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Moderamen inculpatae tutelae: The Jurisprudence of a Justifiable Defense

Intentionality and proportionality enter the jurisprudence dealing with rights of defense at the end of the third century of the common era. A rescript of the emperors Diocletian and Maximian to a certain Theodorus in 290 A.D. resolved a legal issue that had arisen from a court case. The question sent to the imperial court must have been: what kind of a defense a person can use if a robber attempts to take his property away. The imperial court's response coined a new term, "moderamen inculpatae tutelae" that had never been used before, at least not in the sources that are still preserved[1]:

> A person lawfully in possession has the right (*recte*) to use a controlled amount of blameless force (*moderamen inculpatae tutelae*) to repel any violence exerted for the purpose of depriving him of possession, if he holds it under a title that is not defective.

Three centuries later the rescript was included in the Emperor Justinian's codification of Roman law. We have some if not complete certainty that the term was used for the first time because Roman law jurisprudence prior to 290 does not contain the term, rule, or concept. "Inculpata" occurs twice in Justinian's *Digest* and describes only the characteristics a witness in a trial ought to have and what constitutes a blameless delay[2]. Two other passages in the Digest treat the issue of defense of property but not a legitimate self-defense[3]. These texts also do not insert the concept of a proportional or measured defense into the discussion of norms that might bind a person who defended himself.

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[1] Justinian's *Codex* 8.4.1, under the title "Unde vi, recte possidenti": "Recte possidenti ad defendendam possessionem quam sine vitio tenebat, inculpatae tutelae moderatione illatam vim propulsare licet".

[2] Justinian's *Digest* 22.5.3: "… honestae et inculpatae vitae…".

[3] Ibid. 9.2.45 and 43.16.3.9.

Diocletian's and Maximian's rescript did not lay down rules for personal self-defense. Three points were made about defense of property: a person has the right to defend property in his possession; the force used for its defense must be measured; the person must hold a just title to the property or any defense is not legitimate. The word "moderamen" is either mysterious or instructive. It meant either control of someone over something, or the rudder of a ship, or guidance of affairs or government. It occurs twice in the *Digest*. Once in the constitution *Tanta* with which Justinian confirmed the publication of the *Digest*, and in the title dealing with formal pronouncements[4]. In each place the word is used rather vaguely and generically and without a specific juridical meaning. It would be left to the jurists of the medieval and early modern eras to define what the words of the phrase meant.

Self-defense was embedded in classical Roman law. The Roman jurist Gaius in the second century asserted that natural reason permits a person to defend himself[5]. A bit later Paul declared that "all laws and all rights (legal systems) permit persons to repel force with force"[6]. Justinian's jurists put together a summary of what must have been a much larger discussion among their classical forbearers at the beginning of the *Digest*[7]:

> <Ulpian> The *Ius gentium* is what all human beings observe. It is easy to understand how it is different from natural law because natural law applies to all animals but the *Ius gentium* governs only human beings. Pomponius: <e.g.> such as piety towards God, obedience to parents and loyalty to the country. Florentinus: or the right to resist violence and injury.

Although these jurists were quite willing to concede that self-defense was a basic right, they were not inclined to call it a natural right based on natural law. That step was taken in the twilight of the ancient world by Isidore of Seville who connected the right of self- defense for the first time to natural law in his *Etymologies*[8]:

[4] Ibid. "Constitutio Tanta," and 2.12.7.

[5] Dig. 9.2.4: "nam adversus periculum naturalis ratio permittit se defendere".

[6] Dig. 9.2.45: "vim enim vi defendere omnes leges omniaque iura permittunt".

[7] Dig. 1.1.1.4; 1.1.2; 1.1.3: "Ius gentium est, quo gentes humanae utuntur. Quod a naturali <iure> recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit. <2> Pomponius: "Ueluti erga deum religio, ut parentibus et patriae pareamus. <3> Florentinus: "Ut vim atque iniuriam propulsemus…".

[8] *Isidori hispalensis episcopi Etymologiarum sive originum libri XX*, ed. W.M. Lindsay (2 vols. Oxford, Oxford University Press, 1911) 5.4: "Quid sit ius

> What is natural *Ius*? *Ius* is either natural or civil or the peoples. Natural *Ius* is common to all peoples. It has its origins in the instinct of nature, not in any constitution as in the union of men and women, the procreation and raising of children, the common possessions of all persons, the equal liberty of all persons, the acquisition of things that are taken from the heavens, earth, or sea, or the return of property or money that has been deposited or entrusted. This also includes the right to repel violence with force. These and similar things are never unjust but are natural and equitable.

Isidore's text had lain dormant until the first half of the twelfth century when Gratian included it and many other definitions of law from the *Etymologies*[9]. The jurist quickly focused on these texts in the standard *libri legales* when they discussed the right of self-defense. Stephan Kuttner first recognized the importance of the canonists for formulating a jurisprudence of intentionality for regulating the right of self-defense. As was typical of scholarship at the time, Kuttner focused exclusively on the canonists and did not give the teachers of Roman law their due[10]. He showed that the canonists accepted Isidore's claim that the right was established in natural law, which for them was the

naturale? Ius aut naturale est aut ciuile aut gentium. Ius naturale commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut viri et feminę coniunctio, liberorum successio et educatio,communis omnium possessio et omnium una libertas, acquisitio eorum, quae cęlo, terra marique capiuntur; item depositę rei vel commendatę pecuniae restitutio, violentię per vim repulsio. Nam hoc, aut si quid huic simile est, nunquam injustum, sed naturale aequumque habetur." Text here is based on St. Gall, Stiftsbibliothek 231, fol. 151b.

[9] I have discussed Gratian's text and its importance in '*Lex naturalis* and *Ius naturale*', *The Jurist* 68 (2008) 569-591 and in a slightly revised version in *Crossing Boundaries at Medieval Universities*, ed. Spencer E. Young (Education and Society in the Middle Ages and Renaissance, 36; Leiden-Boston, Brill, 2011) 227-253.

[10] Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX: Systematisch auf Grund der handschriftlichen Quellen dargestellt* (Studi e Testi 64; Città del Vaticano, Biblioteca Apostolica Vaticana, 1935) 334-379. See the brief treatment of Thierry Kouamé, 'Légitime défense du corps et légitime défense des biens chez les Glossateurs (XIIe-XIIIe siècle)', *Violences souveraines au Moyen Âge. Travaux d'une école historique*, ed. François Foronda, C. Barralis and B. Sère (Paris, Presses Universitaires de France, 2010) 19-27. Lawrence G. Duggan, *Armsbearing and the Clergy in the History and Canon Law of Western Christianity* (Woodbridge, Boydell, 2013) has touched upon the right of self-defense.

equivalent of divine law[11]. It could also be considered a principle of the *Ius gentium*, but *Ius naturale* trumped *Ius gentium* if the two came into conflict in the hierarchy of laws.

Stephen of Tournai (ca. 1165) may have been the first canonist to connect the Roman law concept of a measured defense with a person's right of self-defense. He argued that a defense could not be without limits. The intentions and judgment of the victim were limited in the face of the attacker's criminal act. Stephen also thought that self-defense must be understood as an immediate response to an attack. Any time between the original attack and a response was no longer self-defense[12].

Stephen's application of the Roman norm for the defense of property to personal self-defense was not a foregone conclusion. The ancient Roman jurists had never linked the two. One could make a respectable argument that defending the human person should not have limits; especially if one were to ignore the humanity of the attacker and focus only on his culpability. Further, the defense of property could be considered to be in a different category. Later canonists followed Stephen. They added one important norm. If a defense was not carried out immediately, then it was no long self-defense but revenge. Johannes Teutonicus (ca. 1215) added yet another wrinkle, if a person defended himself too aggressively, but unintentionally, he was not culpable[13]. Intention began taking center stage in juristic thought.

[11] Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Münchener theologische Studien, 3, Kanonistische Abteilung, 26; München, Max Hueber Verlag, 1967) 141: Paucapalea, who also knew the Roman law texts, D.1 c.7 s.v. *violentiae per vim repulsio*: "Hec omnia predicta ad ius naturale expectant". Kuttner gives several examples of the canonists attributing self-defense to *ius naturale*; Kuttner, *Kanonistische Schuldlehre* 336-339.

[12] Stephen of Tournai, *Die Summa über das Decretum Gratiani*, ed. Johann Friedrich von Schulte (Giessen, Emil Roth, 1891) 10 to D.1 c.7 s.v. *violentiae*: "Videtur contrarium dici, ff. de iustitia et iure l. Ut inde, ibi namque dicitur, quod vim atque iniuriam propulsare de iure gentium est; hic dicit, esse de iure naturali. Sed ibi dicit, vim cum iniuria, quam soli homines et non bruta animalia et pati possunt et facere; quod potius ad ius gentium quam ad naturale spectat Vel hic intelligamus ius naturale, quod solis hominibus insitum est a natura, seposito eo, quod brutis animalibus inest. Violentiae autem repulsionem hic dicit, si fiat in continenti, maleficio adhuc flagrante. Vim enim vi repellere omnes leges et omnia iura permittunt cum moderatione tamen inculpatae tutelae".

[13] Kuttner, *Kanonistische Schuldlehre* 340 n. 2; In the early thirteenth century Johannes Teutonicus commented on C.23 q.1 d.a.c.1, Admont, Stiftsbibliothek 35, fol. 306ra, s.v. *iniuriam propulsandam*: "Requiritur ergo quod defendendo repercutiat non ulciscendo… et ut cum moderamine se defendat, ut extra iii. de resititut. Cum causam, in fine… si quis tamen moderamen excedit et

Martinus, one of the four "doctors" of Roman law, was reluctant to accept Gratian's argument that self-defense rest on *Ius naturale*. He commented in a gloss to Justinian's *Institutes* that the "statute of reason" established by nature in the *Ius gentium* permitted the legitimate ("iure fecisse dicitur") defense of a person's own body.[14] Other Roman law jurists were not so hesitant. Henry of Baila (ca. 1170)[15] copied a long commentary by the canonist Rufinus (ca. 1160) who had a few years earlier broached the question of whether Isidore and Gratian or the Roman jurists got it right[16]:

> In the first title of the Digest it is held that to resist force and injury is established by the *Ius gentium*. If it were established by the *Ius gentium* and not by *Ius naturale*, then the *Ius gentium* would be different from the *Ius naturale*. However, those who are learned in Roman law say it is one thing to repel just force and another to fight because of injury. The first, they say, is established by *Ius naturale* because nature teaches all

non ex proposito, non tenetur, ut ff. ad leg. Aquil. Si ex plagis § Tabernarius, licet illa decretalis Cum causam videatur contradicere".

[14] Weigand, *Naturrechtslehre* 32: "Item ius gentium cum sit constitutio rationis a natura in anima insite ars dicitur boni et equi, set cum quandam distinctione. Hec enim constitutio, scilicet quod quisque ob tutelam sui corporis fecerit, iure fecisse dicitur".

[15] Ibid. 47. Weigand discusses the question of whether Rufinus copied Henry or Henry Rufinus. On Henry see Cecilia Natalini, 'Enrico di Baila', *Dizionario biografico dei giuristi italiani (XII-XX secolo)* (= DBGI), edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti (2 vols.; Bologna, Il Mulino, 2013) 1.798-799.

[16] Rufinus of Bologna, *Summa Decretorum*, ed. Heinrich Singer (Paderborn: 1902; reprinted Aalen, Scientia Verlag, 1963) 9-10, D.1 c.7 s.v. *terra marique capiuntur*: "In primo namque titulo Digestorum habetur quod vim atque iniuriam propellere de iure gentium est: si de iure gentium, non igitur de iure naturali, cum aliud sit ius gentium, aliud ius naturale. Sed, ut aiunt ipsi legis periti, aliud est repellere vim tantum, aliud iniuriam etiam propulsare: primum, inquiunt, est de iure naturali, quia id natura omnia animalia docuit – bruta etenim animalia propulsant vim – ; secundum vero est de iure gentium – soli namque homines, et non animalia, iniuriam pati dicuntur et facere. Nos autem credimus quod hic agitur etiam de repulsione violentie cum propulsatione iniurie. Et ammonitum est supra aliter legum latores et aliter nos accipere ius naturale: et ipsi quidem simplicius et generalius, ut communiter ascribatur illud omnibus animalibus; nos autem specialius, ut attribuamus solummodo hominibus. Ideoque ipsi cum talem propulsationem violentie sciant brutis animalibus non esse communem, non dicunt eam esse de iure naturali, sed gentium. Item quod dicitur 'quia equum est repellere violentiam per vim', satis consonat legibus, ubi traditur quia vi vim repellere. omnes leges omniaque iura permittunt". On Rufinus see Antonia Fiori, 'Rufino', DBGI 2.1756-1757.

> animals to respond to force; brutish animals resist force. The second indeed is established by the *Ius gentium* and applies only to human beings, because only humans are said to suffer injury and to inflict injury.
> We believe that here [i.e. Isidore's text] it concerns the resistance of violence and of injury. As is mentioned above, the teachers of Roman law understand *Ius naturale* differently from us. They understand the term simply and broadly — as they commonly ascribe *Ius naturale* to all animals— we understand it as being especially granted to all human beings. These jurists know that humans have nothing in common with brutish animals that have this propensity for violence. They do not think that this propensity is from *Ius naturale* but from *Ius gentium*. Consequently, when it is said that it is equitable to resist violence with force, it is congruent with Roman law, where it is stated that all laws and all *iura* permit force to be repelled with force.

The Roman law jurists, however, did begin to discuss the limits of resistance dictated by the phrase "moderamen inculpatae tutelae" when a person defended his property.

Guglielmo da Cabriano who was a student of Bulgarus, one of the first teachers of Roman law in Bologna, wrote a treatise on the *Codex* ca. 1150[17]. He was an early jurist to discuss the meaning of the phrase[18]:

> No one is permitted to take possession through force. It is permitted to all persons to protect possessions with force. However, it must be done with "moderatio inculpatae tutelae." If he uses arms against you as he takes possession, you can use arms to retain possession. But if you can otherwise protect yourself, yet you choose to kill, without a doubt you are culpable... If, when you can repel force without homicide, you have chosen, as I have said, to kill, then you have not repelled force but you have created force.

[17] Tammo Wallinga, 'Guglielmo da Cabriano', DBGI 1.1087-1088.

[18] Wilhelmus de Cabriano. *The Casus Codicis of Wilhelmus de Cabriano*, ed. Tammo Wallinga (Studien zur europäischen Rechtsgeschichte, 182; Frankfurt am Main, Vittorio Klostermann, 2005) 555: "Possessionem per vim adipisci nemini licet; tueri autem eam etiam per vim omnibus licet, ita tamen ut cum moderatione inculpate tutele fiat, videlicet ut si ille armis utatur adversus te in possessione auferenda, tu adversus eum utaris in ea retinenda. Se si cum potuisti alias te tueri occidere maluisti, procul dubio culpandus eris… set si cum possis repellere vim sine homicidio maluisti ut dixi occidere, tunc non vim repellere videris, set potius facere".

Guglielmo infers that if a person who wishes to take your property is not armed you may not use arms to defend your property. In a neat bit of analysis, he also observes that if you do use arms against an unarmed person, from the point of view of the law you become the aggressor and, legally, are culpable of the crime of aggression as well as any injury that you inflicted on your attacker.

Placentinus († ca. 1181-1182) probably studied at Bologna with Bulgarus and later taught in various Italian cities and Montpellier[19]. He was the first jurist to write an extensive *Summa* on Justinian's *Codex*[20]. He probably finished it in Montpellier in the early 1160's. His commentary on the title "Unde vi" was extensively and mainly concerned with procedural remedies (*interdicta*) for property that had be taken away illegally with force. These remedies were given to people who had lost their property to armed men because they had been terrorized[21]. He broached the question of time[22]:

> It is permitted to repel violence, as it is stated, immediately. It is permitted to the person who possesses the property to claim it after a time, but only with "moderatio inculpatae tutelae". If it is possible to expel the attacker without arms, they should not be used, and the possessor should not wound his assailant. <The rule is this>. Do not engage in other activity, that is do not postpone or defer to another day. Urge friends, neighbors, relatives; ask and exhort them that they come together and drive out and expel him who has driven out the possessor. It is permitted to everyone to repel an injury but not for revenge.

[19] The facts of Placentinus' life are not certain; see Ennio Cortese, 'Piacentino', DBGI 2.1568-1571 and Hermann Lange, *Römisches Recht im Mittelalter*, 1: *Die Glossatoren* (München, C.H. Beck'sche Verlagsbuchhandlung, 1997) 207-214.

[20] He completed Rogerius' incomplete *Summa*.

[21] Placentinus, *Summa Codicis* (Mainz, 1536; reprinted Torino: Bottega d'Erasmo, 1962) 174: "Item datur in homines armatos, quorum metu quis perterritus de possessione fugerit, sive ille possessionem occupaverit sive alii sive nulli. Haec inquam ita sive re armati veniebant aut si veniebant non ut deiicerent, veniebant interdicto unde vi non tenebuntur nisi possessionem occupaverint".

[22] Ibid.: "Vim ei repellere, sicut dictum est, incontinenti licet, nam ex intervallo possidenti licet, sed cum moderatione inculpatae tutelae. Vt si sine armis possit expellere, arma non debeat adhibere, non debeat vulnerare. Non assumpto alio negotio, id est, non reservet nec differat post dies, set instet amicos, vicinos, consanguineos, rogitet, anxie desudet ut congregato cetu eum qui se expulit expellat, et sic repulisse videbitur, ut ff. eodem de de adulteriis l. Quod ait [Dig. 48.5.24(23)]. Permissum enim est unicuique iniuriam repellere non vindicare".

Placentinus connected violence and possession to a society in which a person had a number of bonds. Arms should never be used when they could be avoided. If one wished to repel violence lawfully, it must be done without delay. One could enlist the aid of others, but action must be taken with a minimum of delay. Force can be resisted with force, but intention is crucial. Force exercised with the intention of revenge is never legitimate.

The canonists loved distinctions, and the concept of a justifiable defense (moderamen inculpatae tutelae) gave them many opportunities to demonstrate their cleverness. An anonymous jurist argued that if someone wanted to take my horse away from me, and I killed the robber, I would be culpable[23]. Huguccio, the most creative canonist of the twelfth century, wrote an exhaustive commentary on the right of self-defense in his great *Summa*, which was the most detailed and extensive ever written on Gratian's *Decretum*. Huguccio was a master of the distinction, and he applied his skill to the weapons that could be used in a defense[24]. He began by noting that self-defense is governed by reason which brings it into congruence with the famous dictum in Justinian's *Digest* that all law and all concepts of rights recognize the right to repel force with force[25]. Reason, emphasized Huguccio, was crucial in determining the

[23] Kuttner, *Kanonistische Schuldlehre* p. 341 n. 3: "si enim aliquis alicui voluit aufferre equum et equum tuendo illum occidit, culpata est hec tutela".

[24] Huguccio, *Summa* to D.1 c.7, s.v. *violentie* [ed. Oldřich Přerovský *Summa decretorum,* 1: *Distinctiones I-XX*, (Monumenta iuris canonici, Series A, 6. Città del Vaticano: Biblioteca Apostolica Vaticana, 2006). p. 40-45 at 40]: "Est etiam de hoc iudicio rationis. Hic consonat quod in lege dicitur vim vi repellere omnes leges et omnia iura permittunt, ut ff. de vi et de vi arm. l.i. [Dig. 43.16.1.27]". This brief passage is a piece of evidence for my remarks about the edition in n. 25. The best manuscripts read: "Est etiam hoc de iudicio rationis. Huic consonat quod in lege dicitur vim vi repellere omnes leges et omnia iura permittunt, ut ff. de vi et de vi ar. l.i.", not reading "huic" for "hic" in the best manuscripts, e.g. Munich, Staatsbibliothek 10247, fol. 2vb and Lons-le Saunier, Archives departementales du Jura 16, fol. 4rb.

[25] Wolfgang Peter Müller, *Huguccio: The Life, Works, and Thought of a Twelfth-Century Jurist* (Studies in Medieval and Early Modern Canon Law, 3; Washington, D.C., The Catholic University of America Press, 1994) and his up-dated summary with a couple of new pieces of evidence in 'Summa Decretorum of Huguccio', *The History of Canon Law in the Classical Period, 1140-1234,* edd. Wilfried Hartmann and Ken Pennington (Washington, D.C.: Catholic University Press, 2008) 142-160. Only the first twenty distinctions of Huguccio's *Summa* have been edited by Přerovský. Unfortunately, his edition has too many errors, beginning on the title page. Müller proved that Huguccio should not be given the cognomen "Pisanus". For further examples, see my review of the edition in *The Jurist* 71 (2011) 238-240.

legitimacy of a person's right of self-defense. For every jurist his emphasis on reason would call to mind all the texts in the Digest that defined the "reasonable person" (*homo diligens*). After first dealing with the issue of clerics, he laid down three primary rules for self-defense: "It should be for one's own defense, the right must be exercised immediately and without delay, and the norms of 'moderamen inculpatae tutelae' must be adhered to"[26]. Huguccio defined personal self-defense as "that which is not done with hate or with the heat of revenge." "It must be understood," he added, "this applies to a situation in which you have no other choice but to defend yourself. If a person may evade the attack, it is not permitted to repel force without punishment"[27]. He then turned his attention to the key term "moderamen inculpatae tutelae"[28]:

> Adhering to the norm of "moderamen inculpatae tutelae," means that if you are attacked with arms you may resist with arms. If you would be attacked by persons without arms, you cannot repel your attacker with arms without punishment. But can I not strike back with a lance, knife or sword a person who has struck with a staff, club, or stone? Does the definition of arms include stones and clubs? Is it not permitted to strike back with a larger or longer lance, knife or stone when one is struck with a smaller one? To this last question, I believe it is permitted. To the first question I think that it is permitted to strike with a staff, club or stone no matter what their size, and it is not permitted to strike back with a lance, knife, sword or other metal. This will be judged according to the decision of a judge and good men.

[26] Huguccio, ed. Přerovský to D.1 c.7, s.v. *violentie*, p. 41: "Set intelligendum… ut enim de iure fiat repulsio iniurie vel violentie, tria exiguntur, scilicet ut fiat ad tuitionem sui et incontinenti et servato moderamine inculpatae tutele". Přerovský citation to Dig. 43.16.3.9 and Cod. 8.4.1 gives the mistaken idea that Huguccio took his gloss from Roman law.

[27] Ibid. 41: "Ad tuitionem sui quod est non odio vel ardore vindicte, set ut se tueatur, nam quod ad tutelam sui corporis quis facit, iure facere extimatur, ut ff. de iustitia et iure l. Vt vim[Dig. 1.1.3], set intelligendum si aliter evadere non potest. Nam si aliter evadere potest, non licet ei vi repellere impune".

[28] Ibid. 42: "Servato moderamine inculpate tutele, scilicet, ut si armis facta est armis liceat repellere. Nam si sine armis esset facta non liceret eam impune repellere armis. Set numquid percutientem virga vel baculo vel fuste vel lapide possum repellere armis, scilicet lancea vel cutello vel gladio? Nonne nomine armorum etiam lapides et fustes continentur? Numquid non licet repercutere maiori et longiori lancea vel cutello vel lapide percutientem minori? Hoc ultimo casu credo quod liceat. In primo credo quod pro quantitate et qualitate virge vel baculi vel fustes vel lapidis liceat vel non liceat repercutere lancea vel cultello vel gladio vel alio ferro. Et hoc diiudicabitur arbitratu iudicis vel boni viri."

Huguccio made a clear distinction between the weapons of war and weapons, if they could be called weapons, of a more common type. Weapons of war, he concluded, can never be used against stones and clubs, but the decision in the end belonged to the courts. These conclusions may be true according to law but are repugnant to the norms of the New Testament and its morality. To demonstrate this conflict, he cited Romans 12:19 and 21: Vengeance is mine, said the Lord of the Old Testament; disarm evil with kindness. How can these biblical injunctions be reconciled with the law of self-defense?[29] As the Ordinary Gloss to the Bible declared, who did not leave vengeance to the Lord, will sin mortally[30].

Huguccio asked "how can we reconcile Isidore's assertion that self-defense is a principle established by *Ius naturale* with these biblical commands? How can a principle of ius naturale lead to sin? It cannot be", he must have thundered and jolted even his most drowsy students back to life[31]. Some jurists had explained these conflicting texts two ways: if the norms were not observed, such as if a person waited to defend himself, or if it were not self-defense but in the defense of another, or if "moderamen inculpatae tutelae" was not observed. Secondly, the biblical commands were for the "perfect"; for those who were not perfect the passages in Romans was a counsel not a command[32]. Huguccio's answer to the conundrum he created reeked of a man who had spent too much time in the classroom: the defense must be carried out with the authority

[29] Ibid. 42-43: "Hec verisimiliter dici videntur, set veritati repugnant, Nonne dicit Apostolus precipiendo non defendentes vos carissimi, set date locum ire? … Date locum ire, idest est vindicte Dei… Item preceptum Domini est 'Mihi vindictam,' Subauditur reservate et ego retribuam".

[30] Ibid. 43: "Super quem locum dicit expositor, 'qui hoc non facit Deum contempnit', id est qui non servat vindictam Deo set ipse eam accipit, Deum, id est preceptum Dei contempnit'; ergo peccat mortaliter".

[31] Ibid. "Qualiter ergo est de iure naturali repulsio violentie per vim? Numquid peccatum est de iure naturali? Absit".

[32] Ibid. 43-44: "Quidam volentes hec omnia ad consonantiam predictorum reducere dicunt quod quis non debet repercutere et se defendere repercutiendo ex intervallo, et non ad tuitionem sui, et non servato moderamine inculpate tutele; in quo casu intelliguntur que dicta sunt de apostoli et Domini preceptis. Alii dicunt quia non repercutere est preceptum perfectis, set imperfectis consilium est; et ita si aliter agunt non peccant". Přerovský cites Rufinus and Johannes Faventinus in his apparatus as the proponents of Huguccio's first opinion. A glance at their works shows they do not hold that opinion. On Johannes Faventinus see Andrea Bettetini, 'Giovanni da Faenza (Johannes Faventinus)', DBGI 1.1013-1014, who refers to Huguccio as "da Pisa," which seems, unfortunately, to have been the choice of the editors, see A. Fiori, 'Uguccio da Pisa' (!), DBGI 2.1997-1999.

of a judge. Otherwise a person should suffer death rather than consent to the evil of injuring another person[33]. To explain the permissible force with which one could defend oneself, Huguccio explained that one should understand that "force (vi)" not as a weapon but as an obstacle, such as an arm[34]. Huguccio's argument makes good sense if it is understood as applying only to the clergy who were forbidden to shed blood. But it is not clear at all that he has limited his analysis to them[35].

Turning from personal self-defense to more general issues of defense in twelfth-century society, Huguccio found "moderamen inculpatae tutelae" a useful concept with which to understand a vassal's obligation to defend his lord with counsel and assistance. Somewhat surprising, Gratian had included a letter of Fulbert of Chartres († 1028) in his *Decretum* in which Fulbert described the obligations of a vassal. Not surprisingly, Fulbert's letter was later incorporated into the *Libri feudorum*[36]. Huguccio used the Diocletian's and Maximilian's phrase to limit a vassal's obligations to support his lord's carrying out violence against others. He took another step in expanding the scope of the phrase in the *Ius commune*. His first point was that the vassal was only obligated to give aid when the lord needed help in licit and honest affairs. Moreover, if his lord was injured a vassal should respond immediately, but within reasonable limits (*moderamen inculpatae tutelae*) and with attention to the admonition of Saint Paul in Romans 12:19: an enemy should be treated with respect; the vassal should disarm malice with kindness[37]. Huguccio's combining of Roman and Biblical precepts to establish a legal norm was typical of twelfth-century jurists[38].

[33] Ibid. 44: "Mihi videtur quod mortaliter peccet qui repercutit ferientem se iuste vel iniuste, sive statim sive post, sive pro se sive pro alio, nisi faceret hoc autoritate iudicis. Si vero aliter evadere non potest nisi repercutiat, potius debet mortem incurrere et quelibet mala tolerare quam malo consentire, ut xxxii. q.v. Ita [C.32 q.5 c.3]".

[34] Ibid. 44-45: "Melius ergo sic intelligitur quod hic dicitur et in lege, licet repellere vim adversarii, vi idest obstaculo… scilicet brachiorum vel alterius rei".

[35] See the flawed analysis on this passage in Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge Studies in Medieval Life and Thought, Third Series, 8; Cambridge, Cambridge University Press, 1975) 96.

[36] See my essay 'Feudal Oath of Fidelity and Homage', *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A. Brundage,* edited by Kenneth Pennington and Melodie Harris Eichbauer (Ashgate 2011) 93-115.

[37] Huguccio to C.22 q.5 c.18 (Munich, Staatsbibliothek 10247, fol. 226v, Admont, Stiftsbibliothek 7, fol. 316r, Lons-leSaunier, Archives departementales du Jura 16, fol. 304v), s.v. *auxilium et consilium*: "In licitis et honestis. Puta pro defensione sui et suarum rerum, licite tamen iniuriam enim illatam domino licet uassallo incontinenti repellere cum moderatione tamen inculpate tutele, et non

Huguccio then turned from the question of intention and judgment when exercising the right of self-defense to the question of the moral duty and legal responsibility of defending someone else. This step in his thinking was far from predictable. However, as he thought about a person's right to self-defense, the age and society in which he lived presented another issue: a vassal's duty to protect his lord from harm. Vassals took an oath to do so. "Nobody should sin himself or sin for another," he reflected, "but at the same time everyone has an obligation to defend anyone from injury"[39]. Huguccio's creation of a duty to render assistance to others was an innovation in the *Ius commune* and was quickly adopted by later jurists. Common law and civil law systems divide on this point. Although the duty to assist is contrary to the norms of British and American common law where the doctrine of nonfeasance has held sway to the present day, thanks to Huguccio and his successors, it is part of the marrow of civil law jurisprudence[40]. Under the influence of the *Ius commune* and especially under the influence of the jurisprudential doctrine in feudal law governing the oath of fidelity, most civil law legal systems have a duty-to-assist other persons[41].

contra preceptum Apostoli scilicet quo dicitur 'Non defendentes', etc. (Romans 12:19)".

[38] Richard H. Helmholz, *The Spirit of Classical Canon Law* (The Spirit of the Laws; Athens-London, 1996) 149-151, 164-165, 314-315, 344-347.

[39] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Non enim pro se uel pro alio debet quis peccare, set eodem modo tenetur iniuriam repellere a quolibet".

[40] The doctrine of a duty to aid another person never emerged in common law, and there is no general obligation or duty to assist another person. Recently there have been attempts to enact "Good Samaritan" laws that imposes a duty on a person to summon help for someone in danger, but these laws have not had great support. One exception is that a person can contractually have a duty to assist. Doctors, lifeguards, and babysitters have fallen into this category. See Melody J. Stewert, 'How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability', *American Journal of Criminal Law* 25 (1998) 385-435, Natalie Perrin-Smith, 'My Brother's Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes', *California Western Law Review* 36 (1999) 135-155 and Marcia M. Ziegler, 'Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome', *Dickinson Law Review* 104 (2000) 525-560. For an argument that there should be a duty-to-assist and for some historical precedents, see Steven J. Heyman, 'Foundations of the Duty to Rescue', *Vanderbilt Law Review* 47 (1994) 673-755.

[41] F.J.M. Feldbrugge, 'Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue', *American Journal of Comparative Law* 14 (1966) 630-657, on pp. 630-631 states that "however, Roman law and scholastic thought were unfavorably inclined toward legislation of this nature... since World War II... almost every new criminal code contains a failure-

As one could infer from the quotation cited in the previous paragraph, Huguccio did not think that a person's a duty to assist another person was limited to those who had sworn the oath of fidelity in Christian society. He asked himself what is the legal foundation behind the vassal's duty to help his lord and his duty to assist others? How would a vassal's duty to his lord be extended to a duty to aid others in distress?[42] He found the answers to those questions not in Roman law but in a conciliar canon: "I say that the vassal is bound to his lord <by the oath of fidelity> more willingly and more specially – just as in the conciliar canon from the Council of Toledo in Gratian's *Decretum*. That canon stated that the breaking of promises is to be feared"[43]. Huguccio quoted a phrase from the canon and expected that his readers would supply the complete quotation: "<the breaking of> specific promises is more to be feared than <the breaking of> of general vows"[44]. Huguccio argued that a vassal has a special obligation to his lord but also a general duty to every other human being.

Later canonists followed the logic of Huguccio's argument and insisted that a vassal must do more than defend his lord when he is in danger. Alanus Anglicus (ca. 1200) formulated a lapidarian expression of the precept: "Although the oath of fidelity does not expressly state it, a vassal should give heed that his lord may not be injured"[45]. Tancred (ca. 1215) and following him, Bernardus Parmensis in the Ordinary Gloss (ca. 1245), insisted that persons who swore oaths of fidelity and obedience must protect their lords from attack and harm. They were also bound to protect them from plots and dangerous plans[46]. This principle

to-rescue provision". He seems unaware of the deep historical roots of the idea in the ethical and moral world of the *Ius commune*.

[42] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Quid ergo prodest iuramentum uassalli domino?".

[43] Ibid.: "Dico (quod *add.* L) propensius et specialius ei tenetur et 'Solet plus timeri etc.' (D.23 c.6)".

[44] Gratian, D.23 c.6: "Solet enim plus timeri quod singulariter pollicetur quam quod generali sponsione concluditur".

[45] Alanus Anglicus to C.22 q.5 c.18, Seo de Urgel 113 (2009), fol. 131r-131v: s.v. *consilium et auxilium*: "Operam enim dare debet ne domino noceatur, licet hoc in fidelitate non exprimatur, arg. ff. locati, In lege (Dig. 19.2.29 [27]), ff. de uerborum oblig. In illa stipulatione (Dig. 45.1.50)".

[46] Tancred to 1 Comp. 1.4.20(17) (X 2.24.4) (Ego [Petrus] episcopus), Admont, Stiftsbibliothek 22, fol. 3v, Alba Iulia, Bibl. Batthyaneum II.5, fol. 3v: s.v. *Non ero neque in consilio neque in facto ut uitam perdat aut membrum*: "Hoc non sufficit, immo 'opportet eum ubicumque senserit dominum periclitantem ad prohibendas insidias, occurrere,' C. quibus ut indignis l.ult. (Cod. 6.35.12) xxii. q.v. De forma, ubi suppletur quod hic de fidelitate minus dicitur e econtrario". The quotation that Tancred took from Justinian's Code is from a statute of Justinian in 532 AD

remained an important part of the jurisprudence that informed the oath of fidelity.

Huguccio then turned to a vassal's military obligation to aid his lord. He formulated several hypotheticals. What if the lord wishes to seize his vassal's fief or property? The vassal must not obey his lord unless his lord's war were just. A vassal was not bound to obey if his lord moved against him personally[47]. What, however, if the lord moved against his son or his father? Huguccio's answer relied on juridical distinctions made for the treatment of family, kin, and vassals of excommunicates[48]. The vassal did not have to obey his lord when his son and father lived under the same roof. Otherwise, if his lord were waging a just war against his family, the vassal was held to obey his lord[49]. These questions and many others about what constituted a just defense would be central to jurisprudential discussions of what constituted a just war for centuries[50].

"Moderamen inculpatae tutelae" officially moved into canonical jurisprudence in 1210 when Pope Innocent III's curia handed down a decision in a case in which a German priest named Laurentius had struck a robber who was plundering the church with a gardening tool[51]. Villagers who were aroused by the clamor finished him off with clubs and swords. The papal judges considered whether local witnesses could determine whether Laurentius had delivered the fatal blow, what his intention was when he struck the robber, and if he might have encouraged the villagers to attack. The court should also determine the force of Laurentius's blow and where on the blow landed on the robber's body. Medical experts had testified that Laurentius' blow was not normally fatal. Furthermore, if the robber had struck Laurentius first, the priest was justified in striking back. The judges quoted the Roman law jurisprudence of self-defense and its limits that was already firmly

in which the emperor clarified a the meaning for Pope John II of "sub eodem tecto" in the Senatusconsultum Silanianum that punished slaves for not defending their masters.

[47] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Quid si uelit inuadere illum uel res eius? In hoc casu non ei tenetur obedire nisi iustum esset bellum. Item non tenetur ei contra se".

[48] See Elizabeth Vodola, *Excommunication in the Middle Ages* (Berkeley-Los Angeles-London, 1986) 63-64, 101-105, for a discussion of the canon that Huguccio cited.

[49] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Set numquid contra filium uel patrem tenetur ei obedire? Non si in una domo simul morantur, arg. xi. q.iii. Quoniam multos (c.103). Alias si iustum esset bellum contra filium uel patrem forte tenetur ei obedire".

[50] See Russell, *Just War* 95-126, which cannot be trusted in details.

[51] Innocent III, *Patrologia latina* 216.64-66, Letter 12.59, included in canon law at 4 Comp. 5.6.2 (X 5.12.18).

embedded in canonical jurisprudence[52]: The judges decided that it would be fitting if Laurentius did not exercise his priestly office but could not resist quoting a popular proverb: "who injures first, injures by touching, who injures second, injures with criminal intent"[53]. This decretal replaced Gratian's excerpt from Isidore of Seville as the standard place to discuss self-defense in canon law.[54]

Accursius († 1262) provided the Ordinary Gloss to the *libri legales* of Roman law and summarized the first 150 years of commentary on "moderamen inculpatae tutelae" when he glossed *Recte possidenti*[55]. He made several points: someone who did not have valid possession could defend his possession under certain circumstances, resisting violent dispossession must always be measured, and resisting violence can never been for revenge. His gloss became the locus for later discussion of self-defense[56].

[52] Ibid. 66: "Vim vi repellere omnes leges et omnia iura permittant, quia tamen id debet fieri cum moderamine inculpatae tutelae, non ad sumendam vindictam, sed ad iniuriam propulsandam". I have doubts that Thomas Aquinas may have used this decretal to support his arguments about self-defense at *Summa theologica* 2.2 q.64 art.7: "Et ideo si aliquis ad defendendum propriam vitam utatur maiori violentia quam oporteat, erit illicitum. Si vero moderate violentiam repellat, erit licita defensio, nam secundum iura, vim vi repellere licet cum moderamine inculpatae tutelae. Nec est necessarium ad salutem ut homo actum moderatae tutelae praetermittat ad evitandum occisionem alterius; quia plus tenetur homo vitae suae providere quam vitae alienae. Sed quia occidere hominem non licet nisi publica auctoritate propter bonum commune, ut ex supradictis patet; illicitum est quod homo intendat occidere hominem ut seipsum defendat, nisi ei qui habet publicam auctoritatem, qui, intendens hominem occidere ad sui defensionem, refert hoc ad publicum bonum, ut patet in milite pugnante contra hostes, et in ministro iudicis pugnante contra latrones". But if he did know the decretal he ignored the decretal's most significant point; self-defense is never a justification for vengeance. Thomas also cites the phrase "moderamen inculpate tutelae" at *Summa Theologiae* II-II, q. 60 a. 6 ad 2.

[53] Ibid. "qui ferit primo, ferit tangendo, qui ferit secundo, ferit dolendo".

[54] E.g. Bernardus Parmensis, Ordinary Gloss X 5.12.18 s.v. *tutelae*. The primary reason why Isidore's text was replaced was because Gratian was rarely glossed after the middle of the thirteenth century.

[55] Lange, *Römisches Recht im Mittelalter* 1.334-385; Giovanna Morelli, 'Accursio (Accorso)', DBGI 1.6-9. On Accurius' Glossa ordinaria see Horst Heinrich Jakobs, *Magna Glossa: Textstufen der legistischen glossa ordinaria* (Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft 114; Paderborn-München-Wien-Zürich, Ferdinand Schöningh, 2006).

[56] Accursius, *Glossa ordinaria* to the *Codex* 8.4.1 (Venice 1496) fol. 263v, s.v. *Recte*: "Sed none idem et si non recte? Respondeo quod sic"; s.v. *moderatione*: "si armis inferatur violentia et armis repellatur, si sine armis simili modo… ut ad defensionem non ad ultionem vel vindictam".

The civilians remained engaged in the discussion of self-defense. Azo was the leading teacher of Roman law in the early thirteenth century[57]. In his *Summa* on the *Codex* he delved deeply into the character of "moderamen inculpatae tutelae". As a first step he defined when and how weapons could be used for a defense of property and the meaning of the word "tutela": "Tutela," he wrote was a synonym for "defense."[58] A blameless defense was either when a person defended himself from an unarmed person without arms or when his arms matched those of his attacker[59]. What if, however, a weaker person was attacked by a stronger? That tipped the balance of justice[60]:

> What if the blow of one is stronger than the other? Can the weaker use arms? Some say with too much simplicity that the person attacked ought to suffer the first blow. But he would have never struck back. It is sufficient that the attacker will seek to enter with arms or to terrorize him with arms that the owner may use arms against him... A blameless defense is maintained if the person repels the attack in self-defense and not for vengeance.

Azo used a famous text from Roman law in the *Digest*'s title on delicts (torts) to nuance and limit the right of defense of property. If a tavern owner ran after a thief who had stolen his lantern, he must not

[57] Lange, *Römisches Recht im Mittelalter* 1.255-271 and Emanuele Conte and Luca Loschiavo, 'Azzone', DBGI 1.137-139.

[58] Azo, *Summa codicis* (Venice 1489) 8.4 (unfoliated): "Sed quem quis vult iniuste expellere potest resistere vim inferenti et propulsare vim illatam ad defendendam possessionem cum moderamine tantum inculpate tutele, idest defensionis".

[59] Ibid.: "quod inculpata sit defensio vel cum moderatione facta attenditur circa duo: Si enim vi inferat sine armis propulsare vim debeo sine armis. Si autem vim inferat cum armis possum eundem armis repellere, ut ff. eodem l.iii. § Cum igitur [Dig. 43.16.3.9]. Arma autem sint omnia tela, hoc est fustes et lapides, non solum gladii baste framee (Swords, large staves, that is, spears), ut ff. eodem l.iii. § Armis [Dig. 43.16(15).3.2] , idest gladii utrinque incidentes, etiam solet dici misericordia framea (a weapond that was used in executions)".

[60] Ibid.: "Quid si pugnus illius durior sit quam ipse percussoris alterius, forte propter debilitatem nature debilibus utetur armis? Illud quidam dixerunt simplicitate nimia servandum ut possessor debeat pati primo se percuti quam ipse percutiat. Sed certe forte numquam percuteret postea. Satis est ergo quod alius petit possessorem invadere armis vel armis terreat ipsum. Ut sic possessor contra eum utatur armis, ut ff. eodem l.iii.§ Qui armati et ad leg. Aquil. L. Sed et si quemcumque et ad leg. Cor. de sic. l. Si qui. Item moderamen adhibetur in alio ut quis propulset ad sui defensionem non ad vindictam, ut ff. ad leg. Aquil. l. Scientiam § Qui cum aliter".

injure him intentionally more than was necessary to retrieve his property. The Latin phrase "data opera possessor oculum effodit" in the case became the common metaphor for committing an act for which one's intentionality determined one's responsibility[61].

Within the boundaries of this paper it is not possible to explore all the nooks and crannies of juristic thought on the jurisprudence of a legitimate and just defense. From this point on I present an outline of what could be a very good monograph. That is not to say that the first part of the paper is comprehensive, but the following remarks are even much less so.

With those caveats in mind, I fast forward to the early fourteenth century and to the great jurist and poet, Cinus de Pistoia[62]. Cinus wrote a long analysis of the legimate defense to the text in Justinian's *Codex* which provoked much discussion under the title *Unde vi*, which contained Diocletian's and Maximian's principle of "Moderamen inculpatae tutelae"[63]. After a word by word analysis of the statute, Cinus turned to the issue of when property could be defended justly[64]. After observing that Diocletian's and Maximinian's statute was both useful and subtle, he cited Jacobus de Ravannis' opinion that anyone who possessed property clandestinely did not have a valid right to it. The legitimate owner could rightfully take the property back[65]. Dinus de Mugello, wrote Cinus, objected[66]. Force was not permissible because Dinus knew of no law that sanctioned it in that situation. Implicitly

[61] Ibid.: "Sed numquid videtur semper fieri ad defensionem si fiat incontintenti? Et ait Ja. quod sic. Ego puto ita presumendum esse. Sed tamen posset probari contrarium, scilicet quod data opera possessor oculum effodit vim inferenti non ad sui defensionem, ut ff. ad leg. Aquil. l. Si ex plagiis § Tabernarius [Cod. 9.2.52(53).1]".

[62] Paola Maffei, 'Cino, Sinibuldi da Pistoia', DBGI 1.543-546 and Hermann Lange, and Maximiliane Kriechbaum, *Römisches Recht im Mittelalter*, 2: *Die Kommentatoren* (München, C.H. Beck'sche Verlagsbuchhandlung, 2007) 632-658.

[63] Cod. 8.4.

[64] Cinus de Pistoia, *Lectura super Codice* (Venice, 1493) to Cod. 8.4.1, fol. 335vb-336rb.

[65] Ibid.: "Adverte quia iste passus est utilis et subtilis. Videtur enim hic Ja<cobus de Ravannis> predictus sentire quod possidentem clandestinum licet mihi expellere si a me clam possidet quia clandestina possessio est viciosa, ut ff. de acqui. pos. l. Pompo. § Cum quis, ergo cum viciosam habeat possessionem mihi licet ingredi et sibi non licet retinere, et pro hoc adducit, supra quod cum eo l. Si servus et glossa videtur sentire istud, ff. uti pos. l.i. [Dig. 43.17(16).1]".

[66] Andrea Padovani, 'Dino Rossoni del Mugello', DBGI 1.769-771.

Cinus and his teacher Dinus thought that the courts, not arms, were the proper forum for the dispossessed to vindicate their rights[67].

What defines a legitimate defense? Cinus focused on two points: an equivalency of force and arms and of time. Violence that exceeded those limits was no longer legitimate[68]. His first example marked Cinus as a professor. What if, he asked, a big, strong man entered my room with a raised fist; if I could not avoid his onslaught, can I protect my book that he wanted to take with arms? Cinus concluded that the human body was more important than property. He could not defend his book with weapons[69].

Cinus then broached the question of the meaning "incontinenti" or immediately. If the aggressor has inflicted injury and the resistance is not immediate, the injured person should go to court. Two influential jurists from Orléans, Jacobus de Ravannis and Petrus de Belleperche,

[67] Cinus de Pistoia, *Lectura* ibidem: "Respondent quidam quod ex quod nolo etc. quod non approbat Dynus ibidem quia non reperitur lege aliqua cautum quod clandestinum possessorem liceat mihi per vim expellere. Praeterea lex dicit vim vi repellere licet, sed qui clam intrat non infert vim, ergo etc. secundum eum, quod verius credo".

[68] Ibid: "Circa lex istam queritur hic dicitur quod pro defendenda possessione mea vim illatam propulsare, licet cum moderamine inculpate tutele que sunt illa que requiruntur ad huiusmodi moderamen? Respondent doctores sint illa que equipollent violentie illate in qualitate armorum. Item que equivalent in cursu temporis. Item que equivalent in ipso actu violento ne alias excedendo censeatur vindicta".

[69] Ibid: "Circa primum dubitatur quid si quidam robustus homo et fortis contra me pugno elevato veniret cui si eodem modo resisteret non possem evadere, nonne mihi licebit cum armis tueri? Certe videtur quod sic quia equalitas ubicumque debet attendi, arg. supra de fruct. et lit. expen. l. ultima [Cod.7.51.6] et ff. de arbit. l. Si cum dies [Dig. 4.8.21(26)]. Econtra videtur quod non, quia si aliquis sine armis veniret ad cameram meam librum meum per vim ablaturus ego velut impar virium corporis percutio eum cum ense impune iam fieret compensatio rei ad corpus humanum quod esse non debet, ut de sacrosanct. eccles. l. Sancimus in fine [Cod. 1.2.21-22]. Solutio in hoc articulo Pe<tri> sic dicit aut tractatur de violentia repellenda circa corpus aut tractatur de violentia repellenda circa res. Primo casu licet propulsare iniuriam cum armis et quandocumque si aliter non possum defensio parari quia non potest alias et per remedium iudicis talis iniuria reparari, ut supra de appell. l. Siquis [Cod. 7.62.30] et quia si possum interficere furem ubi non cognosco eum et sic ubi non possum habere remedium pro rebus meis multomagis etc. ut ff. ad leg. Cor. de sic. l. Furem [Dig. 48.8.9]. Secundo casu quando queritur de propulsatione iniurie circa res, tunc refert aut iniuria vel violentia que infertur mihi circa res posset reparari per viam iudicii aut non. Si posset per viam iudicii reparari tunc non licet mihi propulsare iniuriam quocumque modo, sed cum moderamine in qualitate armorum non factorum".

were agreed that a distinction must be made between violence to persons or things[70]. Injuries to persons must be repelled immediately, but injuries to property not, depending on the circumstances. Why is there this difference? asked Cinus, because injuries to persons cannot be recovered but damages to property can be. Further, recovering property even after a period of time can be considered a defense of a person's rights[71]. Cinus also pointed out that even if a person repelled force immediately, he could still be held to have acted with fault if he could have avoided the confrontation[72].

The jurists very early on connected a legitimate defense of personal property and self-defense to their theories of what constituted a just war[73]. Johannes de Legnano was the first jurist to incorporate the detailed commentaries of the jurists into his treatise on the laws of war.

[70] On these two jurist see Lange and Kriechbaum, *Römisches Recht im Mittelalter* 2: 518-567.

[71] Ibid.: "Sed circa hoc dubitatur quomodo intelligatur 'incontinenti'. Dicunt quidam ipsa aggressione fragranti [i.e. flagranti], si tamen impleta esset iniuria ex parte sua tunc non potest <facere> sed ad iudicem est recurrendum. Sic intelligitur hoc cum similibus. Alii dicunt etiam post fragrantiam [i.e. flagrantiam] aggressionis ex intervallo dumtamen non divertat ad extraneos actus, arg. ff. de adul. l. Quod ait in fine. Solutio. Distinguendum est secundum Ja. de Ra. et Pe. aut queritur de violentia illata persone aut de illata rebus. Si persone tunc incontinenti appellatur ipsa fragrantia, ut ff. ad leg. Aquil. l. Scientiam § Qui cum aliter [Dig. 9.2.45.4], et sic intellige ff. de iustit et iur. l. Vt vim. Si queritur de violentia illata rebus tunc incontinenti accipitur nedum in ipsa fragrantia aggressionis sed postea, dum tamen non divertatur ad extraneos actus, ut ff. eodem l. Qui possessionem et l.iii. § Cum igitur [Dig. 43.16.3.9], et sic intellige quod hic (ibi 1493 ed.) notavi. Accipitur ergo incontinenti modo uno quando infertur ius persone et alio quando rebus. Cur tamen varie? Respondeo quia cum illata est iam iniuria persone non potest auferri, ut supra de apellat. l. Si quis provocatione [Cod. 7.62.30], et sic quicquid ammodo fieret intelligeretur fieri ad vindictam. Sed quando rebus tunc potest auferri et ideo si statim fiat non videtur vindicta sed tuitio sui iuris, et ita intelligitur statim etiam si vadit querendo amicos, ut notavi in dicto § Cum igitur [Dig. 43.16.3.9]".

[72] Ibid.: "Tertium moderamen est equivalentia actui violento, ut scilicet fiat ad defensionem illius actus et non ultra. Sed dubitatur quomodo scietur [sciemus ed. 1493] utrum faciat ad defensionem? Jac. de Are. [de Are. *om*. 1476 ed.] antiquus doctor dicit quod presumitur fieri ad defensionem si fiat incontinenti, si ex intervallo presumitur ad vindictam, et hoc quidam moderni approbant, sed male quia incontinenti potest fieri ad ultionem ut si aliter evadere potest, ut dicto § Cum aliter [Dig. 9.2.45.4]".

[73] Russell, *Just War* 161, dismisses the importance of "moderamen inculpatae tutelae" for their thought and does not understand the precision of the term in jurisprudential thought.

Johannes was particularly dependent on Cinus' commentary on the right of an individual to defend himself[74]:

> The sixth question is whether it is licit to defend property as one would defend one's person whom one can resist in self-defense? Solution: One may do so, among persons who have the right to hold property; thus I exclude slaves, monks, and the like <who would not have the right to defend property they do not own>. But I admit that a legitimate defense ought to take into consideration the various qualities of persons. For one should act differently and more gently against a father than against an absolute stranger; and so with each relationship which comes up for consideration, all the circumstances are to be weighed, since these rights are not circumscribed.

A new issue had arisen in the fourteenth century: the culpability of self-defense against an insane person, a minor person, or a person who has to react to a situation without understanding the context. A text that was attributed to Pope Clement V at the Council of Vienne but was not among the conciliar canons stated[75]: "If an insane person, young child, or sleeping person should mutilate or kill a man, he incurs no irregularity from this. We decree the same for one who, unable to avoid death, kills or mutilates an invader". Johannes applied this new norm to the concept of "moderamen inculpatae tutelae". Johannes thought that killing an insane person was the only exception to the norm of limiting the use of force in self-defense. It also exonerated the perpetrator of all culpability[76]. At the end of his treatise, he linked "moderamen inculpatae

[74] Johannes de Lignano, *De bello*, trans. and edited Thomas Erskine Holland (The Classics of International Law; Oxford: Oxford University Press, 1917) 150: "Sexto qureritur, an pro rebus licitum sit contra omnes vim vi repellere contra quos licitum est pro personis? Solutio. Quod sic, in personis iure valent habere bona, ut excludam servos, monachos, et similes. Fateor tamen quod moderamen tutelae diversificari debet, attenta varia personarum qualitate. Nam aliter, et mitius, contra patrem quam contra penitus extraneum, et sic de singulis qure consideranda venirent, inspectis singulis circumstantiis, cum non sint haec iure limitata, ut l.i. ad finem, ff. de iure deliber. et cap. De causis, de offic. iud. delegati".

[75] Clem. 5.4.1: "Si furiosus, aut infans seu dormiens hominem mutilet vel occidat: nullam ex hoc irregularitatem incurrit. Et idem de illo censemus, qui mortem non valens, suum occidit vel mutilat invasorem." This text and its possible source is discussed by Brandon Parlopiano, *Madmen and Lawyers: The Development and Practice of the Jurisprudence of Insanity in the Middle Ages* (Ph.D. Dissertation, The Catholic University of America 2013) 217-219.

[76] Johannes de Lignano, *De bello* 149: "numquid vim vi repellendo circa res suas, si contingat vim repellentem occidere, vel mutilare, vim inferentem, evitet

tutelae" to the norms of waging war[77]. By the end of the fourteenth century, the jurists had developed a complicated and detailed analysis of "moderamen inculpatae tutelae." I have found no one who doubted that a person's natural right to defend himself was limited, except in the case of a madman[78].

In comparison to the impoverished jurisprudence surrounding self-defense in American common law, the jurists of the later Middle Ages and the early modern era paid close attention to the norms of self-defense. Baldus de Ubaldis († 1400) commented on Diocletian's and Maximinian's statute in Justinian's *Codex* but added a long *repetitio* to his commentary that he held in 1365[79]. Jurists commonly used the *repetitio* to deepen their analysis of especially important texts. Baldus confronted a large number of the issues raised by "moderamen inculpatae tutelae," and focused on the problem of interpretation: which norms are central to the maxim? His answer was detailed[80]:

> Accursius asks how "moderamen" may be defined. Solution: There must be an equality of acts in an appropriate time and with avoidable necessity. In the equality of acts there ought to be equality as when you resist with a appropriate lance and manner, to the attack, just as in a duel, unless another would be persuaded of the inequality of the men. The time of opportunity is required, because it must be immediately and

poenam irregularitatis? Et pono ubi hoc faciat cum moderamine inculpatae tutelae, quid alias non praecederet quaestio. Et videtur quod evitet. Nam pro defensa persona, evitat poenam illam, ut in Clem. Si furiosus, de homicidio".

77 Ibid. 151-152: "Qualiter liceat hoc particulare bellum indicere? … Et huic respondet textus quod licet cum moderamine inculpatae tutelae".

78 For a jurist see Walter Ullmann, *The Medieval Idea of Law as Represented by Lucas de Penna: A Study in Fourteenth-Century Legal Scholarship*, Introduction by Harold Dexter Hazeltine (London-New York, Barnes & Noble-Methuen, 1969, reprint of 1946 edition) 154-155 and for a theologian, Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Emory University Studies in Law and Religion; Atlanta, Georgia: Scholars Press, 1997) 236-237 (Jacques Almain).

79 See Pennington, 'Baldus de Ubaldis' *Rivista internazionale di diritto comune* 8 (1997) 35-61 and Ennio Cortese, 'Baldo degli Ubaldi', DBGI 1.149-152.

80 Baldus, Commentary to the *Codex* 8.4.1 (Venice, 1496) fol. 116v-119r at 117rb: "Querit glossa in quo consistat moderamen huius legis. Solutio: in equalitate actorum in temporis congruitate et in necessitatis evitabilitate, nam in equalitate factorum debet esse paritas ut equa lance resisti et equo modo ei actu congruent sicut in duello nisi aliud suaderet virium inequalitas. Item requiritur temporis oportunitas quia incontinent non ex intervallo. Item requiritur quod ille qui est ita fortis quod potest recuperare possessionem sine armis non ponat manum ad arma nec aperiat viam ferro quod potest apparare de plano".

> not later. Again it is required that a man who is so strong that he could gain possession without arms not seize arms and not open the way to weapons that can be clearly seen.

He had three conclusions. There had to be equality of acts, and there should be an immediate response to violence. It was important that the force a person employed to defend himself should only be a great as necessary to repel the attacker[81]. Baldus went through a number of different hypotheticals to illustrate these points. His most interesting hypothetical was if members of the Podestà's family tried to capture and bring back a fugitive (bannitus) and killed him because he resisted their violence. Baldus noted that according to the *Ius commune* no one could be killed in custody. However, he concluded that if the fugitive resisted he could be killed[82].

Skipping forward two centuries, the discussions of the norm became most sophisticated in the writings of the jurists who wrote tracts of criminal procedure in the sixteenth and seventeenth centuries. Of those writers, the most important criminal lawyer of the medieval and early modern period was Prospero Farinacci (1544-1618). He was probably educated in Perugia and quickly gained experience on both sides of the bench. In 1567 he became the general commissioner in the service of the Orsini of Bracciano; the next year he took up residence in Rome as a member of the papal camera. However, in 1570 he was imprisoned for an unknown crime. Legal problems hounded him for the rest of his life. He lost an eye in a fight, was stripped of his positions, and was even accused of sodomy[83]. In spite of his difficulties, Pope Clement VIII reinstated him to the papal court in 1596. Farinacci defended Beatrice Cenci who was accused of killing her father in the most famous criminal case of the

[81] Ibid.: "Conclude ergo triplicem conclusionem: prima est quod in defensione requiritur factorum qualitas, unde aggressus sine armis non potest se defendere cum armis nec armis uti vel percutere. Secundo requiritur temporis vicinitas nam ut simul dicatur fieri omnem vel simul fieri ipso actu vel congressu vel successive immediate vel quasi immediate. § Tertia est quod talis et tanta debet esse propulsatio quanta est necesssitas defensionis vel offensionis, hec enim est defensio moderata non plus facere quam oportet".

[82] Ibid.: "Sed quid si familia potestatis inerat causa capiendi quemdam exbannitum quem conducere non potest et propter resistentiam occiditur an puniatur, et videtur quod sic, quia captum non licet occidere licet Dynus aliter dicat . . . de iure communi bannitus non potest occidi de custodio… credo contra si reclacitrabat ne duceretur".

[83] When Giuseppe Cesari painted Farinacci s portrait ca. 1600 (Rome, Museo Nazionale di Castel Sant Angelo) he quite deliberately and obviously posed him to leave his left eye in the shadows.

time[84]. He began his most important work, *Praxis et theorica criminalis*, in 1581 and put the finishing touches on it by 1601[85]. In his great tract on criminal procedure Farinacci devoted 16 folio pages to a discussion exclusively devoted to the norm, which also appears in many other parts of his work. He was critical and perhaps a little exasperated by his predecessors' complicated discussions[86]:

> One would want that "moderamen inculpatae tutelae" required equality of blows and so the persons who returned blows would give them in equal measure. This is to say that this is, in a certain way, to argue as Jewish scholars do... a legitimate defense must be conducted in due proportion, not as to the effect but as to the weapons used... I think a more true opinion, which is especially supported by the common opinion of the doctors, is that one cannot have a scale or a measuring device with which to measure the blows struck.

[84] See my essay 'Torture and Fear: Enemies of Justice', *Rivista internazionale di diritto comune* 19 (2008) 203-242 at 235-236 and 'Women on the Rack: Torture and Gender in the *Ius commune*', *"Recto ordine procedit magister: Liber amicorum E.C. Coppens*, edited by Louis Berkvens, Jan Hallenbeek, Georges Martyn, and Paul Nève (Iuris Scripta Historica 28; Brussels, Royal Flemish Academy of Arts and Sciences, 2012) 243-257; *Beatrice Cenci: La storia, il mito.* ed. Mario Bevilacqua and Elisabetta Mori (Roma 1999).

[85] Most recently Aldo Mazzacane, 'Farinacci, Prospero', DBGI 1.822-825. Also Aldo Mazzacane, 'Farinacci, Prospero (1544-1618)', *Juristen: Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert*, ed. Michael Stolleis (München 1995) 199-200; Niccolò Del Re, 'Prospero Farinacci giureconsulto romano (1544-1618)', *Archivio della Società Romana di Storia Patria*, 3rd series 28 (1975) 135-220. Mazzacane writes that he completed it in 1614, but an edition of *Praxis et theoricae criminalis* was published in Venice, apud Georgium Variscum, 1603 (in fine 1601), which is described as the third edition, with additions made by the author to the first and second editions, see *Antichi testi giuridici (secoli XV-XVIII) dell'Istituto di Storia del Diritto Italiano*, ed. Giuliana Sapori (Università degli Studi di Milano, Pubblicazioni dell'Istituto di Storia del Diritto Italiano, 7; Milano 1977) 1.242, no. 1162.

[86] Prospero Farinacci, *Praxis et theoricae criminalis* (2nd ed. Nürnberg 1676), 4 *quaestio* 125, part 6, p.324-340 at 327-328: "In eo quod vult in moderamine inculpatae tutelae requiri aequalitatem percussionum et sic quod repercussio debeat fieri ad mensuram percussionis et quod sic dicere, sit quodam modo judaizare… quo in moderamine inculpatae tutelae requiritur defensionis ad offensam debita proportio, non ex parte effectuum sed ex parte instrumentorum et armorum… quasi voulerit dicere moderamen fuisse servatum, etiam quod ex defensione resultet major offensio insultantis... pro hac contraria opinione quae apud me verior est maxime facit alia communis doctorum conclusio quod non potest stateram in manibus habere insultatus quando se defendendo insultantem percutit nec minus potest ictus dare ad mensuram".

The decision whether a self-defense was legitimate, argued Farinacci following, he says, the great jurist Baldus degli Ubaldis, must be left in the hands of a judge. There are too many variables in any particular case to have certain rules[87]. Farinacci particularly did not like to detailed analysis of "incontinenti," or what sort of a time period after the initial attack could still be considered an act of self-defense. "<These speculations on the period of time permitted to defend oneself> open the way for men to take revenge on their own authority and to kill their enemies. They avoid the death penalty by claiming 'I was provoked, I was injured, I was offended' "[88]. To prove his point to cited a case from Naples in which a man was not punished capitally because he pleaded that the man he killed had thrown stones at his window every night for a year. The court was sympathetic and did not condemn him to death but sent him to the galleys[89].

In another undated Neapolitan case from the first half of the fifteenth century, the issue of what today we could call police brutality had to be decided. The court turned to the distinguished jurist Tommaso Grammatico († 1556) for a decision[90]. Three henchmen of a "magnificent" Neapolitan captain were pursuing a man suspected of crimes but who had escaped. They could not capture him by other means, so they were forced to wound him. As he lay on the ground one of the men stabbed him again. The court was hesitant what the correct decision in this case should be. In his pro et contra argumentation Grammatico first pointed out that representatives of the court (the captain and his men) cannot be faulted for not following the norm "Moderamen inculpatae tutelae". They were not bound by the norm when pursuing a criminal if the criminal resisted arrest[91]. Grammatico cited similar cases from Perugia and Pisa. Other jurists, particularly the Neapolitan criminal lawyer, Paridis de Puteo, agreed. Grammatico, however, was not swayed by the arguments

[87] Ibid. 336: "Et generaliter ut iudicis arbitrio remittatur an et quando sit servatum moderamen inculpatae tutelae, qualisque et quantus sit excessus secundum Baldum… ubi reddit rationem, quia scilicet de factis hominum non potest dari propter nimian factorum multiplicitatem, certa regula".

[88] Ibid. 337-338: "Esset enim aperire viam hominibus ulciscendi se propria auctoritate inimicosque suos occidendi, ac postea ad evadendum mortem quam alteri intulerunt, dicere 'fui provocatus, fui iniuriatum, fuique offensus' ".

[89] Ibid. 337: "testatur ita fuisse servatum in illo Neapolitano apud eum Consilio ut scilicet sic occidens non poena ordinaria puniatur sed ad triremes condemnetur."

[90] Ennio Cortese, 'Grammatico, Tommaso', DBGI 1.1045-1047.

[91] Tommaso Grammatico, *Decisiones sacri regii consilii neapolitani* (Lyon, Apud haeredes Iacobi Iuntae, 1555) Decisio 41, 175: "Quod etiam si talis prosecutio processisset absque moderamine inculpatae tutelae, non tenetur familia curiae propter resisentiam, quam ille faciebat".

in favor of their overenthusiastic actions. He concluded that two of the men who wounded him in flight were absolved of wrong-doing, but the man who stabbed him while prostrate on the ground must serve fifteen continuous years in the galleys[92].

In the next centuries, the principle of "moderamen inculpatae tutelae" came under attack. John Locke († 1704) thought that the right of self-defense was not limited. He made his most trenchant statement in his *An Essay Concerning the True Extent and End of Civil Government* first published in 1690[93].

This makes it lawful for a man to kill a thief who has not in the least hurt him, nor declared any design upon his life, any farther than by the use of force, so to get him in his power as to take away his money, or what he pleases, from him; because using force, where he has no right to get me into his power, let his pretence be what it will, I have no reason to suppose that he who would take away my liberty would not, when he had me in his power, take away everything else. And, therefore, it is lawful for me to treat him as one who has put himself into a state of war with me – i.e., kill him if I can; for to that hazard does he justly expose himself whoever introduces a state of war, and is aggressor in it.

Like Locke, John Milton († 1674) seems to recognize no limits on a person's rights when a she exercised her right of self-defense[94]:

> Although reason dictates a difference between a robber and an enemy, with an enemy the rights and laws of war must be observed; the robber has no rights from the law of war and no rights from the law of peace (i.e. those bestowed by the legal system) that would be recognized.

Although this seems to be the only place where Milton touched upon the right of self-defense, it has become a touchstone for those who wish to discard the principle of "moderamen inculpatae tutelae"[95]. Immanuel Kant († 1804) was also an early skeptic[96]:

[92] Ibid. 176: "Maxime quia erant tres birruarii qui ipsum subsequebantur cum dici non possit non fuisse penitus in dolo, fuit per magnam Curiam condemnatus ad remigandum in regiis triremibus per quinquequennium continuum, caeteri vero duo absoluti".

[93] (Boston: Edes and Gill, 1773) 11.

[94] John Milton, *De doctrina christiana* (Cambridge, Typis Academicis, 1825) 432: "Quamquam latronis atque hostis ratio dissimilis est: cum hoc jus belli saltem servandum; cum illo neque belli neque pacis jus ullum est quod servetur".

[95] David I. Caplan and Sue Wimmershoff-Caplan, 'Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments - and the

> The jurists believe that a person in a state of nature must control himself to conform to that which is proper for a defense, that is moderamen inculpatae tutelae. That means simply that without necessity I should not use the most extreme violence when a lesser degree of force can be employed. That is correct according to laws of ethics. According to strict right and justice, I can never be limited when someone threatens to kill me. According to natural law, I am not bound to use lesser force, and, therefore, moderamen inculpatae tutelae does not apply. But in civil society the principle is valid since the state can require that I have a duty to not injure other persons. If, however, my life is possibly but not certainly in danger the state cannot promulgate a law that requires that I exercise a limited defense since (1) the most severe punishments the state can render are not greater than the evil that I face. The law, therefore, cannot restrict my defense. Such a law would be absurd.

Kant was not a jurist. Perhaps it is unfair to criticize this hodgepodge of ideas that he put together about self-defense. To list his wobbles: No jurist ever thought that *Ius naturale* limited a person from exercising his right to defend himself. As we have seen "moderamen inculpatae tutelae" was a principle of Roman law that was attributed to the *Ius gentium*, i.e. positive law, not to the *Ius naturale*. The jurists did not connect "moderamen inculpatae tutelae" to *Ius naturale* or to the state of nature over the centuries. They also never argued this principle was based on ethical standards. Although he may not have been the first, that seems to have been Kant's central idea. To argue that the state and

Castle Privacy Doctrine in the Twenty-First Century', *University of Missouri Kansas City Law Review* 73 (2006) 1073-1164 at 1161.

[96] *Kant's gesammelte Schriften* (Berlin, Walter de Gruyter, 1979) vol. 27.2, p. 1374: "Die Juristen glauben, der Mensch müsse im statu naturali sich soweit mäßigen, als es eben zur Defension reicht: d.i. Moderamen inculpatae tutelae. Das bedeutet bloß, daß ich nicht ohne Noth die äußerste Violenz brauchen soll, wenn ein geringer Grad nöthig ist. Nach ethischen Gesetzen ist das richtig. Nachm jure stricto kann ich dadurch nie verbunden werden, wenn einer mir den Tod droht, ihm das anzuthun. Im jure naturae bin ich nicht verbunden, ein gelinderes Mittel zu brauchen, daher gilt hier moderamen inculpatae tutelae nicht. Aber im statu civili findts statt, denn der Staat kann von mir einen Erhaltungsbürgen fordern. Wenn aber mein Leben selbst wol möglich, aber ungewiß ist, so kann der Staat gar nicht das Gesetz geben, mich denn zu moderiren, denn (1) die größten Strafen, die der Staat geben kann, sind nicht größer als die Uebel, die ich gegenwärtig habe. Das Gesetz kann mich daher davon nicht abhalten. Ein solch Gesetz wäre absurd". Cf. B. Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution', *Law and Philosophy* 8 (1989) 151-200 at 187-188.

its jurisprudence cannot restrict a person's ability to defend himself may be true on the basis of higher principles or norms, but Kant's conviction ignored European jurisprudence. Kant's argument does have this in its favor: if Saint Isidore of Seville was right that self-defense is a natural right, a *ius naturale*, how can a norm that evolved out of positive law, "moderamen inculpatae tutelae," trump that absolute right?[97] Intentionality and proportionality are products of the human mind. They evolved from an ethos and in a jurisprudence that accepted another fundamental principle, the *bonum commune*, that limited rights by weighing them against a person's duty to recognize another person's right to remain alive, even when she were behaving badly.

Locke, Milton, and Kant did not drive "moderamen inculpatae tutelae" out of the early-modern courtroom. Mary Lindemann has given us a detailed account of the role the principle still played in a colorful criminal trial in eighteenth-century Hamburg[98]. On 18 October 1775 Anna Maria Romellini, a beautiful courtesan who adorned the Hamburg social scene was staying in a home owned by her lover Antonio de Sanpelayo, a Spanish consul to the independent city of Hamburg. Unexpectedly, an Italian adventurer, Joseph Visconti, arrived at Romellini's door and demanded that she and some of Santelayo's silver leave with him. He seems to have had a claim on her. She had lived with him and had consented to join him in a clandestine marriage[99]. However, whatever attachment she had once had to him no longer existed, and she refused to abandon Sanpelayo. A Prussian nobleman, Joseph baron von Kesslitz, and Sanpelayo came to her aid. Kesslitz had a sword, Sanpelayo a cane, and Visconti a knife. A brawl broke out. When it was over, Visconti was dead with 23 wounds; the coroners decided that two of them were certainty fatal[100]. Kesslitz was imprisoned, and his lawyer, Detenhof, argued self-defense. It was a tough sell, but Detenhof was well-acquainted with the jurisprudence of self-defense that we have reviewed in this essay. He cited our norm "Moderamen inculpatae tutelae" in his brief[101]. He also referred implicitly to Pope Clement V's decretal when he described Visconti as a "mad dog." As we have seen Clement's decretal

[97] See Mordechai Kremnitzer and Klalid Ghamayim, 'Proportionality and the Aggressor's Culpabiblity in Self-Defense', *Tulsa Law Review* 39 (2004) 875-899 at 895-896, who discuss Kant and Hegel on self-defense.

[98] Mary Lindemann, *Laisons dangereuses: Sex, Law and Diplomacy in the Age of Frederick the Great* (Baltimore, Johns Hopkins University Press, 2006) in a piece of micro-history devotes her book to the trial.

[99] Ibid. 34.

[100] Ibid. Chapters one and two.

[101] Ibid. 31 and 50.

exonerated any use of force against madmen[102]. The Prussian *Allgemeine Landrecht* decreed that a person could wage a defense "through a means appropriate to the situation"[103]. Other legal voices were heard. Johann Klefeker, a prominent jurist in Hamburg, had insisted in his treatise on criminal law that those who were attacked had a duty to retreat. Detenhof argued that in spite of the unequal weapons and numbers, Visconti's skill with a knife compensated for the power of Kesslitz' sword[104]. After reviewing the evidence, the Hamburg Senate decided that the evidence was strong enough that Kesslitz should stand trial for murder. The indictment for murder described Kesslitz' wounds as being slight in comparison to Visconti's twenty-three[105]. "Moderamen inculpatae tutelae" may have been under siege in philosophical circles but not in the *Ius commune* or in the Hamburg's courts.

Today, most legal systems, if not all, have the principle of "moderamen inculpatae tutelae" in their jurisprudence of self-defense, if not explicitly, then implicitly. The term is still present in every American and foreign law dictionary. However, especially in the United States, the principle is being questioned by those who want no limitations placed on the ownership of guns and on the right to use them. Locke, Kant, Milton, and others are being called upon to support the idea that person's right to defend herself or her property cannot be curtailed[106]. The authors of the American Model Penal Code, Herbert Wechsler, Louis Schwartz, and Sanford Kadish are pilloried for their liberal agendas because they limited a person's right to self-defense[107]. Intentionality and proportionality, however, may not be a part of the legal, moral, and ethical universes of state legislators who have largely rejected these principles, but these old principles that had their birth in a maxim of ancient Roman will probably survive this latest assault on their validity.

[102] Ibid. 33.
[103] Ibid. 51-52.
[104] Ibid. 52.
[105] Ibid. 56-58.
[106] See the essay by Caplan and Wimmershoff-Caplan, 'Postmodernism and the Model Penal Code', an essay that is riddled with many mistakes, especially when reporting on historical common law texts, e.g. Bracton is cleric and is an "exponent of canon law" (p. 1135); lamentably, they write "churchly (sic) standards (i.e proportionality and intentionality) were wrested out of their original context… and found their way into many criminal law treaties… watering down the right to home (sic) defense (ibid.)". This essay is the best argument I have seen in a long time for law reviews to vet their submissions with professional peer reviewing.
[107] Ibid. 1136-1137 and passim. The passages in the *Model Penal Code: Proposed Final Draft* (Philadelphia 1961) that attracted their attention were at § 3.04.

Summary: The term "moderamen inculpatae tutelae" first appeared in an imperial constitution of the late third century. It described what action was permitted to persons who possessed property justly. There was no interpretation of the term or discussion of how a defense might be limited until the twelfth century, when the jurists attempted to define the boundaries of a justified defense of property and also what actions persons could take in defending themselves. The jurisprudence of a justified defense they created has remained the foundation of self-defense until the present day.

Sommario: L'espressione "moderamen inculpatae tutelae" apparve per la prima volta in una costituzione imperiale del tardo secolo III. Essa descriveva quale azione era consentita alle persone a tutela dei beni posseduti conformemente al diritto. L'espressione non fu oggetto di interpretazione, e non si discusse su come la difesa potesse essere limitata, fino al secolo XII, allorché i giuristi tentarono di definire i confini di una legittima difesa della proprietà e anche quali azioni le persone potessero intraprendere per difendere se stesse. La dottrina della legitima difesa, che essi elaborarono, è rimasta fino ai giorni nostri a fondamento del principio di autodifesa.

Key Words: Self-defense; *moderamen inculpatae tutelae*; criminal procedure; law of war; malfeasance; vengeance; *ius naturale*; *ius gentium*; Huguccio; Prospero Farinacci.

Parole chiave: autodifesa; *moderamen inculpatae tutelae*; procedura criminale; diritto di guerra; atto illecito; vendetta; *ius naturale*; *ius gentium*; Uguccio; Prospero Farinacci.