2014

Moderamen Inculpatae Tutelae: The Jurisprudence of a Justifiable Defense

Kenneth Pennington
The Catholic University of America, Columbus School of Law

Follow this and additional works at: https://scholarship.law.edu/scholar

Part of the Law Commons, and the Medieval Studies Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
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:

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. Two other passages in the Digest treat the issue of defense of property but not a legitimate self-defense. These texts also do not insert the concept of a

1Justinian’s Codex 8.4.1, under the title “Unde vi, recte possidenti:” “Recte possidenti ad defendendam possessionem quam sine vitio tenebat, inculpatae tutelae moderatone 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.
proportional or measured defense into the discussion of norms that might bind a person who defended himself.

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. 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. A bit later Paul declared that “all laws and all rights (legal systems) permit persons to repel force with force.” 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: 

\(<"Ulpian"> \text{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:\ \text{<e.g.>}\ such\ as\ piety\ towards\ God,}

\(4\) 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 utuntut. 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.”
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*: 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*. The jurist quickly focused on these texts in the standard *libri legales* when they discussed the right of self-

---

8 *Isidori hispalensis episcopi Etymologiariae sive originum libri XX*, ed. W.M. Lindsay (2 vols. Oxford: Oxford University Press, 1911) 5.4: “Quid sit ius 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 femine coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae ccelo, terra marique capiuntur; item deposita vel commendata pecuniae restitutio, violenti 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.

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.\textsuperscript{10} He showed that the canonists accepted Isidore’s claim that the right was established in natural law, which for them was the equivalent of divine law.\textsuperscript{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.\textsuperscript{12}


\textsuperscript{12} \textit{Error! Main Document Only}.Stephen of Tournai, \textit{Die Summa über das Decretum Gratiani}, ed. Johann Friedrich von Schulte (Giessen: Emil Roth,
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.

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

---

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. Vtim enim vi repellere omnes leges et omnia iura permittunt cum moderatione tamen inculpatae tutelae.

13 Kuttner, Error! Main Document Only. 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 propulsandum: Requiritur ergo quod defendendo repercutiat non ulciscendo . . . et ut cum moderamine se defendat, ut extra iii. de resitut. Cum causam, in fine . . . si quis tamen moderamen excedit et non ex proposito, non tenetur, ut ff. ad leg. Aquil. Si ex plagiis § 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.
of Bailia (ca. 1170)\textsuperscript{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.\textsuperscript{16}

In the first title of the Digest it is held that to resist force and injury is established by the \textit{Ius gentium}. If it were established by the \textit{Ius gentium} and not by \textit{Ius naturale}, then the \textit{Ius gentium} would be different from the \textit{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 \textit{Ius naturale} because nature teaches all animals to respond to force; brutish animals resist force. The second indeed is established by the \textit{Ius gentium} and applies only to human beings, because only humans are said to suffer injury and to inflict injury.

Hec enim constitutio, scilicet quod quisque ob tutelam sui corporis fecerit, iure fecisse dicitur.”


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. He was an early jurist to discuss the meaning of the phrase:

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.

---


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. He was the first jurist to write an extensive *Summa* on Justinian’s *Codex*. 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. He broached the question of time:

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

---


20 He completed Rogerius’ incomplete *Summa*.


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 adulteris I. Quod ait [Dig. 48.5.24(23)]. Permissum enim est unicumque inuiiram repellere non vindicare.”
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. 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.

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. 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. He began by noting that self-defense is governed by

---


24 Error! Main Document Only. Huguccio, Summa, ed. Přerovský to D.1 c.7, s.v. violentie, p. 40-45 at 40: “Est etiam de hoc iudicio rationis huic 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 passage is a piece of evidence for my remarks about the edition in n.20. Přerovský’s edition reads: “Est etiam hoc de judicio rationis. Hic 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”
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.\textsuperscript{25} Reason, emphasized Huguccio, was crucial in determining the 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.”\textsuperscript{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

---


\textsuperscript{26} Huguccio, ed. Přerovský to D.1 c.7, s.v. *violentie*, p. 41: “Set intelligendum . . . ut enim de iure fiat repulsio inurie 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.
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.

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

²⁷ Ibid. p. 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 alter evadere non potest. Nam si alter evadere potest, non licet ei vi repellere impune.”
reconciled with the law of self-defense? As the Ordinary Gloss to the Bible declared, who did not leave vengeance to the Lord, will sin mortally. 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. 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. 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 of a judge. Otherwise a person should suffer death

---


30 Ibid. p.43: “Super quem locum dicit expositor, ‘qui hoc non facit Deum contemplit, id est qui non servat vindictam Deo set ipse eam accipit, Deum, id est preceptum Dei contemplit’; ergo peccat mortaliter.”

31 Ibid. “Qualiter ergo est de iure naturali repulsio violentie per vim? Numquid peccatum est de iure naturali? Absit.”

32 Ibid. p. 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 alter 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),” *Dizionario dei giuristi italiani (XI-XX secolo)*, edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti (2 vols.; Bologna: Mulino, 2013) 1.1013-1014, who unfortunately refers to Huguccio as “da Pisa.”
rather than consent to the evil of injuring another person. 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. 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.

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. 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

---

33 Ibid. p.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.”


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. Huguccio’s combining of Roman and Biblical precepts to establish a legal norm was typical of twelfth-century jurists.

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.” 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. Under the influence of the *Ius commune* and

---

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 tutele, et non contra preceptum Apostoli scilicet quo dictur “Non defendentes,” etc. (Romans 12:19).”


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
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.\footnote{F.J.M. Feldbrugge, “Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue”, \textit{American Journal of Comparative Law}, 14 (1966): pp. 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-to-rescue provision.” He seems unaware of the deep historical roots of the idea in the ethical and moral world of the \textit{Ius commune}.}

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?\footnote{Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. \textit{consilium et auxilium}: “Quid ergo prodest iuramentum iussalli domino?”} 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 \textit{by the oath of fidelity} more willingly and more specially—just as in the conciliar canon from the Council of Toledo in Gratian’s \textit{Decretum}. That canon stated that the breaking of promises is to be feared.”\footnote{Ibid.: “Dico (quod \textit{add. L}) propensius et specialius ei tenetur et ‘Solet plus timeri etc.’ (D.23 c.6).”} Huguccio quoted a phrase from the canon and expected that his readers would supply the complete quotation: “<the breaking of> specific promises is 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. Stewart, “How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability”, \textit{American Journal of Criminal Law}, 25 (1998): pp. 385–435, Natalie Perrin-Smith, “My Brother’s Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes”, \textit{California Western Law Review}, 36 (1999): pp. 135–155 and Marcia M. Ziegler, “Nonfeasance and the Duty to Assist: The American Seinfeld Syndrome”, \textit{Dickinson Law Review}, 104 (2000): pp. 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”, \textit{Vanderbilt Law Review}, 47 (1994): pp. 673–755.\footnote{Ibid.: “Dico (quod \textit{add. L}) propensius et specialius ei tenetur et ‘Solet plus timeri etc.’ (D.23 c.6).”}
more to be feared than <the breaking of> of general vows.”  

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.”

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. This principle 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.

What, however, if the lord moved against his son or his father?

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 ubicunque 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 contrario.” The quotation that Tancred took from Justinian’s Code is from a statute of Justinian in 532 AD 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 obedienti nisi iustum esset bellum. Item non tenetur ei contra se.”
Huguccio’s answer relied on juridical distinctions made for the treatment of family, kin, and vassals of excommunicates. 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. 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.

“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. 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 embedded in canonical jurisprudence.

---


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, *Registers Patrologia latina* 216.64-66, Letter 12.59, included in canon law at 4 Comp. 5.6.2 (X 5.12.18).

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 injuriam propulsandam.” Thomas Aquinas used this decretal to support his arguments about self-defense at *Summa theologica* 2.2 q.64 art.7: “Et ideo si
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.” This decretal replaced Gratian’s excerpt from Isidore of Seville as the standard place to discuss self-defense in canon law.

The civilians remained engaged in the discussion of self-defense. Azo was the leading teacher of Roman law in the early thirteenth century. 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.” A blameless defense was either when a person defended himself from an unarmed person without arms or when his arms matched those of

---

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.
56 Azo, *Summa codicis* (Venice 1489) 8.4 (unfoliated): “Sed quem quis vult injuste expellere potest resistere vim inferenti et propulsare vim illatam ad defendendam possessionem cum moderamine tantum inculpate tutele, idest defensionis.”
his attacker. What if, however, a weaker person was attacked by a stronger? That tipped the balance of justice:

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 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.

57 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 weapon that was used in executions).”


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.\(^60\) Cinus wrote a long analysis of the legitimate 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.”\(^61\) After a word by word analysis of the statute, Cinus turned to the issue of when property could be defended justly.\(^62\) 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.\(^63\) Dinus de Mugello, wrote Cinus, objected.\(^64\) Force was not permissible.

---


\(^{61}\) *Cod. 8.4.*

\(^{62}\) Cinus de Pistoia, *Lectura super Codice* (Venice: 1493) to Cod. 8.4, fol. 335vb-336rb.

\(^{63}\) 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. li. [Dig. 43.17(16).1].”

because Dinus knew of no law that sanctioned it in that situation. Implicitly Cinus and his teacher Dinus thought that the courts, not arms, were the proper forum for the dispossessed to vindicate their rights. 65

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. 66 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. 67

65 Cinus de Pistoia, Lectura ibidem: “Respondent quidam quod ex quod nolo etc. quod non approbat Dymus ibidem quia non reperitur lege aliqua cautum quod clandestinum possessorum 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.”

66 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.”

67 Ibid: “Circa primum dubitatur quid si quidam robustus homo et fortis contra me pugno elevato veniret cui si codem 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. 1. ultima [[Cod. 7.51.6] et ff. de arbit. 1. 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. eecles. 1. Sancimus in fine [Cod. 1.2.21-22]. Solutio in hoc articulo Petri sic dicit aut tractatur de violentia repellenda circa corpus aut tractatur de violentia repellenda circa res. Primo casu licet propulsare inuiri cum armis et quandocunque si aliter non possum defensio parari quia non potest alias et per remedium iudicis talis inuiri repara, ut supra de appell. 1. Sic quis [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. 1. Furem [Dig. 48.8.9]. Secundo casu quando queritur de propulsatione inuiri circa res, tunc refert aut inuiri vel violentia que infertur mihi circa res posset reparari per viam iudicii aut non. Si posset per viam iudicii reparari tunc
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, Iacrobos de Ravannis and Petrus de Belleperche, were agreed that a distinction must be made between violence to persons or things. 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. Cinus also pointed out that even if a person repelled force non licet mihi propulsare iniuriam quocumque modo, sed cum moderamine in qualitate armorum non factorum.”

---


69 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] aggressiois ex intervallo duntamen 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. Ut 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? Responddeo 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 intelligentur 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].”
immediately, he could still be held to have acted with fault if he
could have avoided the confrontation.\footnote{Ibid. “Tertium moderamen est equivalentia actui volento, 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].”}

The jurist very early on connected a legitimate defense of
personal property and self-defense to their theories of what
constituted a just war.\footnote{Russell, \textit{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 de Legnano was the first jurist
to incorporate the detailed commentaries of the jurists into his
treatise on the laws of war. Johannes was particularly dependent
on Cinus’ commentary on the right of an individual to defend
himself:\footnote{Johannes de Lignano, \textit{De bello}, trans. and edited Thomas Erskine Holland
(The Classics of International Law; Oxford: Oxford University Press, 1917) 150: “Sexto queritur, 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
quire 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.”}

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:73 “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.74 At the end of his treatise, he linked “moderamen inculpatae tutelae” to the norms of waging war.75 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.76

---

73 Clem. 5.4.1: “Si furiosus, aut infans seu dormiens hominem mutilet vel occidat: nullam ex hoc irregularitatem incurrit. Et idem de illo censorus, qui mortem non valens, suum occidit vel mutiati 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.
74 Johannes de Legnano, De bello 149: “numquid vim vi repellendo circa res suas, si contingat vim repellentem occidere, vel mutilare, vim inferentem, evitet 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.”
75 Ibid. 151-152: “Qualiter liceat hoc particolare bellum indicere? . . . Et huic respondet textus quod licet cum moderamine inculpatae tutelae.”
Skipping forward almost three 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. 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 time. He began his most important work, *Praxis et theorica criminalis*, in 1581 and put the finishing touches on it by 1601. 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: 80

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.

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. 81 Farinacci particularly did not like to detailed analysis of “incontinenti,” or what sort of a

---

80 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 vulerit dicere moderamen fuisset 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.”

81 Ibid. 336: “Et generaliter ut iudicis arbitrio remittatur an et quando sit servatum moderamen inculpatae tutelae, qualsque et quantus sit excessus secundum Baldum . . . ubi reddit rationem, quia scilicet de factis hominum non potest dari propter nimian factorum multiplicitatem, certa regula.”
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’.”82 To prove his point he 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.83

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.84 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.85 Grammatico cited similar cases from Perugia and Pisa. Other jurists, particularly the

---

82 Ibid. 337-338: “Esset enim aperire viam hominibus ulciscendi se propria auctoritate inimicosque suos occidenti, ac postea ad evadendum mortem quam alteri intulerunt, dicere ‘fui provocatus, fui iniuriatum, fuique offensus.’”

83 Ibid. 337: “testatur ita fuisse servatum in illo Neapolitano apud eum Consilio ut scilicet sic occidens non poena ordinaria puniatur sed ad triremes condemnetur.”


85 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 resistentiam, quam ille faciebat.”
Neapolitan criminal lawyer, Paridis de Puteo, agreed. Grammatico, however, was not swayed by the arguments 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.86

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 1690.87

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 pretense 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:88

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.

86 Ibid. 176: “Maxime quia erant tres birruarii qui ipsum subsequebantur cum dici non possit nonuisse penitus in dolo, fuit per magnum Curiam condemnatus ad remigandum in regis triumibus per quinquevallium continum, caeteri vero duo absuliti.”
87 (Boston: Edes and Gill, 1773) 11.
88 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.”
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.” Immanuel Kant († 1804) was also an early skeptic:

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 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?91 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.92 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. 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. 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. 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 exonerated any use of force against madmen. The Prussian Allgemeine Landrecht decreed that a person could wage a defense “through a means appropriate to the situation.” 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. 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. “Moderamen inculpatae tutelae” may have been

93 Ibid. 34.
94 Ibid. Chapters one and two.
95 Ibid. 31 and 50.
96 Ibid. 33.
97 Ibid. 51-52.
98 Ibid. 52.
99 Ibid. 56-58.
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.\textsuperscript{100} 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.\textsuperscript{101} 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 Roman law principles will probably survive this latest assault on their validity.

\textsuperscript{100} 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. proportionally 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.

\textsuperscript{101} Ibid. 1136-1137 and passim.