Contumacy, Defense Strategy, and Criminal Law in Late Medieval Italy

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> Dominica . . . mother of the abovementioned Antonius . . . asked . . . what she knew about the death of Caterina, said on her oath that she saw [Caterina] dead, and when that same night she was rising at the break of day, Antonius came to her saying, "I have killed Caterina." And she responded, "Traitor! You have destroyed me!" And immediately Antonius went out the door and called his brothers, and told them that he had killed Caterina, and they fled from the said villa, and this witness . . . went to the home of a certain neighbor by the name of Beltraminus, [saying] "Godfather, get up, because Antonius has killed Caterina! Get up, and go to her people and tell them about the death of Caterina!" And immediately he got up and called two relatives, and at once they followed after Antonius, but they could not find him.[1]

1. Archivio di Stato di Reggio Emilia, *Giudiziario*, Atti e processi, May 30, 1395 (hereafter ASRe, Atti e processi).

> "Dominica . . . mater superscriptorum Antonii . . . interrogata . . . quid scit de morte dicte Caterine suo sacramento dixit quod vidit eam mortuam et cum illamet nocte surgeret indilucullo diei dictus Antonius venit ad eam dicendo ego interfeci Caterinam et ipsa

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It is easy to imagine that on this early morning in 1395, Antonius, realizing the magnitude of his actions, had little time to fabricate a defense or construct a plan. In late fourteenth-century Reggio Emilia, flight was often the most desirable path open to those suspected of perpetrating felonies. Subsequent witnesses in this murder investigation speculated that Antonius fled the territory of the Villa de Vetto before the first light of day less to evade the law than to avoid the wrath of Caterina's relatives. Propelled by the need to escape retribution, Antonius, like almost half the defendants cited by the criminal court of Reggio Emilia, fled rather than appear before the criminal judge.

The criminal judge of Reggio Emilia had a difficult mandate in attempting to adjudicate major felonies in violent and uncertain surroundings. This small northern Italian city was acquired in 1371 by the expanding dominion of the Visconti of Milan. In Reggio, the rulers of Milan gained a city that was strategically placed but that was also in full economic crisis, largely depopulated by plague and constant war. Many municipalities faced similar struggles at the end of the fourteenth century, but this region was, as Natale Grimaldi observed, perhaps the most desolate in the Visconti realm. A recent study of political identity at Reggio drew a complex portrait of the power dynamics in this beleaguered city, demonstrating the feudal nature of the *contado* and the complex relationship of the *podestà* and his retinue with the political life of the city.[2] Registers of decrees from the years of Visconti reign reveal that the scarcity of pecuniary condemnations collected from the criminal court created great difficulty in amassing the *podestà's* salary; the scarcity of doctors of law in the region also meant that few civil cases could be tried.[3]

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respondit proditor tu consumpsisti me et incontinenti exivit ex hostium dictus Antonius et vocavit . . . eius fratres et dixit eis quod interfecerat Caterinam et afugerunt de dicta villa et dicta testis . . . 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."

For archival material from Reggio, especially the "Libri delle denuncie" and the "Atti e processi," I preferred in this essay to follow the citation system by date instead of by folio numbers, as, for example, used by Natale Grimaldi and Andrea Gamberini (Natale Grimaldi, *La signoria di Barnabò Visconti e Regina della Scala in Reggio, 1371–1385: Contributo alla storia delle signorie* (Reggio Emilia: Cooperativa fra Laboranti Tipografi, 1921), 93; Andrea Gamberini, *La città assediata:poteri e identità politiche a Reggio in età viscontea* (Rome: Viella, 2003). This system is more practical in this context, because folio numbers are not always consistent in these fondi, and citing by date proves more efficient and reliable in these sources.

2. Gamberini, *La città assediata*.

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

Reggio maintained jurisdiction of the surrounding countryside, but the authority of the podestarial court was sometimes tenuous. Certainly, citations to appear before the *iudex maleficorum* were often unheeded, resulting in a contumacy rate in the court of the criminal judge that averaged approximately 48 percent at the end of the fourteenth century.[4] But although this number appears high, it is not unusually so. A sample of trial registers from Bologna yields a similar result, showing a contumacy rate of 52 percent in 1372, while another sample from Bologna in 1393 indicates that 44 percent of defendants failed to answer their summons.[5] In Florence, records from the early 1380s show a contumacy rate of 56 percent.[6] Some cities had significantly higher rates of contumacy. Fifteenth-century Mantua had contumacy rates averaging between two-thirds and three-fourths of recorded cases, with four-fifths in 1456.[7] Although these numbers may be inflated, as I will discuss below, it is clear that contumacy was widespread, even as courts attempted to compel compliance with their orders.

The problem of contumacy, therefore, was not a localized one, and Reggio's high contumacy rate should not be solely attributed to its difficult circumstances at the end of the fourteenth century. Contumacy was a fact of life in late medieval courts, and recent scholarship suggests that contumacy and its legal remedy, the criminal ban, were tools that served dispute resolution, separating the parties involved to allow a "cooling off" period and serving in this way to limit vendetta.[8] In this view, contumacy could be important to parties involved in processes, allowing them time and opportunity to strategize in an effort to limit the damage of a criminal conviction. Other studies hold that contumacy could even be desirable from the court's

4. This figure is based on a sample of 900 trial records from 1371 to 1409. At Reggio Emilia for this period, twenty one trial registers survive, constituting approximately 1,240 cases. These registers are not concurrent and have large lacunae.

5. These samples are taken from two registers: Archivio di Stato di Bologna, *Curia del podestà*, Giudici ad maleficia, Libri inquisitionum et testium, b. 264, 1393, and b. 214, 1372. The 1393 register allows a sample of outcomes for 70 defendants, whereas the 1372 sample is of 88 defendants.

6. Laura Ikins Stern, *The Criminal Law System of Medieval and Renaissance Florence* (Baltimore: Johns Hopkins University Press, 1994), 229. Stern found contumacy rates of 58.3% from 1352 to 1355, and 55.6% from 1380 to 1383. The numbers in the early fifteenth century were lower: a sample from 1425 to 1428 showed a reduction to 42.4%, which Stern attributes in part to a more effective criminal justice system and a more effective police force (ibid., 210).

7. Trevor Dean and David Chambers, *Clean Hands and Rough Justice: an Investigating Magistrate in Renaissance Italy* (Ann Arbor: University of Michigan Press, 1997), 65.

8. Massimo Vallerani, "Pace e processo nel sistema giudiziario. L'esempio di Perugia" in *La giustizia pubblica medievale* (Bologna: il Mulino, 2005), 173.

perspective, allowing judges to avoid rendering verdicts in contentious or politically volatile cases.[9]

This understanding of contumacy as a choice made by parties in conflict is part of a bigger historiographical picture of late medieval justice that has drawn necessary attention to the active involvement of the parties in conflict in the judicial system, rather than portraying these parties as more passive participants in the hands of an impersonal criminal court. Studies of Perugian and Bolognese archival material have demonstrated the use of criminal courts to further political agendas.[10] Accusatorial and inquisitorial systems operated in the highly charged political atmosphere of late medieval urban centers, and partisan interests shaped prosecution patterns.[11] Inquisitorial procedure, the dominant criminal procedure in late medieval Italian criminal courts, was theoretically a more public and impersonal form of justice, but in reality, it shared a great deal with accusation procedure, which allowed much more involvement of the parties in conflict.[12]

This relationship between criminal courts and dispute resolution has been the subject of a wave of important scholarship on the late medieval courts, which demonstrates that there was no clear and solid line between the formal systems of justice and the actions and agendas of parties in conflict. Formal prosecution in this sense is repressive justice, whereas conflict resolution is the cornerstone of informal justice inside communities.[13] Trials are a stage in the settlement of a conflict, not an end in themselves; parties could use and manipulate the institutions of justice to assist in their ongoing conflicts.[14] Public justice took on the characteristics

9. Daniel Smail, *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille, 1264–1423* (Cornell: Cornell University Press, 2003), 173.

10. Sarah Blanshei, "Crime and Law Enforcement in Medieval Bologna," *The Journal of Social History* 16 (1) (Fall, 1982):121–38; see also Sarah Blanshei, "Criminal Law and Politics in Medieval Bologna," *Criminal Justice History: An International Review* 2 (1981): 1–30; and Blanshei, "Criminal Justice in Medieval Perugia and Bologna," *Law and History Review* 1 (1983): 251–75.

11. Trevor Dean, "Criminal Justice in Mid-Fifteenth Century Bologna," in *Crime, Society and the Law in Renaissance Italy*, eds. Trevor Dean and Kate Lowe (Cambridge: Cambridge University Press, 1994), 38–9.

12. Massimo Vallerani, "Procedura e giustizia nelle città italiane del Basso Medioevo (XII–XIV Secolo)," in *La giustizia pubblica medievale* (Bologna: il Mulino, 2005), 42–45.

13. Mario Sbriccoli, "Giustizia negoziata, giustizia egemonica: riflessioni su una nuova fase degli studi di storia della giustizia criminale," in *Criminalità e Giustizia in Germania e in Italia: pratiche giudiziarie e linguaggi giuridici tra tardo medioevo ed età moderna* (Bologna: il Mulino, 2001), 345–64.

14. Andrea Zorzi, "Conflits et pratiques infrajudiciaires dans le formations politiques Italiennes du XIIe au XVe Siècle," in *L'infrajudiciaire du Moyen Age a l'époque contemporaine: Actes du Colloque de Dijon 5–6 Octobre 1995* (Dijon: Publications de l'Universite de Bourgogne), 20.

of informal, private systems of justice, and revenge and the vendetta were not isolated from the function of the criminal courts.[15]

These important observations on the function of late medieval justice add much dimension to our understanding of conflict and the courts. Trevor Dean's caveat that the criminal justice system offered less room for strategy than did civil justice, however, is important to bear in mind,[16] as is his observation that the function of justice was highly localized, with urban centers having a more repressive form of justice than smaller towns had.[17]

The problem of contumacy provides a small window into this much bigger picture of late medieval justice. Considering the function of contumacy in medieval justice is necessary for understanding the function of the justice system, because it was the result in nearly half of the recorded criminal trials, not just at Reggio but in other cities as well. Contumacy presented a difficult problem for late medieval governments, and it gave a number of puzzles to jurists who tried to define the legal status of those under criminal ban. This article will explore contumacy and its result, the criminal ban, from the perspective of the government, the law, and, where possible, the parties in question, in an effort to shed light on the role of contumacy in late medieval justice.

Contumacy and Law Enforcement

The potential severity of the consequences of contumacy shaped criminal procedure. In the late medieval criminal courts of northern Italy, contumacy carried the weight of conviction. This harsh equation was doubtlessly intended to encourage compliance with a summons to court, something that policing alone could not do. At Reggio, police forces do not appear to have been widespread or particularly effective in capturing contumacious criminals, and there is little surviving documentation of policing in the city. The *familiares* of the *podestà* are mentioned occasionally in the records as helping to investigate crime.[18] The knight of justice of the

15. Mario Sbriccoli, "Legislation, Justice and Political Power in Italian Cities, 1200–1400," in *Legislation and Justice*, ed. Antonio Padoa-Schioppa (Oxford: Clarendon Press, 1997), 43.

16. Trevor Dean, *Crime and Justice in Late Medieval Italy* (Cambridge: Cambridge University Press, 2007), 21.

17. Dean, *Crime and Justice*, 51.

18. ASRe, *Giudiziario*, Libri delle denunzie e querele, delle inquisizioni, degli indizi, dei costituti, delle difese e d'altri atti criminali, November 10, 1389 (hereafter ASRe, *Giudiziario*, Libri delle denunzie).

commune was obligated, in addition, to capture and bring to justice *malefactores* and *banniti*.[19] These figures, however, seldom appear in the records. Other policing officials appear in the statutes, although rarely if at all in the criminal records.[20] The *podestà* traveled with his own *berovarii*, a sort of armed police charged with maintaining public order.[21] Only the *podestà* is described in the statutes as having *berovarii*, but it is very likely that other officials, such as the knight of justice or the captain of the military, did as well. Certainly in other cities such as Florence, the latter half of the fourteenth century saw an increase in the number of officials employed to maintain law and order, and these men had contingents of *berovarii*. This increase was common in Italy and north of the Alps as well, probably as a result of the chaos following the Black Death and subsequent revolts.[22]

Outside of the city, the *capitano del divieto* was invested with authority over the highways and outlawry. He resided outside the city in Montecchio, a location central to the territories under his jurisdiction, that is, the districts of Parma, Reggio, and Borgo San Donnino. As Andrea Gamberini observed, this official, while acting as a kind of *podestà* of the district, was regarded very differently by the citizens of Reggio than was the urban *podestà*.[23] While the *podestà* seemed more a representative of the city to the Visconti, rather than a representative of signorial justice to the city, the relationship between Reggio and the *capitano del divieto* was more tense. Holding authority over the treacherous highways and mountain passes around Reggio, and entrusted with jurisdiction over contraband as well as over outlaws and those banned for life from

19. ASRe, *Comune*, Statuti, 1335, 13v. Complete redactions of the statutes are preserved from 1335 to 1386, 1392 and 1411; ASRe, *Comune*, Statuti, Statuti del 1335 con posteriori aggiunte d'altri statuti, di provvigioni e decreti, e d'istrumenti fino al 1386 (hereafter ASRe, *Comune*, Statuti,1335); ASRe, *Comune*, Statuti, Statuti del 1392 (hereafter ASRE, *Comune*, 1392). The statutes were redacted again in 1411, this time including a full revision of the criminal statutes (Biblioteca del Senato della Republica, Statuti, mss. 77, hereafter BSR.) A manuscript of the 1411 redaction is held at the Archivio di Stato, but the book of criminal law is badly damaged. (ASRe, *Comune*, Statuti, 10). The rubrics of Reggio's statutes have been published, with a useful introduction (Antonella Campanini, *I Rubricari degli statuti comunali di Reggio Emilia (Secoli XIII—XVI)*, Fonti e Saggi di Storia Regionale 7 (Bologna: Università degli Studi di Bologna, Dipartimento di Paleografia e Medievistica, 1997).

20. ASRe, *Comune*, Statuti,1335, 18r, and ASRe, *Comune*, Statuti, 1392, 144v.

21. Caterina Santoro, *Gli offici del comune di Milano e del dominio Visconteo-Sforzesco*, 1216–1515 (Milan: A. Giuffrè, 1968), 227.

22. Andrea Zorzi, "The Judicial System in Florence in the Fourteenth and Fifteenth Centuries," in *Crime Society and the Law in Renaissance Italy*, eds. Trevor Dean and Kate Lowe (Cambridge, Cambridge University Press, 1994), 49.

23. Gamberini, *La città assediata*, 32–34.

the commune, the *capitano del divieto* received a salary that was to be paid by monies collected from pecuniary condemnations, and this perhaps as much as anything led to a reputation for extortion.[24] In addition to jurisdiction over contraband, the *capitano del divieto* received "authority, jurisdiction, and power of pursuing and capturing murderers, highwaymen, assassins, and scoundrels (*malandrinos*) . . . and of capturing those who have been banned since the end of the year 1380. . ."[25] The *capitano del divieto* was entrusted with the ability to dispense summary justice to these captured *banniti*, and he held the *ius gladii*, though the decree required that he take legal advice in consultation with jurisconsults.

Yet in spite of the presence of these officers, contumacy rates remained high. Other measures against contumacy were necessary, if not to successfully bring the defendant to justice, then at least to make public the government's power and authority to convict. The most important weapon the commune had against contumacious felons was not policing but rather a public citation procedure, and for this reason, the process of citation was carefully delineated in the statutes and recorded in trial proceedings. A careful citation process was needed to ensure that contumacy could reasonably be understood as a voluntary act, not a result of ignorance of the charges. The process made denunciations public and made the community aware of judicial proceedings against their neighbors. It ensured that defendants were aware of the charge made against them, so that contumacy could be interpreted as willful and therefore as a justifiable ground for conviction *in absentia*.[26] It also served as a public assertion of the government's jurisdiction over territories and people.

The statutes of Reggio Emilia deal with this crucial phase of the criminal process at some length.[27] Citation procedure itself, which has been discussed in detail by Pazzaglini,[28] ensured that not only the accused but also the neighbors of the accused were made aware of the court case. The statutes required certain information to be present in the citation: the

24. Gamberini, *La città assediata*, 33.

25. ASRe, *Comune*, Provvigioni, December 18, 1385, Piacenza, ". . .concedentes sibi auctoritatem jurisdictionem et baylam quoscumque homicidas robatores stratarum assassinos et malandrinos qui in partibus predictis infraganti crimine reperirentur prosequendi et capiendi ac prosequi et capi faciendi nec non capiendi quoscumque qui baniti sunt ab anno curso milletrecenteximooctagento citra qui in dictis districtibus et burgis reperientur et de ipsis faciendi iusticie complementum et habito prius bono conscilio ac matura deliberatione cum vestris jurisperitis."

26. Peter Raymond Pazzaglini, *The Criminal Ban of the Sienese Commune*, 1225–1310 (Milan: A. Giuffrè, 1979), 22.

27. BSR, mss. 77, 52r. "De modo citandi illos contra quos proceditur."

28. See particularly Pazzaglini, *Criminal Ban of the Sienese Commune*, ch.2. "Citation, Contumacy and Conviction."

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. The place and time of the crime itself were also included. The public crier (*nuncius*) of the commune attempted to deliver the written citation personally; if this proved impossible, he nailed it to the door of the home of the accused, with two neighbors as witnesses. The accused was also summoned orally. He or she was given a period of not less than three days to respond to the summons. If the person was a foreigner, the citation took place at the public assembly-place of the commune and a term of six days would be allowed for the accused to respond. If the cited individuals did not appear, a further term of six days was allowed for making a defense, and if those accused still did not come, then they had a final term of four days to make it known to the court why they should not be condemned. If they still failed to appear, the defendants were placed under the criminal ban. These periods gave the accused time to respond; at the same time, because these terms were publicly announced, they also created windows of time in which the defendants, their families, and their creditors could take appropriate measures to protect themselves and their assets, as I will discuss below.

Although the criminal ban was not a uniform institution in Italian cities, showing clear local variation in its process and application, the essential point of the procedure was, as Cavalca noted, to ensure that defendants had been cited either personally or, if absent, at their residences.[29] Therefore it consisted of several stages that were roughly similar. The *bannum simplex* was issued immediately after the failure to appear, serving as a public warning to the accused to appear before the judge within a certain number of days. The *bannum conditionale*, issued after the defendant ignored the *bannum simplex*, placed the criminal under ban unless he or she appeared before the judge. This stage of the ban also included a statement of whether the ban included confiscation of goods or whether the ban was *in persona*, meaning the defendant's person could be assaulted with impunity. Once the term given in the *bannum conditionale* expired, the defendant was entered into the books of bans. In the case of crimes that carried a capital sentence, the presence of the ban in the *Libri bannitorum* was necessary for the ban to be considered valid. These books usually contained only the names of those banned for serious crimes, not for crimes that did not bear a capital sentence, or for civil offenses.[30] Effectively, those banned for major felonies were set beyond the protection of the law.

29. Desiderio Cavalca, *Il bando nella prassi e nella dottrina giuridica medievale* (Milan: A. Giuffrè, 1978), 168–69.

30. Cavalca, *Il bando nella prassi*, 173.

The citation process made special provisions for those without fixed residence, requiring the charges to be publicly read. A typical example is the 1373 case of Egen, a German man denoted as *forensis et vagabundus.* Egen was accused of committing a serious assault against a German mercenary. The trial record tells us that the criminal judge, aware that Egen had no residence in Reggio where he could be cited, ordered the public crier of Reggio to go to the assembly place of the commune, "and there, publicly and in a loud voice, with the sound of the trumpet and a call beforehand, let him cite and require the abovementioned Egen . . . that he should appear here. . ."[31] The formality and publicity of the announcements were an important means of publicizing the alleged crimes of the defendants and were a display of the court's jurisdiction. Particularly in the case of the vagabonds, who were unsurprisingly contumacious in 81 percent of the cases where they were listed as defendants, these public citations represent an assertion of public authority over those who existed on the periphery of municipal life.

The hearing of a citation conferred obligations upon the community. Once a ban was pronounced, individuals and communities had the obligation to aid in their capture, and failing to do so could result in criminal charges. Statutes also penalized those who aided persons under ban. During the fourteenth century, penalties for those harboring persons under ban increased. The 1335 and 1392 statutes concerning people who harbor persons under ban also institute pecuniary penalties differentiated by status and ranging from twenty-five Reggian Lire (R.L.) for harboring a banned person, and one hundred pounds R.L. for harboring a rebel, unless they delivered the banned person or rebel into the hands of the *podestà* and the commune of Reggio. Communities could be held responsible to the sum of fifty-five pounds R.L. Pupils (minor children until the age of seventeen for boys and fifteen for girls; majority was reached at age twenty-five), orphans, widows, and other impoverished people were exempt. The people of the community were exempt in cases where they were powerless to apprehend the banned person or rebel, as long as they denounced the culprit to the *podestà*, so that the *podestà* could send his officials there to capture the banned person or rebels.[32]

The statute from the 1411 redaction that deals with people who harbor *banniti* is more severe, and leaves judgment to the discretion (*arbitrium*)

31. ASRe, *Giudiziario*, Libri delle denunzie, Dec.7, 1373. ". . . et ibi publice et alta voce sono tube voceque premisso citet et requirat superscriptum Egen superius inquisitum quatenus hic ad octo dies proxima futurum coram dicto domino iudice malleficorum indicio legiptime debeat comparere . . ."

32. ASRe, *Comune*, Statuti, 1335, f.29v., "De pena illius qui tenuerit aliquem bapnitum communis pro maleficio vel rebelle communis in domo sua."

of the *podestà*. This alone is not surprising, as late fourteenth-century statutes in general and the Reggio statutes in particular show a marked tendency to give wider allowance to judicial discretion over the course of the late fourteenth and early fifteenth centuries.[33] The 1411 redaction commands that those harboring banned persons or rebels should suffer the same penalty that the fugitive faced. If that punishment were corporal, then the punishment of those providing shelter or refuge would be determined by the *arbitrium* of the *podestà*.[34] Public, capital punishment for this offense again served the dual function of punishment of crime and a public display of the commune's power, intended at least in part to serve as a deterrent to those who would assist outlaws. These laws represent the city's effort to isolate criminals from the community, to aid the capture of criminals, and to make contumacy more difficult.

Despite the apparent simplicity of statute norms, they constitute a notoriously difficult source to interpret. The criminal records from Reggio add some dimension to the problem, revealing that these laws were enforced, although such cases appear with great infrequency. When those who aided the *banniti* were brought to trial, they were punished, sometimes severely. Encouraging an accused person to attempt an escape could also result in criminal charges. In a 1397 trial, two men, Petrus and Johannes, stood accused of helping Antonius Ciessi, a shoemaker accused of theft, flee the city. The charge against them stated that the defendants knew that Antonius "had been and was denounced and impugned for a certain theft . . . and [knowing] that the . . . Lords Podestà and Vicar were interested [in the case] and intended to cause him to be captured, the same Petrus and Johannes exhorted the same Antonius, and persuaded him that he should take flight from the city of Reggio, lest he come to the gallows of the said Lord Podestà."[35] The charge alleged that Petrus and Johannes gave Antonius "help, counsel and favor" and accompanied him

33. The 1411 redaction codifies the increasing allowance to judicial discretion that grew in the latter half of the fourteenth and the fifteenth centuries in northern Italy. That judicial discretion became more allowable in the late middle ages, see Laurent Mayali, "The Concept of Discretionary Punishment in Medieval Jurisprudence," in *Studia in Honorem Eminentissimi Cardinalis Alphonsi M. Stickler*, ed. Rosalius Iosephius (Rome: Libreria Ateneo Salesiano, 1992); Massimo Vallerani, "Come si costruisce l'inquisizione: 'Arbitrium' e potere a Perugia," in *La Giustizia Pubblica Medievale* (Bologna: Il Mulino, 2005); Richard Fraher, "Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7 (1) (1989): 23–88.

34. BSR, mss.77, 57r.

35. ASRe, *Giudiziario*, Libri delle denunzie, February 10, 1397. ". . . quod superscripti Petrus et Johannes scientes quod Antonius Ciesse calzarolus civis Regii fuerat et erat denunciatus et inculpatus de quodam furto . . . quod dicti domini potestas et vicarius procurabant et intendebant ipsum capi fecere ipsi Petrus et Johannes. . . ipsum Antonium solicitaverunt et

as he fled the city. In this case, one defendant was absolved while the other received a relatively light fine of ten pounds. The key issue was whether the citation had already been publicly made.

Assisting those who were already placed under criminal ban, however, could have more serious consequences. In 1400, Andriolus de Cremona, a tavern-keeper, was executed for providing assistance to men banned for life from the commune, receiving them in his home and giving them hospitality.[36] This case also demonstrates that the penalty in the 1411 statutes was in force before that redaction, as the 1392 and 1335 redactions institute pecuniary penalties, but here the judge was allowed to use his discretion to determine the penalty for harboring fugitives.

The public reading of the charges, the requirement of the presence of neighbors to witness the citations, and finally the public proclamation of ban, made the community aware first of the alleged crime and second of the court's jurisdiction and power to penalize crime. As Pazzaglini observed in his study of the criminal ban at Siena, the criminal ban developed as a weapon against contumacy, which became more and more widespread as populations and crime rates outstripped policing resources.[37] The commune, lacking sufficient policing power to compel compliance with its summons, relied on community involvement in catching and detaining *banniti*, which was often not forthcoming. This was an old problem, widespread in the Bolognese *contado* in the thirteenth century[38] and clearly still at issue in Reggio.

For those accused of a felony that did not carry a corporal sentence, and who had some means to settle a fine, answering the summons had benefits. At Reggio, fines ordered in convictions were often not the fines that

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eidem persuaxerunt ut fugam faceret de civitate Regii ne veniret in forciam dicti domini potestatis. . ."

36. The trial has been lost but the charge was restated in the record of his condemnation. ASRe, *Giudiziario*, Podestà, Giudici, Governatore: sentenze e condanne corporali e pecuniarie, no date but 1400, reg.7, f.11 (hereafter ASRe, *Giudiziario*, sentenze e condanne): ". . . dictus Andriolus scienter loco et tempore in inquisitione contentis receptavit Antoninum de veto bannitum communis Regii de vita ut apparet et libris condempationum dicti communis in domo sua et eidem dedit cibum et potum. Item quod loco et tempore in dicta inquisitione contentis dictus Andriolus receptavit in dicta domo scienter Bartoninum de Gombia bannitum dicti comunis de vita ut apparet in libris predictis et ibidem stetit per aliquantulum temporis. Item, loco et tempore inquisitione contenente quod dictus Andriolus pluries et pluries diversis temporibus et diebus receptavit scienter in dicta domo Jacobinum dictum Cafirum de Carpineto et Antonium de Veto insimul bannitos de vita dicti communis Regii ut apparet in libris predictis et eisdem dedit cibum et potum. Comitendo predicta contra formam iuris et decretorum serenissimi domini nostri prelibati."

37. Pazzaglini, *Criminal Ban of the Sienese Commune*, 3–4.

38. Blanshei, "Crime and Law Enforcement," 124.

convicted persons paid. The condemnation records are filled with payments accepted and charges canceled where the amount paid was ultimately less than the amount penalized.[39] Condemnation records show that people often paid 25 percent less than their condemnation to have their charges cancelled. This was a common practice; at Bologna, condemnation records from this period also show that sentences were mitigated by a quarter if defendants confessed, and by another quarter if the accused entered into a peace agreement with the victim, and could be mitigated yet again if the defendants could prove their poverty.

But those charged with major felonies had good reason to avoid appearance, considering the high condemnation rates of the court. Defendants charged with arson, for example, were almost never acquitted, and were sometimes sentenced to death by burning. Those who enjoyed the protection of powerful lords and those who had little to lose (particularly vagabonds) were particularly likely to avoid response in court. Personal responses to citations were, then as now, the preferred responses of those with strong interests in the community, and of course, those who were captured and compelled to appear.

Contumacy and Conviction

Contumacy had potentially severe consequences because medieval lawyers equated contumacy with confession, and therefore contumacy quickly led to conviction. This practice of convicting absent defendants did not originate from the *ius commune* and in fact, it was flatly prohibited in the Digest: "… absent persons should not be condemned; for the argument of justice does not permit of a person's being condemned without his case being heard."[40] However, conviction *in absentia* was widely allowed by municipal law codes, and again contrary to Roman law, medieval statutory law even allowed the imposition of a death sentence *in absentia*.[41] At

39. ASRe, *Giudiziario*, Libri delle denunzie, September 24, 1386; ASRe, *Giudiziario*, sentenze e condanne, no date, Reg.1 1385–1387, f.19r-v.

40. *Digest* 48,17,1–4. "De requirendis vel absentibus damnandis. Rubrica. Marcianus libro secundo publicorum. Divi Severi et Antonini Magni rescriptum est, ne quis absens puniatur: et hoc iure utimur, ne absentes damnentur: neque enim inaudita causa quemquam damnari aequitatis ratio patitur." The foregoing translation, and all translations of the *Digest* in this article, are those of Alan Watson in the 1985 publication of Mommsen's edition. *The Digest of Justinian*, *vol.* 2, ed. Theodor Mommsen and Paul Kreuger, trans. Alan Watson (Philadephia: University of Philadelphia Press, 1985), 839.

41. Dean, *Crime and Justice*, 92, citing Gandinus. Gandinus here is attempting to resolve the question of whether one accused of homicide or highway robbery (*strata robata*) should be executed if caught: "Aliquis fuit accusatus de homicidio vel strata robata, et quia non comparuit, positus fuit in banno perpetuo, et deinde extitit condemnatus, eo habito pro

Bologna, books of bans from this period show defendants frequently sentenced to death *in absentia* for major felonies, including murder and theft. Conviction *in absentia* for a capital crime was problematic, because in some areas, this meant that the contumacious and subsequently banned defendant, if captured, could be led immediately to punishment without ever standing trial. This gave pause to many jurists. Baldus, for example, believed that the ban could result in an interlocutory sentence but not a definitive one, and would have disallowed provisions like those at Bologna which allowed a captured murderer to be led immediately to execution. As Baldus wrote, "The penalty of death cannot be inflicted from contumacy alone, nor is condemnation to death valid by the *ius commune*, but on this point the captured man can defend himself."[42] Yet even so, in many cities, statutes decreed exactly this treatment.

The statutes of Reggio Emilia maintain that one who is cited to appear and does not come must be considered as one who confessed, and conviction happened quickly for contumacious felons.[43] If the accused did not respond to the summons to answer in court, the criminal judge was obligated to place that person under ban within a month.[44] The accused was to be convicted "just as though he confessed and was convicted of the crime for which he was blamed."[45] This was a common legal fiction; statutes from Ravenna also treat a contumacious defendant as a confessed felon,[46] as did Florentine law.[47] Bologna maintained a similar practice.

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confesso, et quod, si quo tempore venerit in fortiam communis, quod debeat decapitari vel furca suspendi; postea tractu temporis iste malefactor venit in fortiam communis, potestas intendit eum decapitari facere. Queritur, quid iuris?" [Albertus Gandinus, *Tractatus de maleficiis*, *Albertus Gandinus und das Strafrecht der Scholastik*, ed. Hermann U. Kantorowicz, vol.2 (Berlin, 1926), 226.] Gandinus presents first the argument that the defendant must be heard, because an absent person according to the *Digest* cannot be condemned to death and then he presents as an argument *contra*, that the defendant should not be heard and the death penalty should be imposed because, as the defendant was "inobediens et contumax," his contumacy should be treated as a confession ("quoniam fuit inobediens et contumax, unde pro confesso debet haberi...") Ultimately Gandinus concludes that ". . . nisi maleficium probetur, condemnari non debet nec puniri, cum absens ultra penam relegationis non possit damnari . . ."

42. Baldus, quoted and discussed in Cavalca, *Il Bando nella Prassi*, 178–80. ". . . ex sola contumacia non potest infligi poena mortis, nec valet da [sic] iure communi condemnatio ad mortem, sed captus ad hoc se defendere potest."

43. BSR, mss. 77, 52r. ". . . si non comparverit habebitur pro confesso et convicto vere et legitime. . ."

44. BSR, mss.77, 52r. "De modo citandi illos contra quos proceditur."

45. BSR, mss.77, 52r. ". . . tamquam confessus et convictus de dellicto de quo inculpatur."

46. Dean, *Crime and Justice*, 92.

47. Stern, *Criminal Law System*, 210.

Most contumacious felons were then placed under a *bannum pro maleficio*, a criminal ban.

Although ancient Roman law had an institution similar to the medieval *bannum pro maleficio* in the Republican *interdicere aqua et igni*, which allowed property confiscation and outlaw status for contumacious criminals,[48] this institution disappeared from criminal procedure during the principiate and was not part of the medieval *ius commune*.[49] The practice of convicting and banning contumacious felons was a Germanic one, therefore when late medieval jurists commented on the criminal ban, they had no clear categories in Roman law to use as guides.[50] Whereas there was some difference of opinion among jurists over whether contumacy itself was a crime, municipal statutes tended to consider it as such, holding it as a wrongdoing that aggravated the penalty for the original crime.[51] The legal status of the *banniti pro maleficio* developed, albeit unsystematically, in municipal statutes.

The Ilegal Status of Contumacious Felons

In order to explore the functionality of contumacy in the medieval courts, it is necessary to consider the legal status a felon received for his or her contumacy. But defining the status of a banned felon is complex. In the preface to his famous tract on the criminal ban, Nellus da San Gimignano justified

48. In his study of exile, Randolf Starn observed that the *interdictio aquae et igni* was "not such a punishment as a confirmation of the right to evade it," as it allowed both the state to warn the malefactor and also allowed patrician malefactors to reestablish themselves outside the courts' jurisdiction. It appears that medieval contumacy and criminal ban could operate in this way as well. Randolf Starn, *Contrary Commonwealth: The Theme of Exile in Medieval and Renaissance Italy* (Berkeley: University of California Press, 1982), 19.

49. The interdict was pronounced against those defendants who entered into "voluntary exile" before sentence was handed down in their case, and it effectively outlawed the defendant, allowing him or her to be offended with impunity and also carrying with it a loss of property and the status of citizenship. 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. Interdicere aqua et igni. See also Pazzaglini, *Criminal Ban of the Sienese Commune*, 16.

50. Anthony Mooney's 1976 dissertation explored this problem and demonstrated the originality of Nellus' approach. Anthony Michael Christopher Mooney, "The Legal Ban in Florentine Statutory Law and the De Bannitis of Nello da San Gimignano (1373–1430)" (PhD diss., University of California, Los Angeles, 1976). On the origins of the practice of ban (political and civil as well as criminal), see Cavalca, *Il bando nella prassi*, ch.1, and for the development of the ban in medieval jurisprudence, especially 78–90.

51. Cavalca, *Il bando nella prassi*, 185–87.

his detailed treatment of the subject by painting a picture of the confusion surrounding the *bannum pro maleficio*

> In the cities of Italy, statutes are commonly found against those banned for wrongdoing, crime, or delicts, declaring sometimes that [those who are banned] should not be heard [in court]; sometimes it is stated that they can be killed, and sometimes that they can be offended, and sometimes assuredly that they can be offended with impunity for every kind of offense; sometimes rewards are even ordered for those offending or capturing them, and then sometimes besides, they are forbidden to do business. And even when some things are instituted in their favor (on account of which statutes and other ordinances very often, as is well known, have arisen and arise every day) various and diverse subtleties and ponderous questions sometimes also occur, many of which are scattered in the commentaries and out of the commentaries of the doctors of civil and canon law, occasionally well ordered, occasionally incorrect, and sometimes incomplete, even when they are found brought up in arguments. And they occur, [but they are] taken up or examined by no one.[52]

Once placed under ban, the legal status of the defendant changed profoundly, but the nature of that change had local variation and was not always clearly defined. The questions that arose concerning the legal status of *banniti* had important consequences not only for the people under ban, but also for their families, their creditors, and their communities.

The most complete treatment of the ban comes from the work of Nellus, himself a Florentine jurist and teacher of law who considered the criminal ban through a lengthy discussion based on the Florentine statutes.[53] His *Tractatus banniti* was intended as a textbook or guide for judges dealing

52. Nellus da San Gimignano, *De bannitis*, in *Tractatus Universi Iuris* (Venice,1584), XI, pt.1, ff. 357r.

> "In civitatibus Italiae communiter reperiuntur statuta aedita contra bannitos pro maleficio, crimine, vel delicto disponentia interdum quod non audiantur interdum exprimitur quod possint occidi, interdumque possunt offendi interdum quod possint impune offendi certo omni offensionis genere, interdum etiam offendentibus sive capientibus eos praemia statuuntur, interdum etiam contrahere prohibentur. Quandoque etiam in ipsorum favorem aliqua statuuntur, propter quae statuta et alia ordinamenta saepissime, ut notissimum est, orta fuerunt, et quotidie oriuntur variae et diversae subtilitates et ponderosae quaestiones, quarum multae sparsim in commentis et extra commenta doctorum iuris canonici et civilis, interdum bene ordinatae, interdum corruptae, et aliquando non perfectae, quandoque in argumentis adductae reperiuntur, aliquando etiam occurrunt. Occurruntque a nemine aut tactae aut examinatae."

53. Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton: Princeton University Press, 1968), 408–9.

with this persistent problem.[54] Of medieval tracts on the ban, the work of Nellus is the most exhaustive, comprising some forty-nine folios in the *Tractatus Universi Iuris*.[55]

Discussions of the status of *bannitus* were complicated by the lack of clear corresponding categories in the Roman law, and Nellus was not the first to recognize the need for cognizant discussion and to attempt explication. Medieval lawyers often solved complex problems by reduction to Roman law categories, and jurists of the caliber of Bartolus da Saxoferrato and Jacobus de Arena wrote tracts on the criminal ban in which they sought to understand and frame the practice in the terms and categories of Roman law. But this was problematic. Roman law dealt with contumacy largely as an issue of the magistrate's ability to exert his authority, and it had no clear antecedent to the *bannum pro maleficio*. In Roman law, the judge has inherent authority to enforce their summons and their judgments.[56] This enforcement, in the case of those who do not appear, was to be a fine imposed by the judge, not a territorial restriction.[57]

Roman law used territorial restrictions as punishments, but these were by nature different from the medieval criminal ban. The much-cited description of territorial restriction in Roman law is that of Marcianus, who wrote that "Exile is of three kinds: prohibition from certain determined places, imposed banishment so that [the exile] is forbidden all places except for one undetermined place, or a tie to an island, that is, a relegation to an island."[58] The significant difference between these territorial restrictions and the *bannum pro maleficio* was that the Roman territorial restrictions were sentences and were given as punishments for crime. The medieval criminal ban, however, was not itself a sentence – it was a remedy for contumacy. Exile, relegation, or deportation probably served some of the same functions as the medieval criminal ban, acting as a public

54. Mooney, "Legal Ban in Florentine Statutory Law," 204–5.

55. Nellus da San Gimignano, *De bannitis*, in *Tractatus Universi Iuris* (Venice:1584), XI, pt.1, ff. 357–406. Jacobus de Arena's tract on the ban was also included in the *Tractatus*, but interestingly, Bartolus' was not. Mooney attributes this to the novel approach of Nellus and to the abstract nature of Bartolus' study (Mooney, Legal Ban in Florentine Statutory Law, 206.)

56. *Digest* 2.3.1. "Omnibus magistratibus … secundum ius potestatis suae concessum est iurisdictionem suam defendere poenali iudicio."

57. *Dig.* 2.5.2. "Ex quacumque causa ad praetorem vel alios, qui iurisdictioni praesunt, in ius vocatus venire debet, ut hoc ipsum sciatur, an iurisdictio eius sit. Si quis in ius vocatus non ierit, ex causa a competenti iudice multa pro iurisdictione iudicis damnabitur: rusticitati enim hominis parcendum erit …"

58. *Dig.*48.22.4 "Exilium triplex est: aut certorum locorum interdictio, aut lata fuga, ut omnium locorum interdicatur praeter certum locum, aut insulae vinculum, id est relegatio in insulam."

punishment and a deterrent while separating feuding parties and possibly encouraging compromise. The ban had obvious similarity to exile in its removal of a culprit from a community. The ban could be lifted; it was not generally inherited. But the ban was not a sentence arising from an adjudicated matter, and connection with these categories, no matter how well developed, could not fully describe the ban as found in medieval statute law.

Although the criminal ban was not a sentence, it had elements of punishment. Indeed, some jurists equated the *bannum pro maleficio* with a sort of fine. The criminal ban itself was, as Pazzaglini observed, "partly . . . a feature of judicial process and partly of judicial punishment."[59] This element of punishment arose from the equation of contumacy and confession, an equation strong enough to allow the most serious penalties to be imposed on absent parties. This deviation from Roman norms did not pass unnoted by the jurists, although again, there was no general consensus in juridical thought on this matter. Jurists like Baldus and Placentinus did not think that the death penalty should result from contumacy alone, believing instead that the ban could result in an interlocutory sentence but not a definitive one. As Baldus wrote, "The penalty of death cannot be inflicted from contumacy alone, nor is condemnation to death valid by the *ius commune*, but on this point the captured man can defend himself."[60] Essentially, the problem was whether contumacy should result in conviction, as it was not an adjudicated matter, and if so, whether a contumacious felon, once captured, should proceed immediately to punishment without being heard. Yet statute law in many places permitted exactly this, particularly in the case of those condemned to death *in absentia*. At Bologna, those under ban for murder were to be executed without a defense within three days of their capture.[61]

Because the criminal ban developed in local codes, generalizations are difficult to make. There was significant local variation in the circumstances of the application of the ban and in the restrictions placed upon *banniti*, as well as in the terms of their reinstatement. This confusion was greatly magnified by a lack of specificity in terminology. There were many types of ban, not all of them criminal. Nellus' tract treats those banned *pro maleficio*, but, as he explained, "*plures esse species bannitorum, hoc nomine generaliter assumpto...*"[62] The category of "*banniti*" was immense,

59. Pazzaglini, *Criminal Ban of the Sienese Commune*, 3.

60. Baldus, quoted in Cavalca, *Il bando nella prassi* 178–80: ". . . ex sola contumacia non potest infligi poena mortis, nec valet da [sic] iure communi condemnatio ad mortem, sed captus ad hoc se defendere potest."

61. Cavalca, *Il bando nella prassi*, 177.

62. Nellus, *De bannitis*, prologue, f.357r. "Et ut huius materia opusculi clarius dignoscatur, praemittendum putavi; plures esse species bannitorum, hoc nomine generaliter

encompassing persons banned for all manner of reasons—debt, political reasons, even contagion, as well as crime—yet the term was used freely and sometimes without clarification. Clarification of the legal status of persons banned *pro maleficio* for contumacy was the subject of Nellus' work, most of which is devoted to understanding exactly what rights a banned person retains and what rights he or she loses as a result of the *bannum pro maleficio*.

The relationship between banned persons and their cities as well as their families was the central difficulty of determining their status. Are *banniti pro maleficio* citizens? If they are, do they have any rights? If they do not have rights, do they still bear obligations? *Banniti* were sometimes compared to others suffering diminished legal capabilities: Jacobus de Arena, discussing the problem of the banned person's power inside a family, ultimately used Roman law, specifically the Codex, to demonstrate that a curator should be given to the children, just as in cases where the parents were taken captive.[63] Bartolus, asked whether a banned person retains citizenship, declared that if the person suffers a ban which allows them to be assaulted with impunity, then they are as an enemy of their own city (*dicitur hostis suae civitatis*).[64]

Nellus' answer illustrated the problem with a disputation of the jurist Ugolinus de Fontana Parmensis.[65] A certain citizen of Milan was banned from Milan, and went to live in the city of Vercellis, but while he was living there, another man burned his house down. In Vercellis, a statute decreed that anyone offending a Milanese citizen should be punished in the amount of a hundred pounds. The question to Ugolinus was whether it should then be said that the arsonist had offended a Milanese citizen. Ugolinus decided that the banned person could not benefit from the statute, because it was not enough that his origins were Milanese – he must also be in good standing and not under interdict. It was a difficult problem because it was related to the much bigger question of *banniti* and their status as citizens: what exactly were the rights and obligations of the *bannitus*? Nellus'

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assumpto, de quibus tangam quae occurrunt non omnia iura et loca in quibus habentur inserendo, sed aliqua potiora ex quibus alia inveniri poterunt applicabo."

63. Jacobus de Arena, *De banniti*, in *Tractatus Universi Iuris* (Venice,1584), XI, pt.1, 4 and 5, ff. 355v.

64. Bartolus, cited as the argument *sic* in Nellus (*De bannitis* 2,1,q.45). Mooney observed that whereas Bartolus still relied on reduction to Roman law categories to discuss the ban, his comparison with *hostes* and *transfugae* were instrumental in justifying the practice of allowing *banniti* to be offended with impunity (Mooney, "Legal Ban in Florentine Statutory Law" 72–73.) Bartolus' assertion that the banned person is an enemy of his or her own city is also discussed in Cavalca, 42–3.

65. Nellus, *De bannitis* 2.1,q.45.

answer provided a guideline: a banned person remained a citizen with all the obligations of citizenship, but he or she could enjoy none of its protections.[66]

But even inside the category of *banniti pro maleficio*, not all felons were equal. The *bannum pro maleficio* did not necessarily include property confiscation. In the *Speculum iuris*, Durandus allowed severe limitations of rights not in cases of *levis causa* but only *gravis*,[67] a distinction Nellus adopted.[68] Johannes Andreae's gloss on Durandus' work makes clear that confiscation cannot be understood as part of the ban, even in a criminal case; it must be expressed.[69] Nellus also reiterated that confiscation is part of the ban only if this is specifically mentioned in the ban.[70] Felonies that did not merit a capital penalty usually resulted in a pecuniary ban which could be lifted if the felon paid the penalty (and this lighter form of the criminal ban is still referred to as a *bannum pro maleficio*).[71] But the ban for some major felonies that carried a corporal penalty could be further designated as *in avere*, meaning that their property was indefensible, or in the worst cases *in persona*, meaning their person could be assaulted with impunity. Some people who received the status of *bannitus pro maleficio*, then, lost civil privileges and owed a fine but could change their status by appearance before the judge and payment of the fine.[72] Others were subject to property confiscation and outlawry.

Like the statutes of Reggio, the statutes of Florence that Nellus discussed allowed some *banniti pro maleficio* to be offended in both goods and person. These laws posed difficult questions for the jurist. If a person can be attacked with impunity, even murdered, are the statutes that allow such a

66. Nellus, *De bannitis* 2.1,q.45. "... quantum pertinet ad sui favorem perdat civilitatem, quantum vero ad sui odium illam non perdit maxime si est civis origine, sunt enim de iure gentium distinctae gentes, et sic civilitates ordinate."

67. Durandus also holds this distinction, commenting that a banned person can testify only if the reason for the ban is *levis*, which he equates with a pecuniary ban: "Quid de bannito? Dic quod si bannitus est propter levis causam, puta pecuniam, potest testari. Si propter criminalem, puta propter aliquod maleficium: ex quo olim deportabatur, bannitus est in perpetuum, non potest." In the same way, an excommunicate cannot testify until he or she is absolved. Durandus, *Speculum iuris*, Lib. II Partic.II., De instrumentorum editione, §11 (compendiose), No.5. (Venice, 1566), 496.

68. Durandus, *Speculum iuris*, Lib. II Partic.II., De instrumentorum editione, §11 (compendiose), No. 5, cited in Nellus, *De bannitis*,2,1,q.11, 366r.

69. "Et scias, quod etiam in relegatione bona adimi possunt expresse, sed tacite nunquam dicuntur adempta ..." Johannes Andreae, gloss after "relegati," in Durandus, *Speculum iuris*, Lib.II Partic.II., De instrumentorum editione, §11 (compendiose), No.5, 507.

70. Nellus, *De bannitis*, 2,1,q.11, 366r.

71. BSR, mss.77, 53r-v.

72. In Florence, the goods of contumacious criminals could be confiscated up to the sum of the penalty (Stern, *Criminal Law System*, 32). It is unclear from surviving records whether this was common practice at Reggio.

thing not by nature contrary to justice? Are these attacks or killings justified in all circumstances? How can property be confiscated while legitimate creditors are protected? Is a pecuniary ban the same thing as a fine? As important as these questions were, it is surprising to see the vagueness with which they are left in statute law. The *ius commune* did not offer clear guidelines for the criminal ban; if the institution developed largely in municipal codes, why did subsequent redactions not take care to clearly delineate the status, rights, and restrictions of *banniti*, particularly given the scale of the problem? Perhaps these questions were left deliberately vague. No judge or *podestà* wanted to risk problems in their end-of-term syndication by failing to follow procedure. The vagueness of the statutes allowed flexibility, perhaps coinciding with a general trend to allow increased *arbitrium* or judicial discretion in sentencing at the end of the fourteenth century.

But if this vagueness made the ban flexible from the government's perspective, how did it affect the functionality of the ban? That is to say, if even Nellus da San Gimignano found this confusing, how could a person living in the community understand the appropriate treatment of one who was banned? Members of the community were obligated to aid in the capture of *banniti*, but some *banniti* could be assaulted, or even murdered with impunity, and others could not. Some lost their property, while others retained it. And it must be remembered that this concerns only the *banniti pro maleficio* – others were banned for debt or other reasons, and their status was not the same as that of one under criminal ban. The communication of the specific circumstances of the *banniti* must have circulated by means of the public crying of the ban, the *crida*. Like those proclamations that made up the procedure of citation, the crying of the ban must have communicated the extent of privileges lost by the felon, and this is surely why Nellus allowed confiscation only if specifically delineated in the ban. These *cride* also imposed obligations on those hearing them to assist in the detention of those named.

The most potentially severe consequences of contumacy and the resulting criminal ban were property confiscation and outlawry. Both confiscation and outlawry were intended as deterrents. Nellus defended statutes allowing outlaws to be killed with impunity because these statutes served the public interest, "so that men will be frightened by wrongdoing, knowing that afterwards, they can be killed with impunity, and so that crimes will not remain unpunished. . ."[73] Whether the criminal ban was effective as a deterrent is another question that the sources in examination here

73. Nellus, *De bannitis*, 2,1,q.1. f.364v. "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 . . ."

cannot answer. That contumacy and the ban could be the objects of some rudimentary strategies on the part of the defendants and their families is reflective of their integration into closely knit communities. The criminal ban developed and endured as an institution because of its particular blend of severity and flexibility.

The Confiscation of Goods and the Criminal Ban

Property confiscation was a real possibility for those who failed to appear in criminal court to answer accusations of some major felonies. Understanding how the confiscation of property worked in the *bannum pro maleficio* sheds light on the way that this institution was integrated into the life of medieval cities. Necessary protections for those involved in business dealings with the defendant left large loopholes that could be exploited in fraudulent claims on the defendants' property. Nellus dealt at length with the questions of property and rights that faced the contumacious defendant. Should a woman, if banned, lose her dowry? Do *banniti* lose their rights to make wills? If a ban is pecuniary, can the banned criminal claim bankruptcy? Ultimately, the rule of thumb was Nellus' provision that *banniti* retain the obligations but lose the rights of citizenship, yet these kinds of property questions continued to be the subjects of learned *consilia*. This section will consider what happened to the property of a contumacious felon when an order of property confiscation accompanied the ban.

The requirement, discussed previously, that the property confiscation be specifically included in the ban meant that it would have been publicly announced when the bans were read. Although these citations served as public statement of the jurisdiction and authority of the criminal court, they must surely also have served to set the creditors of the felon on notice that claims would need to be prepared and filed on the property. Protection of creditors is perhaps the most important characteristic of this medieval institution, and it made confiscation an effective but pragmatic penalty. At Reggio, persons placed under ban for major felonies could have their goods seized and confiscated by the Visconti court in Milan. The threat of financial ruin, not just for the defendant but for his or her family as well, was significant, and goods of contumacious felons were vulnerable. But in practice the process of confiscation was a long one, with options for protecting the goods of the accused. The procedure was designed to punish the wrongdoer while also respecting the rights of legitimate creditors on those goods, including first and foremost the family of the culprit. These competing concerns meant that the potential for fraud was large, and

it is clear that the lords of Milan were very interested in creating a process that protected their rights of confiscation.

Whereas pecuniary punishments were paid into the coffers of the city, confiscated property devolved to the *camera* of the *signori*, the Visconti of Milan. The procedure for confiscation of goods was clarified in 1387 by Regina della Scala, wife of Barnabò Visconti and governor of Reggio Emilia. Recognizing the potential for fraud and the necessity of careful procedure in dealing with confiscated property, Regina issued in 1387 a general edict to subject territories giving directions on procedures to be followed in assessing the goods of a contumacious felon.[74]

This decree treats the goods of those banned for major felonies for which the death penalty would be exacted: crimes such as homicide, assassination, robbery, arson, or the abduction of a virgin woman. The document tells us that the goods of the felon should be confiscated by the court on the day that the crime was committed. However the document also ensures the preservation of the rights of legitimate claims made by kin. It is necessary, the edict says, to avoid fraud, and to this end, a procedure for dealing with the goods of confiscated felons is set forth. The *podestà* or rector of the city or land in whose district the crime was committed was bound, after receiving notice of the crime, to send his collector or the foreign notary of the criminal court "to describe the goods of the person impugned for the aforementioned crime. . ."[75] The goods were inventoried by the notary, who included all the movable and immovable property of the accused, and then the list was sent for approval to the *anzian*i or city council. The *podestà* or rector was obligated within two days of the crime to see that the description was made. That description within eight days was sent to Milan to the treasury officials.

This means that the confiscation process was supposed to begin immediately on the day the crime was discovered (*a die commissi criminis intelligatur*). Therefore the confiscation process began before the time required in the citation process had lapsed and thus before the pronouncement of the ban – that is to say, the confiscation process began before the defendant was officially placed under ban. It is interesting to consider this beside the example of the 1397 trial discussed previously, where sentences for aiding a contumacious felon hinged on whether the citation process had been made public. In the 1397 trial, at issue was whether the men aiding the fleeing culprit had heard that the defendant was cited to appear before the criminal judge, and the fact that the citation had not been publicized greatly alleviated the weight of their offense. But this technical detail

74. ASRe, *Comune*, Registri dei Decreti, reg.1385–1425, f.17r-v.

75. Ibid., "ad describendum bona illius qui inculpabiliter de crimine predicto . . ."

appears less important in the question of confiscation, where the initial flight of the culprit created a presumption of guilt and grounds for conviction.

This early seizure of goods and property was necessary in order to prevent fraud. The process of confiscation was complex, and determining exactly what property belonged to the person in question could prove a challenge to officials even before creditors began to make their claims. One 1393 case where the defendant was charged with multiple felonies includes an assessment of the contumacious man's property. The record reads: "The things written here are the goods found and described in the home inhabited by Symon Forzani, father of Geminianus Forzani, blamed for a homicide … Symon says the said goods are his, and that his son has not stayed with him for eight years …"[76] Symon had a claim to keep the goods unless witnesses could prove the property belonged to his son. Determining where the property of the accused was, and proving to whom it belonged, was a difficult matter. It was also an opportunity for families to hide property from the court's estimators and avoid confiscation.

Once the list of property was made and the description approved, the *podestà* or rector issued a public directive that anyone claiming to be a creditor of the condemned was bound within one month to the day the proclamation was made to appear before the *podestà* or rector and produce in writing everything that she or he claimed to be owed by the condemned man. If the potential creditor lived outside the jurisdiction, he or she was allowed three months to make the claim. Creditors living outside the territory of Milan had six months to make their claim. The period of six months was extended to foreign pupils, widows, and women who claimed rights to the goods. When the set term had elapsed, no further extensions were to be granted for claims. The process is similar to the process of estimation undertaken in the case of an absent person sued in a civil matter.[77]

The evaluation of claims made upon the goods of the contumacious felon was probably one of the most vulnerable moments in the estimation process for fraud. When claims were made on the goods of the convicted, the decree required that advocates representing the lords of Milan should be present to defend the rights of the *signori*. In this system, if the accused

76. ASRe, *Giudiziario*, Libri delle denunzie, October 20, 1393. "Infrascripta sunt bona reperta et descripta in domo habitatori Symonis Forzani patris Geminiani Forzani inculpati de homicidio … qui Symon dicit dicta bona esse sua et dictum eius filium non stetisse cum eo plurime octo annis elapsis …."

77. The process of estimation and the appointing of procurators in the Genoese courts is examined in Jamie Smith, "Navigating Absence: Law and the Family in Genoa, 1380–1420" (PhD diss., University of Toronto, 2007).

had any financial acumen at all, he or she could take measures to protect their assets. Creditors could make claims on confiscated property, and the first creditors were the families of the accused. A 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.[78] The dowry could provide an extremely effective way to elude property confiscation. Women could shelter their family estate by laying claim to their dowry, as Lucia did, because women stood as legitimate creditors for this property.[79] As Smail observed at Marseille, "The more men were indebted to wives, daughters, and daughters-in-law, the more secure they were from criminal prosecution."[80] One might extend this observation to all the members of the family or even to other kin or friends who could claim to be creditors. 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.

Children had legitimate claims to their fathers' estates. Law governing the claims and responsibilities of children for their fathers' property and debts was complex, but minor children were owed sustenance. In Genoa, statutes stated directly that children should not suffer because of their father's absence.[81] Direct heirs were likewise owed their portion. The 1411 redaction of the statutes at Reggio specifically protected the rights of heirs under the rubric, "*Quod ius creditorum et descendencium sit salvum*."[82] Officials had to strike a careful balance between allowing those with legitimate claims (and dependencies) upon the property to receive their due, and avoiding fraud constructed using the guise of legitimate claims.

In recognizing these claims, it might be tempting at first to assume that the government was acting to aid dispute resolution or to ease the situation of the near kin of the felon, and perhaps de facto it was. But the protection of the family's interest in the patrimony has a complex juridical history, and these laws were not constructed particularly for this situation, but

78. ASRe, *Giudiziario*, Atti e processi, n.d. but 1393, 251r–56v.

79. There is an important body of literature on women's legal rights and dowry restitution that is too large to mention here. I would like to refer especially to 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.

80. Smail, *Consumption of Justice*, 203.

81. Smith, "Navigating Absence," 233.

82. BSR, 60r.

rather were applications of larger principles. In statute law, the idea of the *pars filii* held currency. This idea that the son had interest in the patrimony not just upon the death of the father, but while he was still living, did not have place in Roman law but it was very much part of the medieval *ius proprium*. Heirs of estates also had some minimum due in the form of the *legitima*, their minimum provision.[83] The *legitima* could not be denied to a direct heir by testament; their rights to this property overrode even the strength of a will.[84] Of course, the son's interest in the patrimony could have adverse effects for the defendant if the condemned person were the son and not the father; in this case, the son's part of the patrimony could be liable for confiscation as payment of the condemnation in a criminal matter. This proposition that the son had claim on the goods of a living father beyond the *peculium* was debated.[85] However, in Bologna as in other cities, the father's goods could be obligated up to the *pars filii*.[86]

Only after the claims of the family were satisfied were claims of creditors heard. The portion of the goods that devolved to the *camera* of the Visconti was that portion that remained after all these creditors had been satisfied. In spite of all the care taken to provide against fraud, no public instrument was required to prove a debt. To prove legitimacy as a creditor required only the oath of two witnesses of good *fama et opinio*. The burden of proof in confiscation fell to the government, which had to honor creditors' claims and had to sue if fraud was suspected. Officials had to prove that goods belonged to the *banniti* in order to confiscate them, and even confiscation did not definitively remove the property from the families' use. There was considerable room for negotiation and strategy to protect the goods of a *bannitus*.

Contumacy, even for major crimes which carried a penalty of property confiscation, was surely no guarantee of fiscal ruin. At Reggio, the commune counted itself last, seizing property but then hearing petitions against that property by everyone from the wife and children to the fish vendor and butcher, and paying out sums accordingly. All who could prove themselves to be legitimate creditors of the confiscated estate could make successful claims upon it. In spite of the harshness of the provisions against fraud and the strong language of the statutes, no public instrument was required to prove a claim, and families stood as first creditors. The rights of

83. Thomas Kuehn, *Heirs, Kin and Creditors in Renaissance Florence* (Cambridge: Cambridge University Press, 2008), 43, 70.

84. Ibid., 189.

85. For a full discussion of this problem, see Manlio Bellomo, *Problemi di diritto familiare nell'età dei Comuni: beni paterni e 'Pars Filii'*. (Milan: A. Giuffrè, 1968), especially 111–53.

86. Bellomo, *Problemi di diritto*, 135.

creditors, particularly the family of the accused, took precedence over the collection of a fine or the seizure of assets. This was part of a long legal tradition that gave special place to the patrimony.

This is not to say that the damage caused by confiscation was negligible. Fines were still collected. Old debts that might have been postponed, had the debtor not been banned, were now collected. Property that could not be claimed was lost. A son's conviction could lead to claims on the estate of his family, though this was limited. Confiscation could certainly be expensive, but it was not necessarily ruinous. This may have encouraged some defendants to take this path rather than face formal justice, or, perhaps more fearsome, retribution or vendetta.

Outlawry: the Bannum in Persona

The most potentially severe consequence of contumacy was outlawry. Removed from any protection of the law, *banniti* could be killed with impunity. There were inherent difficulties with this proposition, not the least of which was that it allowed and sanctioned murder. Jacobus de Arena disallowed the practice of killing the banned persons with impunity, in large part because he related the criminal ban to the Roman practices of *relegatio* and *deportatio*.[87] Gandinus allowed that persons under ban could only be killed with impunity if they were banned for a serious offense. But importantly Gandinus recognized that a statute allowing the murder of banned people with impunity might be strictly interpreted to "permit the slaying of any *bannitus* condemned for a crime, including a noncapital offense, on account of his contumacy to the court."[88] Gandinus' concern predicts Nellus' later comments on the difficulties of terminology and the lack of a clear legal status for those banned *pro maleficio*.

Nellus, however, began his discussion of the consequences of people banned *in persona* with his unequivocal support for the validity of statutes that allowed this practice: "First therefore I seek whether a statute which provides that a person under criminal ban can be killed with impunity should be considered valid. This question is well known and well worn, so therefore I will not devote myself to it. I conclude that since such a statute is made for the public utility, so that men will be frightened by wrongdoing, knowing that afterwards, they can be killed with impunity, and so that crimes will not remain unpunished, … then it should be said that

87. Pazzaglini, *Criminal Ban of the Sienese Commune*, 60, and Jacobus de Arena, *De banniti*, *Tractatus*, 16 and 17.

88. Pazzaglini, *Criminal Ban of the Sienese Commune*, 60.

the statute is valid."[89] In his support, Nellus here references the Digest as well as Innocent III's famous decretal *Ut fame.* The murder of a banned person served the public interest, and this was an important part of the philosophy of late medieval criminal justice, having been used also as a justification for the widespread adoption of inquisitorial procedure in the criminal courts.[90] It served the function of a deterrent, and it was a step against the widespread problem of unpunished crime. This question of whether it was legitimate to allow the murder of a person banned *pro maleficio* was, as Nellus stated, well-worn (*trita*): he drew from Jacobus de Arena, Johannes Andreae, and Bartolus, to name only a few, and indeed the issue was also dealt with at length in *consilia* of famous jurists such as Baldus and Angelus de Ubaldi.[91]

Like the question of property confiscation, the question of outlawing a contumacious felon carried with it a maze of legal complexities. The idea that a murder would go unpunished, or that a person could be assaulted or even killed with impunity, seemed to run contrary to fundamental norms of justice, and the question of when this was permissible was a sticky juridical point. Again, local variation marks the law. The statutes of Perugia allowed bandits to be killed for offenses including assault with bloodshed; other cities such as Vercellis allowed death only in cases of capital crimes.[92] Concerned for public order, Venice would later experiment with laws that allowed outlaws to kill each other in return for remission of their ban, though this had dubious results.[93] Reggio allowed *banniti* to be killed with impunity in the case of certain major felonies, all of which were capital; however, not all capital crimes were included in the list, only homicide, arson, robbery, theft, treason, and kidnapping.[94] Statutes appeared in the 1335, 1392, and 1411 redactions forbidding the *podestà*

89. Nellus, 2,1,q.1. f.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."

90. 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* (1984): 577–95.

91. Dean, *Crime and Justice*, 105–6.

92. Dean, *Crime and Justice*, 105.

93. Gaetano Cozzi, "Authority and the Law in Renaissance Venice," in *Renaissance Venice*, ed. John Hale (London: Faber and Faber 1973), 319.

94. A statute concerning the same issue appears in the second book (which primarily concerns the offices of the commune) of the 1335 redaction (ASRe, *Comune*, Statuti 1335, 21v.) and the first book of the 1392 redaction (ASRe, *Comune*, Statuti 1392, 146r.) and was moved to Book Three on the criminal law in the 1411 redaction (BSR, mss. 77, 17v.)

to make any inquiry into the murders of people banned for those crimes, and these laws were retroactive, requiring that the *podestà* cancel penalties for anyone who had been banned or fined for an offense against a *bannitus.* By 1411, the statute included the caveat that those who had peace agreements with *banniti* could not offend them with impunity, and specified that the property but not the person of those banned for crimes that did not carry a corporal punishment could be offended.[95]

The criminal records show that these laws were enforced, and the legal status of a victim as *bannitus pro maleficio* was an allowable and effective exception to a charge of murder. We find an example of one such individual who is present in no less than five criminal trials, always contumacious, and living his life under ban from the court at Reggio. Roffellus, son of Mathiolius de Roncolo, was charged repeatedly with crimes such as murder, theft, and assault, before his own life ended at the hands of another man in 1388. The first surviving trial in which Roffellus was accused, dates from October 31, 1385. Charged with committing a theft at night (crimes committed at night carried severe penalties), Roffellus was contumacious. Ultimately he was condemned to pay fifty R.L., and "if he does not pay this money, let his feet be cut off."[96] Almost exactly a year later, Roffellus was cited in court again, this time with seven co-defendants on the charge of murder. Roffellus and his colleagues, along with others "about whose names it is better if we remain silent," made an armed attack and murdered two men, and this time, Roffellus was placed under a ban of a thousand imperial pounds, and was sentenced to death by decapitation and the confiscation of all his goods.[97]

Placed under two criminal bans, assumed guilty of theft and of murder, Roffellus still remained in the territory of Reggio. We meet him yet again in the criminal records, this time in February of 1387. Roffellus was clearly embroiled in infighting among the powerful Fogliani family, and this time, the victim of the assault was "the noble knight, Lord Nicholaus de Lapiagna de Fogliano, resident in the castle of Rondinara" who had been the denouncer in Roffellus' first murder case. Roffellus and his *socii* made an armed attack against him. Some of Roffellus' accomplices appeared in court and denied the charges (the records do not indicate whether their appearance was voluntary); Roffellus himself remained contumacious.

95. BSR, mss.77, 17v.

96. ASRe, *Giudiziario*, Libri delle denunzie, January 15, 1385. "Condempnatus fuit in libra quinquaginta rexanorum solvendo in decem dies… Quas si non solvit sibi pedes amputent."

97. ASRe, *Giudiziario*, Libri delle denunzie, Oct. 30, 1386.

We meet Roffellus in the criminal court records one final time, in 1388, this time as the victim. On April 6, 1388, a certain Christoforus was accused of murdering Roffellus. On the last day of April, Antonius de Manzano, "notary, procurator, … and dear friend and defender of Christoforus,"[98] appeared before the judge to answer the charges on Christoforus' behalf. He protested to the judge that the prosecution could not continue, because Roffellus was under ban and his name appeared in the books of bans. Antonius produced those documents before the court and also produced the statute that forbade prosecution of the murderer of a person banned for homicide. Twelve days later, the judge canceled the proceedings against Christoforus because the victim was under ban.[99]

Roffellus' story as documented in the criminal records illustrates the function of the citation process and also shows that the criminal ban did not necessarily force malefactors to flee the area of the court's jurisdiction, particularly when the criminal was in the protection or service of a powerful lord. Roffellus' life ended with his murder unpunished by law; his killer went free because of Roffellus' status as a *bannitus*. To consider the criminal ban only in light of statute norms would grossly simplify the reality of jurisdictions and ideas of power in late medieval cities. Law enforcement certainly was not a straightforward implementation of statute law. It was a complex balancing act of political agendas and power.

The permissibility of the murder of a *bannitus* was only the beginning of the questions surrounding the *bannum pro maleficio in persona*. Like property confiscation, outlawry raised a host of complex problems, some of which Nellus attempted to field: can a son kill a banned father? Is it necessary that the killer be aware of the ban to make the murder legal? What if the murdered person is a pregnant woman? And there was an obvious moral question as well: even if the statutes permit the killing of a *bannitus*, does the one killing him not sin *in foro conscientiae*?

The answer to this last question was obviously more theological than legal, but Nellus treated it anyway. The answer depends on the intention

98. ASRe, *Giudiziario*, Libri delle denunzie, April 6, 1388. "Notarius, procurator … ac amicus benevolus et deffensor Christofori …"

99. ASRe, *Giudiziario*, Libri delle denunzie, April 6, 1388, and following days, "non potestis nec debetis procedere contra predictum Christoforum occaxione dicti homicidam commissam personam dicti Roffeli pro eo quod dictus Roffelus erat bampnitus et condempnatus communis regii propter homicidam comissum … quod evidenter apparet in condempnatoribus et bampnus … latis et datis per tunc dictum potestatem Regii quas condempnationes … Antonius … produxit et producti coram vobis … Item, producit coram vobis statuta communis Regii maxime quoddam statutum dicti communis ponitum et scriptum in volumine statutorum dicti comunis in libro secondo capitulo xxxii sub rubrica quod bampniti et condempnati commuis regii in persona possint impune offendi personaliter et in avere …"

of the killer. If the murder is done with the authority of law, it is not a sin but is rather meritorious behavior, similar to a judge sentencing a malefactor, or to an executioner. It is not a sin if the killer is moved to the act in the interest of public utility. If, on the other hand, the killer is motivated by "malice, and a delight in shedding human blood," then the sin is mortal.[100] But even in this case, although a mortal sin, the act remains legal.

The function of the statute allowing the murder of *banniti* was public utility. Public utility was the basis of inquisitorial procedure, it was the backbone of the laws of contumacy, and it alleviated the moral consequences of killing.

Contumacy and the Return from Ban

If contumacy did not necessitate a financial disaster, it also did not necessarily result in a permanent criminal ban. Banned felons could return if they paid the sum of their ban, though this was unlikely in the case of murder and other major felonies that carried an amount of one thousand pounds. Other more realistic opportunities for reintegration came in the form of general edicts that lifted the ban in special circumstances, and in the case of negotiation for return, which involved agreements with the victim or the victim's family as well as formal supplication to the lords of Milan.

In times of emergency, the ban could be generally lifted in return for military service. 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 heirs and friends of the dead (*heredibus et amicis defunctorum*). The term of service owed depended upon the reason for the ban, and this term of service could be halved if the *bannitus* brought another person into service with him.[101]

Negotiation for return was also a distinct possibility for the contumacious felon. The potential for a capital sentence was a good incentive to flee, and when defendants were contumacious on a murder charge, they were placed under an impossible ban of one thousand pounds. But after a year, culprits could attempt to negotiate their return to the commune. This ability to negotiate a return, like so much about the criminal ban, had a great deal of local variation. At Bergamo, for example, factors of the crime determined whether a convicted person was eligible for recall from a homicide ban. Only those crimes committed without premeditation

100. Nellus, *De bannitis*, 2,2,q.11. f.379r.

101. ASRe, *Comune*, Registri dei decreti, reg. 1372–1375, April 2, 1373.

were eligible for the relaxation of the ban.[102] 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 twenty *solidi*.[103] Indeed, at Bologna, rules regarding the ban evolved over the course of the thirteenth century to allow more possibilities for reintegration.[104] At Reggio, negotiation involved a supplication to the lords of Milan to have the ban lifted and the sentence canceled, and it required that the murderer make a formal, binding peace agreement with the victim's family. A mandatory one-year period had to elapse before the guilty person could enter peace negotiations with the wronged family. This distance was important because it allowed a "cooling-off" period after which the aggressor and the victim or victim's family might choose to enter into a peace agreement. Clearly this period of separation could serve to diminish the danger of immediate retaliation by allowing time for tempers to cool, and equally importantly, providing time for parties to negotiate informally whatever terms were necessary to bring peace. Families could then enter into *instrumenta pacis*, an agreement for two parties to maintain perpetual peace.

Peace agreements were a common feature of late medieval justice in northern Italy and also in Marseille.[105] The use of these agreements in the criminal process and their efficacy to end trials or to mitigate penalties varied a great deal by location. In Florence, transaction of a peace agreement within fifteen days from the crime abrogated a trial.[106] At Perugia, peace agreements were effective only in the case of certain crimes, but they could end a criminal prosecution. 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.[107]At Reggio, peace agreements did not end criminal prosecutions, but they did mitigate penalties by 25 percent. At Milan, a peace agreement was necessary for a person to return from a ban imposed

102. Massimo Vallerani, "Pace e processo," 173.

103. Ibid.,174.

104. 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 (2) (1997): 511. Interestingly, Milani found that in 1250, of 89 cancelled bans, only 3 were justified by the payment of the penalty and the peace agreement; almost half of the cancellations were justified by *consilia* that claimed procedural violations, whereas the rest were based on *consilia* that mentioned a peace agreement but stated, without further explanation, that the penalty was not owed. (Milani, 511–13.)

105. Smail, *Consumption of Justice*, 173.

106. Stern, *Criminal Law System*, 27.

107. Vallerani, "Pace e processo," 175.

for a violent offense,[108] and this appears to be the case also at Reggio. In homicide cases, these agreements were necessarily transacted long after the crime was committed, because such an agreement could only be concluded after the culprit had been banned from the commune for at least a year. Condemnation records at Reggio occasionally note the cancellation of a homicide ban, giving as one of many circumstances of its cancellation the *pax.*

As Massimo Vallerani observed at Perugia, the *instrumentum pacis* provided a way for people to return from ban and it limited new sources of vendetta.[109] Contumacy and the subsequent criminal ban aided public order by removing the accused from the family of the victim, thus limiting opportunities for vendetta. The peace agreement was not an expression of private negotiation inside a public system; it was an important part of the criminal process and "an adjunct to judicial sentence and ban."[110] For felonies that carried a corporal sentence, the first ingredient for the creation of peace agreements and the reintegration of the felon into the community was contumacy.

It is unlikely that any government would wish to reintegrate career criminals, particularly highwaymen and assassins. Peace concords were most often transacted between neighbors, not strangers,[111] and the requirement for a peace agreement probably had as much to do with excluding these types of criminals from reintegration as it had with encouraging negotiations among disputing parties. Whereas the criminal ban could be used for conflict resolution, this was not its primary function. The ban helped the commune enlist the help of the community in law enforcement.

Conclusion

Defendants' actions affected not only themselves but also their families, as we hear in the cry of Antonius' mother, whose story opened this essay: "Traitor! You have destroyed me!" The reality of informal justice in the form of retribution or vendetta played an important role in the choices made by one accused of a crime. In their reactions to contumacy, the criminal courts were guided by the principle of public utility. Even in places

108. Ettore Verga, "Le sentenze criminali dei podestà Milanesi," *Archivio Storico Lombardo* 28 (1901): 123.

109. Vallerani, "Pace e processo," 170.

110. Trevor Dean, "Violence, Vendetta, and Peacemaking in Late Medieval Bologna," *Criminal Justice History* 17 (2002): 10.

111. Shona Kelly Wray, "Instruments of Concord: Making Peace and Settling Disputes through a Notary in the City and Contado of Late Medieval Bologna," *Journal of Social History* 42 (3) (2009): 747.

where the flexibility of the law allowed defendants and their families to strategize, it is important to recognize that the law that allowed them to do this was shaped by other, larger questions: questions, for example, of the nature of patrimony and the rights of children, or of the principles of judicial execution, or of the nature of exile. That these procedures allowed for dispute resolution seems to be the result, if not the cause, of their development in the *ius proprium* and their elaboration in the legal tradition.

It would be difficult to claim either that contumacy was a flaw in the justice system or that it was an integral part of it without reifying something that was an organic component of the bigger, informal picture of justice, highly changeable and impossible to generalize. In contumacy and the ban we see courts attempt to impose their will and their authority in a way that served as a stern deterrent, *ne crimina remaneant impunita*, and protected the treasury from the dishonor of defrauding, while still allowing the wheels of commerce and family life to continue – also very much in the public interest. Perhaps the question we should ask is what exactly constituted public utility. Crime control is in the public interest; so is dispute resolution. Procedures for contumacy clearly aimed at the former, but no procedure that failed to allow integration in established structures could be particularly effective. The law maintained a careful balance between flexibility and severity.

Although the ban may sometimes appear to have been ineffective, as in the case of Roffellus mentioned previously, this would be a dangerous generalization. The criminal ban alone could not overcome the strength of magnates or the power of the vendetta. Yet even when it could not force the resolution of a case, it still functioned as propaganda for the government, as a public assertion of an authority that in practice was not realized. As a deterrent, it did not necessarily dissuade those people who lived their lives outside the perimeters constructed by the law of the town. In late medieval Reggio, those people would ultimately be entrusted to other officials, such as the *capitano del divieto*, who, given his prerogative to dispense summary justice, may have played by his own rules as well. The procedural structure of the ban allowed it to function on many different levels, even if it did not always produce the desired result. Legally, the ban was a remedy for contumacy, and the jurisprudence of contumacy evolved to allow governments to exert authority over absent defendants in a way that was not directly sanctioned by Roman law. The ban functioned as a continual public statement of the rule of law, even when in reality that rule was not always effectively implemented. It also encouraged or at least allowed community involvement in prosecution. Pronouncing outlawry upon criminals opened the door for other non-officials to exact retribution or simply to victimize the offender. And yet, it also left the door

open for reintegration of some criminals. Those accused who had strong ties to the community could develop strategies to protect property and limit the damage of the ban, and could ultimately attempt to return to the community through the use of the *instrumentum pacis*.

Although parties could and did strategize to protect contumacious felons and their property, overemphasizing this ability would cause us to lose sight of the reactive nature of these efforts. Strategy, except in the most premeditated acts, would often have been the efforts at damage control exerted by the family of the contumacious felon. Contumacy for major felonies could be an effective and calculated strategy. But it surely was also sometimes a decision made in a moment that was, possibly, the darkest of a person's life – as Antonius' mother cried out her ruin and her son disappeared into the early hours, and Caterina's family prepared her burial. Fear, whether of formal justice or, as Antonius' witnesses assumed, of the vendetta, could inspire flight, and this left damage to be controlled by the courts and the parties who remained behind. The way that governments, courts, and involved parties attempted to control this damage serves as an illustration of the important and sometimes tense relationships that defined medieval justice – relationships between the *ius commune* and statute norms, between the demands of crime control and dispute resolution, and between formal and informal justice.