christoforo prasens audenti et inteligenti dictus Dominus Vicarius et iudex precepit quatenus vadat et inquirat si poterit reperire seu aliquos culpabillem seu culpabilles furti antedicti referreret et denuncieret."

159 ASRe, *Giudiziario*, Atti e processi, February 22, 1382, fols. 427r–432v: "... et cum fuit ibi, cognovit quod erat corpus sive cadaver unius hominis quod videns turbatus mestus et timidus factus est et statit venit Albineam et hoc factum denunciavit consuli dicte terre, et diende consuli et ipsi castellano, qui castellanus misit de hominibus dicte terre ad custodiendo illa nocte dictum cadaver qui postea dictum cadaver portabunt ad ecclesiam."

160 ASRe, *Giudiziario*, Atti e processi, February 22, 1382, fols. 427r–432v.

161 On this investigation, see Vitiello, "Forensic evidence," 150–153.

The interrogations of judges in the investigative stage tested witnesses' conclusions, but did not apparently seek to confirm them. In May of 1395, another body was discovered. This time, in the Villa de Veto, Caterina, daughter of Garofalus, was found dead in her home, strangled with a halter (*capistri*).[162] Two weeks later, on May 30, Nicolaus de Castra Arboxa, acting at the commission of the judge of the Podestà of Reggio Emilia, interrogated a series of witnesses about Caterina's death.[163]

Once again, the witnesses were asked if they had seen the body, and if so, whether it was clear in what manner the victim had died. In this case, there was little doubt that a murder had been committed. Garofalus, the father of the victim—though at first he claimed to know nothing[164]—shared his suspicion of a certain Antonius, because Antonius had often threatened Caterina, and often had beaten her. The judge then asked if Garofalus thought he knew how Caterina died, to which he responded confidently that the only possibility was that Antonius had killed her.[165] Why, the judge inquired, was he so sure she was murdered? "He responded that when the said Caterina was carried to burial, he wished to see her nude, and he did not find her cut or wounded in any place; but she was bloodied between her flesh and skin [i.e. bruised], from the neck to the chest . . ."[166] The strongest evidence against Antonius,

162 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios.

163 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: ". . . Garofalus . . . per sapientem virum Dominum Nicolaum de Castra Arboxa ad hoc commissarium iudicis Pomini potestatis Regii interrogatus . . ."

164 Massimo Vallerani noted the phenomenon of *testes de nichio* in accusatorial processes at Bologna. In the situations he examined, such witnesses were provided by the accuser, and they had to post a high surety of 300 pounds; in accusatorial trials of the thirteenth century, they appear to have some procedural necessity for the continuation of the process. Massimo Vallerani, "The Accusatory System in Action: Bologna between the Thirteenth and Fourteenth Centuries," in *Medieval Public Justice*, trans. Blanshei, 140–141. In scenarios perhaps more similar to inquisitorial trials of the later fourteenth century, these witnesses could also be a sign, as Stern observed, that witnesses were attached at the crime scene; see Stern, "Public Fame in the Fifteenth Century," 205. In Reggio, where "witnesses to nothing" still occur in both investigations and trials in the late fourteenth century, the claim to know nothing might also represent something more rhetorical on the part of the witness—an unwillingness to participate in the process, or perhaps to impugn themselves ("I cannot recall . . .").

165 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: "Interrogatus si suspicatur qua mortua sit morte dicta Caterina. Respondit non suspicatur quod sit mortua alia morte nisi quod dictus eam necaverit."

166 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: "Respondit quod quando dicta Caterina portabatur ad sepulcuram voluit eam videre

however, came from his own mother, Dominica, who said that she had seen the body. She further told the judge that when she was rising early that morning, Antonius came to her and confessed, "I have killed Caterina." Distraught, Dominica cried, "Traitor! You have destroyed me!" As Antonius disappeared into the night, Dominica ran to the home of her neighbor, calling, "Godfather get up, because Antonius has killed Caterina! Get up, and go to her people and tell them about the death of Caterina!"[167] Immediately he called two relatives to pursue Antonius, but they could not find him.

Dominica feared not the criminal judge, but the vendetta that Antonius's actions had brought to her house. She sought an intermediary to speak to the relatives of the murdered woman, presumably to minimize the danger of retaliation; her family was "fearful of the relatives of Caterina, who are powerful and numerous in that land of Veto."[168] Antonius, his brother and even his aged father disappeared; his mother, sister, and young brother, apparently not suitable objects for retaliation, remained behind but all testified against Antonius in this inquest.

In this case, there was no need to pursue the issue of cause of death, about which all the witnesses appeared to agree. The issue that seemed to concern the judge the most was whether the other male members of the family who escaped with Antonius were co-conspirators. And so he interrogated the witnesses who suspected Antonius but not his relatives. "Domina Pedra, wife of Petrus de Veto, when asked the reason she suspected Antonius but not Canes or his other brothers, responded, 'He is thought to be the worst of all those living in that house' . . ."[169] This sentiment was echoed by another witness, Bartolus, son of Andrea de Veto, who, when asked the same question, testified

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nudam et non invenit eam percussam nec vulneratam in aliquo loco sed bene ipsam sanguinolentam inter carnem et pellem a gula usque ad pectus ipsius Caterine."

167 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: ". . . et cum illamet nocte surgeret indilucullo diei dictus Antonius venit ad eam dicendo, 'Ego interfeci Caterinam.' Et ipsa respondit, 'Proditor! Tu consumpsisti me!' Et incontinenti exivit ex hostium dictus Antonius . . . et dicta testis remansit domi et exivit hostium et ivit ad domum cuiusdam vicini sui nomine Beltrame, 'Compater, surgatis! Quia Antonius interfecit Caterinam! Surgatis adcedatis ad aptinentes suos et dicatis eisdem de morte Caterine!' Et incontinenti suressit et vocavit duos aptinentes et incontinenti persecuti fuerunt dictum Antonium tamen reperire non potuerunt."

168 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: ". . . interrogatus qua de causa recessit, si nulla suspicio erat contra eum, respondit quod timuit de aptinentibus dicte Caterine, quod in dicta terra veta sunt potentes et multos."

169 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: "Interrogata quia suspicatur magis contra dictum Antonium quodam contra

that "[Antonius] is considered the worst of all the brothers, and Canes [his brother] is considered to be a good young man."[170] Flight, even before citation, was regarded if not as proof of guilt, then at least as a reasonable ground for suspicion. This is reflected in the case of Zanardus above, as the judge, attempting to determine whether Zanardus died through foul play, asked his witnesses whether anyone had recently disappeared from the territory. And when Caterina's father wished to implicate those other members of the family, the judge asked him if the other men had more likely fled out of fear of Caterina's relatives than because they were guilty.[171]

In both cases, the judge took the role of devil's advocate, asking the witnesses in Caterina's case if there was not some other possible explanation for Antonius's flight from the commune, while in Zanardus's case, where the locals were convinced that Zanardus's death was an accident, the judge asked pointed questions to determine if there was any possibility of foul play. In Caterina's case, where the locals were certain her death was murder, the judge wanted to know the exact grounds of their suspicions, and if there was not some other probable reason for the suspects' absence from the commune. In both investigations, the judge assumed the role of fact-finder.

Though the preliminary stages of investigation were generally left to his officials, sometimes the judge's preliminary investigative role was more substantial. On rare occasions, he visited crime scenes or directly observed the wounds of a crime victim. In the trial of Nicholaus filius Johannis de Flandria, who was accused of murdering a certain Antonius de Udeno near the palace of the Capitano, the judge himself viewed the body, and the trial was conducted *ex officio*.[172] There is no evidence of a medical examination, implying that the detailed observations in the denunciation about the placement of the victim's

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superscriptem Canem [Antonius's brother] et aptinentes suos respondit quia reputabatur peior omnibus aliis de domo sua . . . ".

170 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: ". . . [Antonius] reputabatur peior aliquorum fratrum et dictus Canes reputabatur bonus iuvenis."

171 ASRe, *Giudiziario*, Atti e processi, May 30, 1395 and following days, unnumbered folios: "Interrogatus si suspicatur quod praedicti excepto dicto Antonio fugam ariperuerint plus timore aptinentium dicte Caterine quam quod fuerint culpabilles dicti mallifici. Respondit, quod suspicatur quod magis affugerint timore aptinentium exceptio dicto Antonio et quodam Cane fratre dicti Antonii qui suspicatur quod de morte dicte Caterine aliquid sumpserit. Interrogtatus si suspicatur contra Ubertum fratrem predictorum Antonii et Canis. Respondit quod non quia est forte tredecim annorum vel circa."

172 See below, Chapter Two.

wounds were made by the judge himself.[173] However, this kind of direct involvement by the judge is not often documented in these sources.

Apprehension of Malefactors

If the offices described above were the primary institutions of crime reporting and investigation, policing was largely a separate task. The Podestà traveled with his own *berovarii*, a sort of armed police charged with maintaining public order.[174] Only the Podestà is described as having *berovarii* in the statutes[175] but it is very likely that other officials, like the Knight of Justice or the captain of the military, did as well. Certainly in other cities like Florence, the latter half of the fourteenth century saw an increase in the number of officers employed to maintain law and order, and these men had contingents of *berovarii*.[176] The *familiares* of the Podestà are found occasionally helping to investigate crime.[177] The Knight of Justice of the commune was particularly charged with capturing and bringing to justice *malefactores* and *banniti*, "wherever they may be."[178] These figures, however, seldom appear in the records.

The first line of defense—against crime and every kind of social disturbance—was once again the people. While there was no compulsory military service for the inhabitants of Reggio Emilia, they were at various times required to take turns serving as guards for the city walls, piazzas, gates, towers, and castles.[179]

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173 ASRe, *Giudizario*, Libri delle denunzie, December 6, 1392, vol. 14, fols. 159r–160v.

174 Santoro, *Gli offici del Comune di Milano*, 227.

175 ASRe, *Comune*, Statuti del 1335/1371, fol. 18r, and ASRe, *Comune*, Statuti del 1392, fol. 144v.

176 Andrea Zorzi, "The Judicial System in Florence," in *Crime, Society and the law in Renaissance Italy*, eds. Trevor Dean and Kate Lowe (Cambridge: Cambridge University Press, 1994): 49.

177 ASRe, *Giudiziario*, Libri delle denunzie, November 10, 1389.

178 ASRe, *Comune*, Statuti del 1335/1371, fol. 13v. The charge of the Knight of Justice to capture *banniti* may have overlapped uncomfortably with the later office of the Capitano del devieto.

179 While this requirement was briefly revoked at the beginning of Barnabò's reign, and three hundred men were employed specifically for this purpose, by November of 1372, the obligation was returned to the inhabitants of the land. This could be, as Grimaldi has suggested, because the expense was too great. See Grimaldi, *La signoria di Barnabò Visconti*, 117. It might also be the case that, in the first year of his rule before control of the city was firmly established, Barnabò was uncomfortable entrusting the position of defenders and guardians to the factionally-minded inhabitants of the town.

Unsurprisingly, they also comprised the front lines in the struggle for public order, and the citizens of Reggio who witnessed crime were also obligated to attempt to seize and bring malefactors to justice.[180] The statutes criminalized both actively aiding a criminal, and simply allowing one to escape.[181] These were clearly jurisdictional concerns, as much as issues of public order. Failing to make an effort to apprehend a criminal by chasing him or seizing him could result in a harsh pecuniary penalty which could be applicable to an entire territory, given the circumstances. "If anyone commits any crime or robbery or plundering or arson or anything else similar . . . and the men of that land do not run and follow this malefactor, nor seize him, nor lead him into the hands of the Podestà and commune of Reggio, we institute and ordain that the aforesaid land or commune and the men living in it should be punished in the amount of 25 pounds *R.L.*" Wards, orphans, widows, and the poor were exempt, and there was no penalty for failure—"if the men of the said settlements pursue him, although they do not catch him nor lead him to the control of the commune, they should incur no penalty."[182]

180 ASRe, *Comune*, Statuti del 1335/1371, fol. 33r–v (see ASRe, *Comune*, Statuti del 1392, fol. 153r–v): "Quod presentes ubi et quando fit homicidium vel malleficium et persone vicine ubi sit teneantur capere malefactorem, et post eum cridare et stremitam pulsare, et de pena contrafacientium."

181 See for example ASRe, *Comune*, Statuti del 1335/1371, fol. 29v (cf. ASRe, *Comune*, Statuti del 1392, fol. 150r), " De pena illius qui tenuerit aliquem bampnitum comunis pro maleficio vel rebellem comunis in domo sua"; ASRe, *Comune*, Statuti del 1335/1371, fol. 33r–v (cf. ASRe, *Comune*, Statuti del 1392, fol. 153r–v), quoted above at n. 180; ASRe, *Comune*, Statuti del 1335/1371, fol. 34r (cf. ASRe, *Comune*, Statuti del 1392, fol. 153v), "De pena hominum terrarum districtus Regii et cuiuslibet comunis et terre non capientium et non prosequentium malefactorem in terra sua."

182 ASRe, *Comune*, Statuti del 1392, fol. 150v: "De penna terre et hominum non currentium ad capiendum mallefactorem comitente [sic] aliquod malleficium in terra sua . . . si quis feceret malleficium aliquod vel robarium vel [de]predationem vel incendium vel quid aliud . . . et homines illius terre non cucurrerint et eum malefactorem non fuerint prosecuti nec eum ceperint vel eum in forcia potestatis et comunis Regii eum duxerit, quod statuimus et ordinamus eos facere debere puniatur dicta terra seu comune illius et homines habitates in ea in vigintiquinque libras Rexanorum ad qua condempnatione non teneantur pupilli orfani et vidue et alie miserabilles persone, quod si homines dictarum villarum cucurrerint ad rumorem et suum posse ibi fecerint in capiendo mallefactore licet non ceperint nec in forciam comunis duxerint nullam penam incurrant."

There were also strict rules preventing the harboring of fugitives.[183] Harboring a criminal was considered a more serious crime than failing to aid in his apprehension, though this too was a crime with a significant monetary penalty,[184] and the penalties for sheltering someone who had already been placed under ban were severe.[185] The 1411 redaction of the statutes, made on the occasion of the Este acquisition of Reggio, simplified and presented consecutively the same material, but did not create any new categories of crime in non-reporting or non-seizure of criminals.[186] But the 1411 redaction did change the structure of penalties, leaving them to the *arbitrium* of the Podestà *without set limits*, indicating the serious nature of the problem.

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183 ASRe, *Comune*, Statuti del 1335/1371, fol. 29v (cf. ASRe, *Comune*, Statuti del 1392, fol. 150r): "De pena illius qui tenuerit aliquem predatorem in domo sua. Item, si quis receperit vel retinuerit aliquem preditorem vel robatorem scienter in domo sua propria vel conducta vel alibi in civitate vel districtu Regii vel auxilium vel malum conscilium dedent si fuerit miles vel filius militis puniatur in quinquaginta libras Rexanorum. Si fuerit pedes puniatur in vigintiquinque libras Rexanorum. Si fuerit comunitas aliqua puniatur in centum libras Rexanorum nisi predictum robatorem vel predatorem duxerint potestati vel comuni Regii quo deducto non teneantur aliqui qui eum duxerint de que pena comunitatis non debeant aliquid solvere pupilli orphani vidue nec alie miserabiles persone."

184 ASRe, *Comune*, Statuti del 1392, fol. 150v, quoted above at n. 226.

185 The statute is the same in both redactions: ASRe, *Comune*, Statuti del 1335/1371, fol. 29v: "Item, si aliquis bampnitum comunis Regii pro maleficio vel aliquem rebellem comunis Regii in domo sua propria vel conducta vel aliter gratis habita retinuerit scienter, si fuerit miles vel filius militis puniatur in vigintiquinque libras Rexanorum pro bampnito, pro rebelle in centum libras Rexanorum, nisi bampnitum vel rebellem duxerint in fortia potestis et comunis Regii infra octo dies postquam fuerit eis preceptum vel denunciatum per potestatem vel nuntium comunis Regii. Et quod universitas que tenuerit predictos contra predicta puniatur pro quolibet predictorum in quinquaginta libras Rexanorum de qua penna universitatis debeant solvere, id est, non pupili, orfani, vidue et alie miserabiles persone. Salvo eo, quod si illi de universitate propter potentiam bampniti vel rebellis non possent eum prohibere stare in dicta villa vel eum in fortiam comunis deducere quod dicta universitas excuseret a dicta pena si eum denuntiaverint potestati secrete vel pallam ita quod potestas ibi possit mittere officialles suos causa capiendi illum bampnitum vel rebellem."

186 BSR Statuti, ms. 77, fols. 55v–56r. The statutes of 1411 treat these crimes in five consecutive rubrics: "Quod fures et latrones possint capi et cetera"; "De pena impedientis ne malefactores consignentur"; "De pena auferentis aliquem malefactorem vel bannitum ex manibus Domini Potestatis"; "Quod universitas teneatur dare auxilium ad consignandum malefactors"; "De pena capientis aliquem malefactorem et ipsum non consignaverit vel manifestaverit." The 1411 statutes no longer established penalties for these crimes, but left their punishment to the *arbitrium* of the Podestà. This is in keeping with a wider move towards the allowance of judicial discretion; see Chapter Four.

Such legislation delineated the boundaries of jurisdictional power. Perhaps indeed this was the primary emphasis of the framers of the statutes, because other means to encourage denunciation of crime were not used in Reggio. The city, unlike Siena and Florence, did not create systems of anonymous denunciation. In Siena, foreign police forces dominated the policing of the city, and secret accusers received a portion of the fine when their anonymous denunciations resulted in guilty verdicts.[187] In Florence, *tamburazioni*, anonymous accusations left in boxes set out by the officials of the court, were part of a system of surveillance to gather information about criminal activity;[188] a system which later would play a major role in certain types of prosecutions, especially those of homosexuality.[189] At Reggio, there was no clear venue for anonymus denunciations. People who denounced crimes to the neighborhood captain or consul were not named as accusers but did appear as primary witnesses. When a crime occurred and the culprit was unknown, or when a death occurred under suspicious circumstances, or wounds were treated that appeared to result from violence—in all these cases, notifications were required to come to the criminal judge, who insisted upon it *ne crimina remaneant impunita*, but also, lest the right of the city to exert the *merum imperium* be challenged. Investigation, like prosecution, was a public statement of power.

This overview of communal government at Reggio Emilia and its criminal justice system shows the multiple layers of authority and jurisdiction in the city. The criminal court at Reggio and its officers functioned in a world of competing jurisdictions, and both open and covert expressions of power. The *signore*, the councils, the contado, conflicting political factions in the city, competing jurisdictions, bids for autonomy by the rural nobility, concessions of *imperium* and efforts to limit the same, personal vengeance and the vendetta—all these elements comprised the reality of medieval criminal justice, and the court constituted only one part. It is in this quite limited sphere that we must look at the development of inquisitorial procedure, and how it could be implemented, and sometimes manipulated.

187 William Bowsky, "The Medieval Commune and Internal Violence," 7.

188 Stern, *Criminal Law System*, 25–26. This system seldom resulted in accusations supported by enough evidence to bring the defendant to trial, however. Laura Ikins Stern, "Politics and Law in Renaissance Florence and Venice," *The American Journal of Legal History* 46 (2004): 218.

189 Michael Rocke, *Forbidden Friendships: Homosexuality and Male Culture in Renaissance Florence* (Oxford: Oxford University Press, 1996), 49.

CHAPTER 2

The Formation of a Criminal Inquisition

Durantis's *Speculum iuris* recognizes three types of criminal proceedings: accusation, denunciation, and inquisition. Accusatorial procedure held the injured party responsible for pursing the prosecution. Denunciation procedure occurred when an official, together with the injured party, made the complaint directly to the bishop (or judge), who moderated the trial. Inquisition procedure was an *ex officio* procedure initiated on the basis of the *fama*, or public knowledge, of the defendant's involvement in the crime. In practice, these processes did not remain in a neat triad, as elements of older procedures were incorporated into newer ones in ways that were often highly localized.[1] By the fourteenth century, for example, the process of denunciation largely merged with inquisition, as denunciations made by officials, particularly the captains of urban neighborhoods or the consuls of the rural communes, initiated an *inquisitio*.[2] Of the two criminal trial processes in use in Reggio' court, *accusatio* and *inquisitio*, accusatorial procedure was by far the more rare: of nearly a thousand surviving trials from 1373–1409, only seventeen used the older trial procedure of *accusatio*.[3]

Inquisition was overwhelmingly the dominant trial procedure used in the criminal court. The idea that inquisitorial proceedings could be used to prosecute all crimes, not just infamous ones, was proposed by Nicolaus de Matarellis

1 See the discussion in Trevor Dean, *Crime in Medieval Europe, 1200–1550* (London: Longman, 2001), 7–10.

2 When Bartolus outlined the methods by which an inquisitorial trial could be initiated, he named first the denunciations made by public officials. Bartolus, *Commentaria* ad Dig. 48.5.2: "Primo, faciendo denunciatores et alios officiales, qui denunciant maleficia, quae committuntur, de quibus vidistis plene . . . Quandoque fit ista inquisitio per inspectionem oculorum. Vadit enim iudex personaliter et inspicit quaedam . . . Tertio modo sit per inquisitionem generalem, in qua inquiruntur latrones et alii male conditionis, et famae . . ."

3 Notaries sometimes used the verbs *accusare* and *denunciare* interchangeably, but there is no question of whether the trial record is that of an accusatorial trial or an inquisition. Private accusations begin with the appearance of the accuser before the judge (*Coram nobis* . . .). Inquisitorial trials open with a formulaic statement, described below, that begins *Haec est quedam inquisitio*. . . .

and developed by Bartolus.[4] Throughout northern Italy, inquisition procedure had become a very common criminal trial procedure at the end of the fourteenth century. Inquisition procedure as practiced in these late medieval courts was a hybridized and flexible process that could incorporate elements from all three of Durantis's trial categories.

One of the clearest ways that we can see the transformation of inquisitorial procedure is by examining the many ways apart from *publica fama* that an inquisition could be initiated. Trial records from Reggio show a multitude of possibilities for initiating an inquisition. All inquisitions were technically *ex officio* proceedings that emanated from public knowledge (*publica fama*) of the defendants' involvement with the crime, but frequently the records of the inquisitions also recorded additional sources of initiation, usually either the denunciation of a public official or the complaint (*querela*) of a private party. At Reggio, we find that while judges could and did inquire *ex officio*, more often they relied on the denunciations of local officials who were not in their direct employ and also the complaints of private parties, who made their accusations or complaints to the judge and posted surety for their claims. Especially the *inquisitio ex querela* maintained significant overlap with older accusatorial procedure, and this method of initiation represents a manifestation of the inquisitorial process that extended the scope of judicial authority while still often maintaining the participation of parties in conflict.[5]

The Use of Private *Accusatio* Procedure at Reggio

Of all the extant trial records in Reggio during the Visconti age, only seventeen were privately initiated accusatorial trials. In form, they are very distinct from inquisition trials. Aggrieved parties initiated the proceedings and presented the judge with accusations, which were formal charges probably prepared by professional advocates. In 1388, for example, a certain Antonius, son of Petrizolus,

4 Ullmann, "Some principles," 20. Bartolus further distinguished two kinds of inquisitorial procedure: *inquisitio ad crimen inveniendum* (also called *inquisitio generalis*, and *inquisitio praeparatoria*) which was the identification of crime and criminal, and the *inquisitio ad crimen puniendum* or *inquisitio specialis*, which was the stage of the process that we here refer to as the trial.

5 Stern, *Criminal Law System*, 24. At Florence, this flexibility served as an encouragement for accusations, as it probably did also at Reggio Emilia.

denounced his wife Constanzia for adultery and for fleeing her home. Invoking the *lex Iulia de adulteriis*, he sought reparations for property that he claimed she stole (an estimate is included with the accusation) as well as the remission of her dowry. Antonius took an oath that he would prosecute the accusation to its conclusion, and not renounce it. This oath was sworn on his own life, and on all his goods present and future, *sub obligatione sui et omnium suorum bonorum presentium et futurorum*.[6] Adultery was the most common crime prosecuted by private accusation (and ultimately the 1411 redaction of the statutes would require that all adultery cases be prosecuted by private accusation.)[7] One assault case proceeded with *accusatio*,[8] and occasionally other types of conflicts used it too: when in 1403, Giberto da Fogliano accused two members of another branch of the Fogliano family of seizing possession of his castle at Levizzano, he did so with an accusation.[9] Private accusation procedure was almost entirely replaced with inquisition procedure by the end of the fourteenth century at Reggio.

Inquisitions *ex officio*

In the most technical sense, all inquisitions are *ex officio* processes deriving from *publica fama*, as we clearly see in the formulaic statement that begins the trial, which reads as follows, with only the most minor of variations:

> This is a certain inquest and notice of an inquest which is done, and which is directed to be done, by the above-written Lord Podestà and his Criminal Judge of the Commune of Reggio, by their office, judgment, and power . . . against [name of defendant] concerning the matter which comes to the ears and notice of the aforementioned Lords, the Lord Podestà and his Vicar, the Criminal Judge, for a hearing, with public *fama*

6 ASRe, *Giudiziario*, Libri delle denunzie, February 13, 1388 and following days, vol. 9, fols. 77r–78v.

7 BSR, Statuti, ms. 77, fol. 51r–v. The removal of the right of initiation from the judge's hands in adultery cases is contrary to Dean's findings that laws on matrimony increased in severity after the Black Death. Trevor Dean, "Fathers and Daughters: marriage laws and marriage disputes in Bologna and Italy, 1200–1500" in *Marriage in Italy, 1300–1650*, Trevor Dean and K.J.P. Lowe eds. (Cambridge: Cambridge University Press, 1998), 97.

8 ASRe, *Giudiziario*, Libri delle denunzie, November 11, 1375, vol. 2, fols. 109r–111v.

9 ASRe, *Giudiziario*, Libri delle denunzie, March 29, 1403 and following days, vol. 19, fol. 27r. On the context for this dispute, see Gamberini, *La città assediata*, 238–240.

> preceding and clamorous insinuations following and reporting back, not indeed by malevolent or slanderous or suspect persons, but rather by honest, truthful, and trustworthy persons . . .[10]

If no further accuser was named, then the inquest was carried out *ex officio*: the judge's informant was apparently *publica fama*, and there was no named accuser. The role of *fama* as an accuser in inquisition procedure was extremely important, because it prevented the judge who initiated the trial from standing as the accuser and thus from becoming a party to the case, which was strictly forbidden by Roman law.[11] Rather, the community in general stood as accuser, with *fama* as its voice.[12] For Durantis, the rumor or common understanding (*fama*) that a particular person had committed an act was sufficient to launch a criminal trial against that individual. In fact, Durantis allowed the accused to object to inquisition procedure if he was not infamous for the crimes with which he was charged: "If a prelate wishes to proceed to an inquisition against any person, that one against whom he wishes to inquire may object: 'My Lord, by law you cannot inquire against me, because I am not infamous concerning these crimes.' "[13] By the end of the thirteenth century, *fama* was, in the words of Richard Fraher, "the procedural threshold that had to be surmounted before

10 ASRe, *Giudiziario*, Libri delle denunzie, June 16, 1373, vol. 1, fol. 8r: "Hec est quedam inquisitio et titulus inquisitionis que fit et fieri intenditur per superscriptos Dominos Potestatem et eius Iudicem Maleficorum comunis Regii, ex eorum officio, arbitrio, et baylia, et omni alio modo iuris via et forma quibus melius potest contra et adversus [name of defendant]. In eo, de eo, et super eo, quod ad aures et notitiam predictorum Dominorum Domini Potestatis et Vicarii Iudicis Maleficorum et utriusque eorum, fama publica precedente et clamosa insinuatione subsequenti et referente, non quidem malevolis maledictis nec suspectis sed potius ab honestis veridicis et fide dignis personis pervenit auditu . . ." This transcription is from the first inquisition in the surviving records for this period at Reggio Emilia, but the form is standard. This formula, with only minor variations, was widely used. See Stern, "Public Fame . . .," 200.

11 Esmein, *History of Continental Criminal Procedure*, 81.

12 *Fama* was derived from the *ius commune* and was widely used as a trial initiator. In Florence, it was considered a reliable method of initiation and also, in some circumstances, of proof. Stern, "Public Fame in the Fifteenth Century," 206–207.

13 Durantis, *Speculum iuris*, Book III, part I, *De inquisitione* §1.1, p. 27: "Si enim prelatus velit procedere ad inquisitionem contra aliquem, opponat is, contra quem vult inquirere: Domine, non potestis contra me de iure inquirere, quia non sum de hiis criminibus infamatus."

the inquisitorial magistrate could institute criminal proceedings . . . analogous to the common law theory of probable cause."[14]

The judge's authority to instigate criminal proceedings *ex officio* on the basis of *fama* had been a major development in the scope of judicial authority.[15] Yet there was a proverbial 'elephant in the room': could *publica fama* initiation provide a shield for capricious judicial action? How could *publica fama* initiations reach the ears of a foreign judge who was, at least theoretically, somewhat sequestered from the community? Perhaps to address these very concerns, the process of *publica fama* initiation was well organized in Florence, where witnesses appeared before the judge to testify to their indirect knowledge of a crime.[16] At Reggio, witnesses frequently testified to *fama* after an inquisition was formed against a defendant, and probably this also happened during the course of criminal investigations, but there is no distinction at Reggio as there was at Florence between inquisitions initiated *ex officio* and inquisitions initiated by public fame.

The ability to inquire *ex officio* represented an important expansion of judicial authority, and perhaps for this reason, municipal statutes tended to place limits on the circumstances in which the judge could inquire *ex officio*. In thirteenth-century Perugia, for example, the instances in which a judge could act *ex officio* were limited to those cases that met the criteria for the use of torture: crimes of theft, attacks against communal order, and the usurpation of communal properties. The judge could also inquire *ex officio* over major assaults committed in the piazza of the commune.[17] But in very general terms, there was a tendency in municipal courts to extend the judge's power to act *ex officio* to try most major felonies during the late thirteenth and especially the fourteenth century, and this is clear in the statutes at Reggio Emilia.

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14 Richard Fraher, "Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7 (1989): 33.

15 In fifteenth-century Florence, witnesses to *publica fama* could initiate an inquisition, and it was the most prevalent method of public initiation, distinct from *ex officio* initiations. For a full discussion of public initiation at Florence, see Stern, *Criminal Law System*, 22–27 and 203–211. At Reggio, *publica fama* is a named initiator in every inquisition trial. Only those trials, which do not include an additional denouncer or accuser—an official or a private party—, are here considered *ex officio*. There are no trials at Reggio that show witnesses *initiating* a proceeding by testimony to *publica fama*, though surely this was sometimes the impetus for *ex officio* actions, and witnesses to *publica fama* are frequent at the proof stage (as also at Florence).

16 Stern, "Public Fame in the Fifteenth Century," 198.

17 Vallerani, "How the Inquisition is Constructed," 252–253.

At Reggio, the 1335 statutes (which were left in force after the Visconti takeover of the city in 1371, with only minimal changes) do not clearly define in which instances the judge could inquire *ex officio*, though it is impossible to say whether the ambiguity of the 1335/71 redaction limited the judge's power, or made it limitless. The 1392 redaction, however, included a new provision specifically obliging the Podestà and Criminal Judge to proceed on the denunciations they received, authorizing them to use *ex officio* procedure against any criminal discovered in the city or diocese.[18] This could be interpreted as a significant expansion of power.[19] Dramatic as this development appears, however, the impact of the statute was apparently minimal: prior to 1392, the Podestà only occasionally tried *ex officio* crimes that did not merit a blood penalty, and after 1392, the *ex officio* proceedings concerning less serious crimes continued to be rare. In fact, we might question whether the 1392 addition was really a real expansion of *ex officio* power at all, or just a codification of existing practice. Even after the apparently sweeping authority accorded to the judge in the 1392 redaction, one defendant successfully challenged the validity of a charge of insult made against him in an *inquisitio ex querela* by claiming that the judge did not have the right to proceed *per inquisitionem* in such a case. His crime was speaking injurious words against another man, and his advocate argued that the crime of insult is a minor crime (*crimen iniuriarum sit leve crimen*) and therefore the judge should not proceed by inquisition. In fact, because no one made an accusation, the defendant really should not be prosecuted at all, he continued, turning to Scripture for support: "whence Christ said to the woman, 'If no one accuses you, I will not condemn you." (*. . . unde legitur Christum dixisse mulieri, 'si nemo te acuxat* [*sic*] *nec ego te condempno*).[20]

Real or illusory, the power given to the judge in 1392 to inquire *ex officio* in virtually every criminal case was somewhat moderated in the 1411 redaction of the statutes, which removed the question of *ex officio* procedure to its own rubric, and accorded to the judge the power to proceed *ex officio* in all cases that could incur a corporal penalty (*pena sanguinis*) and in cases than could incur a

18 ASRe, *Comune*, Statuti del 1392, fol. 157r: "Item, quod potestas et Iudex Maleficorum teneantur et debeant ad denuntiationem et notificationem cuiuslibet persone de comittatu Regii et etiam suo mero officio procedere contra quoscumque dellinquentes in Civitate vel in aliqua parte episcopatus Regii."

19 Gamberini, "La forza della comunità," 141. Gamberini notes this expansion of *ex officio* power as one of the significant changes to the penal law of the 1392 redaction.

20 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398 and following days, vol. 18, fol. 27r. See Chapter Four for a further discussion of this case.

pecuniary penalty of more than ten imperial pounds.[21] The only exception was in cases of adultery, which were to proceed only by private accusation.[22]

This wide authority accorded to the judge to proceed in criminal matters was not unusual—such power was given to the judge by the statutes of Bologna a hundred years earlier.[23] But it was also apparently not embraced. At Reggio, while such power rested with the judge at least since 1392 and probably much before, a strikingly small number of trials were actually initiated *ex officio*—only about 15 percent of inquisition trials. A minimum of one further notifier, either a public official or a private party or both, is recorded in 84.7 percent of inquisitions at Reggio. And Reggio Emilia was not unusual in this respect. At Bologna, Blanshei found, in a sample from 1326 of 132 trials, that only 16.6 percent proceeded *ex officio*.[24] Vallerani also found at Perugia that a majority of inquisition trials were not instigated by the criminal judge.[25] At Florence in the fifteenth century, Stern found *ex officio* initiation used in about 15.8 percent of trials.[26] These numbers seem quite consistent.

If we consider the evidence as it relates to periods of signorial rule (remembering, however, that correlation does not equal causation) it is immediately noticeable that *ex officio* initiations appear at their lowest during the period of Giangaleazzo, even though the statutes appear to extend judicial authority for this sort of inquest at his direction. Under Barnabò, the rate of *ex officio* prosecution was higher than under Giangaleazzo and similar to that of the turbulent years of the rules of Giovanni Maria and Ottobuone. It is tempting to wonder if, in periods of great internal disturbance, like the initial years of Barnabo and Regina's rule, or like the period following Giangaleazzo's death, *ex officio* procedure was used more often, either as a tool of crime control or as an assertion of power when that power was threatened or not yet stable.

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21 BSR, Statuti, ms. 77, fol. 51r–v. The material was reorganized into two rubrics, *De ordine procedendi in causis criminalibus* and *In quibus casibus possit procedi per officium*.

22 At least three adultery cases proceeded by inquisition in the 1370's and 1380's.

23 Blanshei, "Criminal Justice in Medieval Perugia and Bologna," 255.

24 Blanshei, *Politics and Justice*, 344.

25 Vallerani, "How the Inquisition is Constructed," 228.

26 Stern, *Criminal Law System*, 204 and 207–208. In Florence, initiation by public fame—in which witnesses appeared before the judge to testify about the *fama* of a case, but with no direct knowledge of the facts—constituted a separate method of initiation that we do not find at Reggio. For this reason, even though the numbers of *ex officio* trials look very similar to Reggio and Perugia, the situation at Florence may not be immediately comparable to the situation at Reggio. On initiations, see Stern, *Criminal Law System*, 205–207.

Table: Notifications in 951 inquisition trials

All inquisitions are *ex officio* and moved by *publica fama*. Most also include other means of initiation.

Method of notification	Percentage of Trials	Number out of 951 inquisition trials
Inquisitions *ex officio*[27]	15.35%	146
Inquisitions *ex querela*[28]	26.29%	250
Inquisitions initiated by a public official.	58.35%	555

Notifications during the *signoria* of Barnabò and Regina, from June, 1373–July, 1382: (No trials survive from the second half of 1382 until October, 1385.)

Method of notification	Percentage of Trials	Number out of 325 inquisition trials
Inquisitions *ex officio*	22.15%	72
Inquisitions *ex querela*[29]	19.69%	64
Inquisitions initiated by a public official	58.15%	189

27 *Ex officio* trials usually noted no other form of initiation besides *publica fama*. Sometimes, however, the notaries were more specific about the ways that the issue came to the judge's notice. I have included in the number of *ex officio* trials above two trials initiated *ex alia informatione*; four trials initiated *ex confessione*; one trial initiated *ex contumacia et fuga*; fourteen trials initiated *ex diligenti informatione*; five trials initiated *ex informatione recepta*; two trials initiated *ex investigatione*; two trials initiated *ex testificatione*.

28 This number includes three trials that the notary designated *inquisitio ex acusa* [sic]. In these trials, the accuser was the victim of the crime and the trial proceeded by inquisition. This number also includes 44 trials that were initiated both by *querela* and by a notification made by a municipal official.

29 This number includes two trials designated as *inquisitio ex acusa*, and seven trials that were initiated by both *querela* and a public notification.

Notifications during the *signoria* of Giangaleazzo Visconti, from October, 1385–December, 1398. (No trials survive for the years 1399–1402.)

Method of notification	Percentage of Trials	Number out of 517 inquisition trials
Inquisitions *ex officio*	10.44%	54
Inquisitions *ex querela*[30]	29.01%	150
Inquisitions initiated by a public official	60.54%	313

Notifications during the *signoria* of Giovanni Maria Visconti and of Ottobuono Terzi, from November, 1402 until June, 1408:

Method of notification	Percentage of Trials	Number out of 109 inquisition trials
Inquisitions *ex officio*	19.26%	21
Inquisitions *ex querela*[31]	33.03%	36
Inquisitions initiated by a public official.	47.71%	52

There were no clear characteristics that united trials that proceeded *ex officio* at Reggio. *Ex officio* trials do not dominate any one category of crime: murders, assaults, thefts, and all kinds of major crimes were sometimes initiated *ex officio* and sometimes initiated by a notification or complaint of an official or private party. Only a few general trends are noticeable that may distinguish these trials: more often than in trials initiated in another manner, *ex officio* inquisitions

30 This number includes one trial that the notary designated *inquisitio ex acusa*, and also includes 32 trials that were initiated both by *querela* and by a notification made by a municipal official.

31 Includes five trials that were initiated both by *querela* and by a notification made by a municipal official.

dealt with serious crimes like murder, were more likely to address crimes committed within the city walls, and were more likely to be cases involving aggravating circumstances.[32] But these generalizations are limited, and exceptions are easy to find.

Were inquisitions *ex officio* the result of direct investigative activity? Bartolus acknowledged the general inquisition (*inquisitio generalis*), as a way that inquisitions could begin, presumably *ex officio*.[33] The *inquisitio generalis* was a regularly scheduled inquiry in which the municipal court sought denunciations of acts that should be prosecuted (as opposed to the *inquisitio specialis*, which today we would consider the trial, where a suspect was identified and accused). Gandinus's manual required such inquests to be conducted once monthly.[34] At Reggio, there is little surviving evidence of the *inquisitio generalis*, though it seems likely that it was in use.[35] Judges could be and occasionally were involved directly in the investigation of crime, leading to an inquisition

32 While only seven percent of cases overall involved infamous criminals, 18 percent of cases brought *ex officio* did. The crimes in these cases are the most serious. Murder, which constituted nine percent of criminal cases overall, constituted 14 percent of *ex officio* proceedings. Insult and assault, which make up about 56 percent of overall cases, constitute only 32 percent of cases tried *ex officio*. Of the crimes that were tried *ex officio*, 79 percent took place in the city itself, and 21 percent took place in the district. Overall, 70 percent took place in the city, and 30 percent in the district. Ten percent of cases tried *ex officio* were conducted against negligent or corrupt city officials; less than one percent of cases overall dealt with these kinds of crimes. Crimes committed at night were considered more serious and were more harshly penalized, sometimes incurring a doubled penalty. Of overall cases, nine percent concerned crimes committed at night; of cases conducted *ex officio*, 30 percent.

33 Bartolus, *Commentaria*, ad Dig. 48.5.2: "Primo, faciendo denunciatores et alios officiales, qui denunciant maleficia, quae committuntur, de quibus vidistis plene . . . Quandoque fit ista inquisitio per inspectionem oculorum. Vadit enim iudex personaliter et inspicit quaedam . . . Tertio modo sit per inquisitionem generalem, in qua inquiruntur latrones et alii male conditionis, et famae . . ."

34 Massimo Vallerani, "Procedure and Justice in the Italian City-States of the Late Middle Ages: Twelfth-Fourteenth Centuries" in *Medieval Public Justice*, trans. Blanshei, 52–53.

35 See for example ASRe, *Giudiziario*, Atti e processi, April 25, 1383, fol. 431r–v. This document is confirmation made by the communal *nuncio* that he had carried out his commission to make an announcement in the customary public places regarding the denunciation of crime. He delivered his message that neighborhood captains and consuls should "on the fifteenth day of the next month of May give satisfaction to the said office about homicides, assaults, quarrels, fights and whatever other crimes which happen to be committed and done in their borders . . . under a penalty decided by the discretion of the said Lord Podestà . . ."

ex officio. Bartolus allowed that inquisitions could begin with the judge's direct knowledge of the crime, *per inspectionem oculorum* (literally, though awkwardly, "through the observation of his eyes").[36] In such instances, "the judge goes forth personally and inspects the matter."[37] This method, in which the judge himself examined the scene of a crime to make his own deductions, appears only rarely in the material from Reggio Emilia. We find it used in 1392, when Nicholaus, son of Johannes de Flandria stabbed Antonius de Udino, a citizen of Reggio Emilia, during a fight and killed him. Though the fight took place near a crowded tavern, only one person testified, and he claimed that while he had not seen Nicholaus deliver the fatal blow, he had seen Nicholaus threaten Antonius with a knife. About the other witnesses, he insisted that he did not know any of their names. But when he was shown the murder weapon, he confirmed that it was the same knife he had seen in the fight. This alone could not, of course, constitute proof, but ultimately Nicholaus gave a full confession before the judge.[38] The case itself had no extraordinary elements, and in the facts of the case as recorded in the statement of charges there is no obvious reason why the trial was initiated "*ex inspectione oculata*." However the crime took place "near a tavern, not far from the palace of the Lord Capitano . . ."[39] (*iuxta barataria prope lobiam domini capitani*). Perhaps it was for this reason that the judge himself investigated the crime scene and initiated the case against him. A marginal note indicates that ultimately Nicholaus was executed.

Criminal matters came directly to the judge in other ways as well, motivating him to begin an *ex officio* proceeding. *Ex officio* inquisitions could arise when a person was denounced in the confession of another criminal, (*ex confessione*) or in the testimony of a witness in another case (*ex testificatione*). Information could be divulged to the court through other unnamed methods, signified in the sources as *ex informatione habita* or *ex diligenti informatione*. A suspect might be identified through a judicial investigation, *ex investigatione*. In only one case was it noted that a person was prosecuted *in absentia* because he fled the scene of the crime (*ex contumacia et fuga*).[40] In most cases,

36 The notary at Reggio recorded the initiation as *ex inspectione occulata* [sic], but the meaning is clearly the same.

37 Bartolus, *Commentaria* ad Dig. 48.5.2, "Quandoque fit ista inquisitio per inspectionem oculorum. Vadit enim iudex personaliter et inspicit quaedam . . ."

38 ASRe, *Giudizario*, Libri delle denunzie, December 6, 1392, vol. 14, fols. 159r–6ov.

39 ASRe, *Giudizario*, Libri delle denunzie, December 6, 1392, vol. 14, fol. 159r.

40 ASRe, *Giudizario*, Libri delle denunzie, May 23, 1403, vol. 20, fols. 35r–37v. Jurists had very serious concerns about prosecution or conviction *in absentia*. On conviction *in absentia*, see also Carraway, "Contumacy, defense strategy and criminal law."

the notary simply stated that the inquisition was *ex officio*, and gave no further explanation.

Even in a small city like Reggio Emilia, judges scrutinized evidence, ordered investigations, and interrogated witnesses, but they were seldom directly involved in determining the suspect. Inquisitions *ex officio* were not the preferred path for judges. Far more commonly, municipal officials or even private parties carried out preliminary investigations and denounced malefactors.

Public Officials and the Initiation of Inquisition Trials

As we saw in the previous chapter, municipal officials had a primary role in the denunciation of crime at Reggio, and when judges proceeded with those denunciations, they did so through the path of an inquisitorial trial. When Bartolus outlined the methods by which an inquisitorial trial could be initiated, he named first the denunciations made by public officials.[41] This was the most common method of initiation at Reggio, and again, Reggio was not unusual. In his study of late thirteenth century Bologna, Vallerani found that inquisition trials in late thirteenth century often began with an initiation from a policing official.[42] In the majority of criminal cases at Reggio Emilia, a city official—usually a neighborhood captain or a consul or *massario* of one of the settlements under the jurisdiction of Reggio—notified the court of a criminal act, often after completing a preliminary investigation.

The trial records distinguish between a *notificatio* and a *denunciatio* made by civic officials, though the meaning of this distinction is unclear: the words appear to be used synonymously and interchangeably. The Latin *denuntiare* can carry the meaning of giving notice or announcing a fact—more akin to the English "notify" and less to the English "denounce."[43] As the chart on page 61

41 Bartolus, *Commentaria* ad Dig. 48.5.2: "Primo, faciendo denunciatores et alios officiales, qui denunciant maleficia, quae committuntur, de quibus vidistis plene . . . Quandoque fit ista inquisitio per inspectionem oculorum. Vadit enim iudex personaliter et inspicit quaedam . . . Tertio modo sit per inquisitionem generalem, in qua inquiruntur latrones et alii male conditionis, et famae . . ."

42 Vallerani, "The Accusatory System in Action," 121. Alternatively, in Bologna inquisitions were initiated by the injured party in an *inquisitio cum promovente*. In Florence, only 17.5 percent of trials were initiated by a municipal official. Stern, *Criminal Law System*, 204.

43 Adolf Berger, *The Encyclopedic Dictionary of Roman Law*. The Transactions of the American Philosophical Society 43, part 2 (new series), 1953 (reprint 1991). s.v. "denuntiare." The *Encyclopedic Dictionary of Roman Law* states ". . . there was a *denuntiare* when a private person gave notice to another of a legally important fact . . ." Yet this definition

demonstrates, denunciations and notifications made by these officials constitute by far the most common way that trials were initiated at Reggio Emilia during the Visconti period, with 58 percent of trials initiated by public officials. Additionally, 44 surviving trials (4.6 percent of the total), were initiated by both *querelae* and notifications made by public officials.

Inquisitions Initiated by Private Parties

The involvement of parties in conflict in inquisitorial procedure was clearly present by the end of the fourteenth century. In practice, we might doubt whether it was ever really absent. Victims of crime or their families were involved in denunciation not infrequently, having some role in the notification in 26 percent of the cases at Reggio.[44] Again, Reggio was not unusual in this respect.

In late thirteenth century Perugia, private parties called *promoventes* could initiate inquisitorial trials, and Gandinus's *Tractatus de maleficiis* allows inquisition to proceed when a judge learned of wrongdoing through a private party (the *promotor*) who was aware of the *mala fama* of the crime "... the *promotor* of the inquisition should prove that he against whom the inquisition is formed is infamous concerning that crime."[45] The *promotor* was supposed to demonstrate that the accused was thought to be the perpetrator of the crime according to *fama*, and as such, the *promotor* bore some responsibility for the prosecution of the case. In Perugia, only the victim or victim's family was allowed to initiate inquisitions in an effort to limit false accusations. The majority of inquisition trials were not instigated by the criminal judge, and the use of the *promoventes* was common.[46] Vallerani saw the use of private promoters in inquisition trials as an indication that inquisition was still in an "elastic" stage, with many similarities to accusation, suggesting that inquisition had not reached its full and mature development at the end of the thirteenth century.[47]

In Bologna, some inquisitions proceeded with the aid of a private party serving as *coadiunctor*. The person in this role filled many of the roles of the

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does not encompass all the uses of *denunciatio* in Reggio's court, since denunciation did not always, or even usually, come from private parties.

44 Based on a sample of 773 cases where I have identified the notifiers.

45 Gandinus, *Tractatus*, 41. "... unde promotor inquisitionis debet probare, quod ille, contra quem inquiritur, sit de illo crimino infamatus." Cf. Vallerani, "Procedure and Justice," 49.

46 Vallerani, "How the Inquisition is Constructed," 250–252.

47 Vallerani, "The Accusatory System in Action," 120–122.

accuser in the accusatorial trial, posting sureties for himself and the witnesses, and assuming much of the work of prosecution, even sometimes writing the interrogatories for the judge's interrogations. The notifier could act as the *coadiunctor*, but usually the *coadiunctor* was a relative of the victim.[48] Sarah Blanshei also found a frequent use of notifications made by private parties in inquisition trials, which comprised 27.3 percent of the inquisitions of her 1326 sample. These private notifiers of inquisitions generally did not take on a prosecutorial role (though there were some exceptions).[49]

At the end of the fourteenth century at Reggio, the terms "promotor" and "coadiunctor" are not found in the trial records or statutes, but private parties, usually the victims or their family, could denounce crimes and instigate inquisitions. It is unclear whether *only* victims and their families could promote a prosecution, as at Perugia, because the subject is not addressed in the statutes, and sometimes the relationship between the named private party and the victim is not immediately apparent. Private parties could be involved in the prosecution of crime in three primary ways: either through *accusatio* procedure, though this process had largely fallen out of use; indirectly, by notifying a municipal official of crime, which would result in an inquisition initiated by that official; or directly, by initiating a prosecution and to some degree promoting it. When individuals denounced crime directly to the judge, their complaints to the judge are variously termed denunciations, notifications, accusations and complaints (*querele*). These terms appear to be used synonymously to describe the same process, with *querela* used most often.

It is in this practice of *inquisitio ex querela* that we can see most clearly the blending of inquisitorial and accusatorial processes. The initial stage of the process where the complainant directly approached the bench to make a criminal complaint is not well attested in the surviving documents from Reggio because this stage took place before the formation of inquests with identified defendants, which make up the bulk of archival judicial evidence. However a close look at the fragmentary surviving evidence together with the municipal statutes can shed light on this important process.

Features of the *Inquisitio ex querela*

We can find forerunners of the *inquisitio ex querela* in two and perhaps three earlier legal developments. First is the older accusatorial procedure, where

48 Blanshei, *Politics and Justice*, 345–355.

49 Blanshei, *Politics and Justice*, 344–345.

private parties denounced their offenders before the criminal judge and undertook the costs and the obligations of the proceedings. Second is the involvement of private parties in the inquisition process in the late thirteenth century, either through the role of *promotor* or *coadiunctor*. The third potential ancestor for the *inquisitio ex querela* is a legal process that developed in Bologna at the end of the thirteenth century, which allowed private parties to bring a petition, called a *querela*, to the Consiglio del Popolo. In these petitions, the private party requested that the council give the judge permission to set aside some elements of due process and conduct the trial with an abbreviated summary procedure, or otherwise to proceed in cases where the law would not regularly allow it.[50] The most important feature of these *querele* at Bologna was their function in seeking summary justice (and the concurrent ability of the Consiglio del Popolo to grant it). The power to set aside due process was a weighty one, and significantly, as Sarah Blanshei has demonstrated, the Consiglio del Popolo guarded this power carefully and considered each *querela* petition individually.[51]

While initially, these petitions were used by legally privileged persons, in 1320 the law changed, opening the door for anyone to make a formal complaint (*querela*) of crimes or property dispossessions to the Consiglio del Popolo.[52] The 1320 legislative changes made the new *querela* petition process open to women as well as men, allowing broad access to this method of denunciation, and special meetings of the Consiglio del Popolo took place every month to deal with reviewing the petitions.[53] The use of these *querele* was meant not only to safeguard against the power of magnates and nobles, but also to allow the justice system to function in spite of lengthy exceptions that could slow or stop the process. The *querela* represented "an instrument of recourse for those people who believed they have been treated unfairly by the law, or that the law had failed them."[54]

At the end of the fourteenth century, this process was no longer in use in Bologna. The term *querela* with respect to the criminal complaint referred, as it did at Reggio, to "complaints" made to the criminal judge as a means of initiating an inquisitorial trial. At first glance we may dismiss the parallel. After

50 Blanshei, *Politics and Justice*, 408.

51 Blanshei, *Politics and Justice*, 420.

52 This was clarified later in the year to state that while the process was open to many who were often excluded—including women—clergy, magnates and nobles were excluded from using the process. Blanshei, *Politics and Justice*, 442–444.

53 Blanshei, *Politics and Justice*, 445.

54 Blanshei, *Politics and Justice*, 461.

all, *querela* simply means "complaint", and it could and did have a wide range of meanings. And the Bolognese *querela* had procedural differences from that of later fourteenth century Reggio, because *querela* initiations at Bologna were presented to the judge after they had been approved by the *signore* and they contained directions for the proceeding of the trial (instructions to use summary procedure, or otherwise). But the criminal "querela" of the later fourteenth century also carried some of the same advantages for the complainant (*querelator*), opening the door to accusations by women and also allowing an injured party to seek summary procedure for his or her assailant. Whether it was a direct descendant from the earlier Bolognese *querela* process or not, the *inquisitio ex querela* at Reggio Emilia appears to serve many of the same functions. It is perhaps not unreasonable to speculate about the possibility of influence: statutes and policies in large cities tended to be influential in shaping policies in those of smaller areas, like Florence in Tuscany, and Bologna was influential in the region.[55]

The surviving evidence suggests four primary features of inquisitions *cum querelis*:

1. **The *querele* which began trials were made by victims or their families, and these complaints could precede an official denunciation.**
   At Reggio Emilia, 26 percent of cases include a *querela* as a form of initiation. In *querele*, the victim or victim's family denounced the crime directly to the judge. In one of the few surviving records of this stage of the process, a certain notary and advocate named Filipus, son of Dominus Johannes de Malviciis, denounced Antonius de Albrixiis for speaking injurious words against him.[56] In a timeless fit of outrage against the legal profession, in the middle of a court hearing Antonius had pointed at Filipus and cried, "A hundred men have been hanged who were not nearly as deserving as this Filipus!"[57] Filipus himself appeared before the judge and the Podestà to make his complaint:

   > Before you, the distinguished noble man, the Lord Johannes de la Latri, honorable Podestà of the city and district of Reggio, and you, the distinguished doctor of law Gerardus de Rachellis de Parma, vicar and criminal judge of the lord Podestà, appeared Filipus, son of lord

55 Waley, "Use of Sortition in Appointments in the Italian Communes," 31.

56 ASRe, *Giudiziario*, Atti e processi, n.d., 1406, unnumbered folios.

57 ASRe, *Giudiziario*, Libri delle denunzie, June 9, 1406, vol. 21, 60r: " 'Suspenduntur centum qui non essent ita digni sicut iste Filipus,' monstrando ipsum Filipum cum digito . . ."

> Johannes de Malviciis, notary of the city of Reggio of the neighborhood of San Petrus, with a *querela* he expounds, names, and speaks against Antonius de Albrixiis . . .[58]

If we wonder why a person would choose to pursue a trial with a *querela*, rather than making the cheaper and safer denunciation to a municipal official, this moment of direct and public expression of enmity cannot be overlooked.

As noted above, frequently the same case was initiated by more than one method, and most, but not all, of the trials that were instigated by a *querela* also include a denunciation or notification by a city official. It is not always possible to know which came first, the *querela* or the official denunciation of the crime. When the order is clear, it seems that the *querela* was frequently the first means of denunciation. When in 1405, a certain Agnexina, daughter of Johannes de Cuvriaco, accused four men of raping her, she made a *querela* directly to the judge and her husband accompanied her to court where he made one too, though it is less thoroughly recorded. (The notary wrote only that "Johannes Puelus, miller and husband of the above-written Domina Agnexina, appeared [before the court] and concerning each and every thing written above, he made a complaint . . . "[59]) The next day, on December 29, 1405, the captain of the neighborhood of S. Maria Maddalena appeared in court to denounce and notify the accused men in this case. It is tempting to wonder if the neighborhood captain hurried to court to make his complaint after Agnexina made her *querela* to avoid appearing negligent. It is also possible that Agnexina and her husband simply went directly to the court of the Podestà and never involved the captain of their neighborhood, particularly considering the nature of the crime they wished to denounce.

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58 ASRe, *Giudiziario*, Atti e processi, n.d., 1406, unnumbered folios. "Coram vobis egregio nobile viro Domino Johanne de la Latri honorabile potestate civitatis et districtus Regii et vobis egregio legum doctore Domino Gerardo de Rachellis de Parma vicario et iudice maleficorum nostri Domini Potestatis comparavit Filipus filius Domini Johannis de Malviciis notarius civitatis Regii vicine Sancti Petri et cum querela exponit nominat et dicit contra Antonium de Albrixiis . . ."

59 ASRe, *Giudiziario*, Atti e processi, December 28, 1405, unnumbered folios: "Comperavit Johannes Puelus molinarius maritus superscripte Domine Agnexine et de superscriptis omnibus et singulis querelam fecit et querelatus fuit in omnibus et per omnia prout superius continetur."

2. **Those making *querele* bore some personal responsibility for the charges they initiated, including an oath and the posting of surety, similar to accusers in *accusatio*.**
That those making the *querela* were required to post surety is clear from both redactions of the statutes that were in force during the period of this study. Both the 1335/71 and 1392 redactions require that "the accuser, denouncer, or person bringing the accusation upon which an inquisition can proceed" must present the charge in writing and then swear to the truth of their statement, providing surety concerning the prosecution of the charges in the form of a fideiussor, a person who appeared before the judge and guaranteed payment of expenses or fines (*fideiussorem prestet de ipsa prosequenda*). This may also have been the rule in Milan, where offended parties making denunciations to the judge and asking him to investigate may also have posted surety.[60] The statutes at Reggio do not treat separately trials made by inquisition or accusation, describing only one general *ordo iuris* that pertains to all criminal trials. Persons initiating *inquisitiones cum querelis*, by statute, posted surety.

When the statutes of Reggio Emilia were revised in 1411 after the takeover of the Este, the book of criminal law was reorganized and elaborated. Among the new rubrics appears one that clarified the penalty for a person who made *querela* in criminal cases but did not pursue the charges until the end of the trial. The statute further directed that anyone who accused, complained against, or denounced anyone before the Podestà or his criminal judge concerning any crime or delict should suffer a penalty if the charge were not pursued, or if it were unproven. The penalties ranged from twenty-five Reggian lire for crimes that merited a blood penalty, to five pounds imperial for crimes that did not. Half of this money went to the accused, and the other half to the commune. The statute further allowed accusers ten days from the time of their denunciation to withdraw the charges.[61] This probably was intended to overlap the ten

60 Verga, "Le sentenze criminali," 107–108. Verga did not reproduce the Latin text of his example but tells us that a complainant, inviting the judge to investigate whether her opponent had brought false witnesses against her in a civil case, swore the truth of her denunciation and presented two fideiussors.

61 BSR, Statuti, ms. 77, fol. 65v: "De pena querelantis non prosequentis vel non probantis accusationem vel denuntiationem factam. Si quis accusaverit querelaverit vel denuntiaverit aliquem coram potestate vel eius iudice mallificorum de aliquo malleficio vel delicto ex quo pena sanguinis venire imponenda et illam talem denuntiationem querellam vel accusam non probaverit vel non prosequtus [sic] fuerit usque ad sententiam, et lata fuerit sententia absolutoria talis accusans vel denuntians condemnet in libras xxv Rexanorum.

days allowed in the 1335/71 and 1392 redactions for the making of the prosecutorial argument. The redactions of statutes in force for this study—the 1335/71 and 1392 redactions—are silent about the penalty for a person making a *querela* who did not successfully pursue prosecution, but they do require that all who brought complaints (*querele*) to the criminal judge were required to post surety.

Trial records shed little light on the subject because surety was pledged when the initial denunciation was made before the judge, before the trial began. For evidence beyond the statutes, there are only sporadic references in trial records. But these references, rare as they are, suggest that the practice outlined in the statutes was followed, and in *inquisitiones cum querelis* during this period, the person bringing the complaint to the judge posted surety for the charge. If they were unable to pay, they may well have endured pre-trial imprisonment.

On January 17, 1393, a certain Giliola, wife of Andriolus de Rinalta, made a *querela* against Aluysinus de Fantis, claiming that "the said Aluysius, with a desire and intention of offending Giliola, made against her an assault, attack and violence (*insultum, impetum et aggressuram*), moving from place to place, running after her with a lance which he held in his hands; however he did not strike her."[62] Three days later, Aluysius appeared before the judge and denied all the charges, irritably adding that everything in the charge was untrue, and Giliola should be the one prosecuted, not him. After his denial, Giliola was summoned before the judge. Giliola then returned to court and "on the occasion of a *querela* produced by her, this same Giliola promised to . . . follow this *querela* to the end, and for her part and at that time Andriolus [Giliola's husband]

Si vero accusa vel denuntia fuerit de crimine vel delicto ex quo pena sanguinis non ingeratur condemnet in libras v imperiales. Et in utroque dictorum casum accusator vel denuntiator in expensis accusato ven denuntiato quarum omnem condemnationem medietas perveniat accusato et alia medietas communi Regii. Et predicta non habeant locum in capitaneis vicinarum nec consulum villam qui denuntiarent aliquod malleficum. Possit tamen quilibet acusator [sic] querelator vel denuntiator a die producte accusationis querelationis vel denuntiationis infra dies decem impune desistere quantum est pro facto accusatoris denuntiatoris vel querelatoris."

62 ASRe, *Giudiziario*, Libri delle denunzie, January 17, 1393, vol. 14, fol. 164r: ". . . quod dictus Aluysius animo et intentione offendendi dictam Giliolam fecit insultum impetum et agressuram contra dictam Giliolam movendo se de locho ad lochum cum uno lanzono ferato quem suis manibus tenebat curendo [sic] post eam non tamen eam percussit."

was her fideiussor."[63] Aluysius was ultimately absolved, though there is no indication of what costs Giliola was required to pay.

It is possible that surety was required from Giliola because she was a married woman, and not because she made the *querela*. On the other hand, other trials instigated by the *querele* of married women do not record the posting of surety or the pledge to follow the case to the end.[64] Rather, one wonders if her pledge of surety appears in the trial record not because it was an unusual practice, but rather because the posting of surety occurred unusually late—as we saw above, the statutes required the posting of surety when the denunciation was made, but Giliola did so late in the process, after the defendant had already appeared and denied the charge. In support of this view, we might consider that without question, accusers in private *accusatio* proceedings posted surety, but in only one instance was the name of the fideiussor recorded in the trial record.[65] We should conclude either the practice of posting surety appeared in the statutes but was not used in practice—and especially in the case of accusation procedure, this seems highly unlikely—or the posting of surety by the accuser is not a process that is generally recorded in the extant trial records.

Another insight may be found in an inquisition for robbery that began in 1397 against two men, a certain Bartolinus and Johannes, initiated *ex querela et notificatione*. The *querela* was made by the victim, a certain Gregorius de Placenta. The advocate for the defendants presented a complex defense to the judge in which he alleged a number of technical exceptions to the case, arguing that the judge should not proceed further with the inquisition. These reasons included a jurisdictional issue (the alleged robbery occurred in territory under the jurisdiction of Giberto da Fogliano) as well as procedural issues, including failure in the complaint to specify the exact place and precise day of the offense. And he also objected that the process violated both *ius commune* and statute law in

63 ASRe, *Giudiziario*, Libri delle denunzie, January 17, 1393, vol. 14, fol. 164v: "Constituta personaliter . . . coram superscripto Domino Vicario et iudice Giliola predicta uxor Andrioli de Rinalta occaxione querele producta per ispam que Giliola promixit stare parere et cetera et prosequi dictam querelam usque ad finem. Et eius partibus et instantia fideiuxit et fideiussor extitit Andriolus . . ."

64 As, for example, ASRe, *Giudiziario*, Libri delle denunzie, April 12, 1388, and following days, vol. 10, fols. 16r–17r; ASRe, *Giudiziario*, Libri delle denunzie, October 29, 1388 and following days, vol. 12, fols. 49r–50r.

65 ASRe, *Giudiziario*, Libri delle denunzie, September 23, 1391, vol. 14, fol. 3v.

part because Gregorius, the accuser, had not sworn to the truth of his accusation, and he had not posted surety (*cum non promixerit iuraverit neque satisdederit superscriptus Gregorius de Placenta, prout debebat*).[66]

If those who brought *querela* to the judge had to post surety—by 1411, a twenty-five pound surety for a blood crime—we must wonder about those who could not pledge such sums. A defendant unable to provide a fideiussor was imprisoned instead. Was this the case for accusers as well? A tantalizing glimpse into the practice of pre-trial confinement for accusers can be found, only by chance, in one of the very few surviving records of jail inmates at Reggio Emilia during this period. An undated order from the *signore* to expedite proceedings for certain inmates notes the reasons for each person's incarceration. Two entries are relevant here:

> Andreas de Sancto Martino, detained because he was impugned concerning a certain homicide that was committed against the person of Brunamontis de Verona. We wish that justice should be done by expediting the process.
>
> Codemanzius de Verona, detained because he accused the aforementioned Andreas, who still has not been found guilty concerning the said homicide. We wish that justice should be done by expediting the process.[67]

The trial record for this case survives, an inquisition initiated by *querela* in 1396 that is dated July 10, in which Codemanzius accused Andreas of attacking and robbing him and his friends, during which attack his father was killed. Andreas denied everything.[68]

Because the document above is undated, it is possible that Codemanzius was in jail because he made a private accusation against Andreas, and the order to expedite the process prompted the Podestà to form an

66 ASRe, *Giudiziario*, Libri delle denunzie, June 6 and following days, vol. 16, fols. 98r–100v. In the end, none of the arguments—procedural or jurisdictional—persuaded the judge, who convicted them. On the jurisdictional issue, see Gamberini, *La città assediata*, 52–53.

67 ASRe, *Giudiziario*, Atti e processi, n.d. but probably 1396, unnumbered folios. "Andreas de Sancto Martino detentus quia inculpatus fuit de quodam homicido quod debuit commisisse in personam Brunamontis de Verona. Volumus quod ius fiat expediendo processum. Codemanzius de Verona detentus quia acusavit predictum Andream qui adhuc non est repertus culpabilis de dicto homicidio. Volumus quod ius fiat expediendo processum."

68 ASRe, *Giudiziario*, Libri delle denunzie, July 10, 1396, vol. 15, fols. 105r–113r.

inquisition. However, it would be highly unusual to have a homicide charge pursued by *accusatio*, as the process was virtually never used, and there are no surviving incidents of homicides tried with *accusatio* at Reggio. Furthermore, if the inquisition had been initiated by direct order from Milan, we might expect it to be an inquisition *ex officio*, not an inquisition *ex querela*. The trial record itself provides a clue to the date that the court at Milan requested the expedited proceeding. The inquisition against Andreas began on July 10, 1396, at which time the defendant appeared and denied all charges against him. He presented a defense claiming that he was a person of good reputation, and also that at the time of the murder, he was not in the territory where the crime was committed. He was able to produce witnesses to swear to his *fama* but not to his alibi, and he was put to torture in August of that year, still maintaining his innocence. On the 23rd of September he was subjected to torture again, this time withstanding rope torture as well as a sort of water torture, as large quantities of water and vinegar were poured into his nose. Still he refused to confess.

On November 17 of that year, an order arrived from Milan, which is copied into the trial document and which was written in response to an unrecorded inquiry from the Podestà. The letter ordered the Podestà to expedite the process, and it may well be a parallel to the order in the document above. The letter states further that Andreas should be tortured (for a third time!), and then the Podestà should make a decision whether to condemn him or absolve him and release him from jail.[69] The letter is dated November 16, 1396. A marginal note tells us that he was released in December.

We cannot know how long Codemanzius sat in the same jail as the man he accused of murdering his father; it is a strange and dramatic image. And we should hesitate to make broad conclusions from one admittedly unusual case. Yet we can clearly see that in this instance, Codemanzius suffered the same pre-trial treatment as the man he accused, well before this practice appeared in the statutes of 1411. Finally, Codemanzius's imprisonment is nowhere noted in the trial record, underscoring once again that the accuser's posting of surety was recorded in another stage of the process that does not survive.

69 ASRe, *Giudiziario*, Libri delle denunzie, November 16, 1396, vol. 15, fol. 113r. "Volumus quod in facto isto faciatis ius expediendum et in quaestionem ipse Andreas veniat condempnandus eundem facti qualitate pensata condempnetis in quaestionem vero absolvendus veniat ipsum absolvatis a carceribus relaxari faciatis."

Whether accusers posted surety is of great significance for our understanding of the late medieval inquisitorial trial. If the accuser in an inquisition *ex querela* had to post surety, one of the great innovations of inquisition procedure—the publication of the process and the removal of the burden of the trial from the victim—was not, at least in cases initiated by *querela*, fully in place. The older accusation procedure, *accusatio*, in which the victims or their representatives undertook the investigation and collected the necessary evidence, was encouraged in other cities like Florence, because it relieved the state of court costs,[70] but if the inquisitions *ex querela* were similarly encouraged, there is no surviving evidence of this.

We are left to wonder whether the 1411 law concerning those who made *querele* but failed to prove their allegations was new, or whether once again, it codified an existing practice (and here again, it is worth remembering that the 1411 statues represent the first full redaction of the book of criminal law since 1335).

3. **Complainants in *inquisitiones ex querelis* could ask the judge to proceed with summary procedure.**

In the case of the notary Filipus and Antonius mentioned above, Filipus not only asked that Antonius be punished, but he even asked that the judge move against his foe with summary procedure, . . . *dicit et petit ipse Filipus sibi fieri debere summarie et de plano sine streppitu* [sic] *et figura iudici* . . .[71] This request, if granted, would allow the judge to evaluate the proofs and the allegations by his own conscience, without the formalities guaranteed by the *ordo iuris*. In the summary process, the judge "could gather and evaluate evidence beyond the allegations of the parties, and beyond the ordinary legal rules: any of his private knowledge could then lead him to intervene in a broader measure than in the ordinary process, although of course the evaluation of the evidence was always

70 Laura Ikins Stern, *Criminal Law System*, 22–23.

71 ASRe, *Giudiziario*, Libri delle denunzie, June 9, 1406, vol. 21, unnumbered folios: "Coram vobis egregio nobille viro Domino Johanne de la Latri honorabili potestati civitatis et districtus Regii et vobis egregio legum doctore Domino Gerardo de Rachellis de Parma vicario et iudice mallificorum nostri Domini Potestatis comparavit Filipus filius Domini Johannis de Malviciis notarius civis Regii vicine Sancti Petri et cum querela exponit nominat et dicit contra Antonius de Albrixiis . . ." The complaint and request for summary procedure also survives in ASRe, *Giudiziario*, Atti e processi, January 26, 1406, vol. 21, unnumbered folios.

indispensable."[72] The *querela* gave the accuser the possibility to seek summary procedure and to ask the judge to intervene in his dispute. In this case, the trial record has also survived, showing that the judge proceeded to try the case but did not do so by summary procedure. One wonders if, as in the similarly termed process at Bologna at the beginning of the fourteenth century, this possibility of seeking summary procedure was one of the benefits of the *querela*.[73]

4. **Women used *querele* exclusively in their denunciations of crime.** Women could make *querele* as well as men, though they did so far less frequently: in cases initiated by the notice of a private party, only 7 percent of these accusers were women. But *all* of these cases were initiated by *querele*. In the surviving court records from Reggio, women never made denunciations or notifications to officials. They made only *querele*. For the most part, they reported major crimes: rape, murder, and major assaults. In all of these cases, the women themselves were the victims or relatives of the victims. That women made *querele* exclusively might indicate the limitations of their legal capacity, suggesting that they could not initiate an inquisition without surety.

What was the advantage of the *inquisitio ex querela* for the accuser? Why would injured parties choose to make denunciations directly to the judge, incurring

72 Antonio Padoa-Schioppa, *Italia ed Europa nella storia del diritto* (Bologna: il Mulino, 2003), 269. "Il giudice poteva raccogliere e valutare le prove anche al di là delle allegazioni delle parti e delle regole legali ordinarie: le sue eventuali conoscenze private potevano dunque condurlo ad intervenire in una misura più ampia che nel processo ordinario, benché naturalmente l'accertamento probatorio fosse pur sempre indispensabile."

73 In Reggio, there is no evidence that the Twelve or any other council ever had such a strong hold over the keys of summary justice as the Consiglio del Popolo had held at the beginning of the century in Bologna. In the later fourteenth century, criminal *querele* at Reggio were made directly to the judge, sometimes together with the Podestà, but there is no evidence to suggest that the municipal councils played a role. At Reggio, the statutes maintain a virtual silence on the responsibilities of the city councils that is unusual in cities under Visconti dominion, perhaps, as Gamberini suggested, because procedure was more easily modified when it remained customary and not codified; Gamberini, *La città assediata*, 77. The Twelve were charged with reviewing petitions, including so-called *querele*. However this term outside the context of the criminal court has many shades of meaning, and these are not necessarily criminal *querele*, as they are grouped together with other kinds of petitions. The council was convened by the Podestà and acted "*. . . una cum dicto domino potestate et cum ipsius presentia et auctorite . . .*" ASRe, *Comune*, Carte di Corredo, October 22, 1383, vol. 2, fol. 10r.

additional responsibilities, instead of making denunciations to municipal officials? Our surviving sources offer no direct answers, but our admittedly sparse archival evidence suggests that the *inquisitio ex querela*, while it may have entailed many financial and personal burdens, carried with it some advantages in the ability to seek summary justice, the possibility for women to make denunciations, and the public expression of enmity. At Reggio, the *querele* did serve as a platform by which the defendant could ask the judge for summary procedure, and in fact, it is very difficult to imagine that the victim would have the opportunity to make this request in the other types of trial initiations. If the petition for summary procedure was not granted, an inquisition *ex querela* where the accuser bore some of the burden for the trial, perhaps like a *promotor* or a *coadiunctor*, was instead performed, as in the case of Filipus and Antonius, described above. So the ability to seek summary procedure may have been part of the impetus behind the *querela*.

This answer is appealing, as it follows a line of thought descending from the early fourteenth century *querela*. But this does not really solve the riddle of those trials that were initiated by both a *querela* and an official notification. At Reggio, inquisitions *ex querelis* also served another function that might—in a very general and limited way—be compared with the function of the Bolognese *querela* of 1320, as they certainly appear to open the door for people of virtually every background to make criminal complaints, and also were apparently the only avenue open for women to bring denunciations. For some victims, there may not have been another choice if the judge did not move *ex officio*.

There may well have been other, less quantifiable benefits to the *querela*, as it gave the victim a chance to become the aggressor, publicly pursuing charges and aiding in the prosecution of the opponent. This may be one more way that inquisition procedure incorporated the successes of accusation procedure and omitted, perhaps, its failures, as neither the late fourteenth-century initiators of *querele*, nor the Bolognese promoters, served the full prosecutorial role than an accuser would in *accusatio*.[74] One of the most problematic features of the older accusatorial procedure was the ability of the accuser to withdraw charges after the initial citations of the defendant. As Vallerani has demonstrated, most accusatorial trials were stopped before their conclusion because the accuser, having achieved their end of publicly embarrassing their opponent, withdrew the charge. The *inquisitio ex querela* solved this problem by removing from the complainant the power to stop the proceeding once the judge initiated the inquest. At Reggio, trials were stopped before their conclusion only by a direct

74 Blanshei, *Politics and Justice*, 344.

intervention from the lords of Milan.[75] Accusers in the inquisitions *ex querelis* could not withdraw their accusations. So in this way, inquisition *ex querela* became a more efficient accusatorial process, one that carried with it considerable more risk for the accuser than the older *accusatio* process. Publicly standing as an accuser against an individual who caused some manner of personal injury may well have given the accuser an added—and highly desirable—measure of public vindication for the damage, but there was little incentive to make a *querela* unless the aggrieved party wanted the case to be concluded.

As a final element in support of this idea that the *inquisitiones ex querelis* replaced the private accusation, we could note that the use of accusatorial procedure at Reggio was statistically insignificant—less than one percent—whereas at Bologna, where *querele* were used less often, accusation procedure was used more frequently, still following old patterns of trials initiated and then settled out of court.[76] In a sample of 238 inquisition trials from four years of trial records of the criminal court of the Podestà in Bologna at the end of the fourteenth century,[77] only 7.5 percent of inquisition trials were initiated by *querela*, as opposed to 26 percent at Reggio. Yet accusations made up 13.7 percent of trials at Bologna, compared with less than one percent at Reggio in the same period. Perhaps at Reggio, the adapted *querele* filled that need.

In many respects, it appears as if the person bringing the *querela* had strong parallels to the *promotor* of the thirteenth-century procedure.[78] And if Vallerani's analogy between the *inquisitio cum promovente* and the earlier

75 The judge may have sometimes informally used his discretion to end a proceeding. For example, in 1379, Symon de Mutina made a *querela* against his brother Dominicus, claiming that he had hit him once without drawing blood. Dominicus appeared before the judge and admitted that he and his brother had argued, but he insisted that he did not strike him, and Symon, who was apparently also present, admitted under the judge's questioning that his brother had not hit him after all. Rather, he told the judge he had made the complaint because his brother had threatened him. There is no further record of the trial, and there is no marginal notiation of the outcome, as there are in most other trials of that register, leaving us to wonder if whether the record was somehow lost or incomplete, or if perhaps the judge simply sent the brothers home; ASRe, *Giudiziario*, Libri delle denunzie, June 13, 1379, vol. 5, fol. 55r–v.

76 Accusation procedure was in more frequent use at Bologna than at Reggio, but also at Bologna, its use was declining. Sarah Blanshei has demonstrated a substantial decline in its use during the fourteenth century, especially during the signoria of Taddeo Pepoli. Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming).

77 This sample is drawn from trial registers of the court of the Podestà. ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium 1372, 1388, 1389, and 1393.

78 This term is not used in court records or statutes at Reggio, and it does not often appear in early fourteenth century Bologna, where generally the promotor seems "not to have

accusation procedure is accurate—which I strongly support—then this is revealing for several different reasons. First, the overlap between accusation and inquisition in the thirteenth century was not simply a factor of the novelty of inquisitorial procedure. The almost complete absence of accusatorial procedure from the late fourteenth century record at Reggio Emilia indicates neither the triumph of inquisitorial procedure nor the centralized position of the judge, but rather the synchronizing of inquisition and accusation that perhaps began through the instrument of the promotor but soon transformed the process. That this fulfilled some of the needs of the earlier procedure finds support in its usage. For example, all forcible rape trials present in the records from this period at Reggio include a *querela* as the initiation of the trial. The one significant exception was prosecuted with a private *accusatio*.

A final benefit of the *querela* may have rested in its ability to force the court to proceed. Recent scholarship emphasizes the roles of parties in conflict shaping and using court procedures, but we must not ignore the very real power of the state that is reflected in inquisition: *ex officio* procedure gave the Podestà the right to act, but it also gave him the ability not to act. This is a complicated matter because of the very real questions we should have at this point regarding the agendas of the foreign rectors themselves. We cannot forget that the men who served as Podestà were often *those same nobility* whose disputes were decided and shaped with criminal and civil actions. And while it is true that most towns and cities preferred magistrates who came from a distance, this concept was relative. Reggio had many judges and officials, for example, from neighboring Parma. Reggian nobility served as Podestà, also, in Milan, Cremona, Parma, and elsewhere, like Giberto da Correggio, Podestà in Milan in 1392, or Gabriotto da Canossa, who earlier also held that position. In that capacity, they sometimes—as did Gabriotto, (see Chapter One)—oversaw cases directly pertinent to their own interests. Gabriotto, for example, as Podestà of Milan, ordered the ban of his own cousin Niccolò, who belonged to another branch of the family and who contested Gabriotto's possession of some castles in the eastern part of the territory of Reggio.[79] It would be a mistake to assume neutrality.

By way of illustration, we can return to Gabriotto's murder, already discussed above in Chapter One concerning jurisdiction, to see how the instrument of *inquisitio ex querela* might find a politicized use. In the trial of Gabriotto's murderers, and in a later trial related to his heirs' claims for jurisdiction, the

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served in the prosecutorial role that an accuser would perform in an *accusatio*." Blanshei, *Politics and Justice*, 344.

79 Gazata, *Chronicon Regiense*, col. 92.

method of trial initiation reflected a greater political struggle. Gabriotto had been one of the most important and powerful lords of the contado. The city, perhaps relieved to be free of such a powerful local autonomous presence, was very slow to prosecute his murderers. The process of the trial itself reveals both Gabriotto's heirs' efforts to have vindication and the city's efforts to delay.

When Gabriotto's murder became known in Reggio, the Capitano della Città travelled to Bianello, but what happened next is a bit less clear: "he [the Capitano] had the castle freely given to him by Lord Niccolò [the murderer], and he led Lord Niccolò to the jail of the commune of Reggio; and likewise he [the Capitano] held the castle of San Paolo, and [these castles] came to the obedience of the Commune of Reggio . . ."[80] Though the chronicler tells us that the Capitano went to Bianello when the matter became known (*hoc audito*) in Reggio, the initiation of the trial was not *ex officio* but was made by a complaint, a *querela*, made by Gabriotto's sons two months after the murder, and in fact, the visit of the Capitano to the castle is not mentioned in the record.

This was exactly the sort of case—a famous homicide, rumors of which were flying about the territory—that should have merited an *inquisitio ex officio* by any definition; the fact that the formal complaint was necessary to bring it to trial suggests a hesitation on the part of the court to act. In other words, the Podestà appeared to be dragging his feet in dealing with the murderers. The trial process, dated November 13, 1385, began nearly two months after the murder, and the condemnation was issued almost two months after that, on January 25, 1386.[81] According to the chronicler, it was in fact Giangaleazzo who ultimately ordered the execution of Niccolò and his son to proceed: the execution was done "by an order of the Lord Count (of Virtù), who desired that justice should be done." If this implies that the city hesitated to execute Gabriotto's murders, that sentiment would later be held also by Gabriotto's sons, who brought forward a charge in the Podestà's syndication claiming that he had allowed the other assassins to escape.[82] Yet when a few years later, in the territory of Gabriotto's heirs at the castle of Montevetro, the woman

80 Gazata, *Chronicon Regiense*, col. 92–93: "et habuit dictum Castrum sibi datum per D. Nicolaum libere, et duxit Dominum Nicolaum ad carceres Communis Rhegii, et similiter habuit Castrum Sancti Pauli, et venerunt ad obedientiam Commuis Rhegii, quod fuit opus sanctissimum; et filii, et uxor dicti Dominus Gabrioti se reduxerunt in Montem-Vedrum. Hoc audito Dominus Comes mandavit, quod fieret ius Nicolao, et filiis D. Gabrioti, et quod dicta Castra obedient Civitati."

81 ASRe, *Giudiziario*, Libri delle denunzie, November 13, 1385, vol. 7, fols. 82r–83v. Of the six named defendants, four were contumacious; all were condemned, in person or *in absentia*, to death and the confiscation of their goods.

82 Gamberini, *La città assediata*, 46.

Benevenuta was murdered by her husband,[83] a denunciation was quickly made by the *massario* of the territory, and the court, eager to assert jurisdiction in the late Gabriotto's lands, now quickly formed an inquisition against Marchocius.[84] The city pounced upon this case because it provided an opportunity to claim the sword of the *merum imperium* in these territories and to limit the jurisdictional claims of Gabriotto's heirs. If Gabriotto's sons used the *querela* to try to force the city to give justice to their father's murderers, the city, acting together with the Podestà's court, used an inquisition formed through official notification as a way of claiming a disputed jurisdiction.

So in addition to other benefits, such as seeking summary justice or publicly airing enmity, the instrument of *querela* may have been a useful tool in situations where, for his own reasons, the judge or Podestà failed to act. For most people, the idea of posting surety to force a trial that the judge already showed reluctance to prosecute may not have been an attractive proposition, but in other instances, it was a convenient tool to force prosecutions that were politically contentious.

The Narrative of the Crime

Whether an inquisition began *ex officio*, by an official notification, or through *querele*, the trial was an investigation of the assertions made in the largely narrative statement of the alleged wrongdoing that instigated the process.[85] In inquisitions *ex officio*, the statement of charges resulted from the judge's investigations or from reports made to him; in inquisitions, which were initiated by municipal officials, the narrative came from the reporting official. In *inquisitiones ex querela*, however, the statements of the charges represent the complaints of the victims, and in this sense, they might be easily compared to the *libelli* which initiated accusatorial trials. The formulation of the charges into a narrative statement might be done in the initial denunciation or complaint made to the judge, but when multiple officials or parties made complaints, which was frequently the case, it was the court's notary that created the

83 ASRe, *Giudiziario*, Libri delle denunzie, June 22, 1388 vol. 12, fols. 35r–45v.

84 On this episode, see the discussion in Gamberini, *La città assediata*, 46.

85 In a civil trial, or in a criminal accusation, we would call this statement of the alleged facts of the case the *libellus*; when an official made a criminal complaint, we would refer to it as a denunciation; but there is no blanket term parallel to *libellus* for charges made in a criminal inquisition, which could be the result of one or more denunciations or complaints. I have used the phrase "statement of charges" to generally describe the opening of the inquisition that sets forth the narrative of the crime.

narrative document. This was perhaps the most centrally important moment in the process, because the specific terms used indicated the degree of the felony, as well as particular circumstances which aggravated the severity of complaint, and taken together, this narrative was the foundation for the penalty if the accused were convicted.

The *formulae* used in the statements of charges gave a certain standardization to criminal complaints. Indeed, notaries used specific *formulae* for writing denunciations for particular crimes. This standardized the process and presented the key elements of the case that determined the nature or severity of the charge (such as force, *per vim*, in a rape charge). Notarial formulary books include exemplars for different kinds of denunciations, as well as defenses and exceptions.[86] While these standardized practice and ensured systematic inclusion of key elements of the charges, they add a layer of obscurity for the modern historian trying to understand 'what happened,' as this formulary language abstracts and standardizes criminal actions. Vallerani noted formulaic statements and even dialogue inserted into the narrative. Within a six-month period, Vallerani found 116 instances of armed attacks that began with the aggressors' warnings: "Thief, it is necessary that I kill you!"[87] And in these narratives, rapes frequently began with the attacker's admonishment: "I will kill you / I will cut off your nose, unless you are silent and permit me to do as I wish with your body."[88] In the documents from Reggio, threats of death sometimes precede a sexual attack (see the discussion in Chapter Five) though we do not find the same formulary dialogue that Vallerani noted. However a host of *formulae* define the crime.

The statement of charges sets forth the primary elements of the crime, or *substantialia*. The *Digest* notes these elements as "the motive, the person, the place, the time, the quality, the quantity and the outcome."[89] The person, place and time of the crimes were carefully described, including the nearest crossroads and neighboring houses of the crime scene. The quality of the act was indicated by the degree of severity, most obviously in the case of assault where the effusion of blood indicated the seriousness of the assaults, which were noted as *sine effusione sanguinis, cum effusione sanguinis*, or some variant of *cum magna effusione sanguinis* (which often, but not always, indicated a

86 See for example Guido Rossi, *"Processus de Causis Civilibus et Criminalibus": Formulario Bolognese del Secolo XIII* (Milan: A. Giuffrè, 1965). This is an edition of a series of processual acts by an unknown jurist that probably date from 1265–67 until 1282.

87 The 116 examples are found in one semester's worth of trials from 1286. Vallerani, "The Accusatory System in Action," 129.

88 Vallerani, "The Accusatory System in Action," 130.

89 Dig. 48.19.16, quoted in Mayali, 312, and 312 n. 68.

mortal wound). The quantity of actions is also indicated. For example, assault charges carefully inventoried the number of individual offenses made against the victim, and theft charges often included lists of items stolen. Defendants noted as *vagabundi* or *robatores stratorum* often had lists of charges against them that could go quite far back in time, ten or fifteen years. This list of charges going far back in time perhaps indicated recidivism, and it was also common in witchcraft trials.

Only motive, which seldom influenced punishment, was usually omitted. Sometimes records tell us that a crime occurred as part of a vendetta, which at Reggio could exacerbate the penalty, or give a set of circumstances leading up to an assault, but this information is rare. State of mind, however, could play a role in the outcome of the case. Most criminal cases address, in some way, the intention of the offender and his or her mental state. Hence in many cases we learn that an assault or an insult was committed when a defendant was enraged (*irato animo*). Intention distinguished accidents from acts committed with the purpose of harming or killing the victim. Premeditation is stressed with the formula "knowingly, and with a calculating mind, and with the intention of committing [the crime], and with a diabolical spirit."[90] The worst crimes—robbery, murder, arson, rape and rebellion, but not assault—are denoted as "treacherously, knowingly, with deliberate and calculating consideration, and with a mind and intention of committing and perpetrating homicide, instigated by a diabolical spirit, not having God before his [or her] eyes, but rather the enemy of the human race . . .",[91] indicating intention and premeditation of the worst sort. All these factors combined to determine the severity of the crime, upon which the judge would then render sentence.

Citation

The accusations made in the charges, including the details of the *substantialia*, were publicized in the citation process.[92] The announcements of the *nuncio*

90 ASRe, *Giudiziario*, Libri delle denunzie, April 4, 1387, vol. 8, fol. 85r, here and elsewhere, ". . . scienter et appensate animo et intentione commitendi spiritu diabolico."

91 ASRe, *Giudiziario*, Libri delle denunzie, July 16, 1387, vol. 9, fol. 35r, here and elsewhere, ". . . dolose, scienter, deliberate tractate et appensate et animo et intentione homicidium comittendi et perpetrandi spiritu diabolico instigati deum pro occulis non habentes . . ."

92 See discussion in Peter Raymond Pazzaglini, *The Criminal Ban of the Sienese Commune, 1225–1310* (Milan: Giuffrè, 1979). Chapter two, "Citation, contumacy and conviction," is devoted to this issue.

were preceded by the blast of a trumpet, ensuring that not only the accused but also the neighbors of the accused were made aware of the accusation.[93] The citation itself gave the particulars of the crime, including the time and place of the incident, the name of the judge and the day and hour at which the accused was cited, the name of the accused, and the name of the victim. Statutes dealt carefully with this important stage, requiring that the defendant be allowed not less than three days to respond to the summons, and also making concessions for other circumstances: foreigners were cited at the public assembly-place of the commune and were given twice as long—six days—to respond, while charges against vagabonds were also publicly read at the assembly place of the commune, in lieu of a neighborhood or residence.

The formality and publicity of the announcements were a display of the court's jurisdiction and power. Beyond that assertion, the citation process served a very important function, allowing a failure to appear, or contumacy, to be interpreted as a deliberate act, and therefore as a justifiable ground for conviction *in absentia*.[94] Approximately half the defendants cited to appear in Reggio's court were contumacious. The citation process allowed the court to frame the defendants' absence as a choice, and therefore, to proceed with a conviction *in absentia*.

The extant records seldom allow us to comprehend whether responses to citation procedure were voluntary or whether defendants were captured or detained. The records use the same formulaic statements in both cases, telling us only that the defendant appeared on a certain day before the judge (*comperavit coram dictum dominum iudicem*). The process followed the same lines either way, as the judge proceeded with the phase of inquisition that today we would term the trial—the *inquisitio specialis*.

The Trial Process

Court procedure and local norms for court procedure, which could have significant variations between towns, were defined in statute law, and occasionally in signorial decrees. We can summarize the beginning of the process as found in the procedural guidelines of the 1335/71 and 1392 redactions as follows:[95]

93 BSR, Statuti, ms. 77, 52r: "De modo citandi illos contra quos proceditur."

94 Pazzaglini, *The Criminal Ban of the Sienese Commune*, 22.

95 ASRe, *Comune*, Statuti del 1335/1371, fol. 51r–v and ASRe, *Comune*, Statuti del 1392, fol. 147r–v.

1. The accuser, denouncer, or person bringing the accusation upon which an inquisition can proceed must present the charge in writing to the Podestà or his judge.
2. That person must swear to the truth of the accusation and provide a fideiussor concerning the prosecution of the charges (*fideiussorem prestet de ipsa prosequenda*). The 1411 statutes clarify that public officials are not obliged to post surety; this almost certainly was already the common practice, which was incorporated into the full revision of the criminal statutes in this redaction.[96]
3. A term of ten days is assigned to the prosecution.
4. The accused (*accusatus, denunciatus vel inquisitus*) is cited by the communal *nuncio*.
5. The accused receives an appointed day to make an initial defense.
6. If the accused appears, the charge is read to him in the vulgar tongue, *in secreto* before the judge.
7. The accused swears to tell the truth and to purge himself (*se purget*) by affirming or denying the charges.
8. The accused offers any exceptions (technical objections to the charge against him or her, based on legal grounds).
9. The accused provides a fideiussor.
10. Ten days are allowed for the preparation of a defense, or fifteen days, if the accused lives outside the city.
11. Copies are made of the accusation (*accuse, denunciationis et inquisitionis*) for the accused.

In all cases, the accuser, denouncer, or person bringing the accusation upon which an inquisition can proceed must present the charge in writing to the Podestà or his judge and must swear to the truth of the accusation, providing a fideiussor concerning the prosecution of the charges, as we discussed above.[97] This surety appears to be a necessary part of the procedure. The statutes make no distinction between the specific trial processes of accusation and inquisition, setting forward only one clearly delineated method of proceeding "to be observed concerning crimes and criminal processes, so that anyone who happens to be seriously accused, denounced, or inquired against

96 BSR, Statuti, ms. 77, fol. 57v, "... predicta non habeant in capitanei vicinae et consulum villarum civitatis burgorum districtus et episcopatus Regii ..."

97 ASRe, *Comune*, Statuti del 1335/1371, fol. 51r–v and ASRe, *Comune*, Statuti del 1392, fol. 147r–v.

for any crime and any criminal case should come before the Lord Podestà or his judges . . .".[98]

The statutes, then, provided a broad *ordo iuris* that gave general outlines for any criminal trial, regardless of whether it were an accusation or an inquisition. This raises the question of whether, at the end of the fourteenth century, it would make more sense to distinguish between trials that were *ex officio* and trials that were not *ex officio*, rather than persisting in the traditional distinction between trials that were private accusations and trials that were inquisitions. Yet the criminal court's notaries pointedly retained that distinction between private accusation and inquisition, and it remains important not to lose the particular distinction that belongs to inquisition trial: the power of the inquiring magistrate. The logic of the older accusatorial trial versus the inquisitorial trial, whether *ex officio* or *ex querela*, was different. Vallerani compared the concept of facts in the triadic accusatorial process (accuser—accused—judge) with that of inquisition in its pure, *ex officio* form. He wrote that the very facts at issue are reflected in, and to some extent determined by, the trial process: accusation seeks the truth of the disputed point through a dialectical process and confrontation between the parties' version of events,[99] while the logic of the inquisitorial model seeks objective truth through a rational process.[100] By the end of the fourteenth century, the *inquisitio ex querela* was a third element that bridged these ideas, still allowing confrontation, but leaving the power to investigate, call witnesses, weigh testimony, and render sentence firmly in the hands of an inquiring magistrate.

Though inquisitorial procedure had emerged as the dominant trial procedure by far at Reggio at the end of the fourteenth century, in fact inquisition was less replacing accusation than absorbing it through a series of technical procedural changes and adaptations that allowed inquisition procedure to fill those needs of confrontation and retribution that had actually been dealt with very effectively in accusatorial justice. The inquisitorial trial of the late fourteenth century developed the flexibility necessary to meet different and sometimes opposing needs: the needs of a court seeking to exert jurisdiction, both as a show of power and as an effort at crime control, and the needs of a culture and a people shaped by ideas of retribution, honor, and self-help.

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98 ASRe, *Comune*, Statuti del 1335/1371, fol. 25r: "In maleficiis et maleficiorum processibus talem ordinem duximus observandum ut quencumque enormiter aliquem accusari denunciari vel inquiri pro quocumque maleficio et maleficii causa coram domino potestate vel eius iudicibus contingerit [sic] . . ."

99 Massimo Vallerani, "How Procedures Think: Facts and the Trial," in *Medieval Public Justice*, trans. Blanshei, 77–78.

100 Vallerani, "How Procedures Think," 80.

CHAPTER 3

Fama, Notoriety, and the Due Process of Law

The adoption of inquisitorial procedure in secular criminal courts created a more powerful and theoretically impersonal justice system.[1] But medieval 'public justice' was never really impersonal justice, in the sense of a blind *Iustitia* that treats every defendant and every victim the same. That modern idea would make little sense in a world where vendetta and self-help fundamentally structured community relationships, and where reputation and honor held the weight of a legal status.[2] Class, wealth, gender, lineage—all these could and did affect a person's standing before the court, underscoring a particularly medieval view: if justice means giving each person his or her due, as Justinian's Code famously declares, then the nature of the person must be considered.

In medieval law, this consideration had a very specific vehicle. *Fama*, or public knowledge, of both persons and deeds was central to the concept of inquisition. *Fama* initiated trials, identified defendants, defamed witnesses, and reframed victims' narratives. It opened or closed the doors of the torture chamber, validated or invalidated testimony, and constituted the difference between rape and sex. *Fama* and its stronger manifestation, *notorium*, determined whether a defendant would be accorded a trial at all or whether the court would proceed to summary punishment. *Fama* was the foundation of medieval understandings of proof. Vallerani called it "the true keystone of the probatory system."[3] Considering the role of *fama* in initiations and in framing punishments, we might go even further, and say that *fama* was the *sine qua non* of the inquisition process.

Yet as centrally important as *fama* was, the concept eluded concrete definitions and even probatory rules. Jurists disagreed on the number of witnesses required to prove it, and the witnesses themselves struggled to define it. *Fama* was real, and it existed in the community consciousness, so therefore testimony

1 Kelly, "Inquisitorial Due Process and the Status of Secret Crimes," 409.

2 See Thomas Kuehn, "Fama as a Legal Status in Renaissance Florence," in *Fama: The Politics of Talk and Reputation in Medieval Europe*, eds. Thelma Fenster and Daniel Lord Smail (Ithaca: Cornell University Press, 2003), 27–46.

3 Vallerani, "How Procedures Think," 108.

to it followed the same rules as testimony to other kinds of evidence. And it is important to note that the medieval emphasis on *fama* was not incompatible with the distrust of hearsay found in Roman law: at least formally, these were very distinct.

Fama, Public Knowledge, and Proof

The idea of *fama* was quite literally an idea of 'common sense' or 'common perception.' *Fama* itself was not a medieval invention,[4] but difficult questions arose when this elusive idea was translated into a complex scholastic legal process. Inside the framework of an Aristotelian view that houses knowledge in sense perception, how does a person know and prove *fama*?

Jurists' definitions of *fama* acknowledged two primary types: *fama* of facts and *fama* of persons. *Fama* of facts stood as the basis of all trial initiations in the criminal court. No matter what other initiations were used—official denunciations or private *querele*—all inquisitions also name *publica fama* as an initiator, referring to the *fama* or public knowledge that the crime was committed and that the named defendant was known to have committed it. Personal *fama* became a legal status—*bona fama* or *mala fama*—and this status could confer or remove privileges in the same way that emancipation or even legitimacy could.[5] It reflected public knowledge of an individual's customs and public dignity. Durantis echoes the *Digest* in his definition: "A status of uninjured dignity, proven by life and customs."[6] The thirteenth-century Hostiensis wrote that *fama* is "public or famous insinuation or proclamation of a community, coming only from suspicion and uncertain origin."[7] Fourteenth-century canonist Johannes Andreae, in his commentary on Durantis's definition, distinguished between *communis fama* and *communis opinio*, emphasizing that *fama* only

4 On the development of ideas and legal categories of infamy, see Peters, "Wounded names."

5 Kuehn, "Fama as a Legal Status", 31.

6 Durantis, *Speculum iuris*, Book III, part. I, p. 45: "Fama est illaese dignitatis status vita ac moribus comprobatus . . ."

7 Fama is "publica seu famosa insinuation vel proclamation communis, ex sola suspicione et incerto authore provinens . . ." Quoted in 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 XIV^e siècle* (Paris: Librairie du Recueil Sirey, 1939), 113.

exists as a public matter, something that is thought by the majority, while an opinion can be held by the minority.[8]

Personal *fama* was evidenced in a pattern of behavior *over time*. This meant evidence of a sin or crime is not evidence of bad *fama*, because good people sin and sometimes commit bad acts. One of the chief characteristics of *fama* is that it builds over time, in the *longue durée*. How long? For Bartolus, personal *fama* or *habitus* "is proven from customs of three years: for from this, virtue can be determined."[9] The fundamental characteristic of *fama*, both of deeds and of persons, was that it existed in the public consciousness. Proving the existence of both kinds of *fama* therefore meant proving the existence of common knowledge. All proof in the medieval inquisitorial system rested on knowledge gained through sense perception, and the complexities begin in earnest when this amorphic concept had to be translated into a probatory system. First, how much weight should it carry, and second, how could it be proven?

Jurists struggled with the probabory value of *fama*. Baldus called it "*probatio multum fallax et facilis*," and together with Bartolus, considered it the "*vana vox populi*." Pierre Jacovi d'Aurillae wrote that *fama* is very dangerous, and often false, because it can arise from ill-intentioned people, or enemies of the accused.[10] And yet, while some jurists viewed with great suspicion the probabory value of *fama*, it not only continued to be used, but even became the engine of the inquisitorial process. As proof, *fama* of person and *fama* of fact were not of equal weight. *Fama* of fact could act as a partial proof if it were testified to by at least two witnesses. Johannes Andreae confirmed in his gloss to Durantis's *Speculum iuris* that *fama* along with one suitable witness constitutes full proof.[11] Bartolus de Saxoferrato noted that "*fama* is not proof by itself, but it assists proof."[12] Only a half-proof was required for a defendant to be put to torture, and significant *fama* could play that role. But *fama* of fact and *fama*

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8 Johannes Andreae, addition after gloss on "Sicut," *Speculum iuris*, Book III, Part I. Gl. "Sicut," p. 46. "... in aliquo differunt simpliciter sumpta fama et opinio: quia fama non potest esse, nisi publica: quia est de eo, quod ab omnibus, vel maiori parte sentitur: opinio potest etiam esse talis, sed potest etiam esse paucorum, et non publica..."

9 Bartolus, *Tractatus testimoniorum*, 289. "Apparet ergo, quod ex moribus trium annorum probatur habitus: ex hoc enim inducitur virtus."

10 Lévy, *La hiérarchie des preuves*, 114; in general see his discussion on the probatory value of *fama* to the jurists, 113–117.

11 Johannes Andreae, addition after gloss on "Sicut" *Speculum iuris*, Book III, Part I. Gl. "Sicut," p. 46.

12 Bartolus da Saxoferrato, *Commentaria in secundam Digesti veteris Partem*, Venice 1570, fol. 155v. Commentary on Dig. 23.3.1: "... fama per se non probat, sed probationem coadiuuat."

of person had a complex relationship, as Massimo Vallerani has demonstrated in his discussion of Gandinus's *Tractatus*, with personal *fama* holding stronger probative value than *fama* of fact. The "... fact (or the crime) is lost in favor of the *fama* of the person: it is engulfed in its natural *habitus* and becomes a secondary variable of *fama*."[13] In other words, people were somewhat protected by their good personal *fama* even if *fama* of fact existed against them. If a person of good *fama* were named as a culprit by several witnesses, this alone was not enough to justify a conviction or an interrogation under torture unless other *adminicula*, or supporting evidence, existed.[14] And for Gandinus, the opposite was also true—a person of *mala fama* arrested as a suspect in a crime could be put to torture more easily than a person of *bona fama*. A defendant of *mala fama* could be tortured based only on a rumor, or *clamor*.

How could *fama* be proven? Modern scholars sometimes liken *fama* to hearsay.[15] Yet this parallel between hearsay and *fama*, natural as it seems, did not stand in medieval law, and when we try to understand the probatory value of *fama*, it is misleading. Roman law and its medieval commentators forbade testimony based on hearsay, and witnesses could testify only to what they perceived with their senses. Thomas de Piperata, whose discussion of *fama* was used in the fourteenth century by Bartolus, wrote that if a witness only knew about a person's *fama* because he had heard it discussed by other people, he could not testify to that *fama*.[16] His tract was not well-known in the fourteenth century, but his opinions are echoed by Bartolus in his *Tractatus de testibus*. Bartolus declared that if a witness said that something was true because he had heard it said—*audivit dici*—this was not probative, even if the witness claimed to have heard it from people who had themselves been eyewitnesses.[17] Rather, in Bartolus's view, a witness must testify to the things he learns from his senses. This reflects the larger, fundamentally scholastic medieval view of

13 Vallerani, "How Procedures Think," 108–109.

14 Vallerani, "How Procedures Think," 110.

15 The introduction to a recent collection of essays on *fama* comments that "Modern legal systems rigorously try to exclude hearsay evidence ... It is startling for the non-specialist, therefore, to realize that medieval legal systems readily acknowledged the force of common opinion and even devised ground rules for its use." *Fama: The Politics of Talk*, eds. Smail and Fenster, 3.

16 Fraher, "Conviction According to Conscience," 34.

17 Bartolus, *Tractatus testimoniorum*, 240: "Testis dixit aliqua vera esse quia audivit dici. Receptum est testimonium de auditu alieno regulariter non valere ... Non enim testi creditur, nisi in iudicio per iudicem iuramento prestito parte presente vel contumace solemniter examinetur, sed cum testis audivit alium se audivisse dicentem, ista solemnitas defuit: igitur insufficiens causa est."

proof, which rested on an Aristotelian concept of knowledge derived from the senses. It is this idea, that witnesses must demonstrate the legitimacy of their knowledge, the *iusta causa et legitima scientia*, that separated testimony on *fama* from hearsay.

This sentiment was echoed by other jurists in their discussions of the evaluation of witness testimony. Nellus da San Gimignano followed Bartolus when he wrote that "Credence should not be placed in a witness concerning the infamy of anyone, unless he shows just cause and legitimacy of knowledge."[18] In this view, Vallerani's observation that the *fama* of the person was "able to overthrow the scale of criteria of veracity imposed on the sensory perception of the facts" may need to be somewhat moderated.[19] Personal *fama* was still a fact, if not a deed, and it was subject to sensory proof. Indeed, to Bartolus, all *fama* derived from sensory knowledge. How can a witness have sensory knowledge of "common knowledge"? Bartolus considered testimony to a person's life and customs to be probatory based on the witnesses' relationship to the accused, perhaps as a close relative or neighbor.[20] Trial records reveal that witnesses who were not neighbors or relatives proved a person's *fama* by describing a person's behaviors, and by describing their own interactions with the person.

On October 19, 1386, Guadagninus de Placena accused a certain Meninus of committing adultery with his wife Dominica. Guadagninus made it clear in his accusation that his wife lived with him honestly, *honestate viventem cum dicto suo marito*. This was a crucial part of his charge, because it indicated that he was seeking a maximum penalty for the offense. The statutes at Reggio Emilia distinguished between sex crimes based on two criteria: whether the woman was of good *fama*, and whether she consented to the act. By claiming his wife was honest in the charge, Guadagninus accused Meninus of a serious crime—the "violation" of an honest married woman—which carried a fine of 100 pounds for Meninus, and if proven, could have carried a capital penalty for Dominica.

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18 Nellus de Sancto Geminiano, *De testibus*, 175, in *Tractatus Universi Iuris* XI, pt. 1. (Venice: 1584), 216–217.

19 Vallerani, "How Procedures Think," 112.

20 Bartolus, *Tractatus testimoniorum* 14, p. 241: "Videbatur eius dicto non standum, quia per nullum sensum corporis causam reddit. Dicebam standum esse, sufficit enim sensum exprimere uel aliquid per quod secundum communiter accidentia per sensum habeatur notitia, quia enim uicinus uel consanguineus est, uidet secundum quod communiter accidit uitam et mores. Per uisum ergo causam reddisse videtur, hoc etiam legibus comprobatur."

Though Meninus answered the summons to appear at court and confessed that everything in the charge was true as it was stated, the next day, his advocate appeared in court, announcing that Meninus had been mistaken, and his confession was *contra omnem veritatem*. The advocate claimed that the petition made by Guadagninus could not proceed because the charge was based on the premise that Guadagninus and Dominica lived together honestly joined in marriage. This, the lawyer asserted, was not true. In defense of Meninus, he would prove his case through six articles. All of these articles aimed to prove the *mala fama* of the woman Dominica.

First, the advocate stated his intent to prove that Dominica had lived a dishonest life while she lived with Guadagninus; second, that she was widely known to be a *meretrix casalenga*, a 'housewife prostitute'; third, that Guadagninus knew about her habits; fourth, that he had expelled her from his home many times because she lived dishonestly, but had always brought her back; fifth, that he had even cut her hair because she lived dishonestly; and sixth, and most importantly, that all of these things were public *vox et fama*. He then provided the court with a list of twenty-one men who, he claimed, could prove these articles. Of these witnesses, the statements of eleven survive in some detail.

To prove Dominica's *mala fama*, these witnesses—all men—gave detailed testimony describing their own interactions with Dominica. One witness claimed to have slept with her himself. Another stated that he had seen Dominica standing in the doorway of her home, with her hair cut up to her ears. Dominica's neighbor testified that he hardly dared to open his doors because he feared for his grown daughters. He testified that he had seen a man sneaking to Dominica's house via his property, and when he sealed off the cut-through, the man threatened him, saying that he would not be impeded. The rector of the hospital testified that he seen her standing in her doorway, making lewd gestures. Yet another man claimed to have witnessed Dominica conversing with a man who said, "My love, you'll stay alone tonight because Guadagninus is out of town." To this Dominica replied, "No I won't—if he won't stay with me, will you?"

The sixth article of the charge was that Dominica's poor character was public *vox et fama* in the community, and all the witnesses testified that this was true.[21] Testimony to the existence of *fama* was very common, and even alone, such testimony could open an investigation. But sensory knowledge was an integral part of proving the fact of a person's *mala fama*. The proof of Dominica's *mala fama* was composed of testimony to individual experiences with her that,

21 ASRe, *Giudiziario*, Libri delle denunzie, October 19, 1386, vol. 8, fols. 49r–57v.

if true, supported the factual condition of *mala fama*. Establishing her *mala fama* was not a matter of testimony to gossip or rumors—at least, not solely. Rather the men testified to their specific interactions with her, establishing their authority with which to speak on the situation, and lastly confirming the public *vox et fama* of the charges. In this sense, the men were doing more than confirming Dominica's pre-existing *mala fama*: they were constructing it, converting what might (or might not) have been a bad reputation into legal *mala fama* through their concrete allegations.

Under municipal law, cases of adultery required more witnesses than usual to prove *fama*—the statutes at Reggio required at least five witnesses to prove the reputation of a woman involved in a rape or adultery case, instead of the usual two to three witnesses required to prove *fama*. This is because the degree of the crime in sex assaults or adultery was entirely dependent upon the *fama* of the woman. Adultery cases and rape cases are notoriously difficult to interpret, not least because they often functioned in parallel with civil disputes over dowry. In Reggio, the civil records do not survive that would allow us to see if these people were involved in any parallel actions, so the charges as stated in the denunciations and the responses of witnesses cannot be properly interpreted. In any case, Meninus's defense was successful: he was condemned to pay only 10 pounds, not the 100 pounds owed by a man committing adultery with a married woman of honest life. It is worth emphasizing here that Meninus's virulent attack on his lover's *fama* also probably saved her life, as the penalty for an "honest woman" committing adultery was death. Regardless of the path that brought the charge of adultery before the court, we can clearly see the construction of legal *mala fama* through witness testimony: it is built with alleged facts, not rumors, to create the *iusta causa et legitima scientia*.

The existence of *publica vox et fama* was essential, constituting the final point in the list of articles to prove. As in the sixth article of the charges against Dominica, witnesses in inquisitorial trials were usually asked whether the facts to which they testified were *publica vox et fama*, a phrase which translates awkwardly into English as "public discourse and fame." This question asked witnesses to confirm that outside the court, in the community, public knowledge already existed. Usually, the question was a yes or no question, which did not ask witnesses for further, sensory evidence of their answer, and witnesses usually did not hesitate to confirm the *vox et fama* of the facts of their testimony. Seldom, when a judge asked a witness if his or her testimony was *publica vox et fama*, did they answer anything but 'yes.' Yet if the distinctions and questions that arose from legal discussions of *fama* and its probatory value were so complex and nuanced, how did members of the community—whose knowledge *fama* was supposed to reflect—understand the concept when

asked to testify to its existence? At Reggio, this verification of *publica vox et fama* was usually the last article of the interrogation, so our records offer little help in answering this question. In Bologna, perhaps the most important center of legal education in medieval Europe, judges sometimes continued the questioning to ensure that the witnesses understood exactly what *vox et fama* meant.

When pressed to define *vox et fama*, witnesses' answers were in no way uniform. Not infrequently, we find that a witness who readily testified to the *vox et fama* of his or her testimony could not in fact explain what this meant. For example, a certain Dominicus Bitini, identified as a laborer, testified to the *vox et fama* of the facts he reported, but when the judge then asked him what *fama* was, he confessed that he did not know.[22] This of course does not mean that he had no idea of the concept—only that he was reluctant to venture a definition before the judge. Other witnesses, asked to define *fama*, answered that it was "what neighbors know," or what was said "fully, by all the people" (*plenarie per omnes gentes*)[23] or "publicly, by all the people."[24] Witnesses sometimes used interchangeably concepts like *manifestum, notorium*, or *fama*. These terms had a great deal of consequence in a legal forum, but naturally lay witnesses did not make the same distinctions that jurists did, using these words as a way simply to say that *fama* is evident to everyone: *publica vox et fama* is "*manifestum*" and "what all men know" (*homines sciunt*),[25] or "notorious (*notorium*) to all people, namely, both the great and the little people."[26] *Fama* was that which was said "fully, by all the people" or that which was said publicly (*publice*) by all people.[27]

How many people were necessary to create *fama*? Once again, there was no uniform answer to the question, even when the witnesses had legal educations. A certain Dominus Egidius, licensed in canon law, thought it was sufficient that it was said by a majority of people (*quod dicitur per maiorem partem gentium*),[28]

22 ASB, Curia del Podestà, Notai Forensi, b. 10, fasc. 1, 42r.

23 ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium, b. 253 fasc. 2, 22v, April 20, 1388.

24 ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium, b. 253 fasc. 2, 23r, April 20, 1388.

25 ASB, Curia del Podestà, Notai forensi, b. 10, fasc. 1, fol. 16v.

26 ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium, b. 253, fasc. 2, fol. 22v, 20 April 1388: "... interrogatus quid est publica vox et fama? Dixit id quid est notorium omnibus gentibus videlicet magnis et parvis personis."

27 ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium, b. 253 fasc. 2, fol. 22v, April 20, 1388.

28 ASB, Curia del Podestà, Notai Forensi, b. 10, fasc. 1, 55r.

while a student of civil law posited that ten were necessary;[29] another witness, a master in a school, thought that six would be enough;[30] Guilelmus, a notary and citizen of Bologna, said it would take "twenty, thirty, even forty and however many, as make up the majority."[31] And a certain Johannes, who held the most esteemed title of "*utriumque iuris*," said that *fama* was made sometimes by many, sometimes by fewer people, depending on the kind of business under examination.[32] Johannes distinguished between what is public and what is notorious, saying that what is public is understood by many, but he admitted that he could not remember the definition of *notorium*, saying only that he was sure it was defined at the gloss on the chapter concerning the cohabitation of clerics and women.[33]

Difficult to quantify, imperative to understand: *fama* influenced virtually every aspect of public justice but, inside a scholastic system rife with distinctions and technicalities, this most important concept eluded rigid definitions. In the *inquisitio specialis*, witnesses to *fama* figure into arguments for guilt or innocence, appearing in three predominant ways: *fama* that impugns a defendant (public knowledge that the defendant committed the particular crime in question, or that the defendant was a habitual criminal), which was used for trial initiation or to support a charge; *fama* that undermines a witness (usually as part of a defense); and, primarily in cases of rape or sexual assault, *fama* that characterizes the victim in such a way that would negate the charge (as in the above-mentioned case of Dominica, and again, usually as part of a defense).

Semel malus, semper malus? The Presumption of Innocence and *Mala Fama*

What presumptions did the judge take with him to the defendants' case? This question is important to consider, because it is judicial power that sets inquisition procedure apart from its predecessors. As Eberhard Schmidt commented,

29 ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium, b. 253, fasc. 2, fol. 8v, April 18, 1388.

30 ASB, Curia del Podestà, Notai forensi, b. 10, fasc. 1, fol. 17v.

31 ASB, Curia del Podestà, Notai forensi, b. 10 fasc. 1, fol. 56r: "... dixit quod viginti, triguinta, et quadraguinta, et quanto plures tanto maiorem faciunt fama."

32 ASB, Curia del Podestà, Notai forensi, b. 10 fasc. 1, fol. 57r: "... interrogatus quod [sic] homines faciunt publicem vocem et famam, dixit quod aliquin plures, aliquin pauciores, iusta qualitate negotii de quo queritum."

33 ASB, Curia del Podestà, Notai forensi, b. 10 fasc. 1, fol. 57r.

"Only a judge equipped with superhuman capabilities could keep himself in his decisional function free from the . . . influences of his own instigating and investigating activity."[34] Yet as we have seen, the judge's instigating and investigating activity was, at Reggio Emilia, somewhat minimized by the role of public officials and private parties. Central to understanding the criminal trial is the determination of whether the judge assumed a prosecutorial role, and whether he worked from an assumption of guilt once the decision was made to move forward with the evidence against a named defendant.

Richard Fraher, in his exploration of the presumption of innocence in medieval canon law, traced the evolution of the axiom *non statim qui accusatur reus est, sed qui convincitur criminosus* ("He who is accused is not immediately [thought to be] a criminal, but rather he who is convicted is criminal") from pseudo-Jerome to Durantis, but concluded that this tenet was shaken by the advent of inquisitorial procedure.[35] The principle of *semel malus, semper malus* ("once bad, always bad"), found in the Liber Sextus and developed into a general legal principle by Dinus de Mugello, allowed *mala fama* to create a judicial presumption of guilt. Gandinus believed the principle allowed suspects of *mala fama* to be put to torture directly, without further evidence. Infamy thus changed a person's legal status.[36] Jurists took different views about the weight and power of *fama*: Dinus allowed *fama* to stand only as a partial proof, which was the more common view, though a few jurists like Cynus would have accepted it as a full proof.[37] Yet as we have seen, in inquisitorial trials at Reggio, not only did the accuser bear the burden of proof, but unless acting in an official capacity, the accuser was also required to post personal surety when the claims were brought to court. At its foundation, the core component of presumption of innocence is simply the requirement that the prosecution should bear the burden of proof, and this is stated explicitly in the *Digest*: "Proof is

34 Eberhard Schmidt, *Lehrkommentar zur Strafprozessordnung und Gerichtsverfassungsgesetz*, quoted in John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1977), 8.

35 Fraher, "Ut nullus describatur reus . . .," 505. Fraher argues that while the idea of presumption of innocence was enshrined in Durantis's *Speculum iuris*—albeit with great qualifications—the notion became more and more limited in the later Middle Ages because of the less stringent nature of late medieval proof laws, because of the widespread use of inquisition procedure, and because of the "elaboration" of the use of torture.

36 Antonella Bettoni, "The Perception of 'Social Danger' among *Ius Commune* Jurists: A Reconstruction of the Concept of *Malus* in Sixteenth and Seventeenth Century Italian and German Juridical Doctrine," *Liverpool Law Review* 26 (2005): 55–57.

37 Stern, "Politics and Law in Renaissance Florence and Venice," 226.

incumbent upon he who brings a charge, not he who denies it."[38] The idea that the defendant is innocent until proven guilty was commonplace in the Middle Ages: as Kenneth Pennington has noted, "The maxims 'the burden of proof lies with the accuser, not the defendant' and 'in doubtful matters the defendant is favored, not the plantiff' were commonplaces of medieval law."[39] *Fama* and public perceptions served as the moderators of truth, and we should carefully consider how—or whether—judicial presumptions were shaped by *fama*.

Good *fama* was assumed, because it was the natural state. *Mala fama* had to be demonstrated, but when it was, the legal status of *infamia* had serious consequences: it could prevent an individual from bringing an accusation, acting as a witness in a case,[40] or bearing witness to a testament or any *instrumentum publicum*.[41] A person of bad *fama* could not serve as judge or an assessor.[42] Nor could a person of *mala fama* serve as a procurator or as a judge, or be ordained without a specific papal dispensation.[43] *Mala fama* could create a presumption of guilt in criminal cases.[44] But it is extremely important to differentiate between these terms, since their modern usage would give us a false impression. *Mala fama* could create a *praesumptio* of guilt, and was weighted like a strong piece of circumstantial evidence. But medieval laws of proof differentiated between *grades* of presumptions, only the strongest of which—the so-called "violent presumption"—was assumed to be factual unless disproven. (The modern use of the phrase 'presumption of innocence' would have been, to a medieval jurist, a *violent* presumption of innocence, because it refers to an assumption that stands unless it is disproven). *Mala fama* (unlike notoriety) did not create a so-called "violent presumption" of guilt, which would have reversed the burden of proof.

If it did not reverse the burden of proof, how, exactly, did *mala fama* change a criminal defendant's standing? When defendants are identified in the

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38 Dig. 22.3.2: "Ei incumbit probatio qui dicit, non qui negat." Quoted in Fraher, "*Ut nullus describatur reus prius quam convicatur*: Presumption of Innocence in Medieval Canon Law," in *Proceedings of the Sixth International Congress of Medieval Canon Law, Berkeley, California*. Monumenta iuris canonici, Series C, 7 (Vatican City: Biblioteca Apostolica Vaticana, 1985), 493–506.

39 Kenneth Pennington, *The Prince and the Law: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), 155–56.

40 Francesco Migliorino, *Fama e infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII* (Catania: Giannotta, 1985), 139–141.

41 Migliorino, *Fama e infamia*, 146–147.

42 Migliorino, *Fama e infamia*, 154–157.

43 Peters, "Wounded Names," 68–69.

44 Migliorino, *Fama e infamia*, 54.

denunciations that begin criminal trials, the accused are sometimes designated as individuals of *mala fama*, such as "Antonius, son of Johannes de Pinaziis de Placentia, a thief, and a man of bad condition and *fama*,"[45] or "Thomaxus de Costa, son of Puzius, and Bartholazus de Costa, son of Albertus, citizens of Bismantova in the district of Reggio, murderers and highwaymen [*robatores stratorum*] and men of the worst [*pessime*] condition and *fama*."[46] These designations are difficult to interpret. Are they legal definitions or allegations? When inquisitions were initiated *ex querela*, the victim or their kin presumably controlled to a large extent the accusatory narrative. In these cases, could the descriptor simply be a rhetorical statement made by the framer of the denunciation against the defendant, akin to, "this man that I accuse is a very, very bad man"? This reading is tempting for its simplicity, but it is problematic: first, because terms like *mala fama* were specific and legally very powerful, and it seems unlikely that they would be used in such a casual way, and secondly, because the designation of *mala fama* seems to bear a close association with certain crimes. If it were a rhetorical part of the narrative made by the offended party, we might expect it to appear in the denunciations or complaints that initiated assault trials—the most common criminal trials in Reggio—but it never does.

The designation of *mala fama* only occurs in accusations of the most severe felonies: theft, witchcraft, murder, sexual violence, and treason or rebellion. For example, murder accounts for 56 percent of the cases where the defendant is termed *mala fama*, but only 8 percent of cases overall. Yet *mala fama* is not a formulaic claim tied to particular categories of crime: most murderers and many thieves are not described this way. What, particularly, did this designation indicate, and did it affect the defendant?

We can use the data from Reggio to explore some correlations. A sample of 150 trials (266 defendants) for murder, rebellion, sexual violence, theft and robbery—those crimes where *mala fama* designations sometimes appear—shows an overall conviction rate of approximately 91 percent—very close to the 90 percent overall conviction rate for all crimes at Reggio's court. If we then compare conviction rates in this sample for the defendants denoted as *mala*

45 ASRe, *Giudiziario*, Libri delle denunzie, October 7, 1389, vol. 13, 79r: "contra et adversus Anthonium filium Johannis de Pinaziis de Placentia furem hominem male conditionis et fame . . ."

46 ASRe, *Giudiziario*, Libri delle denunzie, January 18, 1387, vol. 17, fol. 8r: ". . . contra et adversus Thomaxum de Costa, filium Puzii et Bartholazum de Costa filium Alberti, cives Bismantue districtus Regii homicidas et robatores stratorum ac homines pessime conditione et fame . . ."

fama[47] with those who lack the descriptor, we find that the conviction rate does not significantly vary based on whether the defendants were designated as *mala fama*: defendants designated *mala fama* have a 93 percent conviction rate, compared to 90 percent for those who do not. The designation of *mala fama* in the denunciation, then, does not appear to correlate to conviction.

But *mala fama* does correlate to corporal punishment. Of defendants convicted of the above-listed crimes and designated as *mala fama*, 91 percent were sentenced to corporal punishment or death, compared to 79 percent of defendants without the designation.[48] Other differences are apparent as well. The contumacy rate among defendants denoted in the charges as *mala fama* was 75 percent–28 percent higher than the average contumacy rate. Thirty-three percent of trials against *mala fama* defendants were initiated *ex officio*, compared with an average of 15 percent for criminal cases in general. One wonders if the distinction of *mala fama* in the denunciation may have indicated recidivists and others who appeared to pose a public danger.

Most defendants designated in this way were men. Most, but not all: those rare cases that see a woman acting as a public menace show the courts treating her very much as her male counterparts were treated, most likely including torture, and attaching the same epithets to her name. In 1377, a certain Jacoba and her husband, *homicides publici et famosi et homines male conditione et fame*, attacked and murdered a man; while her husband stabbed him, Jacoba took a club and bashed his head, breaking the bones of his skull. She and her husband were condemned *in absentia* to death by decapitation.[49] Other examples that show women with this denotation in the statement of charges include a woman charged with witchcraft and love magic[50] and a woman accused of murdering a two-year-old child.[51] Women accused of engaging in thefts and murders of strangers are very rare. To find another example we have to once again leave Reggio for Bologna, where we find Bartholomea, daughter of Magister Johannes Petrus de Bologna, who was designated "a thief, and a

47 In this sample of 150 trials, 94 defendants in 64 trials are denoted as *mala fama*.

48 The difference may be greater still, because in order to make a conservative calculation, this sample specifically counts defendants designated as *mala fama*. However others are designated as *malefactores* or *homicides* or *robatores stratorum*—not technically *mala fama*, but surely the idea is the same. If those defendants are included with those called *mala fama*, the distinction between the defendants who received corporal or capital sentences is greater.

49 ASRe, *Giudiziario*, Libri delle denunzie, October 5, 1377, vol. 4, fols. 47r–48v.

50 ASRe, *Giudiziario*, Libri delle denunzie, June 21, 1388, vol. 9, fol. 76r–v.

51 ASRe, *Giudiziario*, Libri delle denunzie, September 14, 1387, vol. 9, fol. 39r–v.

public and famous thieving woman, of wicked condition, association, life and *fama*." Charged with no less than ten separate instances of theft, it is likely that her confession was brought by torture, and she was afterwards remanded to jail.[52]

In general, the *mala fama* designation marks a defendant who committed a major crime, who very often was either not from Reggio or who had no fixed address (*vagabundi*), and whose crimes had calculation or premeditation or some other egregious characteristics. This *mala fama* designation is part of the statement of charges, but there is no evidence that this alleged *mala fama* was formally proven. This brings us to question other epithetic descriptors that sometimes appear in the denunciations. Defendants accused of murder are sometimes noted as *homicides*, but not always: again, though it is not a fast rule, it seems that the notation tends to occur when the person's crime is not a personal crime, like the murder of a spouse or a personal enemy, but rather the victim is a stranger, or the crime is undertaken together with robbery or kidnapping.

Some defendants are designated *robatores stratorum*—highway robbers. Men (and occasionally women) accused of 'highway robbery' were generally considered of *mala fama*, and unsurprisingly, they frequently received a death penalty. But it is worth considering what made a person a highway robber. The roads and mountain passes were dangerous places, and a legitimate fear of this crime pervaded medieval statute law. Jurisdiction over those *robatores stratorum* especially after 1393 should have, in many instances, rested with the *Capitano del divieto*, whose purview included the isolated roads of the mountains: in a reform that further limited the scope of the Podestà's authority, the *Capitano dei monti*[53] or the *Capitano del divieto* was appointed by the *signore* to hold jurisdiction over the dangerous roads and highways of the contado from his residence outside the city at Montecchio. His power, which in 1393 would be extended even to a *merum et mixtum imperium* in the countryside, was essentially over *banniti*, highwaymen, and other criminals, and he was almost like a Podestà of the contado.[54] The statutes are silent about the duties of this office, which figures rarely in the surviving records. Yet we still find defendants designated as *robatores stratorum* in trial records. Why?

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52 ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium, b. 254 (1388–89), fols. 144r–147r. December 30, 1388 and following days: "…furtem ac publicem et famosam latram feminam male conditionis conversationis vite et fame…"

53 Grimaldi, *La signoria di Barnabò Visconti*, 128.

54 Grimaldi, *La signoria di Barnabò Visconti*, 128.

When men so designated are summoned to appear in Reggio's court, sometimes—I think significantly—the crime of highway robbery appears linked to rebellion in the contado. This is the case for three men who were hanged as notorious highwaymen and rebels in January of 1375. Cominus son of Johannes and Jacobus de Verziis, both of Bologna, and Johannes of Padua, "thieves, and public and famous thieves, highway robbers, and men of bad condition and *fama*,"[55] went together with "others about whom it is better if we remain silent" to steal two cows. These men were already known for rebellion against Barnabò's rule together with Clericus da Correggio, whose family—along with the Bioardo de Rubiera—frequently allied with the Este against Milan.[56] As they tried to move the animals from Castelnuovo to Rubiera, they were captured by the men of Castelnuovo, who "wished to return them to the jurisdiction of our Lord (Barnabò)."[57] For cow thieves, the men were certainly heavily armed, bearing arms "offensive and defensive, namely lances and swords." It seems clear that these men were doing more than stealing livestock. They were captured and delivered immediately to the hands of the Podestà, who may have found in this case a way for Reggio to re-assert jurisdiction in the territories of Rubiera, located on the far eastern border of the territory, and closely allied with the Este of Ferrara.[58] It is likely that they were treated with a summary procedure.[59] In the same way, a few weeks later, Antonius son of Petrus de Donellis was captured and hanged, also accused of both rebellion against Barnabò and highway robbery, with many of the same features in the charges against him. Unlike Cominus and his associates, Antonius was brought before the judge where he confessed, presumably under torture.[60]

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55 ASRe, *Giudiziario*, Libri delle denunzie, January 13, 1375, vol. 2, fols. 36r–37r: "... famosos fures, latrones, robatores stratorum et homines male conditionis et fame ..."

56 On the Bioardo family, see Gamberini, *La città assediata*, 161–5; on the Correggio and their ties to the Este, see Gamberini, *La città assediata*, 200–202.

57 ASRe, *Giudiziario*, Libri delle denunzie, January 13, 1375 and following days, vol. 2, fol. 36r.

58 On Rubiera and the Bioardo, and on Rubiera and its relationship to the Este, see Gamberini, *La città assediata*, 161–165.

59 ASRe, *Giudiziario*, Libri delle denunzie, January 13, 1375, vol. 2, fol. 36r–v. A marginal note on the process reads, "Suspensi fuerint per gulam MCCCLXXV die." I assume this means on the day they were captured: marginal glosses indicating executions nearly always either indicate a specific date or else announce that the execution happened "idem die." The record consists only of the denunciation, the narrative of which ends when the men's captors deliver them *in fortiam potestatis*.

60 ASRe, *Giudiziario*, Libri delle denunzie, February 22, 1375, vol. 2, fols. 44r–45v.

The label of '*robatores stratorum*' was of course not necessarily indicative of rebellion against the authority of Milan. But a final example may suggest a bit of further overlap. The above-mentioned Thomaxus de Costa, son of Puzius, and Bartholazus de Costa, son of Albertus, "citizens of Bismantova in the district of Reggio, murderers and highwaymen [*robatores stratorum*] and men of the worst [*pessime*] condition and *fama*",[61] were accused of homicide by the commune of Lucca. They were caught in the early spring of 1386, and held prisoner in the castle at Vologno near Bismantova in the territory of Reggio,[62] and it took until January of 1387 to have the men handed over to Reggio Emilia's criminal court. Both men were citizens of Bismantova, a small territory in the southern, mountainous part of Reggio's diocese which had been granted autonomy by Regina della Scala in the form of a five-year concession of *merum et mixtum imperium*. When that expired, criminal jurisdiction reverted back to Reggio Emilia, but the Podestà's court had to struggle to bring these defendants back to Reggio for trial, perhaps because transfer was an open admission of Reggio's renewed jurisdiction.

Mala fama, when it is used in criminal law as a descriptor of defendants in statements of charges, seems to be more specific than the idea of bad reputation, perhaps denoting some kind of public menace. Designations of *mala fama* or other terms like *robatores stratorum* set a defendant apart as particularly disturbing to the public order (and thus perhaps made them very appropriate targets for inquisition in the public interest, *ne crimina remaneant impunita*), or even summary justice. The terms used to specify defendants in the denunciations or *querela* cannot be read at 'face value', nor can they be ignored. However there is absolutely no evidence that any of these designations subverted due process or changed judicial presumptions. Procedurally, even when defendants were described as *mala fama*, or otherwise indicated as public enemies, they still were granted the due process of law, including the presumption of innocence, if they were the subjects of an inquisition. Yet, while inquisition procedure was a valuable weapon in the war against crime, it was not the only weapon. The 'presumption of innocence' could be subverted in cases where the guilt of the defendant was "notorious" or "manifest." In such cases, a summary procedure was possible that abrogated the right of the defendant to a trial. Defendants whose crimes were considered "notorious" were presumed guilty.

61 ASRe, *Giudiziario*, Libri delle denunzie, January 18, 1387, vol. 17, fol. 8r.

62 Gamberini, *La città assediata*, 132, n. 70.

Ordinem iudiciarium non servare, est iuris ordinem servare: Notoriety and Due Process

"In the preceding passages, we discussed the method of investigating crimes [*de modo cognoscendi de criminibus*] according to the order of the law; and there is still another way in which one can proceed in extraordinary matters, namely when the crime is notorious . . ."[63] In this way, Durantis introduces his discussion of notorious crimes. In late medieval criminal justice, the notoriety of a deed, distinct from the *mala fama* of an individual, was grounds for conviction without a trial. Notoriety is not the same thing as *fama*. Notoriety is certain and incontrovertible knowledge. *Fama*, as Durantis tells us, is known by most people; *notorium* is known by all and demonstrable with eyewitnesses. *Notorium* consists of "irrefutable certainty."[64] *Fama* was common knowledge; *notorium* proceeded from eyewitnesses and it existed when no proof to the contrary was possible.[65] Summary procedure, where the *ordo iuris* was set aside, was possible in major felony cases if the crime were deemed *notorium*.

The theory of notoriety that underlay the suspension of legal process was a canon law invention, with no equivalent in the Roman law.[66] This extremely problematic category of criminal proceeding was of great interest to jurists because the notoriety of an individual or a deed had severe legal consequences, resulting in a summary procedure that essentially denied a defense to the accused. Gratian commented that no one should be condemned without due process, but made an exception for "manifest" crimes (*ceterum quae manifesta sunt iudiciarium ordinem non requirunt*).[67] In his seminal work on the hierarchy of medieval proofs, Jean Phillipe Lévy commented that trial processes had

63 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, p. 44: "In precedentibus de modo cognoscendi de criminibus secundum iuris ordinem ediximus: et quoniam est et alius modus, in quo extraordinarie proceditur, scilicet cum crimen est notorius . . ."

64 Migliorino, *Fama e infamia*, 54.

65 Virdi Makinen and Heikki Pihlajamaki, "The Individualization of Crime in Medieval Canon Law." *Journal of the History of Ideas*, 65:4 (2004): 539; Stern, "Public Fame in the Fifteenth Century," 203.

66 Lévy, *La hiérarchie des preuves*, 33. On the development of notoriety as a canon law concept, see Lévy, *La hiérarchie des preuves*, 32–43.

67 Gratian, *dictum* after C.2 q.1 c.14, quoted in Migliorino, *Fama e infamia*, 50. Some twelfth and thirteenth century jurists like Huguccio made distinctions between *notorium* and *manifestum*, assigning *manifestum* a lower degree of publicity than *notorium*, but still higher than *fama*. That distinction does not appear to hold in the early years of the fifteenth century. On the distinctions of the earlier jurists, see Migliorino, *Fama e infamia*, 49–57.

a hierarchy in terms of the nature of proofs required. Criminal processes were at the top, requiring proof "clearer than the light of day," civil processes were in the middle, requiring the production of a full proof of some nature, and summary processes stood at the bottom, because they demanded the least proof, resting as they did on the presupposition of the defendant's guilt.[68] A criminal summary process was thus obviously a very difficult proposition for jurists, who, by the end of the thirteenth century, had developed a keen interest in the necessity for due process.[69] "Ordinary" defendants, the *accusati* in inquisitorial or accusatorial trials, had the protections of the *ordo iuris*. "Extraordinary" defendants, accused of notorious crimes, were not protected by the *ordo iuris*. Rather, on account of their manifestly evident guilt, they were summoned directly to sentencing.

A concern for the potential abuse of such a profound abridgment of a person's right to a defense can be detected throughout Durantis's discussion. He distinguished two important types of notoriety: notoriety of law (*notorium iuris*) and notoriety of deed (*notorium facti*).[70] *Notorium iuris* concerns legal, not factual, culpability. It arises from a legal confession or clear and incontrovertible proof.[71] A crime can be legally notorious even if the accused confessed

68 Lévy, *La hiérarchie des preuves*, 31.

69 Jurists like Johannes Monachus were taking up the question of defendants' rights by the beginning of the fourteenth century. Johannes believed that defendants had the right to a summons, which right came from natural law, not positive law, and thus could not be denied. Therefore, in a process against a notorious defendant, the judge could proceed in a summary fashion in some components of the trial but the summons and the judgment could not be omitted. Johannes also directly asserted the necessity for a presumption of innocence, dismissing even the argument that a judge may have secret knowledge about a crime that has not been made public. To this, Johannes replied that a judge acts in his public capacity, not as a private party, and "he should learn the truth publicly. For a full discussion, see Pennington, *The Prince and the Law*, 160–164. Durantis's commentary was composed 20–30 years before these discussions were at the forefront, and it was his commentary that went forward as the standard work on legal procedure. Pennington commented that "If [Durantis] had composed his *Speculum* thirty years later, he probably would have written sympathetically about these issues [defendants' rights to due process]. As it was, future readers found little of the significant changes in the doctrine of due process. . . . The *ius commune* of early modern Europe may have been the poorer for it." Pennington, *The Prince and the Law*, 164.

70 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.8, p. 48.

71 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.2, p. 49: ". . . notorium iuris est spontanea confessio, clara probatio, iusta, et irretractabilis diffinitio sentialis." Migliorino defines *notorium iuris*, explaining that it is founded on three elements: evidence of the deed, the sentence, and the confession. Migliorino, *Fama e infamia*, 54.

falsely. This problem of *legal* guilt versus *factual* guilt inspired Durantis's distinction, and further underscored the need for witnesses.

> . . . it often happens that a thing is said to be notorious, that was never a fact, just as if someone confessed falsely that he committed a crime . . . or if someone knowingly were condemned for a crime that he did not commit. Therefore the law requires evidence of the deed, which comes from the men of that place where the crime was committed. And it is called notorious. For though the man confessed falsely, or was condemned iniquitously, still by this confession or sentence the deed is considered notorious according to the law, until the contrary is demonstrated.[72]

As Durantis demonstrates, notoriety could result from legal proceedings. The ruling of the court could create notoriety even when the facts themselves were incorrect.

It was the second kind of notoriety, *notorium facti*, that could lead to summary proceedings against the accused. *Notorium facti* was the pinnacle of the hierarchy of proofs: the evidence was undeniable.[73] Yet this could be further distinguished by whether the *notorium facti* was permanent or impermanent: was the notoriety ongoing, or did it happen only in a moment? The permanent notorious fact was impossible to disprove. Antoine de Butrio illustrated it to his students at Bologna by showing them the tower of the Asinelli at the Porta Ravegnana: their observation of it was irrefutable proof of its existence.[74] Notorious crimes were to be equally clear. But, unlike towers, notorious crimes are not permanent things. Crimes are events, and as such they are transitory and happen in an interval of time that ends: this impermanence led the canonists to further distinctions.[75]

Like other canonists, Durantis agreed with Huguccio that "*semel notorium, semper notorium*."[76] But how to make this clear in a legal sense, to distinguish

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72 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.2, p. 49: ". . . Contingeret saepe dici notorium id, quod nunquam factum fuisset, ut si quis de falso confitetur se crimen, de quo agitur, commisse: vel si quis sententialiter condemnetur de crimine, quod nunquam commisit. Requirit ergo ius facti evidentiam, quae se ingerat hominibus loci, ubi committitur: et rei veritas est, ut quid dicatur notorium . . . Nam licet falso confiteatur, vel inique condemnetur, tamen per illam confessionem, seu sententiam factum illud habetur de iure pro notorio, donec contrarium ostendatur."

73 Lévy, *La hiérarchie des preuves*, 45.

74 Lévy, *La hiérarchie des preuves*, 46.

75 On legal distinctions in *notorium facti*, see Lévy, *La hiérarchie des preuves*, 47–53.

76 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.8, p. 49, cf. Lévy, *La hiérarchie des preuves*, 48.

the notorious crime from others? Durantis set forth three criteria that had to be met in order for a crime to be considered notorious. The crime had to be committed in a public place.[77] It should be committed in the daytime, because otherwise it might not be possible for the witnesses to see clearly. (On this point, Durantis was willing to concede discretion to the judge.)[78] Finally, the notoriety of a defendant's guilt must be proven by eyewitnesses. This is an important distinction between notoriety and public opinion (*communis opinio*) because notoriety is proven by *eyewitnesses*, but it is not possible to prove public opinion with eyewitnesses.[79] Regarding the number of witnesses necessary to prove notoriety, there was no consensus, though it was generally understood that "*notorium* denoted a much higher level of publicity than fame."[80] Durantis reveals debate about this issue:

> . . . so many should be present that their presences can make the crime notorious; neither the presence of a few—of two, or three, or five—suffices to make something notorious . . . but rather the notice of the whole neighborhood is required, and [it is required] that all should acclaim that the crime was committed.[81]

Yet even then, the question persisted: how many people make up a neighborhood? Is the notice of a greater part of the neighborhood sufficient? How many people are necessary to prove this knowledge (*scientia*)? Durantis surveys the variety of opinion on the subject: some say ten men suffice, since that many can make up a parish; others say three men, since that many makes up a *collegium*. But by this reasoning, two witnesses should suffice, since two people

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77 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.5, p. 49: "Primo ex qualitate loci, ut quia sit in loco publico, nam si in occulto fieret, non esset publicum . . ."

78 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.7, p. 50: ". . . deprehenditur notorium facti ex temporis qualitate, putà, sit de die, quia si sit de die, quia si de nocte fiat, non possunt homines bene videre, ubi lumen deest . . . consideret, in principis et ex aliis circumstantiis, quas discretus considerabit."

79 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §5.2, p. 48: "Item etiam aliud est communis opinio, quam notorium. Nam communis opinio est tantum de longe praeteritis, et quae probari non possunt per testes de visu . . . notorium vero est de praesentibus, vel proxime preteritis, et quae de facili probari possunt per testes de visu . . ."

80 Stern, "Public Fame in the Fifteenth Century," 203.

81 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.5, p. 50: ". . . tot enim debent adesse, quod eorum praesentia faciat crimen notorium, nec paucorum praesentia, puta duorum, vel trium, vel quinque sufficit ad aliquid notorium faciendum . . . imo requiritur totius viciniae notitia, et quod omnes communiter crimen commissum fore acclament . . ."

can make a congregation. Durantis finally concludes that "There are still others who say, perhaps not wrongly, that it should be left to the discretion of the judge, since it is not expressed in law."[82]

Notoriety had to be proven before a judge could require the culprit to appear for sentencing.[83] The manner of the proof and of the procedure to be followed in notorious crimes depended in part on whether the notoriety was known to the judge himself, or only to others. The most extreme form of this abbreviated procedure was allowed when a crime was committed before both the judge himself and "many others" (*tot aliis*). In such a situation, the *ordo iuris* could be fully suspended. It is this form of the trial, where "... neither an accusation, a denunciation, an inquisition or an exception, or even witnesses or other proofs, are necessary ...," that appears to subvert legal process entirely:[84]

> In these cases, therefore, which are known to the judge to be notorious, and also to others, since they happened or came to pass in the presence of the judge and many others ... neither an accuser nor a denouncer is required, nor must a *libellus* (a writ) be given, nor is there a *litis contestatio*, nor is an oath of calumny sworn, nor [an oath] regarding the veracity [of the complaint], nor is a witness required, nor other proofs, but [in this case] not to serve the judicial order, *is* the *ordo iuris*: let [the defendant] be cited to sentencing ...[85]

This extreme form of procedure against notorious crimes was intended for use in cases of crimes committed in the presence of the judge as well as many

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82 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.6, p. 50: "Quidam etiam dixerunt, et forte non male, quod arbitrio iudicis relinquitur, quod homines faciant notorium, cum non sit in iure expressum ..."

83 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.13, p. 51: "Unde iudex non potest sententiare, nisi ei probetur, quia nescit ut iudex ... nisi ipso pro tribunali sedente factum fuerit, qui tunc sufficienter intelligitur sibi est probatum, ex quo vidit ut iudex ..."

84 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §1.1, p. 44: "Scias ergo, quod in notoriis non est necessaria accusatio, vel denunciatio, vel inquisitio, vel exceptio, nec testes etiam, vel aliae probationes ..."

85 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.12, p. 51: "In his ergo, quae sunt notoria iudici et aliis, ut quia facta sunt, vel fuit presente iudice et tot aliis, quod sufficiunt ad notorium faciendum, in hoc inquam notorio iudex non recusatur ... nec requiritur accusator, vel denunciator, nec datur libellus, nec fit litis contestatio, nec iuratur de calumnia, vel de veritate, nec requiritur testis, veli alia probatio, imo tunc ordinem iudiciarium non servare, est iuris ordinem servare: citabitur tamen ad sentenciam ..."

others. Procedure would then be dispensed with because there could be no reasonable argument for innocence.

This was not the only form of notorious procedure, though it was the most severe. In the far more likely case that crimes were notorious in the community but not to the judge, there were options for proceeding by a "double path" (*duplici via*). An official denunciation could be heard (though it was not necessary for a written denunciation to be produced), and in this denunciation, proof of notoriety was required. Then the judge had two options for proceeding: by inquisition *ex officio*, as he inquired whether there was notoriety, or with another person pursuing the denunciation of notoriety. In either case, the usual *ordo iuris* was not to be observed, meaning that there was no written denunciation, and no trial. If the defendant denied the charges, witnesses could be heard, but without the usual oaths of calumny and veracity.[86]

The dangers of conviction without due process were clear. Durantis recognized the potential for abuse if the *ordo* could be entirely suspended without a possibility of defense:

> Today however the very office of judges revels in this inquisition [i.e., the kind concerning notorious crimes], for they hinder the defenses, so that it can truly be said, that their office is most widely extended . . . for sometimes they hang a man without allowing him to be heard or defended. But let this thing be certain: by law, a legitimate defense should be denied to no one.[87]

Durantis relies upon Hostiensis to explain the particular concerns that procedure for notorious criminals could entail. If there could be a legitimate defense, the defendant was entitled to it; notorious procedure was meant to abbreviate

86 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §8.14, p. 51: ". . . iudex in eo potest duplici via procedere, scilicet per inquisitionem ex officio suo, ut inquiriat, an sit notorium vel etiam alio sibi denunciante et causum prosequente, et probare volente notorium esse, et quocumque modo procedat, non est ordo iudicarius observandus, nec libellus dandus, nec litis contestatio facienda. Reus tamen potest interrogari, an crimen commiserit, quod si negaverit, possunt testes sine alia litis contestatione, et sine iuramento de calunia, seu de veritate dicenda recipi, quia in talibus ordinem iudiciarium non servare, est iuris ordinem servare . . ."

87 Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, §1.13, p. 45: "Hodie autem valde officium iudicum in hac inquisitione exuberat: ipsi namque adeo defensiones arceant, ut vere dici possit, quod eorum officium latissime patet . . . nonnumquam enim hominem inauditum et indefensum statim suspendunt. Sed certe quicquid fiat, nulli est de iure legitima defensio deneganda . . ."

only those cases where, due to the public and open nature of the crime, there could be no legitimate defense, and the "behavior itself constituted a confession of guilt . . ."[88]

Durantis complained that judges could use this manner of proceeding to abridge defenses. But instead of weakening this power, in his commentary on Durantis's discussion of notorious crimes, Baldus degli Ubaldi added a further blow when he clarified that dilatory exceptions, which could prolong the process, were not to be allowed in notorious cases.[89] As we will see in the next chapter, these exceptions constituted one of the most important defense strategies in the medieval court; Baldus's opinion would disallow the most common avenue of defense.

Because notorious procedure did not require the written processes necessary in an ordinary inquisition, it is difficult to know how often it was used. Sarah Blanshei's monumental study of justice in medieval Bologna uncovered only one instance where a crime was deemed *notorium*.[90] The fragmentary evidence that survives at Reggio for this process suggests that it was not used in every circumstance that warranted it, but it was used in some that Durantis would have disallowed. We can find examples in the records of crimes that were committed in front of the court and in front of a judge, and while Durantis's conditions for notoriety appear to be met, these cases were tried as inquisitions according to the *ordo iuris*. On March 5, 1380, a certain Johannes de Mutina,

> on account of his pride and audacity, said to . . . Antonius [a servant of Gibertus Rastelli] injurious words, saying to him: "Go hang by the neck. You are a glutton (*goliosus*)." And the aforesaid deeds were committed and perpetrated by the said Johannes de Mutina . . . in the Palazzo Nuovo of the commune of Reggio, at the bench of the jurisdiction of Lord Bernardus de Parma, the judge of the said Lord Podestà, and in his presence . . .[91]

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88 Fraher, "Ut nullus describatur reus," 499. Fraher is describing Gratian's position on *crimina manifesta.*

89 Baldus degli Ubaldi, "De notoriis criminibus," commentary to Durantis, *Speculum iuris*, Book III, Part I *De notoriis criminibus*, p. 52.

90 Blanshei, *Politics and Justice*, 317 n. 14.

91 ASRe, *Giudiziario*, Libri delle denunzie, March 5, 1380: "Quod predictus Johannes de Mutina per eius superbiam et audaciam dixit predicto Antonio verba iniuriosa dicendo ei, 'vade ad apicandum te per gulas. Tu es unus goliosus,' et predicta comissa et perpetrata fuerunt per predictum Johannem de Mutina de anno et mense presentibus super palatio

Though the crime was committed before the judge, the inquisition was pursued *ex querela*, not *ex officio*, and the accuser produced three witnesses to testify for his case. Insults flew with some regularity in the court of the *iudex rationis*, who decided financial disputes. "You make God sad, the way you can say that I owe you this money, when I gave you part already!" cried a certain Prosperus to Filippinus Fornaxarius before this judge in March of 1380. Again the case came before the criminal judge by a *querela*.[92] In 1387, another case of injurious words actually drove two men to blows before the criminal judge, but once again, the case was prosecuted by a regular inquisition procedure which was initiated by *querela*.[93] One inquisitorial trial even described the defendants as notorious before proceeding with a regular inquisitorial process. In this trial, the accused, Johannes de Albinea and Guido de Albinea, were charged with murder and with wishing to "sow discord among the citizens and residents of Reggio."[94] They were placed under ban for their crime, and a marginal note in the inquisition tells us that in their absence, they were condemned and sentenced to "the loss of their heads and their property."[95] In this case, the charge of *notorium* appears only in relation to the accusation of sowing public discord, and not to the murder itself; it seems likely that the men had already been convicted of that crime in a previous trial that has been lost (and thus had legal notoriety, the *notorium iuris* that Durantis described). Because the defendants were contumacious, we cannot know how the court would have proceeded had they been caught.

A small window may be opened, purely by chance, by a fragment of a denunciation preserved in the *Atti e processi*. On 20 April of 1405, the captain of the neighborhood of Sts. Jacobo and Filipo came to the judge to denounce a homicide that occurred in his district.[96] Andras, a Hungarian, and his wife Diana were accused of murdering a certain Guilelima of Cremona, a resident of Reggio Emilia, by slitting her throat. The denunciation, according to form, narrated the accusation and provided the *substantialia*, but a marginal note made by the notary indicates that the case did not proceed because Andras

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novo comunis Regii ad banchum iurisdictum Domini Bernardi de Parma iudicis dicti Domini Potestatis et in eius presentia . . ."

92 ASRe, *Giudiziario*, Libri delle denunzie, March 10, 1380: "Tristis te faciat deus quomodo potes tu dicere quod tibi debeo istos denarios quia tibi dedi partem."

93 ASRe, *Giudiziario*, Libri delle denunzie, August 20, 1387.

94 ASRe, *Giudiziario*, Libri delle denunzie, March 23, 1393 and following days.

95 ASRe, *Giudiziario*, Libri delle denunzie, March 23, 1393 and following days: "1393, die xviiii Aprilis. Condempnati fuerunt superscripti Johannes et Guido et utriusque ipsorum in amissione capite et bonorum suorum."

96 ASRe, *Giudiziario*, Atti e processi, April 20, 1405.

and Diana were captured and taken immediately to the gallows, *immediate capti et furcis suspensi*, because their crime was "*manifestum*".[97]

This record offers us a rare description of a notorious crime and the summary execution of the criminals. It is not surprising that summary execution was carried out against foreign defendants. Ultimately, in the treatment of foreigners in the court system, we might also read something of the strength of urban identity; in territories both urban and rural in the late middle ages, outsiders' position in society was seriously weakened.[98] This would certainly accord with practice in other places, like Trieste, where penalties for foreigners were usually decided by the *arbitrium* of the Podestà or Capitano, and where the status of *forensis* was sometimes equated with that of people of 'vile condition.'[99] What is striking about this document is that the crime appeared to meet none of Durantis's criteria: Durantis required that to be notorious, a crime must be committed in daylight; this homicide took place at night. Durantis wrote that a notorious crime takes place in a public space; Guilelima was murdered in her own home. Durantis did not specify a number of witnesses, but concluded that enough witnesses should be present to make it clear that the whole neighborhood was witness to the fact (not the *fama*) of the event; this denunciation names no witnesses at all. In fact, there is nothing in the denunciation that indicates anything different from many of the other homicides prosecuted by inquisitorial procedure; whatever prompted the court to allow a notorious proceeding here has been lost. And it is only by chance that we know of this proceeding: according to Durantis's manual, nothing in writing was required in a notorious prosecution except a denunciation, which also did not have to be written. In fact, this denunciation was not associated with the prosecution of a notorious crime—it was written to begin an inquest, which ultimately proved unnecessary.

Inquisition procedure had protections for defendants, but inquisition procedure was only one of the processes available to the judge. Any consideration of defendants' rights is shaken by the nature of notorious proceedings. We cannot know how often they occurred, though it is clear that a hundred years earlier, Durantis felt that the power was abused. This is a large gap in our understanding of the weight of due process in court proceedings. And of course we cannot ignore political executions or executions that took place without a trial or even a charge, as when, in 1407, the lord of Reggio, Ottobuono Terzi, ordered the

97 ASRe, *Giudiziario*, Atti e processi, April 20, 1405.

98 Massimo della Misericordia, "The rural communities," in *The Italian Renaissance State*, eds. Gamberini and Lazzarini, 278–279.

99 Davide, "La giustizia criminale," 237–8.

Podestà to have two men executed. He directed the Podestà to make no mention of his order until both men were in custody, and to then have them taken to the gallows immediately, without stating their offense beyond commenting that this was to be done "on account of something they did against the honor and the state of our aforementioned Lord [Ottobuono], about which it is better, at present, to remain silent."[100]

Even in modern Western society, the protections of the *ordo iuris* have been sometimes interpreted to apply to some defendants and not others—consider the highly controversial treatment of so-called "enemy combatants" in the United States. The idea of *notorium* in the late medieval period similarly exists in a separate sphere from those "ordinary" defendants whose cases were tried according to the *ordo iuris*, perhaps because they were believed to pose an extreme social danger. Because no written documentation was required in such cases, there is a virtually insurmountable void in our understanding of them. The only hope for a systematic study might rest in an archive with copious condemnation records, a collection which Reggio Emilia unfortunately does not have, but which might be a subject for future research elsewhere.

100 ASRe, *Giudiziario*, Atti e processi, August 5, 1407, fol. 51, "Et hoc propter quedam que ipsi comisserunt contra honorem et statum prefati domini nostri que ad presens tacenter pro meliori."

CHAPTER 4

Proofs, Defenses, and the Determination of Guilt or Innocence

Medieval legal theory generally recognized three grades of proof: full proofs (*probatio plena*), which could alone offer complete proof; imperfect proofs (*probatio semiplena*), which were strong pieces of proof, but not strong enough to stand alone as grounds for conviction; and circumstantial evidence (*indicia*), which was clearly inferior and which alone could only rouse suspicion, not determine guilt.[1] Inquisitorial procedure freed magistrates to consider many kinds of proofs, especially circumstantial evidence (*indicia*),[2] and *fama* could serve as partial proof.[3] A hierarchy of proofs ranged from irrefutable proof (confession), to full and certain proof (two eyewitnesses); half-proofs, which could be compelling pieces of witness testimony or strong circumstantial evidence, and quarter-proofs or uncertain proofs.[4] This last category was the most common, and was particularly useful in all manner of cases because it was more flexible. In the courts, *indicia* were the most common sort of proof.[5]

This system of statutory proofs grew in the *ius commune* and thus was widely applicable, but even so it is difficult to say how judges reached their conclusions, and hard to know how strictly this hierarchy was applied in practice. In Florence, statutory requirements for proof appeared to largely remove judicial discretion from the determination of guilt or innocence, but in practice, there was no clear measure of the quality of these proofs or rules for their combination, and judges held a great deal of discretion in evaluating evidence.[6] In Reggio, the statutes address only occasionally issues of proof, and not in a consistent manner.

1 Lévy, *La hiérarchie des preuves*, 28–29.

2 Langbein, *Torture and the Law of Proof*, 6–8.

3 Stern, "Public Fame in the Fifteenth Century," 198–222.

4 The standard work on proofs in medieval law remains Lévy's 1939 study, *La Hiérarchie des preuves*.

5 Massimo Vallerani, "Procedure and Justice," 52–53.

6 Stern, *Criminal Law System*, 31–32.

This chapter explores the proof presented to the judges at Reggio, and defendants' efforts to rebut that proof. Virtually all evidence that came before the judge was in the form of witness testimony—physical evidence was very rare. Expert testimony in the form of medical *consilia* and the testimony of physicians had a different status than regular witness testimony. The defendant's confession constituted a certain proof, but even a confessed defendant had the right to make a defense, as we will see. When defendants tried to defend themselves from the charges against them, their defenses almost always took the form of a legal objection to the witnesses on the basis of their *fama*.

Full and Certain Proof: Confession and the Problem of Torture

Confession constituted an irrefutable full proof. The rate of confession when suspects appeared before the court at Reggio was very high. Of a sample of 362 cases where the accused was not contumacious (there was a contumacy rate of almost 50 percent in the criminal court of Reggio Emilia), 73 percent confessed to the charges against them. This is rather more than at Florence, where data from condemnation records suggests that about 37 percent of defendants who appeared in court confessed.[7]

The status of confession as the "queen of proofs"[8] combined with the judge's authority to use torture presented a danger that was not unrecognized by jurists, who devised rules for its implementation. Following Roman law, the civilians allowed torture and entrusted the judge to use his discretion (*arbitrium*) to employ this tool with moderation.[9] Jurists tended to handle the question with care, recognizing together with Ulpian that torture is a "delicate and dangerous thing, eluding truth" (*fragilis et periculosa res, et fallens veritatem*).[10] Jurists encouraged judges to use great restraint in the application of torture. Mario Sbriccoli departed from scholars who saw these exhortations as cynical or even hypocritical, remarking that the jurists were trying to guard against

7 Stern's sample of 177 condemnations yielded 75 contumacious defendants. Of those that appeared, 64 denied the charges against them and 38 confessed. As at Reggio, confession could result from the desire for a reduced penalty, but in Florence most were obtained under torture; Stern, *Criminal Law System*, 210–211.

8 Langbein, *Torture and the Law of Proof*, 4.

9 Piero Fiorelli, *La tortura giudiziaria nel diritto comune*, vol. 2 (Giuffrè, 1954), 161–162.

10 Sbriccoli, " 'Tormentum idest torquere mentem,' "19.

the devastation that unrestrained torture would bring to the justice system.[11] It was not just in the degree of torment that the judge's discretion came into play: perhaps more importantly, the judge also had discretion to determine whether enough circumstantial evidence existed to warrant subjecting the accused to torture at all.[12] Once again, *fama* could play a role in this decision. But according to Gandinus, evidence gained under torture was not fully probative, and in any case, the evidence required to put someone to the torture was not radically different from evidence required for a conviction.[13] To guard against coerced confessions, jurists required that confessions made under torture in order to be valid had to be repeated when the fear of torture had passed. However, although a confession made while under torture was not a full proof, it did constitute further *indicia*, which could allow defendants to be tortured again, should they recant their confessions.[14]

The degree to which learned discussions of torture affected practice by the courts is an open question,[15] and the perimeters for the implementation of torture were set forth in municipal statutes, meaning that once again, there could be a great deal of local variation. It was not uncommon for statute law to strongly limit the instances in which torture was permissible. At Vercelli, a 1241 statute declared that no citizen could be tortured; in Bologna, the 1288 statutes forbade the torture of members of the *popolo* without the express permission of the Capitano della Città; in Chieri, citizens could not be put to torture under the 1311 statutes.[16] In late medieval Florence torture was allowable only for certain crimes, including highway robbery, thefts committed at night (the commission of crimes at night was often an aggravating circumstance), arson, homicide, and the rape of an honest woman, as well as crimes like money-clipping and treason.[17] Exemptions from torture for citizens or magnates declined during the late middle ages, perhaps as torture became an established

11 Sbriccoli, "'Tormentum idest torquere mentem,'" 27. "Ipocrita, ribattono altri, se non cinico: fatto di reticenze, connivenze, pasticci argomentativi e sottigliezze sospette. A me sembra un atteggiamento di cautela garantista, vòlto a scongiurare la devastazione processuale che sarebbe seguita ad uso non frenato della violenza possible."

12 Fiorelli, *La tortura giudiziaria*, 163–164.

13 Vallerani, "Procedure and Justice," 53.

14 Edward Peters, *Torture* (Oxford: Blackwell, 1985), 57.

15 Peters, *Torture*, 62. For a thorough discussion of the problems of status and torture, see Blanshei, *Politics and Justice*, 320–322, which explores the role of privilege in exemptions to torture, and presents a different perspective from Fiorelli's observations that statutes generally limited torture to those of *mala fama.*

16 Pennington, *The Prince and the Law*, 158–59.

17 Stern, "Politics and Law in Renaissance Florence and Venice," 217.

component of legal procedure, to be used for crimes that could be punished corporally.[18] At Reggio Emilia in the late fourteenth century, the judge's authority to torture the defendant depended upon the severity of the crime, not upon the person's status. Reggio Emilia's statutes dictated that torture could be used in cases of certain major crimes, including robbery, highway robbery, homicide, arson, patricide, "adultery" (which category could also include rape and abduction), incest, falsity, theft, or violence, or in the case of other serious crimes (*alio gravi et enormi delicto*).[19] This last category would seem vague enough to perhaps allow torture in almost any violent crime. Indeed, one of the few trials that indicates the use of torture at Reggio concerned an assault.[20]

Fama was central to determining who could be subjected to torture. When the degree of the crime was established, the investigating official could resort to torture if legitimate circumstantial evidence, *legitima indicia vel probationes*, existed concerning the bad *fama* of the accused, and of his or her alleged misdeed.[21] During the examination, the presence of two reliable notaries (*duo notarii de melioribus et legalioribus*) from the office of the Podestà was required. Their duty was to record everything said while the accused was being tortured or threatened with the fear of torture, under the penalty of fifty-five pounds if the notary should record anything other than what the accused said. The 1335/71 redaction of the statutes states further that during the torture,

18 Peters, *Torture*, 50–57.

19 ASRe, *Comune*, Statuti del 1335/1371, fols. 25v–26v and ASRe, *Comune*, Statuti del 1392, fols. 147v–148r. There is no significant difference between the two redactions. The 1335/1371 text reads: "Statuimus et ordinamus quod potestas vel eius iudices vel milites vel alter eorum vel aliquis rector seu officialis communis Regii vel aliquis de ipsorum famulis non possint nec debeant aliquem ponere vel poni facere in tormentis vel sub tormentis corde vel alicuius alterius generis tormentorum occasione alicuius maleficii vel delicti vel de quo esset aliquis accusatus vel denunciatus vel inquisitus vel alicuius alterius occasione vel que dici vel excogitari posset nisi ille vel accusatus vel denunciatus vel inquisitus esset accusatus vel denunciatus vel inquisitus de latrocino vel robaria strate vel prodictione civitatis vel castri vel alterius singularis persone vel de homicido incendio et patricidio vel adulterio vel incestu vel falsitate vel furto vel violentia vel alio gravi et enormi delicto. Et tunc possint poni ad tormenta si legittima procedant indicia vel probationes contra eum de mala fama sua et etiam de delicto de quo esset accusatus vel denunciatus vel inquisitus . . ."

20 ASRe, *Giudiziario*, Libri delle denunzie, March 6, 1389, vol. 13, fols. 44r–45r.

21 ASRe, *Comune*, Statuti del 1335/1371, fols. 25v–26v and ASRe, *Comune*, Statuti del 1392, fols. 147v–148r: "Quod nullus possit subici tormentis per potestatem, vel rectorem, vel aliquem de sua familia nisi secundum formam infrascriptam, et quis modus in hoc sit servandus, et de pena contrafacientium. Rubrica." BSR, Statuti, ms. 77, 69r: "Qualiter et quando quis possit et debeat subici tormentis."

only the Podestà or his judges, the two notaries, and four messengers (*nuncii*) from the commune could be present. The 1335/71 redaction forbids all others from attending an examination under torture, but that clause was omitted in the 1392 redaction.[22] Considering that in Perugia a century earlier, the injured party or his relatives was required to attend the torture sessions, this relatively private interrogation emphasizes the authority of the court over the "conflictual" start of inquisitions in Perugia.[23] The 1411 redaction requires the presence of the Podestà and the *iudex maleficorum* and his notary at the interrogation but does not mention the presence or absence of others.[24]

In all cases other than those that met the criteria set forth in the statutes, the Podestà or his officials were to continue their examination to its conclusion without torture, relying on whatever proofs were available to them. The judge did not have *arbitrium* in the use of torture. The only exception occurs in the 1411 redaction, which allows the Podestà "full and free discretion to inquire, proceed and punish, just as seems [best] to him" in prosecuting the "abominable vice of sodomy, on account of which the wrath of God unfurls against the sons of diffidence."[25] That sodomy would be the one crime against which all measures could be used for discovering and prosecuting is not surprising. The fifteenth century saw in Italy a rapid growth in concern with sodomy, which incurred the death penalty in Venice,[26] and in Florence because the target of a tribunal specifically developed to investigate it.[27]

The penalty for any judge or official using unauthorized torture was sharp—two hundred pounds, to be paid from the personal assets of the offending official. The official would also be required to make restitution to the person suffering injury as a result of illegal torture. However, the standard of proof for convicting the Podestà or his officials of such a crime was very high: the statutes required depositions from four citizens of high standing concerning the public *vox et fama* of the charge. It is difficult to know how often such accusations were made because such charges would likely have occurred during the

22 ASRe, *Comune*, Statuti del 1335/1371, fol. 26r. "Alii autem familiares potestatis vel alique alie persone non possint nec debeant inter esse dictis tormentis aliquot modo vel ingenio."

23 Vallerani, "How the Inquisition is Constructed," 255.

24 BSR, Statuti, ms. 77, 69r.

25 BSR, Statuti, ms. 77, 69r: ". . . arbitrium plenum et liberum inquirendi procedendi et puniendi prout eis videbitur . . . abhominabile vitium sodomie propter ira Domini Dei renit in filios diffidentie . . ."

26 Patricia H. Labalme, "Sodomy and Venetian Justice in the Renaissance," in *Tijdschrift voor Rechtsgeschiedenis* 52 (1984): 217–254.

27 For a study of this tribunal and its activity see Rocke, *Forbidden Friendships*.

syndication of the Podestà, and records for that process survive only in the most fragmentary way.

While the statutes set forth clear rules for the situations in which torture could be used, we still should question the interpretation of those rules, or whether the judge sometimes used *arbitrium* not conceded to him in the statute. For example, in 1403, Johannes de Cuvriacho and Antonius Tramalius had a violent quarrel in which Antonius caused Johannes a fairly serious injury, striking him twice in the face, knocking out a tooth and causing an effusion of blood. He also threw Johannes to the ground and struck him with his knees. Johannes in turn was accused of striking Antonius with a stone, but this assault did not draw blood.[28] Antonius was contumacious, but Johannes answered the citation and denied the charges made against him. He was summoned to answer the *indicia* against him, which consisted of the testimony of one eye-witness.

The denunciation specifically and repeatedly states that Johannes hit Antonius *without drawing blood*, and the testimony of one witness survives, who also said that the blow that Johannes gave to Antonius was done *sine sanguine*. It is hard to see how this met the criteria given in the statute, unless it met the vague category of *violentia*, even in the absence of bloodshed. Johannes entered legal exceptions to the charge, avoiding torture by impugning the *fama* of this witness. And yet, though Johannes entered a legal exception against the witness, he did not make an objection based on the statutes' perimeters for the use of torture. It is difficult to know why his advocate did not object on this ground: was the injury more severe than the records indicate? Or was the category of *violentia* really so widely interpreted? The outcome of this case is not known, but it is significant that Johannes could be summoned to torture for what appears to have been a relatively minor offense.

The evidence from torture sessions was not compiled inside the trial records in any systematic way, so it is difficult to gauge how often torture was used. Laura Stern, in her study of the criminal justice system in Florence, concluded that torture was used to elicit confessions in roughly 20 percent of the cases she surveyed.[29] At Reggio Emilia, it is impossible to give with confidence an

28 ASRe, *Giudiziario*, Libri delle denunzie, November 3, 1403, and following days, vol. 20, fols. 122r–126v and 175r–176v. "... coram vobis debeat comparere ad purgandum indicia per torturam que habeat dictus Dominus Vicarius contra ipsum Johannem occaxione cuiusdam formate inquisitione contra eum eo quod percussit Antonium Tramalum aliax [sic] dictum Patagnonum con uno lapide quem dictus Johannes in suis manibus habebat una percussione in pectore dicti Antonii sine sanguine ..."

29 Stern, *Criminal Law System*, 29 and 211–213.

estimate of the frequency with which judges resorted to torture. Very few trials make reference to torture. Those that do include two cases of assault,[30] two of rape,[31] and three of murder.[32] The judicial archive does contain some other sparse evidence of torture, including a badly damaged document, which records an interrogation in which the defendant was subjected to torture three times in spite of his repeated protestations of innocence,[33] a directive to torture, and another investigation which recorded the use of torture.[34] When this evidence can be matched with a trial, it quickly becomes apparent that trial records do not always reflect torture even when it was clearly used.

The records of inquisition trials preserved in the *Libri delle denunzie* did not include torture interrogations as a matter of course, just as they did not include other investigative activity. When torture is mentioned inside criminal trials, it is in reference to another issue: efforts to impugn the *fama* of a witness, anecdotal references inside testimony, or even as the basis for the defendant's absolution after denial of charges under torture. Mentions of the practice are brief and unsystematic, and offer little insight into the use of torture or the frequency of its application.

Anecdotal references inside testimony may add some dimension to our understanding of torture in the courts. One interesting reference to torture occurs inside a murder trial, in which a certain Antonius Radi of Vidrianno was charged by Guido da Fogliano with murdering Daninus de Maxlio, one of Guido's men.[35] According to the denunciation, Antonius with some of his associates went to the home of Daninus, broke down the door, and beat Daninus to death. Antonius then turned to Dominica, Daninus's wife, struck her, and said, "Whore, what do you know? Give me Daninus's money, or you

30 ASRe, *Giudiziario*, Libri delle denunzie, March 6, 1389, vol. 13, fols. 44r–45r; ASRe, *Giudiziario*, Libri delle denunzie, November 3, 1403, vol. 20, fols. 122r–126v, 175r–176v.

31 ASRe, *Giudiziario*, Libri delle denunzie, June 9, 1388, vol. 10, fols. 27r–29r; ASRe, *Giudiziario*, Libri delle denunzie, April 5, 1396, vol. 15, fols. 40r–67v.

32 ASRe, *Giudiziario*, Libri delle denunzie, January 18, 1387, vol. 17, fols. 8r–13r; ASRe, *Giudiziario*, Libri delle denunzie, July 10, 1396, vol. 15, fols. 105r–113v; ASRe, *Giudiziario*, Libri delle denunzie, September 10, 1397, vol. 17, fols. 8r–13r.

33 ASRe, *Giudizario*, Atti e processi, August 26, 1396. The defendant was Andreas de S. Martino, discussed in Chapter Three.

34 ASRe, *Giudizario*, Atti e processi, n.d. 1374, fol. 161r and 1379, fols. 605r–606v.

35 ASRe, *Giudiziario*, Libri delle denunzie, September 10, 1397, vol. 17, fols. 8r–13r. This document is discussed more fully in Chapter Five in relation to the *instrumentum pacis*. On this episode see also Dean, "It's a fine thing trusting in you, Guido!"

will die."[36] Dominica directed him to a place under the threshold of the door, where Antonius found fifty-five gold florins, which he then stole.

What makes this case remarkable is not the alleged crime itself but the extraordinary measures Guido da Fogliano took to see it punished. When Guido asked the *Capitano del devieto*, Carolus de Guarchi, to do justice in this case, Carolus responded that "he was prepared to do justice for him if he gave him proof or circumstantial evidence, on account of which he could have him put to torture."[37] It was at this point that things took a turn to the bizarre. Guido asked Carolus to conceal himself behind a curtain to overhear a false peace negotiation, which Carolus could then use as *indicia* to put Antonius to the torture. This unusual arrangement is discussed more fully in the next chapter as it relates to peace negotiations, but here, it is significant that Carolus clearly assumed that to do justice necessarily meant putting the accused to the torture, and he had a specific idea of *probationes et indicia* required to proceed.

Perhaps even more telling is the reaction of Antonius's friends, when they learned that he confessed without torture. Petrezolus, the blacksmith of S. Paolo, went to Antonius, who was then being held in the home of Carolus, and said. "Oh you wretch, I heard that you confessed everything to Carolus without being tortured . . . why did you not send yourself out to the torture, and if you felt that you had committed anything against Guido, why did you not tell your friends, who would find a way [to help you]?"[38] Not realizing Antonius had been duped, his friend clearly thought he should have taken his chances under torture, not simply confessed before it began. Ultimately it is doubtful that his friend's advice would have done him much good. The criminal judge at Reggio interrogated him under torture, and Antonius confessed his crimes.

Strikingly, some jurists considered torture to be a right: defendants should be able to offer themselves to torture, if they wished, in order to purge the

36 ASRe, *Giudiziario*, Libri delle denunzie, September 10, 1397, vol. 17, fols. 8r–9v: "[Antonius] accessit ad Dominicham uxorem dicti Danini et ipsam percussit dicens, 'meretrix, que tues? Dote me denarius Danini aliter ex [sic] mortua,' que Dominicha videns sic se alteratus dixit eidem Antonio, 'prospice sub limine hostii ubi truet [sic] pecunas suas.' "

37 ASRe, *Giudiziario*, Libri delle denunzie, September 10, 1397, vol. 17, fol. 9v ". . . qui Carolus respondit quod erat paratus ius facere si daret sibi probationes vel indicia propter que posset ipsum ponere ad torturam . . ."

38 ASRe, *Giudizario*, Libri delle denunzie, September 10, 1397, vol. 17, fols. 9r–10v: "O pessime, ego intelexi quod tot et tanta confessus fuisti sine tortura Carolo praedicto . . . quare non dimitebas te torquere et si sentiebas et aliquid comisisse contra dictum Guidonem quare non dicebas amicis tuis qui reperissent modum?"

evidence against them.[39] But influential jurists like Bartolus and Francesco dal Bruno opposed this idea, on the grounds that this right constituted abandoning to private parties the power of torture, which was something that fell under the *imperium* of the government.[40] Petrezolus's comment to the condemned Antonius shows that torture was understood as a window to absolution, if one could manage it: "why did you not send yourself out to the torture?"

It seems strange to consider torture a right. Yet it is worth remembering that a defendant who denied his guilt successfully under torture had to be absolved, and judges may not have found torture to be the expedient in gathering confessions that it is usually assumed to be. Of nine defendants that the records clearly indicate were tortured and whose outcome is known, only one was convicted. This is striking when we remember that the overall conviction rate in Reggio's criminal court was 89 percent. Defendants could and did deny under torture and earn absolution. Is this a statement about the degree of torture employed (or how consistent it was)? Should we consider arguments about the experience of pain in the pre-modern world, in which, without the modern benefit of surgical anesthesia and over-the-counter medications, terrible pain was perhaps not such an uncommon experience?[41] Certainly among the rules that governed torture in juridical discussions were the requirements that it should not be disfiguring or permanently debilitating, and that its application must be limited. Yet our records reveal torture sessions in which the defendant was repeatedly tortured with different devices on the same day, and we should not be quick to think that torture as the court applied it was anything less than agonizing.

But in practice, the lack of clear rules—or perhaps more importantly, the lack of accountability—may well have led to inconsistencies, and judicial discretion not conceded by the statute. It is impossible to know with any certainty how often people confessed under torture, and whether it was commonplace. We simply do not have the evidence to make wide conclusions. The sporadic and fragmentary evidence that does survive, combined with the wide powers allowed to the judge to proceed with torture in major crimes, may suggest its frequent use; the relatively low conviction rate it yielded might suggest

39 Fiorelli, *La tortura giudiziaria*, 167.

40 Fiorelli, *La tortura giudiziaria*, 168.

41 Esther Cohen, "To Die a Criminal for the Public Good: The Execution Ritual in Late Medieval Paris" in *Law, Custom, and the Social Fabric in Medieval Europe: Essays in Honor of Bryce Lyon*, eds. Bernard S. Bachrach and David Nicholas (Studies in Medieval Culture, XXVIII) (Kalamazoo: Medieval Institute Publications, 1990), 285–304.

hesitancy. The statutes tell us only that the judge had the authority to proceed; the court records reflect only inconsistency in recording the practice.

Testimony and Witnesses

It is often remarked that the Romano-canonical trial process changed the format of the trial from a confrontational theater between feuding parties to a more bureaucratic process, much of it conducted in writing.[42] A hundred years earlier in Milan, written documentation submitted to the judge was very common and depositions of witnesses were somewhat rare.[43] But in Reggio, depositions of witnesses before the judge were a necessary part of the process that the defendant was entitled to attend, and trials conducted by inquisitorial procedure retained something of a confrontational character. The only part of the process that clearly took place *in secreto* at Reggio was the reading of the charges to the defendant when he or she responded to the initial summons.[44] If there was an accuser or a party who brought the trial forward *ex querela*, that party was required to be present before the judge to see the witnesses sworn. Defendants who managed to post surety were warned to appear on the designated day that the witnesses were to give their sworn testimony.[45] The confrontational nature of some inquisition trials is also suggested by arguments and insults, which occasionally took place between the parties involved during their appearances before the judge.[46]

The testimony of witnesses was by far the most important source of proof for the criminal judge. The testimony of two eyewitnesses constituted a full proof (though not an irrefutable one, as witnesses could be challenged on the basis of their *fama*). Eyewitness testimony usually resulted in conviction, but having two eyewitnesses testify to a defendant's guilt was quite rare.

Far more often, judges worked with witness testimony and with circumstantial evidence, leaving as an open question the means by which the judge made

42 Peter Stein, "Judge and Jurist in the Civil Law: An Historical Interpretation," *Louisiana Law Review* 46 (1985), 247.

43 Padoa-Schioppa, "La giustizia Milanese nella prima età Viscontea," 17.

44 "*In secreto*" is not further defined in the statutes. Presumably it referred to the defendant's appearance before only the judge and his notaries.

45 After the defendant gave his or her response and the fideiussor made an oath, the judge set the time allowed for making a defense, and then ordered him or her to appear on the determined day to see the witnesses sworn, "ipsum admonuit quatenus singulis diebus et horis iuridicis debeat comparere ad videndum iurare testes."

46 For example, ASRe, *Giudiziario*, Libri delle denunzie, July 9, 1398, vol. 18, fols. 18r–21v.

his decision. At Reggio, it happened at times that the judge was moved to conviction with only one eyewitness and no apparent circumstantial evidence. This may underscore Vallerani's reading of Gandinus, which showed that the judge's conscience played a major role in the determination of conviction.[47] The question of judicial discretion in conviction is addressed in Chapter Five; here, we should consider how the judge's observation of the witness may have influenced his understanding of the testimony, and therefore his decision.

In 1403, Antonius de Albrixiis was accused of hitting Antonius, son of Bartolus de Moncono, and pulling out his hair. The witnesses named against him were Franchischus de Maliveris, *iurisperitus*, and Franchiscus's son Symon. The defendant answered the summons to appear before the judge, but told the judge a different story: he said that Antonius de Moncono had knocked his own son Jacob to the ground, and Antonius de Albrixiis, crying "I told you to let him [Jacob] go!" (*ego bene dicebam tibi quod dimiteres eum!*) then grabbed him up, pulling out a little bit (*aliquantulum*) of his hair in the process.[48]

The *iurisperitus* Franchischus, who was a witness against Antonius de Albrixiis, told a different story. According to him, as the boys were quarrelling, Antonius de Albrixiis called out, "Let my son go, before you make him fall on the ground and his head gets broken!" (*Dimite filium meum, ne facias eum cadere in terram, quoniam habet fractum caput!*) Antonius de Moncono did not listen to him, but threw Jacob on the ground anyway, and bruised his forehead. Antonius de Albrixiis then chased Antonius de Moncono, who tried to run away. The boy made it up two of the stairs to his father's house before Antonius de Albrixiis caught him and pulled out his hair, saying "I very well told you that you should let my son go, and not throw him on the ground!" (*Ego bene dicebam tibi quod dimiteres filium meum, et ipsum non prohiceres in terram*!) Franchischus told the judge that the boys quarrelling were about eight years old, and that the other two people present were his own son Symon, eight years old, and, confusingly, another boy named Simon, who was seven years old. The judge summoned the young witnesses to gauge their age for himself. He determined by looking at them that they were less than ten, so he dismissed them.[49] But he convicted the defendant anyway, ordering him to pay a relatively small

47 Vallerani's analysis of Gandinus's views on conscience and *arbitrium* is found in "Procedure and Justice," 52–57.

48 ASRe, *Giudiziario*, Libri delle denunzie, April 28, 1403, vol. 20, fols. 1r–3v.

49 ASRe, *Giudiziario*, Libri delle denunzie, April 28, 1403, vol. 20, fol. 3v: "... ex aspectu personarum suorum videntur etiam minores decem annorum, dictus Dominus Vicarius et Iudex Maleficorm pronunciavit et declaravit predictos Simonem et Simonem examinandos non esse super dicta inquisitione et contentis in ea."

fine of 1.10s, even though the only evidence introduced was one legitimate eyewitness. Why?

Keeping in mind Gandinus's contention that the judge can consider, by his *conscientia*, the nature of the person before him, it is worth noting that Antonius de Albrixiis was no stranger to the criminal court. Unfortunately there is an almost total gap in the trial records from 1399–1402 (only five trials exist from 1402). But from 1403–1407, the records continue, and in them we find Antonius de Albrixiis named in five separate cases: in March of 1403, together with a certain Antonius Guoli, he was serving as captain of his neighborhood of S. Pietro, and in this capacity, before the same judge, he made an unsuccessful denunciation of a certain Antonius de Gypso concerning a quarrel.[50] In April of that year, the fight described above occurred. In July of that year, he was accused of fighting and quarrelling in a public street (of which charge he was ultimately absolved).[51] And in 1406, he was convicted of insulting his brother's wife—the same brother that stood as his pledge when he was accused of beating the boy Antonius de Moncono—for which he was fined 10 pounds.[52] Also in 1406, he was denounced for insulting a notary during a court proceeding.[53] If his subsequent behavior was in any way descriptive of his behavior in the years for which records are lost, it does not seem unlikely that the court was already familiar with his character. One eyewitness should not have been enough to convict him, but perhaps taken in combination with his general behavior, the judge was moved to believe the version of events in which Antonius acting impulsively, beating the child who threw his son to the ground.

Judges necessarily exercised some discretion in weighing testimony. As in Antonius's case above, the judge decided by observation whether the witnesses seemed old enough to testify. Like the insane, the very young could not testify because they were not understood to have the necessary powers of reasoning.[54] Anyone not under ban could give testimony, and the testimony of women held full weight. All witness testimony had to demonstrate a legitimate basis of the witnesses' knowledge, *iusta causa et legitima scientia*. This demonstration of the basis of knowledge, discussed in the previous chapter with respect to *fama*,

50 ASRe, *Giudiziario*, Libri delle denunzie, March 27, 1403, vol. 19, fols. 56r–58v.

51 ASRe, *Giudiziario*, Libri delle denunzie, July 6, 1403, vol. 20, fols. 49r–51v and 143r–146v.

52 ASRe, *Giudiziario*, Libri delle denunzie, June 9, 1406, vol. 21, fol. 62r–v.

53 ASRe, *Giudiziario*, Atti e processi, n.d., 1406, unnumbered folios, discussed above in Chapter Two.

54 Bartolus, *Tractatus testimoniorum*, ed. Suzanne Lepsius, *Der Richter und die Zeugen: eine Untersuchung anhand des* Tractatus testimoniorum *des Bartolus von Sassoferrato* (Frankfurt: Vittorio Klostermann, 2003).

was central in weighing witness testimony of all kinds, because, "according to nature, nothing exists in the intellect that was not first in the sense[s]..."[55]

Because witness testimony was so heavily weighted, the criminal court, always concerned with fraud, severely penalized perjurers. The penalty for giving false testimony could be corporal. From the 1335/71 redaction of the statutes to that of 1392, an increase in the severity of penalties for supplying a false witness and for producing false evidence is apparent. The statutes distinguished between those who produced false witnesses, and those who gave false testimony.[56] The penalty for anyone producing a false witness before the court in the 1335/71 redaction of the statutes was a fine of twenty-five pounds, which was increased in 1392 to a one hundred pound penalty, and restitution of any damages.[57] Likewise the statute on giving false testimony was augmented in 1392. The version from the 1335/71 redaction set forth severe penalties for those who gave false testimony and produced false *instrumenta* before the court, declaring that in any civil or criminal case, a person giving false testimony should be condemned to fifty-five pounds, and if unable to pay, his right hand, with which he had sworn to tell the truth, should be cut off.[58] The person producing a false instrument was to be penalized twenty-five pounds for the instrument. For the person who produced the false instrument, the penalty was far worse: one hundred pounds for each false instrument produced, and if the fine were unpaid, the amputation of the writing hand. If the forger had produced more than three false instruments, he was to be immolated.[59]

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55 Bartolus, *Tractatus testimoniorum*, "... secundum naturam nil est in intellectu quod prius non fuerit in sensu."

56 ASRe, *Comune*, Statuti del 1335/1371, fol. 32r, and ASRe, *Comune*, Statuti del 1392, 152v.

57 ASRe, *Comune*, Statuti del 1335/1371, fol. 32r and ASRe, *Comune*, Statuti del 1392, 152v. The 1392 redaction reads: "De pena illius qui falsum testem produxerit. Si quis falsum testem produxerit in aliqua causa civilli vel criminalli puniatur et condempnetur pro quolibet falso teste in libras centum Rexanorum si scienter produxerit et ultra teneatur ad restituendum dampnatum passum."

58 *Instrumenta* were public documents created by notaries, which were usually witnessed, but which derived their authority from the *signum* particular to the notary; Marino Zabbia, "Formation et culture des notaires (XI^e–XIV^e siècle)," in *Cultures Italiennes (XII^e–XV^e Siècle)*, ed. Isabelle Heullant-Donat (Initiations au Moyen Âge) (Paris: Les Éditions du Cerf, 2000), 303.

59 ASRe, *Comune*, Statuti del 1335/1371, fol. 32r: "Si quis falsum testimonium dixerit in aliqua causa civili vel criminali puniatur et condempnetur in quinquaginta libras Rexanorum. Et solvi non poterit dictam penam ei manus dextra amputetur cum qua iuraverit testimonium. Et quod si quis falsum instrumentum produxerit scienter puniatur pro instrumento vigintiquinque libras Rexanorum. Item si quis falsum instrumentum scripserit in centum libras Rexanorum pro quolibet instrumento puniatur. Et nisi etiam tertium diem post

These penalties, already serious, were substantially increased in the 1392 redaction of the statutes. The penalty for giving false testimony was raised from fifty-five *R.L.* to one hundred. The 1392 redaction likewise removed the option for a monetary penalty for a person who wrote a false instrument, and the penalty became entirely corporal. It should be remembered also that the 1392 redaction did not include a general redaction of the criminal law: the intensification of penalties for these crimes was not part of a general revision, but rather, these were specific choices, which probably underscored Giangaleazzo's concern with fraud in the criminal courts. In fact, the 1392 statute added a law concerning the forging of seals and public documents, which mandated capital punishment for anyone who falsified the seal of the Duke of Milan or of the commune.[60] There is very limited evidence for the enforcement of these statutes,[61] but the concern inside the statutes was clear. As the primary means of proof, testimony had to be guarded from perjury and falsity.

Medical Evidence and Expert Testimony

Rarely was physical evidence brought before the court. Occasionally a witness was asked to identify a weapon,[62] and occasionally written instruments were

condempnationem solvit amputetur ei manus dextra cum qua scripsit. Et si tria vel plura instrumenta inveniatur scripsisse igne comburatur."

60 ASRe, *Comune*, Statuti del 1392, fol. 152v. The penalty for falsifying a seal was left to the discretion of the judge. A person who falsified other public documentation was condemned to make restitution for the damage caused: "De pena illius qui falsum testimonium dixerit. Si quis falsum testimonium dixerit in aliqua causa civilli vel criminalli puniatur et condemnetur in libras centum Rexanorum et si solvere non poterit dictam pennam ei manus dextera amputetur cum qua iuraverit testimonium. Et quod si quis falsum instrumentum produxerit scienter puniatur pro instrumento in centum libras Rexanorum. Item si quis falsum instrumentum scripsit amputetur ei manus dextra cum qua scripserit et si tria vel plura instrumenta scripsisse inveniatur igne comburatur. Et si quis falsificaverit sigillum vel bulletinum domini nostri vel communis Regii capite puniatur. Si vero falsificaverit sigillum alterius persone vel universitatis puniatur in avere et persona arbitrio potestatis inspecta qualitate facti et personarum. Et eodem modo puniatur qui falsificaverit vel vituperaverit scriptas aliquas communis Regii vel alterius existentes in archivio publico vel ad camera actorum communis Regii et in quolibet casu contentorum in hoc statuto teneatur dellinqueris ad restitutiendum dampnum passo."

61 ASRe, *Giudizario*, Libri delle denunzie, June 1, 1405, vol. 21, fol. 18r and following, is an example of a prosecution for bearing false witness.

62 ASRe, *Giudizario*, Libri delle denunzie, December 6, 1392, vol. 14, fols. 159r–160v.

produced.[63] But descriptions of crimes, thefts, injuries, crime scenes and wounds entered judicial consideration through the medium of witness testimony, always impeachable through the usual means of witness *fama*. The only exception was expert medical testimony, which followed different rules.[64]

By the end of the fourteenth century, the use of formal medical advice in criminal courts was common in northern Italy. We find the practice in Bologna and Venice, where formal opinions, *consilia*, written by medical professionals survive in abundance.[65] Smaller towns such as Imola and Forlì near Bologna, probably influenced by the practice of larger cities, used them too.[66] The physicians who offered professional advice were selected by the court. In thirteenth-century Bologna, the selection was made randomly when the Podestà withdrew one of four names from a bag,[67] working with a relatively small number of experts.[68] In Reggio, it seems doubtful that there were many medical professionals to choose from. One of the stated reasons that physicians were publicly salaried was the fear that they might otherwise leave.[69]

For the physicians, aiding the criminal court through the production of *consilia* was prestigious. The ability to give *consilia* was a mark of expertise.[70] These *consilia* entered the criminal process at different moments: before and during trials, orally and in writing, or even after the conclusion of a trial but

63 For example, ASRe, *Giudizario*, Libri delle denunzie, September 10, 1392, vol. 14, fols. 114r–129v, and September 24, 1392, fols. 132–146; ASRe, *Giudizario*, Libri delle denunzie, June 2, 1396, vol. 15, fols. 83r–89v.

64 On medical expertise and medical-legal *consilia* at Reggio Emilia, see Vitiello, "Forensic evidence," 133–156.

65 Ruggiero, "The Cooperation of Physicians and the State"; Dall'Osso, *L'organizzazione medico-legale a Bologna e a Venezia nei secoli XII–XIV* (Cesena: O. Addolorata, 1956); Münster, "La medicina legale in Bologna dai suoi albori alla fine del secolo XIV," *Bollettino dell'accademia medica pistoiese Filippo Pacini*, 26 (1955): 257–271; Edgardo Ortalli, "La perizia medica a Bologna nei secoli XIII e XIV: Normative e pratica di un istituto *Giudiziario*" in *Atti e Memorie: Deputazione di storia patria per le province di Romagna*, n.s. 17–19 (Bologna 1969), 223–259.

66 Ortalli, "La perizia medica," 225.

67 Ortalli, "La perizia medica," 239–241.

68 Ortalli, "La perizia medica," 248.

69 ASRe, *Comune*, Registri dei decreti, reg. 1371–72, September 10, 1371, cf. Chapter One.

70 Chiara Crisciani, "*Consilia, responsi, consulti*: I pareri del medico tra insegnamento e professione" in *Consilium: Teori e pratiche del consigliare nella cultura medievale*, eds. Carla Casagrande, Chiari Crisciani, and Silvana Vecchio. Micrologus X. (Florence: Edizioni del Galluzzo, 2004), 260.

before a formal peace was sworn between the parties.[71] Sometimes physicians also practiced post-mortem examinations to determine causes of death, using early forensic methods and sometimes performing dissections and autopsies.[72]

Physicians at Reggio had a formal, obligatory role in crime reporting. This reporting could initiate an *ex officio* inquisition. For example, in 1381, the surgeon Gabriel de Medici gave a written *consilium* to the judge the day before an inquisition was formed against two men for a violent quarrel, stating that "I saw and treated Bartholomeus de Posanoschis de Cremona, wounded, as it is said, by Francischinus de Aspertis de Cremona, in the right part of the chest with one wound, with an effusion of blood, whence I say and counsel that the aforementioned Bartholomeus will be in good recovery and outside the danger of death, et cetera."[73] The judge brought an inquisition *ex officio* against both men the next day. It seems safe to assume that this document served as the court's basis for deteriming the charges that were brought against the defendant.[74]

If a medical opinion could form the basis for an inquisition into murder, obviously a great deal of legal power was becoming attached to medical professionals. This raised the issue of fraud. In Bologna by the late fourteenth century, statutes required that two physicians, both over the age of thirty, who had been resident in their community for at least twenty years, should attend post-mortem or physical examinations of crime victims, and attending autopsies was also one of the duties of the criminal court notary. The doctors were required to make their reports under oath to the Podestà or one of his criminal judges, outlining how many wounds they found, and of these how many were

71 ASRe, *Giudizario*, Libri delle denunzie, October 8, 1393, vol. 14, fols. 269r–270r; ASRe, *Giudizario*, Libri delle denunzie, June 21, 1389, vol. 12, fols. 133r–137r; ASRe, *Giudizario*, Libri delle denunzie, Feb. 4, 1393, vol. 14, fols. 163r–v.

72 Ortalli shows that medical-legal *consilia* were used in injury cases to help the judge fix a penalty appropriate to the case, and in homicide cases, physicians were necessary to determine the lethal wound. Ortalli, "La perizia medica," 226. For autopsy and dissection, see Joseph Shatzmiller, "The Jurisprudence of the Dead Body: Medical Practition in the Service of Civic and Legal Authorities," *Micrologus* VII (Florence: Edizioni del Galluzzo, 1999), 223–230.

73 ASRe, *Giudizario*, Atti e processi, October 16, 1381, fol. 391r: "Conscilium [sic] mei Gabrielis de Medici Ciroytum super eo quod vidi et medicari Bartholameum de Posanoschis de Cremona vulneratum per Francisschinum de Aspertis de Cremona ut dicitur in parti destreori pectoris uno vulnere cum sanguinis effuxione unde dico et consulo predictum Bartholameum fore in bona convalescacia et extra periculum mortis ex predicto vulnere et cetera. Et ego Gabriel de Medicis Ciroychus propria manu superscripsi."

74 ASRe, *Giudizario*, Libri delle denunzie, Oct. 16, 1381, vol. 6, fols. 89r–90v.

mortal and how many not. Their reports were to be accepted unless evidence could be produced to the contrary.[75] No statutory directions for medical professional conduct exist at Reggio. However, though there was a relatively small number of medical professionals at Reggio, it is not unusual that the medical *consilia* were signed by two of them. This was probably a measure to prevent fraud, a perpetual concern of the court.

Professional post-mortem examinations occurred at Reggio Emilia, as they did elsewhere in northern Italy. From their origins in ecclesiastical canonization proceedings,[76] autopsies and dissections were a growing part of the medical curriculum in universities, and were increasingly used in courts of law.[77] Autopsies were used by the criminal courts of Bologna[78] and Venice[79] by the fourteenth century, and these involved some elements of dissection, and sometimes even exhumation. By the thirteenth century, Bolognese officials were ordering the examination of bodies, and wounds were measured and inventoried, and their severity ascertained through examinations that included measuring the depth of cuts with wax candles or fingers.[80] In late fourteenth-century Bologna, statutes decreed that these post-mortem exams were to be performed the same day the report of a suspicious death was received, unless the injury and death occurred outside the city walls, in which case the doctors were sent to see the body of the murdered person within three days, before it was handed over for burial.[81]

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75 Archivio di Stato di Bologna, *Statuti*, 1389 vol. fol. 280r–v (hereafter ASB, *Statuti*).

76 Katherine Park, "Holy Autopsies: Saintly Bodies and Medical Expertise, 1300–1600" in *The Body in Early Modern Italy*, eds. Julia L. Hairston and Walter Stephens (Baltimore: Johns Hopkins University Press, 2010), 63.

77 Katherine Park, *The Secrets of Women*: *Gender, Generation, and the Origins of Human Dissection* (Zone Books, 2006) 52–3. For an investigation of dissection as it developed in Renaissance Venice and its use as a didactic tool, see Cynthia Klestinec, *Theaters of Anatomy: Students, Teachers and Traditions of Dissection in Renaissance Venice* (Baltimore: Johns Hopkins University Press, 2011).

78 Katherine Park, "Relics of a Fertile Heart: The 'Autopsy' of Clare of Montefalco" in *The Material Culture of Sex, Procreation and Marriage in Premodern Europe*, eds. Anne L. McClanan and Karen Rosoff Encarnaciòn (New York: Palgrave McMillian, 2002), 118.

79 Shatzmiller, "The Jurisprudence of the Dead Body," 229.

80 Shatzmiller, "The Jurisprudence of the Dead Body," 244. Medical opinions, whether delivered in the form of a certificate or given by a specialist during questioning, were in northern Italy and in southern France not considered testimony but were understood as expert opinions, much as legal *consilia* were admitted in the municipal civil courts.

81 ASB, *Statuti*, 1389, fol. 280r–v.

The statutes at Reggio neither required nor regulated post-mortem examinations, and in fact, the court at Reggio was perhaps equally likely to rely on lay witnesses to determine cause of death. In the surviving records, lay witnesses who had viewed bodies—those who discovered them, guards who examined them, women who prepared them for burial—were solicited to provide evidence about the cause of death. But the professionalization of medical expertise was certainly underway by the fourteenth century, and at Reggio, there is some indirect evidence of professional post-mortem examination. A document recording the torture of certain murder suspects, accused of killing a man by beating him in the head with swords, describes the wounds inflicted on the victim, concluding that "on account of the aforementioned wounds, the said Peter was and is dead, and Magister Petrus, *medicus*, says that he is dead because of the aforesaid wounds."[82] There is no mention of this post-mortem examination in the trial process.

Physicians provided their opinions to the judge at Reggio, sometimes in writing, and sometimes by appearing personally to testify. But their testimony was not regular witness testimony.[83] They were not included in witness lists even when they appeared before the judge during the trial to give their findings orally, underscoring the particular nature of their testimony as expert advice. For Bartolus, always mindful of the basis of knowledge, if "a witness said something is true, because he believes it," that witness is to be discredited. But Bartolus specifically excluded those trained in medicine from this judgment, because "they are not really witnesses, but rather they are like judges accepted to judge an article of a case . . ."[84]

The advice of these experts, and their "epistemologically weak but socially powerful" knowledge,[85] held strong influence in the criminal courts. But, as

82 ASRe, *Giudiziario*, Atti e processi, August 14, 1373, fol. 161r: ". . . pro quibus superscriptis feritis superscriptus Petrus mortuus fuit et est et magister Petrus medicus dicit quod mortus est pro superscriptis feritis."

83 Jole Agrimi and Chiari Crisciani, *Les Consilia Médicaux*, French trans. of Italian text by Caroline Viola (Belgium: Brepols, 1994), 97.

84 Bartolus, *Tractatus*, 240–241: "Testis dixit aliqua vera esse, quia sic credit. Eius dicto standum non esse ab omnibus responsum est . . ., magis enim iudicat quam testatur, nisi causam propter qua credit sufficientem adnectat. Nec hiis contradicit quod in hiis, que consistunt in artis peritia, medici, obstetrices et similes de credulitate deponunt. Non enim sunt proprie testes, sed magis ut iudices adsumuntur ad illum cause articulum iudicandum . . ."

85 Silvia De Renzi, "Medical Expertise, Bodies and the Law in Early Modern Courts," *Isis* 98 (2007): 322.

Mario Ascheri has discussed, their use opened the door to some difficult legal problems. Could a defendant challenge their findings, as he or she might challenge other witness testimony, or seek other experts with more favorable opinions? Johannes Andreae took up exactly this point in his *additio* to Durantis's text, relating the problem of the false doctors to that of false witnesses or the introduction of forged *instrumenta*. Yet all medical experts testified to their belief and understanding of events that could not be proven otherwise, and if a second set of experts were consulted, they could be as right or wrong as the first.[86] The point was especially difficult because it had implications for the juridical *consilium sapientis*: like the legal *consilium*, the medical *consilium* was solicited by the judge and for his use to determine a right course of action, but its probatory value was ambiguous.

As with the problem of torture, the nature of recordkeeping makes it impossible to know how often judges consulted with medical professionals. They are mentioned only occasionally in the trial records.[87] Yet they were clearly sometimes used in cases where they were not mentioned, because some *consilia* survive in documentary form, and the corresponding trial record has no mention of them.[88] Still, the fragmentary evidence that does exist, in parallel with the common practices of other northern Italian towns, suggests that medical professionals participated in the denunciation of crime, in trials, and in postmortem examinations. Their status as witnesses constituted a unique category of expert witnesses, which was much harder for a defendant to discredit.

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86 Johannes Andreae, *additio* ad v. Noscunt, in Ascheri, "*Consilium sapientis*, perizia medica et '*res iudicata*'," 535 n. 5. As discussed by Ascheri, "*Consilium sapientis*, perizia medica et '*res iudicata*'," 539–541, this problem received attention not least because of parallels to the use of juridical *consilia sapientis*: "Subdit etiam quod si iudex ad dictum medici dicentis vulnus Titii cum plures vulneraverunt fuisse mortalem condemnavit Titium de occiso, qui Titius dicens medicum falsum dixisse petit ante sepulturam peritiores medicos adhiberi. Quod factum est, et illi referent illius vulnus non fuisse mortale retractabitur sententia sicut dicitur de lata per testes falsos vel instrumenta, C. si ex falsis instrumentis l. Falsam, et l. finali ff. de re iudi. L. Divus, supra de exceptione Cum venerabilis . . .".

87 For example, in ASRe, *Giudizario*, Libri delle denunzie, June 11, 1374, vol. 11, fol. 118r; ASRe, *Giudizario*, Libri delle denunzie, June 21, 1389, vol. 12, fols. 92v–94v; ASRe, *Giudizario*, Libri delle denunzie, August 20, 1389, vol. 12, fols. 133r–137r; ASRe, *Giudizario*, Libri delle denunzie, February 4, 1393 vol. 14, fol. 163r–v; ASRe, *Giudizario*, Libri delle denunzie, Oct. 8, 1393, vol. 14, fols. 269r–270r.

88 For example, in ASRe, *Giudiziario*, Atti e processi, Oct. 16, 1381, and October 20, 1381, fols. 391r and 392r.

Protections in Municipal Law and the Right to a Defense

The municipal statutes set forth a clear *ordo* (procedural order) to be followed in criminal procedures which included allowance of a defense for the accused, and guaranteed defendants a period of time in which they could prepare a response to charges made against them. The redactions of the statutes from 1335, 1392, and 1411 begin the *Liber de malleficiis et malleficiorum* with an *ordo iuris* for criminal process, "[which] procedure [*ordinem*] should be observed in criminal matters and criminal processes of criminals, so that it should apply to whoever stands accused, denounced, or inquired against for a crime in a case of wrongdoing before the Lord Podestà or his judges."[89] This statute guaranteed the process of law to all defendants in the criminal court and limited judicial power, providing both implicit and explicit protections for defendants.[90]

The statutory requirement that the accuser, denouncer, or notifier must provide surety and swear to the veracity of the charge even in inquisition trials was an effort to protect individuals from calumny.[91] The defendant was entitled to receive a written copy of the accusation. If the cited defendant appeared before the judge, the charges were read and explained in the vernacular. The defendant heard these charges explained privately, *in secreto*. He or she then took an oath to tell the truth about the charges, and to respond to the charges (*se purget*) by affirming or denying them.[92]

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89 ASRe, *Comune*, Statuti del 1335/1371, fol. 25r: "In maleficiis et maleficiorum processibus talem ordinem duximus observandum ut quemcumque enormiter aliquem accusari denunciari vel inquiri pro quocumque maleficio et maleficii causa coram domino potestate vel eius iudicibus contingerit."

90 This was in keeping with juridical thought, which gave great weight and consideration to the rights of defendants and the limits of the power of a prince to act outside the law. For a discussion of rights and natural law in medieval due process, see Pennington, *The Prince and the Law*, 132–164.

91 ASRe, *Comune*, Statuti del 1335/1371, fol. 25r: "Eaque sic recepta et iurata in actis conscribatur et ea conscripta citetur per nuntium communis personaliter vel ad domum accusatus denunciatus vel inquisitus mandato potestis vel iudicis ut certa die vel hora diei compareat coram ipso potestate vel iudice defensurus se ab ipsa accusatione denunciatione vel inquisitione."

92 ASRe, *Comune*, Statuti del 1335/1371, fol. 25r: "Et siquidem comparuerit lecta et vulganter exponita in secreto apud iudicem ipsa accusatione denuntiatione vel inquisitione ipsi accusato denunciato vel inquisitio iuret dicere veritatem et se purget a predictis affirmando vel negando . . ."

That the accused had the right to a defense is manifest in municipal statutes. The 1411 redaction leaves no room for doubt on this subject, guaranteeing the defendant an opportunity to answer the charges under the rubric, "Concerning the defense given to an accused before condemnation:"

> Neither the Podestà nor his judge—either of them—or any other one of their officials exercising jurisdiction can or should condemn anyone in a criminal case on any occasion unless first he gives to this condemned man a sufficient delay to defend himself, which delay cannot be less than three days, but rather he may be given more, after the quality of his person and the magnitude of his business is considered. This delay must be written in the acts. And if [the official] does otherwise, the condemnation has no validity, nor can it stand, but by law it should be considered as nothing . . .[93]

The length of the delay was left to the judgment (*arbitrium*) of the magistrate, but the statutes impose a minimum delay of three days. If this right were violated, any condemnation would be invalidated. The delay could not have been too extensive, because the process was constrained by the fact that criminal trials could not continue for more than six months.

The established delay of three days to prepare a defense was given to accused who confessed their guilt as well as to those who denied it: confession did not abrogate the need for the delay, nor did it prevent the defendant from offering a defense. This is because defenses could aim to demonstrate not just the innocence of the accused, but—and more frequently—defendants could also prepare a legal argument against the validity of some aspect of the charge, the court, or the accuser. They could also construct an argument for a reasonable excuse for criminal behavior when the actions themselves were undeniable. These technical exceptions to elements of the charges were called *exceptiones* and were among the most frequently employed defense strategies.

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93 BSR *Statuti*, ms. 77, fol. 53r: "De defensione danda reo ante condempnationem. Potestas et eius iudex malleficorum vel alter ipsorum seu aliquis alius eius officialis exercens jurisdictionem non possint neque debeant aliquem seu aliquos criminaliter condemnare aliqua occaxione nisi prius dederit tali condemnato competentem dilationem ad se defendendum que dillatio non possit esse minor trium dierum sed dari posit maior inspecta qualitate persone et magnitudine negocii. Que dillatio scribi debeat in actis. Et si contrafactum fuerit, talis condemnatio non valeat nec exigi posit sed ipso iure sit nulla. . . ."

Evidence offered in favor of the defendant had to be admitted by the court. Under the rubric *Quod capitula inteligantur esse admissa ipso iure*,[94] the judges were specifically required to receive as evidence any written materials or instruments that were presented, either as proof of a charge or as a defense.[95] Once again, the statutes required that the judge allow a defendant time to prepare a defense, and that he hear the defense and consider any evidence produced before him. Violating these rules nullified a judgment.

Responses: Confessions, Denials, and Exceptions

The surviving records do not distinguish between defendants who appeared of their own accord, and those who were captured and compelled to appear. Whatever the circumstances of their appearance before the court, the defendants, once before the judge, were entitled to have the charges against them communicated to them in the vernacular. At that point, defendants either confessed or denied the charges. At Reggio, approximately 71 percent of defendants who answered the citation confessed to the crimes they were charged with, while 28 percent denied all or part of the charges against them.[96]

The defendant's initial response before the judge was not binding. Nor is it possible to know at what stage torture entered the interrogation. Whether they confessed or not, defendants were allowed a period of time in which to make a defense. At that point, confessed defendants could retract their initial confession if they wished. For example, in 1386, a member of the city council who stood accused of adultery confessed when he appeared before the judge, but the next day his lawyer appeared in court and announced that the accused had in fact made a mistake when he confessed, claiming that he had done so *pro errore* and *contra omnem veritatem*.[97] More commonly, defendants confessed but then made a defense based upon legal, technical exceptions to the nature of the charge against them. Their initial confession did not always mean conviction, though it usually did: of those cases where the defendants initially confessed and the outcome is known, about 94 percent were convicted. Yet denials could be powerful: they did not necessarily lead to absolution, but

94 BSR *Statuti*, ms. 77, fol. 52v.

95 BSR *Statuti*, ms. 77, fol. 52v.

96 Based on a sample of 398 cases where defendants appeared and their response is recorded. It is not possible to tell from these records whether the defendants appeared willingly or whether they had been captured.

97 ASRe, *Giudiziario*, Libri delle denunzie, October 19, 1386, vol. 8, fol. 49v.

they did dramatically increase the chances of acquittal. Defendants were not condemned in 12 percent of cases overall,[98] but when defendants denied the charge, slightly more than half, 52 percent, escaped condemnation.

When the defendants or their legal representatives returned to court after the delay, their arguments for their defense varied widely in both complexity and strategy. Sometimes defendants simply denied guilt, and in those cases, the charges were proven or not by the weight of prosecution witnesses. More rarely, defendants claimed alternative versions of the facts or claimed alibis. Some defendants denied charges under torture, which led to an automatic absolution. But the most common kind of defenses were technical objections were known as *exceptiones*.

Defense arguments usually took the form of e*xceptiones*, which were arguments against some element of the process or charge or evidence against the defendant. These arguments were usually based on highly technical issues like jurisdiction or procedural matters, or on objections to prosecution witnesses or to the accuser. These were not arguments directly responding to the facts as presented in the denunciation or *querela*, but rather, they were arguments against some element of the charge itself. Not surprisingly, the defendants who responded to charges with these highly technical exceptions often had legal representation. Overwhelmingly, the most frequent exception made was that the victim or one of the key witnesses was a person of bad *fama*, and thus, could not be believed.

Fama and the Defense

According to treatises like that of Durantis, a defendant could object to prosecution by inquisition if there was no *fama* of the crime: "If a prelate wishes to proceed to an inquisition against any person, that one against whom he wishes to inquire may object: 'My Lord, by law you cannot inquire against me, because I am not infamous concerning these crimes."[99] Yet the objection that a defendant was not infamous for a crime does not appear in the surviving trials. This may underscore the degree to which *inquisitio* had absorbed the accusatorial nature of older procedures, which rested on individual accusations. When

98 This number includes convictions based on contumacy.

99 Durantis, *Speculum iuris*, Book III, Part I *De inquisitione* §1.1, p. 27. "Si enim prelatus velit procedere ad inquisitionem contra aliquem, opponat is, contra quem vult inquirere: Domine, non potestis contra me de iure inquirere, quia non sum de his criminibus infamatus."

fama enters into questions of the defense, it is usually based on *fama* of persons, especially witnesses, but not against the *fama* that began the inquest. Most often at Reggio, exceptions hinged on proving the *mala fama* of the accuser or a key witness for the prosecution.

The most common strategy of exceptions was the invalidation of the reliability of the victims or the witnesses for the prosecution by impugning *fama*. This was a favored defense especially in rape and adultery trials, where the *fama* of the victim indicated the severity of the crime, and sometimes determined whether a crime had been committed at all. The following four examples will illustrate common defense strategies using exceptions where defendants attempted to prove the *mala fama* of the victim or of a witness against them.

First we return to the case of Johannes de Cuvriacho and Antonius Tramalius, discussed above with respect to torture. In 1403, Johannes de Cuvriacho and Antonius Tramalius were brought up on charges resulting from a violent quarrel between them.[100] Antonius hit Johannes twice in the face, knocking out a tooth and causing an effusion of blood, and then he threw Johannes to the ground and struck Johannes with his knees. In return, Johannes struck Antonius with a stone, hitting him but not drawing blood. In the trial that followed, Antonius remained contumacious but Johannes appeared before the court and denied the charges. Three witnesses were named in the denunciation, but when the judge summoned them, only two appeared. Of these, only one, a certain Carolus, claimed to be an eyewitness to the fight. This "half-proof" was not sufficient for conviction but it was enough to require Johannes to prove his innocence through torture. Failure to answer this citation would be contumacy, and Johannes was threatened with the criminal ban. As a result, Johannes answered this charge, but attempted to defend himself—not just from the accusation but from the threat of torture—with a charge of his own, that Carolus was a man of *mala fama*, and therefore his testimony should be disregarded by the court. The exception consisted of two articles: first, that "Carolus is a man who stays out day and night and converses in the *barataria* with *barateriis*, for gambling, and in the taverns with the drunkards, and even spends time in the brothel." The final article was that Carolus's poor reputation was public *vox et fama*. Johannes's objective was to show that Carolus's word was not sufficient evidence for Johannes to be put to torture. Johannes brought three witnesses to testify that they had seen Carolus in taverns and gambling, and that it was public *vox et fama* that he did those things. The witnesses testified that they had themselves seen Carolus in these places, and that he lived a

100 ASRe, *Giudiziario*, Libri delle denunzie, November 3, 1403, and following days, vol. 20, fols. 122r–126v and fols. 175r–178v.

debauched life. Though the record is incomplete, it appears that this exception was successful and Johannes was not interrogated further.

In April of 1387, Caterina de Veneciis and her husband Antonius de Cento brought a complaint against three men, Johannes, Peter, and Luchinus. The men were accused of breaking through the wall of a house where Caterina and another woman, Francesca de Verona, were sleeping. The complaint alleged that these men raped and beat the women and stole certain items from the home. Luchinus was contumacious but Johannes and Peter presented the court with no less than thirty witnesses to testify that the two female victims were of bad *fama*.

The defendants answered the charges, claiming that they had gone to the home of Caterina, who was a

> famous procuress (*lene*) or ruffian, of dishonest life and shameless behavior, and there they entered the home though the door . . . and in that home they went to the bed in which a certain Francesca de Verona, a prostitute and known whore (*putana*), a woman of dishonest life and behavior, was sleeping, believing that this Francesca ought to spontaneously and willingly consent to them just as she was accustomed to consent to others, but since she resisted they knew carnally this same Francesca through force and violence . . .[101]

The defendants denied breaking the walls of the home, and they denied stealing anything. They admitted rape, but their answer made it clear that they believed Francesca was a prostitute and they expected her to consent. Their defense was an effort to show that the victim was not an "honest woman" but rather was a prostitute. The objective was not absolution—violent rape of a prostitute was still a crime—but rather it was to lessen the charges. The rape of an "honest" woman carried the penalty of death, but the rape of a woman of *mala fama* was penalized with a fine.

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101 ASRe, *Giudiziario*, Libri delle denunzie, April 5, 1396 and following days, vol. 15, fol. 40r–v: ". . . inerunt ad domum habitatam cuidam Caterane de Veneciis habitatricis civitatis Regii in vicine Sancti Laurentie famoxe lene seu rufiane vite inhoneste et conversationis impudice et ibi dictam domum intervenerunt per hostium dicte domus et in dicta domo pervenerunt ad lectum in quo dormiebat quadam Francischa de Verona meretrix et putana famoxa mulier inhoneste vite et conversationis credentes quod eadem Francischa eisdem deberet sponte et libenter consentire prout consueverat aliis consentire tamen quia resistebat ibidem eandem Francischam carnaliter cognoverunt per vim ac violentiam . . ."

The exception consisted of three articles:

> [The accused] wish and intend to prove through these . . . witnesses, upstanding citizens of Reggio of good judgment and sound *fama*, and many others, . . . that the said Caterina de Venetiis . . . is a dishonest and shameless woman, . . . well known to be infamous, who has dealings with prostitutes and keeps them in her home, and in the past even up to today is regarded as [a prostitute] by all these men who have carnally known her . . . and concerning this there is public *vox et fama* in the city of Reggio and especially in the neighborhood of San Laurentus, where Caterina lives.[102]
>
> *Item*, they wish and intend to prove that the said Francesca de Verona is and was a famous prostitute, living a meretricious life in the city of Reggio for six months or thereabouts, and is a dishonest and shameless woman, and was and is considered and regarded [as such] by all those carnally knowing her.[103]
>
> *Item*, that concerning each and everyone one of the aforementioned claims, there is public *vox et fama*.[104]

Each witness was read the articles and asked what they knew about each of them. Because the facts of the rape were apparently beyond dispute, the defendants relied upon these *exceptiones* to avoid a death penalty.

Exceptions to the credibility of the accuser were not confined to rape trials. On July 20, Johannes, son of Rolandus de Laturre de Argine, was accused by Federichus de Baysio of insulting him:

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102 ASRe, *Giudiziario*, Libri delle denunzie, April 5, 1396 and following days, vol. 15, fols. 42v–43r: "Primo, probare volunt et intendunt per infrascriptos testes viros ydoneos cives Regines bonos opinionis et integre fame et allios multos si expedient et opus fuerit quod dicta Caterina de Venetiis uxor asorta Antonii de cento habitatoris Regii et famosa inhoneste et impudice conversationis lena et infama famoxa cotidie conversationis cum meretricibus et eas in domo tenens et ita fuit temporibus *retroneas* et ita habita et tractata est huic retro et hodie habetur ab omnibus cognoscentibus eam et de hoc fuit et est publica vox et fama in civitate Regii et maxime in vicina Sancti Laurentei in qua habitat dicta Caterina."

103 ASRe, *Giudiziario*, Libri delle denunzie, April 5, 1396 and following days, vol. 15, fol. 43r: "Item, probare volunt et intendunt quod autem dicta Francescha de Verona est et fuit famoxa meretrix et unam meretricallem exercente in civitate Regii a mensibus sex citra . . . et est mulier inhonesta et impudica et ita habita et reputata est et habetur et reputatur ab omnibus eam cognoscentibus."

104 ASRe, *Giudiziario*, Libri delle denunzie, April 5, 1396 and following days, vol. 15, fol. 43r: "Item quod de predictis omnibus et singulis fuit et est publica vox et fama."

> While the said Federichus in the present year of 1397, on the sixth indiction, in the present month of July, was seeking six gold florins before the said Lord Vicar from Barthinus de la Turre, having come before the said lord, Johannes de la Turre [Barthinus's brother] appeared before the Lord Vicar and said to Federichus . . . in the presence of the Lord Vicar, "I gave you two gold florins for this case [already], which Filipus de Pinetis took from you." And then the said Federichus denied that he received these two florins in this case . . . And then Johannes said injurious words to Federichus, with an angry heart and a wicked manner, and with an aim and intention of harming Federichus: "You are not a good man, as you deny that you received this gold in this case," Which words brought and bring Federichus to insult.[105]

This insult was committed before the judge, in the courtyard of the residence of the Podestà. A second charge follows:

> *Item*, that . . . Johannes, after these events, went before the said Lord Vicar after an interval of time and said injurious words to this same Federichus, namely, "You were exiled from this city of Reggio, along with such of your instruments [documents] with which you unjustly made profit of the men of this city."[106]

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105 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, fol. 25r: "In eo, de eo et super eo . . . quod dum dictus Federichus de anno presenti 1398 indictione vi de presente mense Iulii peteret coram dicto domino vicario Berthino de la Turre constitutus coram dicto vicario florenos sex auri dictus Johannes de la Turre constitutus coram dicto domino vicario dixit eidem Federicho presenti et in presentia dicti domini vicarii, 'Ego tibi dedi detum [sic] de causa florenos duos auri quos tibi minavit [minuit] Filopus de Pinotis,' et tunc dictus Federichus se recepisse negavit ipsos duos florenos dicta de causa inquisitionis appareret ipsos duos florenos recepisse et tunc dictus Johannes dixit eidem Federicho irato animo et malo modo et animo et intentione ipsum Fredrichum iniurandi infrascripta verba iniuriosa, videlicet, 'Tu non es bonus homo in negando id quod tu recepisti aura superscripta,' de causa que verba idem Federichus sibi provocavit et provocat ad iniuriam."

106 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, fol. 25v: "Item . . . quod superscriptus Johannes post superscripta per spatium et temporis intervallum existens coram prefacto domino vicario irato animo et malo modo ac animo et intentione ipsum Federichum iniurandi dixit eidem Federicho superscripta verba iniurosa, videlicet, 'Tu fuisti deschatiatus de hac civitate Regii cum istis tuis talibus instrumentis quibus indebite uteris contra homines huius civitatis'."

Summoned to respond to the charges, Johannes appeared in court and gave his answer: yes, he had spoken as charged, but "he denied, however, that he spoke these words against the said Federichus with an intention of injuring him in any way, but rather, he spoke the truth . . ."[107] As in the rape trial above, Johannes admitted the act itself. His defense rested on de-criminalizing his behavior, and, in this case, on denying that he acted with the intention of committing a crime.

In his lengthy response, Johannes made many objections to the charges. He claimed that he should be charged with only one crime, and not two, since there was no *intervalla temporis* between the two statements. He asserted that because the accuser was not present in court to pursue the accusation, the process should not continue. This argument rested on references to the *Digest* and also on the example of Christ: "whence it is read that Christ said to the woman, if no one accused you, I will not condemn you."[108] While to speak injurious words is indeed a crime, he argued, the case should not proceed by inquisition,[109] and at any rate, just because he said that Federichus is not a *good* man, it does not necessarily follow that he is a *bad* man, so really, he had not insulted him at all.[110] Furthermore, he argued, the words were taken out of context, as they were spoken in the course of testimony regarding another inquisition, which involved his brother.

The lengthy response, delivered orally before the judge, occupies nearly a complete folio and is filled with citations to municipal statutes, to Scripture, and to Roman law. The articles of the exception were more specific. They focused on the strongest arguments in the response, and provided the framework for the interrogation of witnesses. The exception focused on the character of the witness:

> First, that this Federichus de Bayso took and had two florins from Filipo de Pinetis at the request of the said Johannes, . . . concerning which, in

107 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, fol. 27r and following days: ". . . negavit tamen ipsa verba dixisse contra superscriptum Federichum animo iniurandi ipsum aliqualiter sed pro veritate . . ."

108 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, fol. 27r and following days: ". . . unde legitur Christum dixisse mulieri si nemo te acuxat nec ego te condempno . . ."

109 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, fol. 27r and following days: ". . . maxime in casu nostro cum crimen iniuriarum sit bene crimen et in talibus nulo modo conceditur de iure procedi per inquisitionem . . ."

110 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, fol. 27r and following days: "Item, non sequitur tu non es bonus homo in negando michi id quod tu recepisti ergo tu es malus homo vel tu non es bonus homo . . ."

this inquisition formed against the said Johannes de la Turre, mention should be made of [this payment] to the said Federichus;[111]

Item, that Federichus is held and reputed to be a man of wicked lifestyle and *fama* . . . by the men of the city of Reggio who know him . . .[112]

Item, that . . . Federichus was expelled from the city of Reggio on account of his wicked doings and his undue extortions made against men who were obligated to him by notarized documents [*per instrumentum*] or likewise . . .[113]

Item, that about each and every one of these matters, there is public *vox et fama* in the city of Reggio and elsewhere among those men who know Federichus and his reputation.[114]

Johannes provided the court with a list of eight witnesses to testify about the assertions in the exception. The witnesses testified that Federichus had been absent from the city for eight years. Some claimed to have seen him in a castle in the district of Reggio, where he stayed because "he did not dare to come to the city of Reggio." He feared returning because he had sought payment for debts already resolved, and, strangely, because "he killed many horses of the Lord Bishop of Reggio."[115] In fact, we can find Federichus as a party or as a witness in at least six previous criminal trials, and in 1389, he was convicted of killing five horses and a mule in the stable of the bishop.[116] Restitution in this case may have been the debt that caused him to flee Reggio: the trial does not

111 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, 27r and following days: "Primo, quod ipse Federichus de Baysio percepit et habuit dictos duos florenos de quibus in ipsa inquisitione contra predictem Johannem dela Turre formata sit mentio a Filipo de Pinetis ad requisitionem dicti Johannis soluentis et numerantis ipse Federicho."

112 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, 27r and following days: "Item, quod ipse Federichus habetur et reputatur pro homine male conditionis et fame inter et per homines civitatis Regii ipsum Fredrichum cognoscentes . . ."

113 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, 27r and following days: "Item, quod dictus Federichus alias fuit expulsus de civitate Regii propter suas pravas operationes et indebitas extortiones factas contra homines sibi per *instrumentum* vel *taliter* obligatos."

114 ASRe, *Giudiziario*, Libri delle denunzie, July 20, 1398, vol. 18, 27r and following days: "Item, quod de predictis omnibus et singulis est publica vox et fama in civitate Regii et alibi inter homines ipsum Federichum et eius conditiones cognoscentes."

115 ASRe, *Giudiziario*, Libri delle denunzie, October 23, 1389 and following days, vol. 13, fols. 85r–89v: ". . . quia petebat et exigebat debita instrumenta semel soluta et etiam interfecit plures equos Domini Episcopati Regii."

116 ASRe, *Giudiziario*, Libri delle denunzie, October 23, 1389 and following days, vol. 13, fols. 85r–89v.

record the amount of the verdict, but one witness claimed that he had been ordered to pay more than two hundred and fifty five florins.[117]

The witnesses also testified to other, similar instances where Federichus had defrauded a debtor, using the courts to force his victims to pay him back twice:

> . . . Federichus sought a certain debt from . . . Rolandinus, concerning which debt . . . Federichus had an *instrumentum* [a document proving the debt.] Which Rolandinus said to Federichus, "I cannot give you the debt right now." And . . . Federichus said to Rolandinus, "Come immediately before the judge and confess this debt." And thus Rolandinus returned to confess this same debt, making the one debt into two. And [Federichus did this] with a mind and intention of deceiving and defrauding Rolandinus, and seeking this debt twice.[118]

This information was given in response to the third and fourth points of the exception. In this instance, the witness was attempting to establish that Federichus had a pattern of defrauding those who were indebted to him, just as, Johannes claimed, he had done to him.

In this case, the facts themselves were not in dispute. Johannes had confessed to everything in the accusation; his argument in the exceptions was simply that he had spoken truthfully and therefore could not be punished. Federichus responded by making arguments against the arguments in the exceptions, claiming that he had been exiled not because of extortion, but because he was Bolognese and the commune was at war with Bologna.[119] The judge believed this but on all other points he was persuaded by Johannes's exceptions and the witnesses who testified to them, and he ultimately absolved Johannes from everything except his remark that Federichus was exiled from the city.

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117 ASRe, *Giudiziario*, Libri delle denunzie, October 23, 1389 and following days, vol. 13, fols. 85r–89v.

118 ASRe, *Giudiziario*, Libri delle denunzie, October 23, 1389 and following days, vol. 13, fols. 85r–89v: ". . . Federichus predictus petierat quoddam debitum a dicto Rolandino de quo debito dictus Federichus habebat instrumentum. Qui Rolandinus eidem Federicho dicti dicebat, 'non possum ad presens tibi dare dictam debitum.' Et dictus Federichus eidem Rolandino dixit, 'venias saltem coram iudice et confitearis debitum' et sic ipsum Rolandinum redduxit ad confitendum idem debitum faciendo dictum debitum esse duo, animo et intentione ipsum Rolandum decipiendi et fraudendi et petendi bis dictum debitum . . ."

119 ASRe, *Giudiziario*, Libri delle denunzie, October 23, 1389 and following days, vol. 13, fols. 85r–89v.

The structure of the presentation of the defense once again shows the oral, potentially confrontational nature of the criminal inquisition. But it also has implications for the issue of judicial *credulitas*, that process by which the judge was persuaded to rule in favor of guilt or innocence. Why present orally objections to the charges that did not figure into the exceptions, if these arguments had no influence? The rhetorical nature of the oral response suggests that the judge was persuadable, that rhetoric and argument could influence a ruling even outside the scope of technical exceptions (which are often all that remain in the trial records). Once again, an analysis of this trial encourages us to moderate the prevailing view of criminal inquests as technical, largely written processes, and consider the role of both oratory and discretion in judicial decisions.

In this context of the criminal inquisition as a confrontational, public arena, the role of personal enmity in impeaching testimony takes on new dimension. When Antonius, son of Jacobus de Astis, was accused of bearing arms against the order of the Podestà, he responded with a vitriolic objection to the chief witness against him. He claimed that all the witnesses against him were "suspecti et odioxi [Antonio]," but particularly objectionable was Rafaelus de Ollis, who, Antonius claimed, was his enemy. This hatred was one of the grounds for the legal exceptions that made up his defense. He provided witnesses who claimed not only that Rafaelus was *inimicus* to Antonius but also that Rafaelus had bragged to some men in a tavern that he would destroy Antonius *in avere et persona* because he was his enemy.[120] Antonius took the opportunity to solicit testimony to the bad character of his enemy, which surely served the dual function of invalidating his legal credibility in the case against him while also insulting Rafelus, and making their dispute widely known. These were not the only objections Antonius made to the case against him: he also objected to the trial on the technical grounds that the man who accused him had not sworn to the accusation, and for this reason alone the trial should not proceed. His arguments worked in his favor, as eventually he was absolved. Testimony was made public, as were charges and verdicts, and perhaps in cases where long lists of damaging witnesses were brought forward, the parties involved had further agendas for damaging reputation and airing private disputes.

The *mala fama* attributed to witnesses and victims—which was so often the grounds of a legal exception—is of a different character than the *mala fama* attributed to defendants. As we saw above, when *mala fama* is attributed to the defendant in the denunciation, the term seems to denote some sort of

120 ASRe, *Giudiziario*, Libri delle denunzie, September 5, 1396 and following days, vol. 15, 155r–160v.

public menace, perhaps in the form of recidivism. But in the case of witnesses, *mala fama* indicates unreliability. The concept of *fama* or *mala fama* is inherently fluid: the same factors that undermine a person in one situation have no bearing in another. Accusations of prostitution, for example, could undermine a victim's complaint of forcible rape. But being a prostitute did not impede a person from standing as witness in the criminal court, or of being legitimately considered as a victim of another crime. When Margarita de Alamania, *meretrix publica*, was beaten by a German mercenary, the soldier was not only convicted but also swore the peace with her.[121] When two men were charged *ex officio* with a violent public quarrel, one of the chief witnesses called by the court to testify was a prostitute.[122] *Mala fama* of witnesses was related not to any potential threat they might pose, but to the veracity of their testimony. And so *mala fama* was a concept most useful for the construction of a defense: public knowledge could acquit as surely as it could convict.

Exceptions constituted perhaps the most important and most effective strategy for defense, allowing the defendant to make an objection to the charges against him on a number of grounds, from highly technical ones to objections to the character of the witnesses for the prosecution. Because verdicts in criminal cases could not be appealed,[123] exceptions were all the more important, as no legal grounds could be used to gain a new trial. Furthermore it was not uncommon for a verdict, once decided, to be enforced immediately: not infrequently, a capital penalty was ordered and inflicted on the same day. This underscores the importance of the delay allowed to the defendant for preparing a defense.

Some legal knowledge was clearly required to prepare exceptions, and they were usually written by notaries who served as advocates for the defendants. Those without representation still tried to deny or even present defenses, though with very mixed results. One man claimed that he should not be tried for assault because he had already made a peace agreement with his victim.[124] The judge, unimpressed, convicted him regardless; peace agreements could not abrogate a trial at Reggio Emilia. Other defendants denied charges against them without exceptions. Some of these defendants, in the face of strong

121 ASRe, *Giudiziario*, Libri delle denunzie, April 8, 1387, vol. 8, fol. 87r–v. Virtually the same scenario can be found again in 1398, where another German soldier struck a German prostitute and was fined 2lb.10s, and swore the peace. ASRe, *Giudiziario*, Libri delle denunzie, June 17, 1398, vol. 18, fol. 10r–v.

122 ASRe, *Giudiziario*, Libri delle denunzie, August 27, 1388, vol. 12, fols. 29r–31v.

123 ASRe, *Comune*, Registri dei decreti, reg. 1385–1425, April 27, 1387.

124 ASRe, *Giudiziario*, Libri delle denunzie, February 26, 1397, vol. 16, fols. 71r–72v.

evidence against them, were put to torture. Thomaxius and Bartholazus de Costa, accused of robbing and murdering a traveling merchant, denied their guilt and were put to torture, where they maintained their innocence, and were therefore absolved.[125] Defendants also presented alternative versions of events, sometimes flatly denying involvement[126] but more often addressing their defense to elements of the accusation and not to the facts of the case. The relatively high acquittal rate for defendants who appeared in court and denied the charges suggests that defenses of all kinds were successful about half the time.

The statutes and trial records show that defendants had the right to know the charges against them, the right to a delay in which they could prepare a defense, and the right to present that defense to the judge. They could produce evidence, call witnesses, and have legal representation. The methods by which they defended themselves from criminal charges could be very simple or very technical and complex. Allowing defendants to respond to the charges was an integral part of inquisitorial procedure. That they often did so demonstrates further that the late medieval criminal judge operated less as a prosecuting magistrate than as the chair of a fact-finding tribunal.

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125 ASRe, *Giudiziario*, Libri delle denunzie, January 18, 1387, vol. 8, fols. 62r–63v.

126 ASRe, *Giudiziario*, Libri delle denunzie, February 10, 1397, vol. 16, fols. 67r–70v.

CHAPTER 5

Resolutions: Conviction, Absolution, and Mitigation

The resolution of criminal trials took many forms, from peace agreements, to absolutions, to public executions. Criminal trials at Reggio are characterized by a high overall conviction rate, which was approximately 90 percent in the period under examination; of these convictions, 48.5 percent were ordered *in absentia*. Overall, only a little more than five percent of cases saw the defendants absolved from charges. The other four and a half percent ended in a variety of ways: with orders from Milan to stop proceedings, with cases cancelled without surviving explanation, or with *gratia* granted by the Visconti. When convictions *in absentia* are not considered, we find that 86.5 percent of trials ended in conviction.[1]

These conviction rates suggest an important distinction between those periods in which accusation was the dominant procedure and those in which inquisition was the regular trial procedure. At Perugia in the thirteenth century, very high rates of acquittal—between 80 percent and 90 percent—reflected the realities of accusatorial procedure, in which parties frequently withdrew their complaints before sentencing.[2] For a fee, the complainant in an *accusatio* could withdraw the charge at any moment before the reading of the verdict, thus avoiding sentencing. This made accusatorial procedure a useful tool in private conflicts and disputes, because the complainants could inconvenience and humiliate their opponents publicly in court and air their grievances, and even force the construction of a peace agreement, without losing control of the process.

However, the type of trial procedure used did not necessarily predict conviction rates: Sarah Blanshei's study of late thirteenth century Bologna found high acquittal rates in inquisition trials. In her sample, acquittals and suspensions of trials accounted for 35 percent of trials from 1285–1296, and in the early fourteenth century those numbers were even higher: 46.6 percent for

1 Of a sample of 357 cases where the defendants appeared in court (regardless of plea) and where the notary recorded the outcome of the trial.

2 Vallerani, "Procedure and Justice," 33.

1304–1326.[3] These numbers also include trial suspensions; if those are removed, then evidence from inquisition trials in Bologna reflects a 28.8 percent acquittal rate.[4] Conviction rates also vary significantly. Early fourteenth century Bologna saw 45.3 percent of trials ending in conviction, including bans for contumacy. In early fifteenth century Florence, Laura Stern found that conviction rates for *ex officio* trials (46.4 percent) were lower than those for trials that originated in public fame denunications (80 percent).[5] Other courts that operated primarily with *inquisitio* have acquittal and conviction rates similar to that of late fourteenth-century Reggio. In mid-fifteenth century Mantua, assault constituted the most frequent crime, and the absolution rate from that charge was 11 percent, while approximately 41 percent of defendants charged were contumacious and 48 percent were convicted.[6]

While these comparisons offer useful perspective, they span a great deal of time—approximately 150 years—and involve cities with vast political differences. High conviction rates were shaped by a number of factors, some of which were localized. Confessions were desirable because they allowed the judge to convict with irrefutable full proof, which was obviously far preferable to deciding a case based on circumstantial evidence, and they could be encouraged in different ways. Torture, which was implemented with different criteria in different times and places, surely played a role in influencing confession and conviction rates, though the nature of the surviving evidence makes it difficult to define exactly what that role was. At Reggio, as in many other Italian cities, confessions were also encouraged with a one-quarter mitigation of pecuniary penalties if the defendants confessed. For crimes that did not carry a capital penalty, confession could be part of a defense strategy to lower fines and limit the damage of conviction. Modern criminal justice systems like that of the United States have similarly high conviction rates when the defendants go to trial, and also rely heavily on confession, even to the point of negotiating with defendants to obtain them. But medieval mitigation was not equivalent to modern plea bargaining: the medieval court did not negotiate with defendants to elicit a guilty plea, and the amount of the mitigation was set by statute.

3 Blanshei, *Politics and Justice*, 338.

4 Blanshei, *Politics and Justice*, 598, Table v.2.

5 Stern, *Criminal Law System*, 204, Table 2 and 204–208.

6 Trevor Dean and David Chambers, *Clean Hands and Rough Justice: An Investigating Magistrate in Renaissance Italy* (Ann Arbor: University of Michigan Press, 1997), 66–67, Table 1. These statistics were calculated from the numbers provided in "Table 1: Sentences in the Mantuan Podestà's Court, 1448–63."

Still, confession provided one of the few moments in the inquisitorial trial at Reggio where the defendant could shape the sentence.

The Weighing of the Evidence: Statutory Proofs vs. Judicial Discretion

We do not know how or why the judges at Reggio Emilia reached their verdicts, and there is no scholarly consensus on the nature of judicial discretion in the late medieval court. Judges left no justifications or explanations of their verdicts. Indeed, jurists like Hostiensis, Durantis, Baldus, and Johannes Andreae actively discouraged them from doing so in order to avoid appeals, because erroneous legal reasoning could nullify an entire process.[7] John Langbein argued that the medieval judge had little if any discretion by virtue of the theoretical basis of the judge's authority: when the earlier Germanic system of "non-rational" proofs was abolished at the Fourth Lateran Council, and inquisition replaced trials by ordeal, the judge's decision replaced the judgment of God. The system of statutory proofs was the answer to this dilemma. By disallowing judicial discretion, the determination of guilt or innocence was determined by an objective standard, difficult to meet and applicable to everyone.[8]

But in practice, this could present problems, and a judge might be persuaded of guilt or innocence even though the proof did not technically meet the standards. Thirteenth-century jurists took up this question. What if, asked Thomas de Piperata, a judge knows a man is innocent, but the evidence is enough to prove him guilty? Can the judge absolve him? Jacques de Révigny, professor of law in Orléans, perhaps echoed a dominant view when he insisted that the judge must base his decision on the proof, arguing that the judge is sworn to obey the law, and he must uphold that oath. After all, he observed, "if the judge could judge according to conscience, he would always feign conscience, whereas conscience should not be feigned."[9] Even without this blatant

7 Julius Kirshner, "*Consilia* as Authority in Late Medieval Italy" in *Legal Consulting in the Civil Law Tradition*, eds. Mario Ascheri, Ingrid Baumgärtner and Julius Kirshner. Studies in Comparative Legal History. (Berkley: University of California Press, 1999), 125. At Reggio Emilia, no appeal was possible from a criminal process. The defendant's only recourse lay either in requesting clemency from Milan or perhaps in making a complaint at the time of the judge's syndication.

8 Langbein, *Torture and the Law of Proof*, 6–8.

9 "Si iudex posset iudicare secundum conscientiam, semper fingeret conscientiam ubi conscientia non esset fingenda," quoted in Padoa-Schioppa, *Italia ed Europa nella storia del diritto*, 272–273.

distrust, another weighty issue hung in the balance: if the judge decides a case based on personal knowledge that was not introduced as evidence, has he not become a witness in the very case that he is called upon to decide? A long-standing maxim of Roman law held that a judge cannot be a party to a case. Jurists like Bartolus and Baldus were very clear on this point.[10]

Yet the evaluation of circumstantial evidence called upon the judge to make decisions about its reliability, and there was substantial debate among jurists convictions based on *indicia*. Gandinus argued that a judge could convict on the basis of undoubted circumstantial evidence.[11] The issue was one of conscience, which traditionally meant the judge's awareness of facts pertinent to the trial but not in evidence. However Gandinus assimiliated this, "in a manner more or less surreptitious," with the discretionary power of the judge. This allowed the judge to consider the defendant's *fama*, and also to examine his aspect using his own observation, not relying upon evidence that had been introduced. For Gandinus, the "conscience" of the judge signified his ability and perhaps his duty to choose which evidence is significant and to evaluate the defendant's person through his own observation.[12] Vallerani observed that Gandinus's definition of conscience merges the concept together with statutory *arbitrium*.[13] Bartolus traced the judge's decision to convict through stages of belief: from not knowing (*nescientia*), to forming doubt (*dubitatio*), to developing a suspicion (*suspicatio*), and then, considering the arguments before him, forming an opinion (*opinio*); finally, the judge is fully persuaded, and his belief (*credas*) in guilt or innocence is established.[14]

Once again, in practice, it proves difficult to make broad generalizations. Judicial discretion, or *arbitrium*, had a range of interpretations. In Venice, which operated outside the norms of the *ius commune, arbitrium* in this sense

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10 Padoa-Schioppa, *Italia ed Europa nella storia del diritto*, 275–277. There were dissenters from this view. John Wycliff would object to this stance on the grounds that a judge should not violate divine law by rendering a sentence he knows to be unjust. It would be better, he said, for the judge to recuse himself and stand as witness in the case before another judge. But this was not the common opinion.

11 Fraher, "Conviction according to Conscience," 41–43. Fraher examined this debate on judicial discretion from the time of Lateran IV in 1215 to the publication of Durantis's *Speculum iudiciale* around 1270, focusing particularly on the treatise of Thomas de Piperata, whose *Tractatus de fama* was a source for Gandinus's *Tractatus de maleficiis*.

12 Vallerani, "Procedure and Justice," 55.

13 Vallerani, "Procedure and Justice," 52–57.

14 "... tunc dicitur perfecta credulitas seu perfecta probatio, nec est tunc causa dubia ... Nam prout dicit credas, loquitur de plena fide et plena probatione, qua ad perfectam credulitatem adducitur iudex." Quoted in Lévy, *La hiérarchie des preuves*, 28.

of decisions made by the judge's own conscience was a fundamental component of the justice system. Indeed the Venetian interpretation of discretion was so broad as to allow judges to consider acts as crimes that had never before been declared criminal.[15] An open allowance of conviction based upon conscience, however, had inherent dangers and required deep trust in the magistrates. Florence, which (like most Italian cities) operated in the world of the *ius commune*, allowed discretion in a more limited way. Discretion in Florence meant that the judge could use extraordinary measures, including evaluation of circumstantial evidence or torture, to inform his decisions, but "[t]he closest Florentine judges got to possessing the power of discretion as conscience was their power to use analogy and precedent."[16] *Arbitrium* in conviction was certainly not fully conceded in Reggio's statutes, which required judges to consider all the proofs available to them. Only in a few instances did Reggio's statutes mandate particular thresholds of proof necessary for a conviction, though given the legal education of the judges at Reggio, we can imagine they were well familiar with the concepts. And as we have seen, judges occasionally seemed moved to convict in cases where the evidence presented would not meet the standards of full proof.[17]

Contumacy, Conviction *in absentia*, and the Criminal Ban

Almost half the cited defendants failed to appear to answer charges. The contumacy rate at Reggio averaged approximately forty eight percent at the end of the fourteenth century.[18] Reggio was not unusual in this respect: trial registers from the court of the Podestà at Bologna also yield high numbers in the late fourteenth century, fifty two percent in 1372, and forty four percent in 1393.[19]

15 Stern, "Politics and Law in Renaissance Florence and Venice," 219. Stern observed that the growth of discretion in the Venetian system increased together with aristocratic domination of the government.

16 Stern, "Politics and Law in Renaissance Florence and Venice," 215–216.

17 As in the case of Antonius de Albrixiis, discussed above in Chapter Four, ASRe, *Giudiziario*, Libri delle denunzie, April 28, 1403, vol. 20, fols. 1–3v.

18 On contumacy at Reggio Emilia and the problem of conviction *in absentia*, see Joanna Carraway, "Contumacy, Defense Strategy, and Criminal Law in Late Medieval Italy." *Law and History Review* 29.1 (February 2011): 99–132.

19 These statistics are calculated from the surviving trials in ASB, Curia del Podestà, Giudici ad maleficia, Libri inquisitionum et testium, b.214, 1372 and b.264, 1393. The 1372 sample is of 88 defendants, while the 1393 sample includes outcomes for 70 defendants.

Florence in the 1380's had a contumacy rate of fifty six percent,[20] and the fifteenth century saw contumacy rates averaging between two-thirds and three-fourths of recorded cases, with four-fifths in 1456.[21]

The widespread nature of the problem with contumacy underlines the limited reach of the podesterial court, both in the urban sphere and in the contado. In Siena, population growth that outstripped available policing resources aggravated the high rates of contumacy,[22] while stronger policing in Florence in the early fifteenth century led to a drop in contumacy rates.[23] Population growth was obviously not a primary issue at Reggio Emilia, but the limited policing resources combined with strong pools of autonomy in the contado certainly contributed to the problem.

Recent scholarship has suggested that contumacy and its legal remedy, the criminal ban, served dispute resolution by allowing a "cooling off" period between affected parties, and thus perhaps limiting the vendetta. In this view, contumacy could even be desirable from the court's perspective, allowing judges to avoid rendering verdicts in contentious or politically volatile cases.[24] Certainly contumacy could play a role inside a larger defense strategy, but medieval jurists did not see the problem this way. Contumacy did not serve the "public interest," which was the focus of the criminal law. Therefore it needed a remedy.

The solution was conviction *in absentia* by holding contumacy equivalent to a confession. Legally and technically this was problematic, because there was no formal judgment (*res iudicata*). Should defendants be convicted if they had no opportunity to present a defense, and no trial? Though it did conflict with Roman law interpretations, the response in municipal statutes tended to be affirmative, and conviction *in absentia* had become common practice at the end of the fourteenth century. The accused was to be convicted "just as though he confessed and was convicted of the crime for which he was blamed."[25]

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20 Stern, *Criminal Law System*, 229.

21 Dean and Chambers, *Clean Hands and Rough Justice*, 65.

22 Pazzaglini, *The Criminal Ban of the Sienese Commune*, 3–4.

23 Stern, *Criminal Law System*, 229. Stern found contumacy rates of 58.3 percent from 1352–55, and 55.6 percent from 1380–83. However the numbers in the early fifteenth century were lower: a sample from 1425–28 shows a reduction to 42.4 percent, which Stern attributed in part to a more effective criminal justice system and a more effective police force Stern, *Criminal Law System*, 210).

24 Daniel Lord Smail, *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille, 1264–1423* (Ithaca: Cornell University Press, 2003), 116.

25 BSR, Statuti, ms. 77, fol. 52r: "…tamquam confessus et convictus de delicto de quo inculpatur."

The statutes of Reggio Emilia allowed it,[26] as did statutes from Ravenna,[27] Florence,[28] and Bologna,[29] to name only a few. Most contumacious felons were then placed under a *bannum pro maleficio*, a criminal ban.

The proclamation of the criminal ban served as an assertion of jurisdiction, and it took place in several stages. Immediately after the defendant's failure to appear, a *bannum simplex* warned the accused to appear before the judge within a certain number of days. If the defendant persisted in contumacy, the *bannum conditionale* was issued, which effectively placed the accused under ban unless he or she appeared before the judge. The proclamation of the *bannum conditionale* set forth the terms of the ban, including the amount of the ban, whether the defendant's goods were to be confiscated, and whether the ban was *in persona*, meaning the defendant's person could be assaulted with impunity. A term was given within which the defendant could appear before the judge and avoid the consequences of the ban (but not the penalty of the crime). The final step took place when the *bannum conditionale* expired.[30] The ban had to be entered into the *Libri bannitorum* to be considered valid.[31] Those banned for major felonies were set beyond the protection of the law.

Banniti pro maleficia were often able to live outside the reach of the law, finding shelter in the contado or escaping to neighboring towns or territories. In spite of officers charged with maintaining order outside the city, like the *Capitano del devieto* at Reggio, there was no compelling police presence outside the city, and though statutory regulations required communites to aid in catching *banniti*, people were reluctant to involve themselves in these matters.[32] The statutes show increasing concern with this problem, as the pecuniary penalites of the 1335/71 and 1392 redactions for aiding *banniti* were replaced in 1411 with severe new penalties: those harboring banned persons or rebels should suffer the same penalty that the fugitive faced.[33] One rare example of the enforcement of this statute can be found in 1400, when a tavern-keeper was

26 BSR, Statuti, ms. 77, fol. 52r: "... si non comparverit habebitur pro confesso et convicto vere et legitime ..."

27 Dean, *Crime and Justice*, 92.

28 Stern, *Criminal Law System*, 210.

29 Blanshei, *Politics and Justice*, 485.

30 BSR, Statuti, ms. 77, fol. 52r: "De modo citandi illos contra quos proceditur."

31 Desidero Cavalca, *Il Bando nella prassi e nella dottrina giuridica medievale* (Milan: Giuffrè, 1978), 173.

32 Blanshei, "Crime and Law Enforcement," 124.

33 BSR, Statuti, ms. 77, fol. 57r. If that punishment were corporal, then the punishment would be determined by the *arbitrium* of the Podestà.

executed for receiving in his home men who had been banned for life from the commune, and giving them assistance.[34]

Like other procedural elements, procedures concerning the criminal ban were codified in local statutes, and there were significant variations in form and in consequence, reflecting diverse local useages. At Reggio, the *bannum pro maleficio* could be a pecuniary ban, lifted if the felon paid the penalty,[35] or it could be further designated as *in avere*, meaning that the property of the felon was subject to confiscation. In its most serious form, the ban was proclaimed *in persona*, meaning the person could be assaulted with impunity. An allowable defense to a charge of murder was proof that the victim was under this type of ban.[36]

Property confiscation was not part of all criminal bans, but it was specifically indicated for some of them when the ban was pronounced *in avere*. Confiscations were paid to the treasury of the Visconti, not the city.[37] In practice, it was possible for a convicted felon to protect assets even when placed under ban, because the same laws that protected heirs and creditors also protected families of the *banniti*.[38] The confiscation process began immediately on the day the crime was discovered, and thus technically before the defendant was placed under ban. Probably this was an effort to freeze and inventory the assets. An inventory of all the movable and immovable property of the accused was to be completed within two days of the discovery of the crime, usually by the foreign notary of the criminal judge. The list was then sent for approval to the *anziani* or city council. Within eight days, the list was sent to Milan to the treasury officials.

After the property was inventoried, the Podestà ordered a public proclamation allowing any creditor one month to appear before the Podestà and produce a list of everything that she or he claimed to be owed by the condemned person (three months, if the creditor lived outside the jurisdiction, and six months if outside the territory of Milan). The first creditors were the families of the accused. Women could petition for the restitution of their dowries,

34 This case also demonstrates that the penalty in the 1411 statutes was in force before that redaction, as the 1392 and 1335/1371 redactions institute pecuniary penalties, but here the judge was allowed to use his discretion to determine the penalty for harboring fugitives. The trial has been lost but the charge was restated in the record of his condemnation. ASRe, *Giudiziario*, Sentenze e condanne, no date but 1400, reg. 7, fol. 11.

35 BSR, Statuti, ms. 77, fol. 53r–v.

36 Carraway, "Contumacy, Defense Strategy, and Criminal Law," 124–128.

37 ASRe, *Comune*, Registri dei decreti, reg. 1385–1425, fol. 17r–v.

38 Carraway, "Contumacy, Defense Strategy and Criminal Law," 121–124.

and children could petition for their due inheritance.[39] These claims were well established in law and protected by statute. The *pars filii*—the idea that the son had an interest in the patrimony even while the father still lived—was very much part of the medieval *ius proprium*, and the minimum provision due to heirs, the *legitima*, could not be denied even by testament.[40] (Of course, this could cut both ways—if the son were the felon, his interest in the patrimony could be liable for confiscation as payment of the condemnation in a criminal matter.)[41] Debts, especially those owed to family members, protected the property of the contumacious felon.[42] No public instrument was required to prove a debt at Reggio Emilia: the process rested on *fama*, and legitimate proof of a debt consisted of the oath of two witnesses of good *fama et opinio*. The confiscators' interests were protected by the presence of two advocates representing Milan during the evaluation process and during the hearing of claims made on the property, but the burden of proof was theirs too, and they had to sue if fraud were suspected.

The most serious potential consequence of the ban was outlawry, which removed defendants from any protection of the law and meant they could be killed with impunity. This was of concern both technically—did it open the door to allow the murder of even those under ban for lesser crimes?—and morally, because such a policy could be understood to sanction murder.[43] The predominant opinion, however, was that very much like executioners, the

39 ASRe, *Giudiziario*, Atti e processi, n.d. but 1393, fols. 251r–256v. This petition, also from 1393, concerns the property of Guido and Cresembene de Albinea, who were banned from the commune. Lucia, wife of the banned Guido de Albinea, successfully petitioned the court for the restitution of her dowry. The mother of Guido and Cresembene was granted seventy florins, part of her dowry that had been assigned to her sons' use. Lucia's sons as well were granted the "first third" of the goods, after Lucia's dowry was subtracted. On women's legal rights and dowry restitution, see especially Julius Kirshner, "Wives' Claims against Insolvent Husbands in Late Medieval Italy," in *Women of the Medieval World: Essays in Honor of John H. Mundy*, eds. Julius Kirshner and Suzanne F. Wemple (New York: Basil Blackwell, 1985), 256–303. The rights of heirs were clarified under the rubric, "*Quod ius creditorum et descendencium sit salvum*." BSR, Statuti, ms. 77, fol. 60r.

40 Thomas Kuehn, *Heirs, Kin and Creditors in Renaissance Florence* (Cambridge: Cambridge University Press, 2008), 43, 70, and 189. This proposition that the son had claim on the goods of a living father beyond the *peculium* was debated. For a full discussion of this problem, see Manlio Bellomo, *Problemi di diritto familiare nell'età dei comuni: beni paterni e 'pars filii'* (Milan: Giuffrè, 1968), especially 111–153.

41 Bellomo, *Problemi di diritto*, 135.

42 Smail, *The Consumption of Justice*, 203.

43 Pazzaglini, *The Criminal Ban of the Sienese Commune*, 60. Gandinus recognized that a statute allowing the murder of banned people with impunity might be strictly interpreted

murderers of *banniti* served the public interest. In fact, in his support of this position, Nellus da San Gimigniano directly referenced the *Ut fame*.[44] Local variation also characterized the category of outlawry. Reggio allowed *banniti* to be killed with impunity in the case of some capital felonies: homicide, arson, robbery, theft, treason, and kidnapping.[45] At Perugia, people convicted of the lesser crime of assault with bloodshed could be killed with impunity; other cities like Vercelli allowed death only in cases of capital crimes.[46] Venice even experimented, though not particularly successfully, with laws that allowed an outlaw to kill another outlaw in return for remission of his ban.[47] The concept of the public interest in criminal justice, which was the foundation of inquisitorial procedure, alleviated even the moral consequences of killing.

For the banned felon, virtually all avenues to reintegration began with the existence of a peace agreement sworn with the victim's family. Again, significant local variation was the rule. At Bergamo, crimes committed without premeditation were eligible for relaxation of the ban.[48] At Bologna in the thirteenth century, bans were sometimes cancelled based upon *consilia* that claimed procedural violations, or based on the existence of peace agreements.[49] A fine had to be paid, though the terms of its payment could be adjusted over time, allowing a very small amount *per annum*. At Reggio, a year had to elapse between the crime and the first possiblity of reintegration. At that point, two conditions were necessary: a supplication to the lords of Milan to have the ban lifted and

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to "permit the slaying of any *bannitus* condemned for a crime, including a non-capital offense, on account of his contumacy to the court."

44 Nellus, 2, 1, q.1. fol. 364v: "Primo ergo quaero, an valeat statutum quo cavetur bannitum pro maleficio posse impune occidi. Haec quaestio est multum nota, et trita, et propterea in ea non instabo. Concludens quod cum tale statutum fiat ad publicam utilitatem, tum ut homines a delinquendo terreantur, scientes se postea posse impune occidi, tum ut maleficia non remaneant impunita . . . dicendum est tale statutum valere."

45 A statute concerning the same issue appears in the second book of the 1335/1371 redaction, which primarily concerns the offices of the commune, and the first book of the 1392 redaction, and was moved to Book Three in the 1411 redaction. ASRe, *Comune*, Statuti del 1335/1371, fol. 21v; ASRe, *Comune*, Statuti del 1392, fol. 146r; BSR, Statuti, ms. 77, fol. 17v.

46 Dean, *Crime and Justice*, 105.

47 Gaetano Cozzi, "Authority and the Law in Renaissance Venice," in *Renaissance Venice*, ed. John Hale (London: Faber and Faber 1973), 319.

48 Vallerani, "Peace Accord and Trial," 186.

49 Giuliano Milani, "Prime note su disciplina e pratica del bando a Bologna attorno alla metà del XIII secolo," *Mélanges de l'Ecole française de Rome. Moyen-Age, Temps moderns* 109 (1997): 511–13.

the sentence canceled, and a formal peace agreement with the victim's family. In times of crisis, the ban might also be lifted in return for military service.[50]

Judicial Discretion in Punishment

For those defendants who appeared to answer charges before the criminal judge, punishment was generally set by the statutes, though increasingly in the fourteenth and early fifteenth century, some room was occasionally allowed for the judge's discretion in punishment. Laurent Mayali traced the development of discretion in punishment among the jurists from the mid-twelfth to the early thirteenth century, showing that there was no clear agreement about discretionary punishment among the jurists. The issue was handled differently by Gratian, by the Justinian Code, and by papal decretals, and twelfth and thirteenth century jurists in turn interpreted these sources differently.[51] In general, judges were bound less and less strictly to statutory penalties. To jurists like John of Faenza, the central point was that the sentence, statutory or not, had to be justified.[52] Canonists and civilians came to agree upon a distinction between ordinary and extraordinary penalties: ordinary penalties were fixed by the canons or laws, while extraordinary punishments were determined by the *arbitrium* of the judge.[53] The jurist Huguccio developed a theory of discretionary punishment which declared that punishment should be fixed according to the seven criteria for consideration set forth in the *Digest*: "the motive, the person, the place, the time, the quality, the quantity and the outcome,"[54] all of which elements (except motive) constituted the *substantialia*, which were crucial components of the denunciation. Allowing judicial discretion was politically very sensitive, and efforts to limit or expand the *arbitrium* of

50 ASRe, *Comune*, Registri dei decreti, reg. 1372–1375, April 2, 1373. In 1373, for example, a decree lifted the ban for anyone at Reggio banned for any crime including murder, excepting only treason, counterfeiting, or rebellion. The person must have been under ban for a year and must have made peace with the victim or with the heirs and friends of the victim ("heredibus et amicis defunctorum"). The term of service owed depended on the reason for the ban, and this term of service could be halved if the *bannitus* brought another person into service with him.

51 Mayali, "The Concept of Discretionary Punishment," 303.

52 Mayali, "The Concept of Discretionary Punishment," 310.

53 Mayali, "The Concept of Discretionary Punishment," 305.

54 Dig. 48.19.16, quoted in Mayali, "The Concept of Discretionary Punishment," 312, and 312 n. 68.

the judges by the councils were caught up in the political struggles of the commune.[55]

Two trends are noticeable in the statutory punishments at Reggio Emilia in this period: increased allowance for judicial *arbitrium*, and an increase in the complexity and sometimes the severity of punishment. The former was part of a general tendency in the fourteenth and fifteenth century to move towards discretionary punishment, which we find also elsewhere. In Modena in 1404, Niccolò III d'Este allowed the Podestà to penalize convicted criminals according to his judgment, and not as specifically set forth in the statutes, writing, "experience teaches that many crimes are committed that require harsher punishment than the law provides…"[56] Bologna saw a shift to increased judicial *arbitrium* also at the end of the fourteenth century.[57] While the foreign rectors at Reggio were bound by their oaths to observe the statutes, during the fourteenth century, the statutes themselves allowed increasing room for *arbitrium* to determine sentences. The 1411 statutes, redacted after the city became part of the Este dominion, shows a marked increase in allowances of *arbitrium* to determine punishments. Statutes which allowed *arbitrium* in sentencing increased during the fourteenth century from seven in the 1335/71 redaction to at least twenty three in the 1411 redaction.

When *arbitrium* was conceded to the Podestà in the 1335/71 and 1392 redactions, there were careful constraints. For example, under the statute "Concerning the penalty of he who throws someone on the ground in anger and strikes him with his feet," the judge had a window of twenty five pounds to penalize the culprit as seemed fitting for the particular circumstance of the crime, except that "lords can strike their grooms and servants without penalty, [but] only if they do not make them bleed."[58] The seven statutes in the 1335/71

55 See, for example, the situation at Perugia, in Vallerani, "How the inquisition is constructed," 238–241.

56 Quoted in Dean and Chambers, *Clean Hands and Rough Justice*, 26.

57 Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming).

58 ASRe, *Comune*, Statuti del 1335/1371, fol. 30v. "De pena illius qui proiecerit aliquem in terra irato animo et eum percuserit cum pedibus. . . . Item, si quis aliquem in terra proiecerit irato animo et eum cum pedibus percusserit si fuerit miles vel filius militis puniatur in decem libras Rexanorum. Si fuerit pedes in centum solidos Rexanorum. Et quod potestas possit condempnare talem de iniquietem usque in quantitatem viginti quinque libras Rexanorum inspecta qualitate personarum salvo quod domini possint percutere scutiferos et pedissequas sine pena dummodo non faciant eis sanguinem." The 1392 redaction includes the same statute, adding only the final caveat, "idem, inteligatur de qualibet percussione facta inter domesticas personas si illud sibi non reputaverint ad iniuriam." ASRe, *Comune*, Statuti del 1392, fol. 151r.

redaction giving arbitrium to the Podestà include blasphemy[59] and assaults in which a person was pushed to the ground and kicked.[60] His *arbitrium* could also be used to increase penalties for theft,[61] or to mitigate or increase penalties for those who built and held others captive in a private jail.[62] Two statutes allowed judicial discretion in determining penalties for speaking out against the actions of the commune or the lord,[63] and for speaking in an unbecoming way of the lords of Reggio, or the Podestà, or the commune itself.[64] Perhaps most significantly, he had the authority to determine a penalty when the statutes did not provide one.[65]

The 1392 redaction added judicial discretion in punishment to the statute "Concerning the penalty of he who says injurious words to anyone,"[66] which was changed to include a final sentence allowing the Podestà the authority to increase the penalty up to 25 pounds imperial, "*inspecta condictione iniuriam passi*."[67] The 1392 redaction also added a clause to the statutes on false testimony that ordered anyone falsifying the seal of the *signore* of Reggio to suffer capital punishment, stating further that if someone falsified the seal of another party, they should be punished according to the *arbitrium* of the Podestà.[68]

An example of the limited nature of discretion in punishment that the statutes ceded to the Podestà is found in the law on blasphemy. The 1335 and 1392 statutes gave the judge perimeters for the punishment, which he could then determine after considering the individual who was charged:[69]

> Concerning the penalty of he who blasphemes God or the Blessed Virgin or other Saints. Rubric. Item, if anyone blasphemes or *speaks ill of* God or the Blessed Virgin Mary, or shows her a fish [sic] or says any other vulgarity (*turpia*) concerning God, the Blessed Virgin Mary or the Saints, let him be punished in the amount of ten pounds *R.L.* and for every other Saint, a hundred soldi *R.L.*, and if he does not pay the said condemnation within ten days, on the third day let his tongue be cut out, or let him be beaten,

59 ASRe, *Comune*, Statuti del 1335/1371, fol. 27v and ASRe, *Comune*, Statuti del 1392, fol. 148v.
60 ASRe, *Comune*, Statuti del 1335/1371, fol. 30v.
61 ASRe, *Comune*, Statuti del 1335/1371, fol. 30v.
62 ASRe, *Comune*, Statuti del 1335/1371, fol. 36r; ASRe, *Comune*, Statuti del 1392, fol. 153v.
63 ASRe, *Comune*, Statuti del 1335/1371, fol. 37v.
64 ASRe, *Comune*, Statuti del 1335/1371, fol. 38r.
65 ASRe, *Comune*, Statuti del 1335/1371, fol. 32v.
66 ASRe, *Comune*, Statuti del 1335/1371, fol. 27v.
67 ASRe, *Comune*, Statuti del 1392, fol. 149r.
68 ASRe, *Comune*, Statuti del 1392, fol. 152v.
69 ASRe, *Comune*, Statuti del 1335/1371, fol. 27v.

> with the nature of the words and the person considered. And whoever is the accuser should have half the [money from] the penalty.[70]

If the blasphemer did not pay the penalty, the judge had to inflict corporal punishment but he could observe the nature of the crime and the "quality" of the person and use this information to influence his decision. His discretion only played a role in determining how severe the corporal punishment should be in the event of non-payment.

It is unclear whether judges always adhered closely to those limits placed on their ability to assign discretionary punishments. For example, in spite of the statute, penalties imposed for blasphemy varied widely. Paulus de Panzano—who was further noted as a man of *mala fama*—was sentenced to pay 25 pounds within ten days or have his tongue cut out and endure a public beating.[71] But he was the only defendant charged with this crime to be threatened with corporal punishment. He is also the only blasphemy defendant designated as *mala fama* in the denunciation, and he is the only foreign defendant (he came from Modena). Other men accused of the same crime were sentenced to pay seven pounds,[72] three pounds[73] or five pounds.[74] Even considering the mitigation for confession and for poverty, it is difficult to reconcile those amounts. If Niccolò d'Este was concerned that the court should have discretion to penalize more heavily, it seems that discretion could also be used to treat some defendants more lightly.

In both the 1335/71 and 1392 redactions, the most important concession to the foreign rectors' *arbitrium* lay in their power to decide penalties for crimes not discussed in the statutes. In such cases, decisions were to be based on similar laws, so that the defendant would be punished "in the measure which is contained in that chapter to which it can best and better be compared, and not otherwise . . . and if no similar statute can be found to which the upcoming

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70 ASRe, *Comune*, Statuti del 1392, fol. 148v: "De pena illius qui blasfemaverit Deum vel Beatam Virginem vel alios Sanctos. Rubrica. Item, si quis deum vel Beatam Virginem Mariam blasfemaverit vel malgradaverit vel siccam ei ostenderit vel alia turpia de Deo, Beata Maria vel Sanctis dixerit puniatur in decem libras Rexanorum et pro quolibet alio Sancto vel Santa in centum soldos Rexanorum et si dictam condempnationem non solverit infra x dies tertiam diem abscidatur ei lingua vel verberetur inspecta qualitate verborum et persone. Et quilibet sit accusator et habeat medietatem bampni."

71 ASRe, *Giudiziario*, Libri delle denunzie, May 14, 1387, vol. 8, fol. 93.

72 ASRe, *Giudiziario*, Libri delle denunzie, Feb. 14 1402, vol. 19, fols. 33r–34v, and ASRe, *Giudiziario*, Libri delle denunzie, Feb. 20, 1408, vol. 21, fol. 79.

73 ASRe, *Giudiziario*, Libri delle denunzie, Nov. 10, 1407, vol. 12, fol. 77.

74 ASRe, *Giudiziario*, Libri delle denunzie, Apr. 4, 1407, vol. 21, fol. 67.

case can be compared, then and in that case the penalty should be imposed by the discretion of the Podestà, after the quality of the crime and the character of the delinquent is considered, and [the quality of] the person against whom the crime was committed."[75] In the 1392 manuscript, this statute is highlighted with *maniculae*, pointing hands that draw attention to the statute on the page, and marginal notes read "*arbitria*" and "*ubi non est certa pena expressa arbitrio potestatis relinquitur*." This sentiment seems far from the reluctance of the great republican communes of the thirteenth century to concede the power of *arbitrium* to the Podestà.[76]

The infrequent references to *arbitrium* and the limits placed upon it in the fourteenth century statutes make it all the more striking that the 1411 redaction includes judicial *arbitrium* in no less than twenty three criminal statutes. In some cases, judicial discretion still occurred within limits imposed by the statutes. The penalty for sodomy and incest, for example, ordered that the adult culprit should be immolated but minors who "can be excused because of their age" should be beaten and punished corporally (*in persona*) to a degree determined by the *arbitrium* of the Podestà.[77] The punishment for witchcraft, which had no specific statute in the two earlier redactions, was left entirely to the judgment of the Podestà in the 1411 redaction, which declares that "Male and female witches should be punished with pecuniary and corporal punishments (*in avere et persona*) by the judgment of the Podestà, after the quality of the

75 ASRe, *Comune*, Statuti del 1392, fol. 152v: "De modo tenendo per potestatem et eius curiam in puniendo dellinquentes quando penna [sic] illius non veniat terminata in statutis et ut procedatur de similibus ad simillia. Rubrica. Statuimus et ordinavimus inviollabiliter esse observandum quod si aliquis casus venerit qui non sit comprehensus in superscriptis vel infrascriptis capitulis et inde certa penna non sit per statutum seu capitulum determinata quod ille qui fecerit malleficium vel quaxi de quo penna non fuerit ordinata puniatur in ea quantitate que continetur in ipso capitulo cui magis et mellius possit assimillari et non alliter et si contrafactum fuerit non teneatur ipso iure quod factum fuerit. Et hoc servari debeat sine tenore et quod si nullum statutum simille inveniatur cui casus obveniens assimillari possit tunc et eo casu imponatur penna arbitrio potestatis inspecta quallitate dellicti et persone dellinquentis et contra quam dellinquitur."

76 Vallerani, "How the Inquisition is Constructed," 238–239.

77 BSR Statuti, ms. 77, fol. 55v: "De pena sodomite et incestus. Si quis inciderit in crimen sodomie igne comburatur ita quod statum moriatur intelligendo agentem et pacientem in tali crimen incidisse et pena predicta punire debet nisi etas eos excusaret ut quia sint minores xiiii xiiii [sic] quo casu fustigentur et puniantur personaliter arbitrio potestatis comittens vero incestum usque ad tertium gradum computando gradum secundum ius canonicum capite puniatur."

deed and the condition of the persons is inspected."[78] Marginal notations in the manuscript indicate most of these statutes with a note of *arbitrio*.[79]

The second trend visible in the statutes is a strengthening of the severity of penalties. While the penalty for arson remained the same in all three redactions, the 1411 redaction was more complex, giving detailed orders on the payment of damages, and noting that the penalty stood whether the structure in question burned down entirely or was only damaged.[80] The statute on homicide was augmented to include not only a death sentence, but also instructions for the confiscation of property (which was clearly already in practice during the fourteenth century). Homicide law in the 1335/71 redaction consisted of only two lines: "If anyone kills anyone, and if he can be captured and if he should come to the hands of the Podestà, the Podestà is obliged to have him killed by cutting off his head."[81] The 1411 redaction, which details property law and bans, incorporated signorial decrees on the treatment of the goods of persons banned for homicide like those made by Giangaleazzo Visconti in 1387.[82] In other cases, however, there were significant increases in penalties, in particular crimes involving social disorder. For example, the penalties for "he who runs to a fight" increased from a relatively modest fine of 25 pounds *R.L.* for a knight and 10 pounds for a footsoldier in the 1335/71 and 1392 redactions, to the loss of a foot in the 1411 redaction (if the culprit was a foreigner).[83]

The change from the 1392 statutes to the 1411 redaction, in both the allowance of *arbitrium* and possibly in the severity of punishments, appears sudden, but this is probably artificial. What appears to be a new severity may be in fact simply represent an articulation of existing practice. Witchcraft, for example,

78 BSR Statuti, ms. 77, fol. 56v: "De maleficis. Malefici et malefice arbitro potestatis puniantur in haveri et persona inspecta qualitate facti et conditione personarum."

79 For some crimes, the penalties became much harsher during the fourteenth century and sometimes *arbitrium* was removed from the statutes instead of added. As the penalty for theft moved from a pecuniary fine to corporal punishment, judicial discretion disappeared from the statute, only to be reinstituted more broadly in the 1411 redaction.

80 ASRe, *Comune*, Statuti del 1335/1371, fol. 29v; ASRe, *Comune*, Statuti del 1392, fol. 150r; BSR Statuti, ms. 77, fol. 59r–v.

81 ASRe, *Comune*, Statuti del 1335/1371, fol. 32r: "Si quis aliquem occiderit et capi poterit et in fortiam potestatis venerit teneatur potestas eum occidi facere amputando ei caput."

82 ASRe, *Comune*, Registri dei decreti, reg. 1385–1425, September 1, 1385, 17r–v. The confiscation of goods for homicide was common in Italian communes during the thirteenth and fourteenth century, and probably was common practice at Reggio before it was included in the statutes.

83 BSR Statuti, ms. 77, fol. 63v.

was penalized corporally long before the 1411 redaction.[84] The 1411 redaction reflects the new Este control of the city, but it seems clear the redaction took into account laws and practices already in force in the commune but not yet codified in the statutes.[85] The trend seems clear—from 1335 to 1411, more and more punishments were left, at least within defined parameters, to the discretion of the Podestà or his vicar, the *iudex maleficorum*.

The types of punishments given by the court of the Podestà were usually pecuniary and sometimes corporal. Pecuniary punishments could be mitigated by peace agreements, claims of poverty, and confession. Corporal punishments were sometimes transmutable for a fee. Capital punishments were often ordered for murder, arson, and treason, but, for reasons that are explored below, they were seldom carried out.

Pecuniary Punishments

The most common punishments were fines, which had fixed guidelines in the statutes. In some cases the statutes allowed the Podestà to decrease or increase the penalties in accordance with his discretion. The use of pecuniary punishments and their importance in limiting the sources of vendetta have long been well established.[86] The court relied upon pecuniary punishments for all but the most serious felonies. Even in the case of such crimes as murder, while the penalty handed down was capital, the penalty exacted in reality was often the payment or partial payment required to have a ban lifted, and whatever losses were suffered as the result of the confiscation of property.

Pecuniary fines usually went to the municipal treasury, not to the wronged party, except in some specific instances like blasphemy, where the statutes decreed that the accuser should receive half the sum of the penalty. Money paid out as penalties was used in part to pay the salary of the Podestà (with the justification that this would motivate him to be zealous in the prosecution of crime.)[87] The 1392 redaction of the statute, which instituted penalties for

84 For examples, see ASRe, *Giudiziario*, Libri delle denunzie, July 28, 1374, and vol. 2, fol. 10r and following; June 21, 1388, vol. 9, fol. 76 and following. These cases are discussed more fully below. Both involve corporal punishment for the crime of witchcraft.

85 On modification of the statutes, see above, in Chapter Two.

86 Harold J. Berman, "The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe," *The University of Chicago Law Review* 45 (1978): 556.

87 ASRe, *Comune*, Registri dei decreti, reg. 1385–1389, July 17, 1386, Milan, 44v. ". . . in civitatibus nostris noviter aquisitis quia cognitum ex ipsis ipsos potestates se prontos et solicitos exibere ad delicta punienda que antea bene transibant inpunita."

"he who says or said injurious words to anyone," preserved the penalties listed in the 1335/71 redaction but gave the Podestà the authority to increase them if he desired. It also included an order that half the penalty should be paid to the offended party.[88] Statutes on theft, on the other hand, ordered a penalty of 10 *R.L.* for petty theft, with the additional burden that the accused must restore to the victim double the value of the stolen property and his court expenses. However it appears that the penalty itself was payable to the city.[89]

The schema of instituting monetary fines underwent change during the fourteenth century. The 1335/71 and 1392 redactions of the statutes show that the penalties followed a gradation according to status. Therefore a person convicted of "running to a fight" (*curret ad rixam*) would face a penalty of twenty five pounds if he were a knight, but only ten pounds if a footsoldier, a *pedes*.[90] The statute was entirely rewritten in the 1411 redaction, removing the distinctions between *miles* and *pedes*, and giving the Podestà the power to punish the guilty party with penalties and corporal punishments (*in havere et persona*) by his own discretion.[91] The fines imposed by the court were seldom the fines the accused paid, because the penalties could be mitigated for a number of circumstances, including the existence of a peace agreement between the offended party and the culprit, the confession of the accused, or the poverty of the convicted person.

Shaming Punishments, Corporal Punishments and Capital Punishments

When defendants were convicted, approximately 22 percent were sentenced to some manner of corporal or capital punishment.[92] Most but not all of these were executions. Other means of corporal punishment included mutilation and shaming punishments. But nowhere near this many people were actually executed or otherwise corporally punished, because most corporal condemnations were handed down against defendants who were absent from the proceedings. Of these defendants, at least 71 percent were contumacious and subsequently placed under ban. Most corporal condemnations were never

88 ASRe, *Comune*, Statuti del 1392, fol. 149r.

89 ASRe, *Comune*, Statuti del 1335/1371, fol. 30v.

90 ASRe, *Comune*, Statuti del 1335/1371, fol. 29v, and ASRe, *Comune*, Statuti del 1392, fol. 150r.

91 BSR Statuti, ms. 77, fol. 63v.

92 Of a sample of 593 trials in which the defendant was convicted and the sentence is known.

carried out, if for no other reason, than because the defendant was not to be found.

Shaming punishments appear very infrequently in the criminal records at Reggio. No instances of the use of pillories or other public shaming devices figure in the sentences from the criminal court, presumably because the court of the Podestà tried felonies, and those types of shaming punishments were not generally used in felony sentences. Shaming punishments sometimes inflicted physical pain and harm, but their real punitive value was in their degradation of the convicted person.[93] For this reason, we should include the processions that accompanied witchcraft punishments, public beatings, and some physical mutilations in the category.

In certain instances described by the statutes or in the event that there was no statute to deal with a certain offense, the foreign rectors could use *arbitrium* to decide punishments. This was the case with convictions for witchcraft before 1411. In 1374, Gabriyna de Albetis stood accused not only of performing witchcraft herself, but of teaching spells and incantations to others.[94] The statement of charges delineates spells that she taught to various men and women, most of which relate to love and sex. Women consulted Gabriyna for methods to keep their husbands in love with them and to ensure that their husbands would not leave them for their concubines, or to bring their absent husbands home. One woman, a certain Jacobina, entreated Gabriyna to teach her a spell that would make her husband stop beating her. Gabriyna recommended that Jacobina feed her husband some powdered chamomile, and afterwards, he would be gentle with her.[95] Other were perhaps more controversial, as when she allegedly advised one woman who wanted her absent husband to return home to go to a secret place and, nude and on bended knee, declare "I adore you, Great Devil."[96] Gabriyna was charged with fourteen separate crimes, some

93 I am borrowing here Martin Ingram's distinction, who considers "shame penalties" to be those punishments inflicted upon the body but designed chiefly as a public exhibition, as one end of a spectrum of corporal punishments from other penalties which aimed at causing physical pain. Martin Ingram, "Shame and Pain: Themes and Variations in Tudor Punishments" in *Penal Practice and Culture, 1500–1900: Punishing the English*, eds. Simon Devereaux and Paul Griffiths (New York: Palgrave Macmillian, 2004), 36.

94 ASRe, *Giudiziario*, Libri delle denunzie, June 28, 1374, vol. 2, fols. 10r–12r.

95 ASRe, *Giudiziario*, Libri delle denunzie, June 28, 1374, vol. 2, fol. 10v: "... docuit ipsam Dominam Jacobiam accipiere de pulvere camamille seu quod de camamilla pulvere faceret et daret ad comendum eidem Petro et quod ipse Petrus esset postea ipsi Jacobine mansuetus."

96 ASRe, *Giudiziario*, Libri delle denunzie, June 28, 1374, vol. 2, fol. 11v.

as old as thirteen years. She confessed, and a marginal notation declares that not only was she branded, but also her tongue was amputated.[97]

In 1388, Henricus de Afamacavalo, a citizen of Reggio, made a *querela* alleging that Caterina, daughter of Boninus de Colorano,

> . . . knowingly, treacherously and with aforethought, with a mind and intention for committing and perpetrating the misdeeds recorded here, instigated by a diabolical spirit, not having God or his mother the glorious virgin Mary before her eyes, but rather the enemy of the human race, with a blessed wax candle which she held in her hands she touched the said Henricus in the right arm, and, after she said certain diabolical words and incantations over this candle, about which it is better here at present to remain silent, she placed and buried this candle under the ground in a certain corner of the home near the bed where this Caterina was accustomed to lie, and thus it was that the said Henry was not able to carnally know any other woman; from which *maleficia* and diabolical operations thence the said Henricus was made unable to be with any other woman . . .[98]

Caterina's alleged attack on Henricus's sexual abilities was punished severely by the criminal court. Once again, the discretion of the Podestà and the judge was used to devise her penalty:

> The said Caterina should be beaten through the city of Reggio, and branded across the brow with a hot iron, and thence she should be placed on an ass with a miter on her head upon which should be painted images of the devil, whose works she followed, and she should be led through the city.[99]

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97 ASRe, *Giudiziario*, Libri delle denunzie, 28 July 1374, vol. 2, fol. 10r.

98 ASRe, *Giudiziario*, Libri delle denunzie, June 21, 1388, vol. 9, fol. 76r–v: ". . . scienter dolose et appensate animo et intentione infrascriptum malleficium comitendi et perpetrandi spiritu diabolico instigata deum pro oculis non habendo nec eius virginem matrem gloriosam sed potius humani generis inimicum cum una candela de ceri benedicta quam habeat in manibus tetigit dictum Hericum in brachio dextro et dictis super ipsa candela certis diabolicis verbis et incantationibis que hic ad presens quam meliori tacenter ipsam candelam posivit et sepelivit sub terram in quodam angulo domus prope lectum ubi iacebat ipsa Caterina et hoc fuit ut dictus Henricus aliquam aliam mulierem carnaliter cognoscere non posset ex quibus maleficiis et diabolicis operationibus exinde dictus Henricus factus est inhabilis ad habendum rem cum aliqua alia muliere . . ."

99 ASRe, *Giudiziario*, Libri delle denunzie, June 21, 1388, vol. 9, fol. 76v: ". . . dicta Caterina per civitatem Regii fustigetur et cum ferro calido in fronte buletur et exinde super uno asino

Because Gabryina's punishment had similar elements to that of Caterina, it seems probable that she too suffered the procession and other shaming elements in the ritual of punishment, though we know only what the notary recorded in his brief marginal note.

Public beatings were another punishment that was intended both to inflict pain and to shame. Like the more elaborate punishments described above, public beatings were rarely ordered. I have found only three cases other than that those mentioned above in which the sentence was public beating.[100] In all three cases, the defendants were mercenaries accused of theft, and two of them were German foreigners. Two of the men were also sentenced to the puncturing of an ear with hot iron. As in the witchcraft cases above, these punishments were intended to leave the convicted person with an enduring mark of their crime. Other corporal punishments ordered by the criminal court included the loss of a hand or foot if the condemned person were unable to pay their fine. These punishments were without exception handed down against convicted thieves and robbers.

Incarceration

Exactly when imprisonment became a mode of punishment and not simply a mechanism for pre-trial detainment is an issue that remains unresolved. Reacting to Foucault's assertions about the eighteenth-century birth of punitive imprisonment,[101] scholars have explored the existence of punitive imprisonment in the early modern period, and have demonstrated that the origins of imprisonment may be found in the Church, as it developed means to deal with discipline issues within monasteries. By the twelfth century, imprisonment was used as a punishment for heresy.[102] In Siena during the fourteenth century an advanced system of incarceration, where prisoners were separated by sex, social class, and type of crime, was already in use, though at Siena lifetime incarceration had not yet developed as a penalty.[103] At Mantua, Dean

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ponatur cum una mitria in capite super qua depinte sint ymagines diaboli cuius opera sequenta est et per ipsam civitatem conducatur . . ."

100 ASRe, *Giudiziario*, Libri delle denunzie, March 7, 1375 vol. 2, fols. 46r–47v, ASRe, *Giudiziario*, Libri delle denunzie, October 25, 1376, vol. 3, fols. 120r–121r; ASRe, *Giudiziario*, Libri delle denunzie, March 26, 1377, vol. 4, fol. 5r–v.

101 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, 2nd ed. (New York: Vintage Books, 1995).

102 Peters, *Inquisition*, 44.

103 Ascheri, "La pena di morte a Siena," 499.

and Chambers noted a 1461 case of sacrilegious theft that earned its author a sentence of incarceration for life, *ad perpetuos carceres*.[104] In his treatment of early modern imprisonment, Pieter Spierenburg commented that "the crucial difference between the Middle Ages and later periods is that in the medieval period these places were not primarily meant for punishment, though offenders might sometimes be imprisoned there."[105] He places the origins of punitive incarceration largely in the late sixteenth century. Geltner's recent study of prisons suggests that incarceration as a penalty was already well developed in the late medieval period. Even if punitive imprisonment received little treatment in legal texts of this period,—and what discussion there was tended to be opposed to the practice—he argues that it was still used, and judges tended to hand down sentences of imprisonment especially as a substitute for fines, and as a penalty for some minor offenses.[106]

The prison at Reggio was used for pre-trial as well as post-conviction detention, though the records are not complete enough to allow us to speculate on how often it was used, and in what instances. We might hesitate to make assumptions based on the uses of imprisonment in other cities because, once again, there seems to be a fair amount of local variation, as Geltner's study of Bologna, Florence and Venice shows. At Trieste, imprisonment in the late fourteenth and early fifteenth centuries was used when major crimes were at issue in an inquisitorial process, and the jail housed largely either those who were awaiting the execution of their sentences or those whose trials were ongoing.[107] At Reggio at the end of the fourteenth century, punitive imprisonment was not unknown, but we find it primarily used for those who could not post surety (defendants and perhaps also accusers) as well as an alternative punishment to a fine. The statutes directed that all who were able to provide surety or pay their condemnations should be released from jail within three days, unless they were accused of heresy, for which no surety would be sufficient.[108] In 1378, a certain Jacobinus was sentenced to pay either 300 pounds or stay six months

104 Dean and Chambers, *Clean Hands and Rough Justice*, 72.

105 Pieter Spierenburg, *The Prison Experience: Disciplinary Institutions and their Inmates in Early Modern Europe* (New Brunswick: Rutgers University Press, 1991), 8.

106 G. Geltner, *The Medieval Prison* (Princeton: Princeton University Press, 2008), 44–5.

107 Miriam Davide, "La giustizia criminale" in *Medioevo a Trieste: Istituzioni, arte società nel Trecento*, ed. Paolo Cammarosano, Atti del Convegno Trieste, 22–24 Novembre 2007 (Rome: Viella, 2007), 242.

108 ASRe, *Comune*, Statuti del 1335/1371, fol. 25v, "Quod qui de heresi fuerit accusatus non tradatur alicui pro securitate sed in carcere et sub fida custodia recludatur nec inde extrahatur nisi fuerit absolutus . . ."

in jail for an assault.[109] Antonius de Pedemonte, a tavern owner, found himself in a similar situation when he was sentenced to 200 pounds for an assault and a further hundred pounds for bearing arms. Alternatively, he too could spend six months in jail.[110] Marchus, son of Petrus de Ferrara, was fined twenty gold florins for carrying arms at night in the city without a license.[111] He could not pay the fine and spent four months in jail, after which his sentence was cancelled.[112]

The jail at Reggio also housed convicted criminals awaiting corporal punishment. How long people sentenced to corporal punishment might spend in jail awaiting the execution of their sentences varied. Some corporal punishments were inflicted on the day they were handed down, while in other cases, it appears that the defendants were incarcerated for months between conviction and punishment. A certain Nicholaus, a Hungarian man accused of theft, was convicted in January of 1376.[113] In May of that year, three custodians of the city jail were tried for negligence for allowing some inmates to escape, one of whom was Nicholaus, still apparently in jail months after his sentencing.[114] Inmates were detained for many different reasons, not all criminal, and it appears they were housed together—the convicted together with those awaiting trial, the debtor together with the thief and the murderer—because they sometimes planned escapes together. It seems likely that female inmates would have had some separation. Women were not infrequently remanded to jail by the criminal judge, and apparently, like men, they served time in the jail as a substitute for fees if they were unable to pay. The prostitute Margarita de Alamania, for example, stayed in jail for two months after a quarrel with another woman because she could not pay her fine.[115]

A surviving list of inmates shows twenty-seven people held for a variety of reasons and at the orders of various city officials, or "*ad petitionem*" of people that made complaints against them.[116] People were incarcerated for debt, for non-criminal offenses, and for reasons that are not immediately apparent from the records, such as Andriolus de Manfredis who was held in the jail because of an unspecified order made by the Podestà and the Captain of Reggio at the

109 ASRe, *Giudiziario*, Libri delle denunzie, April 14, 1378, vol. 4, fols. 83r–84v.
110 ASRe, *Giudiziario*, Libri delle denunzie, June 21, 1381, vol. 6, fols. 45r–46v.
111 ASRe, *Giudiziario*, Libri delle denunzie, June 8, 1389, vol. 12, fols. 91r–92v.
112 ASRe, *Giudiziario*, Sentenze e condanne, reg. 2, fasc. 3, fol. 18r–v.
113 ASRe, *Giudiziario*, Libri delle denunzie, January 9, 1376, vol. 3, fols. 12r–14v.
114 ASRe, *Giudiziario*, Libri delle denunzie, May 20, 1376, vol. 3, fols. 69r–70v.
115 ASRe, *Giudiziario*, Atti e processi, n.d., 1374, fol. 571r.
116 ASRe, *Giudiziario*, Atti e processi, May 3, 1374, fol. 569r.

will of Barnabò Visconti, *de conscientia magnifici domini domini nostri*.[117] The jail also could be used to house the insane. The Podestà was required to make an inquest into the presence of the insane in his jurisdictions, and if the insane person had no family to assume his or her care, then they were to be incarcerated and chained, and fed with alms.[118]

No records survive to describe conditions within the jail. Like prisons in Bologna, Venice and Florence—indeed, like most municipal medieval prisons—the jail was urban, connected to the city and part of city life.[119] It was situated near the *palazzo di comune*, on the edge of, or perhaps over, a canal. There was therefore some concern about the inmates' safety in times of heavy rain, probably for fear of flooding.[120] While imprisoned, the convicted persons or those awaiting trial had the right to a certain quality of treatment. By 1411, this was legislated in the statutes under the rubric, "The penalty of a guard of the jail oppressing unduly those who are incarcerated:"

> The guard or superintendent (*superstans*) of the jail of the commune of Reggio should not fetter or place in fetters or hold someone in a putrid place without the license of the Podestà or other official upon whose order he is detained, nor should he withhold or deny food or drink or clothing or a bed to that person, nor should he make any other trouble or harshness beyond the customary recommendation and usual guardianship. And let he who does otherwise be punished for whatever [violation] in turn, in the amount of ten pounds *R.L.* and more or less according to

117 ASRe, *Giudiziario*, Libri delle denunzie, May 20, 1376, vol. 3, fols. 69r–70v.

118 ASRe, *Comune*, Registri dei decreti, reg. 1385–1425, July 26, 1384. "Quia furiosorum dementium sive mentecaptorum actus per quos nil nisi detestabile potest insurgere supermodum et incomperabiliter aborremus fecimus ideo multis iam annis elapsis contra eosdem actus per nostrum decretum specialiter provideri, quod ex precessorum tuorum neglienda iam in desuetudinem nobis abisse videtur cum nulla lege cohertiti per iurisdictionem tibi comissam. Sentiamus ipsos ultrum citroque discurere pro libito voluntatis quare providere volentes quantumcumque nobis possible sit quod dictorum furiosorum dementum sive mentecaptorum actus onitus reprimantur. Mandamus tibi quatenus decretum nostrum incluxi tenoris, quod aliax per nos misum nunc iterato examinari et corigi fecimus pro ut nobis expediens visum fuit in tota iurisdictionem per nos tibi commissa. Serves prout iacet et facias inviolabiliter observari rescribendo nobis statim de receptione presentium. Datum Mediolani die xxvi July 1394."

119 Geltner, *The Medieval Prison*, 28–29.

120 ASRe, *Comune*, Proviggioni, August 12, 1390, vol. 9, fol. 22v "... providerunt et ordinaverunt quod massarollus comunis Regii faciat voluere scallam carcerum et ipsam talliter recaptare quod non ledantur carcerati ab aliqua pluvia quando pluit."

> the judgment of the Podestà or the judge, with the quality of the deed and the character of the person being considered. And every eight days, the Podestà is bound to go or send [someone] to inquire at the jails how things are done by the guard or the supervisor of the jail.[121]

The sporadic evidence remaining about Reggio's late medieval jail includes several lists of inmates made at the request of the Podestà, perhaps indicating that the provision in the statute that obliged the Podestà to conduct regular checks on the jail was already in place before 1411.[122] No charges made against jailers for the mistreatment of prisoners survive, though whether this indicates that the problem was not widespread or that it was not prosecuted remains an open question.

The guards of the jail had a great deal of legal responsibility. They were responsible for bringing their detainees to court on the appointed days, and could face severe penalties for failure to do so. Johannes Spadario, the jailer in 1376, was threatened with a ban for not bringing to the court at the appointed time a man accused of murder,[123] and the threat apparently produced results, as the man appeared in court some weeks later and was then executed.[124] The judges handed the defendants into the custody of a jail guard, who conducted them to the prison. If the defendants escaped, these guards then became responsible for the amount of the fine the defendants would have faced had they been convicted. It is difficult to imagine how a guard's salary could compensate for this risk. In addition to facing serious financial penalties if they failed at their duties, guards undertook some element of personal risk too, as they were sometimes injured in escape attempts.[125]

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121 BSR Statuti, ms. 77, fol. 64v: "De pena custodis carcerum gravantis carceratos indebite. Custos seu superstans carcerum comunis Regii non debeat aliquem detentum vel carceratum inbogare vel ponere in cepis vel in loco putrido tenere sine licentia potestis vel illius officialis cuius precepto detentur fuerit nec cibum vel potum vel panos seu lectum carcerato auffere nec denegare persone vel alium nec aliquod gravamen vel asperitatem ultra solitam recomendatam et ordinatam custodiam facere et que contrafecerit puniatur pro quolibet et qualibet vice in libras decem Rexanorum et plus et minus arbitrio potestis vel iudicis considerata facti qualitate et personarum condictione et potestas singulis octo diebus teneatur ire vel mittere ad inquirendum a carceratis qualiter tractantur a custode vel superstite carcerum."

122 For example, see ASRe, *Comune*, Atti e processi, 1379, fol. 569r; ASRe, Atti e Processi, 1389, 571v–572v; ASRe, Atti e Processi, n.d., 1394, unnumbered folios.

123 ASRe, *Giudiziario*, Libri delle denunzie, September 1, 1376, vol. 3, fol. 99v.

124 ASRe, *Giudiziario*, Libri delle denunzie, October 23, 1376, vol. 3, fol. 116r.

125 As happened on January 20 1390. ASRe, *Giudiziario*, Libri delle denunzie, January 20, 1390.

In general, medieval prisons were not particularly closely guarded, and jailers were not particularly well compensated, perhaps leaving them open to corruption.[126] The above-mentioned Andriolus de Manfredis escaped together with a certain Jacopinus de Rio Sanguinaria and three other men, who had been convicted of theft and were awaiting the execution of their sentence (they were to have their ears punctured with an hot iron, and then they were to be "fiercely beaten").[127] All escaped together along with the guards, who were accused of negligence in their duties and convicted *in absentia*. In other cases, people escaped jail when they managed to steal the keys to the jail from their guards. One guard was sentenced to pay the staggering sum of 260 pounds. He was not able to pay, and was therefore himself sent to jail.[128] In another example, three men stole the keys from their jailer, but were still not able to open the door. They finally managed to break the lock and ran through the city in the middle of the night until they reached the walls, where they stole a ladder, climbed over the walls, swam through the moat, and disappeared into the night. The jailer, faced with a fine of 200 imperial pounds for his negligence, apparently ran too—he never answered the charges in court.[129] Other escapees were not so fortunate. An inquisition against another would-be fugitive was ended when his drowned body was pulled from the moat.[130] In 1396, the jail was the scene of another dramatic—if unsuccessful—effort at escape. Two men imprisoned for an assault and one man imprisoned for debt drew up "a plan [which] was made and shared among the three of them for breaking out of the aforesaid jail."[131]

> With a piece of iron which they stole from a certain iron grate which was in the canal that runs through the said jail, broke the wall of the said jail and went into the said canal, and with that same piece of iron they shattered and broke the walls of the workshop in which works Tomaxinus de Acerbo, a blacksmith, and in such a way, that from the said canal they went into this workshop from the canal and fled from the said jail.[132]

126 Geltner, *The Medieval Prison*, 76.

127 ASRe, *Giudiziario*, Libri delle denunzie, May 20, 1376, vol. 3, fol. 67r.

128 ASRe, *Giudiziario*, Libri delle denunzie, October 20, 1376, vol. 3, fol. 115r–v.

129 ASRe, *Giudiziario*, Libri delle denunzie, October 16, 1377, vol. 4, fols. 49r–50v.

130 ASRe, *Giudiziario*, Libri delle denunzie, May 7, 1376, vol. 3, fols. 87r–88v.

131 ASRe, *Giudiziario*, Libri delle denunzie, September 28, 1396, vol. 15, fols. 172r–175v: ". . . facto et participato conscilio inter ipsos tres de rompendo et fragendo carceres predictes . . ."

132 ASRe, *Giudiziario*, Libri delle denunzie, September 28 1396, vol. 15, fol. 172r: ". . . cum uno ferro quem abstulerunt de quadam grata feri que est in canali quod decurrit per dictos carceres fregerunt murum dictorum carcerum et in dictum canale[m] intraverunt et de

Two of the men were caught and confessed their actions; the judge then questioned them about how well they had been guarded while they were in jail. They replied that three men were assigned to the jail that day. Two were nowhere to be seen, and the third was carrying a bucket of water back to the jail when the two made their escape. The escapees were sentenced to be publicly beaten.[133] This was the only recorded instance in which the escapees were caught. Contumacious escapees were usually placed under a ban of a thousand pounds imperial, and sentenced to death *in absentia*.

In conclusion, incarceration at Reggio, as elsewhere, was used for a variety of purposes, and while jail sentences were not given in place of other means of punishment, it does appear that many convicted criminals were incarcerated as an alternative to fines they could not pay. So in practical terms, incarceration was a penalty used in lieu of fines even in cases when the accused was not sentenced to it. Capital punishment, however, was handed down as a sentence far more often than it was carried out.

Capital Punishments

The value of the capital sentence for the municipal authorities lay as much in its publication as in its execution. Sentences of death were read publicly by the *nuncii* in the central piazza of the city. This was an assertion of public authority. Execution itself, however, was a relatively rare occurrence. When executions were carried out, their value as deterrents was exploited as much as possible, and sometimes the records tell us that the condemned man was executed *in exemplum*, as an example for others.

Municipal statutes placed strict limits on capital punishment. When statutes allowed the judge to impose penalties with his own *arbitrium*, he could order punishments that harmed the body but he could not by his own discretion sentence someone to die unless a capital penalty were provided for in the statutes. These were not the only limits on capital punishments.[134] Minors could not be subject to any corporal punishment, and if they committed crimes

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ipso canali cum eodemmet [sic] ferro ruperunt et fregerunt murorum stationis in qua laborat Tomaxinus de Acerbo ferarius ita et taliter quod de dicto canali in dictam stationem intraverunt et de dictis carceribus affugierunt . . ."

133 ASRe, *Giudiziario*, Libri delle denunzie, September 28, 1396, vol. 15, fols. 172r–175v.

134 BSR Statuti, ms. 77, fol. 52v–53r: ". . . nullus pro aliquo malleficio vel delicto puniatur vel puniri possit corporaliter nisi a lege municipali caveatur sed puniatur in havere arbitrio potestis inspecta condictione persone et qualitate delicti et non intelligatur per legem

for which the penalty would normally cause blood to flow, their sentence was commuted to a pecuniary penalty left to the Podestà's discretion:

> *Item*, that no one who, having committed a crime, is not older than fourteen years, can be punished corporally; rather that person can be punished financially, according to the judgment of the Podestà, with the kind of deed and the condition of the person having been inspected.[135]

The 1411 redaction of this statute allows the Podestà to sentence these minors to jail instead:

> . . . the Podestà can condemn the person to stand in jail for the offense for a time which seems appropriate to him, after the offense and wrongdoing are considered.[136]

Sentences of death and dismemberment were determined with the counsel of other foreign officials, and at least nominally with the consent of the public assembly. For example, Martinus de Colonia was captured and executed in July of 1397, having already been convicted of no less than seven crimes, including adultery, theft and assault, for which he was under ban for life from Reggio. His death sentence was promulgated by Podestà "with the will and deliberation of the above-mentioned Vicar, the *Iudex Maleficorum*, and of the said *Iudex Rationis*, and other officials of the court of the aforementioned Lord Podestà, in the public and general assembly of the men and persons of the said city . . ." The death sentence was read aloud and publicly in the vulgar tongue by the notary.[137] The Podestà ordered that

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municipalem cautum esse ubi in aliquo statuto reperiretur quod aliquis puniri deberet in havere et in persona arbitrio potestatis."

135 ASRe, *Comune*, Statuti del 1392, fol. 157v: "Item quod nullus qui non sit mayor quatuordecim annis comittens malleficium possit puniri in persona sed puniatur in avere arbitrio potestatis inspecta qualitate facti et condictione personarum."

136 BSR, Statuti, ms. 77, fol. 60r: "Statutum et ordinatum est quod nullus minor quatuordecim annis possit puniri corporaliter sed puniatur in havere arbitrio potestatis inspecta qualitte facti et conditione personarum. Posit tamen Potestas ipsum condemnare ad standum propter hoc in carceribus vel ad tempus secundum quod sibi placuitum [sic] et videbitur inspecta malleficii et offensi."

137 ASRe, *Giudiziario*, Sentenze e condanne, July 18, 1397: "Lata data et in hiis scriptiis similiter pronuniciata et promulgata fuit superscripta condempnatio corporalis et sententia condempnata corporalis per superscriptum Dominum Potestatem pro tribunali sedentem super quodam bancho [. . .] super arengheria palacii novi comunis Regii cum voluntate et

> the said Martinus should and must be led to the customary place of justice, and there he should be suspended with a noose by the neck from the gallows in such a way that he dies, and his soul is separated from his body, so that his death might become an example for others.[138]

Whatever goods Martinus possessed were also to be confiscated. Martinus himself was a foreigner, *de Lamania* being a common corruption of *de Alamania*. He was accused of multiple crimes and was clearly believed to be a career criminal. This is in keeping with the trend in the late fourteenth century for capital sentences to be used disproportionately against recidivists and foreigners.[139] His public death was intended to serve as a deterrent.

Once the sentence was determined by the foreign rectors, orders were given to another official to arrange the details. These men have various titles, sometimes *dominus* or *miles*. Martinus's execution was entrusted to a man who may have been the "knight of justice" of the commune:

> We entrust the execution of this sentence to the wise man Lord Filipus de Vigevano, whom on this occasion we choose to act on our behalf, ordering to the said Filipus that he should effectually order this our present sentence to execution, and he should report to us concerning the abovementioned execution.[140]

The executioner himself is unnamed and his office is unmentioned in records and in municipal law. The people who served as executioners sometimes held

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deliberatione superscriptorum vicari iudici malleficorum et dicti iudicis rationis et aliorum officialium curie prefati domini potestis in publica et generale contione hominium et personarum dicte civitatis sono campane et sono tube ac voce preconia ut moris est congregati et convocati in platea comunis dicte civitatis et super arengheria predicta. Et scripta lecta publicata et vulgarizata per me Johannem de Calchaguis notarium infrascriptum de mandato consensu et voluntate dictorum dominorum potestatis et iudicium et officialium curie prefati domini potestatis . . ."

138 ASRe, *Giudiziario*, Sentenze e condanne, July 18, 1397: "Quod dictus Martinus ducatur et duci debeat ad locum justicie ordinatum et ibi furcis per gullam laqueo suspendatur taliter quod omnino moriatur et anima a corpore separetur ut eius mors ceteris transeat in exemplum."

139 Blanshei, "Crime and Law Enforcement," 123.

140 ASRe, *Giudiziario*, Sentenze e condanne, July 18, 1397: "Executionem cuius sententie comittimus prudenti viro domino Filipo de Vigevano quem in hac parte ellegimus pro colaterali nostro mandantes dicto domino Filipo quatenus hanc nostram presentem sententiam debeat effectualiter executioni mandare et nobis de executione predicte referre debeat."

their unenviable employment as a result of their own crimes. As convicted criminals, they sometimes had to be escorted to the places of justice because they might try to escape.[141] Executioners held their offices because they were sentenced to them for a term of years: their horrific duties were understood as a punishment. A late fifteenth century case in Mantua showed an executioner balk at his orders to execute a convicted woman. The Marquis of Mantua, Ludovico Gonzaga, threatened that if he refused to carry out his order, the woman would be pardoned and ordered to execute him instead.[142]

Men and women of all social classes might receive a sentence of capital punishment, but the sentences were disproportionately carried out against the lower strata of society, mercenaries and foreigners. Defendants who were mercenaries or *vagabundi* figure prominently in the list of defendants sentenced to corporal and capital punishment, but they are accompanied, admittedly more rarely, by defendants who appear to be of higher status, even nobles. However, sentencing defendants to death was one thing; executing them was quite another, and in fact, the fulfillment of capital sentences was very rare at Reggio.

As a revision of the nineteenth-century image of the medieval court as a place of frequent executions, some scholars have argued that in fact, medieval courts were loath to use capital punishment unless the circumstances of the crime were particularly heinous.[143] Neither image is true for Reggio. Capital punishment was carried out at Reggio, though it was reserved for the crimes of murder, witchcraft, arson, rape, theft, and treason. Particularly murder and arson convictions resulted in every case I have examined with an order for capital punishment.

It is not possible to offer a reliable quantified analysis of the number of death sentences that were imposed and carried out because the condemnation records from Reggio survive only sporadically and only for a period encompassing a little more than ten years, with lacunae. The marginal notations in the trial records sometimes reveal whether a sentence was carried out. Of the surviving trials where the sentence was death and where the outcome is known, approximately 15 percent of death sentences were carried out. (This number includes defendants sentenced to death *in absentia*.) Yet most defendants sentenced to death were contumacious, and they might have been executed years after the sentence was proclaimed, while trial records reveal

141 Chambers and Dean, *Clean Hands and Rough Justice*, 75–6.

142 Chambers and Dean, *Clean Hands and Rough Justice*, 120.

143 R. Lavoie, "Les statistiques criminelles et le visage du justicier: justice royale et justice seigneuriale en Provence au Moyen Age," *Provence historique* 28 (1979): 15–18.

nothing about summary executions for notorious crimes. However research in other cities would support the impression that executions were rare events. In Milan for the period 1385–1429, of seventy-one condemnations to death in the surviving sentences from 1385–1429, only thirteen were actually carried out: two for homicide, seven for theft, one for false witness, and three for heresy.[144] In Florence in the second half of the fourteenth century, an average of between eleven and thirteen executions per year were carried out, which fell by the fifteenth century to seven or eight.[145]

In theory, capital punishment was both a sign of and an instrument of good government.[146] Executions could be maximized for their value as political propaganda. Esther Cohen, in her study of late medieval Paris, saw what she interpreted as a strong inconsistency in types of penalties meted out for the same crimes. Some ended in fantastical executions, while many more ended in pecuniary penalties or royal pardons. This prompted her to write: "... the exact retribution to each offender mattered little to the authorities. What mattered was the effect of this retribution upon the rest of society. The logical consequence was that, while punishment must be seen to be done, it need not always necessarily be done. It served no purpose publicly to penalize the petty, unspectacular offender, but the public ritual of one spectacular execution might be more useful in many ways than the systematic application of law to all."[147]

Cohen's astute observation about the theatrical use of public execution shows the value of capital sentences as deterrents, even when they were not carried out frequently or systematically. Because the authority of the sword, the *merum imperium*, was the highest level of jurisdictional autonomy, these public executions were doubtless reassertions of territorial rights as well.

Mitigation and *Instrumenta Pacis*

Confession was not the only possibility for mitigating penalties: a penalty could be mitigated by another quarter if the accused made peace with the

144 Verga, "Le sentenze criminali dei podestà milanesi," 130.

145 Zorzi, "The judicial system in Florence," 54. See also Zorzi, "Le esecuzioni delle condanne a morte a Firenze nel tardo medioevo tra repressione penale e cerimoniale pubblico," in *Simbolo e realtà della vita urbana nel tardo medioevo*, ed. Massimo Miglio (Rome: Vecchiarelli, 1993).

146 Ascheri, "La pena di morte," 489.

147 Cohen, "To die a criminal for the Public Good," 287.

victim. This was done through formal agreements, either written or oral, that forgave offenses and declared a peace between the parties that was punishable by law if either violated it. Though the particular written form of these documents emerged in the thirteenth century, the roots of the practice may have had its origins in early Germanic law that sought in a similar way to limit the vendetta.[148]

Peace agreements were not contracts and they contained no reciprocal agreements. They were, in form, more similar to gifts.[149] Indeed a marginal notation on the 1411 redaction of Reggio's statutes conceives of the formal peace as a type of gift: the anonymous writer, citing Dinus, explains that peace is like a gift given. He also references Augustine's *De civitate Dei* XVIII, in which Augustine wrote that peace is a gift given by the conquered to the stronger party that defeated them, in hopes of lessening the violence.[150] Surely these agreements could play a role in restoring order after conflict, especially when the community became involved in bringing the parties to agreement.[151] However, in the medieval culture of honor and shame, and of feud and vendetta, the enaction of the peace was probably not always or perhaps even often an altruistic gift. After all, assailants sometimes needed encouragement to accept the "gift" of peace, at least in the form of a reduced penalty, and even then, peace agreements were not always welcome. At Marseilles, Daniel Smail noted a case of a man whose victim taunted him from outside the jail, saying, "unless you make peace with me, I will ensure that you lose a foot or a fist."[152] This does not sound much like a gift.

The role of formal peace agreements in the criminal courts of late medieval Italy is difficult to generalize because the efficacy of these agreements to halt proceedings or mitigate penalties changed over time and also varied in different cities. The function of the *instrumentum pacis* in criminal proceedings was determined by statute. Peace agreements played the strongest role in criminal proceedings in municipal statutes from the twelfth and thirteenth centuries,

148 Katherine L. Jansen, Peacemaking in the Oltrarno, 1287–1297," in *Pope, Church and City: Essays in Honour of Brenda M. Bolton*, eds. Frances Andrews, Christoph Egger and Constance M. Rousseau (Leiden: Brill, 2004), 331.

149 Many peace agreements transacted before the court were technically *remissione*, which absolved the offender for liability for injuries. Glen Kumhera, "Making Peace in Medieval Siena: Instruments of Peace, 1280–1400," (Ph.D. diss., University of Chicago, 2005), 65. Kumhera gives extensive treatment to the form and function of these agreements in the courts.

150 BSR, ms. 77, 66r.

151 Jansen, "Peacemaking in the Oltrarno, 1287–1297," 343.

152 Smail, *The Consumption of Justice*, 116.

during which period they often could be used to stop an ongoing trial; during the fourteenth century, together with the rise of inquisitorial procedure in the courts, there was a general tendancy to limit their efficacy to stop the trial process, especially when the offense was a blood crime.[153] Generally speaking, statutes did tend to limit which crimes could be resolved or partially resolved with a peace agreement: some excluded sodomy, like Grosseto, others homicide, robbery and theft, like Bergamo and Siena, as well as Perugia, which also excluded forgery, breaking a truce, and some assaults.[154]

A fair amount of local variation existed in the relationship between peace agreements and ongoing criminal processes. In late medieval Florence, the *instrumentum pacis* was allowable as an exception in some criminal cases. If the parties contracted their agreement within fifteen days of the commission of the crime, the public trial was abrogated.[155] At Milan, a peace agreement absolved the offender from the portion of the fine that would eventually go to the offended party, but it could not absolve him from paying the portion owed to the city coffers.[156] In Siena, Parma, and Grosseto, a peace agreement could remit the entire penalty.[157] At Siena, where the peace could abrogate a trial, it was used with great frequency: one sample shows that 223 of 330 inquisition trials were dismissed because of the presentation of a peace agreement.[158] At Reggio, as we shall see, the peace agreement mitigated the penalty by one quarter but it did not stop a proceeding or cancel a process.

These distinctions are extremely important, because whether the parties in dispute had the power to end the process before sentencing determined how much risk was borne by the accuser or person making a *querela* in the course of the criminal trial. The ability of parties in conflict to negotiate an end to the trial is no less significant than the ability of a modern prosecutor and defendant to reach a plea bargain. The fact that Reggio did *not* allow parties in

153 Marco Bellabarba, "Pace pubblica e pace private: linguaggi e istituzioni processuali nell'Italia moderna," in *Criminalità e giustizia in Germania e in Italia: Pratiche giudiziarie e linguaggi giuridici tra tardo medioevo et età moderna / Kriminalität und Justiz in Deutschland und Italien: Rechtspraktiken und gerichtliche Diskurse in Spätmittelalter und Früher Neuzeit*, Annali dell'Istituto storico italo-germanico in Trento. Contributi 11; eds. Marco Bellabarba, Gerd Schwerhoff, Andrea Zorzi (Bologna: il Mulino, 1999), 200.

154 Glenn Kumhera, "Promoting Peace in Medieval Siena" in *War and Peace: Critical Issues in Euroepan Societies and Literature, 800–1800*, eds. Albrecht Classen and Nadia Margolis (Berlin: De Gruyter, 2011) 338–39.

155 Stern, *Criminal Law System*, 27.

156 Verga, "Le sentenze criminali dei podestà milanesi," 117–118.

157 Kumhera, "Promoting Peace in Medieval Siena," 337.

158 Kumhera, "Promoting Peace in Medieval Siena," 342.

conflict to settle the dispute outside court after the inquisition began, together with the requirement, in the case of a *querela*, that the accuser post personal surety, must together have discouraged use of the criminal court as a place to air disputes. This raises the question of how the use of peace agreements—either to mitigate a penalty or to set it aside altogether, as at Siena—fit inside the bigger theoretical picture of punishment, as the inquisitorial trial was based on the idea of public interest: *interest civitati ne crimina remaneant impunita*, as opposed to punishment *interest alcui*.[159] This wide allowance of peace instruments to mitigate penalties or abrogate trials, especially when placed beside the role of private parties in inquisition trials, shows once again that inquisitorial procedure in practice retained features of the older process.

One of the most important examinations of peace agreements and legal procedure is Massimo Vallerani's study of the system of peace agreements in thirteenth century Perugia. Vallerani isolated three primary motivations for government authorities to allow the peace: it provided a way for people to have their bans lifted and return to the community, it concluded violent actions with a promise for stable peace, and it limited the new sources of vendetta which could arise from these actions.[160] At Bergamo, certain crucial aspects of the crime determined whether a convicted person was eligible for recall from a homicide ban. Only those crimes committed without premeditation were eligible for relaxation of the ban. At Bologna, a recall for homicide came with a fine, but that fine could be delayed or spread over time so that the culprit paid a very small amount *per annum*, sometimes around 20 soldi. At Perugia, peace agreements were effective only in the case of certain crimes. If a peace agreement was concluded within eight days, the Podestà and the city captain could not proceed to sentencing except in the cases of the most extreme crimes, including murder, the breaking of a truce, and assaults resulting in permanent blindness or debilitation of a limb.[161] Vallerani examined separately cases which proceeded by accusation procedure (which was the most common criminal procedure in use at Perugia at this time) and inquisition procedure. He found that the peace played a major role in both. In the register of 1258 at Perugia of inquisitions in the court of the Podestà, comprising 80 cases, 50 cases, or 62.5 percent, ended in acquittals; 44 percent of these acquittals used peace agreements. Registers of successive years also showed frequent use of the peace accord.[162] Sarah Blanshei also found peace accords in frequent

159 Sbriccoli, "Legislation, Justice, and Political Power," 50.

160 Vallerani, "Peace Accord and Trial," 178–180.

161 Vallerani, "Peace Accord and Trial," 183–186.

162 Vallerani, "Peace Accord and Trial," 196.

use. In mid-fourteenth century Bologna, she found them involved in 29 percent of inquisitorial processes.[163]

The numbers at Reggio tell quite a different story. Overall at Reggio, only approximately nine percent of the extant trials include the use of a peace agreement. Where Vallerani found peace agreements in use for the worst offenses—including murder and rape—at Reggio, these agreements are found almost exclusively in assault cases of varying severity. Of a sample of 71 cases where the trial record records a peace between the parties, all but three were cases of assaults or quarrels that resulted in assaults. The remaining three cases include a charge of threatening assault, a charge of speaking injurious words, and a charge of theft. Peace agreements in homicide cases were necessarily transacted long after the crime was committed, because at Reggio such an agreement could only be concluded after the culprit had been banned from the commune for at least a year. Condemnation records do occasionally note the cancellation of a homicide ban, giving as one of many circumstances of its cancellation the *pax*. I have found no examples of the use of the peace agreement for other crimes in Reggio's criminal court. The use of peace agreements in lesser assault cases shows that while they could be used in serious cases to limit sources of vendetta, they were probably also used simply to "keep the peace" and to keep smaller altercations from escalating. Peacemaking did not end criminal proceedings and it did not confer absolution, but it could further mitigate a penalty after a confession. A 1386 decree from the Visconti allows the reduction of penalties by a quarter for a confession, and by another quarter if a peace is made.[164] This was also true in Bologna, where peace agreements were used largely for their value in reducing penalties, rather than as tools of reconciliation.[165]

There may have been additional expenses involved in creating a formal peace, though our records at Reggio are silent on this issue. However, in Siena, the total costs for registering the peace, dismissing the inquest, and paying the notary amounted to a little less than one Sienese pound.[166] At Milan, a peace agreement was necessary for a person to return from a ban imposed for a violent offense,[167] and this appears to be the case also at Reggio.

Peace agreements found their way into criminal proceedings in a variety of ways. *Instrumenta pacis* could be drawn up outside the court and presented

163 Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming).

164 ASRe, *Comune*, Registri dei decreti e lettere, reg. 1385–1425, December 8, 1386.

165 Blanshei, "Cambiamenti e continuità nella procedura penale a Bologna," (forthcoming).

166 Kumhera, "Promoting Peace in Medieval Siena," 337

167 Verga, "Le sentenze criminali dei podestà milanesi," 123.

before the judge as evidence. In a 1391 case, Antonius de Cereto was accused of assaulting another Antonius also known as Ughinus, and he hired Guido de Bebio, a local notary, to act as his procurator in the matter. Guido de Bebio appeared before the judge and "for the defense of the said Antonius produced an *instrumentum pacis* made with the said Antonius de Carcana, drawn up and written by Jacobinus de Burano, notary . . ."[168] The notary who acted as an advocate for the defendant did not draw up the act.

Sometimes these agreements were made orally outside the court, and then the accused had to present two witnesses to swear to the existence of the agreement. In 1397, a certain Rizardus was accused of robbing Dominicus de Barsasina. The complaint came to the court through a *querela* made by Dominicus which alleged that Rizardus took by force (*per vim*) property estimated at the value of 28 soldi. Rizardus confessed to the robbery, but claimed that he had made restoration to Dominicus for the value of the property and that he had made peace with him before witnesses.[169] Two witnesses testified that they witnessed the peace agreement, which was transacted before Guilelmus de Lista, the captain of the city of Reggio. A marginal note indicates that in May of that year, Rizardus was condemned to pay six pounds imperial. The penalty was likely mitigated because of the peace made between the two men, but the peace agreement neither ended the proceeding nor prevented a condemnation.

Often at Reggio, these agreements were drawn up and signed in the *camera* of the criminal judge. (This common method of transacting a peace was the preferred procedure at Milan as well.[170]) A 1397 document records a peace made between Johannes de Placentia and Dominica de Tarasconibus, on the occasion of a fight between them. In this document, Johannes "made peace, remission and absolution" with Dominica, and Dominica likewise forgave: "every other injury, strike, and affront" perpetrated against her:

> In the name of Christ, Amen . . . Johannes de Placentia, an inhabitant of the city of Reggio of the neighborhood of San Prospero de Castello, the

168 ASRe, *Giudiziario*, Libri delle denunzie, December 20, 1391, vol. 14, fols. 42r–44v: ". . . ad defensionem dicti Antonii produxit instrumentum pacis facere cum dicto Antonio de Carcana rogatum et scriptum per Jacobinum de Burano, notarium . . ."

169 ASRe, *Giudiziario*, Libri delle denunzie, February 26, 1397, vol. 16, fols. 71r–72v: "[Rizaradus] ipsas omnes res eidem Dominico restituit et redidit et cum ipso et ab ipso Dominico pacem pacem remissionem et quietatum habuit et habet de predicto et cetere. Et quod paci et remissione sibi facte per eum inter fuerunt testes."

170 Verga, "Le sentenze criminali dei podestà milanesi," 121–122.

> above-mentioned struck and offended party, spontaneously, freely, and from certain knowledge made peace, remission, and absolution with the above-written Dominica de Tarasconibus of Borgo San Donino, an inhabitant of the city of Reggio in the said neighborhood . . . concerning the above-mentioned hits made against him by the above-written Dominica, and generally concerning each and every other injury, strike, and affront made, said, and inflicted by the said Johannes against the said Dominica, et cetera, the said parties promising to each other in turn and especially the said Johannes to her . . . to have, hold, and perpetually observe [the peace] by his own obligation and the obligation of all his goods, and under the penalty of 10 pounds *R.L.* imperial payable by the party who does not observe it.[171]

The agreement was drawn up by Petrus de Mutina with two other notaries as witnesses, in the *camera* of the judge. Dominica used this agreement to mitigate her penalty, presenting the document to the criminal judge:

> On the same day. The above-mentioned Dominica, *inquisita*, to make her defense concerning the aforementioned matters, produced before the Lord Vicar the above-mentioned instrument of peace, so that she might rejoice in the benefit of peace according to the form of the decretals of our lord, et cetera.[172]

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171 ASRe, *Giudiziario*, Libri delle denunzie, May 4, 1397, vol. 16, fol. 86r–v: "In Christi nomine Amen . . . Johannes de Placentia habitator civitatis Regii vicinae Sancti Prosperi de Castello superius percussus et offensus sponte libere et ex certa scientia fecit pacem remissionem et absolutum superscripte Dominighine de Tarasconibus de Borgo Sancti Donini habitatori civitatis Regii in dicta vicina ibidem presenti de percussione superscripta eidem facta per superscriptam Dominighinam et generaliter de omnibus et singulis aliis inuriis percussionibus et contumellis sibi per dictam Dominighinam quomodolibet factis dictis et illatis. Et conversso [sic] dicta Dominighina pacem facit et remissionem generalem dicto Johanni de omnibus iniuriis questionis contumellis eidem Dominighine per dictum Johannem factis dictis et quomodolibet illatis et cetera, promittentes [dictam pacem formatum *scripsit et delevit manuscriptus*] dicte partes sibi ad invicem et specialiter dictus Johannes sibi ad praedictam ratam et formam habere tenere et perpetuo observare sub obligatione sui et omnium suorum bonorum et sub pena librarum x imperialium applicando parati observando et aufferendo a parte non observasit et cetera . . ."

172 ASRe, *Giudiziario*, Libri delle denunzie, May 4, 1397, vol. 16, fol. 86r–v: "Die dicta. Superscripta Dominighina inquixita ad omnem ipsius deffensionem faciendo de predictis produxit coram superscripto domini vicario superscriptum instrumentum pacis ut gaudeat beneficio pacie secundum formam decretorum domini nostri et cetera."

The "benefit of peace" was presumably the mitigation of her penalty. Dominica was still fined to pay the substantial penalty of twenty five pounds imperial for her crime.

The breaking of a peace agreement was a very serious matter. The statutes placed in perpetual ban those who broke the peace, whether it was a peace or truce made by the Podestà, or whether it was another kind of concord agreement, presumably including these *instrumenta pacis*. The ban could be lifted only at the will of the person with whom the peace had originally been made, or at the will of that person's heirs (*voluntate eius vel heredis eius cui pax vel tregua facta fuerit*.)[173] The 1335/71 and 1392 redactions are identical, but the 1411 redaction recognized more distinctions and imposed additional pecuniary penalties in addition to the ban. Those who broke the peace by harming their enemies *in persona*, in addition to the ban and in addition to whatever fines their actions would merit on their own, also endured an additional 100 pound fine, of which half went to the offended party and the other half to the city. If the peace were broken by the destruction of the enemy's property, that additional fine was reduced to 50 pounds, payable half to the city and half to the offended party.[174]

Shona Kelly Wray found that in Bologna, the use of peace agreements primarily fell to the elite.[175] In contrast, Andrea Zorzi found in Florence that these notarial *instrumenta pacis* were used by a great variety of social classes.[176] Katherine Jansen's study of notarial peace agreements from 1257–1343 in Florence also found them employed by a people with a wide range of backgrounds, and used to resolve a wide variety of disputes.[177] At Reggio, we find people from all walks of life using peace agreements, and not always in the form of a notarial document or public instrument. Particularly among the lower classes, peace agreements were sometimes transacted orally in front of the judge instead of with a public instrument drawn up by a notary. This oral peace avoided the fee of a private notarial instrument, but still served its function before the court. For example, in 1398, Petrus de Alamania, a German

173 ASRe, *Comune*, Statuti del 1335/1371, fol. 37r, and ASRe, *Comune*, Statuti del, fol. 156r, which are identical.

174 BSR, Statuti, ms. 77, fols. 60r–v.

175 Shona Kelly Wray, "Instruments of Concord: Making Peace and Settling Disputes through a Notary in the City and contado of late medieval Bologna," in *Journal of Social History: Societies and Cultures* 42 (2009): 735.

176 Zorzi, "Legitimation and Legal Sanction," 34.

177 Katherine Jansen, "'Pro Bono Pacis: Crime, Conflict, and Dispute Resolution. The Evidence of Notarial Peace Contracts in Late Medieval Florence," in *Speculum* 88 (2013): 432.

scribe (*scriptor*), struck Anna de Flandria, a prostitute, in the face. The two appeared before the judge and made peace:

> In the name of Christ, Amen . . . Anna de Flandria, a prostitute, appearing before the distinguished and wise man Lord Gastarino de Grassis de Castronovo, publicly licensed in the civil law, honorable Vicar and Criminal Judge of the Lord Podestà of the city and district of Reggio, made and makes peace, concord, remission, and peace with Petrus de Alamania, scribe, present and receiving [it] . . .

The *instrumentum pacis* was recorded in the trial record. It inventoried Anna's injuries, recording the damage done to her eye, that it was made "bruised and black." The document goes on to say that Anna appeared at the court

> saying and protesting that the said peace and its benefit should give relief to the said Petrus in the condemnation to be made concerning this Petrus by the office of the aforementioned Lord Podestà, concerning which an inquiry was made against the said Petrus, promising to hold the said peace firm and strong, perpetually under the penalty of ten gold florins . . . and the obligation of all his goods, present and future.
>
> Given in the city of Reggio in the palace of the commune of Reggio, with the Lord Tomaxius de Canonicha de Canoniis, a judge of the commune of the aforementioned Lord Podestà, and Nicolino de Lucha, the herald of the commune of Reggio, and others, named and brought forward as witnesses.[178]

178 ASRe, *Giudiziario*, Libri delle denunzie, June 17, 1398, vol. 18, fols. 10r–11v: "In nomine Christi amen. Anno circumxionis eiusdem milliotricento nonageximo octavio indictione sexta die [. . .] mensis Iulii Anna de Flandria meretrix coram egregio et sapiente viro in iure civili publice licentiato domino Gasparino de Grassis de Castronovo honorabile vicario et iudice malleficorum domini potestis civitatis et districtus Regii constituta fecit et facit pacem concordiam remissionem et quietationem Petro de Lamania [sic] scriptori presenti et recipiente de omnibus iniuriis sibi per dictum Petrum illatis et maxime de una percussione facta cum pugillo per dictum Petrum super facie ipsius Anne sine sanguine ita et quod fecit eidem oculum lundum et nigrum dicens et protestens predictam pacem et beneficium eiusdem debere opitulari predicto Petro in condempnatione fienda de ipso Petro per officium prefacti domini potestas de eo quod inquiritur contra ipsum Petrum promittens predictem pacem firmam et ratam habere perpetuo sub pena florenos decem auri et reffectione d[. . .] et ex parte litis et extra et obligationum suorum bonorum presentium et futurum. Actum in civitate Regii in pallatio comunis Regii presentibus

This contract specifically stated the reason for the peacemaking as the reduction of the penalty of the assault for which Petrus was charged.

The use of peace agreements by persons of lower social status, like prostitutes and mercenaries, was not uncommon at Reggio. In 1387, Marguerite de Alamania, also a prostitute, was beaten by Anex Calimber, a German mercenary in the city of Reggio. Anex used a wooden *bastone* to hit her in the head, causing an effusion of blood. Anex appeared in court and confessed to the charges. On the same day,

> Margarita de Alamania, the offended party above, in the presence of the above-written Lords Podestà and Judge, made peace and remission with the said Anex, a hired soldier, concerning the above written strike made against her by the said Annex and concerning which [strike] an inquisition was made against him, et cetera.[179]

Anex was condemned to pay 12 pounds and six soldi *R.L.*

Peacemaking was used by people of every social standing, both men and women, from those designated as *dominus* or *filius domini*, to people of low social standing, including servants, prostitutes, and *stipendiarii*. This might imply that the motivation for these agreements was the mitigation of the penalty, and probably often enough there might have been some extra-legal incentives added to encourage the victim's participation in the peace agreement. This may also serve to underscore Zorzi's observation that vendetta and retribution in medieval society were not the sole province of the elite.[180]

In only one surviving case where a peace agreement was introduced was the defendant absolved, and it seems clear that he was absolved not because he made peace with his victim but because he presented the court with an acceptable reason for assaulting her. In a process dated January 10, 1396, the judge proceeded against Cataneus de Mediolano, a knight (*cavalarium*), and two of his servants, Antonius de Mediolano and Filipa de Barleta, because

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domino Tomaxio de Canonicha de canoniis iudice conumis superscripti domini potestati et Nicolino de Lucha nuncio comunis Regii testibus nominatis et rogatis et aliis."

179 ASRe, *Giudiziario*, Libri delle denunzie, April 8, 1387, vol. 8, fol. 87r–v: "Margarita de Alamania superius offensa existens in presentia superscriptorum dominorum potestas et iudicis fecit pacem et remissionem dicto Anex stipendiarius de superscripta percuxione sibi per dictum Annex [sic] illata et de qua superius inquiritur contra ipsum Annem [sic] et cetera."

180 Zorzi, "Legitimation and Legal Sanction," 34.

> while the aforementioned Antonius and Filipa argued together with words, this Filipa, with an angry heart and in a wicked manner, took a stone in her hands and threw it at the said Antonius and hit him in the face, one strike without [drawing] blood. And then the said Antonius, with an angry heart and in a wicked manner and way, . . . took another stone in his hands and holding it in his hand he hit the said Filipa with the said stone on the face two times: one strike below the eye and the other on the brow of the said Filipa, both with great bruising, and another strike in the head from behind Filipa, without blood. After a little while, the said Cataneus arrived and took the said Filipa by the hair and scratched her and threw her on the ground and with his feet and his fists he stuck and beat her thus lying there.[181]

Cataneus and Filipa appeared together before the judge on January 14; Filipa confessed to the charges against her, while Cataneus confessed that he had scratched, hit and beaten her, but he did it because he was trying to correct her, and make her return home, and the statutes gave him this right.[182] Cataneus himself stood as the fideiussor for Filipa, but no one pledged surety for Cataneus, which is very unusual unless the proceedings were terminated against him as soon as he produced the statutes. On the same day, Filipa appeared to make peace with Cataneus, "saying that he did these things to her for the purpose of correcting her, and [he did them] with a good heart and for

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181 ASRe, *Giudiziario*, Libri delle denunzie, January 10, 1396, vol. 15, fols. 20r–21v: ". . . quod dum predicti Antonius et Filipa simul verbis contenderent ipsa Filipa animo irato malo [modo] et ordine ceperit unum lapidem in manibus et ipsum lapidem contra dictum Antonium proiecit et ipsum percussit super vultu una percussionem sine sanguine. Et tunc dictus Antonius animo irato malo modo et ordine quibus supra cepit unum allium lapidem in manibus et cum dicto lapide tenendo eum in manu percussit dictam Filipam super vultu duabus percussionibus una super oculum et allia super frontem dicte Filipe ambabus cum magna smaxitura et una allia in capite de retro de dicte Filipe sine sanguine postea stando modicum supervenit dictus Cataneus et dictam Filipam cepit per capillos et ipsam sgarmigliavit et proiecit in terram et cum pedibus et pugilis ipsam sic prostractam [sic] percussit et verberavit."

182 ASRe, *Giudiziario*, Libri delle denunzie, January 10, 1396, vol. 15, fol. 20v: "Dictus vero Cataneus dixit et sponte confessus fuit se sgarmigliasse percusisse et verberasse dictam filipam eius famulam et pediustram prout in dicta inquixitione continentur sed ipsam sgarmigliavit percussit et verberavit animo et intentione ipsam corigendi et ipsam faciendi redire domum. Dicens et protestans idem Cataneus ad deffensionem suam sibi licuisse et licitum fuisse predicta facere vigore statutorum comunis Regii que quidem statuta producit in alegat in ea parte et partibus specialiter in qua et quibus faciunt pro iuris et defensione sui."

her own good . . .”[183] Cataneus produced the written *instrumentum pacis* in his own defense. It is not entirely clear why the peace agreement was necessary at all. Filipa was charged with assaulting Antonius, not Cataneus; she made a separate peace agreement with Antonius that mitigated her own penalty, and Cataneus was absolved and so incurred no penalty at all. It is a curious case, but it demonstrates that these peace agreements served a multiplicity of purposes and crossed class and gender boundaries.

There were many reasons why a culprit might seek a peace agreement, not the least of which was a possibility for a reduced sentence. But why would a victim choose to enter into a peace agreement? Victims sometimes needed encouragement, which could involve their friends and neighbors. When Bartolinus de Placentia struck Luchinus de Placentia with a rock, drawing blood, the neighborhood immediately began to talk. As Luchinus lay bleeding, a prostitute ran to fetch help, asking a certain Jacobus to fetch a doctor. Jacobus ran to Magister Maxotus de Bebio, a surgeon, and as the men walked back to Luchinus, Jacobus told him that he heard it was Bartolinus who had committed the assault and he thought it would be better if Maxotus could convince the men to make peace, and the matter went no further. Maxotus replied confidently that he would get involved, and he did not doubt they would bring the matter to him.[184] Only a partial record survives, so we do not know the

183 ASRe, *Giudiziario*, Libri delle denunzie, January 10, 1396, vol. 15, fols. 20v–21r. The peace was sworn before the judge. “Superscripta Filipa constituta coram superscripto Domino Vicario Iudice Malleficorum fecit pacem remissionem et absolutionem perpetuam et perhennem dicto Cataneo presenti et recipiendi de omni sgarmigliatione percussione decapilatione iniuria et contumellia sibi factis illatis et datis per idem Ca[ta]neum et specialiter de omni eo quod sibi fecit idem Cataneus loco et tempori in dicta inquixitione contenta dicens quod illud sibi facere causa ipsam corigendi et bono animo et pro suo bono et utili promittens per se et suos heredes dictam pacem et remissionem dicto Cataneo presenti [. . .] sub pena libras decem et obligationem sui et omnium suorum bonorum et cetera. Quam superscriptam pacem et remissionem dictus Cataneus produxit in continenti coram dicto Domino Vicario ad omnem suam defensionem faciendum de predictis.”

184 ASRe, *Giudiziario*, Libri delle denunzie, November 11, 1403, vol. 20, fol. 136v. “Jacobus Tragnolus sartor . . . dixit . . . quod quedam meretrix, quam tenet dictus Luchinus de Placentia, accessit ad ipsum testem dicendo quod reperiat eidem unum medicum qui medicaret dictum Luchinum, qui fuerat percussus . . . et tunc dictus testis ivit ad reperiendum Magistrum Maxotum de Bebio et eum duxit ad domum dicti Luchini, et in itinere dictus Magister Maxotus dixit cum dictum testem, ‘Quis percussit dictum Luchinum?’ Et dictus Jacobus respondit, ‘Ego audivi a dicto Luchino quod fuit Bartolinus barberius de Placentia, et vere esset bonum antequam res procederetur ulterius quod faceretis eos facere pacem.’ Et dictus Magister Maxotus respondit, ‘Ego me intromitam et non dubito quod veniet michi factum.’ ”

final outcome, but another witness said later that Maxotus did get involved, telling Luchinus that it would be better for him to make a peace accord with Bartolinus—not the least because then Bartolinus would pay his medical costs—but at least initially, Luchinus refused.

Certainly the possibility to put aside a dispute and end the possibility for vendetta played an important role in the victim's motivation to seek peace. There may also have been other motivations. Formal agreements of peace before a notary usually included a penalty for breaking the agreement, as did the statutes, but they did not involve exchanges of property or other incentives for making peace. Part of the difficulty with using peace agreements to reconstruct social reality is that the agreement itself was probably only the tip of the iceberg. Real peace negotiations probably involved more negotiation than the simple agreement recorded by the notaries or sworn before the judges would suggest. Any such negotiations would have resulted in private, oral agreements.

A rare glimpse of this sort of peace negotiation survives in a strange criminal investigation, which we have already discussed in Chapter Four (as it pertains to the history of torture). This document is worth revisiting here because of the unusual insight it offers into peace negotiations. We return to Antonius Raddi, accused of murdering a certain Daninus, a retainer of Guido da Fogliano. Guido had Antonius captured and held him in his castle at San Polo. There was no solid evidence for the crime, so Guido brought an official to the castle and hid him behind a curtain while Guido attempted to elicit a confession from Antonius. With the official hidden behind a curtain, Guido began a conversation with Antonius with the intention of eliciting a confession. He did so by negotiating a peace with him:

> Guido went to Antonius Raddi. When Antonius saw Guido, he said to him, "Welcome," which Guido said, "I do not have any right to speak to you, who killed my man." Which Antonius began to deny, and to say that this was not at all true. Then Guido said, "How can you deny those things which Bartholameus Botus and Johannes de Lamotta said to me? But if you wish to take as your wife the daughter of Maffeus de Vecto, who is your enemy and my friend, and to make her a dowry of fifty-five gold florins, then you will still be my friend by making peace with Maffeus and his brother Andriolus. You see, if I cause you to be hanged, there is nothing [in it for me], and I will not be enriched at all." Then Anthonius said that he was prepared to make peace with the aforementioned men but he could not take his daughter in marriage as a wife, since he was already married; but he would make his nephew marry her. He could not

> provide such an ample dowry of 55 florins, but he would provide one of 25. Then Guido said that he wanted Antonius to kill one of his men who killed Daninus, which Antonius promised he would do; and then Antonius said to Guido that Bartolomeus Botus and Johannes de Lamota were those men who led Antonius to Daninus, and he said that it was true that he killed Daninus. And thus this witness heard from Antonius himself . . ."[185]

Had Guido been in earnest when negotiating this agreement, he would have been asserting the value of private justice ("You see, if I cause you to be hanged, there is nothing [in it for me], and I will not be enriched at all"), which clearly seemed reasonable to Antonius. And there was justice inside the agreement. The dowry of fifty-five gold florins corresponded to the amount of money that Antonius stole from the dead man. Vengeance would still be exacted against

185 ASRe, *Giudiziario*, Libri delle denunzie, September 10, 1397, vol. 17, fols. 8r–13r.: "Quod dum nobilis vir Guido de Folianno accesserit ad castrum Sancti Pauli ad Carolum de Guarcho lochum tenentem Capitanei episcopatus Parme et Regii super deveto de mense Augusti et diceret dicto Carolo ut faceret sibi ius de quodam Anthonio Raddi de Vidrianno quem habebat in carzeribus [sic] qui sibi interficerat unum ex suis hominibus. Qui Carolus respondit quod erat paratus ius facere si daret sibi probationes vel indicia propter que posset ipsum ponere ad torturam, qui Guido dixit 'Si vultis vos ponere in secreto itaque ipsum audire valeatis ego solus ibo ad ipsum et talles tenebo modos quod ipse erit confessus dictum delictum,' qui Carolum dixit quod multum contentebatur et se posuit retro una frascatam et ipse testis etiam se posuit prope dictum Carolum et dictus Guido accesserit ad dictum Antonium Raddi. Et dum dictus Antonius videret dictum Guidonem sibi dixit, 'Bene veneretis [sic],' qui Guido dixit, 'Ego non habeo ius aliquod tibi dicere qui interfecisti hominem meum,' qui Anthonius incepit negare et dicere quod minime erat verum, qui Guido tunc dixit, 'Quomodo potes tu negare quoniam Bartholameus Botus et Johannes de la Motta michi dixerunt? Sed si vis ducere in uxore filiam Maffei de Vecto qui est tuus inimicus et est amicus meus et facere sibi dotem de quinquaginta florenis auri, ut aduc [adhuc?] eris meus amichus faciendo pacem con dicto Maffeo et Andriolo fratri ipsius Maffei, quia si facerem te suspendi nec aliud esset et nichil essem lucratus,' qui Anthonius dixit quod erat paratus pacem facere cum predictis sed filiam ipsius capare non posset in uxorem quoniam erat uxoratus, sed faceret quod quidam eius nepos eam capaveret in uxorem, sed non posset tam amplam dotem facere, videlicet, de florenis quinquaginta quinque, sed faceret de vigintiquinque florenis. Qui etiam Guido dixit quod volebat quod interficeret unum ex illis hominibus qui interfuerunt morti dicti Danini, qui promixit sic facere, et tunc ipse Anthonius dixit dicto Guidoni quod Bartolomeus Botus et Johannes de la Mota fuerunt illi qui duxerunt ipsium Anthonium ad dictum Daninum et dixit quod verum est quod fuit morti dicti Danini et ita ipse testis audivit a dicto Anthonio praedicto . . ."

one of the murderers. And a new bond would be made between allies and enemies, limiting the possibility of the vendetta.

It seems most unlikely that the highly formulaic peace agreements, sworn orally or made in writing, represent the negotiations that ultimately resulted in the *instrumentum pacis*. These documents do not record details of individual circumstance or motivation. While peace agreements must be considered in relation to their legal power in the criminal court, they must also be read with the understanding that they represent more complex negotiations that ended conflicts, made retribution for wrongs, and perhaps sometimes included provisions, such as Guido's requirement that Antonius kill another man, that were themselves illegal.

Peace agreements and confessions were the most common tools employed to mitigate penalties, but in rare cases, other agreements were used to avoid a conviction, such as agreements of marriage in rape cases. In two rape cases recorded at Reggio Emilia where the victims were children, the defendants were absolved because they agreed to dower and marry their victims. Trevor Dean observed that the difficulty of understanding the horrifying practice of betrothing a rape victim to her attacker "is because the modern crime of rape has shed all connection with abduction, and because 'normal' sexuality has become less violent."[186] But this would not explain these cases of child rape, where the confusion between rape and abduction does not appear. A 1396 case illustrates this problem.

In 1396, Johannes Axerbi, a citizen of Reggio, was accused of raping a certain Johanna, a girl eight years old, and daughter of Domina Johanna de Lenco. The record states that Johanna was playing outside Johannes's door with some other children, when Johannes said to her, "Come into my house so I can give you some bread and wine." She entered the home, where immediately he threw her on the bed and raped her. She fought him, as the record says, "shouting and continually and bravely objecting to the violence he was doing to her," though he told her that if she cried out, he would throw her against the wall and cut out one of her eyes.[187] Another rape that resulted in the betrothal of a child to her attacker was equally violent—at one point, the attacker threatened to feed her to his dogs if she cried out.[188] Are these formulaic pieces of dialogue,

186 Trevor Dean, "Fathers and daughters: marriage laws and marriage disputes in Bologna and Italy, 1200–1500," in *Marriage in Italy, 1300–1650*, eds. Trevor Dean and K.J.P. Lowe, 88–89.

187 ASRe, *Giudiziario*, Libri delle denunzie, November 26, 1387, vol. 9, fols. 61r–62r.

188 ASRe, *Giudiziario*, Sentenze e condanne, reg. 7, fols. 16v–17r: "... minabatur eidem Petre dicendo quod ipsam comedere faceret canibus suis tamen dicta Petra nolendo eidem

as Vallerani noted, when he found that rapes continuously began with the attacker's admonishment: "I will kill you / I will cut off your nose, unless you are silent and permit me to do as I wish with your body"?[189] This is possible, and it is also possible that the age of the child is minimized by the complainant, and the entire accusation existed to force a marriage agreement. Certainly both these children were ultimately betrothed to their attackers. Yet we saw in the previous chapter, in the trial of Antonius de Albrixiis, when a judge became aware that witnesses to the crime were children, he wanted to judge their age with his own eyes.[190] Many instances where sexual violence appears in the trial records may indeed be veiled references to elopement or abduction, but in these particular cases, the law and the mothers' insistence that it be applied to the rapists may be best understood as indicators of how difficult the children's lives might have been, had they remained shamed and unmarriageable. In both these cases, the agreement of marriage served to absolve the defendant from the charge of the rape of a child, which carried a mandatory death penalty.

Signorial Participation in the Administration of Justice: Instruction, Cancellations, and Pardons

The participation of the lords of Milan in quotidian matters of justice constituted an overarching layer of authority in the criminal courts. The Visconti lords of Reggio received queries from the Podestà as well as supplications from accused or condemned defendants, and were deeply entwined in the administration of justice. This participation was characteristic of northern Italian signorial regimes, and has been noted at Milan during the same period.[191] Other studies have also revealed this sort of interaction between signorial lords and municipal courts under Gonzaga and Este leadership[192] and during the reign of Taddeo Pepoli in Bologna.[193]

Petro ascentire sed semper resistendo et recusando non obstantibus minis predictis continue plorabat . . ."

189 Vallerani, "The Accusatory System in Action," 130.

190 ASRe, *Giudiziario*, Libri delle denunzie, fol. 3v: ". . . ex aspectu personarum suorum videntur etiam minores decem annorum, dictus Dominus Vicarius et Iudex Malleficorm pronunciavit et declaravit predictos Simonem et Simonem examinandos non esse super dicta inquisitione et contentis in ea."

191 Verga, "Le sentenze criminali dei podestà milanesi," 120–125.

192 Chambers and Dean, *Clean Hands and Rough Justice*, 83.

193 Vallerani, "The Petition to the *Signore*," 321–339.

At Reggio, in addition to those decisions that are preserved in the *Registri dei decreti*, evidence of this participation is found in interlinear and marginal notes in trial records and books of sentences, and in some surviving decrees from the Milanese court. We find advice dispensed on specific cases, orders for the cancellation of proceedings, and granted absolutions (*gratia*). All these acts were typical in general of responses to petitions by signorial governments.

Many of the extant examples of this signorial participation date to the rule of Regina della Scala. The queries posed by the Podestà of Reggio are minute in their applicability and detail. An illustration of these referred cases and of signorial participation in the justice system at Reggio is provided by a degree of 1374 from Regina della Scala to the Podestà of Reggio. This decree addressed the larger problem of civil disorder caused by mercenaries, *stipendiarii*, who were housed at Reggio. Regina herself took an active role in attempting to control the disorder caused by the hired soldiers present at Reggio, and she wrote to the Podestà:

> We have understood that certain men from our *stipendiarii* and *provisionates* staying at Reggio inflict damage and injuries upon our citizens of Reggio, in violating their women and in not making due payments for the rents of homes and property which they take for their own use. Whence we order you that you should immediately inform us about the aforesaid matters, and if you should discover that anyone from these *stipendiarii* or the aforementioned mercenaries has committed any illicit act, you should write to us, etc.[194]

The Podestà and his judges responded to this request by referring a wide variety of matters to Regina for her guidance. In response, Regina made proclamations on civil as well as criminal cases, and on situations that were likely to lead to conflict. She also concerned herself with cases that appear to deal with minutiae, including marriage difficulties and dowry problems. When a certain Guilelmus Copini, citizen of Reggio, complained that Mayninus de Mayneriis of Milan, an inhabitant of the city of Reggio,

194 ASRe, *Comune*, Registri dei decreti e lettere, reg. 1372–75, February 22, 1374: "Inteleximus quod certi ex stipendiarii et provisionatis nostris in Regio commorantibus dampna et iniurias inferunt civibus nostris Regii in eorum violando mulieres et non faciendo solutiones debitas pro pensionibus domorum et rerum quas acipiunt pro eorum usu quare mandamus vobis quatenus statim de predictis vos informetis et si reperitis aliquem ex stipendiariis vel provixionatis predictis aliquid illicitum comixisse ut prediximus ad nobis rescribatis et cetera."

> gave to this Guilelmus as a wife Placentina de Mantua, whom the said Mayninus before held as his lover (*amaxia*), and [he said] that the said Mayninus promised to Guilelmus twenty-five gold florins as a dowry for the said Placentina, and one robe of good cloth for Placentina's use; further, [he stated] that the said Guilelmus held the said Placentina as his wife in his home for eight months. And since afterward she left and went to stay with the said Mayninus, he does not wish to give her her dowry.

The Podesta had ordered a preliminary investigation:

> Concerning these matters, we received the information of the aforementioned Deputy concerning the promise of a dowry, he had no faith nor information, and he found that the said Placentina, once separated from her said husband, went to stay at the castle of S. Paolo, where the brother of the said Mayninus was staying, and afterwards she returned with her said husband and stayed with the mother of the said Placentina, and he could not find other information.

Regina's decision was straightforward. She replied:

> If the said Placentina wishes to go with her said husband, we are content that she goes.[195]

No other information about the case is given; apparently the wronged husband had made a petition with the court of the Podestà to require his wife to return

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195 ASRe, *Comune*, Registri dei decreti e lettere, reg. 1372–75, February 22, 1374: "Guilelmus Copini Barberii civis Regii dixit per sacromentum quod Mayninus de Mayneriis de Mediolano habitator civitate Regii dedit eidem Guilelmo in uxorem Placentinam de Mantua quam dictus Mayninus ante tenebat pro sua amaxia et quod dictus Mayninus promixit ipsi Guilelmo pro dote dicte Placentine florenos xxv auri et unam robam ab uxu dicte Placentine de bono panno et quod ipse Guilelmus tenuit dictam Placentinam pro sua uxore in domo sua pro octo menses. Et quod postea recesit et ivit ad standum cum dicto Mayninum, quam dare non vult nec dare dotem. Super quibus dicti deputati informationem recipientes de promissione dotis nullam fidem habuerit nec informationem et reperiverit [sic] quod dicta Placentina quoddam semel discessit a dicto suo viro et ivit ad standam ad castrum Sancti Pauli in quo morabatur frater dicti Maynini et posta reversa fuit cum dicto suo viro, et moratur cum matre ipsius Placentine aliam informationem reperire non potuerit. [Responsio ut super] Si dicta Placentina vult ire cum dicto suo marito, contentamus quod vadat."

or to allow him to keep her dowry if she did not, and the Podestà referred the case in accordance with Regina's order because the men were mercenaries.

Other cases clearly involve criminal matters and show that the Podestà sought approval for certain cases to proceed even after a complaint or *querela* had been made with his officials. For example, one case considers what appears to be a straightforward assault:

> Senexia, wife of Azalirius de Saviola, a Reggian citizen, complained that around the month of this January at the time of night, Cataldus de Pullia, a hired soldier, with a certain comrade, entered the home of the said Senexia and went to her bed and hit her with a stone which he was holding in his hands on the head of this Senexia, many strikes, with a great effusion of blood, and he hit her in many parts of her person.

The incident may have been referred to Regina because it involved a hired soldier, but in spite of her demand to be informed of cases involving these men, Regina herself seemed perplexed by the court's inaction, irritably responding,

> We wonder why no process is made concerning the aforesaid [and we] desire that the law should be rendered concerning this [crime] by our Podestà of Reggio.[196]

Other incidents referred to Regina's decision probably aimed more at settling disputes between the municipal officials themselves than in resolving particular cases, for example, when Nicholaus Pichioni, a cobbler and a citizen of Reggio, made a complaint that Johannes de Cremona, a hired soldier, "threatened him many times that he would kill him." Regina responded, "The city captain should provide that our *stipendiarii* do not inflict injuries or threats upon our citizens of Reggio."[197]

It is perhaps not too much to say that sometimes, the signorial court shouldered the function of a *consilium sapientis*, directing the judge how to proceed

196 ASRe, *Comune*, Registri dei decreti e lettere, reg. 1372–75, February 22, 1374: "Responsio ut super. Miramus quare non est factus processus de predictis volentes quod ius super hoc fiat per potestatem nostrem Regii."

197 ASRe, *Comune*, Registri dei decreti e lettere, reg. 1372–75, February 22, 1374: "Nicholaus Pichioni calzolarus civis Regii conquestus est de Johanne de Cremona provixionato quod minatus fuit eidem pluries de ipsum occidendo. Responsio ut super, capitaneus taliter provideat quod stipendiarii nostri non inferant iniurias nec minas civibus nostris Regii."

in ambiguous matters.[198] In 1387, Agnexina, daughter of Cupinus, was accused of killing a small child. In the course of an argument with the child's mother, she grabbed the child by the arm, lifted her and threw her to the ground, from which injuries the little girl died.[199] On September 8, Agnexina confessed, and she was granted a term of eight days to make her defense, instead of the more usual ten days. On September 24, Agnexina's father, seeking to defend her, hired a notary to draw up a sworn statement in which the father of the child declared that the child died not because of Agnexina's actions, but because she had always been gravely ill. In this document, the child's father also testified to the friendship that had existed always between himself and his family, and Cupinus and Agnexina, denying that the familes had ever had enmity. Johanna, the mother of the little girl, testified similarly that the child had been ill. But still Agnexina remained in jail. On the 17th of October, a letter from Milan was presented to the Podestà, ordering him to give consideration to the document, and that if the father and mother both testified to the cause of death in the instrument, then Agnexina should be released. This release was ordered a full twelve days later, on October 29th.

There were other benefits to the arrangement for the foreign rectors. In criminal cases, the *consilia sapientis* were seldom used. Cases involving complicated scenarios or conflicting jurisdictions were generally not referred to jurists for final decisions. Instead the Podestà could rely upon the guidance of Milan, which had the added benefit of moving difficult decisions out of their hands—important, because they faced syndication at the end of their terms. C*onsilia sapientis* protected judges by reducing the judge's personal liability in the case.[200] This was also the benefit of these requests for signorial guidance in court matters. And they emphasized too the nature of power in the Visconti dominions. Signorial authority, with its *plenitudo potestatis*, rendered a final decision that lay outside the hands of the judge, at the highest level of authority. This was absolutely in line with the theory of justice that underlay Visconti reforms during the late fourteenth century: if Barnabò and Galeazzo believed that justice was best served by abbreviating procedures and limiting the role of

198 These responses had an entirely different form from the sic-et-contra form common to *consilia*, by which the jurist established the authority of his opinion. Kirshner identified four primary bases of the authority of the *consilium sapientis* in civil (and sometimes criminal) courts—professional expertise, impartiality, the dignity and sacred character of the legal profession, and rules of judicial accountability which allowed for unmotivated decisions. See Kirshner, *Consilia as Authority*, 109–125.

199 ASRe, *Giudiziario*, Libri delle denunzie, September 8, 1387, vol. 9, fols. 49v–50r.

200 Kirshner, "Consilia as Authority."

lawyers in the courts, and Giangaleazzo and his successors "proceeded to give further encouragement to a system in which justice was grounded on their ability to overturn laws and rights,"[201] then this direct, case-by-case intervention in justice aligned very well with these views.

Gratia and the Cancellation of Proceedings

There was no appeal process for criminal sentences. However, cancellations of ongoing trials and pardons from convictions could be obtained directly from the court at Milan. In fact, Barnabò and Regina chose to increase access to the process at Reggio by providing a place in the city where petitioners could leave their requests,[202] and perhaps for this reason, the petitioners in these cases were not all of one social class or profession, though they were often hired soldiers, *stipendiarii*. This was a useful tool of recourse for people from all walks of life. This interference with the activity of the criminal court emphasized the power of the Lords of Milan, and during the reign of Barnabò and Regina, who firmly maintained the right to operate above and outside the law of the land, such petitions were widely used. But the practice posed vast legal questions, dealing as they did with singular situations,[203] and sometimes imposing, sometimes setting aside municipal norms. These *suppliche* or acts of *gratia* represent a practice that was growing but still largely unsystemized in the fourteenth century. At Reggio, the evidence for the practice takes the form both of records of the decrees, and marginal notations or interlinear notes in the *Libri delle denunzie* or in the *Sentenze e condanne*. The evidence is not systematic, and a quantification of the frequency of the practice is impossible. Indeed these orders could have halted many trials before they began, as they often include the caveat that if the proceedings have already been written in the books of trials, they should be cancelled, implying that the order could reach the court before those records were made.

Increasing accessibility to the process of appeal spoke volumes about the nature of power in Visconti Reggio. Here was a way that the court's decisions could be questioned or even set aside; the petitions operated not as appeals—the cases were not reheard—but as kind acts made by a powerful and benevolent lord. The petitions at Reggio, as was normal for the genre,[204] emphasized

201 Black, *Absolutism in Renaissance Milan*, 118.

202 Black, *Absolutism in Renaissance Milan*, 117.

203 Vallerani, "The Petition to the Signore," 347.

204 Vallerani, "The Petition to the Signore," 306.

the grace and magnanimity of the lord of Milan in his (or her) responses to these petitions. Even after the fall of Visconti control in Reggio, the new lord, the condottiero Ottobuono Terzi, continued the practice, though less frequently, and with great concern about the possibility of fraud: he was very concerned that letters of *gratia* were authentic, and he ordered the Podestà to verify the presence of his seal.[205]

In 1373, Rizardus de Antonius, an English mercenary, murdered one of his countrymen, Schielar de Anglia.[206] A contingent of these mercenaries, probably a fortune company, was housed in Reggio. A marginal note tells us that the proceeding was cancelled by an order from Milan, which read:

> Attending to the supplication of Lord Conrad de Rodesten, Lucius Sparaverius, and others of our German and English mercenaries living in Reggio, we order you that you should take no new action against Rizardius Anton, an Englishman whom you have detained for the reason that he killed a certain servant of his, but rather you should freely release him from jail, annulling and revoking every process made against him on the aforesaid occasion.[207]

It is possible that the mercenary capitans interfered because they wished to exercise their own jurisdiction over these men, a jurisdiction that would later fall into the hands of the captain of the city. These men made a supplication to Milan on Rizardius's behalf, causing the cancellation of the inquisition made against him. Whether he was held accountable for the murder by another court or by his superiors is unknown, but it seems unlikely, as he was denounced again to the criminal judge a few months later. On April 5, 1374, Rizardius was cited by the court to answer charges that he assaulted an inhabitant of the city of Reggio, beating him in the head and body with a wooden club. Rizardius was contumacious and placed under ban.[208] Jurisdiction may have underscored many of these contested rulings. In the same way, as was discussed in Chapter 2,

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205 Gamberini, "Un condottiero," 296 n. 63.

206 ASRe, *Giudiziario*, Libri delle denunzie, December 13, 1373, vol. 1, fol. 47r–v.

207 ASRe, *Giudiziario*, Libri delle denunzie, December 13, 1373, vol. 1, fol. 47r: "Attententes [sic] suplicationi domini Conradi de Rodesten Lucii Sparaverii et aliorium nostrum provixatorum Teotonicorum et Anglicorum existentium in Regio mandamus tibi quatenus contra Rizardium Anton anglicum quem detentum habes causa quia interfecit quemdam eius familiarem nullam novitatem facias sed ipsum a carceribus libere relaxes tolendo et revocando omnem processum contra ipsum factum occaxione predicta."

208 ASRe, *Giudiziario*, Libri delle denunzie, April 5, 1374, vol. 1, fols. 91r–92v.

the heirs of Gabriotto da Canossa petitioned Milan to stop a proceeding against a certain Marcocius who was accused of murdering his wife, because they wanted to require the city to respect their claims of jurisdiction.[209]

Ambiguous situations could be referred to the lord for an opinion, much as a judge might use a *consilium sapientis*. For example, in 1378, Nicholaus de Cornazatio, a servant of the Capitano della Città, was accused of murdering Bartholina, daughter of Zacharius, because

> While the said Nicholaus, with his said horse, which he was making to run, this Nicholaus with the said horse pushed Baratholina, daughter of the deceased Zacharius, furrier, who was crossing the public street, in such a way that she fell to the ground, on account of which the aforesaid horse placed his feet upon the head of the said Bartholina, in such a way that he caused three wounds to Bartholina in her head, with an effusion of blood, from which strikes and wounds the said Bartholina, after some interval of time, was and is dead.[210]

Nicholaus was charged and cited, which citation he ignored; he was then placed under ban in the amount of 1,000 pounds *R.L.*, the amount of a ban used for murders. In December of that year the case against him was cancelled because of an order from Regina della Scala. The notary who cancelled the case recorded the order in the margin:

> We order you that you should in no way proceed against Nicholaus de Cornazano, a servant of Nicholaus Tereius, the captain of our Reggio, on the occasion of a death of a certain woman. And if you have begun any process, you should cause it to be freely cancelled, since no one can be forewarned.[211]

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209 ASRe, *Giudiziario*, Libri delle denunzie, June 22, 1388, vol. 12, fols. 35r–45v.

210 ASRe, *Giudiziario*, Libri delle denunzie, vol. 4, fol. 135r: "... dum dictus Nicolaus cum dicto equo quem curere faciebat ipse Nicolaus cum dicto equo taliter spinxit Baratholinam filiam condam Zacharie pilizarii per stratam publicam transeuntem quod eam cadere fecit in terram ob quem casum equus predictus posuit pedes super capite dicte Bartholine sic et taliter quod fecit ipsi Baratholine tria vulnera in capite cum sanguinis effuxione. Ex quibus percussionibus vulneribus dicta Bartholina per aliquod spatium temporis mortua fuit et est."

211 ASRe, *Giudiziario*, Libri delle denunzie, November 15, 1378 and following days, vol. 4, fols. 135r–136v: "Mandamus tibi quatenus contra Nicolaum de Cornazano familiarem Nicholay Tereii capitanei nostri Regii occaxione mortis eiusdam femine nullatenus

These orders followed supplications made by the accused for a pardon, or *gratia*, who usually remained contumacious until the request was answered. *Gratia* was conferred after a sentence was handed down against the defendant. As at Milan, *gratia* conferred complete and unconditional absolution.[212]

Few of the supplications themselves survive. One extant example dates to 1386, and coincidentally, involves another horse. A certain Minus was accused of murdering a German mercenary, Annes de Alamania, by running him down with his horse.[213] Minus was convicted and sentenced to death; he was contumacious, and placed under ban for 1,000 pounds. His condemnation survives in the register of condemnations from 1386. The sentence itself was cancelled (indicated by hatch-marks) and a marginal note dated June 3, 1395 tells that a supplication was received and granted. The notary recorded the text of the supplication within the marginal note, in which the convicted man claimed that he had accidentally killed Annes "not led by wickedness, but innocently running with a horse through the street . . ."[214] and that the death was an accident, which occurred "not wickedly or voluntarily, but by chance . . ."[215] Minus also stated that he had made peace with the brother of the dead man. In this way, his sentence was cancelled and the ban against him was lifted, albeit nine years after the fact. Minus was contumacious, and apparently never attempted to defend himself to the judge of the Podestà. The truthfulness of his claim, as in the case of all claims made in supplication, is of course open to question: as a judge in Ferrara many years later would remark to his duke, "everyone lies in petitioning in order to obtain your Excellency's pardon."[216]

Ettore Verga found that *gratia* could be conferred in the case of a violent crime only when a peace agreement had been completed between the offender and the victim.[217] The desire for the formal peace may explain the frequent long delays between conviction and the conferral of *gratia*—this was not a problem specific to Reggio, but was the case in Milan itself, and was also a pattern in mid-fifteenth century Mantua. Whether these long delays reflected

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procedas. Et si quem processum fecisti illum incontinenti libere facias canzelari quoniam etiam infortuniis casibus nemo sibi precavere potest."

212 Verga, "Le sentenze criminali dei podestà milanesi," 123.

213 ASRe, *Giudiziario*, Libri delle denunzie, March 23, 1386, vol. 7, fols. 43r–44v.

214 ASRe, *Giudiziario*, Sentenze e condanne, reg. 1, fol. 4r: ". . . nulla malignitate ductus sed innocenter currens cum uno equo per platea . . ."

215 ASRe, *Giudiziario*, Sentenze e condanne, reg. 1, fol. 4r, "non dolose non voluntarie sed casu fortunito . . ."

216 Quoted in Chambers and Dean, *Clean Hands and Rough Justice*, 34.

217 Verga, "Le sentenze criminali dei podestà milanesi," 123–24, cf. Pertile, *Storia del diritto penale* V, 180, 188.

difficulties in arranging the peace agreement, resulted from long imprisonments while the question hanged with the ducal court,[218] or whether applicants were unlikely to successfully petition until they had suffered some of the punishment a ban could offer, it is not possible to know.

Punishments in the court were sometimes intended as deterrents, as in the case of public executions, but these public displays of power were rare. Although the court used inquisitorial procedure almost exclusively, which at least in theory was designed to facilitate the punishment of crime, in fact, the court still acted in a way to maximize conflict resolution. Rewarding the use of the *instrumenta pacis* is one example of this. Another is in the use of capital and corporal sentences. Though the court at Reggio did not sentence murderers to a ban directly (they incurred this sentence only through their contumacy), the contumacy rate of those accused of murder was so high that it must have been expected, and one can imagine that contumacy in this sense was not only a strategy for the defendant, as was discussed in the previous chapter, but was also a strategy for the court. It allowed the court to still publicly promulgate the death sentence, maintaining its usefulness both as a show of authority and perhaps also as a deterrant, but without the risk of creating new sources of vendetta and hatred among the parties, leaving alive the possibility for a future peace between them. The legal system facilitated reconciliation between parties in precisely this way, by allowing a return from ban after a period of time if peace could be made with the offended party. As was previously discussed, the commune allowed the families and creditors of those banned for homicide to collect money that was owed to them, and in this way strategies could be enacted to protect the property of the accused; by using bans of contumacy, the city could hope to place distance between parties in conflict and allow for legal reconciliation after some time had passed. Confession and peacemaking allowed for this kind of reconciliation. And acquittal was far from unknown: rates of outright acquittal at trial, while lower than in the previous century at Perugia, were still generous when compared to acquittal rates of modern justice systems. Solutions to criminal trials were multifaceted and operated both before the judge and outside his court to bring resolution to criminal acts and to maintain order.

218 Chambers and Dean, *Clean Hands and Rough Justice*, 83.

Conclusion

Recent studies have rightly challenged the image of inquisitorial procedure as a depersonalized system of justice that placed almost unlimited power in the hands of a prosecuting judge. This examination of the function of justice at Reggio makes clear that the use of inquisition procedure as the predominant mode of justice was not necessarily a marker of a strong or established state. But it could certainly be an indicator of an assertive, deliberate plan to claim and establish jurisdiction. In practice, this was complex: at Reggio, the Podestà and their judges sometimes spent long periods of time in the city, ultimately holding a nebulous position somewhere between signorial authority and municipal reality. Actions of the criminal court of the Podestà sometimes pertained as much to the city's jurisdictional interests as they did to the idea of justice in the public interest.

But much of the activity of the court concerned quotidian matters, not overtly political ones. How was the individual accused of crime treated by the court? We have approached this question through a consideration of the role of the judge in the inquisition process. This process was constructed to enact justice in the public interest, but at Reggio, inquisition procedure, *ex officio* and otherwise, did not signify the rise of a prosecuting magistrate, and due process granted protections to defendants. The role that *fama* played as a denouncer, and indeed throughout the trial, was not a legal fiction. *Fama* was real, and if not tangible, it was knowable through sense perception. It was reified and fundamentally intrinsic to the process. Even if witnesses could not always define *fama*, they knew what it was; perhaps the problem with defining it was that it was so personal and so specific to people and to situations, and it had so many legal uses, that generalizations were difficult if not impossible to make.

This is not to say that inquisition procedure did not extend a wide latitude of power to the judge. And with that power came obvious opportunities for misuse. While even learned jurists like Durantis recognized that judicial power was sometimes—perhaps frequently—abused, the point is a different one. The inquisition process was a scholastic process, developed to resolve unanswered questions in the face of conflicting information. The probative system rested on Aristotelian ideals of truth and sense knowledge, and at Reggio Emilia, the men who implemented it were learned in the law, sometimes holding the highest titles. Inquisition procedure reflected the dialectical arguments

of the schools, with the judge in the position of a fact-finder or a jurist seeking the *solutio* to a *sic et contra* argument.

This is borne out by the details of the process. This study shows a real distance between the judge and the prosecutorial argument in most cases. Ideally, we might explore the figures of the judges themselves, an area in which there has been little scholarship (Dean and Chambers' study of the career of Beltramino Cusadri in northern Italy in the fifteenth century is a notable exception). But at Reggio for this period, the sources do not allow such a direct examination. However we can see that the judges' role in investigation, discussed in Chapter One, was very limited. Judges were free to investigate, and they did investigate, but they actively sought witnesses that both supported and opposed the charges as stated in the statement of charges, taking neutral positions in witness interrogations.

The judges' role in initiating trials, as was explored in Chapter Two, was likewise limited. They had the power to initiate trials *ex officio*, and sometimes they did, but more often than not, they dealt with notifications and complaints made by public officials and injured parties, and in these cases, their role in shaping the accusatory narrative of the crime found in the statement of charges was minimal. Even in *ex officio* trials, as we saw, the narrative of the crime came from other sources: medical reports, witness testimony in unrelated investigations, or confessions. As the judge considered proofs, he did use his own conscience and his own discretion, even when the statutes forbade it, but sometimes this was a great benefit to the defense, as he absolved or handed down light penalties in situations where the statutes mandated something harsher.

The importance of maintaining a strong tribunal to dispense justice and to keep order was as propagandistic as it was real. Inquisitorial courts were not necessarily markers of a strong state. But the criminal justice system, with the continuous announcements of its heralds, the open and confrontational nature of the trials, and even the public displays of punishments, all asserted the strength and power of the government and its ability to keep order—much of which, in reality, was probably largely an illusion. Public justice could give the illusion of power, and this was perhaps one of the most important functions of the criminal court at Reggio.

When we put the criminal court under such close scrutiny, examining its actions and processes under a magnifying glass, perhaps the biggest challenge is to maintain the perspective of how small a piece of the puzzle we

actually have. Clues to the limited sphere of influence of the criminal court are everywhere: in the high rate of contumacy, and the ability for a contumacious felon to live ten years outside the city before reintegration; in the brief, enigmatic glimpses of witness testimony, which show us the lords of the contado enacting summary justice against those they suspected of betraying them; in peace negotiations that required murder and ignored municipal justice; in legal judicial actions that sent defendants to hanging without a trial. Inquisition procedure was only one tool available to the criminal judge. It could be a venue for conflict resolution, especially given the development of the *querela*, and sometimes it was, but it was a dangerous tool for this, carrying far more risk to the accuser than the older processes, and impossible for the parties to stop once the wheels of justice began to turn.

This investigation of justice in Reggio Emilia illustrates inquisition procedure as it operated on the periphery, outside the important urban centers of late medieval Italy. This small city struggled under all the burdens of the fourteenth century—war, plague, famine and unrest—while surviving in a contested zone on the borders of the great expanding powers of late medieval Italy. The activity of the court shows us the scholastic inquisitorial process as it confronted the quotidian reality of justice. It is a picture of how one court, in difficult and uncertain times, navigated its complex role inside a changing hierarchy of laws, between crime control and dispute resolution, and between public interest and personal justice.

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