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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 arraiging the miscreants.²

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1. For general accounts of the Becket controversy, see the relevant chapters in D. KNOWLES, THOMAS BECKET (1970), and W.L. WARREN, HENRY II (1973). A more extensive bibliography is available in Alexander, 19 J. BRIT. STUD. 1-26 (1970).

2. X 5.39.35:

Sane consuluisti nos utrum clerici graviter excedentes qui tute non possunt monasteriis ad agendam 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*.³ 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.⁴ 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."⁵

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.⁶ The king had phrased his complaint about contemporary 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.⁷

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

fugiendi captata carcerem fugerent claustrum, et prioribus se sceleribus scelestius immiserent, a te vel aliis prelatibus suis arctae possint custodiae mancipari, et utrum laici, se clericis in magnis sceleribus deprehendant, in canonem incidant latae sententiae, cum nec comprehendere nec ad iudices trahere ipsos possint, nisi manus in eos iniecerint violentas.

3. *Ut fame* is the incipit of the decretal, which is printed in 2 CORPUS IURIS CANONICI 904 (E. Friedberg ed., repr. 1959). Hereafter, all citations to Roman and canon law sources will follow the conventional forms established by the *Bulletin of Medieval Canon Law*.

4. *Id.* [Prelati] non solum possunt, sed debent etiam superiores clericos, postquam fuerint de crimine canonicè condemnati, sub arcta custodia detinere.

5. X 5.39.35 in medio: "Laici vero citra excommunicationis sententiam capere clericos et ad iudicium trahere possunt, si oporteat, etiam violenter, dum tamen id de mandato faciant prelatorum . . . dum tamen non amplius eorum violentia se extendat quam defensio vel rebellio potius exigit clericorum."

6. See 4 SUMMA CAUSAE INTER REGEM ET THOMAM: MATERIALS FOR THE HISTORY OF ARCHBISHOP THOMAS BECKET 202 (Rolls ser.) (J.C. Robertson ed., London 1879).

7. X 5.39.35 in medio: "[Prelati] excessus corrigere debeant subditorum, et publicae utilitatis intersit, ne crimina remaneant impunita, et per impunitatis audaciam fiant qui nequam fuerant nequiores."

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.*

9. Post, *A Romano-Canonical Maxim "Quod omnes tangit" in Bracton*, 4 *TRADITIO* 197-251 (1946).

10. The full phrase is: "Quod omnes tangit ab omnibus debeat communiter approbari."

the Church in matters of doctrine.¹¹ Peter Stein further elaborated the standard model for the emergence of Romano-canonical maxims.¹²

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 communities, 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 decretalist Tancred used Innocent's phrasing in much the same way as a medieval 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 tertia*, 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.¹⁴ 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 obligatory citations from Roman law follow, along with the conventional observation that impunity leads to delinquency, while inflicting penal

11. See *supra* note 9.

12. P. STEIN, *REGULAE IURIS passim* (1966).

13. See Fraher, *Tancred's Summula de criminibus: A New Text and a Key to the Ordo iudicarius*, 9 BULL. MEDIEVAL CANON L. 23-36 (1979).

14. J. TEUTONICUS, APPARATUS GLOSSARUM IN COMPILATIONEM TERTIAM ad 3 Comp. 5.21.8 s.v. *ne crimina*. C. de penis Si operis (CODE JUST. 9.47.14), ff. de fideius. Si a reo § Id quod (DIG. JUST. 46.1.70.5), ff. de iudic. Si longius (DIG. JUST. 5.1.18). K. Pennington's edition of the *Apparatus* appears in 3 MONUMENTA IURIS CANONICI (ser. A) (1980) (Corpus Glossatorum).

15. HOSTIENSIS, LECTURA IN V GREGORII NONI DECRETALIU LIBROS ad X 5.39.35 (Paris 1512) s.v. *et publice*. "Hic 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."¹⁹

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."²⁰ Hostiensis suggested this movement

16. *Id.* ad X 5.39.35 s.v. *per impunitatis*. "Alias et per impunitatis. Nam facilitas venie in-centivum tribuit delinquenti . . . et pena terrorem incutit, 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 hiérarchie des preuves dans le droit savant du moyen age* 32-66 (1939).

18. HOSTIENSIS, *supra* note 15, ad X 3.2.8 s.v. *notorium*.

Vel dicas quod generaliter in quolibet notorio potest procedi sine citatione et probationibus. Nec propter hoc retractabitur sententia nisi constat contrarium . . . Sed melius est et tutius ut citatio fiat antequam procedatur, nisi forte scandalum uel magnum periculum reipublice sit in mora. Et secundum hos qui hoc asserunt, quandocumque aliquid negatur notorium semper probandum est. Sed hoc nihil aliud est quam prolongare lites et circuitus inducere. Unde dicendum est quod ubi non est locus inficiationi potest iudex procedere et delinquentem punire quantumcumque inficietur.

19. *Id.* "Et hoc est speciale in maleficiis, ne remaneant impunita."

20. See, e.g., BARTOLUS, *COMMENTARIA IN IUS UNIVERSUM CIVILE* (Basel 1562) [hereinafter cited as BARTOLUS, *CIVILE*] ad DIG. JUST. 48.5.2.5: "[I]sta inquisitio succedat in locum accusationis, ut iudex vices accusatoris sustineat." BARTOLUS, *COMMENTARIA AD I-XII LIBROS CODICIS* (Basel 1562) [hereinafter cited as BARTOLUS, *CODICIS*] 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.²¹ 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.²² 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,"²³ because in an accusatorial procedure the plaintiff bound himself to the *lex talionis*.²⁴ And so, concluded Hostiensis, crimes would remain unpunished.

This same process of turning "private" functions into "public" 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."²⁵ Hostiensis's discussion ended by reiterating

non occultandum Nam reipublice interest habere bonos subiectos set homines boni efficiuntur si eis pena imponatur ex delicto et de hoc quod expresse sit ratio publice discipline Interest ergo sua punire subditos, et sic statutum ad eos extenderetur Inquisitio enim succedit loco accusationis.

See also F. DE ZABARELLIS, LECTURA SUPER I-V LIBRIS DECRETALIUUM ad X 5.1.24 (Venice 1502) s.v. *Hunc tamen* (quoting Cynus: "[Q]uia processus inquisitorius est adinventus ut crimina non remaneant impunita."); A. ARETINUS, TRACTATUS DE MALEFICIIS (Venice 1578) rubr. Hec est quedam inquisitio, no. 29: "[A]ccusatio de quolibet crimine est permessa, ergo et inquisitio que succedit loco eius Et sic ad eundem effectum, ne maleficia remaneant impunita."

21. HOSTIENSIS, SUMMA AUREA (Venice 1605) tit. De officio iudicis, rubr. Quid sit officium iudicis?, col. 342: "Proprio enim motu debet cuncta rimari . . . certam sententiam dare . . . lites dirimere . . . 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 ecclesie 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 erat, contra Et sic delicta 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 . . . quoad specialem utilitatem. Vel licet specialiter non intersit, interest tamen generaliter et etiam temporaliter. Puta prelati

Innocent's maxim in an interesting new permutation: "It is in everyone's interest that crimes should not remain unpunished."²⁶ 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.²⁷

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."²⁸ 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.²⁹ 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.³⁰ Only in severely circumscribed cases, where silence would sustain an infamous sinner in some dignity and hence lead to scandal,

est, cuius interest habere bonum subditum, vel subditus cuius interest habere bonum prelatum. Vel interest ratione reipublice, nam et tunc quilibet admittitur, ut puta si bona ecclesiastica delapidantur.

26. *Id.* "Interest autem cuiuslibet, ne crimina remaneant impunita."

27. See HOSTIENSIS, *supra* note 21, De criminibus sine ordine puniendis, col. 1481:

Secundum leges et canones ad quemlibet iudicem pertinet excessus subditorum laicorum et aliquoties clericorum etiam sine aliqua fama inquirere et punire. Hoc enim publice interest Et proceditur in his de plano, sine aliqua solemnitate, ita quod iudex malos expellat et bonos admittat, alias in pecunia puniendo, aliquando in corpore torquendo, vel excommunicando vel suspendendo, prout viderit expedire, quia hec omnia arbitrio suo committuntur.

28. INNOCENT IV, COMMENTARIA IN V LIBROS DECRETALIUM ad X 3.2.7 (Venice 1610) s.v. *notorium*. "Sed dicimus quod speciale est in maleficiis, quia interest reipublice, ne crimina remaneant impunita."

29. *Id.* "[E]t tamen necessarium est quod non solum probet maleficium, sed etiam qualitatem facti, scilicet quod homicida insultum fuerit et occiderit, et sic de omnibus aliis, quia alias est inficiationi locus."

30. *Id.* ad X 2.21.1 s.v. *odior*: "In criminalibus autem et ubi non est peccatum celare veritatem, non presumo eum qui non vult reddere testimonium taliter (scil. ex odio) se subtrahere, quod idcirco non est cogendus nisi manifeste appareat malitia . . ." And *infra* s.v. *compellas*: "Ubi autem celare veritatem non est peccatum, ut quando agitur criminaliter . . . vel alio modo

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.³¹ Innocent's sparing use of the idea that Hostiensis widely applied is an extremely important piece of evidence, because it suggests that *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.

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.³² Durantis's *Speculum iudiciale*, first published around 1272 and later glossed by the canonist Johannes Andreae³³ and by the great civilian Baldus de Ubaldis,³⁴ remained the most popular textbook on procedure until the end of the Middle Ages. Following the example of Tancred,³⁵ Durantis placed his entire discussion of criminal procedure under the rubric of Innocent III's dictum. The third book of the *Speculum iudiciale* begins:

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 [*nova doctrina*] of this matter.³⁶

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

ad penam tantum, non dicimus cogendos, quia celare veritatem non est peccatum sed meritum, scilicet celare crimen fratris."

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

32. For Durantis's career, see F.C. VON SAVIGNY, 5 *GESCHICHTE DES ROEMISCHEN RECHTS IM MITTELALTER* 345 (2d ed. photog. repr. 1961).

33. See SAVIGNY, 6 *GESCHICHTE DES ROEMISCHEN RECHTS* 98.

34. *Id.* at 208.

35. For Tancred's career, see J.A. CLARENCE-SMITH, *MEDIEVAL LAW TEACHERS AND WRITERS, CIVILIAN AND CANONIST* 38, 54 (1975).

36. G. DURANTIS, *SPECULUM IUDICIALE* (Lugduni 1521) pars tertia, fol. 1: "Superius in parte precedenti plenius explicavimus qualiter in civilibus sit negotiis procedendum. Sed quoniam criminalia iudicia sepe frequentantur, et quia reipublice 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.³⁷ 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.³⁸ 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.”³⁹ 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.⁴⁰ In secular courts, however, the mere commission of a crime permitted a judge to conduct an inquisition *ex officio*.⁴¹ 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.”⁴² By the fifteenth century, *inquisitio* had

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., Pazzagliani, *The Criminal Ban of the Sieneese 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”

39. Gandinus, *Tractatus de maleficiis*, in TRACTATUS DIVERSI SUPER MALEFICIIS (Lugduni 1555), rubr. Quid sit accusatio et quando accusator sit necessarius, c.4: “Sed pone quod Titius interfecit hominem, heredes vel fratres eius mortui timebat accusationem deponere propter potentiam illius Titii. Modo queritur numquid potestas possit illos heredes et fratres compellere accusare . . . ? Et videtur quod possit, quia expedit reipublice ne maleficia remaneant impunita.”

40. *Id.* at rubr. Quomodo de maleficiis cognoscatur per inquisitionem:

Sed hodie de iure civili iudices potestatum de quolibet maleficio cognoscunt ex officio suo per inquisitionem, quod videtur posse fieri per hec iura [numerous citations], et ita servant iudices per consuetudinem Et ita vidi communiter observari, quamvis sit contra ius civile. De iure Lombardico potest iudex de quolibet et super quolibet maleficio procedere per inquisitionem.

Iure enim canonico de quolibet maleficio et super quolibet maleficio inquiritur, si tamen interveniant ea que sequuntur, et non alias regulariter. In primis est necessarium quod ille contra quem inquisitio sit infamatus de illo crimine, idest quod sit publica vox et fama quod ille sit culpabilis

41. *Id.*

42. de Vitalinis, *Tractatus de maleficiis*, in TRACTATUS DIVERSI SUPER MALEFICIIS (Lugduni 1555), rubr. De inquisitionibus et earum forma: “Inquisitio est alicuius criminis indagatio Vel inquisitio est iudicis officium ad inveniendum malorum delicta et pena debita puniendi, favore rei publice introductum Nam rei publice interest, ne committentur maleficia.”

become commonplace, indisputedly 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 remaneant impunita."⁴³

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 jeopardies, with the judge presiding as referee, "declining neither to the left nor to the right."⁴⁴ The inquisitorial judge, according to Gandinus and Bonifacius de Vitalinis, was the defender of his jurisdiction against malefactors.⁴⁵ 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.⁴⁶ 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.⁴⁷ Witnesses the law formerly excluded from testifying found themselves rehabilitated—"ne crimina remaneant impunita."⁴⁸

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 maleficiis*, 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)."

45. Gandinus, *supra* note 39, at rubr. Quid sit agendum reo absente et contumace: "Quelibet potestas et iudex potest iurisdictionem suam defendere penali iudicio." de Vitalinis, *supra* note 42, at proemium, no. 10: "Nam malos punire et bonos sublevare et defendere eorum officium est."

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

47. Aretinus, *supra* note 43, at rubr. Et ad querelam Titii infrascripti, no. 7: "Hodie communiter ex forma statutorum Italie hoc non observatur, 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 participes 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 delicts, 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 âge*, in 17 LA PREUVE, RECEUILS DE LA SOCIÉTÉ 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 notoriis criminibus 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 dampnatione dignum." For the civilian definition, see BARTOLUS, CIVILE, *supra* note 20, ad 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, ad titulum De privatis delictis: "Et recte in titulo delictis, non criminibus. Nam delicta proprie sunt privata, crimina 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 maleficiis cognoscatur per inquisitionem, no. 17, offers several reasons for preferring *inquisitio*: "Quoniam per inquisitionem non requirantur multe solemnitates, et sic facilius poterit culpa inveniri Item, cum duo accusant, idoneior eligitur; sic hic publica persona preferenda est private Item reipublice interest et etiam iudicis, invenire hoc crimen 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.⁵⁴ 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,⁵⁵ 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.⁵⁶ 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.⁵⁷ In both cases, the criminal law severely curtailed the defendant's right of appeal.⁵⁸ 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.⁵⁹ 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.⁶⁰

54. See W. ULLMANN, *THE MEDIEVAL IDEA OF LAW AS REPRESENTED BY LUCAS DE PENNA* 142-62 (1946).

55. See, e.g., DURANDUS OF ST. POURCAIN, *TRACTATUS DE LEGIBUS* fols. 10-23 (Paris 1506); Tierney, *Public Expediency and Natural Law: A Fourteenth-Century Discussion on the Origins of Government and Property*, in *AUTHORITY AND POWER: STUDIES IN MEDIEVAL LAW AND GOVERNMENT PRESENTED TO WALTER ULLMANN ON HIS SEVENTIETH BIRTHDAY* 167-82 (1980).

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 BELLOVISU, *TRACTATUS IUDICIORUM CRIMINALIUM* rubr. *De furtis 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.*

59. Bowsky, *The Medieval Commune and Internal Violence: Police Power and Public Safety in Siena, 1287-1355*, 73 *AM. HIST. REV.* 1-17 (1967); W. BOWSKY, *A MEDIEVAL ITALIAN COMMUNE: SIENA UNDER THE NINE, 1287-1355*, at 117-58 (1981), outlines the history of Siena's experiments in criminal jurisdictions and police functions.

60. BARTOLUS, *CIVILE*, *supra* note 20, ad DIG. JUST. 48.3.6:

Quero quis sit effectus denunciationis? Et videtur quod denunciatio habeatur pro plena probatione. Creditur enim nuncio, et creditur officiali in officio . . . Breviter ista est veritas: quedam sunt maleficia gravia, et in istis denunciatoribus non creditur . . . (et) quedam sunt maleficia non gravia, et hic adverte quandoque punitur denunciator ad denunciandum illud quod re ipsa invenit et vere illud quod vidit ipse. Exemplum: Mittitur aliquis ad perscrutandum per civitatem ludentes vel portantes armas et similia levia, et in istis creditur tali officiali.

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 interest, 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 interest, 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.*

Ideo dico hic quod sunt quidam iudices stulti qui statim cum habeant indicia contra reum cogunt eum ad confitendum. Certe hoc non debet fieri, quia condemnarent eum ex indiciis et suspicionibus, sed debent adhibere tormenta cum moderamine, et ex istis veritatem investigare. Et ita iam feci pluries fieri, sed si habita tortura non inveniebatur verum, absolvebam eum, et hoc faciebam scribi in actis: "Habita tortura cum moderamine non reperi eum culpabilem." Et hoc ne tempore syndicatus possit dici, "Tu debuisti eum torquere."

62. See *supra* notes 9-12 and accompanying text.

crimina remaneant impunita." 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.⁶³ Hostiensis, characteristically, unearthed five.⁶⁴ 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.⁶⁵ 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."⁶⁶ 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

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 remanere 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 percusserunt, ubi non apparet quis occiderit. Licet enim non omnes occiderint, tenebuntur, ne dicatur de occiso teneri aut nullum, et sic maleficcium 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."⁶⁷ 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 expeditious 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-

67. CODE JUST. 9.47.14.

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 *Induunt sancti*.

71. DIG. JUST. 16.3.31: "Nam male meritis publice, ut exemplum aliis ad deterrenda maleficia sit, etiam egestate laborare debet."

72. DIG. JUST. 50.12.13: "Conditiones donationibus appositae que in rempublicam fiunt, ita demum 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.⁷⁴ Julianus's rationale was that "it is not fitting that crimes should be unpunished, nor should they be able to be committed easily."⁷⁵ 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.⁷⁶

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.⁷⁷ 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.⁷⁸ 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."⁷⁹

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 constitui putaverit, cogitet longe absurdius constitui neutrum lege Aquilia teneri, aut alterum potius, cum neque impunita maleficia esse oporteat, nec facile constitui possit, uter potius lege teneatur. Multa autem iure civili contra rationem disputandi pro utilitate communi recepta esse, innumerabilibus rebus probari potest.

This passage was certainly the source of Placentinus' comments, cited *supra* note 66, in his *SUMMA* at CODE JUST. 3.35.

77. See A.H.M. JONES, *THE CRIMINAL COURTS OF THE ROMAN REPUBLIC AND PRINCIPATE* 90-118 (1972).

78. A. BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 418, 430 & 573 (1953) (s.v. *crimen*, *delictum*, and *maleficium*).

79. F. SCHULZ, *A HISTORY OF ROMAN LEGAL SCIENCE* 140 (1946).

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.⁸⁰ 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.⁸¹

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.⁸² 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.⁸³ 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.⁸⁴ 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.⁸⁵

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

80. MIRACULI SANCTI STEPHANI 2.5.852, cited by P. BROWN, CULT OF THE SAINTS 102 (1981).

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 possumus, 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, Epistolarum 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 process, preserved by the Western Church, embraced a stringent law of proof and a strict requirement of due process,⁸⁶ making successful prosecution of criminal cases extremely difficult. This procedural form protected 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 prelates 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.⁸⁷

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 favored toleration and a studied lack of interest as the proper ecclesiastical 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,⁸⁸ 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 governments 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 interest 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 decretistarum et decretalistarum 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, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 85-119 (1983).

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 manufacture, 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 medieval 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 suggested, 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 Middle Ages than to the Roman jurists of classical antiquity.

