The Individualization of Crime in Medieval Canon Law

Virpi Mäkinen and
Heikki Pihlajamäki

In *The Mourning of Christ* (c. 1305, fresco at Cappella dell'Arena, Padua, Italy), Giotto di Bondone (c. 1267-1337) depicts the Virgin Mary embracing Christ for the last time after he has been taken down from the cross. Whereas his predecessors in the devotional Byzantine tradition concentrated on flat, still figures, Giotto emphasizes their humanity and individuality. The grief on the Virgin's face is touching and convincing but in a slightly different way than the sorrow experienced by St. John or the other accompanying figures. Even the ten angels following the scene seem to grieve for the Redeemer in their own personal way. The individuality of Giotto's figures may not seem much if we compare it with the seventeenth-century Flemish masters. Giotto's Virgin and her company still show a restraint in their grief which does not seem entirely natural. In late medieval art, however, Giotto's approach was fresh and new, reflecting a trend toward individualization which was not peculiar merely to art but was taking over many other areas of late medieval life as well. Philosophy, theology, and law—the medieval *scientiae*—were all putting increasing emphasis on the rights and responsibilities of the individual.

Nor does this trend leave criminal law and the law of evidence untouched. The medieval development of law was just as revolutionary as the development of other branches of knowledge. Starting in early twelfth-century Bologna, the *Corpus Iuris Civilis* became an object of systematic academic research and teaching for the first time in history. The development of canon law was perhaps even more striking. Positive, enacted law first became not only an object of academic studies but also an instrument of social engineering in the domain of church law. The hierarchical structure of the worldwide Catholic Church was built and run in conjunction with positive, enacted legislation.[1]

[1] See H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, 1983).

The development of criminal law was just as innovative as the changes that took place in other branches of law, with canon lawyers taking the lead. Aspiring for universal power and competing for it with secular rulers, the Church was in need of an efficient system to control disobedient priests and monks and suppress heretical movements.[2] The traditional system of criminal control was clearly not sufficient. Canon law, making use of the contemporary trend toward increased individualization in theology, philosophy, and Roman law, was developed to meet the church's need to master the situation.

One of the most important and influential developments in thirteenth-century criminal law concerned the individual's criminal intention and responsibility. Before the change criminal responsibility was mainly based on the consequences of a crime. The canon lawyers began to determine different modes of subjective responsibility. In the law of criminal evidence the individual was also shifted from the margins to the center of attention. Earlier criminal evidence had been produced from sources external to the individuality of the defendant, such as oaths, compurgators, and ordeals. In the thirteenth century and with the development of the so-called statutory or legal theory of proof, increasing attention was paid to the stories of both the defendant (in the form of confessions) and the witnesses. The development of criminal law and criminal procedure in the thirteenth and fourteenth centuries can be understood in the context of the simultaneous trend toward individualization that took place in moral philosophy and theology as well as in canon law.[3] These connections are not the only way of understanding the modernization of canon criminal law, for the prevailing view sees the transformation in conjunction with the twelfth-century hierarchization and centralization of church bureaucracy. The particular form that the criminal law and law of proof assumed in these changes did not arise out of a vacuum but, however, has to be understood in relation to the neighboring fields of thought.

The Human Will and the Individual in Medieval Moral Philosophy

The *primus motor* of medieval philosophy, Aristotelianism, encountered its first competing theories in the thirteenth century. One of the most far-reaching ideas concerning human psychology and behavior, developed by the Franciscans, was the voluntarist conception of the will as a source of free choice and of an individual act. The new voluntarist ideas on the human being as an active and rights-bearing individual had important consequences not only in

[2] See G. Leff, *Heresy in the Middle Ages: The Relation of Heterodoxy to Dissent c. 1250–c. 1450*, I (New York, 1967); M. D. Lambert, *Medieval Heresy: Popular Movements from the Gregorian Reform to the Reformation* (Oxford,1992).

[3] See D. Willoweit (ed.), *Die Entstehung des öffentlichen Strafrechts: Bestandsaufnahme eines europäischen Forschungsproblems* (Vienna, 1999).

moral philosophy but also in other fields of thought. The philosophical discussion both of the individual's moral responsibility and rights concerning himself and his actions also influenced the individualization of criminal law and the law of evidence.

Theologians such as John Buridan (c. 1295-c.1358) and John Duns Scotus (c.1265-1308) criticized the Thomist-rationalist theory of acts as being opposed to the empirical notions of human behavior. According to the Franciscans, it was more than usual that a human being fails to do something by voluntary act and not by weakness of the will.[4] Thus, according to Scotus, the will acts freely because it can will or not will, and there is no other efficient reason for its willing than the individual will itself. The willing act presupposes information given by the intellect, but unlike the intellect, the will has power to determine itself and thus also to express its own individual essence. The will also chooses each goal afresh in each individual act.[5] For Scotus, the individual will did not have the moral right freely to express its individual essence, since moral law restricts freedom of the will. William Ockham (1285-1347) later developed this idea in his theory of ethics which saw moral values as based on obligations that had its foundation in divine command, limited only by the bounds of logical possibility and known by each individual in his conscience.[6]

The new voluntarist ideas influenced the doctrine of individual natural rights. Within the Thomist-rationalist tradition natural law was mainly seen as an objectively given order of nature, and natural right was defined as a just portion which is due between people rather than something characteristic of the person himself. This objectively understood sense of right was transmitted to medieval discussion through the study of Roman law and the recovery of Aristotelian *Ethics* and *Politics*, for example, in the texts of Thomas Aquinas.[7] Since the Franciscans saw the will as the center of the subjective personality, they also understood the notion of right merely as a faculty of an individual belonging to the person himself.[8] The individual's right to sustenance and prop-

[4] See R. Saarinen, *Weakness of the Will in Medieval Thought* (Leiden, 1994).

[5] See E. Stadter, *Psychologie und Metaphysik der menschlichen Freiheit: Die ideengeschichtliche Entwicklung zwischen Bonaventura und Duns Scotus* (Munich, 1971); B. M. Bonansea, "Duns Scotus' Voluntarism," *John Duns Scotus 1265–1965*, eds. J. K. Ryan and B. M. Bonansea (Washington, 1965), 83-121.

[6] See T. M. Holopainen, *William Ockham's Theory of the Foundations of Ethics* (Helsinki, 1991).

[7] Cf. Aristotle, *Nichomachean Ethics*, Book V; and P. Aubenque, "Das aristotelische Modell der Gerechtigkeit und die Grenzen seiner Anwendbarkeit," *Die Gegenwart der Gerechtigkeit. Diskurse zwischen Recht, praktischer Philosophie und Politik*, eds. C. Demmerling and T. Rentsch (Berlin, 1995), 17-28.

[8] See P. Grossi, "*Usus facti:* La nozione di proprietà nella inaugurazione dell'età nuova," *Una economica politica nel Medioevo*, ed. O. Capitani (Bologna, 1987), 1-58; R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), especially see 25-28. For the criticism of Grossi's and Tuck's studies, see A. S. Brett, *Liberty, Right and Nature. Individual*

erty was one of the central themes among late thirteenth-century theologians.[9] Nevertheless, the late medieval achievement of rights was a melding of the classical and Christian heritage into both the rationalist and the voluntarist philosophies rather than simply a phenomenon of the voluntarist tradition.[10] A brief glance at the *Quodlibeta* of the secular theologian Henry of Ghent (c.1217-93), more particularly at the discussion of the moral rights and duties of a condemned criminal, will show that the key concepts of subjective rights theories had medieval and canonistic origins and that subjective rights were understood as independent licenses for action wherein the individual and his choice were sovereign.[11]

In his *Quodlibet IX*, question twenty-six (probably written in 1289), Henry asks "whether one condemned to death can licitly flee."[12] He responds to this question of the dominion of self, taking two interesting notions relevant to our subject. First, he explains that several people could have power (*potestas*) over the same thing in different ways. For example, one could acquire the property and another one use it.[13] Second, Henry elaborates different kinds of rights that the judge and the condemned person possess in the body of the criminal: the judge has the power of capturing, holding, and executing the condemned person, whereas the criminal has the power of using his body so as to preserve his life so long as he does not injure another.[14] Furthermore, Henry describes the power of the criminal over his body as being equitable (*fas*), licit (*licitum*), right (*ius*), and necessary (*necessitas*) because natural law (*ius naturale*) permitted it. For Henry, to have power over the same thing by natural equity (*fas*) was to use a thing belonging to another, provided that one does not cause any

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Rights in Later Scholastic Thought (Cambridge, 1997), 5, 10-11, and B. Tierney, "Tuck on Rights: Some Medieval Problems," *History of Political Thought*, 4 (1983), 429-41.

[9] See V. Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Leuven, 2001).

[10] See Brett, *Liberty*.

[11] Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, 1997), 83-89.

[12] Henry of Ghent, *Quodlibet IX*, ed. R. Macken, *Opera omnia* (Leuven, 1983), XIII, q. 26, 307-10.

[13] Henry of Ghent, *Quodlibet IX*, 307: "Dicendum quod plures habere potestatem super eandem rem diversis respectibus non est inconveniens, ut quod unus habeat in eam proprietam et alius usum...."

[14] Henry of Ghent, *Quodl. IX*, 308: "Dico ergo ad propositum quod super corpus damnati ad mortem potestatem habet iudex saecularis capiendi, detinendi et occidendi. Habet autem et imprimet damnatus quoad animam potestatem super idem corpus utendi eo ad vitae suae in corpore custodiam, in qua consistit eius perfectio sine iniuria alterius." Tierney notes that Henry's argument is rather similar to Samuel Pufendorf's in his *De jure naturae et gentium libri octo* (Amsterdam, 1688), 8.3.1., 79: "Competit quoque summo imperio civili potestas in corpus ac vitam, ut et bona civium ex causa delicti; quae presse solet vocari jus vitae et necis." Reference from Tierney, *The Idea*, 81-82.

damage to the thing or disadvantage to the owner.[15] To have power over the same thing licitly or lawfully (*licitum*) was to have the permission of the law. One can thus use another's thing even if causing some damage. It was permissible, for example, to eat grapes in another's field but not to take them away.[16] To have power by equity (*aequitas*) bestows a claim on something.[17] To have power over the same thing by occasion or necessity (*necessitas*) was to use a thing belonging to another.[18] These terms are organized so that each term has a more restricted scope than that which precedes it.

Henry's conclusion for his *Quodlibet IX*, question twenty-six, is that the criminal had a right to preserve his life and acquire the necessities of life that override the right of the judge to imprison and kill the condemned. The right to preserve one's life is greater because everyone (including the judge in this case) is compelled by the necessity.[19] The principle of extreme necessity is found in the *Ordinary Gloss* to the *Decretum* (D. 5 c. 26), which states that when a person is starving, necessity excuses theft.[20] According to the *Gloss*, the criminal had both the power (*potestas*) and the right (*ius*) to steal food since in a time of extreme need all things become common.[21] In this particular question Henry explicitly states that self-preservation is a natural right but only in the case of extreme necessity. Later in the same question Henry asserts that the condemned also had a property right (*proprietas*) over his own body, whereas the judge had only the right to use (*ius utendi*) the criminal's body (which gives him the power to capture, imprison, and kill the condemned). Moreover, Henry maintains that one was obliged to use the right over one's body in order to preserve one's life but without injuring anyone.[22] For this particular idea Henry also emphasizes an individual subjective right. His way of using *proprietas* strictly understood as a property right rather than any broader notion of *do-*

[15] *Quodl. IX*, q. 26, 307: "Fas est acquitas naturalis, qua quisque potest uti re alterius absque damno et incommodo illius. Ut enim divitur Decretorum dist. I, par. 'Omnes leges,' 'transire per agrum alienum fas est,' id est aequum, cum subest causa et innoxius est transitus." For the reference to canon law, see *Ordinary Gloss* to D. 1 c. 1.

[16] Henry of Ghent, *Quodl. IX*, q. 26, 308: "Licitum est quod a lege indultum est, quo quis potest uti re aliena in aliquale damnum eius: in veteri enim lege licitum erat comedere uvas in agro alterius, sed non exportare, et conterere spicas, sed non falcem immittere."

[17] *Quodl. IX*, 308: "Ius est acquitas quae dat actionem rem vindicandi." Cf. William of Ockham, *Opera omnia I*, eds. R. F. Bennet and J. Sikes (Manchester, 1940), c. 2, 310, and M. Kriechbaum, *Actio, ius und dominium in den Rechtslehren des 13. und 14. Jahrhunderts* (Ebelsbach, 1996), 28-62.

[18] Henry of Ghent, *Quodl. IX*, q. 26, 308: "Necessitas est opportunitas utendi re aliena...."

[19] *Op. cit.*, 308-9. See also Tierney, *The Idea*, 86.

[20] Henry of Ghent, *Quodl. IX*, q. 26, 308; see Tierney, "The Idea," 43-77, and S. G. Swanson, "The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity," *History of Political Thought*, 18 (1997), 399-456.

[21] Henry of Ghent, *Quodl. IX*, q. 26, 308.

[22] *Op. cit.*, 309.

minium stresses his individualistic treatment of the notion of right in question twenty-six.[23]

Henry of Ghent's whole argument concerning the moral rights and duties of a condemned criminal was based on the elucidation of the individual rights of each party.[24] He started from the canonists' definition, creating a mode of rights language that was neither Thomist, Ockhamist, nor even canonist but similar to the language of early modern rights theories and containing many of the same elements of discourse, such as those of Samuel Pufendorf.[25] This example shows that the language of subjective natural rights was a central and characteristic theme of Western moral philosophical and political as well as legal discourse in the twelfth and thirteenth centuries.

Not all medievalists share the view discussed above. Janet Coleman, for instance, claims that what are presented above as rights are not really rights but obligations.[26] Recently, however, a similar rights discourse has been applied to other fields of law as well, namely, the medieval canon law of crime and criminal procedure. Kenneth Pennington argues that the right to defend oneself in orderly criminal proceedings (*ordo iudiciarius*) emerges in twelfth-century canon law as a natural right. Lorenz Schulz shows how thirteenth-century canonists systematically formulated the presumption of innocence (*praesumptio innocentiae*) as a subjective right.[27] These observations of Pennington and Schulz seem to reinforce the observations made above. It seems that the idea of subjective rights was advancing in many different areas of law in the high Middle Ages. Other developments in high medieval law also support the argument on subjective rights. Not only were certain legal institutions increasingly seen from the point of view of subjective rights, but as far as criminal law and the law of evidence were concerned, the focus was turning towards the inner workings of the individual's mind.

The Transformation of Criminal Law: The Turn Towards the Individual's Mind

The two centuries that followed the beginning of law taught at Bologna around 1100 brought with them a transformation in the way crime was under-

[23] See Tierney, *The Idea*, 86-87.

[24] See *Quodlibet XII*, eds. M. de Wulf, A. Peltzer, J. Hoffmans, and O. Lottin, *Les Quodlibets de Godefroid de Fontaines*, q. 19, 139-55 and *Quodlibet VIII*, q. 11, 102-25.

[25] Tierney, *The Idea*, 87.

[26] J. Coleman, "Are There Any Individual 'Rights' for Imperfect Individuals as Self-Lovers in Political Communities or Are There Only Duties?," in *Transformations in Medieval and Early Modern Rights Discourse*, eds. P. Korkman and V. Mäkinen (manuscript, forthcoming).

[27] K. Pennington, "Due Process, Community, and the Prince in the Evolution of the *Ordo iudiciarius*," *Revista internazionale di diritto commune*, 9 (1998), 9-47; Lorenz Schulz, "Die praesumptio innocentiae—Verdacht und Vermutung der Unschuld," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte CXIX, Germanistische Abteilung* (2002), 193-218.

stood. This transformation was mainly the work of lawyers specializing in ecclesiastical law.[28] According to the modern view, criminal liability consists of a set of general prerequisites (*allgemeine Verbrechenslehre, Strafbarkeitsvoraussetzungen*) such as the criminal deed (*Tatbestandsmässigkeit)*, guilt (*Schuld*), and the absence of a valid defense (*Rechtswidrigkeit*).[29] An older view divided the elements of criminal liability into objective and subjective components, whereas most criminal law theorists now see objective and subjective elements in criminal deeds, guilt, and the defenses. It was, however, the medieval canonists who originally brought the subjective elements into the discussion.

The emergence of canon criminal law meant that the Church separated some secular crimes under its own jurisdiction and its own newly-established judicial system. To do this, sin and crime had to be conceptually distinguished from each other. Before the late medieval transformation of canon law, sin and crime were not systematically distinguished. When the systematic distinction was finished, all crimes continued being considered as sins but not vice versa. The non-criminal sins were a matter of inner forum (*forum internum*), the sacrament of confession. The outer forum (*forum externum*) was the ecclesiastical court's responsibility for determining punishment for crimes against Canon law, "criminal sins," on earth. According to Peter Lombard (c. 1100–1160), there was no criminal "sin if it is not preceded by prohibition." The roots of the legality principle (*nullum crimen, nulla poena sine lege*) have sometimes been seen here, although the principle itself did not become a general rule until the nineteenth century. In fact the Church law followed almost the contrary principle that "no crime is to be left unpunished" (*ne crimina remaneant impunita*).

Peter Abelard (d. 1142) laid the theoretical basis for the distinction between sin and crime.[30] In the group of deadly or grave sins (*peccata damnabilia et graviora*) Abelard defines those which were criminal: "Some damnable sins are said to be criminal and are capable of making a person infamous or criminous if they come to the hearing of other people, but some are not in the least." Moreover, criminal sins "blot a man with the mole of a great fault and greatly detract his reputation; such are consent perjury, murder [and] adultery." According to Abelard, these criminal sins unlike, for instance, vanity, "greatly scandalize the Church."[31] Thus in Abelard a sin was also a canon law crime under the following circumstances. First, the sin had to be a grave one. Here

[28] See A. Winroth, *The Making of Gratian's Decretum* (New York, 2000).

[29] See e.g., C. Roxin, *Strafrecht: Allgemeiner Teil, Band I: Grundlagen, Aufbau der Verbrechenslehre* (Munich, 1997), 149; and J. Smith and S. Hogan, *Criminal Law* (London, 1992), 33.

[30] Gregory the Great, *Moralia in Job*, cited by Paolo Prodi, *Eine Geschichte der Gerechtigkeit: Vom Rechts Gottes zum modernen Rechtsstaat* (Munich, 2003), 36-37.

[31] D. E. Luscombe (ed.), *Peter Abelard's Ethics* (Oxford, 1971), 71.

the distinction was made between deadly sins, such as greed, and venial, and forgivable sins.[32] Only deadly sins could form the basis of a canon law crime, and even then only if the crime was grave enough. Second, a criminal deed also had to be perceivable by senses, since the central idea here was that God judged bad thoughts only in the celestial, or as Abelard put it, the inner forum. It was thought that only God was able to look into the heart and the soul of the human being. Thence derived the principle that the Church was not to base its judgments on things not perceivable (*de occultis ecclesia non iudicat*). A human court was to draw its conclusions on the basis of outer signs alone. This had consequences for the law of proof to which we shall return later.[33] Lastly, the crime had to be harmful to the punishing community, and it had to "scandalize the Church."

Despite his important contribution to the development of criminal law theory, of the foundation for the division into sin and crime, Abelard's conception of criminal law was not modern in the sense of being individualistically oriented. If a poor woman accidentally kills her baby when trying to warm him at night, she should, according to Abelard, be punished, "so that subsequently she or other women should be rendered more cautious." Abelard also argues that in some cases an innocent accused ought to be punished. For instance, when his enemies using false witnesses have framed someone and if the judge cannot rebut these witnesses "with plain reasons," the judge has no choice but to accept the proof and convict. This is again because "humans do not judge on the basis of hidden, but manifest facts" (*non enim homines de occultis, sed de manifestis iudicant*), and God alone, "the trier and examiner of the heart and soul" (*probator et cognitor cordis et renum*) "truly considers guilt in our intention and examines the fault in a true trial."[34]

These passages of Abelard's *Ethics* reveal that his basic conception of criminal liability was still partly oriented towards result and not simply towards guilt. In this Abelard was more attached to the old criminal law than to the individualized criminal law that began to be seen in the works of decretists (commentators on Gratian's *Decretum*) such as Rufinus (d. 1192), Huguccio (d. 1210), and Stephen of Tournai (1135-1203). These canonists were able to take advantage of Abelard's basic division of sin and crime, but they also moved further into seeing crime and punishment as phenomena worthy of individualized treatment.

Rufinus, often considered, perhaps alongside Huguccio, as the most important of the twelfth-century decretists, is one example. In his highly influen-

[32] See O. Lottin, *Psychologie et morale aux dix-septième et dix-huitième siècles* (Louvain, 1948), II, 496-99.

[33] Abelard, *Ethics*, 71.

[34] *Ibid.*, 38-41.

tial commentary on Gratian's *Decretum,* around 1157-59, Rufinus distinguishes between intrinsic and extrinsic causes of crime.[35] Both classes of causes significantly affect the magnitude of crime. Intrinsic causes are further distinguished into interior (*interior*) and intimate (*intima*) causes, and the extrinsic causes into exterior (*exterior*) and outermost (*extima*) causes. Exterior causes relate to the type of crime (*in genere*) or to the position of the wrongdoer. The outermost causes are those that have to do with facts external to the crime itself, such as it being committed in a sacred place or during a time of abstinence. An interior cause is the pleasure (*delectatio*) of the sin "which is located in the sensuality." The intimate cause of sin is contempt, located in the rationality (*in illa aula superioris humanis, scil. rationis*). This is crucial to Rufinus's theory. If man's rationality consents to the pleasure of sin experienced by his sensuality, he commits a sin: "The one whose rationality consents to pleasure commits contempt properly speaking." The intimate cause or contempt is the most important cause of crime: "Among these causes the principal cause of sin is the intimate one, that is, contempt; put simply, the one who commits contempt the most sins the most."[36]

Rufinus's theory of the interior cause of crime as consent to sinful pleasure is directly related to Augustine's theory of sin. According to Augustine, a will was transformed into action in a process, consisting of suggestion (*suggestio*), pleasure (*delectatio*), and consent (*consentio*). By suggestion Augustine means the emergence of the possibility of willing in a soul; by pleasure, the first degree of wanting; and by consent, the acceptance either of a sinful thought or a course of action. This model of analyzing the sinful motions of a soul became popular in the Middle Ages, especially in monastic circles, where it was important in the development of the means of battling sinful behavior from its earliest possible stage. The twelfth century produced, however, different variations of the theme. Many authors considered the first motions of the soul as sins (Odo of Soisson, Peter Lombard). Peter Abelard, following Augustine, thought that the first motions of the soul toward sinful behavior were only a sign of weakness, whereas the term "sin" was reserved for conscious thoughts and actions.[37]

Understandably enough, of the competing conceptions regarding the first motions of the soul Rufinus adopted Abelard's. It offered a realistic philosophical basis for practical crime control because it excluded many actions from the definition of the sin. Abelard's conception of sin—and thus that of

[35] Rufinus of Bologna, *Summa decretorum*, ed. by H. Singer (Aalen, 1963).

[36] "Ille enim proprie contemnit, cuius ratio delectationi consentit.... Inter omnes autem has causas principalior causa peccati est intima i.e. contemptus; simpliciter enim magis peccat qui magis contemnit." Rufinus of Bologna, 95-96.

[37] S. Knuuttila, "The Emergence of the Logic of Will in Medieval Thought," in G. B. Matthews (ed.), *The Augustinian Tradition* (Los Angeles, 1999), 206-21.

Augustine—became operative in the canonist writings of Rufinus and his successors, and crucial to the development of the concept of crime in medieval canon law. As for the doctrine of self-defense, canon lawyers built on the same natural law premise as the Roman lawyers had: "the right to defense rests on natural law" (*defensio est de iure naturali*). The penitence theorists whose teachings were then taken over by the canonists further defined the subjective elements of this doctrine. Thus, according to the canon law theory, excommunication would fall on whoever defended himself "with merry lightness" (*cum iocosa levitate*) or "with lustful claim" (*libidine vindicate*). Although secular scholars did not as clearly direct their attention to the human soul, a similar movement towards individualization of self-defense took place.[38] Another example of canon law's subtle interest in the inner workings of the human mind comes from a particular type of crime. The canonists accepted domestic discipline if it took place "out of love" (*ex charitate*) or "in order to correct and discipline" (*causa correctionis et discipline*), whereas discipline was considered sinful and criminal only if it resulted "out of violent malice" (*ex impetuosa malitia*) or "from malice and hate" (*ex malitia vel odio*). Again, the subtle nuances of guilt were not of concern to secular law unless they were demonstrable in a more concrete way, such as by the use of a weapon.[39]

In secular law individualization, although it did not advance as rapidly as it did in the law of the church, eventually took over secular law as well. Albertus Gandinus (d. ca. 1310) was an Italian judge who wrote down his thoughts on criminal law in a book later called *Tractatus de maleficiis*.[40] Gandinus's prime concern is procedural law, whereas criminal law comes in only second place. Of the roughly 400 pages of Kantorowicz's edition, only about half deals with substantial criminal law and only a small part of that with general questions of criminal law, yet many points in Gandinus's text point towards a growing concern for individualized guilt. Like the canonists, Gandinus thinks that in order to be punished in an earthly court, there has to be conduct (*cogitationis penam nemo meretur*). God judges only on the basis of what happens in the human heart (*Deus enim non ex operibus iudicat, sed ex corde*).[41] According to

[38] G. Dahm, *Das Strafrecht Italiens im ausgehenden Mittelalter: Untersuchungen über die Beziehungen zwischen Theorie und Praxis im Strafrecht des Spätmittelalters, namentlich im XIV.* Jahrhundert (Berlin, 1931), 126-27, and Dahm, *Strafrecht Italiens*, 147-48.

[39] Baldus de Ubaldis said: "ex genere instrumenti praesumitur animus et atrocitas maleficii." Cited in Dahm, *Strafrecht Italiens*, 97. S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX systematisch auf Grund der handschriftlichen Quellen dargestellt* (Vatican, 1935), W. Engelmann, *Die Schuldlehre der Postglossatoren und ihre Fortentwicklung: eine historisch-dogmatische Darstellung der kriminellen Schuldlehre der italianischen Juristen des Mittelalters seit Accursius* (Aalen, 1965).

[40] H. Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastik 1-2* (Berlin, 1907, 1926); and "Leben und Schriften des Albertus Gandinus," *Zeitschrift der Savigny-Stiftung, Romanistische Abteilung*, 44 (1924), 224-358.

[41] Gandinus, *Tractatus*, 211.

Gandinus, however, an observable deed does not suffice even for the human court. In order to merit a punishment, the accused needs to have understood the meaning of what she or he has done, and so children (*infans*) and lunatics (*furiosus*) deserve no punishment. If the accused is of age and sane (*maior et sane mentis*) but in a drunken state, however, a mitigated punishment (*mitius punitur*) is in order.[42] Some of the factors affecting punishment in Gandinus appear universal in that they have influenced punishment from ancient Rome until today, but a judge also has to take into consideration factors that are, strictly speaking, alien to the developing canonical concept of guilt stressing will and intention such as fame and respect (*fama, estimatio*).

Because canon criminal law primarily paid attention to observable deeds, mental preparation of crime was normally not punishable. Even today, in no Western system of law are "thought-crimes" punished.[43] An attempt if it amounted to conduct, however, could be punishable. Gandinus, following Odofredus (d. 1265), divided the relationship of premeditation, action, and perfection into five possible combinations as follows:

1. *Cogitat [delinquere], agit, et perficit.*
2. *Cogitat, agit, sed non perficit.*
3. *Cogitat, nec agit, nec perficit.*
4. *Non cogitat et agit et perficit.*
5. *Nec cogitat, nec agit, nec perficit.*

According to the principle of "no crime shall be left unpunished" (*ne crimina remaneant impunita*), the first and the last cases are, with some exceptions, clear, whereas cases two to three bring us to the heart of the doctrine of attempt. As for case two, Gandinus further distinguishes between a case in which the result was either desired or not. If it was desired (*voluit*) but the wrongdoer was not able to achieve the desired result, he should be punished, because "as for crimes, the will [of the wrongdoer] shall be observed, not the result [of the crime]" (*in maleficiis voluntas spectatur, non exitus*). If the result had not been desired, the accused ought not to be punished (*venia dignus est*). In case three, Gandinus distinguishes between *forum internum* and *forum externum*.[44] Since secular courts do not condemn anyone for their thoughts (*cogitationis pena nemo meritur*), simply thinking about crime is not punished. In the internal forum, however, sinful thoughts unless resisted as a temptation are punished (*Deus enim non ex operibus iudicat, sed ex corde*). In case four, in which an

[42] Gandinus, *Tractatus*, 210-11.

[43] See C. M. V. Clarkson, *Understanding Criminal Law* (London, 1995), 18.

[44] See W. Trusen, "Zur Bedeutung des geistlichen Forum internum und externum für die spätmittelalterliche Gesellschaft," *Zeitschrift der Savigny-Stiftung, Kanonistische Abteilung*, 76 (1990), 254-85.

action is brought to its result but without premeditation, subcategories are again distinguished. Minors and the insane are not punished, whereas the punishment of drunken wrongdoers is mitigated. If the wrongdoer acts accidentally (*ex casu*) and not with premeditation (*ex proposito*), he will not be punished. To simplify Gandinus, punishment usually depends on whether at least some degree of blame is involved.[45]

What conception of the human will does the development of criminal-law doctrine imply? Underlying the doctrine is the voluntaristic supposition that, under normal circumstances, the human being was free to choose whether or not to commit crimes or sins. He was, however, responsible for his choices.

The significance of penitence literature for the development of criminal law was important. The Fourth Lateran Council in 1215 ordered in the canon *omnis utriusque sexus* that every Christian should confess his or her sins at least once a year, repent, and receive absolution from them. *Omnis utriusque sexus*, of course, did not appear from nowhere. The earliest attempts to establish regular confessions date to the eighth century (Regulations of *Chrodegang* of Metz, d. 766). The regulation of 1215 was different, however, in that for the first time it was directed towards laymen and not only clerics.[46] Penitence as a theological instrument was developed strongly in the thirteenth century, and theorists such as Raymond of Penyafort (1175-1275) had a keen interest in refining the concept of individual guilt. Although the relations between penitence and canon law have thus far not been much researched, it is likely that a relation exists between the two. In his classic work on the Italian late-medieval criminal law Georg Dahm supposes that canon lawyers knew penitence literature well, although they did not often cite it. According to Dahm, this was because a division of labor existed between the penitence theorists and the canonists on the one hand and the legists on the other. Since legists thought that the *forum internum* took care of what *forum externum* could not take into account, they failed to mention penitence literature in their writings.[47]

The *forum internum* was part and parcel of the same intellectual complex as the *forum externum* and secular criminal law, although individualization affected all of them to different extents. As we have already seen, secular criminal law was affected last and the least: while some movement towards individualization was visible in the Middle Ages, secular criminal law largely stayed

[45] Gandinus, *Tractatus*, 210-12.

[46] M. Ohst, *Pflichtbeichte: Untersuchungen zum Bußwesen im Hohen und Späten Mittelalter* (Tübingen, 1995). Cf. G. Inger, *Das Geständnis in der schwedischen Prozessrechtsgeschichte I: Bis zur Gründung des Svea Hofgerichts 1614* (Stockholm 1976), 17-19; and W. Trusen, "Zur Bedeutung des geistlichen Forum internum und externum für die spätmittelalterliche Gesellschaft," *Zeitschrift der Savigny-Stiftung, Kanonistische Abteilung*, 76 (1990), 254-85.

[47] G. Dahm, *Strafrecht Italiens*, 88-89.

within the confines of the old result-oriented criminal law.[48] In the law of proof, however, the change towards individualization was clearly visible in both canon and secular law.

The Individualization of Criminal Procedure: The Law of Proof

Before the twelfth-century revolution law of evidence in Europe relied on the system of ordeals and oaths. Ordeals—such as water ordeals, hot iron tests, and many other kinds of tests carried out in order to let God decide a judicial question—certainly existed before the Christian era, but the active participation of the clergy helped spread them even to the remotest corners, such as Scandinavia and the Baltic area.[49] It has been shown that systematic opposition to the clergy's involvement in the blessing and sacramentalization of the ordeal began in the ninth century, but it did not gain significant strength until the beginning of the thirteenth. The main objections to the ordeal were that it was a human invention, uncanonical, internally inconsistent, and unreliable. The critical clergy also claimed that ordeals were an attempt to force God to reveal his opinion.[50] With ordeals the decision almost literally fell from heaven. The human being subjected to a water proof or made to carry a hot iron was supposed to remain passive.[51] The same went for the court, since the method of proof, the ordeal, automatically provided the answer, which needed no interpretation. A hierarchical, controllable court structure needed to be based on a different law of evidence.

As Kenneth Pennington has remarked, the centralization of papal powers, both legislative and judicial, profoundly influenced ecclesiastical justice. Pope Gregory VII's *Dictatus papae* (1075) holds that "no one shall dare to condemn one who appeals to the apostolic chair." This stipulation ultimately came to mean a deathblow to the system of ordeals, as it was logically impossible to appeal against the decision of an ordeal.[52] The importance of confession, the new "queen of proofs," had grown steadily since the late eleventh century onwards, and the Fourth Lateran Council of 1215 sealed the revolution in the law of evidence by prohibiting clerical participation in ordeals.

[48] See H. Pihlajamäki, "On the Verge of Modern Law: Mitigation of Sentence in Nineteenth-Century Finland," *Ius Commune: Zeitschrift für Europäische Rechtsgeschichte*, 28 (2001), 269-94.

[49] See H. Nottarp, *Gottesurteilstudien* (Kösel, 1956).

[50] See J. H. Baldwin, "The Intellectual Preparation for the Canon of 1215 Against Ordeals," *Speculum*, 36 (1961), 613-36; Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford, 1990), 4-12.

[51] On various ways of avoiding the crucial consequences of the ordeal, see H. Nottarp, *Gottesurteilstudien* (Göttingen, 1956).

[52] K. Pennington, "Due Process, Community and the Prince in the Evolution of the *Ordo Iudiciarius*," at http://classes.maxwell.syr.edu/His381/procedure.htm, 11.

Ordeals and oaths were replaced by the thirteenth century by what have been called "rational proofs" formulated into a theory of statutory proofs. This new system was based on the idea that "full proof" consisted of either the defendant's confession or the concurring statements of two eyewitnesses. Confession thus came to form an integral part of this new theory of statutory proofs, and the responsibility of deciding a difficult evidentiary question was transferred from God to human beings. As part of Roman law this new theory helped to structure and to rationalize the use of centralizing judicial powers both of the Church and of secular princes.[53] Gradually the theory became an important part of the Roman-Canon *ius commune*.

As part of Roman-Canon law, the statutory theory of proof spread with the newly founded universities to most parts of Europe in the late Middle Ages and the early modern period. Although the theory was originally a creation of legal writing, it found its way into statutory law as well.[54] It is often said that criminal law as a distinct entity actually emerged with the official control of serious criminality,[55] that it was for this kind of criminal law that legal proof and the inquisitorial procedure were first intended. As centralization of power increased in the early modern age, the state judicial apparatus began to intervene in petty crime more often and more effectively, and the scope of criminal law increased.[56]

In the medieval theory of proof many different gradations of proof developed during the late Middle Ages. The basic division into three degrees of proof that Bartolus of Sassoferrato (1313-57) presents is a typical one, despite the abundance of additions and subdivisions that were made to the theory by various medieval authors. The lowest category, the first degree of proof, is that of circumstantial evidence (*indicium*) capable of producing a suspicion in the mind of the judge only (*suspicatio*). The second degree is imperfect evidence (*probatio semiplena*), which produces an opinion (*opinio*); the third degree is perfect or full proof (*probatio plena*), on whose authority a verdict can be based. Full proof causes a *credas* instead of a mere opinion or suspicion in the judge's

[53] R. C. van Caenegem, "La preuve dans le droit du moyen âge occidental," 691-753 in *La Preuve, Deuxième partie, Moyen âge et temps modernes* (Brussels, 1965), 727; Berman, *Law and Revolution*, 250-53; E. Peters, *Torture* (New York, 1985), 43-47.

[54] See in general J.-P. Lévy, *La hierarchie des preuve dans le droit savant du moyen âge depuis la Renaissance du Droit Romain jusqu'à la fin XIV siècle* (Lyon, 1939), and his article "Le problème de la preuve dans les droits savants du moyen âge (1)," *Société Jean Bodin's La Preuve*, 137-16; and P. Fiorelli's *La tortura giudiziaria nel diritto commune I-II* (Milan, 1953-54).

[55] G. Kleinheyer, "Tradition und Reform in der Constitutio Criminalis Carolina," 7-27 in G. Kleinheyer and P. Mikat (eds.), *Strafrecht, Strafprozess und Rezeption* (Frankfurt am Main, 1984), 9-10; J.-M. Carbasse, *Introduction historique au droit penal* (Paris, 1990), 135.

[56] See B. Lenman – G. Parker, "The State, the Community and the Criminal Law in Early Modern Europe," 11-48 in V. A. C. Gatrell, B. Lenman, and G. Parker (eds.), *Crime and the Law* (London, 1980).

mind.[57] To simplify a complex theory confession or two eyewitness statements produced full proof, whereas a half proof was made up of one eyewitness or a sufficient amount of circumstantial evidence. The European *ius commune* then, with modifications, adopted these basic gradations of evidence. Parallel to the hierarchy of proof, a hierarchy of types of procedure was established in medieval theory. Only the most serious criminal cases demanded the most perfect of proof (*plenissima, indubitata, luce meridiana clarior*). In ordinary civil cases the verdict could be based on full proof; in summary civil cases, even imperfect evidence would suffice.[58]

Apart from the actual proofs the concept of notoriety (*notum, manifestum*) was of great importance to medieval legal theory. Notoriety, an original product of canon law scholarship with no precedent in Roman law, rendered a fact incontestable in the sense that no counter-evidence could be produced against it. Thus, notoriety was hierarchically above proof proper. Furthermore, declaring a fact notorious accelerated the procedure, since no appeal was allowed. The concept of notoriety had a practical function in the internal legal order of the Church. When it came to typical crimes committed by the clergy, such as concubinage, usury, and heresy, it rendered ecclesiastical discipline easier. Using the concept of notoriety the Church ventured to seek measures in order to be able to act rapidly whenever this was necessary to avoid scandals.[59]

The major importance of circumstantial evidence lay in the fact that it could be conducive to torture (*indicia ad torturam*).[60] In the logic of the *ius commune* confession was what judicial torture strove for.[61] In order to commence judicial torture, full certainty of the commission of the crime (*corpus delicti*) had to be available. Not just anybody could be subjugated to torture. Serious circumstantial evidence needed to exist against the accused, although full proof had yet to be obtained. Furthermore, all other legal means of arriving at full proof had to have been exhausted.[62] In other words judicial torture was the last resort (*ultima ratio*).

Although examples of evidence sufficient for torture abound in treatise books and statutes,[63] it was finally a matter of the judge's free evaluation to decide whether the circumstantial evidence sufficed to torture the accused or not.[64] In itself the ordering or execution of torture (*quaestio*) did not have procedural effects, as they were dependent on the outcome of the torture and on

[57] Lévy, *Hiérarchie*, 28-29.

[58] Lévy, *ibid.*, 30-31.

[59] *Ibid.*, 32-33, 36-37.

[60] See Fiorelli, *La tortura giudiziaria*. See also Lévy, *Hiérarchie*, 127-29.

[61] Fiorelli, *La tortura giudiziaria*, 103-4.

[62] *Ibid.*, 1-2.

[63] E.g., *Halsgerichtordnung* of Charles V (Carolina) of 1532 and the Ordinance of Villers-Cotterets of 1539.

[64] Fiorelli, *La tortura giudiziaria*, 163-64.

the subsequent judgment.[65] A forced confession had to be reiterated and ratified in court afterwards.[66] If the accused refused to ratify his or her confession without producing convincing counter-evidence, the torture could be renewed one or more times.[67]

Judicial torture formed an integral element of the system of legal proof. In fact without the possibility of recourse to torture the system would be difficult to imagine. Given the strict requirements of full legal proof, judicial torture offered at least some likelihood of providing it and thus imposing criminal liability in serious cases. Although judicial torture seems not to be the best instrument for a court striving towards material truth, it is understandable when placed in the intellectual context described above. An alternative to ordeals was needed, and the statutory theory of proof was developed to fill the void. This developing theory was brought into line with the individualizing tendency of the thirteenth century and with the emerging theological concept of confession.

The new system of statutory proofs was an individualized one in the sense that the production of evidence depended on the accused or the witnesses much more personally than the old system of oaths and ordeals had. What the accused confessed depended on his will or intention. When we forget the horrors of judicial torture, it was ideally the choice of the accused person to decide whether and what criminal deeds he acknowledged having committed. In the eleventh and twelfth centuries, the development of private confession probably rendered the instrument of judicial confession all the more useful in the *forum externum* and secular courts as well. It may be assumed that the decision of the Fourth Lateral Council of 1215 concerning private confessions helped to create an atmosphere in which confession would now be considered the most appropriate way of arriving at a criminal judgment as well. Since it was no longer accepted that God should decide earthly legal problems, the truth now had to come from the mouth of the accused.

The judge or the court now had to take a personal stand on the problem of evidence. The statutory theory of proof is often presented as if it were pure mathematics, with the deciding judge passively adding the emerging pieces of evidence together and then drawing the necessary logical conclusion of condemnation (*condemnatio*) or dismissal (*absolutio*). As we have seen above, this was not quite the case. First, the court needed to evaluate the worth of circumstantial evidence and determine whether it sufficed for torture. Second, after a confession was obtained, the court still had to decide whether it was believable and if it covered all the necessary elements of the suspected crime.

[65] Fiorelli, *La tortura giudiziaria*, 88, 155.
[66] *Ibid.*, 105-6, 117.
[67] *Ibid.*, 125-27.

Third, witness's statements brought similar problems. It was not at all certain whether they were reliable or concurred with each other sufficiently, or whether they provided enough information on the guilt of the accused. Fourth, as the statutory theory of evidence was being developed fully in the twelfth century, legal literature simultaneously began to allow judges to condemn even without full proof in cases where the accused was nevertheless strongly suspected of being guilty (*praesumptio violenta*).[68]

There is an important connection between the medieval statutory theory of proof and the contemporary substantive criminal law. Compared to their medieval colleagues, our judges in the Western world have a relatively extensive competence of deciding the worth of the evidence that they accept. The appropriate comparison for the late medieval statutory theory of proof was, however, the preceding system of ordeals, which, at least in theory, as little as possible was left for the human judges to decide. In the new system, everything was left for the parties and the court, although they were bound by a set of rules laid down in the statutory theory of proof.

The notion that a judge in his human imperfection was unable to look into the soul of a wrongdoer had consequences for the law of proof. In order to ascertain the degree of guilt pertinent to criminal conduct, the judge had to base his conclusions on outer signs (*signa exteriora, circumstantiae, indicia*).[69] These outer signs were of the kind that could only be observed directly by the senses; only indirectly did the *signa exteriora* speak of the "invisible kernel of guilt."[70] The statutory theory of proof matched this conception of criminal guilt perfectly. Dependent as it was on eyewitness statements, the statutory theory did not even claim to produce direct information on the movements of a defendant's soul. In the last instance these were left for God alone to observe. It was only in the nineteenth century, with the breakthrough in free evaluation of evidence, that human judges openly ventured into this domain reserved for God.[71]

[68] See M. Schmoeckel, *Humanität und Staatraison: Die Abschaffiung der Folter in Europa und die Entwicklung des gemeinen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter* (Cologne, 2000), 267-94; and "Neminem damnes, antequas inquiras veritatem," *Zeitschrift der Savigny-Stiftung für Rechtsgeshichte 118, Kanonistische Abteilung* (2001), 191-225.

[69] Kuttner, *Kanonistische Schuldlehre*, 24-25.

[70] *Ibid.*, 26.

[71] See H. Pihlajamäki, *Evidence, Crime, and the Legal Profession: The Emergence of Free Evaluation of Evidence in the Finnish Nineteenth-Century Criminal Procedure* (Stockholm, 1997).

Conclusion: Crime and the Individual in the Context of Late Medieval Thinking

The theory of criminal law and criminal evidence had much in common with the individualization tendency that was gaining ground in many other spheres of medieval intellectual life from the thirteenth century onwards, such as moral philosophy and theology.

Mathias Schmoeckel has observed that the consolidation of evidence theories in the twelfth century served the interest of the control of the judiciary, not that of the accused.[72] Although Schmoeckel's observation is convincing, it does not follow that the development of law of evidence could not have created rights for the individual as a side-product.[73] As Knut Nörr points out, subjective rights served the interests of a Church aiming at centralized power perfectly well. Legal order could thus be optimized, while individuals themselves were encouraged to take action safeguarding their rights.[74] In order to function effectively canon criminal law needed a uniform theoretical framework. The situation was thus essentially the same as in civil law, in which the developing commercial relations and world trade benefited from the academic research into Roman law defining property relations in a precise way.

The development of the concept of guilt in turn can hardly be seen as relating directly to the emergence of subjective rights. The terminology of subjective rights was not used in that context any more than it is today. However, a link was and still is there. The same general individualizing tendency that informed the rise of subjective rights can be seen in the background of the individualized concept of guilt. From the point of view of social control the concept of individual guilt helped to guide individuals more effectively towards correct behavior. Criminal law based on individualized guilt may thus have seemed a more efficient tool in the hands of the ecclesiastical judiciary, just as the precise definitions of the first motions of the soul helped monastic authorities to identify and root out sin in their institutions.

University of Helsinki.

[72] Schmoeckel, "Neminem damnes," 225.

[73] See J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago, 1977).

[74] See K. W. Nörr, "Zur Frage des subjektiven Rechts in der mittelalterlichen Rechtswissenschaft," in *Festschrift für Heinrich Lange zum 70. Geburtstag* (Stuttgart, 1992), 198.