NOTORIETY: A MEDIAEVAL CHANGE OF ATTITUDE

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Scripture refers to an 'informer' in the story of the rich man who had a steward, and was told that he was mismanaging his master's resources (Luke 16:1ff). The Vulgate has *hic diffamatus est apud illum*. We hear nothing more about the informer in this parable, or what became of him. He is not reproached for his action.[1]

Yet in Roman law of the early Christian period it is held to be profoundly reprehensible to damage someone else's reputation; indeed to take someone's good reputation away is a serious offence in itself. The Theodosian Code contains numerous references to *delatores* or informers, in terms of the strongest disapproval. It recognises that good reputation is a valuable possession, easily destroyed. Anonymous defamatory writings should be burned at once (*Theodosian Code* 9.34.3 (320 AD)). If anyone accidentally finds such a writing he ought to destroy it and not repeat what it says, and if he does repeat it he himself will be guilty of defamation (*Theodosian Code* 9.34.9). There must be no investigation of the accusations such writings contain, for he who brings someone else's life into question ought to do so by an open charge in court (*Theodosian Code* 9.34.4 (328 AD)). Authors of defamatory writings must be prepared to prove what they say, and even if they are able to do so they must expect to be punished because they chose to defame rather than to make a formal accusation through the courts in the proper way (*Theodosian Code* 9.34. 1 (319 AD); cf. 9.34.2 (313 AD)). A defamed person who lacks an accuser prepared to do that must be considered innocent, even though he conspicuously does not lack an enemy (*Theodosian Code* 9.34.6 (355 AD)).

The Theodosian Code makes an exception to the rule that an informer is himself committing a serious offence, in the case of informers who tell about a practitioner of the magic arts who goes to a secret meeting in someone's house (*Theodosian Code* 9.16.1). The presumption here is clearly that clandestine magical practices are worse than the crime of damaging reputation. Similarly, if someone informs on a person who rapes a consecrated virgin he does not deserve punishment (*Theodosian Code* 9.25.3). So there are exceptions to the general rule that 'informing' is a discreditable activity. But in most cases informers are to be punished severely, by deportation (to prevent their repeating the calumny) (*Theodosian Code* 9.39.1 and 2 (383 and 385 AD)). It is not the Emperor's wish that the innocent should be ruined by the attacks of devious men (*Theodosian Code* 9.39.3 (398 AD)). Informers may even deserve capital punishment, because that is proportionate to an offence which essentially consists in attacking a man's *caput* (his head figuratively taken to mean his status) (*Theodosian Code* 10.10.1).

I want to argue that in the period between Gratian and the Fourth Lateran Council there seems to have been a radical shift away from these assumptions of late Roman society, with the arrival of a vocabulary of 'notoriety' and a concomitant change in the legal procedures required for dealing with cases which fall into that category.

[1] The question of bearing false witness against one's neighbour, forbidden by the commandment (Exodus 20:16), belongs to a different area, for the informer may very well be telling the truth. On the issue of propriety in a witness, and all the formal restrictions which attach to his acceptability in a court, the mediaeval texts have a great deal to say, but for reasons of space that must form the subject of a different study.

In classical legal usage a *notoria* is a written statement 'notifying' the authorities about a crime.[2] Neither *notorius* nor *notorietas* seems to come into common legal usage until well on into the mediaeval period.[3]

Yet there were certainly notorious persons before there was a word for them; there is, accordingly, an earlier vocabulary to be taken into account. *Iniuria* is mostly discussed in terms of reputation in Roman law.[4] There is material in Salic law on the possibility of injuring, defaming and falsely accusing and thus causing injuries by words, with lists of possible insults which might have such an effect.[5] Isidore discusses loss of reputation in connection with the loss of standing which a person experiences when he is found out in a crime. *Ignominium, eo quod desinat habere* ***honestatis nomen*** *is qui in aliquo crimine deprehenditur. Dictum est autem ignominium quasi sine nomine, sicut ignarus sine scientia, sicus ignobilis sine nobilitate. Hoc quoque et infamium, quasi sine bona fama* (*Etymologiae,* V. 267). What is lost here is specifically the 'name for honesty'. This is an association of the individual with certain attributes or characteristics which made him respected. It is a strong idea in Roman society.[6]

Fama is in itself a neutral term for reputation. It can be qualified by 'bad'.[7] Or it can be qualified by 'good', and then one might call it 'praise'.[8] But *fama* can also mean 'rumour', and then it is an uncertain thing: *fama nomen incerti, locum non habet ubi certum est*, says Tertullian (*Apologeticum* 7). Moreover, in its capacity as rumour, *fama* is likely to spread: *et exiit fama haec per universam terram illam.*[9] Augustine speaks of widespread fame: *late patens fama.*[10]

This linking of rumour and reputation is central to the problem we are trying to address here. *Fama* is people's good opinion: *bona hominum opinio*. That can be lost or diminished.[11] Loss of reputation is frequently mentioned in the Theodosian Code as a just penalty of certain actions.[12] Thus infamy is a legally defined state or condition of someone who has been condemned by a court. The twelfth-century *Summa 'Elegantius'* says that no-one ought to be removed from office (*deiectus*) solely for *infamia.*[13] Infamy is created by the sentence of a judge (*sententia iudicis*), as it is by the declaration that someone has broken the law, and the imposition of a penalty.[14] *Infamia* technically both destroys reputation and makes that state of affairs public knowledge.

In the late classical period *clamor* is often mere noise. This seems to be so in the *Code* of Justinian (6.35.12.1; 1.3.32.8; 9.30.2.). It is commonly no more than that in Jerome's Vulgate version: *Ascenditque clamor eorum ad Deum* (Exodus 2:23) But *clamor* comes to mean an outcry related to moral indignation. The *clamor* surrounding Sodom and Gomorrhah in Genesis is a key case in point in the Vulgate (Genesis 18:20).[15] There are also hints of this notion in *et expectavi ut faceret iudicium et ecce iniquitatis, et iustitiam et ecce clamor* (Isaiah 5:7). The notion of mal-

[2] *Digest* 48.16.6.3 (Paul). Cf. Code 9.2.7, *falsis necne notoriis* may be closer to the mediaeval *notorius.* Gratian has *notorius* twice, but of the offence not the person. cf. Causa 2.6.41 (titulus); Causa 2.1.1.

[3] By the early fourteenth century. It appears at the Council of Pisa in 1409. Latham has it in 1280 (*Revised Medieval Latin Wordlist*).

[4] Elemér Pólay, *Iniuria Types in Roman Law* (Budapest, 1986).

[5] J. Balon, *Traité du Droit Salique, Ius Medii Aevi*, 3 (Namur, 1965), p. 375.

[6] But loss of position or standing in mediaeval societies was a more complex matter, for arguably, even if everyone thought less well of him afterwards, the miscreant might remain—and mostly would remain—whoever he was before in terms of rank and possessions.

[7] E.g. Tertullian *Ad nationes* I.vii, p. 17.

[8] *Marius Victorinus, De Definitionibus*, p. 10. Cf. Augustine, Letters 86, CSEL.34.2, p. 396.

[9] Chromatius of Aquilegia, *Tractatus* 47, CCSL 9A.

[10] Augustine, *De Moribus Ecclesiae Catholicae et Manichaeorum*, I, PL 32.1321.

[11] *Summa 'Elegantius'*, vol. 2, p. 66.

[12] E.g. Theodosian Code 8.11.4.

[13] *Summa 'Elegantius'*, vol. 2, p. 51.

[14] *Summa 'Elegantius'*, vol. 2, p. 67.

[15] Cf. Augustine, *Enchiridion* 21, CCSL 46.

ice as an outcry rising to the ears of God is in: *quia ascendit malitia eius coram me* (Jonah 1:2). In the New Testament Ephesians 4:31 is important in its linking of *clamor* and *malitia: omnis amaritudo et ira et indignatio et clamore et blasphemia tollatur a vobis cum omni malitia. Clamor* can be itself a testimony, as it is already in Augustine: *Clamor tuus testis sit contra te.*[16] Gregory the Great, commenting on Genesis 18:20, has a usage of *clamor* which links it with sin: *peccatum quippe cum voce, est culpa in actione; peccato vero etiam cum clamore, est culpa cum liberate.*[17]

In the pre-Gratian collections there is an insistence that no-one can be condemned unless proved guilty, nor excommunicated without the evidence being considered and the accused allowed to speak up for himself: *Nullum damnare nisi comprobatum, nullum excommunicare nisi discussum. Nullus potest damnari, nisi prius canonice vocatus refutaveri reddere rationem.*[18] But these ground rules would seem to be set at risk by subsequent events.

Innocent III distinguished three modes of conducting legal proceedings. First moves differ, but are in each case laid down as appropriate for the form of proceeding. In the case of an accusation, there should first be a *legitima inscriptio*, that is, a lawful charge. In the case of denunciation, there should first be a *caritativa adhibitio*, a loving broaching of the matter. In the case of *inquisitio*, there should be a public awareness of the charge which makes it necessary to do something about it (*clamosa insinuatio*).[19] In the first (drawn from Roman practice) an accuser must bring a formal charge. He does this *sub pena talionis*. This is to discourage the bringing of accusations out of malice or trivial litigation. In *denunciatio* the accuser again brings a formal charge, but there must first be an attempt at bringing about repentance and amendment of life. This is deemed to be in line with Matthew 5:25. The difference is described in V.1.6 of Gregory IX's *Decretals*. The *accusator* has punishment in mind, the *denunciator* correction: *denunciator . . . ad correctionem tendit; accusator . . . tendit ad poenam.* But Innocent set up inquisition as a third mode of proceeding for cases where the evil-doing was very conspicuous in the community.[20] This allowed the informant or informants to hide behind a veil of anonymity in certain circumstances.[21] Here something which would have been discreditable in the days of the Theodosian Code becomes a legitimate practice.

The 8th Canon of the Fourth Lateran Council deals with *inquisitio.* It begins with the guidance to be found in Scripture on how to deal with someone defamed as notorious. In Luke's Gospel Jesus describes how the rich man asks his steward about whom he has been told a rumour (*qui diffamatus erat apud dominum suum*), 'What is this I hear about you (*Quid hoc audio de te?*) (Luke 16:2). And in Genesis, God says that he will go down and see for himself whether the rumour which has reached him about Sodom and Gomorrah is true (*descendam, et videbo utrum clamorem, qui venit ad me, opere compleverunt*) (Genesis 18:21).

The starting-point is the arrival of a rumour in the ears of a superior: *si per clam-*

[16] Augustine, *Sermo* 20, CCSL 41, line 140.

[17] Gregory the Great, *Regula pastoralis* III.31, PL 77.113.

[18] The Collection in 183 *titulos digesta*, ed. J. Motta, *Monumenta Iuris Canonici, Corpus Collectionum* 7 (1988), Tit. 85(1), p. 137, from 'Augustine'.

[19] Fourth Lateran Council, Canon 8.

[20] Jehan Dahyot-Dolivet, 'La procédure judiciaire d'office dans l'Église jusqu'à l'avenement du pape Innocent III', *Apollinaris*, 41 (1968), 443–55; W. Trusen, 'Der Inquisitionsprozess: Seine historischen Grundlagen und frühen Formen', ZRG Kan Abt. 74 (1988), 168–230; Henry Ansgar Kelly, 'Inquisitorial due process and the status of secret crimes', *Proceedings of the Eighth International Congress on Medieval Canon Law, Monumenta Iuris Canonici*, 9 (1992), 407–427.

[21] Henry Ansgar Kelly, 'Inquisitorial due process and the status of secret crimes', *Proceedings of the Eighth International Congress on Medieval Canon Law, Monumenta Iuris Canonici*, 9 (1992), 407–427, p. 411. Kelly suggests that the defendant's right to know his rights is first discussed as late as Philip Probus (=Philippe Lepreux), a jurisconsult of Bourges, in John Monk's *Glossa aurea* (1535). Here it is argued that a defendant who does not use a defence allowed to him loses it, but that would apply only if he knew he had it.

orem et famam ad aures superioris pervenerit. And the first task is to ensure that no malice is involved: *non quidem a malevolis et maledici sed a providis et honestis.* The next task is to check that this story is widespread: *nec semel tantum sed saepe.* Even then, there must be careful investigation of its truth. If *clamor et fama* come to the ears of someone who holds a responsible office, he has a duty to check that the sources of the story are not motivated by ill-will or malice, but are honest people. He should also not rely upon a single witness, but ensure that the story is being widely told. This means that he will have looked carefully into the evidence before deciding it is true, and acting upon it (Canon 8). There is to be no secret proceeding on the basis of allegations: *nec ad petitionem eorum qui libellum infamationis porrigunt in occulto procedendum est.*[22] That would imply that the judge at least ought to know who the accusers are.

There is a recognition that some cases may be so outrageous and blatant that it becomes impossible to 'do nothing about them', for fear of causing scandal to the people: *cum super excessibus suis quisquam fuerit infamatus ita, ut iam clamor ascendat, qui diutius sine scandalo dissimulari non possit, vel sine periculo tolerari,* something has to be done (Canon 8). The Scriptural principle adduced here is that the steward ought to be removed from his stewardship if he cannot give a satisfactory account of it (Luke 16:2).

If the truth of the story seems established, the senior person responsible for taking action must act not as if he himself were both *actor* and *iudex*, but as though the rumour itself made the accusation and the outcry did the denouncing: *sed quasi deferente fama vel denunciante clamore.* Thus the rules of natural justice are preserved even within a truncated process.

Due process is set out in Canon 8 for cases involving *inquisitio.*

(1) The person concerned ought to be present, unless he absents himself *per contumaciam.*

(2) He should be given the accusations against him (*exponenda ei sunt capitula, de quibus fuerit inquirendum*).

(3) He should be allowed to defend himself (*et facultatem habeat defendendi seipsum*).

(4) With the reservations already mentioned, he should be told not only what witnesses have said but also who they are (*non solum dicta sed etiam nomina ipsa testium sunt ei . . . publicanda*). The intention is to prevent people bringing false accusations for which they cannot be called to account (*ne per suppressionem nominum infamandi . . . falsum audacia praebeatur*). But Canon 8 makes an exception of notorious cases (*ut de notoriis excessibus taceatur*).

Canon 8 presses for a sense of proportion, to avoid great damage being done for a very small benefit: *ne forte per leve compendium ad grave dispendium veniatur.*

The Canon goes on to set out further rules of proper procedure in line with these principles. The prelate responsible is to behave in the same way whether the story is about a subordinate or a senior person: *non solum cum subditus verum etiam cum praelatus excedit.* There is to be no special protection for the senior official. On the other hand, careful adherence to fair process is seen to be especially important in the case of senior prelates, because they will inevitably make enemies, since they must *ex officio* condemn and discipline others.

The form of the sentence (*forma iudicii sententiae*) should always be in accordance with the rules of legal procedure. So there is a necessary minimum of process, and the pre-Gratian ground rules are still really being honoured.

Notoriety consists in something being 'known'. For every notorious criminal there have to have been persons to whom his crime seems blatant and who are prepared to say so. Being public property does not make a story true. So the legal con-

[22] *Decretal Inquisitionis Negotium of 1212.* Gregory IX. *Decretals.* X.5.1.21.

cept of notoriety cannot be considered apart from those of calumny and defamation and the making of accusations by those who are ill-disposed to the accused in general. The texts are very conscious of this.

If a criminal can be defined as 'notorious' because a great many people know of his offence, the defining factor is the effectiveness with which the gossip has been disseminated. This test of 'the numbers who know' is discussed in the *Summa 'Elegantius'* in a passage in which it is suggested that there are three kinds of manifest or notorious crimes. Some are known to the judge but to no-one else. Some are known to the judge and to a few others. Some are known to the judge and many others. The basis for declaring something notorious would thus seem in part to depend on how many people know about it.[23] But it is realised that if two or more witnesses swear that they actually saw the accused commit the crime there can still be a possibility that infamy is involved (Gregory IX, *Decretals*, V.1.21).

What everyone thus 'knows' may not be something for which objective proof can easily be found. There may be a general view that a priest is an adulterer even though no-one has ever seen him in bed with his mistress. The *Summa 'Elegantius'* makes the point that no-one can see into another person's conscience, and so, although it may be possible to judge others where the offence is manifest, it is not possible to judge *in occultis*.[24] This 'secrecy' problem can be partly addressed by dealing with things tactfully and quietly.

Despite this problem with the secrets of the heart, and perhaps paradoxically, *notorii* are deemed to be offenders whose crime is so publicly or certainly known that it seems there can be no doubt about it. And because this is so, it could be argued, there is no need for them to be tried according to the rules which would be necessary to protect someone whose guilt is in any doubt. The key point in processes against the *notorius* is that notoriety is deemed to remove the need for a formal accusation: *super notorio procedit iudex nemine accusante*.[25]

There are two main reasons why it might be desired to hasten things. The first we have already touched on. A known miscreant in a pastoral office may be a stumbling-block to the faithful and there may therefore be an urgent need to remove him. And litigation has a built-in tendency to extend itself. Lawyers make more money that way, and, as Bernard of Clairvaux pointed out to Pope Eugenius III in Book I of the *De Consideratione* which he wrote for him in the 1140s, a trial can be a professional 'shop-window', in which an advocate may wish to display himself lengthily. But the justice of taking a short cut to punishment depended on the security of the information laid, and here we come back to our paradox.

The authority most commonly cited in this connection came to be a letter of 866 from Pope Nicholas I to the Bulgars. He instructed them to go on receiving the sacraments from a priest publicly known to be an adulterer, until he has been properly convicted and deposed.[26] Gratian, who includes a reference to this letter,[27] errs on the safe side. He says that due process would be required even in these circumstances unless the crime or misbehaviour is so obvious that it actually consti-

[23] *Summa 'Elegantius'*, vol. 2, p. 51.

[24] *Summa 'Elegantius'*, vol. 2, p. 54.

[25] Gregory IX, Decretals V.1., from 'Augustine on Genesis'.

[26] Richard M. Fraher, *'Ut nullus describatur reus prius quam convincatur*: Presumption of innocence in medieval canon law,' *Proceedings of the Sixth International Congress, Monumenta Iuris Canonici, Series C: Subsidia*, 7 (1985), 43–506, p. 495. See, too, Bruno Paradisi, 'Il diritto Romano nell'alto medio evo, le epistole di Nicola I e un'ipotesi del conrat', *Studia Gratiana XI, Collectanea S. Kuttner*, I (Bologna, 1967), 211–51.

[27] *In manifestis enim calliditate accusantium non opprimitur reus, nec tergiversatione proprium crimen celatur quum culpa sua oculis omnium sponte se ingerat, atque ideo institutus est, ut nec innocentia insidiis pateret adversantium, nec culpa delinquentium sententiam effugeret justi examinis*: Gratian, *Decretum*, II.2 q.1.15 ff., PL 187.590–1, and Friedberg, Vol. I.

tutes a confession of guilt.[28] So Gratian sets a high standard for a case needing no proof.

Gratian already raises the question whether *in manifestis*, in 'obvious' crimes, it is necessary to follow due trial order: *an in manifestis iudiciarius ordo sit requirendus* (Causa 2.q.1). Gratian explains in a rubric that a condemnation is not valid unless the accused has either been convicted or confessed: *damnari non valet nisi aut convictus aut sponte confessus.*[29] The rule applies, he thinks, only to matters where the guilt has to be proved because it is hidden (*Causa* 2.q.1). *Manifesta* are a different matter, because there is no need for proof. The truth is known. He gives a series of patristic *allegationes* to support this view (*Causa* 2.q.1).

The problem is that the truth may not be *manifesta* to everyone. If only the judge knows it in that way, or only the public but not the judge, then there must be a fair trial. And even if the judge has seen, for example a murder, with his own eyes, there would still have to be a trial if the murderer denied that he had done it.[30] There could thus actually be some difficulty in proving even something of which the accused seems manifestly guilty.[31]

The same line is pursued by the *Summa 'Elegantius'*, with a reference to Gratian, where the author explains that even *in notoriis* Gratian expects proof.[32] The *Summa 'Elegantius'* says that if the judge himself does not have direct knowledge that the alleged offender is guilty he should not pronounce sentence on suspicion.[33] For one reason why a proper procedure is needed is that it would be unjust for an accused person to be found guilty on a basis of untested malicious rumour.[34]

In the pre-Gratian collections there are clear warnings about the need to check the credentials of accusers and witnesses, so as to discover in what spirit an accusation is being made.[35] The classical *talio* rule appears in Burchard of Worms, and had certainly not died out in mediaeval usage. (He says that a false witness should be punished for the crime of which he has falsely accused another.)[36] If you have accused someone and as a result of your accusation he is *occisus*, you must do penance, fasting for forty days on bread and water and doing penance for seven years.[37]

It is a normal requirement that those who are to accuse or bear witness must swear that they have no malicious motive: *iurabit quidem actor, quo non animo calumpniandi petit vel quod non animo calumniandi litem movit, sed quia existimat, se bonam causam habere secundum rationem aut secundum consuetudinem vel constitutum illius loci.*[38]

The tag '*non statim qui accusatur reus est*' appears in a letter of Pope Nicholas I written in 867 to Charles the Bald, forbidding the use of trial by combat as a means of purgation in a case of alleged adultery.[39] Gratian uses it (*Causa* 15.8.c.5). There was a recognition here of a need to underline that fact, that something more than accusation, formal or by defamation, is needed to establish guilt, not least because the almost universal mediaeval use of the term *reus* for the accused seems to pre-

[28] He comments: *hoc autem servandum est quando reum publica fama non vexat. Tunc enim auctoritate eiusdem Gregorii propter scandalum removendum, famam suam reum purgare oportet.* Gratian, *Decretum*, II.vii.q.5.2, PL 187.742 and Friedberg, vol. I.

[29] Gratian, Rubric to Causa 2 q.1.c.1.

[30] *Summa 'Elegantius'*, vol. 2, p. 54. See, too, Fraher (note 26 above), p. 499.

[31] Fraher, *op. cit.*, p. 499, discusses this eventuality.

[32] *Summa 'Elegantius'*, vol. 2, p. 54.

[33] *Summa 'Elegantius'*, vol. 2, p. 54.

[34] *Summa 'Elegantius'*, vol. 2, p. 52.

[35] The Collection *in 183 titulos digesta*, ed. J. Motta, *Monumenta Iuris Canonici, Corpus Collectionum* 7 (1988), Tit. 76 (3), p. 12, from Ps. Felix (*Prius probare debet*).

[36] Burchard of Worms, *Decreta*, xvi. 18, PL 140.912.

[37] Gregory IX, *Decretals* V.1.8.

[38] *De Ordo Invocato Christi Nomine*, ed. Wahrmund, *Quellen* Vi (1931), p. 69.

[39] Richard M. Fraher, op. cit. (note 26 above), p. 495.

judge matters, and it must have been necessary to call attention to this point again and again.

Testing the accusation means testing the credentials of the accuser. What of the person who spreads the rumour or makes an official notification of someone's crime (*proditor*)? It may be by calumny that *crimen in publicam notitionem defertur*. It may be that something which is a secret is claimed not to be a secret (*secretum non secreto arguitur*) (and of course the moment such a claim is made it ceases to be a secret). Someone's crime may be published by a person acting not out of zeal for justice but from motives of malice (*si servato ordine correptionis, odii magis amaritudine et sui ostensione quam zelo iustie, crimen cuiuspiam publicatur*).[40] Calumny ought to carry the penalty of *talio*.[41] The proven *calumniator* is to suffer penalties of demotion and deprivation.[42] But the judge ought to distinguish between deliberate false accusation (*falsa crimina scienter intendere*) (Digest 48.16.1.1) and the making of a genuine mistake.[43]

Apart from calumniators there are two other categories of those who may make unjust accusations, or accusations which may have the result of giving rise to unjust condemnation. Prevaricators pretend to be on one side but in fact they are on the other. *Prevaricatores sunt qui vitia partis adverse attenuant et sua produnt et cum in causa iuvare simulent magis ledunt*.[44] Someone who behaves in this way should be banned from testifying or accusing again.

A turncoat may act for money, or under undue influence.[45] *Tergiversator est qui prece vel pretio corruptus in universum ab accusatione desistit* (Digest 48.16.1.1 and 48.16.13 pr.) . . . *Hoc vitium cum sua causa quidam satis* ***urbane*** *notavit dicens:*

> *Cum mihi sudanti manus ungitur ere deorsum*
> *vertre non verero tunc pro cataplasmate dorsum.*

It is a definition of malice that it presses on and on with an accusation even after it has been dismissed in a fair trial.[46] A person should not be tried twice for the same offence, says Burchard of Worms: *de his criminibus de quibus absolutus est accusatus, refricari accusatio non potest*.[47] Gregory IX has: *absolutus de certo crimine, de eodem iterum accusari non potest*.[48]

Qualiter et quomodo debeat praelatus procedere, Canon 8 of the Fourth Lateran Council, is, then, building on a good deal of previous work, and taking unto account factors which had been noticed for nearly two centuries at least. It accordingly contains a degree of protection for the accused in cases where it is claimed that the offender is notorious.[49] In the *Decretals* of Gregory IX there is a long sequence of texts on the bringing of accusations. V.1. 21 discusses the question of the identification of witnesses. There should be no question of proceeding against

[40] *Summa 'Elegantius'*, vol. 2, p. 55.

[41] *Summa 'Elegantius'*, vol. 2, p. 62.

[42] Gregory IX, *Decretals*, V.2.1 and 2.

[43] *Summa 'Elegantius'*, vol. 2, p. 61. *Ubicunque potest dubitari, numquid actori ius competat ex probationibus factis, nec constat, ei ius non competere, nec in evidenti calumpnia invenitur, illic reus debeat condempnari*: Johannes Fagelli de Pisis, *Tractatus brevis de summariis cognitionibus* ed. L. Wahrmund, *Quellen zur Geschichte des Romische-Kanonischen Prozesses im Mittelalter* (Innsbruck, 1928) IV.v, p. 24.

[44] *Summa 'Elegantius in iure divino'*, V (26) ed. G. Fransen and S. Kuttner, *Monumenta Iuris Canonici, Series A: Corpus glossatorum*, 1, Vol. 2, p. 63. The word can be used equivocally: *equivocatur autem nomen ad falsum et fraudulentem advocatum et ad fictum accusatorem qui vera crimina non sincere prosequitur, contigentia omittens.*

[45] *Summa 'Elegantius in iure divino'*, V (27) ed. G. Fransen and S. Kuttner, *Monumenta Iuris Canonici, Series A: Corpus glossatorum*, 1, Vol. 2, p. 64.

[46] *Theodosian Code* 9.38.3 (398 AD). This notion reappears in the twelfth century, for example in the *Summa 'Elegantius'*, where it is asked whether fresh allegations ought to be accepted after sentence has been pronounced: Part VII, 2a, p. 153.

[47] Burchard of Worms, *Decreta*, xvi. 9, PL 140.911.

[48] Gregory IX, *Decretals*, V.1.6, ed. A. Friedberg, *Corpus Iuris Canonici* (Leipzig, 1881).

[49] This becomes X.5.1.24 of the *Decretals* of Gregory IX.

anyone on the basis of the evidence of witnesses who will not identify themselves. Witnesses who are not going to be identified cannot be called to account. On the other hand, to identify witnesses may in some cases be to expose them to reprisal. All this is important in connection with what we should now call 'witness protection', if it allows the identity of the informers to be kept from the accused, while insisting that someone in authority is in a position to check their story.

There is wider recognition after Lateran IV that there might be circumstances in which it would be desirable to shorten the process of trial. This seems to take things outside the category of the *notorii* while still being to some degree attributable to the Innocent III codification of earlier developments concerning the handling of notorious cases. The reasons for wanting to cut things short might be simply that there appeared to be an open and shut case.[50] The example of a case where short cuts are appropriate to which Johannes Fagelli de Pisis repeatedly recurs is that of the son who petitions for sustenance (*alimenta*) from his father. But if this was to happen, it needed, in the interests of justice, to be very strictly regulated. Johannes Fagelli sets out in his *Tractatus brevis de summariis cognitionibus* an account of the ground rules as he sees them. (He is conscious that such a treatise is needed, because there is a lack of literature on the subject.)[51] There are two possibilities: to abbreviate procedure and deal with things summarily (*summatim*) or to go outside ordinary procedure altogether (*in eis extra ordinem procedere*).[52]

But he sees that the grounds on which either route might be taken require careful thought. There are difficult problems of definition (*nam huiusmodi rei difficilis est diffinitio*), for some cases need not be dealt with by adversarial trial while other cases require full process, and it is important to be clear which is which.[53]

If proceedings are to be abbreviated (*semiplena sive summaria*), what are the elements which it is essential to retain?[54] A judge may be able to deal rapidly with objections such as that a witness is old or ill or a calumniator, but they must still be considered.[55] But it might be open to question whether a formal written accusation is required *in summariis*.[56]

Johannes Fagelli de Pisis stresses that no-one can be justly condemned without a hearing: *inaudita causa neminem patitur aequitatis ratio condempnari*.[57] It is also important that what happens should be transparent, 'brighter than the noonday sun': *et ideo dicitur, quod debent esse luce meridiana clariores de probationibus*.[58] Some degree of due form must be preserved before a sentence is pronounced.[59] As we have already seen, it is already contended in the *Summa 'Elegantius'* and elsewhere that there must at least be a sentence (*sententia*).[60] Even if someone can be suspended in his absence, he must be present to be sentenced.[61]

There are perhaps three *genera causarum* in which it may be possible to shorten the process or eliminate elements of the *ordo judiciarius*, in the view of Johannes Fagelli de Pisis. The first is that in which it is possible to proceed *summatim* because only a limited standard of proof is needed: *semiplena probatio sufficit*. (This might

[50] On the acceleration of hearings, see R. H. Helmholz, 'Ethical standards for advocates and proctors in theory and practice', *Proceedings of the Fourth International Congress of Mediaeval Canon Law* (1972), *Monumenta Iuris Canonici, Subsidia*, 5 (Vatican, 1976), p. 291 ff.

[51] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 1.

[52] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 1.

[53] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 25.

[54] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 5.

[55] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 7.

[56] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 14.

[57] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 2.

[58] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 3.

[59] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 4. Here he cites Azo as authority.

[60] *Summa 'Elegantius'*, vol. 2, p. 51.

[61] *Summa 'Elegantius'*, vol. 2, p. 51.

be the equivalent of the 'balance of probabilities' required in a civil case in modern English law.) There are, secondly, cases which are in some degree *extraordinariae*, such as grave-robbing. The notion here is that the judge may proceed on his own sole authority (*ex suo mero procedit officio*). But that does not mean that such cases do not require *plena probatio* (*immo plena requiritur*). 'For in every case, civil and criminal the accused is found not guilty if the accuser does not prove his case': *nam in omni causa civili et criminali actore non probante reus absolvitur.*[62] The third type of special case is that in which the matter is obvious: *quia quaedam dicuntur de plano cognosci, id est sine libello, ut quidem dixerunt.* An example of this would be flagrant adultery.[63] But again here full proofs are required, not *semiplenae.*[64] Everywhere the judge ought to place great weight on being able to pronounce a *certain* sentence, and not merely give his opinion: *cum iudex maxime niti debeat ad certam ferendam sententiam.*[65]

In Johannes de Lignano *Super Clementina 'Saepe'*[66] there is a further discussion of the circumstances in which process may be abbreviated. A number of technical issues are raised by the text of *Saepe contingit* itself. It often happens that we instruct that in certain causes: *simpliciter et de plano, ac sine strepitu et figura iudicii procedi mandamus*, says Clement V. He acknowledges that this gives rise to confusion about how to proceed: *de quorum significatione verborum a multis contenditur, et qualiter procedi debeat dubitatur*, explains the text. The rules are accordingly set out. The judge before whom such a case comes is not to insist on a written accusation (*libellus*). He does not have to require the actual adversarial setting out of the case: *Litis contestationem non postulat.* He can cut short the treatment of the subject-matter: *amputet dilationum materiam.* He can ensure that the whole process is kept to the minimum and prevent the calling of innumerable witnesses. Matters such as ensuring that there is no malice in the accusation and that the truth is being told, are not to be skimped: *citationem vero ac praestationem iuramenti de calumnia vel malitia, sive de veritate dicenda, ne veritas occultetur, per commissionem huiusmodi intelligimus non excludi.* The overriding purpose is to ensure that nothing is done in a disorderly way because of being simplified: *non erit processus propter hoc irritus, nec etiam irritandus.*

Johannes de Lignano asks in his treatise what can fairly be left out, that is, left out without breaking the rules of natural or divine justice: *nec videtur remissa, nam est de iure naturali et divino.*[67] God visibly keeps the rule that no-one may be tried in his absence by asking Adam 'Where are you?' when he comes to investigate the episode of the eating of the forbidden fruit (Genesis 3:9).[68] So that must be essential. But he agrees that the production of a *libellus* or formal written accusation may not be necessary.

The question of the standard of proof required is clarified by Lignano. He defies *plena probatio* as that which makes the judge quite sure (*plena fides*).[69] He also accepts that there are grades of proof, from the point where the judge merely begins to suspect something to his having absolutely no doubt to the contrary.[70]

Not unconnected with the notion of notoriety is that of the seriousness (*atroci-*

[62] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 10.
[63] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 12.
[64] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 13.
[65] Johannes Fagelli de Pisis, *Tractatus* IV.v, p. 20. *Mihi autem videtur sine praeiudicio sententiae melioris, quod in his et similibus, ubi reo potest maius praeiudicium generari, quam in actione ad exhibendum et in aliis suprascriptis,* [quod semiplena probatio] *non per sacramentum, sed saltim per unum testem, quid semiplenam inducit probationem*: IV.v, p. 23.
[66] Clement V, V. 11.2. Johanes de Lignano's text is edited by Wahrmund, *Quellen*, IV.vi.
[67] Johanes de Lignano, *Super Clementina 'Saepe'*, ed. Wahrmund, *Quellen*, IV.vi, p. 1.
[68] Johanes de Lignano, *Super Clementina 'Saepe'*, IV.vi, p. 1.
[69] Johanes de Lignano, *Super Clementina 'Saepe'*, IV.vi, p. 9.
[70] Johanes de Lignano, *Super Clementina 'Saepe'*, IV.vi, p. 9.

tas) of the crime. Serious offenders are robbers, those who encourage sedition, leaders of factions, rapists of virgins, homicides, adulterers (*latrones, seditionum concitatores, duces factionum, raptores virginum; similiter homicida, . . . adulter*) and so on. The perpetrators of these could be denied a right of appeal because of the sheer heinousness of what they had done.[71] The denial of a right to appeal may logically be linked with the notion that some crimes demand instant condemnation without due procedure, or all the usual due procedure, being required. Someone who confesses in his own voice cannot appeal.[72]

So there are changes in the direction of speed and efficiency, and of rapid but not in intention rough justice, in the case of notorious offenders.[73] But there is a continuing awareness of the danger that the rules of natural justice may be betrayed where short cuts are taken, and it is to the credit of our writers that they see that very clearly, and draw back from the brink. The informers now get away unpunished unless it can be shown that they are acting out of malice. The protection of reputation is no longer seen as a high good in itself.

[71] *Summa 'Elegantius'*, vol. 2, p. 89.

[72] *Summa 'Elegantius'*, vol. 2, p. 89.

[73] See in this area C. Lefebvre, 'Les origines romaines de la procédure sommaire aux xii^{e} et xiii^{e} siècles, *Ephemerides Juris Canonici* conscience', *Law and History Review* 7 (1989), 231–88; J. W. Baldwin, 'The intellectual preparation for the canon of 1215 against ordeals', *Speculum* 36 (1961), 613–36; K. Pennington, *The Prince and the Law* (Berkeley, 1993).