The Theoretical Justification for the New Criminal Law of the High Middle Ages: "Rei Publicae Interest, Ne Crimina Remaneant Impunita"

Richard M. Fraher

Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Criminal Law Commons, Legal History Commons, and the Medieval History Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
THE THEORETICAL JUSTIFICATION FOR THE NEW CRIMINAL LAW OF THE HIGH MIDDLE AGES: "REI PUBLICAE INTEREST, NE CRIMINA REMANEANT IMPUNITA"

Richard M. Fraher*

I. INTRODUCTION

During the latter part of the twelfth century, criminal law suddenly caused a sharp conflict between church and crown in England. Thomas Becket's intransigence concerning criminal jurisdiction over the English clergy gave rise to a bitter and protracted confrontation between the archbishop and King Henry II. The clash culminated in Archbishop Becket's dramatic martyrdom at Canterbury Cathedral.1 In 1203, some thirty years after the Becket controversy had violently ended, the Bishop of London, William of Ste. Mere-Eglise, wrote to Pope Innocent III. William inquired, in a somewhat more level-headed way than Becket, about two of the points for which the prickly archbishop had sacrificed his life. First, William asked for Innocent's advice concerning whether prelates might forcibly incarcerate clerics who had proved incorrigible by repeated offenses and by escaping from penitential detention in monasteries. Second, William asked whether laymen might escape the penalty of ipso facto excommunication if they laid violent hands upon clerics whose rebellion left them no alternative but to use force in capturing and arraigning the miscreants.2


2. X 5.39.35: Sane consulusti nos utrum clerici graviter excedentes qui tute non possunt monasteriis ad agendum penitentiam deputari, quoniam, cum non peniteant de commissis, opportunitate
Pope Innocent III's reply to William's inquiry is preserved in the decretal *Ut fame.* Innocent's response reflects both the cooling of tempers between 1170 and 1203, and his ability to draw upon Roman legal antecedents to frame the specific content of the reply as a broad juristic principle. The pope wrote that prelates could and ought to imprison incorrigibly wayward clerics. The pope also wrote that laymen could use violence to arrest clerics accused of serious crimes if the laymen acted upon a mandate from the clerics' superiors, and if the laymen used only such violence as they needed to overcome the wayward clerics' "defense or rebellion." 

The tone of William's inquiry and the gist of Innocent's response indicate that neither William nor Innocent was primarily concerned with questions of ecclesiastical rights and liberties. Rather, they both addressed the concern which ostensibly had driven Henry II to confront his bishops at Winchester in 1163: the uncontrolled increase in crime, specifically among the clergy who enjoyed immunity from secular prosecution. The king had phrased his complaint about contemporay lawlessness in terms of a mythic past, when his predecessor had enforced good laws. Innocent reached still further into the past and phrased his remarks, not in the context of contemporary conditions, but in the context of three principles which Innocent presented as timeless truths: the prelates are responsible for correcting the excesses of their subjects, the wicked respond to impunity by becoming yet more wicked, and as a matter of public utility crimes should not remain unpunished.

This article explores the origin, development, and eventual expansion of Innocent III's pronouncement that "publicae utilitatis intersit, ne crimina remaneant impunita." Although Innocent apparently borrowed the phrase from an anonymous contemporary, medieval scholars thoroughly searched for its Roman law origins. This approach to criminal law produced a startling change in legal and public attitudes.
toward state prosecution of criminals and the safeguards protecting their rights. The ramifications of this change in focus can be seen in the divisive modern attitudes toward criminal procedure.

II. THE DEVELOPMENT OF "REI PUBLICAE INTEREST, NE CRIMINA REMANEANT IMPUNITA"

Innocent's statements may seem at first glance to contain truths so self-evident that one need not pause to glance twice. The entire thrust of the Latin patristic tradition underlay the magisterial conception of prelates, whose functions were predicated, at least in part, on the model of Roman magistrates charged with "correcting the excesses" of their subjects. There was nothing new, either, in the idea that the failure to punish deviancy leads to moral and behavioral deterioration. The Roman law and the Latin fathers strongly believed in the deterrent function of punishment. Finally, there is nothing immediately striking in Innocent's parenthetical observation "publicae utilitatis intersit, ne crimina remaneant impunita"—"In the interest of public utility, crimes ought not to remain unpunished."8

Enforcement of the law stands with diplomacy, defense, and taxation as one of the functions which modern observers associate with the state. According to the popular version of western history, those functions were defined and exercised in classical antiquity, subverted by centuries of barbarian ignorance and feudal disarray, and finally resurrected following the rediscovery of Roman law. This rediscovery led, however gradually, to the establishment of the modern western state. In Innocent's decretal, most legal historians would find a nice, but not atypical, example of the rebirth of Roman law in its best medieval garb. A rebirth, that is, in the form of a legal maxim that civilian lawyers and canonists in the age of scholasticism abstracted from its context in the Corpus iuris civilis and applied willy-nilly.

The reasonable medievalist would expect that the phrase "publicae utilitatis intersit, ne crimina remaneant impunita" is an example of a phenomenon illustrated by Gaines Post's study9 of the legal maxim "What touches all should be approved by all" (Quod omnes tangit ad omnibus approbetur).10 Post found that this legal rule had originated as a parenthetical remark embedded in a lex in the Digest. Canon lawyers then excerpted the remark during the High Middle Ages to explain such diverse topics as the right of cathedral canons to counsel and consent in matters concerning the alienation of episcopal property, "the right of even lay people to be represented in decision-making processes concerning the faith," and the ultimate authority of general councils of

8. Id.
10. The full phrase is: "Quod omnes tangit ab omnibus debeat communiter approbari."
the Church in matters of doctrine. Peter Stein further elaborated the
standard model for the emergence of Romano-canonical maxims.

If Innocent's phrase, for example, followed Stein's standard
model, Innocent would have excised the phrase from its original
Roman law context shorn of any limitations that the original setting
imposed. He would have then reformulated the phrase as a general
principle and fruitfully applied it to all sorts of situations disassociated
from the original meaning of the phrase. "Quod omnes tangit" remains
the best known example of this process, having moved from a specific
context in private law to the theory of representation in religious com-

munities, thence to the theory of conciliarism, and finally, once the
kings of England had begun to call parliaments, to the level of national
constitutional theory, ripe with revolutionary potential.

In the centuries succeeding Innocent's time, Innocent's phrase,
slightly abbreviated, enjoyed at least as stellar a career as "Quod omnes
tangit." The scholastic jurists seized upon Innocent's decretal as the
raison d'être for virtually every innovation in criminal law from the
thirteenth through the sixteenth century. As early as 1210, the decretal-

ist Tancred used Innocent's phrasing in much the same way as a medie-
val preacher employed a passage from scripture to begin a sermon.
Tancred's Summula de criminibus begins: "Quoniam rei publice interest,
 ut crimina non remaneant impunita . . . ."13

Within a generation of canonists after Tancred, the maxim became
a standard catch-phrase. Johannes Teutonicus, commenting on the
early thirteenth-century canonical collection known as Compilatio
terti, did not explain this section of Innocent's decretal other than to
list three passages from Roman law that Teutonicus thought expressed
the same concept. By mid-century, however, Hostiensis, perhaps the
most influential thirteenth-century canonist, discovered widespread
uses for Innocent's phrase. Commenting upon this passage of
Innocent's decretal, Hostiensis wrote: "Here you have a notable snippet
which we use frequently, saying that it is in the interest of the republic
or of public utility that crimes not remain unpunished."15 The obliga-
tory citations from Roman law follow, along with the conventional ob-
servation that impunity leads to delinquency, while inflicting penal

11. See supra note 9.
13. See Fraher, Tancred's Summula de criminibus: A New Text and a Key to the Ordo
14. J. TEUTONICUS, APPARATUS GLOSSARUM IN COMPILATIONEM TERTIAM ad 3 Comp.
5.21.8 s.v. ne criminia. C. de penis Si operis (CODE JUST. 9.47.14), ff. de fideius. Si a reo § 1d quod
(DIG. JUST. 46.1.70.5), ff. de iudic. Si longius (DIG. JUST. 5.1.18). K. Pennington's edition of the
15. HOSTIENSI, LECTURA IN V GREGORII NONI DECRETALIUM LIBROS ad X 5.39.35 (Paris
1512) s.v. et publice: "Hie habes notabile scissum quo frequenter utimur, dicentes rei vel utilitatis
publice interest, ne crimina remaneant impunita."
sanctions creates terror and restrains others from sinning.  

16 True to his word, Hostiensis used Innocent’s “snippet” in a number of contexts touching upon criminal law. Hostiensis always used the passage to justify some curb upon the traditional protections of the defendant and the learned law’s guarantee of full, formal procedures in criminal cases, safeguards which often frustrated zealous officials’ pursuit of malefactors.

For example, the legal development which most directly threatened to subvert the defendant’s traditional guarantee of “due process” (ordo iudicii) was the old idea that a judge could pronounce a definitive sentence in a “notorious” crime without citing the accused or establishing proof beyond the fact of notoriety.  

17 Hostiensis, who did not agree with the more extreme applications of this approach, wrote that “it is better and safer to summon the accused (and thus to allow for his defense), unless perhaps the delay would cause scandal or grave danger to the republic.”  

18 Hostiensis concluded his discussion of notoriety by saying that “this is special in criminal matters, ne crimina remaneant impunita.”

III. The Public Interest in Criminal Trials

A. Development of the Public Interest

The idea that the community had a legitimate interest in criminal prosecution caused thoroughgoing changes in almost every aspect of the criminal process. The shift that students of history most widely appreciate is the move away from an accusatorial process to an inquisition (inquisitio). The jurists repeatedly expressed a clear self-consciousness about this fundamental alteration in the criminal law, repeatedly justifying the change by recourse to the phrase “publice interest, ne crimina remaneant impunita.”  

19 Hostiensis suggested this movement

16. Id. ad X 5.39.35 s.v. per impunitatiis: “Alias et per impunitatis. Nam facilitas venie incentivum tribuit delinquenti . . . et pena terrorem incitit, et retrahit alios a peccatis.”

17. A crime which was notorium or manifestum did not require the full ordo iudiciarius, according to many of the canons collected in Gratian’s Decretum at C.2 q. 1. See K.W. Noerr, Zur Stellung des Richters im gelehrten Prozess der Fruehzeit 43-44 (1969); Levy, La hierarchy des preuves dans le droit savant du moyen age 32-66 (1939).


19. Id. “Et hoc est speciale in maleficiis, ne remaneant impunita.”

20. See, e.g., Bartolus, Commentaria in Ius universum civilis (Basel 1562) [hereinafter cited as Bartolus, Civil] ad Dig. Just. 48.5.2.5: “[I]sta inquisitio succedat in locum accusatioris, ut iudex vices accusatoris sustineat.” Bartolus, Commentaria ad i-xii libros codicis (Basel 1562) [hereinafter cited as Bartolus, Codices] ad Code Just. 1.1.1 s.v. cunctos no. 47: [C]um de iure communi inquisitio fiat ad vindictam pulicam . . . . et ad delictum puniendum
to an inquisition by including among the functions of judges the obligation to obviate the malices of men and to punish crimes. Hostiensis cited Innocent’s decretal Ut fame as the textual authority for this responsibility.  

More specifically, Hostiensis explicitly rejected the conventional opinion of the canonists and the civilian jurists who taught that courts could not coerce witnesses to testify in criminal cases. The function of the witness, Hostiensis countered, is a public office. If jurists construed criminal accusations as merely private matters, and if courts could not compel witnesses to testify on behalf of an accuser, “the innocent would be damned and the guilty would be absolved,” because in an accusatorial procedure the plaintiff bound himself to the lex talionis. And so, concluded Hostiensis, crimes would remain unpunished.

This same process of turning “public” functions into “private” functions appeared in Hostiensis’s treatment of procedure by denunciation. Roman law and Christian tradition taught that only interested parties might proceed via denunciation. Innocent’s dictum obviously applied in cases where the right to initiate an action derived from interesse, and Hostiensis did not fail to make the connection. Although an individual might not have a specific interest in prosecuting a given crime, Hostiensis alleged that everyone has a general interest in every crime. This interest, the “ratio rei publice,” might translate best as “by reason of state.”

Hostiensis’s discussion ended by reiterating

---

21. HOSTIENSIS, SUMMA AUREA (Venice 1605) tit. De officio iudicis, col. 342: “Proprio enim motu debet cuncta rimari...certain sententiam dare...partes ad compositionem inducere...malitiis hominum obviare...exceptiones arctare...crimina punire...”

22. Id: De testibus cogendis, col. 637: “Agimus supra de testibus, quorum officium publicum est.” Traditionally, Hostiensis wrote, witnesses were not compelled to testify in criminal cases:

ubi contra salutem hominis oppressa putatur esse iustitia...Licet consuetudo in foro ecclesiis hanc opinionem amplexa fuerit usque ad hec tempora et communis sit opinio magistrorum, dico tamen eam erroneam. Nam secundum eam damnabitur innocens, qui primus afficiendus esset, et nocens absolvetur, qui condemnandus est, contra...Et sic dicta remanebunt impunita, quia cum accusans sciat quod non cogetur testis, non accusabit, timens penam talionis.

23. Id.

24. The lex talionis was the principle in Roman and canon law whereby accusers who failed to prove their cases became liable to the same punishments which the defendants would have received if convicted.

25. See HOSTIENSIS, supra note 21, De denunciatoribus, col. 1469: Item potest denunciari peccatum ab eo cuius interest...quod specialem utilitatem. Vel licet specialiter non intersit, interest tamen generaliter et etiam temporaliter. Puta prelatus
Innocent's maxim in an interesting new permutation: "It is in everyone's interest that crimes should not remain unpunished." The same justification permitted ecclesiastical or secular judges to conduct inquisitiones into the behavior of their subjects, without any private accusation or denunciation. In ex officio inquisitions, according to Hostiensis, judges could proceed without observing the solemnities of the law (de plano). The judges could punish malefactors through fines and sometimes torture, excommunication, or suspension from office. The judges did whatever seemed expeditious, for the law committed the decision concerning proper punishment to the arbitrium, or discretionary power, of the judge.

Hostiensis applied Innocent's little phrase with a fair measure of creative ingenuity, and Hostiensis's influence did much to popularize the refrain "ne crimina remaneant impunita." Hostiensis does not, however, reflect the entire story. His contemporary, Sinibaldus Fieschi, who became Pope Innocent IV, proceeded more scrupulously in expanding the sphere of public interest in criminal prosecutions at the expense of private interests. Innocent IV, accordingly, recognized that something special about criminal cases permitted a judge to proceed summarily in a case of notorious crime, because "interest rei publice, ne crimina remaneant impunita." But Innocent qualified this assertion very carefully, requiring the inquiring judge to establish both that the accused had actually committed the crime and that the qualitas facti, the quality of the deed, was indeed notorious. Innocent IV, unlike Hostiensis, resisted the impulse to sweep aside the traditional view that criminal prosecution was a matter of private interest. In contrast to Hostiensis, Innocent taught that the court could not force witnesses to testify; moreover, refusal to bring to light another's crime was meritorious.

Only in severely circumscribed cases, where silence would sustain an infamous sinner in some dignity and hence lead to scandal,
or where occult crimes such as heresy or the dilapidation of churches would lead to further damage, did Innocent IV approve of forcing witnesses to testify.\footnote{31} Innocent's sparing use of the idea that Hostiensis widely applied is an extremely important piece of evidence, because it suggests that \textit{not} all thirteenth-century jurists immediately accepted the idea of public interest in every criminal prosecution as a universal and self-evident truth. Innocent IV countered his namesake's new maxim and Hostiensis's arguments with a fully articulated alternative view. But before returning to the grounds for Innocent IV's resistance to the idea of public interest in crime and punishment, we should look ahead to see whose position won wider acceptance among the jurists of subsequent generations.

\section*{B. Spread of Hostiensis's View}

Without doubt, Hostiensis's position won wider acceptance. The proceduralist William Durantis, who became the great purveyor of Innocent III's maxim, shared Hostiensis's view.\footnote{32} Durantis's \textit{Speculum iudiciale}, first published around 1272 and later glossed by the canonist Johannes Andreae\footnote{33} and by the great civilian Baldus de Ubaldis,\footnote{34} remained the most popular textbook on procedure until the end of the Middle Ages. Following the example of Tancred,\footnote{35} Durantis placed his entire discussion of criminal procedure under the rubric of Innocent III's dictum. The third book of the \textit{Speculum iudiciale} begins:

\begin{quote}
Above, in the preceding section we have explicated at length how one ought to proceed in civil cases. But because criminal adjudications occur frequently, and because it is useful to the state that crimes should not remain unpunished . . . according to which "you shall not suffer malefactors to live", therefore we have foreseen that it will be useful to dispute a few things concerning the new teaching [\textit{nova doctrina}] of this matter.\footnote{36}

The lawyers after Durantis used the idea of public interest to chip away at defendants' rights and procedural guarantees that had been
\end{quote}

\addcontentsline{toc}{section}{B. Spread of Hostiensis's View}

\footnote{31. \textit{Id.} "[N]isi esset crimen de quo esset periculum quod esset occultum, sicut heresis, dilapidatio. Nam in his dicimus testes cogendos etiam si sit occultum, quia nequeunt sine periculo dissimulari."}

\footnote{32. For Durantis's career, see F.C. \textsc{von SAVIGNY}, \textsc{5 Geschichte des roemischen Rechts im Mittelalter} 345 (2d ed. photog. repr. 1961).}

\footnote{33. \textit{See Savigny, 6 Geschichte des roemischen Rechts} 98.}

\footnote{34. \textit{Id.} at 208.}

\footnote{35. For Tancred's career, see J.A. \textsc{Clarence-Smith}, \textsc{Medieval Law Teachers and Writers, Civilian and Canonist} 38, 54 (1975).}

\footnote{36. G. \textsc{Durantis}, \textit{Speculum iudiciale} (Lugduni 1521) pars tertia, fol. 1: "Superius in parte precedentium plenius explicavimus qualiter in civilibus sit negotiis procedendum. Sed quoniam criminalia iudicia sepe frequentantur, et quia reipublico utile est, ne maleficia remaneant impunita . . . iuxta illud maleficos non patieris vivere, ideo fore previdimus de ipsius nova doctrina aliqua disputare."}
fixtures of the Romano-canonical tradition. The twelfth century had perhaps witnessed a brief moment when criminal defendants enjoyed virtual impunity in courts which rigidly adhered to the procedural rules of the learned law. In England, at least, the ease with which clerical offenders escaped retribution created a public scandal. The Romano-canonical criminal procedure struck most contemporaries as inadequate, and the learned lawyers of the thirteenth century responded by tightening the screws—literally and figuratively—in the name of the public interest.

Generalizing the patterns of change, historians have simply stated that the odds shifted after 1200, weighing increasingly heavily against the accused. The simple reason for this shift is that crime was becoming a public rather than a private concern. According to Albertus Gandinus (approximately 1290), a judge could force accusers to bring charges against suspected criminals because “it is expeditious for the state, that crimes not remain unpunished.” Gandinus also noted that according to the canon law, *fama*, or ill-fame, constituted sufficient grounds for a judge to begin an inquisition against a suspect. In secular courts, however, the mere commission of a crime permitted a judge to conduct an inquisition *ex officio*. Gandinus’s ideas concerning the function of *inquisitio* led to Bonifacius de Vitalinis’s teaching that *inquisitio* was a judicial function aimed at detecting and punishing crimes, and that the law had invented inquisitorial courts *favore rei publice*, “in favor of the state.”

37. The most serious case was the murder of William FitzHerbert by Osbert of York. See *The Letters of John of Salisbury* 16 (W.J. Millor, H.E. Butler & C.N.L. Brooke eds. 1955). See also *The Letters and Charters of Gilbert Foliot* 127 (A. Morey & C.N.L. Brooke eds. 1967).

38. See, e.g., Pazzaglini, *The Criminal Ban of the Sienese Commune*, 45 STUDI SENESI 106 (1979): “The weight of evidence in the inquisitorial proceeding put the burden of proof on the accused, whose rights were but vaguely formulated. At least in a judicial duel, a man had a chance, even if guilty. Now the odds were against him . . . .”


40. Id. at rubr. Quomodo de maleficis cognoscatur per inquisitionem: Sed hodie de iure civili iudices potestatem de quolibet maleficio cognoscent ex officio suo per inquisitionem, quod videtur posse fieri per hec iura [numerous citations], et ita servant iudices per consuetudinem . . . . Et ita vidi communiter observavi, quamvis sit contra ius civile. De iure Lombardico potest iudex de quolibet et super quolibet maleficio procedere per inquisitionem. Nam etiam canonico de quolibet maleficio et super quolibet maleficio inquiritur, si tamen interveniant ea quae sequuntur, et non alias regulariter. In primis est necessarium quod ille contra quem inquiritur sit infamatus de illo crimine, idest quod sit publica vox et familia quaud ille sit culpabilis . . . .

41. Id.

42. de Vitalin, *Tractatus de maleficiis*, in *Tractatus diversi super maleficiis* (Lugduni 1555), rubr. De inquisitionibus et earum forma: “Inquisitio est alciuis criminis indagatio . . . . Vel inquisitio est iudicis officium ad inveniendum malorum delicta et pena debita puniendam, favore rei publice introductum . . . . Nam rei publice interest, ne commitentur maleficia.”
become commonplace, indisputably displacing *accusatio* as the standard criminal procedure, the *remedium ordinarium*. This displacement, according to Bartholomew Salicet and Angelus Aretinus, resulted from efforts to extend public prosecution of crimes—"ne maleficia reman- ant impunita."  

A myriad of substantive changes accompanied the growth of the inquisitorial mode of criminal procedure. In accusatorial proceedings, accuser and accused faced one another in a delicate balance of jeopardy, with the judge presiding as referee, "declining neither to the left nor to the right." The inquisitorial judge, according to Gandinus and Bonifacius de Vitalinis, was the defender of his jurisdiction against malefactors. Gandinus suggested that one of the judge's functions was to strike terror into the hearts of would-be offenders by the savagery of the judicial process. The civilians, the canonists, and the legislators of the city-states that employed the Romano-canonical law, (*ius commune*) conspired to provide the defenders of the public order with arms sufficient to overwhelm criminals and malefactors. The accuser in most criminal cases escaped the traditional *lex talionis* by opting for inquisition or denunciation instead of the hazardous accusatorial procedure. Witnesses the law formerly excluded from testifying found themselves rehabilitated—"ne crimina remanent impunita."  

The concept of circumstantial evidence, based upon the idea of *fama* and the pseudo-scientific measurement of *indicia*, led to short-cuts

43. Aretinus, *Tractatus de maleficis*, in *TRACTATUS DIVERSI SUPER MALEFICIIS* (Lugduni 1555), rubr. Hec est quedam inquisitio, no. 74: "Hodie autem cum per statutum permittatur quod de omni crimine possit fieri inquisitio, et sic inquisitio erit remedium ordinarium [citations from Bartolus and Salicet] . . . . Nec est inquisitio remedium extraordinarium . . . si teneas quod de omni crimine potest inquiri ad publicam vindictam." If an inquisition failed to prove a case against a malefactor, the victim might yet proceed via accusation, "ne delictum remaneat impunitum." Angelus thought *inquisitio* more useful than *accusatio*: "Magis favorabilis est inquisitio ad reprimendum ipsa delicta, quam accusatio."  

44. Medieval jurists routinely described the judge's office as being placed in medio, between the two parties to a suit. Extensive citations in K.W. NOERR, supra note 17, at 17. Gandinus, *supra* note 40, at rubr. Qualiter advocati circa accusationem se debent habere: "Debet esse iudex medius inter utramque partem et personam, non declinando a dextris neque a sinistris, ut C. de falsis 1. Ubi (CODE JUST. 9.22.22)."  


46. Gandinus, *supra* note 39, at rubr. A quo vel a quibus possit fama incipere: "Et ideo videtur quod iudex animadvertendo in eundem ut infirium et male meritum possit ut terribilem se ostendendo de dicto crimine inquirere per tormenta, et maxime, ut publice aliiis ad terrenda maleficia sit exemplum."  

47. Aretinus, *supra* note 43, at rubr. Et ad querelam Titii infrascripti, no. 7: "Hodie commune et iudex ex forma statutorum Italici hoc non observaverit, ut accusator stet detentus, quia ut plurimum ex forma statutorum, accusator non tenetur ad penam talionis."  

48. INNOCENT IV, *supra* note 28, at ad X 2.20.10 s.v. et cum altero: "Videtur quod saltem in exceptis criminibus infames et particeps criminis admittendi sunt ad testimonium." The judge, moreover, decided which witnesses' testimony to believe; see BARTOLUS, *CIVILE, supra* note 20, ad DIG. JUST. 22.5.3.1: "Nota quod potestati iudicis conceditur utrum debeat adhiberi fides testi vel non."
in the law of proof.49 While Roman and canonical tradition demanded testimony from two eyewitnesses or the accused’s confession as the minimum standard of proof in criminal cases, the *ius commune* followed the thirteenth-century canonists by creating a set of alternative standards. To root out sexually incontinent clerics, heretics, and usurers, ecclesiastical reformers established classes of “notorious” and “manifest” crimes which required less stringent proofs in court.50 The use of partial proofs to justify torture, and moreover the burgeoning jurisprudence concerning torture that aimed at securing confessions in the absence of eyewitness testimony, both found justification under the umbrella of public interest.51 During the thirteenth century, the conception of crime shifted away from the canonists’ association between crime and sin, and away from the civilians’ traditional teaching that only the handful of offenses that Roman law defined as actionable by any citizen constituted *crimina*.52 By 1300, all *maleficia*, including ddicts, came under public, inquisitorial cognizance, and the law began defining crime as an offense against public interest. In practice, by the end of the thirteenth century, inquisition *ex officio* had displaced private initiative in criminal prosecution.53

Penal practice became more harsh as jurists adapted the learned law for everyday use in the criminal courts. Furthermore, the officers of the courts moved away from conflict resolution into prosecuting and

---

49. See J.P. Levy, *La hiérarchie des preuves dans le droit savant du Moyen Age* 127-30 (1939); Levy, *Le problème de la preuve dans les droits savants du moyen age*, in 17 LA PREUVE, RECEUILS DE LA SOCIETE JEAN BODIN 137-67 (1965). The history of the jurists’ treatment of *fama*, and especially the influence of Thomas de Piperata’s *Tractatus de fama*, is a subject which I plan to treat at greater length elsewhere.

50. The canonists created a theory of *notorium* based on two decretals concerning clerical cohabitation, X 3.2.7 and X 3.2.8. These passages in the *Corpus iuris canonici* became the locus for the decretalists’ analysis of *fama*, *notorium*, and *manifestum*. Bartolus acknowledged that *crimen notorium* was a creation of the canonists; see BARTOLUS, *CIVILE*, supra note 20, ad Dig. Just. 48.16.6.3, no. 3: “Tractatum de notorii criminius non habemus in iure nostro, sed canonistae habent tractatum longum.”

51. See Damaska, *The Death of Legal Torture*, 87 YALE L.J. 866 (1978). The author notes the ubiquity of the refrain “ne crimina remaneant impunita” in medieval discussions of torture. The implication of public interest would have been clear to any scholastically trained lawyer.

52. For the canonistic definition, see the *Decretum* D.25 dict. Gratiani post c.3: “Crimen est querela, idest peccatum accusatione et damnatione dignum.” For the civilian definition, see BARTOLUS, *CIVILE*, supra note 20, at Dig. Just. 47.1.3: “Aut quis agit ad penam applicandum sibi, et est iudicium civile, aut agit ad penam applicandum fisci vel inferendum parti in corpus, et tunc est iudicium criminale.” See also the *glossa ordinaria* to Dig. Just. 47.1, at titulum *De privatis delictis*: “Et recte in titulo delictis, non criminibus. Nam delicta proprie sunt privata, crimin publica.”

53. The standard *questio* through which the jurists elaborated this point was the case in which a judge wished to inquire *ex officio* in a criminal case, in which an *accusator* wished to proceed via private accusation. Gandinus, *supra* note 40, at rubr. Quomodo de **maleficis cognoscatur per inquisitionem**, no. 17, offers several reasons for preferring *inquisitio*: “Quoniam per inquisitionem non requirantur multe solemnitates, et sic facilius poterit culpa inventiri. ... Item, cum duo accusant, idoneior eligitur. Sic hic publica persona preferenda est private. ... Item republcae interest et etiam judicis, invenire hoc crimem et prevenire. ...” This *questio* remained a fixture in the jurists’ discussion of criminal procedure, from the time of Guido de Suzaria to that of the Bartolists.
punishing criminal offenses as a matter of public interest. The jurists, to their credit, never totally lost sight of the rehabilitative ends expressed in the penitential theory of the Latin fathers. But despite this limited survival and despite the availability of a theory of social utility as the basis for a penal law aimed at rehabilitation and deterrence, a vindictive conception of the ends of criminal justice dominated penal law in the later Middle Ages. Inquisitors and magistrates alike opted for brutal adaptations of the harshest features of the Romano-canonical tradition, the Old Testament, and the Lombard Laws. Jurists portrayed beating, blinding, branding, slashing nostrils, and hanging for petty theft as exercises of *vindicta* in defense of public interest. They rationalized the penal law, like other developments, in terms of Innocent III's maxim. Jurists used public interest to justify the Italian communes' use of the criminal ban to condemn suspects who failed to answer criminal summonses, much as the ecclesiastical inquisition used excommunication against contumacious defendants. In both cases, the criminal law severely curtailed the defendant's right of appeal. Popular pressure upon communal governments, urging the magistrates to curb criminal behavior at whatever cost, influenced the evolution of criminal justice. Despite the expense and effort, a commune such as Siena experimented repeatedly with multiple overlapping criminal jurisdictions, each having an independent police force. Indeed, the public functions of police forces seemingly found their initial definition by the fourteenth century, for at that time the testimony of police officials began to carry decisive weight in Italian courts.

56. de Vitalinis, supra note 42, catalogues a variety of penalties under the rubric *De penis condemnationis*. Lombard influence is evident in the gloss to DIG. JUST. 48.18.1 s.v. *confessus*, and in J. DE BELLOVISI, TRACTATUS IUDICIORUM CRIMINALIUM rubr. De furis et latronibus, invoking the Lombard penalties for theft: for the first offense, loss of an eye; for the second, loss of the nose; and for the third, death by hanging. The treatise attributed to Jacobus, whose authorship Domenico Maffei has challenged, appears in TRACTATUS UNIVERSI IURIS tom. ix (Lugduni 1549).
57. Pazzaglini, supra note 38, at 20-43, makes it clear that the ban could only have been effective if appeal were not normally available to the contumacious defendant.
58. Id.
Popular pressure extended beyond political support for "law and order" legislation. Judges, who enjoyed a wide discretionary power in conducting criminal investigations, sometimes had to use their *arbitrium* to protect suspects against popular bloodlust. No less an authority than Bartolus, who patently disdained Albertus Gandinus's enthusiasm for torture, nevertheless felt constrained to put suspects to the question before releasing them:

There are some stupid judges who force a defendant to confess (by torture) as soon as they have bits of evidence (*indicia*) against him. Certainly they ought not to do this because they condemn him on the basis of *indicia* and suspicions. But they ought to apply tortures with moderation, and from these to investigate the truth. I myself have done this frequently, but if the truth (of the charge) was not established by torture, I absolved him, and I had it entered in the records that "Having tortured him with moderation, I found him not guilty." And this so that at syndication it might not be said, "You should have tortured him."61

On the basis of the foregoing discussion, one can reasonably conclude that the idea of public interest lay at the heart of the new criminal law of the High Middle Ages. Clearly, the phrase "rei publicae interesse, ne crimina remaneant impunita" carried a broadly suggestive meaning after 1200. This meaning in the course of time, influenced criminal procedure, the rights and roles of the participants, the law of evidence and proof, the aims of penal institutions, and ultimately the conception of crime itself. Indeed, one may say that the ideas associated with this maxim dominated the development of western criminal law in its formative stages.

IV. REEXAMINING THE ORIGIN OF THE PUBLIC INTEREST IN CRIMINAL LAW

Nevertheless, the story of the phrase "rei publicae interesse, ne crimina remaneant impunita" is not complete. As suggested above, if Innocent III had followed the standard model for resurrecting important ideas from Roman law, he must have dug this particular gem out of some dusty corner of the *Digest* and presented it alone, shorn of its obscure and obscuring context.62 If Innocent did this, he must have rescued this maxim from the deepest and darkest of obscure sources; no amount of scholarship, medieval or modern, has yet unearthed a passage in Roman law which reads quite like "publice utilitatis intersit, ne

61. *Id.* at ad *Dig.* *Just.* 48.18.20 s.v. *Qui sine.*

62. *See supra* notes 9-12 and accompanying text.
The medieval jurists certainly did not neglect the roots of Innocent's statement, for they indulged themselves as a matter of professional pride and pleasure in the scholastic habit of citing every possible legal source which might serve as an authority in support of their positions. Invariably, when a medieval jurist argued for public interest in some aspect of a criminal matter, as in arguing for coercing witnesses to testify, the jurist cited Innocent's decretal **Ut fame**. Beyond Innocent's own legislation, however, the chain of authority got sticky. Johannes Teutonicus, commenting upon this section of **Ut fame**, offered three passages from Roman law which purportedly said the same thing as Innocent's decretal.**3** Hostiensis, characteristically, unearthed five.**4** Bartolus, unlike many jurists, did not pile up such citations; in support of this phrase, Bartolus presented only two references to Roman law, one of which the other jurists had overlooked.**5** Still, despite the erudition of the jurists, none found the source from which Innocent had drawn his seemingly commonplace principle.

Innocent had in fact borrowed the phrase from an anonymous contemporary, rather than lifting a passage from the **Corpus iuris civilis**. Although Innocent III's statement first launched the phrase into general circulation, he was not the first person to combine the ideas of crime, punishment, and public interest. During the 1190's, a French canonist had written that "It is proper and in the public interest that crimes should not remain unpunished."**6** The author of this passage generally provided supporting citations when quoting from Roman law, but in this case he offered none. Significantly, in the context of the same discussion the canonist referred to Johannes Bassianus, and elsewhere the author relied upon Placentinus. In the absence of further evidence, one may well speculate that a twelfth-century Romanist was the source of this phrase, which was to have such a fruitful career. Innocent's contribution, then, was not in the originality of his thought, or even in any substantial improvement in the turn of phrase, which the earlier canonist had enunciated in properly Justinianic tones. The outstanding contribution of Innocent III is that once his decretal gave the phrase

---

**63.** J. TEUTONICUS, APPARATUS AD COMPILATIONEM TERTIAM 5.21.8, supra note 14, citing CODE JUST. 9.47.14; DIG. JUST. 46.1.70.5; and DIG. JUST. 5.1.18.

**64.** HOSTIENSIS, supra note 15, ad X 5.39.35 s.v. et publice citing DIG. JUST. 9.2.51.1; DIG. JUST. 46.3.95.1; DIG. JUST. 5.1.18.1; DIG. JUST. 46.1.70.5; and CODE JUST. 9.47.14.

**65.** BARTOLUS, CODICIS, supra note 20, ad CODE JUST. 2.4.18 citing DIG. JUST. 9.2.51 and DIG. JUST. 39.4.9.5.

**66.** The original phrase was: "crimina non remaneant impunita publice interest et oportet." Summa Induent sancti ad C.4 q.1. My edition of this text appears in the MONUMENTA IURIS CANONICI (ser. A) (1984) (Corpus Glossatorum). The author of **Induent sancti** might have picked up the phrase from Placentinus, who used the idea in his **Summa Codicis** ad CODE JUST. 3.35: "Huius legis actione etiam de occiso tenentur omnes qui perceresserint, ubi non apparat quis occiderit. Licet enim non omnes occiderint, tenebuntur, ne dicatur de occiso teneri aut nullum, et sic maleficium remaneat impunitum."
maxim wide exposure, the refrain "ne crimina remaneant impunita" became a universal fixture in the legal vocabulary.

The virtually universal use of Innocent's statement most emphatically does not reflect a striking new breakthrough in legal concepts. Rather, the use reflects the social, intellectual, and legal context of western European society in the later Middle Ages. The Justinian Digest and the Justinian Code already contained both the language and the ideas expressed in the maxim. In one imperial decree preserved in the Code, Diocletian and Valentinian had ordered that imperial judges not remit criminal penalties because it was in the public interest "ne ad maleficia temere quisquam prosiliat."7 Valentinian, Theodosius II, and Arcadius had demanded that local officials put an end to the exercise of patronage that let crimes go unpunished.68 The Digest, as well, contained passages suggesting a public interest in punishing all criminal behavior. A snippet of Gaius interjected that a magna ratio demanded that the courts punish wrongful actions.69 One Digest passage quoted Paulus as writing that "it is neither good nor equitable to condemn an individual who accuses a miscreant, for it is right and expedient that the sins of wrongdoers should be known."70 Another Digest passage lifted an argument for the deterrent value of public punishment from Tryphonius.71 Medieval jurists later cited all of these texts as authorities for the statement "rei publice interest, ne crimina remaneant impunita." The scholastic lawyers also unearthed several texts in the Digest which clearly provided the textual bases for parts of the medieval maxim.

Innocent III might have been quoting directly from Piperius Justus when writing "si publice utilitatis intersit;" the same phrase appears, in the indicative voice, in a passage of the Digest dealing with private donations to municipalities.72 Two passages in the Digest mentioned maleficia impunita. The first, drawn from Ulpian, states that a son, although not legally independent (sui iuris), might prosecute noxal actions if his father were far away, "so that maleficia [will] not remain unpunished while the father is gone."73 The second such passage concerns the case where an assailant has attacked and mortally wounded someone and then another assailant attacks and slays the same victim. This case posed the question whether the courts could charge both as-

68. CODE JUST. 1.55.6: The crucial phrase is "qui non sinant crimina impunita coalescere."
69. DIG. JUST. 46.1.70.5: "Nam poenas ob maleficia solvi magna ratio suadet."
70. DIG. JUST. 47.10.18: "Eum qui nocentium infamavit, non esse bonum ob eam rem condemnari; peccata enim nocentium nota esse et oportere et expedire." The verbs here suggest that this was the source of the phrase in Induent sancti.
71. DIG. JUST. 16.3.31: "Nam male meritus publice, ut exemplum alii ad deterrenda maleficia sit, etiam egestate laborare debet."
72. DIG. JUST. 50.12.13: "Conditiones donationibus appositas que in rempublicam fiunt, ita demun ratas esse, si utilitatis publicae interest."
73. DIG. JUST. 5.1.18.1.
sailants for homicide under the *lex Aquilia*. Julianus argued the affirmative, despite the anomaly of the suggestion that the assailants had twice murdered the victim. Julianus's rationale was that "it is not fitting that crimes should be unpunished, nor should they be able to be committed easily." Finally, Julianus argued that jurists, on account of the common utility, included in the law a great many things contrary to the principles of disputatory rhetoric.

Despite the presence of such ideas in Roman law, public interest never emerged as the unifying theme of the criminal law in the ancient world. Perhaps the failure of this doctrine extended as far back as republican times, when the Roman jurists had ignored criminal jurisprudence while creating the foundations for an elaborate science in the field of civil law. The scope of criminal law gradually expanded after the fall of the Republic, as the emperors empowered provincial governors to prosecute *crimina extraordinaria*, so-called in contrast to the *crimina ordinaria* already established by republican statutes. The jurists of the imperial era nevertheless failed to create any consistent rationale for the expanded criminal law. The *Digest* continued to distinguish between a broad category of wrongs actionable only by private initiative and the narrow class of *crimina* actionable by any citizen. Platitudes touting public interest in punishing every sin, injury, crime, and delict remained simply parenthetical observations in the corpus of the law, while the imperial authorities' actual prosecution of crime bore little resemblance to the traditional law preserved in the *Digest*. As Fritz Schulz concluded, imperial criminal procedure "was so undefined, arbitrary, and authoritarian, that any juristic construction of concepts and principles would have been devoid of practical significance."

V. THE CHURCH AND CRIMINAL LAW

As the western Roman Empire tottered toward dissolution, the leaders of the Latin Church busily assimilated much of the Roman law and made it the law of the Church. But while the Church leaders borrowed the vocabulary and the forms of Roman criminal law, they also

---

74. DIG. JUST. 9.2.51.
75. Id.
76. Id:
Quod si quis absurde a nobis haec constituti putaverit, cogitetur longe absurdius consituti neutrum lege Aquilia teneri, aut alterum potius, cum neque impunita maleficia esse oporteat, nec facile constituti possit, uter potius lege teneatur. Multa autem iure civili contra rationem disputandi pro utilitate communi recepta esse, innumerabilis rebus probari potest. This passage was certainly the source of Placentinus' comments, cited supra note 66, in his *Summa at Code Just.* 3.35.
rejected the penal theory which underlay the system. While the Christian leaders hardly approved of wrong-doing, they had ample reason to reject the Roman approach to crime. The martyrs, almost by definition, cast a vote for some alternative to Roman justice. Furthermore, the miracles of the early saints abound in tales of fetters broken, prisons unlocked, and admitted transgressors miraculously acquitted. When St. Stephen's biographer narrated the story of the saint's successful intervention on behalf of one Florentius, an embezzler of public monies, the moral of the story was not an endorsement of illicit self-enrichment. Rather, the tale was an exemplary contrast between the benevolent patronage of the saint and the malign undertakings of the Roman magistrates. The excessive measure of public retribution under the Roman Empire discredited the idea that public interest demanded vindicta for every transgression. The Church leaders thought it best to leave vengeance to God; the Church could better concern itself with a penitential approach to wrong-doing, that aspired to rehabilitative and curative ends. Retribution was contrary to the spirit of the New Testament. Other than protecting itself against heresy, the City of God cheerfully left criminal matters to the City of Man.

Although the Latin Church rejected the Roman definition of the purposes of criminal proceedings, the Church leaders did preserve the forms of Roman accusatorial procedure. In the real world, after all, even the Church leaders could not follow literally Christ's injunction to love one's enemies, or St. Paul's command to provide food and drink to one's enemy in need. Augustine borrowed the Roman idea of due process to formulate the classic statement of the rule that a court could not pronounce a definitive sentence against a defendant unless the defendant confessed or the court legitimately convicted the defendant. Gregory the Great might have felt that truly good Christians would not have exercised the right to prosecute any wrongs which they might suffer, but in 603, Gregory instructed his legate John to ensure that the Spanish churches made use of the Roman form of judicial process (ordo iudicii) in criminal cases. By the ninth century Pope Nicholas I waged a not always successful battle against the erosion of the proper Roman accusatorial process in ecclesiastical courts.

This rejection of theory and preservation of forms is less of an

81. Augustine, De civ. Dei xix.17 pointed out that the earthly city seeks the end of civic obedience and rule, the basis of an earthly peace. The heavenly city "makes use of this peace only because it must, until this mortal condition which necessitates it shall pass away."
82. Matthew 3:39; Romans 12:20.
83. Augustine, Sermo 351, no. 10 in the Maurist edition, excerpted by Gratian at C.2 q.1 c.1: "Nos in quemquam sententiam ferre non possimus, nisi aut convictum aut sponte confessum."
84. Jaffe, no. 1530, quoted by Gratian at C.2 q.1 c.7.
85. NICHOLAS I, EPISTOLAE 99 (E. Perels ed. 1925) (MGH, Epistolarium tom. vi) (the letter to the Bulgars). Gratian quoted Nicholas on legal procedure at C.2 q.1 c.10 and C.15 q.8 c.5.
anomaly than one might first surmise. The Roman accusatorial pro-
cess, preserved by the Western Church, embraced a stringent law of
proof and a strict requirement of due process, making successful pros-
secution of criminal cases extremely difficult. This procedural form pro-
tected the clergy from any but the most solidly grounded charges of
criminal misbehavior. Predisposed to prefer toleration over active
prosecution, and sensitized to the dangers inherent in scandal, the prel-
ates of the Western Church contented themselves with punishing only
outrageous misbehavior that the Church could not ignore. Otherwise
the phrase "the Church does not judge secrets" expressed the Church
hierarchy's attitude toward crime.

The Church's toleration is the principal reason that Innocent III's
new maxim "rei publice interest, ne crimina remaneant impunita" met
with a mixed response among his contemporaries. Innocent IV still fa-
vored toleration and a studied lack of interest as the proper ecclesiasti-
cal attitude toward crime. The concern that investigation of crime
would lead to scandal led Innocent IV to shy away from any broad
applications of Innocent III's "new" idea. In the thirteenth century,
however, the tide was running against Innocent IV's traditional ideas.
In the context of the ongoing reform of the Church, which since the
eleventh century had featured an active campaign against simony and
clerical cohabitation, Innocent III's public interest doctrine made more
sense than Innocent IV's traditional reluctance to prosecute. Moreover,
with the enormous popularity of Aristotle, all of the jurists, and many
of the public officials charged with combatting crime, came to the study
of crime already grounded in the doctrines of social utility and public
interest. In secular society, the doctrine of public interest helped to
justify the nontraditional punitive measures which communal govern-
ments enacted to ensure stability and curb violence in the new city-
states.

VI. CONCLUSION

While one cannot venture to write the entire history of medieval
European criminal law by tracing the career of a single legal maxim,
the history of the phrase "rei publice interest, ne crimina remaneant
impunita" does cast some significant light upon the development of the
new criminal law of the High Middle Ages. The notion of public inter-
est helped both explain and inspire such developments as the growth of
inquisitorial procedure, the elaboration of a new law of circumstantial

86. Sufficiency of process is the subject of Causa 2 of the Decretum.
87. "Ecclesia de occultis non iudicat." S. Kuttner, Ecclesia de occultis non iudicat:
Problemata ex doctrina poenali decrealitarum et decretalitarum a Gratiano usque ad Gregorium ix, 3
Actus Congressus Iuridici Internationalis 225-46 (1936).
88. For a general treatment of the legal impact of the Gregorian Reform, see H. Berman,
evidence, the expanded use of torture in criminal investigations, and
the gradual abandonment of private initiative in criminal prosecutions.

Ultimately, offense against the public interest became the defining
characteristic of crime. The facts that the maxim was of medieval man-
ufacture, that Innocent III launched the principle into wide circulation,
and that the civilian jurists borrowed the principle from the canonists
suggest that the legal revival of criminal law in the High Middle Ages
involved more than a rebirth of Roman law. Without discarding the
traditional view that the scholastic jurists rationalized medieval law
with principles drawn from Roman law, one can conclude that medi-
eval jurists and public authorities were quite capable of fashioning new
ideas in order to justify new social relationships, new judicial forms,
and new functions for criminal law. If, as some historians have sug-
gested, a theory of public interest is one of the essential features of
western European ideas about crime, then in the field of criminal law,
the modern world owes more to the scholastic lawyers of the High Mid-
dle Ages than to the Roman jurists of classical antiquity.