

A Felonious State of Mind: Mens Rea in Thirteenth- and Fourteenth-Century England

by

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DEDICATION

In memory of Robert Richard Papp (1923-1998) and
in honor of the eightieth birthday of Judith Ann Papp.

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ABSTRACT

This dissertation explores the role of *mens rea*, or guilty mind, as a factor in jury assessments of guilt and innocence during the first two centuries of the English criminal trial jury, from the early thirteenth through the fourteenth century. Drawing upon evidence from the plea rolls, but also relying heavily upon non-legal textual sources, including popular literature and guides for confessors, I argue that mind was central to how jurors determined whether a particular defendant should be convicted, pardoned, or acquitted outright. I analyze the meaning of the word “felony,” demonstrating that its meaning was considerably more complex in the medieval context than it is now, when it tends to serve as a placeholder for a category of serious crime. An examination of the word’s use in medieval England’s three primary languages—Latin, Middle English, and Anglo-Norman French—reveals that “felony” was often used interchangeably with such concepts as malice, iniquity, treason, and evil. Furthermore, jury acquittals and pardon recommendations reveal a default understanding of felony that involved, in its paradigmatic form, three essential elements: an act that was reasoned, willed in a way not constrained by necessity, and evil or wicked in its essence. Further chapters explore the complicating role of anger, which could exacerbate or reduce the level of guilt attached to an alleged felony; the contours and mechanisms of guilt assessment, including the gradation of particular sins and crimes and the use of confession to access guilty mind; and the peculiar dangers and difficulties involved in the task of judging, a task shared by judges and jurors within the medieval English system of felony adjudication. The dissertation engages with a long-standing discussion on the history of the medieval English criminal trial jury while also initiating

a new discourse on this early chapter in the long Anglo-American history of ideas about criminal responsibility. It introduces a new methodological approach for the study of the early criminal trial jury, placing legal texts within a broader cultural context in order to illuminate the concerns of jurors otherwise largely silenced by the formality and brevity of the legal record.

CHAPTER ONE

An Introduction to Medieval English Felony Law

“Reum non facit nisi mens rea.”¹ Appearing in an early twelfth-century English legal compilation, but traceable to Augustine perhaps by way of Ivo of Chartres, this maxim rings familiar to modern lawyers as a principle fundamental to the Anglo-American common law tradition: culpability depends upon the presence of *mens rea*, or guilty mind. Equally fundamental to the common law tradition, but not equally celebrated, is the harsh nature of medieval felony law: a person found guilty of felony—whether homicide, theft, arson, or rape, for example—faced punishment of death, typically by hanging. Judgment resided largely in the hands of lay jurors, who issued a verdict that might send an accused man or woman back to prison to await a pardon, into the world as a free individual, or to the gallows. When faced with such stark punishment, did medieval English jurors apply the above maxim in a meaningful way? If so, how did they ascertain what lay hidden within an accused individual’s heart and mind?

This dissertation is inspired in part, by earlier work undertaken by Thomas Green on the English criminal trial jury. In *Verdict According to Conscience*, Green highlights the ways in which medieval English juries tempered the harsh formal law of felony—which mandated the death penalty for homicide and for thefts over a certain value—by acquitting defendants who for

¹ “A person is not to be considered guilty unless he has a guilty intention.” L. J. Downer, ed. and trans., *Leges Henrici Primi* (Oxford: Clarendon, 1972), 95, §5.28b. For a discussion of potentially contradictory passages in the same treatise, see *ibid.*, 11.

one reason or another struck them as undeserving of capital punishment.² As Green's study illustrates, we can never know exactly why a jury acquitted in a particular case: perhaps they felt that the defendant was indeed guilty, but that the penalty was too harsh; perhaps the defendant was a sympathetic figure due to his or her role within the local community; maybe too little was known about the circumstances of the crime to give the jurors confidence to convict; alternatively, maybe the suspect was manifestly guilty, but the jurors feared the vengeance of friends or kin should they issue a guilty verdict; maybe, as legal realists might suggest, it was all about what the jurors had for breakfast; or perhaps the defendant did not seem to have the requisite state of mind in committing the alleged crime.

It is this last possibility—the question of guilty mind or *mens rea*—that drives my analysis in the pages to follow. I would like to know what might prove to be unknowable: assuming *mens rea* was among the factors juries considered in assessing a defendant's culpability, how important a factor was it? And what exactly constituted a sufficiently guilty state of mind to merit a felony conviction? Was intent to carry out a wrongful act sufficient? Or did one need to exhibit something more damnable, such as malice, hatred, envy, or even pure evil? Religious texts are clear on this point, speaking directly to issues of consent and intentionality, suggesting that guilt was almost entirely dependent upon states of mind. It is difficult to imagine that the contemporary criminal law could have veered too far from the church's insistence on the essentially mental aspect of culpability. Perhaps this is self evident: jurors *must* have considered whether a defendant intended to undertake a wrongful act, whether he or she consented to participating in a crime, whether he or she bore ill will toward the crime victim or, alternatively, expressed no concern for the ramifications of his or her self-interested

² Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), 28-64.

actions. Historians have not, however, taken this as a given, nor should they, particularly in light of the danger of anachronistically reading back our current priorities onto a distant and alien legal system, a danger all the greater in the history of the common law, where the slow pace of explicit doctrinal change and the conservative nature of legal vocabulary can mask great shifts in understanding over the intervening centuries. Even if we were to assume that *mens rea* was a factor in jury decision-making, the further question remains about how *mens rea* came to be a part of the common law tradition, and how the average medieval English juror came by his understanding of the nature of guilty mind.

In the first part of this dissertation, I elucidate the meaning of felony, highlighting the ways in which the very notion of felony was bound up with issues of guilty mind. This requires finding patterns in the medieval English plea rolls that gesture toward the centrality of mind in felony adjudication, ‘gesture’ rather than ‘point’ because these coroners’ reports and trial records were not written with the purpose of demystifying felony’s meaning, but rather were kept for more mundane administrative and fiscal purposes. After making the case for an intentionality-rich understanding of the word felony, I then move on to test these ideas against the backdrop of the most prevalent emotion in felony cases—anger—to show how this complex passion tested the boundaries of felony and elicited disgust and sympathy alike from medieval jurors. In the second part of the dissertation, I highlight broader cultural norms of guilt assessment to explore commonalities and contrasts in how sin and crime were understood according to church teaching and in broader society, acknowledging that society was heavily influenced by and in some ways inseparable from the church, but also brought its own distinct, experientially driven concerns about crime to the fore.³ Finally, I consider the task of judging, both by justice and juror, in light

³ On this notion of the inseparability of the religious and secular spheres, or “the judicial and spiritual realms,” see Trisha Olson, “Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial,”

of the centrality of mind to felony adjudication. In doing so, I emphasize the ways in which *mens rea* was also a factor in judging judges and jurors, not in a technical sense of putting such decision-makers on trial, but in a cultural sense of denoting the bounds of appropriate comportment for those involved in the weighty business of judging. In contrast to how we tend to think about judging and jury duty today, the emphasis was less on getting the verdict factually correct than on approaching the process of judging with the appropriate state of mind, balancing the demands of justice and mercy. In fact, some of the same concerns with mind that appear in descriptions of felony defendants, most notably the danger of unchecked anger, also appear in texts about judging.

No one has to this point written a monograph devoted to exploring the meaning of felony and the centrality of *mens rea* in medieval English felony adjudication. There may be good reason. Some of the questions I ask here resist resolution, and in some instances I can do little more than open up a dialogue on what might have been. It is possible that the issue of *mens rea* and its role in medieval felony cases has not been entirely worked out because the records simply do not speak sufficiently to the matter.⁴ No medieval English juror ever wrote a tell-all memoir of his experiences judging felons. No statutes laid out the balancing between the general part of the criminal law, as we term it today—issues of mind and act and excuse—and the special part, the specific varieties of crimes. No comprehensive manuals for judges or jurors survive to tell us

Syracuse Law Review 50 (2000), 147-148. D'Avray emphasizes the extent to which sermon collections offer a window into a common culture. D. L. d'Avray, *The Preaching of the Friars: Sermons Diffused from Paris before 1300* (Oxford: Clarendon, 1985), 2-4, 11, 95 (highlighting how Latin sermons by friar academics at the University of Paris were transmitted throughout Europe, and arguing that model sermon collections "were one of the nearest things to a common factor in the experience of different sorts and conditions of men in the thirteenth century.")

⁴ This problem is not restricted to common-law crime. Writing on church courts, Richard Helmholz has noted that the troubling question remains "whether we have sufficient understanding of the habits and attitudes surrounding the prosecution of crime in earlier centuries to draw sure conclusions." Richard H. Helmholz, "Crime, Compurgation and the Courts of the Medieval Church," *Law and History Review* 1:1 (1993), 1.

how people understood these issues either. What does survive, in great abundance, are records of coroners' inquests and trials, as well as a smattering of legal treatises and case reports in the early Year Books. Reading these texts alongside extralegal materials—sermons, poems, theological tracts, romances—allows the legal historian to piece together an understanding of ideas in wide circulation in England during these centuries. It is an imperfect methodology, relying on informed hypotheses and sometimes on less-tethered speculation. Yet I believe that this approach—the wide-angle lens view of medieval felony prosecution—promises to open a broader conversation about the medieval origins of modern ideas of criminal responsibility within the Anglo-American common law tradition.

In fact, literary evidence points firmly in the direction of jurors concerning themselves with issues of mind in reaching felony verdicts. The centrality of mind to weighing guilt arises in the theological texts that informed the sermons jurors heard at church and the advice they received during confession. This theme appears repeatedly in a diverse range of registers, from the most elite and Latinate to the more humble and vernacular, as well as the elite vernacular of higher society and the humble Latin of parish priests. Indeed, thirteenth- and fourteenth-century religious texts betray a near obsession with mind, an obsession reflecting a long-standing tradition in Judeo-Christian thought that was sharpened in the twelfth and thirteenth centuries by top-down interventions from the papacy and influential theologians in Paris and elsewhere—an increasing emphasis on matters of conscience and a movement to reform the Christian clergy—and bottom-up responses—the clergy, in turn, reforming the laity through preaching and confession, and the laity bringing these ideas to bear on daily life. I contend that such ideas did not leave off at the church door: popular literary works drove home the theme of intentionality

as central to matters of culpability and innocence, thereby reinforcing the message preached from the pulpit.

Related to this emphasis on mind was a commitment to the principle of mercy, another theme prevalent in contemporary religious and secular literature. Most notably, if one had doubts as to a person's state of mind, judging could be fraught with difficulty and with danger, the latter insofar as a wrongful judgment would have repercussions not only for the defendant but also for the person issuing the judgment. At the same time, other literary evidence suggests that jurors had cause to take a tough-on-crime stance, particularly during periods when gang violence and civil disorder reached distressing heights. These worries were heightened when jurors were faced with alleged criminals who were strangers, and therefore presumptively dangers, to the local community. Mirrors for princes and texts offering guidance to royal justices emphasized that it was in the king's interest that crimes be dealt with swiftly and severely. While the church was often a source of competing ideas regarding mercy and forgiveness, it also shared and in fact broadcast concerns with collective responsibility for the extirpation of crime. A decretal of Pope Innocent III popularized the maxim, "rei publica interest ne crimina remaneant impunita," or "it is in the public interest that no crimes remain unpunished."⁵ Trisha Olson points out the seeming incompatibility of such concepts when she asks, "what was the mode of thought that allowed medieval Western Europe to simultaneously embrace and practice mercy as an attribute of justice proper, and to nevertheless resort, however infrequently, to the wreaking of fantastic suffering upon the body of a felon?"⁶ Olson's words remind us that the

⁵ For a discussion of this decretal, see Finbarr McAuley, "Canon Law and the End of the Ordeal," *Oxford Journal of Legal Studies* 26:3 (2006), 494; Richard M. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages: 'Rei publicae interest, ne crimina remaneant impunita'," *University of Illinois Law Review* 1984:3 (1984), 577-595.

⁶ Trisha Olson, "The Medieval Blood Sanction and the Divine Beneficence of Pain: 1100-1450," *Journal of Law and Religion* 22:1 (2006-2007), 80.

problems I will explore in the pages to follow were issues common to all of Western Christendom, even though my focus will be on the development of the English common law in particular. How jurors and justices balanced these conflicting concerns—the importance of mercy and the need for severe justice—will be explored in greater depth below.

Relying on complex and sometimes contradictory sources, I strive to answer a question which might ultimately prove unresolvable: to what extent did medieval English trial juries consider issues of guilty mind, or *mens rea*, in deciding upon an accused individual's guilt or innocence in felony cases? Relatedly, what constituted a guilty state of mind for medieval English jurors? The elusiveness of answers to these questions lies in medieval English law's largely unwritten nature, such that the legal historian faces a dearth of procedural manuals and statutory law to draw upon in answering such basic questions. At the same time, these are questions which still trouble criminal law theorists today, who might be inclined to point out that we still do not entirely know what we mean by *mens rea* despite an overabundance of statutory criminal law. Replacing "medieval English" with "modern American" trial juries above, could we answer satisfactorily the question regarding the extent to which mind plays a central role in the outcome of felony cases today? That, of course, is a topic for another book.

Although the medieval English common law of crime was largely unwritten, records of coroners' inquests and trials survive in comparative abundance and can take us some distance in answering the questions raised here. Yet these sources, too, fail to spell out answers to questions that might seem, from our vantage point, to be fundamental to a full understanding of medieval English felony. For example, legal texts, including the sometimes colorful inquest narratives recorded by coroners' scribes, do not typically invoke language providing great insight into state of mind, calling into doubt any sweeping claims regarding the centrality of *mens rea* to medieval

felony adjudication. The streamlined nature of felony procedure casts further doubt. Can we really believe that jurors weighed issues of mind as they judged a felon briefly hauled before them in court, a felon not represented by counsel and therefore poorly equipped to bring sophisticated arguments to bear in responding to accusations? Perhaps it is the very fundamental nature of these matters that resulted in the historical records' silence: if everyone understood that *mens rea* was of great account, there might have been no need to spell out its role in individual cases. Alternatively, perhaps medieval English jurors did *not* pay great heed to issues of mind, focusing instead on simple causality or on an evaluation of the accused individual's character, reputation, and status within the broader community. This is an alternative to which I do not subscribe. To rely on the immortal words of the far too mortal Patrick Wormald, writing about an earlier period but in ways that apply to later medieval England as well: "One of legal history's most enduring illusions is that 'primitive' law draws no distinction between the degrees of an offense, 'punishing' the unintended, involuntary, or otherwise excusable wrong as heartily as the premeditated or malicious." Wormald adds, "Inasmuch as [this misconception] persists, that is because of failure to distinguish between the priorities of penalization and compensation."⁷ An accidental death, for example, even if minimally culpable due to the lack of specific intent involved, gave rise to a measurable harm that demanded restitution to the victim's kin. This does not mean that accidental death was equated with premeditated death by poisoning, for example. Nevertheless, given the nature of the questions posed and the limits of the evidence available, the word "perhaps" and its close friend "might" will make frequent appearances throughout the chapters to follow. Much of my argumentation will be speculative, but will aim to initiate conversations about matters of great import, insofar as they have

⁷ Patrick Wormald, *Papers Preparatory to The Making of English Law: King Alfred to the Twelfth Century*, ed. Stephen Baxter and John Hudson (London: University of London, 2014), 94.

inevitably informed the development of the systems of criminal law adjudication still at work throughout the Anglo-American world.

A Brief Chapter Summary

In chapter two, I argue, in part, that *mens rea* was central to medieval English jurors' understandings of guilt and innocence. I reveal an understanding of the word "felony" itself, and its cognates, that drew upon issues of mind in the broad sense encompassing willfulness, premeditation, and even evil. I argue that, while medieval English felony law was not theorized in its time, we can distill from the legal record, with some assistance from extra-legal sources, a paradigm of felony that is unmistakably influenced by notions of mind rather than reflecting a mere category of criminal acts. Perhaps because the law was not heavily theorized, or perhaps because these are complex matters with which we still struggle in modern jurisprudence, we also find felony law tested by particular circumstantial elements that made a simple guilt or innocence determination difficult for jurors to reach. For example, how might a jury respond to a fact pattern involving a person lashing out in anger following an affront to his or her honor, or in response to an attack upon a loved one? Would that response change if the jurors knew that the accused individual had long harbored a tendency toward rash anger and intemperate responses to provocations? What if the person were drunk? What if he or she happened to be twelve years of age? The list of possible permutations goes on, and it is primarily the categories of accident, self-defense, insanity, infancy, and duress (particularly in its gendered form, such as a wife acting under command of her husband) that will most heavily inform my discussion of the paradigm of felony. An analysis of anger in chapter three, in turn, throws some of my neat categorizations into disarray, as I unearth the medieval underpinnings—or abandoned precursors—of later, early modern doctrinal developments in the area of provocation. I

demonstrate how anger tested the limits of felony, insofar as it pushed in some cases toward exculpation and in other cases toward severe condemnation.

In chapter four, I grapple with issues of guilt assessment more broadly, looking to legal and religious texts to understand how individuals were expected to rank and order various crimes and sins. The thirteenth century was, after all, the golden age of the confessor's manual, as the reforms of the Fourth Lateran Council inspired a proliferation of an already extant genre that aimed to guide priests in hearing confessions. It was also the age of Aquinas' morality of intention, and a time in which the ripple effects of the remarkable twelfth-century school of Parisian theologians, most notably Peter the Chanter, continued to influence high-level theology, practical piety, and even the adjudicatory tools available to secular leaders in the prosecution of crime.⁸ Delving into earlier centuries, I will briefly highlight changes in the ranking of types of homicide over time. I will also emphasize generally the centrality of mind as compared with act in the ranking of the severity of sins in confessor's manuals. In this portion of the dissertation I will, at the same time, consider the mechanisms involved in guilt assessment, with a particular emphasis on the role played by confession in the ecclesiastical and secular spheres. While England never came to rely on confession to the same extent as the inquisitorial systems on the continent, the practice nevertheless remained quite central and ubiquitous in felony cases due to its use as a liminal device that could transform an accused individual into an abjurer or approver,

⁸ Peter the Chanter and his followers were largely responsible for disseminating ideas that fed into the clerical reforms introduced by Lateran IV, most notably the canons related to priestly abstention from the ordeal. He lies at the nexus of a network of theologians who worked out the guidelines for confessional procedure and debated the nuances of guilt and innocence in a complex world with psychologically complex individuals. Among the English individuals influenced by the Chanter were Robert Courson, who wrote extensively on penance; Stephen Langton, whose sermons and *quaestiones* survive, although he is probably best remembered for his involvement in the formulation of *Magna Carta*; Robert of Flamborough, famous for his *Penitentiale* for confessors; Thomas de Chobham, author of guides to confessors, including his *Summa Confessorum* of c. 1215; and even Gerald of Wales. See John W. Baldwin, *Masters, Princes and Merchants: The Social Views of Peter the Chanter and His Circle* (Princeton: Princeton University Press, 1970), esp. 24-36, 39-43.

or alternatively send him or her to the gallows. In the absence of confession, coroners and justices, like confessors, relied on inquiries into the circumstances in order to ascertain the level of culpability involved. Lest we be inclined to think such oblique approaches to guilt assessment smack of primitive or archaic procedure, we might observe that twenty-first century inquiries into criminal intent often follow a similar route.⁹

In chapter five, I turn to the broader issue of judging. I point out how felony's grounding in a notion of mind added to the dangers involved in the act of judging. At the same time, I highlight the ways in which medieval culture embraced prudential judgment as a routine fact of life. On the former issue, I build upon the work of James Whitman, who in *The Origins of Reasonable Doubt* revealed the extent to which judging elicited fear for medieval men, for whom issuing judgments, particularly in capital cases, might place at risk their chances for eternal salvation. I suggest that these concerns were exacerbated by felony law's dependence upon an often-unknowable variable, an individual's innermost thoughts and desires, such that a judge or juror having to weigh a person's guilt or innocence might find himself stymied by the inaccessibility of mental states. Literature on judging emphasized the extent to which judges—and, by extension, jurors—would in turn be judged, and so in this portion of the dissertation I ask the reader to consider not only the complexities of the accused's mental state, but also the complexities of the mental state of the person engaged in the act of judging; this, too, would be subject to scrutiny on the final day of judgment. On the other hand, despite these fears of the Last Judgment so commonly found in medieval literature, one finds medieval English men comfortably handing down verdicts in a wide range of disputes, felony cases being only the most

⁹ Consider, for example, the pattern criminal jury instructions for the State of Michigan, which provide: "The defendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the defendant, and any other circumstances surrounding the alleged killing." *Michigan Model Criminal Jury Instructions* 16.21 (Inferring State of Mind). My thanks to Gabe Mendlow for pointing out this parallel.

extreme example due to the blood sanctions attached to them. How individuals reconciled their fear of judging with the expectation that they issue verdicts in routine and extreme cases alike will be explored in this final chapter.

Why the thirteenth and fourteenth centuries? These were the first two centuries in which England, having had to abandon trial by ordeal in the wake of the Fourth Lateran Council in 1215, relied almost exclusively on lay juries to try felony cases. Taking Lateran IV as a starting point is appropriate for two reasons: first, the council abolished clerical involvement in the ordeal, which facilitated a rapid transition in England toward the use of juries to try criminal cases. Second, Lateran IV mandated annual confession, which resulted in an explosion of literature related to penance and the method of hearing confessions. Admittedly, Lateran IV may be given too much credit for inspiring the rise of the criminal trial jury and penitential literature alike: scholars have pointed out the long-term decline of the ordeal in England as well as an increase in penitential literature and an expanded use of inquests for civil and criminal matters well before 1215. Additionally, my examination of theories of culpability will necessarily require glancing back pre-Lateran IV to consider the influence of Peter the Chanter and his Paris circle of theologians on the development of canonistic thought on penance and guilt. Moreover, Anglo-Saxon and Anglo-Norman treatises, some pre-dating Lateran IV, can help illuminate the intellectual underpinnings of later secular criminal law. Furthermore, studying criminal trial by jury necessitates exploring the decades prior to the ordeal's abolition, when England was employing lay juries to "present" alleged criminals and, in some instances, to decide whether a private prosecution was brought in good faith or instead inspired by *odio et atia*, hate and spite. How these juries reached their verdicts, whether medial or final, remains largely a mystery, which is not altogether surprising when we consider that even today the criminal trial jury is

often described as a black box, delivering a verdict as mysteriously as an oracle might issue from an ancient Greek priestess. Yet enough clues survive, both within the legal record—in the phrasings, sometimes formulaic, presumably invoked by juries and certainly inscribed by court clerks—and in literary evidence that might seem ancillary to the law yet is central to an understanding of medieval English cultural approaches to discerning guilt and innocence. In short, Lateran IV serves as my starting reference point, but I necessarily reach further back in time at various points in the chapters to follow. In terms of an endpoint, I traverse the long durée of the thirteenth century and continue on into the fourteenth century past the punctuating moments of plague and peasants’ revolts through and past the year 1390, when the distinction between manslaughter and murder became statutorily recognized after a statute of Richard II forbade the king to grant pardons of grace to those guilty of murder, defined as a slaying with malice, unless the aggravation was explicitly stated in the pardon documentation.¹⁰

This dissertation cannot be about the trial jury alone. For one thing, developments in criminal procedure can be understood better when viewed in tandem with developments in penitential procedure and theory. The entire system of felony prosecution, whether by design or by organic development, gestures to understandings of human relationships, wrongdoing, and salvation that might strike the twenty-first century legal theorist as alien.¹¹ Both in England and on the continent, the most common response to a homicide was immediate flight. That might be the most common response for a homicidal actor today, too, yet flight in these early centuries

¹⁰ See Maitland, “Early History of Malice Aforethought,” 305, 309. Green, *Verdict According to Conscience*, 33. This statute was not of long-lasting significance, and a better ending point may therefore be less precise.

¹¹ On this “alien” nature of medieval law and its relationship to modern jurisprudence, see Karl Shoemaker, “Regarding Untimeliness: Medieval Legal History and Modern Law,” *Critical Analysis of Law* 2:1 (2015), 199-213. See also James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008), 2 (describing “a forgotten world of premodern Christian theology, a world whose concerns were quite different from our own.”)

was undertaken not only to avoid facing arrest and trial: flight might allow time for passions to cool, and for the perpetrator's and victim's families to reach a concord to resolve the crisis between them. This was especially true in places like southern France, where flight was understood to provide space for negotiation and was often followed by reintegration of the perpetrator into the community.¹² In England and on the continent, flight in many cases ended in a space of sanctuary, typically a church, where any desire for revenge could not breach the threshold, and where the accused might pause to weigh the options: surrender for trial or confess. If a sanctuary seeker confessed to felony in England, he or she faced a further choice: whether to abjure the realm, turn king's evidence as an approver, or face the gallows. There was also the option of claiming benefit of clergy, by which a clerical perpetrator might have his trial transferred from the royal to the ecclesiastical courts, which relied on compurgation rather than the death penalty. Lest this summary give the impression that English felony law was lenient toward the accused, with all these escape valves to avert bodily punishment, it is noteworthy that the sole punishment for a person convicted of felony was death, typically death by hanging, whether the felony involved a grisly murder or theft of a sheep. Medieval English felony law was a law of contradiction—mercy and severity as co-presiders—and by the end of this dissertation I will have added layers of further contradiction to this fundamental one at the heart of the adjudicatory system.

The Essentials of Medieval English Felony Procedure

To understand the role played by mind within felony adjudication, one must understand the basics of felony procedure. Here I will provide a basic introduction that necessarily oversimplifies but is designed to offer a quick primer for those unfamiliar with medieval English

¹² Daniel Lord Smail, *The Consumption of Justice: Emotions, Publicity, and Legal Culture in Marseille, 1264-1423* (Ithaca: Cornell University Press, 2003), 168-171.

criminal law. I will sketch out the aftermath of a crime, relying on a “choose your own adventure” model admittedly more common in children’s literature than in works of English legal history. From the moment a person committed an act of violence toward another individual or his or her possessions, situational choices heavily determined the outcome of the ensuing crisis. For the purpose of illustrating the basic procedural mechanisms of felony prosecution, I will begin with an invented crime, a homicide.

My imaginary homicide involves a perpetrator (as the omniscient narrator, I will not say “alleged perpetrator”, as we will stipulate that he committed a fatal act of violence) named John, who worked as a laborer in a village not far from Norfolk. While out drinking after a long week’s work, John fell into argument over the necessity of abstaining from meat on Fridays. The dispute started off congenial enough and tapered off, but as John and his companions consumed ale over the course of the evening, one friend, Simon, decided unwisely to rekindle the discussion. Simon claimed to have seen John gnawing on a piece of meat the previous Friday and began to speculate as to what might happen if he reported this sighting to John’s priest or, even worse, John’s religiously scrupulous wife. Offended by Simon’s ribbing, John stood up from his stool unsteadily and told John in no uncertain terms to retract his accusations. Simon stood up, too, but rather than backing down from his comments, pulled out the knife which he kept in his belt for quotidian uses, whether slicing stale bread or cutting a rope or cord, and brandished it menacingly. John responded in kind, removing a similar knife from his own belt. Pushed toward the door by the pub owner and some other men enlisted for the task, John and Simon took their altercation outside, where John, stumbling forward, stabbed Simon in the side, wounding him. Friends quickly intervened, and the group split up, one taking the inebriated John home to bed, and the other rushing the equally inebriated and now wounded Simon to the

nearest home for bandaging. Simon's fate would not be clear until daybreak, in fact, daybreak a few days after the fatal incident.

Choice one. John woke up the following morning, hung over but recalling the events of the previous evening with great remorse and a not-inconsiderable fear of his wife's wrath. The house was empty but, by the time he had dressed, his wife had returned home with news of Simon's condition: she had learned from neighborhood women that the local priest had visited Simon's home that morning to hear his confession and administer last rites. John had to decide what action to take next. He might choose to: 1) remain home and perhaps even go about his daily business, waiting for further news of Simon's condition, 2) flee immediately, leaving the Norfolk environs entirely and going into hiding some distance away, 3) flee, but only as far as the closest church to seek sanctuary, with the possibility of leaving sanctuary if Simon rallied and the conflict dissipated, or abjuring the realm entirely if Simon succumbed to death.¹³ Any one of these options would involve a further series of choices, some of which will be explored in greater depth below. For example, if John chose to remain home, would he approach Simon and his wife and seek to make amends? Would he visit his parish priest and confess his actions, seeking guidance on how to proceed? Would he instead simply go on with work as usual and hope that the incident would blow over? Flight would inevitably involve further choices, particularly flight to sanctuary, where John would have forty days to decide what course to take should an indictment issue.

In the meantime, let us imagine that Simon lingered for three days, losing more blood and developing an infection that rapidly progressed to sepsis. Upon his death, his wife ran outside

¹³ Hurnard devotes an entire chapter to the issue of fugitives who take flight due to fear over possible felony prosecutions. See Naomi D. Hurnard, *The King's Pardon for Homicide before A.D. 1307* (Oxford: Clarendon, 1967), 131 ff.

and raised the hue and cry, alerting the village to a possible felony and leaving no uncertainty as to whether she intended to forgive John and move on, or instead bring an appeal, or private accusation of felony, against him.¹⁴ If John had earlier chosen to remain in town, he again faced the question of whether or not to flee town or seek sanctuary locally. Regardless, the local coroner was summoned to Simon's home, where he finalized the selection of a group of respectable men from the neighborhood of the tavern and Simon's house, where he died, to undertake an official inquest into the death.¹⁵ The coroner was an official whose responsibilities included holding inquests into suspicious deaths and preparing a narrative of such deaths that could form the basis for adjudication if a suspected homicide case proceeded to trial.¹⁶

We will imagine that the inquest took place. The coroner and the inquest jurors, twelve in number in this instance, examined Simon's corpse, looking for signs of trauma and measuring the length and depth of any wounds. They described John's knife and valued it, as its price was forfeit to the crown; because John had not surrendered the knife, the jurors could only offer a vague description based on one juror's recollection of the knife. They summoned the nearest neighbors and the first finder of the body, Simon's wife. Most importantly, they compiled a seamless narrative of the events as they had transpired, from the argument in the tavern up until

¹⁴ On the strategic use of the hue and cry in anticipation of bringing an appeal in the county court, see R. F. Hunnisett, *The Medieval Coroner* (Cambridge: Cambridge University Press, 1962), 56. On the hue and cry generally, see Sara M. Butler, *Forensic Medicine and Death Investigation in Medieval England* (New York: Routledge, 2015), 42-43. On the process of appeal, see Daniel Klerman, "Women Prosecutors in Thirteenth-Century England," *Yale Journal of Law & the Humanities* 14:2 (2002), 277-278.

¹⁵ Based upon my own study of fourteenth-century coroners' rolls for London, I would expect the coroner to choose men from both of these locales in order to obtain information both about the altercation in the pub and about the aftermath, including Simon's convalescence at home. For an expansive discussion of the process of summoning potential inquest jurors and their social status, see Butler, *Forensic Medicine and Death Investigation*, 43-44, 79-83.

¹⁶ For a description of the coroner's duties in criminal cases, see Butler, *Forensic Medicine and Death Investigation*, 40-51, 127-129. See also Hunnisett, *Medieval Coroner*, 9-117.

the time of Simon's death, not delving into excruciating detail but nonetheless giving the basic contours of the altercation and its aftermath. To do so, they relied upon second-hand testimony from those who had been present in the pub when the fight broke out, as well as those who visited Simon at home during his brief convalescence. Finally, they identified John as the apparent perpetrator of the violence against Simon.¹⁷ The coroner then issued an order to the sheriff to apprehend John if possible, and his wife was instructed to appear as well to ascertain the extent of her knowledge and involvement.¹⁸ The coroner kept a record of this inquest on his roll, ready to present to the king's justices if a trial ensued at gaol delivery or during an eyre.

Once the inquest pinpointed John as the suspect in Simon's violent death, attention shifted to securing his presence. If John were still in town, he would be attached at this point to stand trial. He would likely be imprisoned, although there is a chance he might be released if he found sureties, particularly if the next visitation of royal justices was not scheduled for the near future.¹⁹ As for progressing to trial, John's case might proceed by means of private prosecution, or appeal, if Simon's wife decided to press charges.²⁰ This would require her to bring an accusation against John at four consecutive sessions of the county court; if John failed to appear

¹⁷ Typically the inquest would also report whether the accused individual had fled, and would provide an initial valuation of any real property and chattels he had to his name.

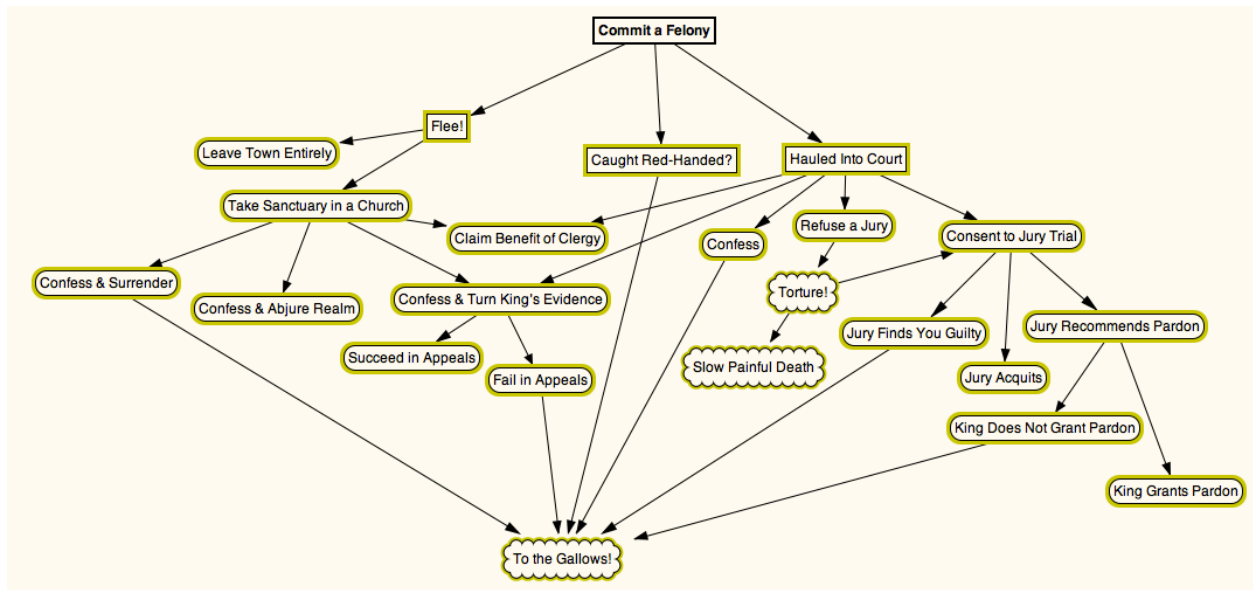
¹⁸ On the attachment of appellees by the coroner and/or sheriff, see Hunnisett, *Medieval Coroner*, 59.

¹⁹ See Hunnisett, *Medieval Coroner*, 63.

²⁰ For a more comprehensive description of appeal procedure, see John H. Langbein, Renee Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Institutions* (New York: Aspen, 2009), 29-35. See also Hurnard, *King's Pardon for Homicide*, 171 ff; J. H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), 503-505.

by the fourth session, he would be outlawed.²¹ Alternatively, a public prosecution might occur upon indictment.²²

Fig. 1. A streamlined (and caricatured) view of felony prosecution.



If John had taken flight and secured sanctuary, he would have forty days to decide upon a course of action. If rumors were such that John had reason to believe he would likely be acquitted or recommended for pardon at trial, he might surrender himself. If, however, he feared a negative trial outcome, John might instead choose to abjure the realm, leaving England entirely and permanently. For a man like John, married and with other local village ties, this would be a devastating decision to face, but the uncertainties of life abroad would be preferable to the near certainty of facing the gallows upon a felony conviction. Moreover, John might anticipate being able to return in the future by securing a pardon, particularly if any others from his village had

²¹ On this process, see Hunnisett, *Medieval Coroner*, 61. Outlawry might be delayed until a fifth session if one or two men in attendance at the fourth pledged that they would ensure his appearance.

²² On indictment procedure, see Baker, *Introduction to English Legal History*, 505-506.

previously managed that feat. He might also persuade his spouse to accompany him abroad to start life anew in France.²³

Once a decision had been made to abjure, John would have had to confess his crime to the coroner in the presence of witnesses, men from the neighboring vills. This would have the effect of publicity, making known that John was a self-acknowledged felon and also broadcasting his protected status as a felon en route to abjuration.²⁴ John would then receive his literal marching orders, the coroner assigning him a port of departure and spelling out the towns that would serve as wayposts along the route. John would be attired in penitential garb, sans breeches and belt, and would carry a cross to identify him as an abjurer and thereby guarantee his safe passage.

Had John been a man of a different sort, further options would have been open to him. For example, if he had taken on minor clerical orders, he could have claimed benefit of clergy to remove his case to ecclesiastical jurisdiction.²⁵ If, alternatively, he were a notorious felon, perhaps guilty of other occasions of homicide or theft, he could become an approver (*probator*), turning king's evidence. Just like an abjurer, John would have been required to confess his crimes to the local coroner. In addition, to secure a reprieve from the capital punishment that would normally ensue from a confession of felony, John would have had to bring official accusations, in the form of an appeal, against any accomplices. If he succeeded in securing

²³ For the perspective that family members may have sometimes followed abjurors to the port to accompany them on their journey abroad, see William Chester Jordan, *From England to France: Felony and Exile in the High Middle Ages* (Princeton: Princeton University Press, 2015), 79, 83. Jordan's study on abjuration to France focuses on the town of Wissant as the typical port of arrival.

²⁴ On the many ways in which publicity was built into the system, see Henry Summerson, ed., *Pleas of the Devon Eyre of 1238* (Torquay: Devonshire Press, 1985), xvi-xvii.

²⁵ Ordinaries would regularly be sent before the royal justices to claim any men who successfully asserted clerical status. See, e.g., the commissions contained in this archbishop's register: William Brown, ed., *The Register of Thomas of Corbridge, Lord Archbishop of York, 1300-1304*, part 2 (Durham: Andrews & Co., 1928), 32, 61-62.

convictions in each of these private prosecutions, he would continue to enjoy his reprieve from the gallows and might eventually be permitted to abjure the realm. If, on the other hand, he failed in even just one appeal, as was typically the case for approvers, his earlier confession would send him straight to the gallows. A further option for John, whether he found himself in gaol awaiting trial, on the road toward abjuration, or bringing accusations against others as an approver, was the risky escape attempt. If caught, however, John might face further peril: some escapees were decapitated if taken in flight.

Assuming John eventually had his day in court, he would face the choice of whether to submit to trial by jury—putting himself “on the country,” as the common law described it—or to refuse jury trial either explicitly or by standing mute. The legal treatise *Britton* leaves little doubt as to the fearful punishments awaiting the defendant who chose the latter route: “let them be put to their penance, until they pray to do it; and let their penance be this, that they be barefooted, ungirt and bareheaded, in the worst place in the prison, upon the bare ground continually night and day, that they eat only bread made of barley or bran, and that they drink not the day they eat, nor eat the day they drink, nor drink anything but water, and that they be put in irons.”²⁶ By the 1300s, pressing to death was the typical mode of inflicting what came to be known as *peine forte et dure*.²⁷ The choice to stand mute, like a decision to abjure, might be complicated by family concerns. If he submitted to trial and were convicted, John would lose his chattels and real property as a convicted felon. However, if he died while undergoing torture aimed, unsuccessfully, at coercing him to agree to a jury trial, John would die *not* as a convicted

²⁶ Francis Morgan Nichols, ed. and trans., *Britton: The French Text Carefully Revised with an English Translation*, vol. 1 (Oxford: Clarendon, 1865), 26-27.

²⁷ Baker, *Introduction to English Legal History*, 508-509.

felon, thereby averting the property forfeiture attendant upon felony conviction, with its dire consequences for his surviving spouse and children.

Standing trial itself might involve further decisions with regard to pleading, all undertaken without the benefit of official legal counsel.²⁸ These pleading options, including claims of self-defense, will be treated in future chapters. As for John's chosen adventure, I leave that to your imagination.

The Historiography of Trial by Jury

In 1985, Thomas Green's *Verdict According to Conscience* set out several of the questions that historians would debate in the closing years of the twentieth century, and which continue to inspire scholarship today, this project included. Green described the use of trial juries in criminal cases c. 1220 onwards as "the final stage of a century-long evolution in the administration of the criminal law" elsewhere described as the Angevin transformation.²⁹ This period witnessed a shift from private to public criminal prosecution, from compensation to capital punishment, and from a presenting jury reflecting "communal attitudes" to a trial jury serving a similar purpose.³⁰ Although this evolution centralized power in royal hands, it paradoxically "placed the defendant in the hands of the local community."³¹ Green situated the

²⁸ This absence of counsel would continue well into the early modern period. See John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003), 10-66.

²⁹ Green, *Verdict According to Conscience*, 4. See also Thomas A. Green, "A Retrospective on the Criminal Trial Jury, 1200-1800," in J. S. Cockburn and Thomas A. Green, eds., *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton: Princeton University Press, 1988), 359.

³⁰ Green, "Retrospective on the Criminal Trial Jury," 359.

³¹ Green, *Verdict According to Conscience*, 4. Groot argues that English law moved deliberately in the direction of local, lay trial juries in the years immediately following Lateran IV, despite the availability of possible alternatives. See Roger Groot, "The Early-Thirteenth-Century Criminal Jury," in J. S. Cockburn and Thomas A. Green, eds., *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton: Princeton University Press, 1988), 3-35. See also Richard Kaeuper, *War, Justice and Public Order: England and France in the Later Middle Ages* (Oxford: Clarendon,

rise of the trial jury within the context of an expansion in the availability of royal pleas through the twelfth century, and the introduction of new criminal justice procedures with the Assize of Clarendon in 1166.³² The Assize instituted a system by which sworn juries of lawful local men, for which there was already precedent, would speak the truth (*verum dicere*, the source of our term “verdict”) as to whether there were any individuals in the locality who were known or suspected to be a robber, murderer, or thief, or alternatively a harbinger of robbers, murderers, or thieves.³³ These juries of presentment, the predecessor of the grand jury, employed local men in bringing accusations, and eventually took the further step of deciding whether an accused person, due to the weight of suspicion, should be released or proceed to trial by ordeal or, later, trial by jury.³⁴ By the time of the Fourth Lateran Council’s abolition of priestly involvement in the ordeal, England already had a time-tested tradition of employing jurors to speak to a suspect’s

1988), 154-155 (describing, in the previous century, Henry II’s shift away from using local justiciars, and simultaneous replacement of them with local juries of presentment).

³² Green, *Verdict According to Conscience*, 5-6.

³³ William Stubbs, ed., *Select Charters and Other Illustrations of English Constitutional History*, 9th ed. (Oxford: Clarendon, 1942), 170. For an English translation, see Carl Stephenson and Frederick George Marcham, *Sources of English Constitutional History* (New York: Harper, 1937), 77. “In primis statuit praedictus rex Henricus de consilio omnium baronum suorum, pro pace servanda et Justitia tenenda, quod per singulos comitatus inquiratur, et per singulos hundredos, per xii. Legales homines de hundredo, et per iv. Legales homines de qualibet villata, per sacramentum quod illi verum dicent: si in hundredo suo vel villata sua sit aliquis homo qui sit rettatus vel publicatus quod ipse sit robator vel murdrator vel latro vel aliquis qui fuerit receptor robatorum vel murdratorum vel latronum, postquam dominus rex fuit rex. Et hoc inquirant Justitiae coram se, et vicecomites coram se.” On precursors to the jury of presentment, see James Masschaele, *Jury, State, and Society in Medieval England* (New York: Palgrave Macmillan, 2008), 47; Naomi D. Hurnard, “The Jury of Presentment and the Assize of Clarendon,” *English Historical Review* 56 (1941), 374-378. On ways in which the Assize of Clarendon introduced novel procedures, see Hurnard, “Jury of Presentment,” 396-399.

³⁴ Roger Groot has written extensively on these issues. See, e.g., Roger D. Groot, “The Jury of Presentment before 1215,” *American Journal of Legal History* 26 (1982), 1-24; “The Jury in Private Criminal Prosecutions before 1215,” *American Journal of Legal History* 27 (1983), 113-141; “Teaching Each Other: Judges, Clerks, Jurors and Malefactors Define the Guilt/Innocence Jury,” in Jonathan A. Bush and Alain Wijffels, eds., *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900* (London: Hambledon, 2003), 17-32.

guilt or innocence.³⁵ In a later but related development, the system of eyres, or sessions of visiting justices who heard civil and crown pleas, declined as regular commissions of gaol delivery became the norm in the early fourteenth century. This contributed to the growing separation between juries of presentment and trial juries.³⁶

Perhaps the most influential portion of Green's book, at least for medievalists like myself, is his analysis of self-defense cases and related conclusions about jury nullification. Comparing coroners' indictments with trial records for self-defense cases, Green found evidence of trial jury manipulation of facts to place some defendants in a sympathetic light, ultimately resulting in a self-defense verdict and access to a royal pardon.³⁷ In so doing, jurors essentially manufactured a distinction between "simple" homicide, or manslaughter, and murder, a distinction not yet made formally.³⁸ In this way, the jury imposed "the community's—or the communities'—concepts of liability for felony" upon the courts.³⁹ Furthermore, Green argues, juries might have unwittingly affected the course of common law development: judges, already dependent on juries for information on the alleged crime and on the credibility of witnesses, seemed ready to acquiesce in nullification.⁴⁰ Judicial acquiescence might, in turn, have stifled

³⁵ Green, *Verdict According to Conscience*, 13.

³⁶ Green, *Verdict According to Conscience*, 21-22.

³⁷ Green, *Verdict According to Conscience*, 31, 36-46.

³⁸ Green, *Verdict According to Conscience*, 46. See also Thomas A. Green, "Societal Concepts of Criminal Liability for Homicide in Medieval England," *Speculum* 47:4 (1972), 669-694. Green points out that the letter of the law failed to distinguish murder from manslaughter from late Anglo-Saxon times to the end of the Middle ages, although society recognized such a distinction.

³⁹ Green, *Verdict According to Conscience*, 28. To take a second example, the formal law prescribed death for thieves, yet most defendants were acquitted. See *ibid.*, 60-61. This, too, suggests a disconnection between formal legal requirements and social attitudes.

⁴⁰ Green, *Verdict According to Conscience*, 65. See also Green, "Retrospective on the Criminal Trial Jury," 359-360.

legal progress, resulting, for example, in the continuation of strict self-defense rules.⁴¹ By contrast, had judges resisted jurors' efforts to recharacterize some homicides as self-defense, the formal law may have had to be altered to reflect the outcome of this judicial activism and to clarify the bounds of appropriate jury mitigation of capital punishments.

Green's study largely commences in Henry II's reign, viewing the presenting jury as a milestone on the road toward the trial jury. In his *Constitutional History*, J. E. A. Jolliffe offers a fairly standard view regarding Henry's innovations, describing the introduction of criminal presentment by the 1166 Assize of Clarendon as the "earliest enactment of inquest as the basis of administrative action" and "the forerunner of our grand jury."⁴² Jolliffe acknowledged that presentment had an adjudicative effect, driving individuals to the ordeal and, even if cleared, requiring abjuration or outlawry for those of ill repute.⁴³ He stopped short, however, of describing the presenting jury as the direct antecedent of the trial jury. Juries of presentment did, at the very least, acclimatize medieval English men to the practice of close involvement in adjudicating felony cases, so in that sense the institution did help prepare for England's adoption of criminal trial juries in the post-Lateran years.

Regardless of whether one sees presenting juries as directly tied to the development of trial juries, historians generally center on 1215—and the Fourth Lateran Council's ban on priestly involvement in trial by ordeal—as a turning point in the history of the English trial jury. J. H. Baker, for example, described the jury's "prominent place in criminal procedure" as "a

⁴¹ Green, *Verdict According to Conscience*, 94-95. John Bellamy suggests thinking of this instead as judge-jury "consensus" instead of acquiescence by judges in jury nullification. See J.G. Bellamy, *The Criminal Trial in Later Medieval England* (Toronto: University of Toronto Press, 1998), 14. For Green's reply, see Thomas A. Green, review of *The Criminal Trial in Later Medieval England: Felony before the Courts from Edward I to the Sixteenth Century*, by J. G. Bellamy, *American Historical Review* 105:1 (2000), 266-267.

⁴² J. E. A. Jolliffe, *Constitutional History of Medieval England* (London: A. and E. Black, 1937), 209.

⁴³ Jolliffe, *Constitutional History of Medieval England*, 209.

direct result of the decision of the church in 1215 to stop ordeals.”⁴⁴ This is not to imply that historians like Baker believe the jury sprang to life *ex nihilo* in the council’s wake, but that the Lateran pronouncement gave the final push toward using juries to sort the innocent from the guilty in felony cases. According to the standard and oversimplified narrative of the Lateran Council’s impact, the continent lacked a tradition of local inquests and therefore resorted to inquisitorial methods of prosecution and, relatedly, to torture as a means of extracting confessions after 1215.⁴⁵ In contrast, England made a nearly seamless transition to trial by jury within years of the council thanks to its familiarity with inquest procedure in other contexts. Both these descriptions, of course, fail to capture the complexity of the continental and English responses to Lateran IV, not to mention the great diversity of responses in various localities on the continent. Nevertheless, to speak in broad terms and to the issue of mind more specifically, I might argue that, to the extent that continental criminal adjudication relied on confession, this enabled judges to be cautiously confident regarding an accused individual’s state of mind. The reliance instead on trial by jury in England, I argue, should not be interpreted as demonstrating a less active interest in discerning an accused individual’s state of mind. In fact, juries in some ways may have been better situated than royal justices in evaluating mind, a topic to be taken up below.

⁴⁴ Baker, *Introduction to English Legal History*, 73. See also Groot, “Early-Thirteenth-Century Criminal Jury,” 3 (“The most important event in the history of the criminal jury was the abolition of the ordeal by edict of the Roman church in 1215.”) Lateran IV, of course, did not technically abolish the ordeal, but rather simply withdrew priestly involvement in such procedures.

⁴⁵ But see Richard M. Fraher, “Conviction According to Conscience: The Medieval Jurists’ Debate Concerning Judicial Discretion and the Law of Proof,” *Law and History Review* 7:1 (1989), 23-74, which complicates the narrative of the continental response to the abolition of the ordeal and adoption of inquisitorial procedure, concluding that jurists were more open to judicial discretion than once believed.

The Slow Fade (or Rapid Loss?) of the Ordeal

Although I take as my temporal starting point the Fourth Lateran Council, arguing that from the trial jury's earliest days, considerations of mind were central to jurors' evaluations of a person's guilt or innocence, I do not mean to imply that intentionality did not matter under earlier adjudicatory procedures. My assumption, in fact, is that the sorting process that preceded earlier trials by ordeal also paid great heed to issues of mind, and that competing concerns with character, reputation, and other factors influenced outcomes both in the ordeal and in later trial by jury. I imagine that mind was one of the multitude of factors that determined whether an individual was sent to the ordeal rather than compurgation, and that it also influenced those charged with deciding whether a person had passed the ordeal successfully. Nevertheless, I believe that the issue of mind gave rise to greater anxiety following the transition from ordeal to jury trial, when felony adjudicators could no longer take some comfort in a procedure that purported to leave the ultimate judgment to God. With jury trial, the verdict lay firmly and unequivocally in human hands, albeit residing in a group of men rather than burdening the conscience of a single judge.

In the decades preceding 1215, including the years after Henry II's imposition of a system of presenting juries in 1166, the typical mode of felony trial involved the ordeal, with compurgation or oath swearing offering an alternative available to some accused individuals.⁴⁶ Ordeal procedure took a variety of forms in its English and continental usage, but in England the

⁴⁶ Scholars have argued that the ordeal had only "a brief existence" in English felony cases, only being used mandatorily from the time of the Assize of Clarendon (1166) until Lateran IV (1215). Margaret H. Kerr, Richard D. Forsyth, Michael J. Pyley, "Cold Water and Hot Iron: Trial by Ordeal in England," *Journal of Interdisciplinary History* 22:4 (1992), 573.

two primary methods were by water or hot iron.⁴⁷ The former, trial by water, involved dunking the accused in a pond or cistern; if the person sank, he or she was pronounced innocent, and if the person floated, he or she was found guilty and either maimed or killed. The latter procedure required the accused to carry a hot iron a number of paces, after which the resulting wound was bandaged. If the wound showed signs of healing after three days, the accused was declared innocent, but if the wound turned out to be infected, a guilty verdict ensued. As with most attempts to summarize medieval criminal procedure, this account necessarily oversimplifies; in some instances, for example, a person found “innocent” by the ordeal might nevertheless be required to abjure the realm. Trial by ordeal necessarily involved a priest, who was called upon to bless the water or iron prior to putting the accused to the test. The idea behind the ordeal was that it revealed God’s judgment, although more legal-realistically inclined historians contend that great discretion was likely exercised by the individuals called upon to determine whether a person had sunk or floated, or whether a wound was infected or healing.⁴⁸ Even prior to this, human judgment determined whether a person should face the ordeal in the first place. Nevertheless, as alluded to above, I believe that, although individuals were making determinations of guilt and innocence, including an assessment of mind, the nature of the procedure—invoking the judgment of God—provided moral comfort in cases where a person might have doubts about the guilt of the accused.

⁴⁷ For a much more thorough discussion of the ordeal in English and continental usage in the ninth through twelfth centuries, see Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon, 1986), 13-33.

⁴⁸ See, e.g., Kerr, Forsyth, and Plyley, “Cold Water and Hot Iron,” 580, 582-583 (arguing that the ordeals were “engineered to ensure a high rate of success”, and suggesting that women were more commonly put to trial by hot iron rather than water because they were much less likely than men to pass the latter ordeal due to their higher percentage of fat).

In fact, some historians argue that the ordeal was used primarily in difficult cases, where a lack of eyewitnesses or other evidence made a guilt or innocence determination a challenge.⁴⁹ Alternatively, the ordeal might have been designed primarily as a means of providing some measure of mercy to accused individuals known or very strongly suspected to be guilty.⁵⁰ I find this argument compelling. The twelfth-century legal treatise *Glanvill*, for example, described the ordeal as a purgation and, as mentioned above, even those who passed the ordeal frequently abjured the realm, thereby suggesting that their blameworthiness was apparent prior to the ordeal, and that concerns with recidivism might have driven post-ordeal arrangements.⁵¹ In any event, the ordeal allowed for greater nuance in assessing guilt than might be apparent at first acquaintance, and the accused's state of mind—possibly at the time of crime commission as well as at the ordeal—might have largely determined outcomes.⁵²

Focusing on the post-1215 world, I do not grapple head-on with the ordeal in the chapters to follow. Nevertheless, I attempt to place jury trial, and jurors' interest in a defendant's mentality, in the context of the longer *durée* within which there might be more intellectual continuity despite the procedural discontinuity of a shift from ordeal to jury trial. Paul Hyams argues for continuity of sorts even within the procedural realm, contending that the shift away from ordeal was a gradual process whose rapidity was overestimated due to post-hoc attempts to

⁴⁹ See, e.g., Bartlett, *Trial by Fire and Water*, 29-30, 64 (describing the ordeal as coming into play when a person of ill repute was accused of a crime, but evidence was lacking: "The ordeal existed in that narrow place where suspicion was considerable but guilt was not unquestionable."); Olson, "Of Enchantment," 121-122. Looking further back, the Carolingian capitularies explicitly reserve the ordeal for "doubtful cases". See Henry Charles Lea, *Superstition and Force: Essays on the Wager of Law, the Wager of Battle, the Ordeal, Torture*, 2nd edition (New York: Greenwood, 1968; first published 1870), 202.

⁵⁰ This argument is advanced by Kerr, Forsyth, and Plyley in "Cold Water and Hot Iron," 574.

⁵¹ See Kerr, Forsyth, and Plyley, "Cold Water and Hot Iron," 576, 578-579.

⁵² See Olson, "Of Enchantment," 149-150. ("The medieval's definitional emphasis when considering wrong was not upon a man's past act but upon the corrupting aspect of wrongdoing.")

find intellectual justifications for the change. In fact, historians' fixation with 1215, even as it pertains directly to the decline of ordeals (as opposed to the rise of the jury) might be attributed, according to Hyams, to the historian's natural inclination to look for the intellectual preparation behind a practice's abandonment.⁵³ If the ordeal ended in 1215, then the natural impulse is to seek out the pre-1215 voices of reform. Yet Hyams cautions that writers who appear to be "reforming critics" might instead reflect a belated, overly intellectualized critique of a method of proof that had long had its detractors.⁵⁴ Moreover, Hyams sees ecclesiastical thinkers as the unlikely source of radical change in criminal procedure.⁵⁵ Instead, he posits that change occurred gradually as individuals experimented with alternate forms of proof. The ordeal's demise was "the consequence of commonsense choices unencumbered by much theory."⁵⁶ In fact, long before 1215 royal justices were steering cases away from the ordeal and toward the inquest, although Hyams concedes: "the occasional peasant still had to carry the hot iron in the England of Magna Carta."⁵⁷ This emphasis on judicial activism in bringing about the shift from ordeal to jury can be found in the writings of T. F. T. Plucknett as well, although he describes the

⁵³ Paul Hyams, "Trial by Ordeal: The Key to Proof in the Early Common Law," in Morris S. Arnold et al., eds. *On the Laws and Customs of England* (Chapel Hill: University of North Carolina Press, 1981), 101-102.

⁵⁴ Hyams, "Trial by Ordeal," 102-103.

⁵⁵ Hyams, "Trial by Ordeal," 103. But see Fraher, "Conviction According to Conscience," 63; Richard M. Fraher, "IV Lateran's Revolution in Criminal Procedure: The Birth of Inquisitio, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics," in *Studia in Honorem Eminentissimi Cardinalis Alphonsi M. Stickler*, ed. Iosepho Rosalio and Lara Castillo (Roma: LAS, 1991), 98-100.

⁵⁶ Hyams, "Trial by Ordeal," 106. Hyams similarly sees rational decision-making by individuals as causative in the demise of the feud. For example, men could choose trespass or the appeal of felony to deal with wrong by the late twelfth century. Paul Hyams, *Rancor and Reconciliation in Medieval England* (Ithaca: Cornell University Press), 174.

⁵⁷ Hyams, "Trial by Ordeal," 123.

justices' experimentation with juries occurring after 1215, given the fact that Henry III's 1219 decree left great room for discretion in dealing with criminal accusations.⁵⁸

In *Trial by Fire and Water*, Robert Bartlett describes a less gradual abandonment of the ordeal. He examines both the ordeal's origins—Frankish, in his estimation—and its demise. Bartlett argues against functionalists, such as Hyams, who hold that the ordeal was a method for achieving consensus in a small community; according to this view, the ordeal lost its appeal as community boundaries expanded in the twelfth century.⁵⁹ First, Bartlett disagrees with the notion that the ordeal generated consensus, finding it instead to be a top-down measure. Moreover, he suggests that the ordeal was actually flourishing and even expanding during the eleventh and twelfth centuries, thanks in part to the spread of Christianity.⁶⁰ As a result, Bartlett attributes the ordeal's ultimate demise to the confluence of three preconditions: dissent within the church over the ordeal's value, the presence of a reforming faction within commanding church positions, and the ability of the church's administration to respond to commands from the top.⁶¹ Once these factors converged, the ordeal could be abandoned swiftly in 1215. In summary, Bartlett distinguishes his views from those of Hyams, who sees the ordeal's demise as a foregone conclusion long before the Lateran Council's rubber-stamping in 1215.⁶² Bartlett

⁵⁸ T. F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 2010; first published 1929), 119. For a close analysis of the experimentation with trial juries in the immediate aftermath of Lateran IV, focusing on the years 1216-1222, see Groot, "Early Thirteenth-Century Criminal Jury," 3-35.

⁵⁹ Bartlett, *Trial by Fire and Water*, 35 (citing Hyams, "Trial by Ordeal"). Hyams' assessment is accepted wholeheartedly by Miller. See William Ian Miller, "Ordeal in Iceland," *Scandinavian Studies* 60:2 (1988), 190.

⁶⁰ Bartlett, *Trial by Fire and Water*, 42-43.

⁶¹ Bartlett, *Trial by Fire and Water*, 100.

⁶² Bartlett, *Trial by Fire and Water*, 70.

instead finds the ordeal flourishing through the twelfth century and then hastily abandoned in the early thirteenth century when clerical sentiment against it prompted a deliberate policy decision.

Neither Hyams nor Bartlett satisfactorily explains what the ordeal was meant to accomplish. Trisha Olson, in a 2000 article, takes issue with the way historians have understood the practice. Rather than “an appeal to the Deity as a supra-fact finder,” the ordeal served, according to Olson, as a means for guilty individuals to purge themselves and be adjudged innocent as a consequence.⁶³ While, according to Olson, continental inquisitorial procedure abandoned this purging process in favor of accurate fact finding, the English criminal jury system continued to seek a resolution carrying “sacerdotal meaning.”⁶⁴ Here, one might query whether continental methods also carried a deeper spiritual significance. Olson has elsewhere demonstrated the potentially salvific value of pain; presumably judicial torture, as applied on the continent, might have delivered a similar “divine beneficence,” to borrow Olson’s phrasing.⁶⁵ Nevertheless, Olson moves from this notion of ordeal as sacrament to the idea that jury trial also reflected a “sacramental faith.”⁶⁶

Indeed, Olson locates the ordeal within twelfth-century penitential practices and the contemporaneous emphasis on concord in the resolution of criminal accusations.⁶⁷ She sees the jury trial operating on similar assumptions, as demonstrated by the high acquittal rate with

⁶³ Olson, “Of Enchantment,” 112.

⁶⁴ Olson, “Of Enchantment,” 112. I would query the continent’s commitment to the facts, however, as confessions were frequently elicited through torture, understood to be an unreliable means of accessing truth even during the Middle Ages. See, generally, Kenneth Pennington, “Torture and Fear: Enemies of Justice,” *Rivista internazionale di diritto comune* 19 (2008), 203-242.

⁶⁵ See, generally, Olson, “Medieval Blood Sanction,” 63-129, especially 87-88.

⁶⁶ Olson, “Of Enchantment,” 112 (citing van Caenegem in agreement), 115. Note that William Ian Miller, in his comparison of ordeal and modern jury trial, suggests that both procedures rely on pain and humiliation. Miller, “Ordeal in Iceland,” 212.

⁶⁷ Olson, “Of Enchantment,” 137-146.

judges' acquiescence. Just as the ordeal might allow a defendant to be purged of guilt, so the jury trial might allow for the exercise of mercy.⁶⁸ Distinguishing herself from Green, Olson finds in acquittals not the application of equity, as when a jury determines that a defendant acted rightly or did not deserve the prescribed punishment, but a manifestation of divine grace.⁶⁹ In Olson's account, the ordeal allowed for purgation of factually guilty individuals, and in similar fashion jurors sat in judgment of a defendant's character at the time of trial rather than at the time of commission of an alleged crime.⁷⁰ In other words, a person guilty of homicide at the time she committed the offense might prove herself "innocent" of homicide by the time of trial. There might be some truth to this, although the attention paid to getting the facts straight in coroners' narratives suggests to me that there was great interest as well in discerning a defendant's state of mind at the time an offense was committed. Olson's arguments are unconventional, but only insofar as legal historians do not often focus on religious norms in analyzing continuity and change in secular criminal procedure. This possible blindspot might over time have resulted in a distortion in the historical analysis of criminal procedure.⁷¹ Olson offers a refreshing corrective and a reminder of the value legal historians can find in extra-legal evidence.

In a 2006 article, Finbarr McAuley similarly proposes a more religio-centric analysis of the ordeal, but in his case focusing on the criminal procedure reforms of Innocent III in the late twelfth century and the long-standing campaign to enforce a clearer division between secular and clerical as part of the ongoing process of Gregorian reform.⁷² According to McAuley, Innocent's reforms established an auxiliary procedure, trial *per inquisitionem*, allowing a judge to proceed

⁶⁸ Olson, "Of Enchantment," 173-174.

⁶⁹ Olson, "Of Enchantment," 175-176.

⁷⁰ Olson, "Of Enchantment," 181-182.

⁷¹ But see Whitman, *Origins of Reasonable Doubt*, especially chapter five regarding England.

⁷² See generally, McAuley, "Canon Law and the End of the Ordeal," 473-513.

without the ordeal when pre-existing *fama* had been shown.⁷³ Pointing out that the 1215 ban on clerical participation in the ordeal was one of several bans on clerical involvement in the shedding of blood, McAuley situates the Lateran decree *Omnis utriusque sexus* within the broader process of Gregorian reform aimed at demarcating more visibly the sacred from the profane.⁷⁴ The decree was likewise part of a program to shift the understanding of crime and punishment from a mere private concern to a matter affecting the broader public interest.⁷⁵ The value in McAuley's analysis is that it encourages historians of England to situate the insular experience of the ordeal within the broader European framework of criminal justice reform. For example, the shift from private to public prosecution, documented by Green in England, has its parallels in continental legal developments.⁷⁶ McAuley also, contra Hyams, views the shift away from ordeal as inextricably bound up with changing religious norms. Each of these accounts of the shift from ordeal to jury trial encourages us to abandon any notion that the earlier procedure had been a pure judgment of God, or that the latter procedure replaced divine with human judgment and removed any sacral quality from felony adjudication in the process.

⁷³ McAuley, "Canon Law and the End of the Ordeal," 490, 500.

⁷⁴ McAuley, "Canon Law and the End of the Ordeal," 501-502.

⁷⁵ See also Fraher, "Theoretical Justification for the New Criminal Law," 577-595 (attributing the new emphasis on the public nature of crime not to classical Roman law but instead to twelfth-century theory; Fraher suggests that a twelfth-century Romanist coined the phrase, taken up by Innocent, "*publice utilitatis intersit, ne crimina remaneant impunita.*" *Ibid.*, 589-590.) And see Rebecca V. Colman, "Reason and Unreason in Early Medieval Law," *Journal of Interdisciplinary History* 4:4 (1974), 577 (arguing against the idea of a shift from irrational early medieval legal procedures to more rational methods of proof.) Colman points out that the *Lex Salica* contains no more than a dozen references to the ordeal, but more than sixty to *testes* and *testimonium*.

⁷⁶ See, e.g., Sarah Rubin Blanshei, "Criminal Justice in Medieval Perugia and Bologna," *Law and History Review* 1:2 (1983), 251-75.

From Ordeal to Jury: The Search for Antecedents

If changing norms favored abolition of the ordeal, to what extent did they also have an impact upon the matter of *mens rea*, and the extent to which mind should factor into felony adjudication? Consider the fact that Lateran IV severed the church from involvement in trial by ordeal and also instituted a mandate of annual confession to one's parish priest. Were these merely parallel reforms, or were they more closely related? On the one hand, abolition of the ordeal forced church officials to step back from their previously direct involvement in trying run-of-the-mill criminal cases. Previously, priests had been instrumental in carrying out criminal procedure, insofar as they were required to bless the water or the instruments involved in trial by ordeal. Forbidding them from taking part created a new divide between the sphere of priestly responsibility and that of criminal adjudication. This was further reinforced by the broader implications of Lateran IV's prohibition of priestly involvement in blood sanctions: not only might priests not engage in the ordeal, but they also in theory should not serve as justices in trials where capital or corporal punishment might be the outcome. Yet priests were arguably the best situated to judge issues of mind: they were trained in hearing confessions and might even be personally familiar in some instances with the particular defendants hauled before them. Lateran IV reinforced the practice of priests judging mind, insofar as the council mandated annual confession and emphasized the importance of training priests in the kinds of knowledge necessary for examining conscience.⁷⁷ If felony really depended upon the presence of guilty mind, why not put priests in the role of judge? This is, perhaps, one of the core contradictions of

⁷⁷ For a one-paragraph summary of what priests were expected to know in order to ensure their ability to save souls, see Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 183. According to Grosseteste, priests should know the Decalogue, the seven deadly sins, the seven sacraments and especially the nature of "a true confession", and the elements of faith in the major and minor creeds. Moreover, priests were to "repeatedly teach the laity in the vernacular tongue the form for baptizing."

the Lateran IV decrees, which emphasized the importance of priests hearing confessions while removing from priests their earlier involvement in the adjudication of secular criminal cases.

From the crown's perspective, the abolition of the ordeal presented a conundrum: namely, how to process felony cases once the ordeal was no longer available. It was not until 1219, four years after Lateran IV, that the crown issued a letter patent, *De justitia facienda loco ignis et aque*, to the itinerant justices of several counties, providing tentative directions on how to deal with those accused of the most serious crimes of theft, murder, and arson in the wake of the Roman church's prohibition of the ordeal.⁷⁸ These instructions will be explored in further detail in part two. In short, if the justices suspected that the accused individuals were actually guilty, and that they might commit further evil acts if allowed to abjure the realm, they were to place the accused in prison.⁷⁹ For those accused of medium-level crimes, the justices were advised to allow them to abjure the realm if this did not seem to pose an enduring threat of recidivism.⁸⁰

⁷⁸ Lyte, H. C. Maxwell, ed., *Patent Rolls of the Reign of Henry III, A.D. 1216-1225* (London: Mackie & Co., 1901), 186. "Quia dubitatum fuit et non determinatum ante incepcionem itineris vestri quo iudicio deducendi sunt illi, qui rettati sunt de latrocinio, murthero, incendio, et hiis similibus, cum prohibitum sit per ecclesiam Romanam iudicium ignis et aque..." In this formulation, "rettati" seems to be derived from the Anglo-Norman "retter", to accuse or find guilty. This initial letter patent was addressed specifically to the justices of Cumberland, Westmorland, and Lancaster, but similar letters were sent to itinerant justices assigned to other counties as well. *Ibid.* "Eodem modo scribitur domino Batoniensi et Glastoniensi episcopo, et sociis suis, justiciariis itinerantibus in comitatu Oxonie, et Justiciariis itinerantibus in comitatu Kancie, et justiciariis itinerantibus in comitatibus Essexie et Hertfordie, et justiciariis itinerantibus in comitatu Eboraci, et justiciariis itinerantibus in comitatibus Bedefordie et Bukinghamie, et domino H. Lincolnensi, et sociis suis justiciariis itinerantibus." Henry Summerson, in his study of medieval suicide, suggests that these directives were to be applied to "suspects who refused jury trial," but the language of the letter patent does not explicitly refer to refusal of a jury. See Henry Summerson, "Suicide and the Fear of the Gallows," *Journal of Legal History* 21:1 (2007), 54.

⁷⁹ Lyte, ed., *Patent Rolls of the Reign of Henry III, A.D. 1216-1225*, 186. "...provisum est a consilio nostro ad presens ut in hoc itinere vestro, sic fiet de rettatis de hujusmodi excessibus, videlicet, quod illi qui rettati sunt de criminibus predictis majoribus, et de eis habeatur suspicio quod culpabiles sint de eo unde rettati sunt, de quibus etiam, licet regnum nostrum abjurarent, adhuc suspicio esset quod postea malefacerent, teneantur in prisiona nostra, et salvo custodiantur; ita quod non incurrant periculum vite vel membrorum occasione prisone nostre."

⁸⁰ Lyte, ed., *Patent Rolls of the Reign of Henry III, A.D. 1216-1225*, 186. "Illi, vero qui mediis criminibus rettati fuerint, et quibus competeret iudicium ignis vel aque, si non esset prohibitum, et de quibus, si regnum nostrum abjurent, nulla fuerit postea malefaciendi suspicio, regnum nostrum abjurent."

Finally, those accused of minor crimes, where there was no suspicion of evil, would be released upon securing pledges.⁸¹ The letter patent gave leeway to the justices to apply their own discretion and conscience, and the use of juries does not yet seem to be a given. This suggests a lack of consensus among the king's counselors, who were unable to provide a definitive response to the question of how to proceed with criminal trials.⁸²

Nevertheless, and remarkably, the ensuing vacuum was swiftly filled by lay jurors in England who now not only presented individuals suspected of crime, but also were tasked with issuing final verdicts of guilt or innocence. While such jurors would not have had the same training and experience as priests in hearing confessions and sizing up an individual's state of mind, they did share the priests' familiarity with many of the particular individuals hauled into court accused of a crime. In fact, the collective nature of information gathering by juries may have been conducive to the task of judging mind, insofar as the number of jurors serving on a trial jury offered multiple potential avenues to gain insight into the characteristics of an individual defendant and the circumstantial facts of a specific accusation against him or her, particularly if some of the trial jurors had previously served as presenters. Trial by jury did not rely on the understanding of a single individual, whether priest or lay judge, in assessing guilt, but rather brought to bear the expertise of many individuals, typically twelve, who each might have access to channels of information about an alleged crime. In this sense, trial juries might

⁸¹ Lyte, ed., *Patent Rolls of the Reign of Henry III, A.D. 1216-1225*, 186. "Illi, vero, qui minoribus reattati fuerint criminibus, nec de eis fuerit mali suspicio, salvos et securos plegios inveniant de fidelitate et pace nostra conservanda, et sic dimittantur in terra nostra."

⁸² Lyte, ed., *Patent Rolls of the Reign of Henry II, A.D. 1216-1225*, 186. "Cum igitur nichil certius providerit in hac parte consilium nostrum ad presens, relinquimus discrecioni vestre hunc ordinem predictum observandum, in hoc itinere vestro; ut qui personas hominum, formam delicti, et ipsarum rerum veritatem, melius cognoscere poteritis, hoc ordine, secundum discreciones et consciencias vestras, in hujusmodi procedatis. See also Groot, "Teaching Each Other," 20 (describing the instructions as a "temporary expedient.")

have been peculiarly well suited to trying complicated issues, including those related to a defendant's state of mind.

To understand the role of the jury in assessing guilt, it is helpful to consider the history of inquests more broadly both in England as well as on the continent. Just as the ordeal had insular and continental parallels, the use of inquests can be found on both sides of the channel.

Historians, particularly those viewing the pre-1215 inquest as a precursor to trial jury procedure, have naturally sought to find the institution's origins. For Maitland, the inquest was not a native invention, but rather a conquest-era accretion. This "transplanted Frankish inquest", as Maitland termed it, carried the "germ of trial by jury", an institution "most distinctively English in the English law of the later Middle Ages".⁸³ Maitland suggested that it was difficult for "Englishmen to admit that this 'palladium of our liberties' is in its origin not English but Frankish, not popular, but royal."⁸⁴ Maitland's tidy summation continues to stimulate debate.

For example, Patrick Wormald and Susan Reynolds have taken issue with Maitland's genealogy of the jury. Reynolds tackles the issue head on in *Kingdoms and Communities*, arguing that Maitland's English-Frankish duality represents an overly simplified and overly polarized historical approach. "Collective judgments," she argues, "sometimes and perhaps often sworn, were traditional everywhere except perhaps in some areas of Roman law, and even there some signs of them appear."⁸⁵ Reflecting on the history of the jury more broadly, Charles Donahue has cautioned historians to eschew all mention of the jury's "life and death, the birth, growth, maturity, and decline", thereby opening up the possibility of multiplicity of

⁸³ Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol. 1 (Union, N.J.: Lawbook Exchange, 1996; first published 1898), 93.

⁸⁴ Pollock and Maitland, *History of English Law*, vol. 1, 141-142.

⁸⁵ Susan Reynolds, *Kingdoms and Communities in Western Europe, 900-1300* (Oxford: Clarendon, 1984), 33.

explanation.⁸⁶ If nothing else, recent scholarship has disproven theories reliant upon a single-stream theory of jury origins, whether of the Anglo-Saxon, Carolingian, or Romano-canonical variety.⁸⁷ Reynolds is certainly in this camp, as she argues that the English jury, far from creating the idea of collective judgment, instead “preserved it long after the legal ideas which it had once embodied had been forgotten.”⁸⁸ These legal ideas, moreover, were not purely English in origin, but reflected values held more broadly throughout medieval Western Europe. In Reynolds’ assessment, the late twelfth-century jury of presentment, along with the petty and grand assizes, “constituted varieties of traditional procedure which were unusual only because they were given precise form and rules of application by a monarchy with the power to enforce them.”⁸⁹ In other words, England might be somewhat exceptional with regard to its strong central monarchy, but not with regard to its reliance on collective judgment.

In *The Making of English Law*, Patrick Wormald, like Reynolds, grappled with the Maitland thesis, and with others inclined to deny the Anglo-Saxon lineage of the inquest. He expressed his agreement with the approach taken by Julius Goebel, who was one of the first to posit the importance of Anglo-Saxon and other influences on the development of the common law regarding crime. Goebel, who highlighted Frankish, Norman, and Anglo-Saxon contributions alike, found in the Carolingian age “a sense of crime as a threat to the community”

⁸⁶ Charles Donahue, Jr. “Biology and the Origins of the English Jury,” *Law and History Review* 17:3 (1999): 591-596.

⁸⁷ As early as 1937, Julius Goebel, Jr. introduced complexity into the “lineage” of English criminal procedure: “The bearings of our procedure are roughly both Norman and Anglo-Saxon; yet, when one scrutinizes them closely, there are strange quarterings—Frankish, Visigothic, Roman and Danish. Of these the strongest and most vigorous is the Frankish.” Julius Goebel, Jr., *Felony and Misdemeanor: a Study in the History of Criminal Law* (Philadelphia: University of Pennsylvania Press, 1976; first published 1937), xxxix.

⁸⁸ Reynolds, *Kingdoms and Communities*, 34.

⁸⁹ Reynolds, *Kingdoms and Communities*, 33-34.

that was not part of a monolithic Germanic past.⁹⁰ Wormald intuited that Goebel, had he lived to write more, would have tried to demonstrate how Angevin notions of felony and misdemeanor owed a debt to lingering Frankish principles, including a broad idea of “fidelity” which contributed to “a communal concept of crime.”⁹¹

The villain of Wormald’s historiographical account was Maitland, who viewed Henry II’s 1166 Assize of Clarendon, and its introduction of the jury of presentment, as “a watershed” in English legal history, accepting Heinrich Brunner’s thesis that the Frankish jury was introduced to England by Norman and Angevin kings.⁹² Reading between the lines of the *Leges Henrici Primi* and Anglo-Saxon codes, Wormald found earlier English precedents for the system of presentment in the practice of frankpledge and its “denunciatory functions.”⁹³ In a more recent lecture, Wormald conceded that Henry II’s legal innovations were “momentous,” arguing that his aim as an historian has been nevertheless “to remove that element of ‘marvellous suddenness,’ never the most plausible element in the Maitland model, by tracing much of its raw energy back to those who created the English kingdom”.⁹⁴ To Wormald, Henry II’s assizes merely added window dressing to a preexisting idea of communal responsibility to address behavior hurtful to all.⁹⁵ Wormald also rejected Maitland’s argument that the idea of tort, rather than crime, predominated in the Anglo-Saxon period, only to be reconfigured under Henry II, when the

⁹⁰ Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Wiley-Blackwell, 2001), 25.

⁹¹ Wormald, *Making of English Law*, 25.

⁹² Patrick Wormald, “Frederic William Maitland and the Earliest English Law,” *Law and History Review* 16:1 (1998), 10-11. Goebel offers a helpful summary of the “Brunner thesis”: i.e. “that English legal history is at various points inextricably bound to the history of continental law,” and that the idea of the peace is central in the universal Germanic legal tradition. Goebel, *Felony and Misdemeanor*, 3, 7-8.

⁹³ Wormald, “Maitland and the Earliest English Law,” 11.

⁹⁴ Patrick Wormald, *Lawyers and the State: the Varieties of Legal History* (London: Selden Society, 2006), 18.

⁹⁵ Wormald, “Maitland and the Earliest English Law,” 12.

bloodfeud suddenly vanished; he went so far as to suggest that Anglo-Saxon kings might have made greater use of the death penalty than their Angevin counterparts.⁹⁶ Finding a shift from compensation to penalty in the late Anglo-Saxon period, Wormald observed that *bot* came to be a fine for damaging society writ large, rather than simply compensation for wronging a kin group.⁹⁷ In summary, he posited that criminal law had progressed a good way toward its common law form by the tenth to eleventh centuries, when punishment of death had already emerged, alongside the idea that serious offences were against the king, state, or community.⁹⁸ Wormald's account of English criminal law is one of deep historical continuity.

Roger Groot also emphasized continuity in his effort to locate deeper pre-Lateran roots for the criminal trial jury. In two articles in the early 1980s, Groot emphasized the relevance of the pre-1215 use of inquests in criminal adjudication to the later development of the trial jury. Groot's theory represents a similar vein of thought to that found in Reynolds' *Kingdoms and Communities*, where she argues for the pervasive importance of collective activity, including collective judgment, throughout medieval Europe.⁹⁹ First, Groot contended that the jury of presentment, frequently described as the antecedent of the modern grand jury, in actuality exercised a role beyond simple accusation: it also issued a "verdict" which, if adverse, allowed the accused to be subjected to trial by ordeal.¹⁰⁰ In my view, this "verdict" was likely based in part on considerations of guilty mind, judging from contemporary understandings of the nature

⁹⁶ Wormald, "Maitland and the Earliest English Law," 17-18.

⁹⁷ Wormald, "Maitland and the Earliest English Law," 17.

⁹⁸ John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996), 20 (citing to Wormald).

⁹⁹ Reynolds, *Kingdoms and Communities*, 1, 33-34.

¹⁰⁰ Groot, "Jury of Presentment Before 1215," 1-24. See also Groot, "Early Thirteenth-Century Criminal Trial Jury," 7 (observing that by 1215 presenting juries moved beyond accusing, deciding which defendants should go to the ordeal).

of guilt and innocence.¹⁰¹ In a second article, Groot further postulated that by the 1190s, an individual accused of crime by private accusation could raise an issue requiring local information, thereby placing an inquest between the appellee and the possibility of having to submit to physical proof.¹⁰² Most often, an appellee raised the issue *de odio et atia*, suggesting that the appellor had been motivated by hate and spite.¹⁰³ This essentially, in my estimation, shifted focus from the accused's state of mind to the accuser's, essentially putting the accuser's motivations on trial. Groot observed that there must have been something more than mere hate and spite lurking behind the Latin phrase *de odio et atia*. After all, it is conceivable that an appellee might have committed a crime against a person who bore a preexisting hatred toward him; such hatred might have even increased the attraction of initiating an action against the appellee.¹⁰⁴ As such, Groot surmised that the question initially posed to the inquest was whether the appeal was true, i.e., whether the appellee had indeed committed the alleged act. If the answer were negative, then the inquest had to offer an explanation for the appellor's decision to prosecute. In many instances, the jurors would have naturally suspected the motivation of spite; over time, this "explanatory response" became synonymous with the "substantive response" of false appeal.¹⁰⁵ Groot found a common-sense explanation for the ease with which the criminal trial jury became accepted in the immediate post-Lateran years, and even for the motivation behind the introduction of *peine forte et dure* to compel submission to a jury.¹⁰⁶ While the Lateran decree compelled change, the use of juries in criminal matters was already well

¹⁰¹ For a discussion of the role of mind in the assessment of guilt, see chapter four.

¹⁰² Groot, "Jury in Private Criminal Prosecutions," 113, 117.

¹⁰³ Groot, "Jury in Private Criminal Prosecutions," 117.

¹⁰⁴ Groot, "Jury in Private Criminal Prosecutions," 118.

¹⁰⁵ Groot, "Jury in Private Criminal Prosecutions," 119.

¹⁰⁶ Groot, "Jury in Private Criminal Prosecutions," 141.

established by 1215.¹⁰⁷ As Thomas Green summarizes the ramifications of Groot's view, "[t]he importance of the local community thus predated the trial jury, the adoption of which ought to be understood as a continuation and enhancement of traditional practices, not as a revolutionary step."¹⁰⁸

Similarly addressing the question of jury origins, Mike Macnair focused his 1999 study on the requirement that trial jurors should come *de vicineto*. Macnair situates himself in opposition to the widely accepted "Brunner thesis" of jury origin, which posited a sequence beginning with the post-conquest Domesday inquest, eventual regularization under Henry II, and then generalization to other areas, all guided by royal initiative.¹⁰⁹ Situating his work historiographically, Macnair observes that Wormald, Hyams, and Reynolds, among others, have given new life to the idea of the jury as a vestige of early medieval communal judgments. This distinguished group did not, however, challenge Brunner's idea that the survival of the jury into the later Middle Ages was a product of a strong central monarchy.¹¹⁰ Macnair continues in the revisionist line, but focuses on two puzzling matters: why the late medieval jury's use was confined to certain kinds of facts, and why some Romano-canonical ideas about witnesses seem to apply to jurors.¹¹¹ Macnair illustrates how jurors, as early as *Glanvill*, were employed as witnesses for certain kinds of facts, such as local reputation.¹¹² He also highlights the early

¹⁰⁷ In a later article, Groot pointed to the significance of Henry II's reform of the public prosecution system with the Assizes of Clarendon and Northampton in 1166 and 1176, respectively, which required twelve lawful men of each hundred, and four of each vill, to report persons suspected of crime to royal authorities. See Groot, "Early Thirteenth-Century Criminal Jury," 5.

¹⁰⁸ Green, "Retrospective on the Criminal Trial Jury," 363.

¹⁰⁹ Mike Macnair, "Vicinage and the Antecedents of the Jury," *Law and History Review* 17:3 (1999), 541.

¹¹⁰ Macnair, "Vicinage and the Antecedents of the Jury," 545.

¹¹¹ Macnair, "Vicinage and the Antecedents of the Jury," 546.

¹¹² Macnair, "Vicinage and the Antecedents of the Jury," 554.

medieval contexts in which *vicini* were relied upon for testimony, most notably in conveyancing.¹¹³ In the late twelfth century, the use of local reputation as a form of proof became systematized, first in canon law and later in English law under Henry II.¹¹⁴ Macnair concludes that the jury was not a descendant of earlier forms of lay communal judgment, not the product of a strong monarchy schooling subjects for self-government, and not extended by Henry II due to ignorance with canon law methods of proof.¹¹⁵ To the contrary, Macnair describes the expansion of local juries as motivated by “politico-legal conditions,” including disputes about land between clergy and laity, where the appropriate method of proof was a contentious issue.¹¹⁶ The use of local juries was, according to Macnair, part of the transition from lay adjudication to professionalization, which oddly resulted in “a conceptual space within which persons can be in theory witnesses, but in practice judges in a much stronger sense.”¹¹⁷ Macnair’s theory is complex and, like Olson and McAuley’s work on the ordeal, breathes new life into the issue of jury origins by refusing to impose an artificial religious-secular divide. I would extend his observations about the use of juries to assess reputation to the issue of mind as well: in part, the determination of whether an act involved *mens rea* often boiled down to issues of reputation, which helped jurors to interpret the circumstantial evidence available to them in felony cases. One might more easily speculate about *mens rea* if one were already familiar with the disposition, temperament, and local reputation of a defendant and alleged crime victim.

¹¹³ Macnair, “Vicinage and the Antecedents of the Jury,” 556.

¹¹⁴ Macnair, “Vicinage and the Antecedents of the Jury,” 571 ff.

¹¹⁵ Macnair, “Vicinage and the Antecedents of the Jury,” 588-589.

¹¹⁶ Macnair, “Vicinage and the Antecedents of the Jury,” 589; Donahue, “Biology and the Origins of the English Jury,” 592-593.

¹¹⁷ Macnair, “Vicinage and the Antecedents of the Jury,” 590.

Roger Groot, in a later piece, added a twist to his account of the development of the criminal trial jury in Lateran IV's wake. He viewed the development of the "guilt/innocence jury" as a direct product of "discussion, consultation and conversation" on a variety of levels.¹¹⁸ He found justices at gaol delivery taking the first tentative and pragmatic steps to extend the use of the jury to more forms of criminal prosecution.¹¹⁹ Yet he also revealed high-level discussions at Westminster regarding an ordeal replacement and low-level attempts by defendants to experiment with the novel form of criminal adjudication.¹²⁰ To return to Donahue's caveat, historians of the jury must exchange single-stream explanations for more complex theories given the many forces at work in shaping criminal procedure. Among these forces, I believe, was an assumption that adjudication required some insight into a defendant's state of mind, which would have been, on balance, more accessible to local jurors than to itinerant royal justices.

The Issue of Jury Composition

If state of mind were, in part, determinative of trial outcomes, how did jurors learn about a defendant's interior disposition? To what extent would they have known the defendant personally or have had access to people who knew him or her? In *Verdict According to Conscience*, Green raises the issue of how medieval jurors were informed about the facts of an alleged crime. He suggests that the most important early modern changes in criminal law included the decline of the self-informing jury and the development of the prosecution.¹²¹ This issue has been taken up by Edward Powell, who argues that the early fifteenth-century criminal

¹¹⁸ Groot, "Teaching Each Other," 30.

¹¹⁹ Groot, "Teaching Each Other," 29, 30.

¹²⁰ Groot, "Teaching Each Other," 20, 30-31.

¹²¹ Green, *Verdict According to Conscience*, 119.

trial jury was not typically self-informing, relying instead on evidence presented in court.¹²² He also expresses his suspicion that trial juries might never have been as fully self informing as typically believed, even in the jury's earliest days.¹²³ Powell, like Green, takes the stance of a legal evolutionalist, as opposed to expecting sudden transformations in the law.¹²⁴

While unable to draw upon a body of evidence comparable in size to that of Powell, Anthony Musson addresses the issue of fourteenth-century jury composition in a 1999 article. The generally accepted view has been that juries were gathered from the hundred or even the neighborhood of an alleged crime.¹²⁵ This would imply that the jurors might have first-hand knowledge of the circumstances, including, in my perspective, enough familiarity with individual defendants to have a sense of their reputation to bring to bear on assessing state of mind. Based on an extensive survey of plea rolls, Musson argues that local notables, whether coroners, knights, or bailiffs, frequently served as trial jurors. This suggests to Musson that possession of knowledge about an alleged crime might have indeed been a valued attribute in a juror. I would contend, however, that the prevalence of local notables could also point to the idea that status, more than direct knowledge, may have influenced jury selection. Of course, persons of relatively elevated status were probably able to tap into local sources of information. In fact, Musson highlights the frequency with which presenting jurors were bringing accusations of

¹²² Edward Powell, "Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400-1429," in J. S. Cockburn and Thomas A. Green, eds., *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton: Princeton University Press, 1988), 115.

¹²³ Powell, "Jury Trial at Gaol Delivery," 115-116. For Green's response, see "Retrospective on the Criminal Trial Jury," 370-374. See also Daniel Klerman, "Was the Jury Ever Self-Informing?" *Southern California Law Review* 77:1 (2003), 125-126.

¹²⁴ Powell, "Jury Trial at Gaol Delivery," 116. For an explication of the evolutionary view of common law development, see S. F. C. Milsom, *A Natural History of the Common Law* (New York: Columbia University Press, 2003).

¹²⁵ Anthony Musson, "Twelve Good Men and True? The Character of Early Fourteenth-Century Juries," *Law and History Review* 15:1 (1997), 126.

offenses against their own persons or property, and quite likely on behalf of friends and neighbors as well.¹²⁶ He also demonstrates the frequency of repeat presenters, who were likely drawn from a fairly small pool of local notables.¹²⁷

At the same time, Musson finds considerable overlap between presenting and trial juries, yet no discernable bias toward conviction in such cases.¹²⁸ In fact, Musson notices a trend toward acquittal when the presenting and trial juries overlap by more than half, and a trend towards conviction in cases of less overlap.¹²⁹ Perhaps overlapping juries were more likely to be composed of jurors local to the crime, and therefore possibly sympathetically familiar with the defendant and his or her family. It is not until the 1340s that Musson finds evidence for discomfort with the idea of presenting jurors serving on trial juries.¹³⁰ Over the course of the fourteenth century, there arose an increasing disconnect between the composition of presenting and trial juries, a shift which Musson attributes to changing attitudes towards and the increasing centralization of the administration of criminal justice.¹³¹ In 1352, statutory measures were taken to end the practice of allowing presenting jurors to serve as trial jurors, further evidence of its continued prevalence well into the mid-fourteenth century.¹³² Musson's article goes a long way toward answering, in the affirmative, the question posed by Powell over whether criminal trial juries had ever been entirely self-informing even in the earliest days.¹³³ Nevertheless, exactly what kind of information presenting and trial jurors would have brought with them or could have

¹²⁶ Musson, "Twelve Good Men," 121.

¹²⁷ Musson, "Twelve Good Men," 122.

¹²⁸ Musson, "Twelve Good Men," 135-137.

¹²⁹ Musson, "Twelve Good Men," 142.

¹³⁰ Musson, "Twelve Good Men," 141.

¹³¹ Musson, "Twelve Good Men," 116-117, 141.

¹³² Musson, "Twelve Good Men," 141.

¹³³ Powell, "Jury Trial at Gaol Delivery," 116.

obtained during the course of felony adjudication remains largely a matter of informed speculation, and to what extent issues of guilty mind were prominent among the questions jurors brought to bear stands at an even further remove from the surviving historical record.

In contrast to Musson, who argues for the predominance of local notables on criminal juries, James Masschaele has made the case for broader participation in juries, albeit focusing not just on criminal trials but on the institution of the jury more broadly. In his 2008 study of the jury system's early history in the mid-twelfth to late fourteenth century, Masschaele places emphasis on "social analysis," particularly as it pertains to the "relationship between people and state" inherent in the jury system.¹³⁴ He describes juries as a 'core part of the process of state formation,' observing that the medieval English court system was remarkably dependent on the participation of local individuals.¹³⁵ Such local individuals, moreover, included even men from lower, sub-gentry social levels.¹³⁶ As the use of sworn inquests by royal justices expanded in the thirteenth and fourteenth centuries, more and more individuals were pulled into the ambit of jury service.¹³⁷ Perhaps most surprisingly, Masschaele finds that juries tended to be "socially integrated bodies," drawing together peasants, gentry, knights and others into a common pursuit.¹³⁸ Juries were helpful in maintaining social order and reflected a widespread belief that local people familiar with a dispute's context were best suited to weighing a case's merits.¹³⁹

¹³⁴ Masschaele, *Jury, State, and Society*, 1.

¹³⁵ Masschaele, *Jury, State, and Society*, 5-6.

¹³⁶ Masschaele, *Jury, State, and Society*, 9, 155-156.

¹³⁷ Masschaele, *Jury, State, and Society*, 86-87.

¹³⁸ Masschaele, *Jury, State, and Society*, 195-197.

¹³⁹ Masschaele, *Jury, State, and Society*, 207.

One point Masschaele emphasizes is the sheer number of inquests, an indication of social norms and values.¹⁴⁰

Daniel Klerman weighed in on the debate regarding the self-informing nature of trial juries in a 2003 article, also placing himself in dialogue with Powell.¹⁴¹ Following a close analysis of legal treatises, plea rolls, and year book accounts of trials, Klerman concluded that the thirteenth-century criminal jury was indeed self-informing, even if it did occasionally hear additional testimony from defendants, victims, or others in court.¹⁴² “Medieval jurors knew a lot,” argues Klerman, “and were selected for that reason.”¹⁴³ *Bracton* offers some indirect verification of this fact, describing how a judge, faced with doubt about the veracity of a jury verdict, might interrogate the jurors as to the source of their information. “For perhaps one or a majority of the jurors will say,” said the treatise, “that they learned the matter put forward in their *veredictum* from one of their fellow jurors, and he under interrogation will perhaps say that he learned it from such a one, and so by question and answer the judge may descend from person to person to some low and worthless fellow, one in whom no trust must in any way be reposed.”¹⁴⁴ In this instance, *Bracton* highlighted the potential for hearsay to prove unreliable, but in general jurors were relied upon to come to court with trustworthy information. As a result, Klerman argues, the crown had no motivation to engage in evidence gathering, in-court testimony was relatively infrequent and largely unregulated, and judges were seen to be

¹⁴⁰ Masschaele, *Jury, State and Society*, 34.

¹⁴¹ Daniel Klerman, “Was the Jury Ever Self Informing?” in Maureen Mulholland and Brian Pullan, eds., *Judicial Tribunals in England and Europe, 1200-1700* (Manchester: Manchester University Press, 2003), 58-59.

¹⁴² Klerman, “Was the Jury Ever Self Informing?” in *Judicial Tribunals*, 59-60.

¹⁴³ Klerman, “Was the Jury Ever Self Informing?” in *Judicial Tribunals*, 60.

¹⁴⁴ Samuel E. Thorne, ed. and trans., *Bracton: On the Laws and Customs of England*, vol. 2 (Cambridge: Belknap, 1968), 404.

comparatively ignorant of the facts and therefore dependent on jurors.¹⁴⁵ Acknowledging the convincing evidence for the decline in self-informing juries in the later Middle Ages, Klerman attributes this change to the phasing out of the eyre and rise of the more frequent gaol delivery sessions, attendance at which would have been burdensome for local jurors.¹⁴⁶ More directly, the 1352 statute excluding presenting jurors from serving on trial juries likely had the direct effect of excluding those most familiar with a case's facts from jury service.¹⁴⁷ Even so, Klerman concedes that these developments might not have entirely tolled the end of the self-informing jury; there were still instances where juries could lean on the knowledge of at least one juror with pre-trial familiarity with the facts.¹⁴⁸ It is my belief that jurors' prior knowledge of a particular defendant or access to witness testimony about the circumstances of an alleged crime would have helped them sort out the issues needed to render a judgment, including the issue of guilty mind.

The History of Criminal Intent and Felony

The historiography of criminal intent in England, though no doubt paved with good intentions, was historically influenced by models of human psychology that posited the Middle Ages as a time of unfettered emotionality and legal obtuseness toward such nuanced subjects as intentionality and motive. Johann Huizinga's theory of the Middle Ages as the "childhood of man," and Norbert Elias' theory of the civilizing process at work in medieval society have both contributed, even if indirectly, to scholarship on criminal intent.¹⁴⁹ Perhaps an even greater

¹⁴⁵ Klerman, "Was the Jury Ever Self Informing?" in *Judicial Tribunals*, 60.

¹⁴⁶ Klerman, "Was the Jury Ever Self Informing?" in *Judicial Tribunals*, 74-75.

¹⁴⁷ Klerman, "Was the Jury Ever Self Informing?" in *Judicial Tribunals*, 75.

¹⁴⁸ Klerman, "Was the Jury Ever Self Informing?" in *Judicial Tribunals*, 76.

¹⁴⁹ See Barbara H. Rosenwein, *Emotional Communities in the Early Middle Ages* (Ithaca: Cornell University Press, 2006), 5-9 (describing Huizinga and Elias, although not connecting them to the history

contributor to historical perspectives on intentionality has been the English letter of the law itself, which stubbornly declined to distinguish explicitly between murder and manslaughter well into the sixteenth century.¹⁵⁰

The extent to which English trial juries considered an individual's state of mind, a simple question on the surface, is complicated by the terse nature of legal records and definitional problems related to words used in those records to describe crime and criminals. Most important, perhaps, is the meaning behind the term "felony." In *Kingdoms and Communities*, Susan Reynolds decries the obsession of legal historians with defining words while they ignore the fact that such words had a life outside the law, and perhaps a richer complexity of meaning as a result.¹⁵¹ This observation applies to the word "felony," which lived in English sermons, chronicles, and poems, as well as coroners' rolls, indictments, and gaol delivery records. On the

of criminal law per se). As for influence on the history of criminal intent, see Eugene J. Chesney, "The Concept of Mens Rea in the Criminal Law," *Journal of Criminal Law and Criminology* 29:5 (1939), 627-644. Chesney argued that early English law came close to "absolute liability" in its conception of culpability for homicide, such that proof of simple causation alone could be sufficient to secure a homicide conviction. *Ibid.*, 628, 630. According to Chesney, the concept of *mens rea* only entered learned discourse in the late twelfth century with the revival of Roman law and its principles of *dolus* and *culpa*, as well as the canon law's insistence on moral guilt. See also William W. Basset, "Canon Law and Common Law." *The Hastings Law Journal* 29 (1977-1978), 1413 (arguing that canon lawyers were the first to distinguish crime from sin and negligence from intent, and also to define the varying kinds of intent; cites Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX* (Città de Vaticano: Biblioteca apostolica vaticana, 1935). Chesney attributed *Bracton's* heavy dependence on *mens rea* and intent to the influence of canon and Roman law source materials despite their incompatibility with contemporary English law. Chesney, "Concept of Mens Rea," 630-631. Nevertheless, Chesney saw the post-*Bracton* period as a time of transition from primitive ideas of culpability to a more sophisticated notion of moral blameworthiness. According to him, the law progressed steadily until, by the late seventeenth century, evil intent was an absolute prerequisite for a finding of felony. *Ibid.*, 632, 634. The impact of the Huizinga/Elias mode of thought comes through most strongly in the writing of Charles Radding, who conflated "the reasoning of tenth-century adults" with "that of modern children" in his 1978 study of medieval mentalities. Charles M. Radding, "Evolution of Medieval Mentalities: A Cognitive-Structural Approach," *The American Historical Review* 83:3 (1978), 583.

¹⁵⁰ Green, "Societal Concepts of Criminal Liability," 669. There was a short-lived statutory nod to murder in 1390, when legislation restricted the king's ability to grant pardons of grace to those found to have committed murder. *Ibid.*, 672.

¹⁵¹ Reynolds, *Kingdoms and Communities*, 65.

one hand, felony could mean, according to the *OED*, “villainy, wickedness, baseness;” “anger, wrath;” or “daring, recklessness.”¹⁵² Literary uses of the word often suggest these meanings. Alternatively, felony might connote “guile, deceit, treachery, perfidy;” or “a crime, misdeed, sin.”¹⁵³ The use of felony in homilies and other religious texts often evokes this sense of the word. Legal records might involve some of the *OED*’s distinctly legal definitions of felony, including “an act on the part of a vassal which involved the forfeiture of his fee” and the common and statutory law name for crimes “of a graver character than those called misdemeanors.”¹⁵⁴ One question I will consider in the next chapter is the extent to which non-legal meanings of the word influenced the understanding of felony within the legal environment.

In his *Concise History*, Plucknett adopted the feudal vision of felony, defining it as “the breach of the fidelity and loyalty which should accompany the feudal relationship which has been consecrated by homage,” a breach for which the characteristic punishment was escheat, or loss of tenement.¹⁵⁵ Maitland also took the view that felony connoted disloyalty to one’s lord, and suggested that it came to mean a heinous crime more generally due to the rule about a felon’s fee escheating to his lord.¹⁵⁶ Wormald pointed out that this explanation failed to account for the application of the term “felony” to larceny and treason alike. Wormald highlighted the frankpledge oath twelve year olds were required to swear, an oath that included the renunciation of theft.¹⁵⁷ In other words, someone could become an enemy of the king by committing theft,

¹⁵² “Felony” in *Oxford English Dictionary*, 2nd edition.

¹⁵³ “Felony” in *Oxford English Dictionary*, 2nd edition.

¹⁵⁴ “Felony” in *Oxford English Dictionary*, 2nd edition.

¹⁵⁵ Plucknett, *Concise History*, 5th ed., 442. See also K. J. Kesselring, “Felony Forfeiture in England, c. 1170-1870,” *Journal of Legal History* 10:3 (2009), 203.

¹⁵⁶ Wormald, “Maitland and the Earlier English Law,” 18.

¹⁵⁷ Wormald, “Maitland and the Earlier English Law,” 18.

just as they might through treason. Wormald suggested that this mindset influenced Angevin criminal theory.

To return to my earlier discussion of the aims of this study, the definition of felony is crucial, in my opinion, because it has implications for our understanding of criminal responsibility. If one branches out from the legalistic definition of felony to the alternate meanings more commonly found in popular and religious literature, then felony seems to connote something directly related to an individual's state of mind or moral status. Given the comparative abundance of evidence related to *mens rea* in the post-medieval period, the debate over the nature of criminal responsibility has been more directly tackled to date by early modern historians than by medievalists. Historians focusing on the seventeenth and eighteenth centuries have described a shift over the past 250 years from theories of criminal responsibility based on character and disposition toward those based instead on capacity and human agency.¹⁵⁸ For example, Nicola Lacey argues that the agency-based idea of capacity-responsibility first appeared in Enlightenment philosophy from the late seventeenth century onward, but only passed over into common law treatises some time later.¹⁵⁹ Until that time, legal writers, most notably Hale and Blackstone, tended to focus on the enumeration of crimes rather than on ideas such as responsibility and intent.¹⁶⁰ Lacey argues for three distinct stages in the history of

¹⁵⁸ See, e.g., Nicola Lacey, "Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law," in Markus Dirk Dubber and Lindsay Farmer, eds., *Modern Histories of Crime and Punishment* (Stanford: Stanford University Press, 2007), 17. See also Lacey, "Responsibility and Modernity in Criminal Law," *Journal of Political Philosophy* 9:3 (2001), 250.

¹⁵⁹ Lacey, "Character, Capacity, Outcome," 20. Elsewhere, Lacey suggests that the "idea of subjective, capacity responsibility" only came to the forefront of English legal thinking by the early 19th century. Nicola Lacey, "In Search of the Responsible Subject: History, Philosophy, and Social Sciences in Criminal Law," *Modern Law Review*, 64:3 (2001), 357.

¹⁶⁰ Lacey, "Responsibility and Modernity," 250; Lacey, "In Search of the Responsible Subject," 359. But see Blackstone, *Commentaries*, vol. 4, 20-32, for a detailed discursus on the types of persons who,

criminality: 1) a period of “manifest” criminality, when a self-informing jury witnessed to immediately visible danger, a model obsolete by the eighteenth century;¹⁶¹ 2) an intermediate stage during which judgments about an individual’s character supplemented the increasingly indirect information a jury had about the facts of a crime; and 3), by the eighteenth century, a model of “subjective criminality” in which a defendant’s responsibility was the subject of proof at trial.¹⁶² Lacey’s analysis leaves open the question whether the medieval period was bereft of any measurable theory of agency-based criminal responsibility.

Cynthia Herrup, like Lacey, finds the seventeenth-century English criminal trial to be centered on assessments of a defendant’s character, including love of God and king, obedience, neighborliness, sloth, greed, and pride.¹⁶³ Herrup posits, however, that juries considered both fact *and* character in producing a verdict, and that they exercised greater leniency in death penalty cases or when a defendant’s conduct was mitigated by necessity, such as the theft of basic goods.¹⁶⁴ Furthermore, motive also played into jury deliberations, and juries tended to differentiate between criminals too dangerous to remain in society and criminals deserving of sympathy.¹⁶⁵ To some extent, historians focused on medieval England might apply similar

due to a defect in understanding or will, might be incapable of committing a crime, including infants, lunatics, and those acting under duress.

¹⁶¹ Langbein relies upon a notion of “manifest” criminality as well in his discussion of the origins of adversary criminal trial, arguing: “Into the later Middle Ages trial of any sort was reserved largely for cases of clandestine crime. Someone caught in the act or in flight from a serious crime was put to death on the spot, without trial.” Langbein, *Origins of Adversary Criminal Trial*, 65. This account overstates the frequency of summary justice in medieval England. While such instances of immediate death for felons caught red-handed do appear on the record, they appear to be rare exceptions rather than common practice.

¹⁶² Lacey, “In Search of the Responsible Subject,” 361. Similar arguments, albeit with a different time frame, have been advanced by other scholars. See, e.g., Chesney, “Concept of Mens Rea,” 632.

¹⁶³ Cynthia B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1987), 4.

¹⁶⁴ Herrup, *Common Peace*, 145, 148.

¹⁶⁵ Herrup, *Common Peace*, p. 158, 166, 197.

language to the complexities involved in jury decision-making in the thirteenth and fourteenth centuries. Most notably, Green's study of self-defense cases draws similar conclusions about jurors' willingness to exercise leniency in cases involving circumstances sympathetic to the defendant, such as the presence of sudden anger in homicide cases, and their comparative severity in other instances, such as in theft cases where insidiousness was a factor.¹⁶⁶ Green suggested that intent was important to jury deliberations, but he did not explore the subject in great depth, focusing instead on the implications of the exercise of jury discretion.¹⁶⁷ Green bequeathed the subject of mind—and its relative importance to jury determinations—to ensuing scholars. In this dissertation, I take up this challenge, hoping to initiate a broader discussion on the history of *mens rea* in the Anglo-American tradition. *Mens rea* is fundamental to our modern concept of criminal responsibility, yet its operation in the first centuries of the criminal trial jury remains murky.

The human interior, in Lacey's view, did not become a subject to be examined and produced as criminal proof until after the rise of the field of psychology in the nineteenth century.¹⁶⁸ Lacey does acknowledge the earlier presence of legal terminology hinting at the idea of *mens rea*, such as the idea of malice. However, she associates early references to malice with “meanness of status” rather than “substantive evil or wickedness.”¹⁶⁹ In this way, Lacey empties malice of its plain meaning. Medievalists have at times lent support to this idea, although this perspective is not, and perhaps never was, a mainstream view. For example, J. M. Kaye, in his

¹⁶⁶ See, e.g., Green, *Verdict According to Conscience*, 38. This idea of sudden, deliberate intent would later become manslaughter, with the notion of “hot blood” influencing the development of provocation doctrine. See *ibid.*, 30-32, 46-59, 78-79, 99-100. On distinctions made by jurors in judging theft, see *ibid.*, 62-64.

¹⁶⁷ For a discussion of *malicia precogitata*, see Green, *Verdict According to Conscience*, 56.

¹⁶⁸ Lacey, “Responsibility and Modernity,” 268.

¹⁶⁹ Lacey, “Character, Capacity, Outcome,” 21.

article on murder and manslaughter, argued that “to say that an act was done *felonice* was to allege simply that the *actus reus* was punishable by law as a felony;” moreover, he suggested, the phrase “*ex assultu praemeditato*...had nothing to do with actual premeditation.”¹⁷⁰ Francis Sayre, while not a medievalist per se, argued that *mens rea* in the immediate post-Bracton period “smacked strongly of general moral blameworthiness.”¹⁷¹ And while Eugene Chesney conceded that *mens rea* received the “final seal of acceptance” in English law by the time of *Bracton*, he argued that under earlier law “many evil doers were convicted on proof of causation and without proof of an evil intent to harm.”¹⁷² Barbara Hanawalt, commenting on the harsh, black-letter law of homicide in the fourteenth and fifteenth centuries, argues that all homicides failing to fit the few available exceptions—accident, self defense, insanity, minority, etc.—were “punishable by hanging, whether or not done with malice aforethought.”¹⁷³ Of course, Hanawalt was speaking to the state of the law itself, and not to the actual outcome of jury trials. She suggests that murder came to have a secondary meaning—“a particularly heinous crime involving secret slaying or malice aforethought”—in the fourteenth century, although not recognized statutorily until 1390.¹⁷⁴ Kaye cites this statute as marking “a transition from times when the relative heinousness of cases of homicide rested on different types of *actus reus*, to a period when it came to depend on gradations of *mens rea*.”¹⁷⁵

¹⁷⁰ See, e.g., J. M. Kaye, “The Early History of Murder and Manslaughter, Part I,” *The Law Quarterly Review* 83 (1967), 372-73.

¹⁷¹ Francis Bowes Sayre, “Mens Rea,” *Harvard Law Review* 45 (1931-1932), 988.

¹⁷² Chesney, “Concept of Mens Rea,” 630-632.

¹⁷³ Barbara A. Hanawalt, “Violent Death in Fourteenth and Early Fifteenth-Century England,” *Comparative Studies in Society and History* 18:3 (1976), 298.

¹⁷⁴ Hanawalt, “Violent Death,” 299. But see Green, “The Jury and the English Law of Homicide,” *Michigan Law Review* 74 (1976), 469, 471 (arguing that this official legal meaning of “murder” faded not long after issuance of the 1390 statute).

¹⁷⁵ Kaye, “Early History of Murder and Manslaughter,” 367-68.

Other medieval historians have found evidence for the importance of criminal intent and premeditation as a factor to be considered by fourteenth-century juries. John Bellamy, following Green, observes that the murder/manslaughter distinction became crucial to specify after 1390, thanks to the statute restricting the king's exercise of his pardon power.¹⁷⁶ By then, the distinction had already been in place for at least 30 years, according to Bellamy, who finds a mid-fourteenth-century division between planned, cold-blooded homicide and killing in hot blood.¹⁷⁷ Over time, this distinction came to be based increasingly on the presence or absence of premeditation.¹⁷⁸ In fact, Bellamy suggests that exceptions to this rule did not appear until the sixteenth century, when one begins to see acts like killing an officer of law classified as murder regardless of premeditation.¹⁷⁹

Forays into medieval English criminal trial practice, like that undertaken by Bellamy, are frustrated by the terseness of jury verdicts and of criminal law records generally. Juries then, much like juries today, were not required to enumerate the reasons behind their verdict or to justify a particular outcome. They did, however, occasionally provide a description of the crime as they claimed to understand it. Coroners' rolls, too, provide a narrative as relayed by the inquest jury. In private appeals, the language of the count, or claim made by the appellor, offers some basis for historians to assess the required components of a criminal accusation: an appellor might describe an assault or homicide as felonious, wicked, or premeditated, for example. While this descriptive language is admittedly formulaic, it nevertheless provides some insight into the

¹⁷⁶ Bellamy, *Criminal Trial in Later Medieval England*, 64. For the most comprehensive treatment of the 1390 statute and its limited long-term impact, see Green, "Jury and the English Law of Homicide," 457-472.

¹⁷⁷ Bellamy, *Criminal Trial in Later Medieval England*, 61. See also Green, review of *Criminal Trial in Later Medieval England*, 266-267.

¹⁷⁸ Bellamy, *Criminal Trial in Later Medieval England*, 67.

¹⁷⁹ Bellamy, *Criminal Trial in Later Medieval England*, 67.

factors to be considered in assessing the guilt or innocence of the accused. Yet where language of criminal intent does appear, many historians have been ready to ascribe alternate meanings to downplay the presence of a notion of *mens rea*. This study of medieval understandings of criminal intent therefore searches for parallel uses of the language of intentionality in legal and non-legal sources, using the latter to backfill the meaning likely intended by the use of such terms in the former. Furthermore, the absence of language speaking directly to the issue of *mens rea* is not considered dispositive. Even if a defendant's state of mind were considered a relevant issue, it might have gone unmentioned in instances where guilt was more or less manifest, and might have been quietly at play in exceptional cases, such as those involving infancy, insanity, or duress.

Methodology and Sources

In the pages to follow, I will argue that medieval jurors had ideas about *mens rea*—complex ideas, in fact—and that they applied these ideas in reaching verdicts. One of the central arguments of my project is that ideas about *mens rea* were in wide circulation in medieval English culture, both in religious sources and in more popular literary works. These ideas formed part of the basic understanding jurors brought with them to the judging table. In fact, such ideas even informed the popular meaning of the word “felony,” a word found in legal sources but never explicitly defined there.

To make this argument, I necessarily rely upon legal records and extra-legal sources. My project takes the legal texts, which will be described in greater detail below, very seriously, dissecting them for evidence of what juries were weighing in deciding an accused individual's guilt or innocence. At the same time, I try to complicate our reading of these legal records,

arguing that to understand fully what jurors were doing, we need to look beyond the lawyers' texts, which often provide little insight into jury behavior.

My methodological intervention involves conducting a broad sweep of literary and religious sources from the period, thereby revealing that the word "felony" and its cognates had a tremendous life outside the formal legal texts. I have scoured elite theological texts, vernacular manuals for less elite parish priests, vernacular poems, and so forth, reading closely for discussions of guilt and innocence. Both within legal sources and in these non-legal religious and literary texts, I have found that the word "felony" is consistently associated with guilty mind.

It must be acknowledged at the outset that the vast majority of jurors were illiterate, in the sense that they did not read or write.¹⁸⁰ Most of them spoke no language other than English, while the written material from this period is largely, but not exclusively, written in Latin or French. Nevertheless, whether one looks at elite theological texts, like the writings of Thomas Aquinas, or humble, vernacular texts written for barely literate parish priests, one finds remarkable consistency in the treatment of felony. Medieval England had a largely oral culture, and I believe these ideas reached the ears of jurors, whether through sermons, conversations during confession, or stories shared by the hearthside or to pass time during the work day.¹⁸¹

For those unfamiliar with the legal sources of this period, I provide here a brief introduction to the kinds of surviving records:

¹⁸⁰ On the issue of juror literacy, see Butler, *Forensic Medicine in Medieval England*, 80.

¹⁸¹ On the penetration of legal concepts thanks to church attendance, see Anthony Musson, *Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester: Manchester University Press, 2001), 101-102. On the impossibility of knowing the extent to which religious ideas penetrated medieval English culture, see Summerson, ed., *Crown Pleas of the Devon Eyre*, xlv.

Legal Treatises

Medieval legal treatises, although they purport to present law as actually practiced, are often more of an indicator of societal expectations of the law, the author's desired reforms of the existing law, or sometimes an imperfect understanding of how law once used to be during some prior golden age. For purposes of this dissertation, I surveyed legal codes and treatises from prior to the thirteenth century, such as the *Leges Henrici Primi* (c. 1115) and *Glanvill* (c. 1187-1189), as well as those contemporaneous with the period of analysis, such as the *Placita Corone* (second half of the thirteenth century), the *Mirror of Justices* (late thirteenth century), *Britton* (c. late thirteenth century), *Fleta* (c. 1290), and most importantly, *Bracton* (c. 1220-1230s).¹⁸² The *Bracton* treatise is particularly rich in its discussion of criminal law and *mens rea*, which has led some historians to believe that the treatise reflects contemporary canon law ideas regarding guilt even when such ideas did not directly impact secular criminal law.

Legal Records

A variety of published and manuscript legal records lies at the heart of this dissertation's source base. Although my primary interest is in trial jury behavior, I employ a definition of jury broad enough to capture coroner's inquests, juries of presentment, and trial juries alike. I rely heavily on the amazing wealth of digitized material from the British National Archives now

¹⁸² See, e.g., Frederick Levi Attenborough, *The Laws of the Earliest English Kings* (Cambridge: University Press, 1922); Downer, ed., *Leges Henrici Primi*; G. D. G. Hall, ed. and trans., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford: Clarendon, 1993; first published 1965); J. M. Kaye, ed. and trans., *Placita Corone* (London: Selden Society, 1966); Andrew Horne, *The Mirrour of Justices* (New York: Augustus M. Kelley, 1968); Nichols, ed. and trans., *Britton*; H. G. Richardson and G. O. Sayles, *Fleta* (London: B. Quaritch, 1955); Thorne, ed. and trans., *Bracton*.

available, thanks to the work of Robert Palmer, Susanne Jenks, and others, on the Anglo-American Legal Tradition (AALT) website.¹⁸³

a. Coroner's Rolls (1194-)

Coroner's rolls contain a record of the inquest held by the coroner with the aid of local men from the vicinity in which a corpse was found. The inquest panel, a group of men often drawn from the four nearest hundreds or, in a city like London, from the wards neighboring the alleged crime scene, met to view the corpse, measure the wounds, interrogate neighbors, and produce a tidy narrative as to the inquest's best understanding of what had actually occurred. In the case of homicide, the rolls typically specified where the incident occurred, the suspects involved, the first finder, the nature and size of the wound, the type of weapon involved, and sometimes the motivating factors (e.g., sudden quarrel, longstanding hatred, etc.). This record, which is often factually rich, could serve as the basis for a later trial. Although the coroner rolls do not declare final judgments, they do tend to state the particulars of individual homicide cases in matter-of-fact fashion, often indicating that a specific individual committed the *actus reus* of a crime. Moreover, coroner's rolls sometimes speak to matters of intent, such as prior tension between a deceased individual and his or her accused killer. On average, they offer more narrative than the corresponding trial records and therefore provide some insight into the factors considered by jurors in assessing guilt or innocence.

Several runs of coroner's rolls have been published.¹⁸⁴ Others are found solely in the JUST 2 series of records at the British National Archives, now available through AALT.¹⁸⁵

¹⁸³ Citations to National Archives documents (JUST1) refer to the digital archive assembled by Robert C. Palmer and Elspeth K. Palmer, *The Anglo-American Legal Tradition* available at aalt.law.uh.edu, hereafter *AALT*. As of January 2014, AALT had 8,500,000 frames of archival material.

¹⁸⁴ See, e.g., R. F. Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls* (Streatley: Bedfordshire Historical Record Society, 1961).

b. *Gaol Delivery Rolls (1271-1476)*

Gaol delivery rolls are the records produced when royal justices were sent out into localities to “deliver” the gaols of prisoners. Persons would be subject to trial and convicted, acquitted, remanded, or surrendered to a bishop if they claimed clergy.¹⁸⁶

As with coroners rolls, several series of gaol delivery rolls have been published.¹⁸⁷ Manuscript rolls are typically found in the JUST 3 series of records at the British National Archives and now on AALT.¹⁸⁸ The KB 27 series, which is also available online through the AALT database, includes gaol deliveries in the Court of King’s Bench. Some stray gaol delivery records are also found in the JUST 1 series at the British National Archives.

c. *Eyre, Assize, Oyer et Terminer, and Justice of the Peace Records*

An eyre (c. 1166-1294, with only limited eyres thereafter through 1374), derived from the Latin *iter*, to travel, was a judicial visitation of a single county by itinerant royal justices appointed specifically for that purpose. Jurisdiction was not limited to criminal and other crown pleas, but extended to civil pleas and even to the oversight of local administrative officials.

Overlapping with the general eyre were the assizes (c. 1166-), which were also carried out by itinerant justices. Initially the assizes’ jurisdiction was limited primarily to possessory

¹⁸⁵ For a description of this source base, see “Coroners’ Rolls and Files, with Cognate Documents,” accessed June 12, 2015, <http://www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATID=8671&CATLN=3&FullDetails=True>.

¹⁸⁶ Ralph B. Pugh, ed. and trans., *Wiltshire Gaol Delivery and Trailbaston Trials* (Devizes, 1978), 2. See also chapters 12 and 13 of Ralph B. Pugh, *Imprisonment in Medieval England* (Cambridge: Cambridge University Press, 1968).

¹⁸⁷ See, e.g., Elisabeth G. Kimball, ed. and trans., *A Cambridgeshire Gaol Delivery Roll, 1332-1334* (Cambridge: Cambridge Antiquarian Records Society, 1978); Barbara A. Hanawalt, ed. and trans., *Crime in East Anglia in the Fourteenth Century: Norfolk Gaol Delivery Rolls, 1307-1316* (Norwich: Norfolk Record Society, 1976); Pugh, ed. and trans., *Wiltshire Gaol Delivery*.

¹⁸⁸ See “Justices of Gaol Delivery: Gaol Delivery Rolls and Files,” accessed June 12, 2015, <http://www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATID=8672&CATLN=3&FullDetails=True>.

civil pleas (e.g., novel disseisin), but of relevance to this dissertation is the fact that the assizes began to be involved in the delivery of gaols between 1273 and 1330, and that gaol delivery came to encompass a large amount of their business. *Oyer et terminer* commissions (c. 1248-), which included the infamous trailbaston proceedings of 1305-1307, were headed by justices appointed to try particular categories of offenses.¹⁸⁹ Justices of the peace (c. 1264-) tried trespass and felony cases alike, but they become more relevant in the later fourteenth century and therefore are not a major focus of my research.

As my description of these materials suggests, criminal jurisdiction in medieval England was complex and overlapping, resulting in a wide range of source materials from several different types of tribunal. Many of these criminal records have been published.¹⁹⁰ The vast majority of unpublished manuscript material is mostly found in the JUST 1 series at the British National Archives, available online through AALT.

Year Books

Year Books contain law reports, or unofficial paraphrasing of individual pleas held before royal justices. In contrast to court rolls, the year books often quote judges or counsel directly and therefore offer a bit more material for studying doctrinal development over time.

¹⁸⁹ See the description of these jurisdictions at “Records of Itinerant Justices and Other Court Records, accessed October 31, 2011, <http://www.nationalarchives.gov.uk/catalogue/DisplayCatalogueDetails.asp?CATID=178&CATLN=1&FullDetails=True>.

¹⁹⁰ For eyres, see, e.g., Herbert G. Fowler, *Calendar of the Roll of the Justices on Eyre, 1247* (Aspley Guise: Bedfordshire Historical Record Society, 1939); C. A. F. Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre, 1249* (Devizes: Wiltshire Archaeological and Natural History Society, 1961); Doris M. Stenton, ed. and trans., *Rolls of the Justices in Eyre for Gloucestershire, Warwickshire, and Shropshire, 1221, 1222* (London: Selden Society, 1940); Doris M. Stenton, ed. and trans., *Rolls of the Justices in Eyre for Lincolnshire (1218-1219) and Worcestershire (1221)* (London: Selden Society, 1934); Doris M. Stenton, ed. and trans., *Rolls of the Justices in Eyre for Yorkshire in 3 Henry III (1218-1219)* (London: Selden Society, 1937); R. Stewart-Brown, ed. and trans., *Calendar of County Court, City Court and Eyre Rolls of Chester, 1259-1297* (Manchester: Chetham Society, 1925).

They tend to focus more heavily on civil law matters, but criminal trials are also documented. A law professor at Boston University, David Seipp, has undertaken the remarkable task of compiling a keyword-searchable database of all printed year book sources between the years 1268 and 1535. In the first years of the fifteenth century, one can see the justices and counsel working out some of the nuances of felony doctrine and procedure, such as whether an inciter of a crime became a principal, rather than an accessory, when present at the crime's commission;¹⁹¹ whether a burglar, issued a charter of pardon of execution and therefore "dead in the law" (*mort en ley*) could later be appealed for theft as if he were a "new man" (*novel home*);¹⁹² and how felony and trespass differ in nature.¹⁹³ The year books are not official court records and must be approached with some circumspection, insofar as they sometimes highlight unusual cases and therefore may skew one's view of the norm, and due to the fact that they are sometimes relied upon as an indicator of the timeframe of doctrinal change, when in some instances what may appear to be novel in the year books may in fact be the statement of already accepted practice.

Extra-Legal Sources

In addition to the above-mentioned legal sources, I draw heavily upon extralegal forms of literature. Lateran IV's canon regarding annual penance resulted in a boom in literature aimed at advising confessors on how to elicit the most thorough and effective confessions. Thomas Tentler estimates that twelve to twenty-five summae for confessors were written between 1215

¹⁹¹ See Y.B. Mich. (2nd) 7 Hen. 4, fol. 27a-27b, no. 4 (K.B. 1405); to access a summary and image of the Vulgate reports online, see David J. Seipp, compiler, *An Index and Paraphrase of Printed Year Book Reports, 1268 – 1535*, accessible at <http://www.bu.edu/law/seipp/> (hereafter, *Seipp's Abridgement*), no. 1405.080.

¹⁹² Y.B. Hil. 6 Hen. 4, fol. 6b, no. 29 (K.B. 1405), *Seipp's Abridgement*, no. 1405.029.

¹⁹³ Y.B. Hil. (2nd) 7 Hen. 4, fol. 35b-36a, no. 4 (K.B. 1406), *Seipp's Abridgement*, no. 1406.022.

and 1520,¹⁹⁴ and their popularity is indicated by the frequency with which they were printed in the fifteenth century and onward. Leonard Boyle has demonstrated that the genre of confessor's manuals was already developing by the time of Lateran IV, as indicated by the influential *summae* of Robert Flamborough (c. 1210) and Thomas Chobham (c. 1215).¹⁹⁵ Furthermore, the council's directives on annual confession were not the only stimulus for the production of such manuals. Rather, papal directives to bishops to allow preaching and hearing of confessions by mendicants also resulted in a need for such manuals, first begun by the Dominicans and later taken up by the Franciscans as well.¹⁹⁶

In addition to this literature of pastoral care, the ensuing chapters will rely on sermons, church statutes, and other surviving documentation of practice and belief. I will draw upon

¹⁹⁴ Thomas N. Tentler, "The Summa for Confessors as an Instrument of Social Control," in *The Pursuit of Holiness in Late Medieval and Renaissance Religion: Papers from the University of Michigan Conference*, ed. Charles Trinkaus and Heiko A. Oberman (Leiden: Brill, 1974), 103, 107. On the tradition of *summae* for confessors generally, see generally Pierre Michaud-Quantin, *Sommes de casuistique et manuels de confession au moyen âge* (Louvain, 1962); Joseph Goering, "The Internal Forum and the Literature of Penance and Confession," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX* (Washington, D.C., 2008), 379-428. See also Leonard E. Boyle, "The *Summa confessorum* of John of Freiburg and the Popularization of the Moral Teaching of St. Thomas and of Some of His Contemporaries," in *St. Thomas Aquinas, 1274-1974: Commemorative Studies*, vol. 2 (Toronto: 1974), 245-268; Leonard E. Boyle, "The Summa for Confessors as a Genre, and its Religious Intent," in *The Pursuit of Holiness in Late Medieval and Renaissance Religion: Papers from the University of Michigan Conference*, ed. Charles Trinkaus and Heiko A. Oberman (Leiden: Brill, 1974), 126-130. While Tentler's article emphasizes the *summa* genre in the immediate wake of Lateran IV, Boyle highlights examples of the genre that preceded the council, most notably the manuals of Robert Flamborough and Thomas of Chobham.

¹⁹⁵ Boyle, "Summa for Confessors as a Genre," 126. The first confessor manual to be called a *summa* was the *Summa confessorum* of John of Freiburg in 1298.

¹⁹⁶ Boyle, "Summa for Confessors as a Genre," 128. For a general introduction to English sermons and preaching in this period, see Gerald Robert Owst, *Preaching in Medieval England: An Introduction to Sermon Manuscripts of the Period, c. 1350-1450* (New York: Russell & Russell, 1965); Beryl Smalley, *English Friars and Antiquity in the Early Fourteenth Century* (Oxford: Basil Blackwell, 1960), 28-44; Siegfried Wenzel, *Verses in Sermons: Fasciculus Morum and Its Middle English Poems* (Cambridge: Mediaeval Academy of America, 1978). On vernacular preaching, see also Michel Zink, *La Prédication en Langue Romane avant 1300* (Paris: Editions Honoré Champion, 1976). For the argument that sermons and confessor's manuals are inter-related and should ideally be studied together, see d'Avray, *Preaching of the Friars*, 51. It is tempting to see a parallel with itinerant justices in the traveling of mendicants through parishes during Lent at and other times of year both to hear confessions and to preach. See *ibid.*, 56-57.

academic treatises composed within university settings, such as the writings of Thomas Aquinas, which lack the immediate practical import of texts like confessor's manuals. Sources will range in accessibility from sophisticated Latin works of moral theology, to more simplified versions of such sophisticated texts—such as John Mirk's *Festial*—designed for an audience of parish priests with limited education.

Popular literature, much of which was thoroughly religious in nature, is another focus of my analysis. Among the genres explored here are hagiographies, political poems and songs, outlaw tales, chronicles, and romances. I draw examples from the writings of Geoffrey Chaucer, whose tales span a variety of genres, as exemplified by the sermon-like quality of *The Parson's Tale*. Just as with the religious literature described above, these sources range from elite works such as the writings of John Gower, to vernacular poems that presumptively reached a broader audience. Each of these various literary forms had a unique audience with distinct expectations. One difficulty in drawing upon such a range of genres is the issue of the relationship between such texts and the largely illiterate jurors whose mindsets I aim to elucidate. Where possible, I point out parallels between the more elite forms of literary and religious texts and their less elite counterparts, arguing for an interplay of ideas among various registers of sources, as well as a broad cultural understanding of the nature of guilt and innocence.

CHAPTER TWO

Felonica Felonice Facta: Felony and Mens Rea in Medieval England

Introduction

At the 1329 Northamptonshire Eyre, the king's justices were presented with a difficult felony case.¹ A surviving law report, penned in Anglo-Norman French, described how the deceased, William atte Grene, had been caught red-handed stealing a cow. William broke free and attempted to flee while being led by several townsmen toward gaol.² The townsmen, six in all, responded with what we might characterize as excessive force: they decapitated him. The eyre justices ordered the arrest of the men because, again according to the law report, "they had made themselves judges" (*pur ceo qil se firent mesmes iuges*).³

Three of the six townsmen died before the matter came before the eyre justices, indicative of just how stale a felony case might be by the time it reached adjudication. The law report tells us that the men, asked how they would plead, responded that they "wished to be in the king's grace" (*voudroient estre en la grace le roi*). Perhaps this represented an acknowledgement of guilt, and a desire to rely on the king's mercy to escape the consequences

¹ For the manuscript image of the official trial record, see JUST1/635 AALT 0898 (1329), accessed August 25, 2014, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no635/bJUST1no635dorses/IMG_0898.htm.

² This is the word from which we get our modern term "jail." It was a pre-trial holding location, and a grim locale in which many met their demise long before being heard in court.

³ For the full text and translation, see Donald W. Sutherland, ed. and trans., *The Eyre of Northamptonshire, 3-4 Edward III, A.D. 1329-1330*, vol. 1 (London: Selden Society, 1983), 207, 213.

of a seemingly inevitable felony conviction. Nevertheless, a jury was convened. According to the official plea enrollment, written in Latin, the jurors testified that William atte Grene was a “notorious thief” (*latro notorius*) who had drawn a knife to defend himself against his pursuers. His unsavory character might have worked in the townsmen’s favor.⁴ The record provides us with the alliterative phrase that inspired this chapter: the jurors testified that they did not suspect the three men of “any felony committed feloniously” (*de aliqua felonia felonice facta*). This, of course, raises the question whether a felony could theoretically be committed in a nonfelonious manner. This is no small matter, as it gets to the heart of my working hypothesis about the meaning of “felony,” a word which I believe was connected intrinsically with the idea of guilty mind, or *mens rea*, in the first two centuries of the English criminal trial jury.

Felony today signifies a category of crime. It connotes a crime of sufficient gravity to merit incarceration and, in some instances, capital punishment.⁵ To label someone a felon today is to mark him or her as a person set apart from law-abiding society, worthy of such stigma as disenfranchisement, ineligibility for jury service, or even, in some circumstances, the termination of parental rights. A felony conviction carries severe consequences, and in this sense the word felony continues to be rich in meaning. Nevertheless, we are not in the habit of using the word in our daily speech or calling people felons outside of the criminal law context. In fact, felony’s resonance today pales in comparison to its medieval usage. While modern fiction reserves words of felony for criminal courtroom drama, where legal terms add a layer of realism, medieval literature abounds with felonious characters and presents a cornucopia of felonious words. One

⁴ John Bellamy has demonstrated that defendants described as “common” or “notorious” felons had a much higher chance of conviction. See Bellamy, *Criminal Trial in Later Medieval England*, 29-30.

⁵ For an account of felony’s modern significance, which falls outside the scope of this chapter, see Elizabeth Papp Kamali, “Felonies,” in *Encyclopedia of Criminology and Criminal Justice*, ed. Jay S. Albanese (New Jersey: John Wiley and Sons, 2014).

particular fourteenth-century Middle English text, the *Cursor Mundi*, includes such diverse variants as the substantive forms *felun* and *feluni*, the adjectival use of *felun*, the adverbs *felunli*, *felunlik*, and *felunsi*, and the superlative adjectival form, *felunest*.⁶ Authors such as Chaucer and Gower bandied the term felony about to describe wickedness or treachery and to personify such insidious characters as Herod, Judas, or the devil himself. To understand felony as a legal term of art, the medieval historian must, surely, wade through plea rolls and coroners' inquests to examine the word in its criminal law environment. At the same time, the legal historian must also venture into felony's second native habitat: the world of literature. In fact, I would go so far as to argue that accurate interpretation of the legal record requires contextualizing the meaning of felony within a broader Latinate and vernacular tradition.

This chapter, by examining legal and non-legal uses of words of felony in thirteenth- and fourteenth-century England, prompts us to imagine a world in which felony was omnipresent both in a metaphysical sense—the idea that felony resided in all—and in common linguistic use. In this chapter, I trace the meaning of felony from its continental usage to its late medieval insular manifestations. I argue that felony, while sometimes used in a categorical sense to distinguish more heinous crimes from less, continued to be used simultaneously in a much richer way throughout the thirteenth and fourteenth centuries. Moreover, this richer meaning of felony imported a sense of guilty mind, or *mens rea*, into a criminal law that otherwise appeared to be clumsily out of sync with the contemporary theological emphasis on locating culpability in an actor's heart and mind. Understanding felony's place within non-legal medieval sources promises to deepen our understanding of the meaning of felony in the criminal law context.

⁶ See, generally, Richard Morris, ed., *Cursor Mundi: A Northumbrian Poem of the XIVth Century in Four Versions*, parts 1-5 (London: Oxford University Press, 1961-1966). The text is searchable online through the *Corpus of Middle English Prose and Verse*, yielding more than one hundred uses of words of felony, with a diverse range of orthography.

Medieval English law notoriously prescribed the death penalty for felony, most notably homicide and thefts of property over a minimal value. In fact, English law failed to distinguish systematically between murder and manslaughter well into the sixteenth century.⁷ Maitland, for example, characterized thirteenth-century homicide law as follows:

Every homicide that is neither justifiable nor yet excusable as the result of misadventure or self-defence, is in Bracton's age felonious; also it is conceived as having been perpetrated by 'premeditated assault' or by 'malice aforethought'; also it earns the punishment of death...we may say that our law knows but one degree of criminal homicide; it does not yet know the line that will divide 'murder' from 'manslaughter.'⁸

The harsh nature of the formal law has led some historians to describe the medieval English criminal justice system in strict liability terms. In other words, merely by committing a proscribed act, and regardless of one's culpability or state of mind, an individual might be convicted and hanged for felony. This view of medieval criminal justice resonates with an image of the period as a time of pre-subjectivity, a time when society was characterized by homogeneity and static hierarchy and comparatively unconcerned with interiority.⁹ The present study contributes to the debunking of this theory, although it is admittedly a theory espoused by few medieval historians today.¹⁰

⁷ Green, "Societal Concepts of Criminal Liability," 669.

⁸ Pollock & Maitland, *History of English Law*, vol. 2, 484.

⁹ For an eloquent refutation of this view as it appears within literary criticism, see David Aers, "A Whisper in the Ear of Early Modernists; or, Reflections on Literary Critics Writing 'The History of the Subject'," in *Culture and History, 1350-1600: Essays on English Communities, Identities and Writing*, ed. David Aers (New York: Harvester Wheatsheaf, 1992), 177-202.

¹⁰ The question of felony's relationship to *mens rea* does relate to a current debate over the continuing role of *mens rea* in felony adjudication. In *The Collapse of American Criminal Justice*, Stuntz reflected upon the incorporation of general intent standards into criminal statutes in the twentieth century. Such standards require only that the defendant intended the physical act in question, and that the physical act itself violated the conduct requirements of a criminal statute. In such instances, *mens rea* no longer connotes a truly guilty mind, in the sense of understanding that one is engaged in seriously criminal behavior. William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011), 260-267. Stuntz argued that this changing standard, coupled with a shift toward plea

My examination of thirteenth- and fourteenth-century evidence has led me to question the assumption that medieval English criminal law was dependent upon a notion of strict liability, or a worldview in which acts were inextricably bound up with fault regardless of the actor's intentionality. English criminal law was not heavily theorized during these centuries, forcing the historian to work from the ground up in sorting out the history of criminal responsibility. Fortunately, some patterns do emerge from a close reading of felony cases. By examining the common usage of terms like "felony" and "felonious," I hypothesize that *mens rea* played a crucial role in jury considerations from the earliest days of the criminal trial jury. Although the formal law did not routinely invoke the language of *mens rea*, the idea of criminal intent lay at the heart of the word "felony," thus reducing the need for any systematic use of alternative terms connoting *mens rea* in records of jury verdicts. It is the meaning of the word "felony" and its derivatives that forms the basis for the present chapter. Throughout, I will compare discussions of felony in legal treatises, popular literature, and trial records, highlighting instances in which the last source base mirrors or diverges from the previous two in conceptualizing felony.

To return to the lurid decapitation of William, the eyre jurors might have been alluding to residual guilt—some lesser wrongdoing not amounting to full-blown felony—when they described the townsmen as not suspected of a felony committed feloniously. Assuming the veracity of the tale, William had defended himself with a knife, and the men might have had no feasible alternative but to kill him to prevent his escape. Perhaps their response was proportionate to the danger posed by the notorious thief. Then again, it is difficult to imagine that there was no option short of decapitation to restrain William. The townsmen would not

bargaining at the expense of jury trials (where due process safeguards might result in more acquittals), has contributed to the swelling of America's prison population in recent decades. Perhaps understanding *mens rea*'s earliest applications might help contribute to dialogue on this issue.

hang for the homicide, but the justices nevertheless ordered them to prison for failing to disarm William of his knife upon arrest, as both common sense and, according to the record, common custom (*moris*) would have dictated. In other words, the men were not guilty of killing William feloniously, but they were guilty of other lesser transgressions. The townsmen, described as the poor peasants of Sir John Trussel, later returned to court and each paid a fine of one mark, Trussel standing as pledge. The final disposition of the case leaves the legal historian befuddled. What does it *mean* to say the men were not suspected of any felony committed feloniously? Had they committed no felony in decapitating William, thanks to the legal loophole permitting violence against a fleeing, red-handed thief?¹¹ Alternatively, had they committed a felony, but in a nonfelonious manner, escaping judgment thanks to the king's mercy? Could one commit a felony nonfeloniously? Alternatively, could one commit a non-felony, such as a trespass, feloniously? Are all felonies felonious? What exactly *is* felony?

The Meaning of Felony

The language of felony commands a ubiquitous presence in medieval English criminal records. This is partly by design: individuals bringing an appeal, or private prosecution, for homicide were required to employ words of felony in their count. Trial records might even refer to an individual acting “feloniously as a felon of the lord king,” a curiously repetitive formulation that evoked the king's ultimate power over the life and property of the accused, as suggested by a line in the *South-English Legendary*: “For al that the king's felon has, the king's chattels it is” (*For al þat þe kingus feloun hath : þe kingus catel it is*).¹² Poetically, one might

¹¹ For another example of a thief killed in the act, see Susan Stewart, ed. and trans., *The 1263 Surrey Eyre* (Woking: Surrey Record Society, 2006), 297. For a fleeing burglar decapitated in the presence of the king's bailiffs, see *Calendar of Inquisitions Miscellaneous*, vol. 2, 84, no. 339.

¹² Carl Horstmann, ed., *The Early South-English Legendary or Lives of Saints: MS Laud 108* (London: N. Trübner & Co., 1887), 123, line 568. A nearly identical line appears in the mid- to late-

speak of “God’s felons” (*Goddys felons*) as well, the devils whom newly confirmed Christians, as “God’s champions” (*Goddess champyons*) were qualified to fight.¹³ Within legal records, the language of felony appears formulaic, boilerplate, and unassuming, as if connoting nothing further than a category of crime determined by external conduct. Perhaps this would eventually hold true.¹⁴ In the early centuries of the criminal trial jury, however, I believe that “felony” and its adjectival and adverbial derivations (felonious, feloniously) signaled something more dramatic and more damning.¹⁵

thirteenth century chronicle of Robert of Gloucester: “For all that the felon has, the king’s it is” (“Vor al þe felon haþ þe kinges it is”). William Aldis Wright, ed., *The Metrical Chronicle of Robert of Gloucester* (London: Eyre and Spottiswoode, 1887), 679, line 9668. The preceding lines of the chronicle express a concern with the church keeping the chattels that a traitor of the king carried with him to sanctuary. For other examples of this phrasing, see Helen M. Cam, ed. and trans., *The Eyre of London, 14 Edward II, A.D. 1321*, vol. 1 (London: Bernard Quaritch, 1968), 88, 100; G. O. Sayles, ed., *Select Cases in the Court of King’s Bench*, vol. 4 (London: Bernard Quaritch, 1955), 23, 44, 47. See also the case of Geoffrey le Shepehurd, accused of killing Oliver de Rytone feloniously as a felon (*felonice ut felo*), JUST3/74 AALT 0069 (1308/9), accessed October 22, 2012, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no74_3/IMG_0060.htm. In terms of literary appearances, Peter Langtoft’s chronicle, discussing the time of William Wallace, observes: “The king through the land did seek men of reason, and with justice them bound, to sit on Trailbastons. Some through inquest they deemed to be bound in prisons, and those who fled they outlawed as the king’s felons.” (“The kyng þorgh þe lond did seke men o resons, / & with þe justise þam bond, to site on Trailebastons. / Som þorgh quest þei demed be bonden in prisons, / & þo þat fled þei flemed als þe kynges felons.”) Thomas Hearne, ed., *Peter Langtoft’s Chronicle*, vol. 2 (London, 1725), 328.

¹³ See Frederick J. Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1 (London: K. Paul, Trench, Trübner & Co., 1901), 307.

¹⁴ Consider, for example, Nicola Lacey’s contention that eighteenth-century uses of such terms as ‘maliciously’, ‘wickedly’, or ‘feloniously’ did not point to interest in a guilty mind or a defendant’s internal state, but were rather starting points for an investigation of external conduct. Nicola Lacey, “Psychologizing Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility,” *Criminal Law and Philosophy* 4:2 (2010), 117.

¹⁵ This would bring the reading of felony in legal texts in closer alignment with prevailing readings of felony in literature. See, e.g., Glynnis M. Cropp, “Felony and Courtly Love,” in *The Court Reconvenes: Courtly Literature Across the Disciplines*, ed. Barbara K. Altmann and Carleton W. Carroll (Cambridge: D. S. Brewer, 2003), 73, 78. Cropp describes felony as a powerful force—driven by anger and hatred and characterized by aggression and violence—that could disrupt relations based on fealty. On the use of adverbs like “traitorously” and “feloniously” to signal the seriousness of an offense, see Anthony Musson and W. M. Ormrod, *The Evolution of English Justice: Law, Politics and Society in the Fourteenth Century* (Houndmills: Macmillan, 1999), 164.

Felony's modern usage as a legal term of art masks a rich etymological heritage.¹⁶ While the following analysis will draw heavily upon accounts of felony's Middle English usage, it will necessarily consider the term's appearance in the other languages regularly used in medieval English legal records and literature: Latin and Anglo-Norman French. It is nearly impossible to separate distinct strands of word usage given the close coexistence of medieval England's three languages, as demonstrated by the opening decapitation vignette, which drew upon an Anglo-Norman court report of a case that had likely been tried in English and officially documented in Latin. It is likely that the various appearances of words of felony in Latin, Middle English, and Anglo Norman track each other fairly closely during these two centuries in England.

Frederic Maitland once observed that felony "came to stand for a number of crimes which could be enumerated, but no definition of felony ever was or could be formed."¹⁷ Plenty of legal theorists have tried. In fact, the meaning of felony has troubled legal writers for centuries, with etymological theses proposed by the likes of Edward Coke (1552-1634), Henry Spelman (1562-1641), and, over a century later, William Blackstone (1723-1780). Drawing in part upon Blackstone, Jeremy Bentham (1748-1832) colorfully illuminated some of these longstanding theories about the etymological origins of felony in his *Rationale of Punishment*, all the while poking fun at his forebears' keenness to display their knowledge of exotic languages:

¹⁶ This section draws upon my entry on "felonies" in *The Encyclopedia of Criminology and Criminal Justice*. I also make use of the following dictionaries: J. F. Niermayer's *Mediae Latinitatis lexicon minus* (Leiden: Brill, 1976); *The Anglo-Norman Dictionary*, accessed October 15, 2012, at <http://www.anglo-norman.net/gate/>; *The Middle English Dictionary*, accessed October 15, 2012, at <http://quod.lib.umich.edu/m/med/>; and the *Oxford English Dictionary*, 2nd and 3rd editions. A further analysis would try to trace precisely when and how felony took on its adverbial and adjectival forms, and to trace any differences in meaning between the use of felony as a substantive and its use as a modifier. It might be that the adjectival and adverbial forms of felony maintained their connection with wickedness for some time after felony as a substantive came to signal a mere category of crime.

¹⁷ Frederic William Maitland, "The Early History of Malice Aforethought," *The Collected Papers of Frederic William Maitland*, vol. 1, ed. Herbert Albert Laurens Fischer (Cambridge: Cambridge University, 1911), 316.

Some etymologists, to show they understood Greek, have derived it [i.e., the word felony] from the Greek: if they had happened to have understood Arabic, they would have derived it from the Arabic. Sir Edward Coke, knowing nothing of Greek, but having a little stock of Latin learning, which he loses no opportunity of displaying, derives it from *fel*, gall.

Having mocked Coke, whose etymological theory I happen to favor, Bentham next moved on to discuss the theories of Blackstone and Spelman, who were at least perceived to be within the correct geographical ballpark:

Spelman, who has the good sense to perceive that the origin of an old northern word is to be looked for in an old northern language, rejecting the Greek, and saying nothing of the Latin, proposes various etymologies. According to one of them, it is derived from two words, *fee*, which, in ancient Anglo-Saxon had, and in modern English has, a meaning which approaches to that of property or money; and *lon*, which in modern German, he says, means *price*: fee lon is therefore *pretium feudi*. This etymology, the author of the Commentaries adopts, and justifies by observing, that it is a common phrase to say, such an act is as much as your life or estate is worth.¹⁸

Bentham did not challenge Blackstone's opinion head on. Nevertheless, having skewered the Latinate Coke and the unnamed Greek and Arabic linguists, Bentham then offered his own theory, which he attributed to one of Spelman's alternative hypotheses:

But *felony*, in mixed Latin, *felonia*, is a word that imports action. I should therefore rather be inclined to derive it from some verb, than from two substantives, which when put together, and declined in the most convenient manner, import not any such meaning. The

¹⁸ Bentham, *Rationale of Punishment*, 370-371. According to the 2nd edition of the *OED*, scholars have also suggested possible connections with classical Latin (*fello*, a term of abuse used by Martial and Catullus) and Old High German, and have also pointed to similar words in modern Dutch and Danish. Variations on the word *felon* also appear in other romance languages, including Spanish (*fellon*) and Italian (*fellone*). The use of *fêlon* or *fel* as an adjective is traced to c. 980 and the use of *fêlonie* as a noun to c. 1050 by *Le Grand Robert de la langue française*, which finds the word used both to describe one who betrays the loyalty due his lord or, alternatively, disloyalty more generally in the sense of betrayal or deceit, or guilt of treason. The Bloch-Wartburg *Dictionnaire étymologique de la langue française* (2002 edition), moreover, suggests that *felon* might be derived from the Carolingian Latin *fello*, which might be in turn a Latinization of the French *fillo*, referring to one who whips or mistreats slaves. My thanks to Bruce Frier for alerting me to this last source.

verb *to fall*, as well as *to fail*, which probably was in its origin the same as the other, by an obvious enough metaphysical extension, is well known to have acquired the signification of *to offend*; the same figure is adopted in the French, and probably in every other language. In Anglo-Saxon there is such a word as *feallan*, the evidence root of the English word now in use.¹⁹

It is unclear how or why *felony* or *felonia* struck Bentham as particularly active words. Moreover, he failed to examine words of felony contextually, leading him to fall into a convenient trap not unlike that of the Greek and Arabic scholars he mocked for failing to recognize the inapt connection between their expertise and the analysis at hand. Bentham's rejection of Coke's Latin hypothesis and acceptance of an Anglo-Saxon theory neglected to account for the frequency with which words of felony were coupled with references to *fell*, or gall, presumably not due solely to the alliterative relationship between the two terms.²⁰ In other words, a contextual analysis of felony suggests that Coke might have been correct after all,²¹ and that Spelman, Blackstone, and Bentham's later theories were proffered in vain. In the next section, I will explain further my reasons for believing that the word "felony" can likely be traced to an association with gall.

In Defense of Coke: A Quick Summary of Felony's Etymology

In Latin, *felonia* is a term of medieval origin, but likely derived from the classical Latin *fel*, or gall bladder. The word *fel* also denoted gall or the gall bladder in Anglo-Norman French

¹⁹ Jeremy Bentham, *Rationale of Punishment* (London: Robert Heward, 1830), 371.

²⁰ In addition to alliterative uses of *fel* and *felony*, it is not unusual to find fellness bound up with references to the "fiend," or devil. See, e.g., Simmons, ed., *Lay Folks Mass Book*, 136 ("þe foule fend so fel is.") See also "The Siege of Calais (1347)," in *Historical Poems of the XIVth and XVth Centuries*, ed. Robbins, 35 ("Ðe franche men er fers and fell..."); "Of Women Cometh This Worldes Weal," in Brown, ed., *Religious Lyrics of the XIVth Century*, 174, line 22 ("To folewe þe false feendes fele"); "Maiden Mary and Her Fleur-de-Lys," in *ibid.*, 183, line 67 ("Ðe fend, þat was boþe fers and felle"). Admittedly, there is a danger of producing a false etymology by relying on alliterative patterns, a danger pointed out to me by Catherine Sanok.

²¹ A contention supported by others as well. See, e.g., W. H. Hitchler, "Felonies and Misdemeanors," *Dickinson Law Review* 15:9 (1910-1911), 268.

and was used adjectivally in Anglo Norman and Middle English alike to connote bitterness (an attribute of gall), treachery, evil, deceit, or violence. A 1363 French anatomy text by Guy de Chauliac, translated into Middle English in the early fifteenth century, described “the receptacle of gall” (*þe Chiste of þe gall*) as the part of the stomach cavity (*wombe*) that received “superfluous choler” (*þe colerik superfluite*).²² By gathering the “choleric humor” (*colerik humour*) within it, the gall bladder cleansed the blood so that the members of the body might not be infected with choler.²³ Gall played a small but vivid role in Jesus’ passion story: according to Matthew 27:34, Jesus was offered a drink of wine mixed with gall but, despite his thirst, refused to drink after tasting it. A text on the vices and virtues, c. 1200, would contrast this bitter drink with the sweetness of the fruit that led to Adam’s downfall.²⁴ Gall was characterized most of all by its bitterness, a quality that made it an appropriate bodily metaphor for the cruelty of felony.²⁵

It is not clear when the leap was made from *fel* to *felonia* in Latin, but it appears to have been an early medieval phenomenon. Legal historians have generally agreed that felony—in

²² Björn Wallner, ed., *An Interpolated Middle English Version of the Anatomy of Guy de Chauliac*, part 1 (Lund: Lund University Press, 1995), 63.

²³ Wallner, ed., *Anatomy of Guy de Chauliac*, part 1, 70.

²⁴ F. Holthausen, ed., *Vices and Virtues, Being a Soul’s Confession of Its Sins with Reason’s Description of the Virtues: A Middle English Dialogue of About 1200 A.D.*, part 1 (London: Oxford University Press, 1967), 118-119. (“His [i.e. Adam’s] hands too the fruit of the tree, but Christ’s hands were nailed through to the holy cross. The fruit in his mouth seemed sweet to him, but God received the bitter gall (zalle) in His mouth.”) I rely here on Holthausen’s modernization.

²⁵ For the association of gall’s bitterness with deadly sin, see “A Prayer of Penitence to God Almighty,” in Carleton Brown, ed., *English Lyrics of the XIIIth Century* (Oxford: Clarendon Press, 1932), 158, lines 9-12.

early medieval continental usage—came to connote the disloyalty of a vassal to his lord.²⁶

Tracing the word's deep history poses difficulties, however. While many legal historians have described an early medieval continental usage of felony, typically citing to earlier generations of legal historians who similarly posited such a usage, they have tended to do so without citing to particular appearances of the terminology. Felony does not arise with any great frequency in the historical record until roughly the twelfth century, by which time its meaning in the French feudal context referred to the betrayal of a lord by his vassal, resulting in the loss of the vassal's right to land.²⁷

In both Middle English and Anglo Norman, *felonie* or *felunie* also came to connote villainy, wickedness, perfidy, deceit, crime, or sin. In England, felony gradually became disengaged from the idea of a breach of loyalty; by the end of the thirteenth century, felony as a category encompassed such crimes as treason, homicide, arson, rape, robbery, burglary, and grand larceny.²⁸ In Normandy, felony similarly took on a broader meaning by the early thirteenth century, although the homicide provisions of the *Très Ancien Coutumier* suggest that there was still something particularly troubling about the betrayal of the relationship between a

²⁶ See, e.g., William Blackstone, *Commentaries on the Laws of England*, book 4 (Buffalo: William S. Hein, 1992; first published 1769), Ch. 7; Plucknett, *Concise History of the Common Law*, 442. Goebel dates this use of felony to the twelfth century. Goebel, *Felony and Misdemeanor*, 249-250. One of the earliest, non-literary continental references to *felonia* I have found to date is from an 1162 concord between Emperor Frederick I and Count Raymond of Barcelona (Raymond Berengar IV), in which the word is used in the context of the emperor granting the county of Provence “in feodum”. Heinrich Appelt, ed., *Die Urkunden Friedrichs I, 1158-1167* (Hanover, 1979), 245, accessed through the *Monumenta Germaniae Historica* site on June 15, 2015, <http://www.dmgh.de/>. The term appears even earlier in the *Leges Henrici Primi* (c. 1115); see Downer, ed. and trans., *Leges Henrici Primi*, 170-71, §53.4. Not specifically focused on origins, I have not undertaken an exhaustive search for earlier uses, but I suspect the word *felonia* might be traceable much earlier.

²⁷ For the argument that this betrayal came to be known as *felonia* in the twelfth century, see Goebel, *Felony and Misdemeanor*, 249-250.

²⁸ Plucknett, *Concise History of the Common Law*, 442; Pollock & Maitland, *History of English Law*, vol. 2, 511.

lord and his man.²⁹ Throughout the thirteenth and fourteenth centuries, felony appeared in its Latinate form in legal records, but was also used extensively in contemporary Middle English and Anglo Norman literature, where it frequently described the nature of evil protagonists. In Chaucer and Gower, for example, felony was equated broadly with anger, cruelty, malice, ruthlessness, venom, and even premeditation.³⁰ Finally, just as the word “trespass” originally imported a biblical idea of sin and later became a legal term of art, “felony” has historically been used to reference sin or crime in a general sense.³¹ Today felony signifies little more than a category of serious crime, but this is due to an etymological transformation that was centuries in the making. Even today, where to draw the line between non-criminal villainy and criminal felony remains a live and vexing question.³²

A Closer Look at Felony as a Legal Term of Art

A search in the *Oxford English Dictionary*, *Middle English Dictionary*, and *Anglo-Norman Dictionary* will bring up many of these rich and varied meanings of felony, but will also reveal a separate, secondary legal definition of felony, including the feudal idea, discussed

²⁹ Namely, while exile is prescribed for most felonious killings, the death penalty comes to the fore in killings of a lord by his man or vice versa. According to the *coutumier*, “If a lord kills his man, he is to receive death. And if a man kills his lord, if it is not by misadventure, he is to be drawn and hanged; and if it was by misadventure, he is to receive death” (“Se li sires ocit son home, il en recevra mort. E se li homs ocit son segnor, se ce n’est par mesaventure, il soit trainez e panduz; e se ce fu par mesaventure, il en receve mort”). In other words, even an accidental killing of a lord by his man was to be punished by death. See Ernest Joseph Tardif, ed., *Coutumiers de Normandie*, vol. 1, part 2 (Rouen: E. Cagniard, 1881), 27.

³⁰ William Snell, “‘Feloun’ and ‘Felonye’: Violence and Violent Crime in Chaucer’s *Canterbury Tales*,” *Geibun Kenkyu* 80 (2001), 126.

³¹ On the development of trespass as a legal term of art, see Langbein et al., *History of the Common Law*, 103. For a mid- to late-fourteenth-century example of the pairing of sin and felony, see James Henthorn Todd, *An Apology for Lollard Doctrines, Attributed to Wicliffe* (London: Camden Society, 1842), 55. The text accuses members of the church hierarchy of “al kynd of syn, felony, and abhominacoun”.

³² See, generally, Leo Katz, “Villainy and Felony: A Problem Concerning Criminalization,” *Buffalo Criminal Law Review* (6:1 (2002), 451-482.

above, of a vassal's act resulting in forfeiture of his fee and the common and statutory law name for crimes more serious than misdemeanors.³³ Evidence from the *Bracton* treatise suggests that felony was already being differentiated from trespass in severity in the thirteenth century.³⁴ Historians have long looked to the idea of felony as a means to understanding the medieval jury's deliberative process and gradation of crime, and they have tended to support the contention that felony carried a distinct legal meaning.³⁵ In the early twentieth century, legal historian Theodore Plucknett looked to the word's deep origins to describe felony in its earlier usage as "the breach of the fidelity and loyalty which should accompany the feudal relationship which has been consecrated by homage."³⁶ Plucknett argued that felony remained restricted to the feudal context on the continent, while it came to encompass all sorts of heinous crimes—most notably murder, robbery, and theft—in England.

This view, which one finds repeated in many accounts, gives a false picture of a tidy divide between feudal felony on the continent and criminal felony in England. This downplays the exchange of legal ideas and practices between Normandy and England, an exchange described thoroughly in the early twentieth century by Julius Goebel, Jr., who attributed to Norman influence such integral components of English felony law as the death penalty,

³³ For a description of the differentiation between felony and trespass, and later misdemeanor, see Baker, *Introduction to English Legal History*, 502.

³⁴ See Thorne, ed. and trans., *Bracton*, vol. 2, 353. ("If those in the county court act with circumspection they ought to examine the deed for which the man is to be exacted, for though felony may be alleged in the appeal not every deed amounts to felony, though it sometimes amounts to an *injuria* and a trespass.")

³⁵ Early modernists have zeroed in on felony as well. In her study of criminal law in seventeenth-century England, Cynthia Herrup defines felony as a deliberate, malicious wrong, in contrast to the idea of mistake. Felony, in Herrup's assessment, "struck at the very heart of a community" and, in cases resulting in execution, typically involved a direct violation of one of the Ten Commandments. Herrup, *Common Peace*, 2-3.

³⁶ Plucknett, *Concise History of the Common Law*, 442. See also Kesselring, "Felony Forfeiture in England," 203.

forfeiture of chattels, escheat of land, and the king's right to the profits of a felon's lands for a year-and-a-day.³⁷ The earliest French translation of the *Très Ancien Coutumier*, a Norman customary law collection (c. 1200), substitutes the word *felonie* for the Latin *inique* in referring to non-accidental homicides.³⁸ The *coutumier* might therefore be employing *felonie* in a manner closer to Plucknett's sense of the English term for a heinous crime, although the examples given in the Norman text are limited to intrafamilial homicide and homicide breaching the bond between a lord and his man, suggesting some continued resonance of the feudal context with its emphasis on interpersonal relationships. Just as one can find felony used to connote crimes such as homicide on the continent, one can also find felony used in the characteristically French sense of breach of the feudal bond in some twelfth-century English legal sources. For example, the early twelfth-century treatise *Leges Henrici Primi* declared: "If a lord accuses his man of felony (*felonia*) or breach of fidelity (*fide mentita*), the man shall not make answer to any other charges against him until he has been dealt with in respect of that one."³⁹ Accusations of felony, in other words, took priority over all other allegations, perhaps due to the property interests at stake.

The feudal meaning of felony drew upon notions of disloyalty or treason, the ultimate breach of fealty. This sense of felony comes through strongly in the *Song of Roland*, a twelfth-century Anglo-Norman poetic account of the Battle of Roncesvalles in 778. In the earliest surviving Roland manuscript (c. 1140-1170), the words felon and traitor were used in conjunction:

³⁷ Goebel, *Felony and Misdemeanor*, 279.

³⁸ The French translation was produced within a decade or two of the Latin original. For information on the dating of the *coutumier*, see "Summa de Legibus Normanniae," accessed January 23, 2013, <http://www.law.harvard.edu/library/digital/summa-de-legibus-normanniae.html#appendix>. For the text of the section on homicide, see Tardif, ed., *Coutumiers de Normandie*, vol. 1, part 2, 26-27.

³⁹ Downer, ed. and trans., *Leges Henrici Primi*, 170-71, §53.4. See also *ibid.*, 156-57, §46.3.

On the other side is a pagan, Estorgant;
Estramariz is there too, a valued companion:
They are felons, deceitful traitors.⁴⁰

Similarly, the later twelfth-century French author, Chrétien de Troyes, speaks of disloyalty in relation to the word *fel*, further making the case for a *fel-felonie* French connection. In his account of Lancelot (c. 1180), Chrétien refers on separate occasions to “fell traitors” (*fel traïtres*), “the fell plains of disloyalty” (*Li fel plains de deslëauté*), and men who are “fell and disloyal” (*fel et deslëaus*).⁴¹ Trisha Olson, in her discussion of the transition from ordeals to jury trial, suggests that *traisoun*, which connoted a “betrayal of good faith” in Anglo Norman and Middle English, carried the same meaning as “felony plain” as late as the early fourteenth century.⁴² Supporting Olson’s argument is the frequent pairing of felony and treason in English literary sources, such as the description of Judas in *Handlyng Synne* as both a “foul felun” and

⁴⁰ A more poetic translation than mine can be found here: Patricia Terry, trans., *The Song of Roland*, 2nd ed. (New York: Macmillan, 1992), 38. The original French is from Raoul Mortier, ed., *Les Textes de la Chanson de Roland: La Version d’Oxford*, book one (Paris: La Geste Francor, 1940), 28, lines 940-942. (“D’altre part est uns paiens, Esturganz; / Estramariz i est, un soens cumpainz: / Cil sunt felun, traïtur suduiant.”) Additional use of words of fellness or felony may be found elsewhere in the poem as well. See, e.g., *ibid.*, 4 (line 69, referring to King Marsile’s inner circle as “Des plus feluns”, or the most felonous of men), 25 (line 844, describing Ganelon as “li fels en ad fait traïson”, combining references to fellness and treason), 27 (line 910, referring to a certain emir as “plus felun en la tere d’Espaigne”, or unsurpassed in felony in all the land of Spain), 30 (line 1024, referring to “Guenes le sout, li fel, li traïtur,” essentially describing Ganelon as a mercenary, evil-doer, and traitor). Duggan’s concordance of the Oxford manuscript reveals ten instances of the word *fel*, one of *felon*, three of *felonie* or *felonies*, six of *fels*, and sixteen appearances of *felun* or *feluns*. See Joseph Duggan, *A Concordance of the Chanson de Roland* (Columbus: Ohio State University Press, 1969), 152-153. For access to images of the full manuscript, see “Bodleian Library MS. Digby 23 (Pt 2), accessed January 24, 2013, <http://image.ox.ac.uk/show?collection=bodleian&manuscript=msdigby23b>.

⁴¹ These excerpts (from lines 6891, 6166, and 3179, respectively) are taken from the website of the *Princeton Chariot Project*, accessed January 24, 2013, <http://www.princeton.edu/~lancelot/ss/>. See also line 5487, describing Meleagant as known to be *fel*, or wicked.

⁴² Olson, “Of Enchantment,” 180.

one guilty of “tresun.”⁴³ Ultimately, treason would come to be treated as categorically distinct from felony, although also a form of felony itself.⁴⁴

In defining felony, some historians have emphasized its consequences, particularly forfeiture, over its qualities. “We thus define felony,” commented Maitland in the nineteenth century, “by its legal effects; any definition that would turn on the quality of the crime is unattainable.”⁴⁵ These legal effects included: the fact that felony could be prosecuted by appeal, or private accusation; that a felon’s lands escheated to his lord or to the king, and his chattels were confiscated; that the felon lost life or member; and that a man who took to flight to avoid a felony prosecution could be outlawed.⁴⁶ In the eighteenth century, William Blackstone described

⁴³ See Robert Mannyng’s *Handlyng Synne*, a 1303 adaptation of an Anglo-Norman penitential manual: “When this Judas, foul felon, waited for Jesus with treason” (“Whan þys Iudas, foul felun, Weytede Ihu wyþ tresun”). The text goes on to exhort, “Traitor, remember what you have heard, said, and sung in all the world. Under heaven there is not so great a treason as in the fair words of a felon at heart.” (“Treytur, recorde what þou hast herd, / Seyd, and sunge yn al þe werld. Vndyr heuene ne ys so moche tresun, / As yn feyr wrd of herte felun.”) Robert Mannyng, *Handlyng Synne*, ed. Idelle Sullens (Binghampton: Medieval & Renaissance Texts, 1983), 106, lines 4189-4190, 4195-4198. To take another example, two different manuscripts of the thirteenth-century poem *Bevis of Hampton* interchange words of felony and treason: “‘Saber,’ she said, ‘where is Bevis, that wicked traitor, that foul thief?’” (‘Saber,’ zhe seide, ‘whar is Bef, / þat wike treitour, þat fule þef?’) and “‘Saber,’ she said, ‘where is Bevis, that wicked lad, that felon?’” (“‘Sabere,’ she said, ‘where is Bevoun, / That wekyd lad, that ffelown?’”). Eugen Kölbing, ed., *The Romance of Sir Beues of Hamtoun* (London: N. Trübner, 1885), 21, lines 479-80, 357-58. Likewise, the story of Havelok the Dane (c. 1280), describing the villainous Godard, contains the lines, “he thought a full strong treachery, a treason, and a felony” (“He þouthe a ful strong trechery, / A trayson, and a felony”). Walter Skeat, ed., *The Lay of Havelok the Dane* (London: N. Trübner, 1868), 14. See also Minot, “The Taking of Guines,” in Rossell Hope Robbins, ed., *Historical Poems of the XIVth and XVth Centuries* (New York: Columbia University Press), 38 (“...for treson of þe franche men þat fals war and fell.”) It might be due to the blurring of the distinction between felony and treason that Parliament was called in 1352 to clarify the meaning of treason and to pronounce that riding armed with other armed men in order to attack or rob another was not treason, but instead either felony or trespass. Mark Ormrod, ed., “Edward III: Parliament of 1352, Text and Translation,” in *The Parliament Rolls of Medieval England*, ed. C. Given-Wilson et al., CD-ROM (Leicester: Scholarly Digital Editions, 2005).

⁴⁴ On the 1352 Statute of Treasons, see Edward Powell, *Kingship, Law, and Society: Criminal Justice in the Reign of Henry V* (Oxford: Clarendon, 1989), 50.

⁴⁵ Pollock and Maitland, *History of English Law*, vol. 2, 467. This definition of felony has not gone entirely by the wayside. See, e.g., Wendy Scase, *Literature and Complaint in England, 1272-1553* (Oxford: Oxford University Press, 2007), 44, n. 5 (“Defining a crime as felony meant that the judge could confiscate the defendant’s property if he was convicted.”)

⁴⁶ Pollock and Maitland, *History of English Law*, vol. 2, 466.

felony as comprising “every species of crime which occasioned at common law the forfeiture of lands and goods.”⁴⁷ Blackstone further suggested that later associations of felony with capital punishment were faulty given the fact that not all felonies were capital and not all capital crimes were felonies in the earlier common law. In a recent study, K. J. Kesselring agreed that forfeiture, which had Anglo-Saxon origins, became a key component of felony earlier than did capital punishment.⁴⁸ Jeremy Bentham, in his description of the various revolutions in meaning undergone by the word felony, argued that the death penalty, once added to the punishments for felony, was a mere accretion to the original, damning punishment of loss of land:

He lost his fief, the only source of his political importance, and with it all that was worth living for. He was thrust down among the ignoble and defenceless crowd of needy retainers, whose persons and precarious properties were subject to the arbitrary disposal of the hand that fed them. So striking and impressive a figure did such a catastrophe make in the imaginations of men, that the punishment of death, when, in course of time, it came in various instances to be superadded to the other, showed itself only in the light of an appendage.⁴⁹

Bentham’s analysis, of course, might be more revelatory of eighteenth-century attachments to property than of medieval sentiments. It is difficult to imagine a convicted felon finding death by hanging a mere “appendage” to his or her loss of property. Nevertheless, the point remains that forfeiture preceded capital punishment as a default punishment for felony.

Yet references to felony in the thirteenth and fourteenth centuries suggest that forfeiture or capital punishment might best be considered mere consequences of a felony conviction, while the word “felony” itself, even when used in legal records, often connoted something much more abstruse and intangible, something closer to the *OED*’s primary definition of the term. Even

⁴⁷ Blackstone, *Commentaries*, vol. 4, chapter 7. See also Plucknett, *Concise History of the Common Law*, 442.

⁴⁸ Kesselring, “Felony Forfeiture in England,” 203.

⁴⁹ Bentham, *Rationale of Punishment*, 369-370.

Maitland, who was inclined to emphasize the legal effects of felony, conceded that the word, at least in the thirteenth century, implied “a certain gravity in the harm done and a certain wickedness in the doer of it.”⁵⁰ Other historians have expressed doubt as to the extent to which we can safely read greater meaning into words like “feloniously.” For example, J. M. Kaye has argued: “to say that an act was done *felonice* was to allege simply that the *actus reus* was punishable by law as a felony.”⁵¹ In other words, words of felony merely signaled a category of crime, not a state of mind. Nevertheless, I am interested in exploring the extent to which felony, when used in legal records, tracked the dictionaries’ primary meanings, such as wickedness or wrath, rather than merely signifying a category of crime. Coroners’ rolls, eyre rolls, and other criminal law documents from the thirteenth and fourteenth century are replete with references to felony, typically without any explanation as to how or why a given crime was so classified. Looking at standard homicide cases, one cannot easily probe the meaning of the word felony. However, outlier cases—those involving infancy, wives under the control of husbands, insanity, and self-defense, to take several examples—sometimes include a jury’s explanation as to why certain behavior did not rise to the level of felony. One methodological approach I employ below is the analysis of these types of cases with an eye toward illuminating the assumptions undergirding jury decision-making in routine cases. By analyzing cases of not-felony, we can begin to ascertain the boundaries of felony itself.⁵²

⁵⁰ Pollock and Maitland, *History of English Law*, vol. 2, 467. See also “Felony and Its Incidents,” *Law Magazine, or Quarterly Review of Jurisprudence* 18:2 (1837), 357-358. The latter argues that “the words *felon*, *felonous*, and *felonious* are used rather with reference to the enormity of a crime in a moral point of view and as deserving some tremendous personal punishment proportioned to its villainy, than to such artificial and conventional results as the forfeiture of land and goods.” And see Baker, *Introduction to English Legal History*, 523. Baker argues that felony implied wickedness, and that the later rules differentiating crime from tort, the latter not requiring *mens rea*, reflect the common lawyers’ attempt to follow canonist teaching.

⁵¹ Kaye, “Early History of Murder and Manslaughter,” 372-373.

⁵² Admittedly, I will also include some cases resulting in conviction or outlawry.

Crafting a Definition of Felony

To compile a working definition of felony, I undertake here a broader search of the meaning of the word within literary and religious sources, in addition to considering its more formulaic use in legal records. Even within legal records, I contend that the language of felony is at times laden with greater meaning than mere legal boilerplate. Looking at references to felony and discussions of guilt and innocence alike, I consider whether canon law ideas regarding intentionality bled over into the secular criminal law sphere, or whether instead there was a disconnect between the two. I ask whether popular literature may reveal a broader understanding of the meaning of guilt and innocence, and whether such ideas influenced the outcome of criminal trials. Ultimately, I am interested in whether there was a rift between the English common law of crime, with its heavy reliance on capital punishment, and popular and ecclesiastical understandings of culpability. This raises larger questions that operate in the background: for example, what is “the law” in medieval England: the law as written in assizes and statutes, the law as discussed in year books, or the actual outcomes of jury trials? Is the very notion of jury nullification problematic in its formulation; were juries expected to exercise lenience to counteract an overly draconian law? In other words, when a jury acquits a defendant otherwise guilty according to a formalistic interpretation of the law, is it nullifying the law or announcing it?⁵³ Are sanctuary and abjuration as much a part of the law as the requirement of

⁵³ Thomas Green helpfully discusses the varied motivations behind jury nullification, e.g., because the jurors do not believe the defendant’s act is unlawful or should be considered unlawful, or in other instances because they believe the prescribed penalty is too harsh in light of the nature of the unlawful act. See, generally, Green, *Verdict According to Conscience*, xiii-xx. With regard to jurors understanding the law, Morris Arnold argues that the common law did not need to be taught in universities or told to jurors, as it already formed part of their habit: “Why teach life when all one had to do was simply to live it?” Morris S. Arnold, “Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind,” *American Journal of Legal History* 18:4 (1974), 279.

capital punishment for felons? It would take several further projects to answer these questions, but I hope the ensuing chapters will contribute to the ongoing conversation.

In the next few paragraphs, I will posit components of a multi-layered definition of felony by examining what jurors found *not* to be felonious.⁵⁴ The terse nature of felony verdicts, where the most common outcome is a bald, unexplained acquittal, marked by a capital *Q* (*quietus*) in the margin, in contrast with the occasional capital *S* for *suspensus* (hanged), justifies my circumnavigatory approach. I will argue that the paradigm of felony was a crime involving deliberation and rationality, the exercise of a person's will in the absence of countervailing necessity, and an act that was wrongful and perhaps essentially wicked. Surely not all felonies were paradigmatic, yet these categories are helpful in conceptualizing the general meaning of felony in the thirteenth- to fourteenth-century English legal context.

Deliberation, Maturity, Sanity

When felony trials ended in acquittal or a recommendation for pardon, the jurors often emphasized the accused's failure or inability to form an advance plan.⁵⁵ Such a finding might be based on a suspect's youth, the default assumption being that children could not engage in reasoned premeditation.⁵⁶ Similar reasoning lay behind some acquittals due to insanity and

⁵⁴ Perhaps this analytical approach would receive the approval of Pollock and Maitland, who observed that homicide by felony was frequently contrasted in the historical record with homicide by misadventure, self-defense, and insanity. Pollock and Maitland, *History of English Law*, vol. 2, 468.

⁵⁵ A remaining question is just what threshold of forethought would justify a felony conviction: was advance planning requisite, or might one "deliberate" in the heat of the moment to form a hasty yet felonious plan?

⁵⁶ In some instances, a homicide inflicted by a child might be labeled misadventure. See, e.g., Stewart, ed. and trans., *1263 Surrey Eyre*, 332-222, no. 703 (case of Henry son of John de Merror, age eleven, who accidentally struck his twelve-year-old friend Walter in the heart with shears while the two were wrestling together inside a house. Henry immediately fled but was told he might return due to his young age). See also William Page, ed., *Three Early Assize Rolls for the County of Northumberland, Saec. XIII* (Durham: Andrews & Co., 1891), 323 (case of Reginald son of Robert de Seles, age four-and-

accident as well. Finally, arson convictions offer some evidence of the centrality of deliberation, or at the very least deliberateness, to felony convictions. Even literary references to felony tend to emphasize the forethought involved, as in the plotting of the emperor's steward, Morgadour, to slay Guy of Warwick in the eponymous fourteenth-century romance: the author explains how Morgadour mulled over how best to kill Guy, entertaining thoughts of felony.⁵⁷ "Felony" here may refer to a category of act, but the emphasis is placed by the author on the forethought involved.

Turning to trial evidence, in a case presented at the 1249 Wiltshire Eyre, a jury found one William Skywe guilty of the death of Robert Badding. Robert had been climbing a hayrick in Seagry Meadow in the presence of several others.⁵⁸ He allegedly tumbled from the hayrick, landing on top of William. Startled by the impact (*ob hoc commotus*), William struck Robert twice on the head, killing him. One might speculate as to the variety of factors the jury might have weighed in assessing William's guilt or innocence. For example, did William bear any prior grudge against Robert that might have given him motivation to respond disproportionately? How quickly did William respond? Was it in the heat of the moment, or did he fumble around for his staff before striking Robert? Were any of the onlookers involved, and what sort of individuals were they? Did William intend to kill or seriously injure Robert? We will never know whether the jurors discussed any of these questions, or whether they considered William's reputation within his community. What we do know is that the jury, in what might strike us as

a-half years, who killed Robert son of Richard, a two year old; the justices said that Reginald should have his life and members on account of his age).

⁵⁷ Julius Zupitza, ed., *The Romance of Guy of Warwick* (London: Kegan Paul, Trench, Trübner & Co., 1883), 215. ("Than he bethoughte him, the sothe to sey, / How he might Guy best betraye. / On felonye he bethoughte thoo, / [lines missing] / That Guy shulde on message goo.")

⁵⁸ On this particular place name, identified in the roll as "Segre," see H. K. Anketell, "Collections for a History of Seagry," *The Wiltshire Archaeological and Natural History Magazine* 23:67 (1886), 71-72.

an apparent contradiction, decided that William was guilty of Robert's death (*culpa...de dicta morte*) but did not commit the homicide by felony (*per feloniam*). Rather, he did so out of simplicity (*per simplicitatem*) due to his tender age.⁵⁹ William, as it turns out, was twelve years old. He was taken into custody so that his case could be presented to the king, presumably to secure a pardon.⁶⁰

What is striking in the hayrick case is the fact that an eyre jury, drawn from the hundred, a territorial unit, where the incident occurred, could find both that twelve-year-old William was guilty of Robert's death yet not guilty of acting feloniously. The precise meaning of *culpa* here could be debated: was he guilty in the sense of merely committing the *actus reus*, like a person who accidentally kills another when felling trees, or was he guilty in a way implying some greater measure of blameworthiness, like the townsmen in the opening paragraphs of this chapter? Was *culpa* perhaps to be understood in relation to *dolus*, the latter being the more serious form of wrongdoing in the Roman legal tradition? Would the jury have found William's actions felonious had he been a teenager or adult? The case appears to have troubled others within the local community, as suggested by the fact that the local coroner, Henry of Hertham, had unlawfully accepted a sizable bribe to conceal the incident.⁶¹ Perhaps it was felt that a tragic end to a youthful romp in Seagry Meadow should not be compounded with a tragic trial of a young boy. In any event, the language of the record suggests that the jury agreed William was guilty of killing—that fact does not appear to have been in doubt—but felt that he lacked the requisite state of mind to have committed the act in a felonious manner. The reflexive nature of

⁵⁹ *Lewis and Short* defines *simplicitas* as simpleness or simplicity, and indicates that word can also evoke, in a moral sense, frankness, artlessness, or innocence.

⁶⁰ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 159.

⁶¹ He received one mark, well over the cost of a cow, for comparison purposes. See "List of Prices of Medieval Items," accessed March 10, 2012, <http://www.luminarium.org/medlit/medprice.htm>.

his striking out at Robert might have also played in his favor, but it is significant that the record specifically excuses the boy on the grounds of his simplicity or witlessness related to his age.

Insanity or feeble-mindedness, too, might negate a felony charge due to lack of deliberation.⁶² Sometimes literary sources suggest that untamed ire could lead to irrationality, as in the *Ayenbite of Inwyt*, which cautions the reader to guard against “the sin of ire and of felony that troubles the heart and makes a sane man all out of wit” (*þe zenne of ire / and of felonye / þet troubleþ þe herte / and makeþ þane man al oute of wytte*).⁶³ More often, however, legal cases refer to what we would identify today as mental illness. For example, in a 1329-1330 Northamptonshire eyre case, the jurors found that Robert fitz Adam of Clipston, who had been ill for fourteen years, killed his servant “while suffering that illness (*ea infirmitate laborans*) and in frenzy (*furore*), not by felony or malice aforethought (*non per feloniam aut maliciam excogitatam*).”⁶⁴ Medieval records like this one illustrate an understanding of mental illness as both durational (Robert had been ill for fourteen years) and episodic in intensity (he was in the thralls of his illness at the time of the homicide). Robert received a pardon by letters patent from Chancery. Like a self-defender, Robert needed a pardon despite the fact that he had not killed in felony.⁶⁵ This might represent a holdover from an earlier period in English law, when homicides

⁶² On insanity in felony cases, see generally, Butler, *Forensic Medicine in Medieval England*, 197-209.

⁶³ Dan Michel, *Ayenbite of Inwyt or Remorse of Conscience*, vol. 1, edited by Pamela Gradon (London: Oxford University Press, 1965), 150.

⁶⁴ Sutherland, ed. and trans., *Eyre of Northamptonshire*, vol. 1, 215. For a roughly contemporary example from Cambridgeshire, see Kimball, ed. ed. and trans., *Cambridgeshire Gaol Delivery*, 36-37. The case involves a mother who killed her daughter “neither through malice nor premeditated felony but by the cause of her frenetic infirmity” (“nequam per maliciam nequam per feloniam precogitatam set tanquam causa infirmitati sue frenetice”).

⁶⁵ Does this mean, perhaps, that he committed a felony, but not feloniously? A return to my earlier question...

required compensation regardless of the killer's intentionality or lack thereof.⁶⁶ It might also reflect concordance with the canon law of sin, which described less than fully intentional wrongs as venial sin, but sin nonetheless. Although Robert's violence toward his servant might be partly excused on the basis of mental illness, he might nevertheless be seen to bear some guilt in the matter.⁶⁷ Again, we might think back to the case that opened this chapter, in which the townsmen who killed a fleeing criminal were not entirely free of guilt. The early thirteenth-century legal treatise *Bracton* addresses the example of the infant and insane together, marking both off as instances in which evil intent is missing: "a crime is not committed unless the intention to injure (*voluntas nocendi*) exists...as may be said of a child or a madman, since the absence of intention (*innocentia consilii*) protects the one and the unkindness of fate (*fati* [sic] *infelicitas*) excuses the other."⁶⁸ Lacking this fully formed intent to injure, an insane killer could be seen as culpable, yet not necessarily felonious. In some instances, with or without further explanation, a mentally disturbed killer might be found to have acted feloniously.⁶⁹

⁶⁶ See, e.g., Downer, ed. and trans., *Leges Henrici Primi*, 282-83, §90.11a. This idea of paying compensation despite the lack of personal culpability appears as well in the fourteenth-century *Saxon Mirror*: "Neither shall fools nor the feeble-minded be sentenced to punishment. If they cause harm to someone, their guardian shall pay compensation." Maria Dobozy, trans., *Saxon Mirror: A Sachsenspiegel of the Fourteenth Century* (Philadelphia: University of Pennsylvania Press, 1999), book 3, 117.

⁶⁷ This remains a contested issue in modern criminal law, where theorists and the general public disagree as to the extent to which evidence of mental illness should serve as a full or partial excuse, or no excuse at all. See, e.g., Anita L. Allen, "Mental Disorders and the System of Judgmental Responsibility," *Boston University Law Review* 90:2 (2010), 621-640; Clarence E. Tygart, "Public Acceptance/Rejection of Insanity-Mental Illness Legal Defenses for Defendants in Criminal Homicide Cases," *Journal of Law and Psychiatry* 20:3 (1992), 375-390.

⁶⁸ Thorne, ed. and trans., *Bracton*, vol. 2, 384. *Consilii* might also translate to deliberation. The nexus between the insane and the infantile might also be reason, or lack thereof, as suggested by the *Bracton* author's comment that "animals which lack reason (*ratione carent*) cannot be said to commit *iniuria* or felony." *Ibid.*, 379.

⁶⁹ See, e.g., Stewart, ed. and trans., *1263 Surrey Eyre*, 259, no. 539 (Agnes la Russe, who took her own life while sick with frenzy (*habens frenesim*) in the hospital of St. Thomas the Martyr of Southwark, was found guilty of *felonia de se*, such that her chattels were forfeit).

In rare instances, one might find a killer recommended for pardon on mental illness grounds despite the fact that the homicide was described as a felony. Take the case, for example, of Philip Stateman, tried in 1315 for killing his wife. Philip opted for jury trial, pleading not guilty. The jury, in turn, stated under oath that Philip had killed Agnes, but “at the time that he committed that felony, and for a long time before and after, [he] was detained continually by frenzy and many times wished to extricate himself [i.e., commit suicide] but was stopped by his neighbors.” Moreover, he had, prior to the homicide, “committed many and diverse infamies by night and by day” and “was mad at the time of the commission of the aforesaid felony.” In light of the jury’s testimony, Philip was remitted to prison to await a pardon, his chattels having been valued at one mark.⁷⁰ Despite this pardon recommendation, the jury referred to the killing as a felony. Possibly the term *feloniam* was a scribal error, or alternatively it might have marked the event as a tragedy. Most likely it pointed to the fact that, despite his persistent mental illness, Philip bore some responsibility for his actions. The recommendation for pardon was preceded by a sympathetic description of Philip’s long-standing struggle with *furia*—frenzy, or madness—and documented his neighbors’ involvement in trying to keep Philip safe and reduce the impact of his frequent nocturnal and diurnal episodes, or *infamias*.

⁷⁰ For the MS image, see JUST3/48 AALT 0047 (1315), http://aalt.law.uh.edu/AALT7/JUST3/JUST3no48/aJUST3no48fronts/IMG_0047.htm, accessed October 22, 2012. (“Philippus Statheman captus pro morte Agnetis uxoris eius venit & profert breve domini Regis de bono et malo quesitus qualiter se velit inde acquietare defendit mortem et totum etc. Et quod in nullo est inde culpabile de bono et malo ponit se super patriam. Juratores dicunt super sacramentum suum quod predictus Philippus interfecit predictam Agnetam uxorem eius sed dicunt quod predictus Philippus tempore quo feloniam illam fecit et per magnum tempore antea et post furia continue detinebat et multociens seipsum emersisse voluit nisi per vicinos suos impeditus fuisset et ante quam feloniam illam fecit multas et diversas infamas noctanter et de die fecit ob quod venera dicunt quod predictus Phillipus tempore felonie predictae facte extitit furiosus. Ideo predictus Phillipus remittatus prisone ad expectandam gratiam domini Regis. Catalla predicti Philippi J marca unde villatio de Estwaltone respondere.”)

Yet another clue to the meaning of felony lies in the word's use in opposition to misadventure, or accident. In *Britton*, a legal treatise dating to the late thirteenth century, the coroner was instructed to commence an inquest over a suspicious death with an inquiry into whether the deceased was killed by felony or by misadventure (*par felonie ou par mesaventure*).⁷¹ *Britton* specifically described an accidental killing as having occurred without felony aforethought (*autri felonie purpensé*).⁷² This juxtaposition of felony and misadventure can be found in Normandy as well, as evidenced by the early thirteenth-century French translation of the *Très Ancien Coutumier*. The section on homicide begins with the following:

If a father kills his child by misadventure, he shall face the penance which holy church enjoins upon him; and if he kills by felony he shall go into exile out of the duke's realm...

(Si pater per infortunium suum filium occiderit, penitenciam agat ab ecclesia sumptam, et si inique eum occiderit, exul ibit a tota potestate Ducis...)

(Se li peres ocit son fil par mesaventure, face sa penitence que sainte yglise li enjondra; e, se il l'ocit par felonie, ill ira en essill hors de la poosté le duc...)⁷³

In other words, the text contrasts misadventure with felony, and applies the punishment of exile to the father who slays his son feloniously. The meaning of *felonie* here can be inferred from the fact that it is used as a direct translation for the Latin *inique*, despite the fact that Anglo Norman had words like *iniquité* that could have served as a more direct substitute. By choosing to use the word *felonie*, the translator might have been suggesting that felony imparted iniquity or

⁷¹ Nichols, ed. and trans., *Britton*, vol. 1, 10-11.

⁷² Nichols, ed. and trans., *Britton*, vol. 1, 14-15.

⁷³ Ernest Joseph Tardif, ed., *Coutumiers de Normandie*, vol. 1, part 1 (Rouen: E. Cagniard, 1881), 29-30 (one might expect "exulabit" in place of "exul ibit"); *ibid.*, vol. 1, part 2, 26-27. Emphasis added. Note that the original Latin includes the following as well: "...if he murdered his son wrongfully, he should be burned by fire" ("...si inique filium murdrierit, igne comburatur"), suggesting that "murder" might have carried a more onerous punishment than other forms of homicide. It is unclear why this phrase disappears from the translation; perhaps it was seen to muddy the clarity of the provision.

wickedness in its very nature, or substituting a term that, though not used in the original Latin *coutumier*, might have been understood already as a term of art for a particular kind of heinous crime.

Returning to England, in a 1249 case, the jurors found that Richard Hubert had done “nothing in felony” when “by misadventure” he struck Robert de la Forde in the leg with his scythe when the two were mowing together.⁷⁴ Richard was acquitted outright, his case having been aided by the fact that he had been engaged in a lawful and reasonable activity when the accident occurred. Richard’s accident transpired in the workplace, but other accidental deaths occurred during leisure activities. In a fourteenth-century Northamptonshire case, for example, the jurors of Rothwell hundred presented that William Wodereve, casting the pennystone with other men, inadvertently killed seven-year-old Walter of Deseburgh, who had suddenly crossed the line of the goals. According to the jury, William had indeed killed the child, “but not out of any will to harm him” (*set non ex voluntate gravandi eum*). The official eyre record provides some clue of courtroom procedure, noting that the jurors first provided a basic narrative of the game and its unfortunate outcome. To put it in modern legal terms, they described the *actus reus*. They were then pressed further, presumably by the justices, to indicate whether or not William had killed Walter by felony or any other malice aforethought (*si predictus Willelmus per feloniam seu maliciam aliquam precogitatam ipsum Walterum interfecit necne*). The phrasing here, while somewhat ambiguous, can be interpreted to suggest that felony was seen as a species of malice aforethought.⁷⁵ The jurors, going even beyond the parameters of the question, responded that William’s action was done not out of felony nor any other malice aforethought

⁷⁴ Meekings, ed. and trans., *Wiltshire Eyre*, 188. For a 1281 case of a death by misadventure without felonious intent, see Aileen M. Hopkinson, ed., *Rolls of the 1281 Derbyshire Eyre* (Wingerworth, Chesterfield: Derbyshire Record Society, 2000), 165.

⁷⁵ My thanks to Ben Graham for pointing out the possible significance of the *aliquam* construction.

nor of any desire or will to harm the boy (*non ex felonia seu malicia aliqua precogitata nec ex animo seu voluntate nocendi eum*), but was instead purely accidental.⁷⁶ William secured a pardon. Misadventure or accident was defined in contrast with felony, which was in turn paired by the justices and jurors alike with notions of premeditation and intent to harm.

Misadventure was also characterized by ignorance in some cases. In a late-thirteenth-century Northumberland case, for example, a narrative records how a begging woman (*mulier mendicans*) came upon Thomas de Hoburn while he was cutting cod into pieces (*frustando mulvellos*). Begging for a handout, the woman approached and, without Thomas realizing it (*ipso ignorante*) came underneath his knife. As he continued with his fish filleting, Thomas accidentally (*per infortuniam*) struck the beggarwoman fatally on the head. Although Thomas fled after the fact, it was determined that he might return; his chattels were nevertheless confiscated due to his flight.⁷⁷

The *Leges Henrici Primi*, an early twelfth-century legal collection, provides some historical context for this understanding of misadventure. According to the *Leges*, “many kinds of misfortune...occur by accident rather than by design (*scienter*) and...should be dealt with by the application of mercy.”⁷⁸ Once again, there was some notion of residual guilt: presumably one did not need mercy if one was entirely innocent. The absence of *scienter* made misadventure the legal equivalent of a venial sin and might explain William’s need to secure a pardon after killing a child while casting a pennystone, and Thomas’ permanent forfeiture of his chattels despite escaping a felony conviction after accidentally slaying a beggarwoman.

⁷⁶ Sutherland, ed., *Northamptonshire Eyre*, vol. 1, 218. For the original manuscript image, see JUST1/635 AALT 0699 (1329), http://aalt.law.uh.edu/AALT4/JUST1/JUST1no635/aJUST1no635fronts/IMG_0699.htm, accessed October 7, 2012.

⁷⁷ Page, ed., *Three Early Assize Rolls for Northumberland*, 348.

⁷⁸ Downer, ed. and trans., *Leges Henrici Primi*, 282-83 (§90.11).

Similarly, *Bracton* indicates that one “is not liable who kills by misadventure, without intention and wish to kill, and is guilty neither of *dolus* nor *culpa*”—roughly speaking neither evil intent nor negligence—borrowing such terms from the Roman law of crime.⁷⁹

By comparison, clear *culpa* or even *dolus* might be present in arson cases, which imported a notion of felony as a deliberate act. Arson was peculiarly suited to this distinction between deliberate and unintentional, as fires were frequently set unwittingly or through forgivable negligence.⁸⁰ The *Mirror of Justices* (c. 1290) defined arsonists as “those who burn a city, town, house...feloniously, in time of peace for hatred or revenge.”⁸¹ The adverbial use of feloniously, coupled with references to hatred and revenge, suggests that an arsonist was defined by his or her state of mind, rather than by the bare act of fire setting. *Bracton*’s arson definition encompassed times of riot or civil disturbance as well. The treatise prescribed capital punishment for those who committed arson “wickedly and feloniously, either through enmity or for the sake of spoil.”⁸² As in the *Mirror of Justices*, *Bracton* placed emphasis on the manner in which the act of fire setting was committed, suggesting an interest in the perpetrator’s state of mind. *Bracton* further indicated that “accidental fires or those caused negligently and without evil intent (*per negligentiam facta et non mala conscientia*)” were not similarly punished, although such incidents could be sued civilly.⁸³ In other words, while clear intentionality would be required to bring a case of fire-setting into the realm of felony, even accidental or negligent

⁷⁹ Thorne, ed. and trans., *Bracton*, vol. 2, 438.

⁸⁰ Francis Sayre has argued that proof of an intent to burn has been a required element for the felony of arson from the earliest times in England. See Sayre, “Mens Rea,” 981.

⁸¹ Horne, *Mirror of Justices*, 40. The specification of peace time is puzzling; presumably one could commit arson even in a time of war.

⁸² Thorne, ed. and trans., *Bracton*, vol. 2, 414.

⁸³ Thorne, ed. and trans., *Bracton*, vol. 2, 414.

fires could give rise to a harm that would need to be set right through recourse to legal action, much like the workings of our modern tort law.

Bracton's focus on times of civil disturbance is echoed in the plea rolls. In the 1276 London eyre, for example, several men were accused of having “maliciously demolished or burned down the houses of others within the liberty of the City against the peace.”⁸⁴ Richard de Ware, in particular, “burned a great part of Cheap the day before the battle of Lewes” and then exacerbated matters by obstructing men who tried to bring water to extinguish the fire.⁸⁵ The context of this arson case left little doubt as to the perpetrator’s intentionality, which in this instance was illuminated with the language of malice and reinforced with the narrative of Richard’s obstructive behavior. Taken together, these cases suggest that felony typically required deliberation or clear intentionality, as well as the capacity to exercise reason.

Exercise of Will and Absence of Necessity

Felony also seems to have demanded the absence of necessity and the unimpeded exercise of an individual’s volitional faculty or will, evil being a matter of choice and not innate. As the mid-thirteenth-century *Middle English Mirror* put it, “who does evil by his will, great shall be the vengeance that shall be taken against him.”⁸⁶ This helps explain the harsh treatment of *felos de se*, or suicides, as demonstrated by the 1394 case of Robert Brian, who committed felony by jumping from a ship into salt water. Because his status as a felon would have property-related ramifications, an inquisition was taken on the sea shore by a jury of mariners.

⁸⁴ Martin Weinbaum, ed. and trans., *The London Eyre of 1276* (London: London Record Society, 1976), 83.

⁸⁵ Weinbaum, ed. and trans., *London Eyre of 1276*, 84.

⁸⁶ Robert de Gretham, *The Middle English “Mirror”*: An Edition Based on Bodleian Library, MS *Holkham Misc. 40*, ed. Kathleen Marie Blumreich (Tempe: Arizona Center for Medieval and Renaissance Studies, 2002), 2 (“...who þat doþ yuel by his wille, gret schal be þe vengauce þat schal be taken of hym.”)

The jury concluded that Robert had taken the leap “of his own will”, and therefore had drowned himself feloniously.⁸⁷

While Robert was damned by his exercise of will, in some instances women might be excused of crime by virtue of their compromised willpower. Married women, subject to their husbands’ authority, were in some instances perceived to be hampered in their decision-making and therefore less than fully engaged in felony. A vernacular poem captures contemporary sentiments about the capacity of women to be swayed toward wrongdoing by the goading of men:

Women never wrought any wrong
Unless through men’s enticement.
Men beseech women so powerfully
And say in fire they might be burned,
And justify themselves so long,
To bring them to their assent...⁸⁸

This view of women, emphasizing limits to their agency, helps explain some felony acquittals, as might religious understandings of women as less rational than men by nature.⁸⁹ For example, in a Wiltshire case, Robert le Folur and Agnes his wife were found guilty of harboring a thief and known outlaw. While Robert was hanged for the deed, the jury acquitted Agnes, indicating that she “was so subjected to him that she had to obey” (*ei sic subdita quod necesse habuit parere*).⁹⁰ Similarly, Christiana Sprot, accused of a merchant’s death, was acquitted at the same eyre by a

⁸⁷ *Calendar of Inquisitions Miscellaneous (Chancery)*, vol. 6 (1392-1399), (London: Her Majesty’s Stationery Office, 1963), 31-32.

⁸⁸ “This World’s Weal Comes from Women,” in Frederick J. Furnivall, ed., *Minor Poems of the Vernon Manuscript*, vol. 1 (London: Kegan Paul, 1892), 706, lines 49-54. (“Wimmen wrouzte neuer no wrong / But þorw Monnes entysement. / Men secheþ wimmen so strong, / And sei in Bale þei mote be brent, / And ligge aboute hem so long, / To bringen hem til heore a-sent...”)

⁸⁹ Tentler illuminates how men were perceived to sin more gravely than women due to the latter’s less rational nature. Tentler, *Sin and Confession on the Eve of the Reformation*, 150.

⁹⁰ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 180. Original Latin from MS image at JUST1/996 AALT 0151 (1249), accessed October 7, 2012, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no996/bJUST1no996dorses/IMG_0151.htm.

jury that concluded, “Christiana was not consenting (*non fuit consenciens*) unless against her will (*nisi invita*) through compulsion and fear of her husband (*per compulsionem et timorem viri sui*).”⁹¹ Here, the Latin suggests that Christiana was unable to consent to the criminal action, and the scribe’s choice of word (*consenciens*) explicitly denotes the idea of being of one mind with another. Relatedly, a 1322 Year Book report suggests that a husband might be presumed to consent to his wife’s evildoing. This particular husband rebutted the presumption of consent; the inquest explained that he had moved out of the family home to avoid complicity in his wife and son’s felonious behavior.⁹² A 1238 Devon eyre case confirms this interest in a husband’s consent: when Beatrice, wife of Thomas de Seinghille, was found to have committed arson with her husband’s consent, she was waived (a female form of outlawry) rather than executed.⁹³ This inter-gender criminal dynamic was not at play when partners in crime were both women. When, in 1316, Alicia the daughter of Gervase Beneyt stole grain by night and furtively carried off 20 gallons of cider, her partner Avicia, wife of Geoffrey Martin, was treated as a fully complicit and knowing participant.⁹⁴

⁹¹ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 238. Christiana’s husband had already been hanged for the homicide. For more examples of cases in which women were treated leniently due to their subservience to their husbands, see Henry Summerson, ed., *Crown Pleas of the Devon Eyre*, 86-87 (citing specifically to JUST/1/564 m3, Just/1/1190 m10, JUST/1/614B m44d, JUST/1/872 m33d).

⁹² Y.B. Pasch. 15 Edw. 2, fol. 463a, no. 4 (1322), *Seipp’s Abridgement*, no. 1322.018. For another instance of a wife convicted without her husband, see the Bedfordshire case of Alicia wife of John Poberove. While Alicia was hanged for burning a house, her husband was described by the gaol delivery jury as *ignorante* of the crime. See the original MS image at JUST3/1_1 AALT 0007 (1301), accessed January 26, 2013, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no1_1/aJUST3no1_1fronts/IMG_0007.htm.

⁹³ Summerson, ed., *Crown Pleas of the Devon Eyre*, 85-86, no. 519.

⁹⁴ Bertha Haven Putnam, ed. and trans., *Kent Keepers of the Peace, 1316-1317* (Ashford: Headley Brothers, 1933), 12. The jurors “state on their oath that Alicia who was the daughter of Gervase Beneyt of Eyllisford stole a quarter of grain in the grange of Gregory Baker at Aylesford at night and entered the grange of Nicholas Turkot and furtively carried off twenty flasks of cider, which Avicia wife of Geoffrey Martin of Ditton received, aware of that felony and participating” (“dicunt per sacramentum suum quod Alicia que fuit filia Geruasii Beneyt de Eyllisford furata fuit vnum quarterium frumenti in grangia Gregori

The issue of will sometimes arises in other discussions of a killer's motivation, with blame only very occasionally shared with the devil. For example, in the *Placita Corone*, the justice investigating a servant's alleged murder of his master suggests that the servant was "instigated by the devil" (*repleny del deble*) when he entered the room to kill his master.⁹⁵ The hypothetical defendant then claimed that the master had drawn a sword, and that he had attacked out of fear of "*sa felonie et sa malice*".⁹⁶ Not accepting this version of the events, the "*bone genz*" of the jury concluded that the defendant, "*par atticement del diable et en assaut purpense*," had attacked his master "*come felon et treytre*", fully intending to kill him.⁹⁷ Despite the justice and jury's description of the devil's instigation, the man was found responsible for the murder and allowed to see a priest before his hanging. In some instances, the word felon may be used as a direct reference to the devil. One Middle English poem, for example, exhorts God to "shield us from the fiendish felon" (*schilde [sic] vs fram þe fend feloun*) and, in the familiar words of the Lord's Prayer, "*libera nos a malo*."⁹⁸ The legal case referenced above suggests that "the devil made me do it," while perhaps recognizable as an extenuating circumstance, was nevertheless an unwise defense tactic.

The importance of volition or will in determining guilt or innocence marks an important theme in contemporary religious literature.⁹⁹ In the *Ayenbite of Inwyt*, a Middle English

Bakere apud Eyllisford de nocte et intravit in grangia Nicholai Turkot et furtive asportavit xx lagenas siseree, quam Auicia vxor Galfridi Martini [de] Dittone recettavit, sciens feloniam illam et participans.")

⁹⁵ Kaye, ed. *Placita Corone*, 31.

⁹⁶ Kaye, ed. *Placita Corone*, 31.

⁹⁷ Kaye, ed. *Placita Corone*, 31.

⁹⁸ Pfander, *Popular Sermon*, 43 (quoting the "Seven Petitions of the Pater Noster," from a MS in which the first part of the poem appears in a thirteenth-century hand, while the remainder exhibits fourteenth-century characteristics).

⁹⁹ The question of free will can be traced in Christian theory back at least as far as Augustine, who based his conclusion that "each evil man is the cause of his own evildoing" on the observation that it would be unjust for God to punish evil deeds if they had not been committed willfully. Augustine, *On*

translation undertaken c. 1340 of a French text composed c. 1279, the author digresses on the topic while discussing the Tenth Commandment, i.e., that one shall not desire a neighbor's possessions. According to the text, "if there is any evil arising without will and without consenting to harm others it is not sin. [But] if there is sin, it is light sin."¹⁰⁰ A similar distinction between willed and unwilled harm might be found in the discussion of the Fifth Commandment, one shall not kill.¹⁰¹ One might be deemed a manslayer simply by virtue of fostering hatred against another given the forbidden nature of hate, wrath, and ire.¹⁰² In fact, the

Free Choice of the Will, trans. Anna S. Benjamin and L. H. Hackstaff (Indianapolis: Bobbs-Merrill, 1964), 3. Augustine reconciled God's foreknowledge with man's culpability, arguing that "God's foreknowledge of future events does not compel them to take place." *Ibid.*, 95. Thomas Bradwardine, a fourteenth-century theologian perhaps better known for his contributions to mathematics and physics than theology, argued that God participates in man's every action, although God is not responsible for the evil intention behind an evil action. Heiko Augustinus Oberman, *Forerunners of the Reformation: The Shape of Late Medieval Thought* (Philadelphia: Fortress Press, 1981), 134. Bradwardine's contemporary, Robert Holcot, raised such questions as whether it was possible for man to sin, whether God could be the cause of sin, and whether perjury is a graver sin than homicide, during his famed quodlibetal debates at Oxford. Richard E. Gillespie, "Robert Holcot's 'Quodlibeta'," *Traditio* 27 (1971), 488. Free will was a hot topic among Oxford theologians in the fourteenth century, and even influenced popular literature. For example, Thomas Usk, in his *Testament of Love*, devoted great space to a discussion of the complexities of free will, ultimately acknowledging that "prescience of God and fre arbytrement withouten any repugnaunce acorden". Thomas Usk, *The Testament of Love*, ed. R. Allen Shoaf (Kalamazoo: Medieval Institute Publications, 1998), 265-266, lines 551-552. Even within the more entertaining literary works of Robert Mannyng of Brunne, one finds discussion of the idea that God has foreknowledge of all events to come, which necessarily leads to the question of whether an individual ever truly has freedom of action. "Of all that is He (i.e. God) knows the ending" ("Of al þat ys he [i.e. God] woot þe endyng"), says Mannyng at one point. Mannyng, *Handlyng Synne*, ed. Sullens, 17, line 582. In another instance, he suggests that an individual may sin "through temptation of the fiend that is a felon" ("þurgh temtacyun / Of þe fende þat ys a felun"), thereby placing some causal blame on the devil. *Ibid.*, 13, lines 411-412.

¹⁰⁰ Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 11. ("...yef þer is / eni kuead arizinge / wyþ-oute wylle / and wyþoute grantinge / to harmi oþren : hit ne is no zenne. And yef þer is zenne : hit is lizt zenne.") Yet another example of residual guilt, suggesting a somewhat obsessive concern with not writing off any sin or crime as entirely excused or justified.

¹⁰¹ Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 9 "Wrath or contempt that goes lightly without great will or willing to harm others, that is not deadly sin." ("...wreþe / oþer onworþnesse / þet geþ liztliche / wyþoute grete wille / an willinge / uor to harmi oþren : ne is nazt dyadlich zenne.")

¹⁰² Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 8 ("hate / and of wreþe / and of grat ire").

Ayenbite, drawing on John's Gospel, describes a person who hates his brother as a manslayer with regard to his will and as one who sins in a deadly manner.¹⁰³

Repeated acts of volition gave rise to the danger of bad habit, a state in which an actor might find himself or herself ultimately not exercising their volitional capacity any longer once a habit had taken root. In fact, Richard Rolle viewed sin as a habit formed through the poor exercise of one's reason: "All sins shall you hate through casting of skill (i.e. the use of reason and volitional capacity), and yearn to go through the gate that is without evil."¹⁰⁴ Robert Mannyng, in his 1303 poem *Handlyng Synne*, also emphasizes the importance of habits:

If a man curse as in a game,
And in his heart wills himself no shame,
He sinneth not then deadly,
For it is said all in ribaldry.
This sin is not damnable
Unless it be said customarily.¹⁰⁵

In Mannyng's view the occasional curse, done "in ribaldry" during a game, did not rise to the level of deadly sin. This no longer held, however, in cases where such curses were said customarily. Force of habit could transform an otherwise venial sin into a deadly one. Referencing temptation to lechery, Mannyng reassured those tempted by the occasional unsolicited thought, but warned those who made a custom of entertaining such dreams:

If any does it once through chance,
Then this therefore [merits] but light penance;
If it be done through custom,
Then falleth therefore harder judgment.¹⁰⁶

¹⁰³ Michel, *Ayenbite of Inwyrt*, vol. 1, ed. Gradon, 8 ("þe ilke / þet hateþ his broþer he is mansla3þe / ase to his wylle and zenezep dyadlich").

¹⁰⁴ Ralph Hanna, ed., *Richard Rolle: Uncollected Prose and Verse with Related Northern Texts* (Oxford: Oxford University Press, 2007), 23 ("All synnes sal þow hate thorow castyng of skylle/And 3herne to gang in þe gate þat es withowten ille.") *Gate* might also denote path.

¹⁰⁵ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 129, lines 3761-3766. ("3yf a man curse as yn game, / and yn hys herte wyl him no shame, / he ne synneþ nat þan dedly, / For hyt ys seyð al yn rybaudy. / Þys synne ys nat dampnable / But hyt be seyð custummable.")

Thus, the occasional lighthearted curse or lecherous thought elicited no great concern. However, a person who failed, through the exercise of reason, to shun future minor transgressions was at grave risk of developing habits that might lead to eternal damnation.

Reason could only take a person so far, however. In some cases, dire necessity placed too strong a hold on an individual's will. This was the case with the married women discussed above, yet necessity might negate felony even outside the marital relationship.¹⁰⁷ In a 1249 Wiltshire case, William Plance, the son of Robert of Bodenham, carried off two tunics and two cloaks from his father's home and pawned them in Jewry, an area of London populated by Jews until the 1290 expulsion.¹⁰⁸ Sued by his father, William admitted pawning the clothing but denied the larceny, arguing that he had not carried away the items "by stealth (*furtive*) but compelled by necessity (*necessitate compulse*)" insofar as his father would neither support him nor allow him to enter another's service.¹⁰⁹ On this basis, William contended that he "did no felony" in taking the tunics and cloaks. The jurors agreed, arguing that William had been "driven by necessity and great want (*necessitate et magna penuria*)" and had pawned the clothes "by simplicity and not by felony (*per simplicitatem et non per feloniam*)."¹¹⁰ The same term,

¹⁰⁶ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 242, lines 7601-7604. ("Ȝyf any do hyt ones þurgh chaunce, / Þan ys þerfore but lyȝt penaunce; / Ȝyf hyt be donē þurgh custome, / Þan falleþ þarfore harder dome".)

¹⁰⁷ For a discussion of the contrast between felony and necessity as presented in *Britton* and *Fleta*, see Green, *Verdict According to Conscience*, 77, n. 34.

¹⁰⁸ Robert's place name appears as "Bote'ham," and my suspicion is that this is a reference to the village of Bodenham.

¹⁰⁹ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 184. MS image at JUST1/996 AALT 0064 (1249), accessed October 15, 2012, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no996/aJUST1no996fronts/IMG_0064.htm. Another entry from the same eyre similarly specifies theft by stealth. See *ibid.*, 218.

¹¹⁰ Jurors and judges might have been reluctant to punish a theft too harshly in the presence of mitigating circumstances. See, e.g., Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 256

simplicitas, is used here as in the case of the twelve-year-old killer in the hayrick case above, perhaps suggesting that William did not fully appreciate the potential consequences of his actions. William was acquitted. Robert, a “most wicked father,” was taken into custody for this suit aimed at hanging his son.¹¹¹

By far the most frequently discussed example of necessity was self-defense. *Bracton* explicitly linked the two categories: in considering whether an outlawed individual should be accepted back into the peace, one had to consider whether the person had possibly acted out of “necessity, as where one has killed a man in self-defense.”¹¹² As early as the *Leges Henrici Primi*, legal texts described slaying in self-defense as an act committed “under compulsion” and in response to an attack.¹¹³ Self-defense, unlike felonious homicide, was not premeditated or undertaken with scant regard for human life. In one of the treatise’s more poetic passages, *Bracton* characterized self-defense as an unavoidable necessity committed “without premeditated hatred (*sine odii meditatione*) but with sorrow of heart (*dolore animi*).”¹¹⁴ This idea of “sorrow of heart” appears in contemporary literature, where it connotes the appropriate demeanor for one seeking penance. In the fourteenth-century *Ayenbite of Inwyte*, for example, the author treated the River Jordan as a metaphor for judgment and penance (*ssrifte*), encouraging the examination of one’s conscience with sorrow of heart:

(amercing the coroners and bailiffs who compelled a woman named Helen to abjure the realm for “so small a crime,” namely, the theft of a rochet or overgarment).

¹¹¹ It is difficult to make out the abbreviated Latin, but I believe Robert is called “*pessimus pater*,” or the worst sort of father.

¹¹² Thorne, ed. and trans., *Bracton*, vol. 2, 372.

¹¹³ Downer, ed. and trans., *Leges Henrici Primi*, 266-267, §87.6.

¹¹⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 340-41. The phrase *dolore animi* might also be translated as pain or sorrow of the soul or intellect. The centrality of the heart or soul to individual identity has deep roots in the Western world; Carolingians, according to Abigail Firey, frequently referred to the individual using one of these two terms. Abigail Firey, *The Contrite Heart: Prosecution and Redemption in the Carolingian Empire* (Leiden: Brill, 2009), 4.

The River Jordan is just the same as the stream of judgment and signifies confession, where man shall judge himself with great sorrow of heart and with great repentance, so that a stream of eager tears is the conduit of the eyes.¹¹⁵

Such sorrow was also called for in meditating upon Jesus' passion: "Now behold him with sorrow of heart," wrote Nicholas Love in his *Mirror of the Blessed Life of Jesus Christ*, "namely, when they smite him grievously and repeatedly upon the head, full of sharp thorns, the which pierced grievously into the brain pan, and made it all full of blood..."¹¹⁶ Sorrow of heart encapsulated the contrite sinner's demeanor in contemplating his or her past sins and seeking absolution.¹¹⁷ The self-defender, with bloodied hands, might appropriately feel sorrow of heart despite the extenuating circumstances that compelled his or her homicidal act. Speaking less metaphorically about penance, Robert Mannyng in *Handlyng Synne* described the appropriate comportment for a penitent:

If thou will have the sacrament,
It behooves thee to give well better intent,
And record every deed
With sorrow of heart, and with dread,
And forthink, with much moan,
That thou may not think of each one;
And if thou shrive thyself entirely
Of those, that thee meaneth well,
That thou withhold not for any shame
To tell openly thy blame:

¹¹⁵ Michel, *Ayebite of Inwyt*, vol. 1, ed. Gradon, 202. ("þe flum iordan þet is ase moche worþ : ase stream of dom and be-tokneþ ssrifte. Huer man ssel him-zelue deme mid greate zorze of herte / and mid greate repentonce / zue þet o stream of tyeares : yerne be þe conduit of þe ezen.")

¹¹⁶ Nicholas Love, *Mirror of the Blessed Life of Jesus Christ*, ed. Michael G. Sargent (Exeter: University of Exeter Press, 2004), 169. ("Now behold him with sorowe of herte, namely when þei smitene him greuously & oft siþes vpon þe hede, ful of sharpe þornes, þe wech persede greuously in to þe brayne panne...")

¹¹⁷ This connection between sorrow and contrition would be retained by the Council of Trent (1551), which declared that contrition "is a sorrow of mind, and a detestation for sin committed, with the purpose of not sinning for the future..." See Frank Allen Patterson, *The Middle English Penitential Lyric: A Study and Collection of Early English Verse* (New York: Columbia University Press 1911), 7 (citing, in translation, this portion of the council's rulings).

Such a man that thus is shriven,
May be absolved, and penance given.¹¹⁸

By Mannyng's account, the penitent sinner had to approach confession only after serious, thoughtful preparation, having recorded each sin to the greatest extent possible after a thorough search of the memory. In a Middle English translation of the Rule of St. Benedict, dating to the early fifteenth century, felony continued to be situated in the heart and provided an apt translation for the Latin *dolus*:

Hold no felony in thy heart; nor give no false peace. Charity fail
thou not; evil for evil shall thou not do, nor wrong to any man,
until God's vengeance descends.¹¹⁹

Thus, we might contrast felony, or *dolus* of heart, with the sorrow of heart experienced by *Bracton*'s self-defender. *Bracton*'s reference to "sorrow of heart" suggested that the self-defender needed to perform penance, although the act of killing in self-defense was nevertheless pardonable and nonfelonious due to the necessity involved. Again, we find a notion of residual guilt at play, gesturing toward a lost worldview in which even excusable or pardonable actors could bear some measure of culpability, yet not to the extreme of strict liability. Another factor at play might have been the disruptive nature of violence within a community; even when the violence was justifiable or excusable in whole or in part, the king's pardon was instrumental in restoring harmony.¹²⁰ This was, after all, still a world of deodands, where even inanimate

¹¹⁸ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 336, lines 10835-10846. ("Ȝyf þou wylt haue þe sacrament, / Þe behouþ ȝyue weyl bettyr entent, / And recordē euery dede / with sorow of herte, and with drede, / And forþynke, with mochē mone, / Þat þou ne mayst þenk on echone; / And ȝyf þou shryue þe euery deyl / Of þo, þat þe menep weyl, / Þat þou ne lettē for no shame / To tellē opunly þy blame: / Swyche a man þat þus ys shryue, / May be asoyled, and penaunce ȝyue.")

¹¹⁹ Ernst A. Kock, ed., *Three Middle-English Versions of the Rule of St. Benet* (London: K. Paul Trench, Trübner & Co., 1902), 8 ("Halde na feluni in þi harte [a translation of the Latin *dolum in corde non tenere*]; Ne giue na fals pes; Charite felle þu noht; Iuil for iuil sal tu noht do, Ne wrang to na man; Til god uengance fallis it.") For the Latin rule, see "Regula S.P.N. Benedicti," accessed January 24, 2013, <http://www.thelatinlibrary.com/benedict.html>.

¹²⁰ My thanks to Martha Umphrey for suggesting this possibility.

objects were tainted by wickedness, in the medieval sense of tainted by sin, by virtue of their instrumentality in a human death.¹²¹

The plea rolls are replete with cases of self-defense. To take one example, in the 1321 London eyre, the jurors of Bishopsgate ward described under oath how a man named John had taken his horses outside Bishopsgate to Houndsditch. Driving his horses into the water, John inadvertently disturbed a bar Richard had placed there for drawing his hides out of the water. Seeing this, Richard attacked John with an iron staff, dragged him from his cart, threw him on the ground, and continued to strike him repeatedly. According to the jurors, John struck Richard “in self defense” (*se defendendo*), all the time “thinking that he was in imminent danger of death” (*perpendens mortis periculum sibi iminere*).¹²² The defendant’s state of mind at the time of the killing entered directly into the narrative presented by the trial jury. Another manuscript describing the same case indicates that John had acted against his will, perhaps akin to the married woman compelled by her husband: John “was forced to kill him in self defense” (*vi depulsus defendendo hominem occidet*) and did so “without malice aforethought” (*sine malicia precogitata*).¹²³ According to the first manuscript, the jury further elaborated, arguing “definitively” that John “did not slay Richard feloniously or by malice aforethought, but in self-

¹²¹ Deodands were inanimate objects or non-human animals that were forfeit (or at least their value was forfeit) to the crown if they were determined to be the cause of a person’s death. For an introduction to the concept and its development over time, see Anna Pervukhin, “Deodands: A Study in the Creation of the Common Law Rules,” *American Journal of Legal History* 47:3 (2005), 237-256. Butler argues that forfeiture of the value of deodands was intended to punish the owner of the subject property, observing that the common law did not allow one to indict a person for homicide when his or her property, whether animate (e.g., a sow) or inanimate (e.g., a cart) was instrumental in a person’s death. Butler, *Forensic Medicine in Medieval England*, 110.

¹²² Cam, ed. and trans., *Eyre of London*, vol. 1, 81.

¹²³ Cam, ed. and trans., *Eyre of London*, vol. 1, 80.

defense, to avert his own death.”¹²⁴ Further indicative of his innocence, John had not gone into hiding. Ultimately, he was returned to gaol to apply for the king’s pardon.

John’s case and the others outlined above demonstrate felony’s reliance upon an individual’s ability to exercise his or her volitional capacity unimpeded by any countervailing necessity or overwhelming duress. In some instances, a homicide might be deemed non-felonious even under circumstances less dire than true duress or self-defense. For example, in a 1238 Devon eyre case, Gilbert le Brun and his companions were acquitted outright for the homicide of Ralph le Bret. It was clear that Gilbert had killed Ralph, shooting him with an arrow, but the homicide occurred in the context of a pursuit after Ralph broke out of prison. The eyre jury concluded that Gilbert and the others were not guilty “because they did not come intending to kill Ralph (*animo interficiendi*), but only to arrest him, as he had broken out of Lydford gaol”.¹²⁵ The imprisoned man’s escape attempt transformed what might otherwise be a felonious killing into an acquittable offense.

Wrongful and Essentially Wicked

In addition to deliberation and the free exercise of an individual’s will, felony often implied some measure of moral blameworthiness, often couched in terms of malice or wickedness.¹²⁶ In literary terms, this connotation of felony made it ideal for the characterization of biblical villains. In the *Cursor Mundi* (c. 1300), an ambitious Middle-English history of the

¹²⁴ Cam, ed. and trans., *Eyre of London*, vol. 1, 81.

¹²⁵ Summerson, ed., *Crown Pleas of the Devon Eyre*, 79, no. 474.

¹²⁶ For additional cases involving allegations of malice or wickedness, see the allegation against John Pricke (accused of fatally attacking Thomas de Barentone *ex malicia precogitata*), JUST2/18 AALT 0134 (1346), accessed October 22, 2012, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no18/aJUST2no18fronts/IMG_0134.htm; and against Thomas de Stalays (for killing Robert Palfreyman *pro malicia precogitata*), JUST2/18 AALT 0148 (1350/1), accessed October 22, 2012, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no18/aJUST2no18fronts/IMG_0148.htm.

world, the author applied the term *felun* to Old Testament actors such as Adam, Cain, Ham, and the Egyptian pharaoh, and to New Testament villains such as Herod and Judas. The author also, with alarming frequency, used felony as a blanket term to signify Jews, a “*felun folk*”.¹²⁷ When used as an epithet for villains, felony might be contrasted with love or charity, as described in Robert Mannyng’s *Handlyng Synne* (1303):

Charity has no envy,
And charity wills no felony;
Charity is not wrathful,
And charity is not covetous.¹²⁸

A charitable person personified the opposite of the quintessential biblical felon, who was characterized by wickedness. In the visual arts, one might find felony personified by an act of violence, sometimes placed in contrast with a corresponding virtue, such as a striking image in the Fitzwilliam Museum MS 192, a Parisian copy of *La Somme le Roi* (c. 1290), contrasting *equité* with *felonnie*.¹²⁹ Contemporary legal cases, too, paired notions of felony with

¹²⁷ See Morris, ed., *Cursor Mundi*, part 1, in which words of felony can be found in the stories of Adam (*bat felun*, 52, line 773), Cain (*felunny*, 72, line 1132 and 74, line 1137; *felon dede*, 74, line 1160; *feluns*, 100, line 1621); Ham (*fole felun*, 126, line 2069), Shem (*felunny*, 134, line 2220), Abraham (*felun folk*, 144, line 2381), Sodom (*foles feluns*, 166, line 2777; *for þair felunne be slaine*, 170, line 2834), Jacob and sons (*feloni*, which is associated with *trecheri*, 258, line 4391). See also *ibid.*, part 2, in which words of felony continue in the stories of Moses (*felun*, 324, line 5591 and 394, line 6820), David and Goliath (*felun*, applied to the Philistines, 430, line 7440), David (describing laying hands on someone *in felony* and seizing a person *vilani*, 452, line 7831), Solomon (*Feluns in entent*, 520, line 9031), the King and his Four Daughters (*felun*, 550, line 9555), the Conception of Mary (*felunni*, 590, line 10258), the Three Kings (describing Herod as *fals felun*, 658, line 11481; *felunlik*, 680, line 11878; *felun*, 682, line 11896), and the Ministry and Death of Jesus (*ful of feloni*, 686, line 11977; *wreche sede o felunny*, 690, line 12022; *felun*, 690, line 12035; *felunsli him broght o lijf*, 704, line 12286). New Testament references to felony continue in part 3 of the series as well. Morris, ed., *Cursor Mundi*, part 3. See, e.g., the stories of the Tempting of Satan (*felun*, 760, line 12982), Christ’s Ministry (*Iues þat war felun*, 760, line 13244; *felun Iues*, 779, line 13576; *felunli*, 782, line 13631; additional references to *felun* on 792, 826, 836, 842).

¹²⁸ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 229, lines 7149-7152. (“Charyte haþ noun enuye, / And charyte wyl no felunnye; / Charyte ys nat Irus, / And charyte ys nat coueytous”).

¹²⁹ For a copy of the image, see Tuve, *Allegorical Imagery*, 95, fig. 18. It depicts *felonnie* in the guise of Cain slaying Abel, paired with an image of Moses defending himself from attackers. For a color image, see “Leaves from Frère Laurent, *La Somme le Roi* (France, Paris, c. 1290)”, accessed June 18, 2015, <http://www.fitzmuseum.cam.ac.uk/gallery/cambridgeilluminations/themes/5.html>.

wickedness, ire, or wrath. In a 1218 Staffordshire case, Alice, the widow of Adam the Clerk, sued William de Grisele for her dower.¹³⁰ William, in turn, argued that Alice's husband had been hanged for his wickedness (*nequitia sua*), and for robbery and other felonies. This would have resulted in the loss of his lands, thus giving rise to Alice's dower predicament. Alice denied this, saying that Adam had been hanged wrongfully, without a proper judgment and at the will of the sheriff, who had been fined thirty marks for his transgression. The case remained unresolved, as the sheriff was ordered to transmit the record of the court regarding Adam's hanging to aid in the adjudication. Regardless of the outcome, the significance for the purpose of this analysis is the notion that Adam had been hanged for his wickedness, which was used as a proxy for a felony conviction.

Malice, too, might be used as a way of signifying felonious guilt, particularly when it was paired with a detailed description of a gruesome and heartless crime. The Bedfordshire coroners' rolls, for example, relay a 1271 felony appeal narrative in which a man named John of Brytviles was savagely attacked while walking on the king's highway with Emma, his wife. According to Emma's accusation, Simon son of Roger of Cainhoe approached the two, striking John on the crown of his head and his ear with an iron and steel sword, dislodging thirteen pieces of bone. Simon also maimed two of John's fingers and, what is more, "[h]is malice did not stop there," as he proceeded to beat John further with the flat of his sword, causing him to lose hearing in his right ear. Remarkably, John survived the attack to mount his own private appeal against Simon, who was eventually convicted by a jury.¹³¹

¹³⁰ "Staffordshire Pleas Temp. Hen. III," in *Collections for a History of Staffordshire*, vol. 6, part 1, 30.

¹³¹ Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 18-19, no. 42.

In a 1321 London case, Henry of Braundeston was accused of the homicide of Robert of Brome. Henry was indicted and eventually outlawed due to the jury's suspicion of his guilt. The jurors, drawn from seven wards due to the notorious nature of his case,¹³² reported that Henry, in striking his victim, had been "moved by the anger (*iram*) he cherished against him," thereby drawing attention to the long-standing enmity between the two men and Henry's resultant motive. From the jury's perspective, further indicative of Henry's malice and deliberate state of mind was the fact that he struck Robert on the face and head with his fist "again and again." Robert managed to break free and flee, only to be pursued by Henry who, having drawn his knife, "pursued him without a break, meaning to kill him."¹³³ The jury's version of the events placed heavy emphasis on Henry's intentionality and persistence, both in striking Robert repeatedly and in chasing him with homicidal intent. While one might query whether Henry had acted in the heat of the moment, infuriated with Robert, the jury's description of Henry's "cherished" anger suggests a longer-term failure to temper his condemnable emotions.

Self-defense cases, although discussed above under the topic of necessity, often present an image of felony as a form of wickedness. In many of these cases, *mens rea* appears to be a required element, but more so in terms of the deceased's state of mind rather than the defendant's. Frequently the jury portrays the defendant as innocent, producing a narrative in which the deceased individual, as the initial aggressor, was the actual felon. One defense put forward by the typical defendant is the idea that the deceased individual bore ill will toward the defendant and fully intended to kill him. Even the generic self defense template offered by the *Placita Corone*, a thirteenth-century manual of criminal trial procedure, suggests this: when

¹³² The case implicated the mayor of London, who admitted Henry into the freedom of the city after the commission of the felony, presumably so that Henry could be released on mainprise while awaiting trial. See Cam, ed. and trans., *Eyre of London*, vol. 1, 95.

¹³³ Cam, ed. and trans., *Eyre of London*, vol. 1, 94-95.

asked by the justice, “what was the name of the man whom you killed in premeditated attack (*en assaut purpense*), feloniously as a felon (*felonnesment com felon*)?”, the fictional defendant denied having undertaken a premeditated attack and instead asserted that the deceased “feloniously as a felon and in premeditated attack tried to kill” him, and this “solely on account of his own malice” (*pur sa iniquite demeyne*).¹³⁴ The hypothetical defendant elaborated on the deceased’s character as well, describing him as “an unprincipled man (*un wischous homme*), full of fraud and subtle tricks, untrustworthy and of ill fame” (*ne...de bon renom ne de bone fame*).¹³⁵ The *Placita Corone* example presented the self-defense case as a trial of the deceased’s intent and character more so than a trial of the actual defendant, suggesting that the underlying principle was that a true self-defender had undertaken a legitimate execution of an unsavory, law-flaunting, felonious individual.

Actual trial records bear this out. In 1236-1237 in Staffordshire, for example, an inquest was made to respond to a writ *de odio et atia*¹³⁶ and determine whether Ralph le Foun had killed Robert son of Matilda feloniously or in self-defense. The inquest concluded that Ralph’s actions amounted to self-defense. Robert had a reputation for poaching animals in the Earl of Ferrars’ forest, over which Ralph resided as forester. When Ralph, on official duty, came upon Robert one day with an animal he and his accomplices had killed, Robert assaulted and wounded him. The inquest described Ralph’s action in killing Robert as self-defense. Moreover, the inquest further testified that Robert was a “public malefactor” (*puppublicus malefactor*), and that Ralph had

¹³⁴ Kaye, ed. and trans., *Placita Corone*, 19.

¹³⁵ Kaye, ed. and trans., *Placita Corone*, 19.

¹³⁶ A writ charging the sheriff to inquire into an accusation to determine whether the defendant had been accused rightfully, or instead out of hatred and ill will.

no alternative short of homicide to evade Robert's attack. Ralph was pardoned for both the death and for fleeing.¹³⁷

In another case, from 1310, in which Robert son of John was accused of slaying William son of Henry Bishop, the jurors used strong adverbs to paint William's aggression against Robert and his father, John, in the most negative light. The incident began with an argument over a dike that John had raised, an argument that quickly escalated into physical violence. The jurors described, for example, how William assaulted John and hit him gravely with a spade (*insultum fecit et eum graviter cum quadam vanga percussit*), and how William then speedily (*celeriter*) approached Robert, whom he assaulted ferociously (*ferociter insultavit*) and gravely struck with the same spade on the right side of his head (*cum predictam vanga ex dextra parte capitis graviter percussit*).¹³⁸ These hyperbolic adverbs left little doubt in the narrative that culpability resided with the deceased rather than with Robert, a clear self-defender.

In a nearly contemporary Bedfordshire gaol delivery case, dating to 1313, William Mose of Woodhill stood accused of the felonious killing of William Bass of Podington.¹³⁹ In the jury's narrative of the events, the deceased, Bass, bore culpability for acting against Mose with malice aforethought, while Mose, the self-defender, was taken unawares by Bass' aggression. While Mose slept in his home one night, Bass entered his yard and hid with malice aforethought (*latitando per malitiam excogitatum*), all the while planning to kill Bass. Ignorant of the plot and of the murderous man lurking in his yard, Bass arose at dawn (*in aurora diei surexisset*) and stepped outside his home thinking no evil (*nulli malum cogitans*). In the meantime, Bass

¹³⁷ "Staffordshire Pleas Temp. Hen. III," in *Collections for a History of Staffordshire*, vol. 6, part 1, 35.

¹³⁸ For the original MS image, see JUST3/1_1 AALT 0015 (1310), accessed June 15, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no1_1/aJUST3no1_1fronts/IMG_0015.htm.

¹³⁹ The first place name appears in the roll as "Wodhulle," and may be a reference to Woodhill, known today as Odell.

feloniously jumped out at Mose with malice aforethought and assaulted him with a staff, intending to kill him (*malicia precogitata in ipsum Willelmum Mose felonice prosiliit et cum quadam baculo ipsum insultavit ad ipsum interficiendum*). Furthermore, when Mose tried to flee, Bass pursued him feloniously and vigorously (*felonice et viriliter*) and with felony aforethought (*feloniam precogitatem*). In case Bass' intention remained unclear, the jury specified that he wished to kill Mose (*interfecisse voluit*). Mose, having no alternative but to defend himself, raised the hue and cry and ultimately struck Bass with a knife, inflicting a fatal wound. Where the jurors repeatedly ascribed to Bass felonious and malicious thoughts, they concluded that Mose did not kill Bass by any felony or malice aforethought (*per aliquam feloniam aut maliciam excogitatem*) but only in self-defense, and that he could not have evaded his own death in any other way (*nullo alio modo mortem suam propriam potuit evasisse*).¹⁴⁰ Mose was recommended for a pardon.

In this light, self-defense took on the glow of a regrettable but nevertheless justifiable execution, similar to the case of the fleeing outlaw decapitated by his pursuers after turning on them with a knife. This view of self-defense had deep and far-reaching roots, as one can find parallel ideas outlined explicitly in the fourteenth-century *Saxon Mirror*, or *Sachsenspiegel*. The *Sachsenspiegel* offered legal procedures to self-defenders to help them avoid the death penalty. A self-defender could shield himself from death by admitting his deed swiftly before anyone had an opportunity to bring a formal accusation against him. According to the text, if a man killed another in self-defense he might, if he feared vengeance, leave the deceased's body and appear before the court to admit the deed. If he did this before anyone brought a charge, he could not thereafter be condemned to death, although he owed a fine to the court and wergeld to the

¹⁴⁰ For the MS image, see JUST3/1_1 AALT 0025 (1313), accessed June 15, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no1_1/aJUST3no1_1fronts/IMG_0025.htm.

deceased's family. Intriguingly, if someone brought the deceased's body to court to lodge a formal complaint against the alleged self-defender, the killer had to "prove his case against the dead man or answer for his own deed with his life."¹⁴¹ The trial would come down to a contest between the alleged self-defender and the deceased, and the former could secure his own life by inculcating the latter. The deceased essentially stood trial, in absentia, for his own death.

This interpretation gains further support from a second provision of the *Sachsenspiegel*, this one dealing with property forfeiture. According to the text, a man who killed his lord would forfeit "life, reputation, and the property he received from him." A lord would experience a comparable forfeiture if he killed the man instead. The next provision makes it clear that the *Sachsenspiegel* envisioned lawsuits brought against the deceased individual in cases of self-defense. According to the text, "if a man kills his father, his brother, his kinsman, or someone belonging to the allod or fief for which he is awaiting, he voids his grant in expectancy *unless he committed the deed in self-defense, and the deceased is convicted for it*, or if the perpetrator acted without knowing, so that it happened unintentionally."¹⁴² A victim of self-defense homicide might find himself convicted for his own death.

Returning to English evidence, in some instances, the text of a plea roll sets off the "wickedly and feloniously" formulation from the description of the underlying *actus reus* itself. Thus, in the 1276 London eyre, William Egrith appealed Robert servant of Ralph Pikeman for "wounds and battery against the peace."¹⁴³ The appeal alleged that Robert had given a staff to a third man, who actually perpetrated the assault, and that Robert "did this wickedly and feloniously." Robert had not inflicted any wounds, and the act of giving a staff to another person

¹⁴¹ Dobozy, ed. and trans., *Saxon Mirror*, book 2, 97.

¹⁴² Dobozy, ed. and trans., *Saxon Mirror*, book 3, 140 (emphasis added).

¹⁴³ Weinbaum, ed. and trans., *London Eyre of 1276*, 39, no. 140.

was in and of itself not felonious. It was only the intent in which Robert did so—wickedly and feloniously, or we might say instead, with the knowledge and even desire that the third man would use it to beat William—that placed the act within the purview of felony.¹⁴⁴

It is not uncommon to find felony paired with malice in the description of illicit acts. In the 1249 Wiltshire crown pleas, Margery Pytte appealed William Fucher for the death of her daughter, Maud, alleging that William “came wickedly and in felony and against the king’s peace and beat Maud and out of malice mistreated her,” ultimately resulting in death after six weeks of illness.¹⁴⁵ This accusation of malice was disproved by juror testimony that William had discovered Maud gleaning in the bishop of Winchester’s field without permission. Of course, one must bear in mind the formulaic nature of such claims of wickedness and felony in private appeals, which required a certain threshold of accusatory language to produce a viable plea.

To surmount this problem of boilerplate language, we can look to the Year Book reports of judges’ discussions of the merits of particular cases. In a 1322 Year Book report, for example, Chief Justice Bereford recalled an earlier case of a boy attempting to slit the throat of his master in order to rob him. The master survived, but the boy was nevertheless arraigned. Although Bereford, taking an extremely formalistic view, felt the boy should not hang due to the master’s survival, Bereford’s colleague gave judgment that he should hang because his will could stand in for the deed (*voluntas reputatur pro facto*). Justice Spigurnel shared a similar story of a

¹⁴⁴ See also the 1306 case of William de Hampton and Henry of Wollenecherchehagh, who made duplicate keys and files, respectively, that were used to perpetrate a gaol breaking. While the woman who paid for the keys and files was hanged, William and Henry were acquitted of felony since they had not acted feloniously or consented to the woman’s felony. Nevertheless, they had acted thoughtlessly (*inconsiderate*) and were therefore sentenced to a year in gaol. Ralph B. Pugh, ed., *Calendar of London Trailbaston Trials Under Commissions of 1305 and 1306* (London: Her Majesty’s Stationery Office, 1975), 122-123. For another example of this “wickedly and in felony” (“*nequiter et in felonia*”) formulation, see Stewart, ed. and trans., *1263 Surrey Eyre*, 267-268.

¹⁴⁵ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 186.

woman and her lover who were executed despite the failure of their homicide attempt against the woman's husband.¹⁴⁶ Of course, in both these instances an actual act was undertaken to further a plan of homicide. Nevertheless, the reasoning offered by Bereford's unidentified colleague was not that the boy had actually stabbed his master, but that the homicidal nature of his will could stand in for the absence of an actual completed homicide. In fact, evidence of malicious intent could sometimes overrule other exceptions to felony, such as an alleged perpetrator's minor age. In a 1338 Year Book case involving a thirteen-year-old girl who killed her mistress, Justice Spigurnel described an earlier case in which he had allowed a ten-year-old child to be hanged for killing his companion. By concealing the body, the boy demonstrated that he could distinguish good from evil. Spigurnel quoted the maxim "*malitia supplet aetatem*" (malice makes up for age) in justifying his judgment.¹⁴⁷

Further evidence in favor of reading a sense of evil or wickedness into the meaning of felony lies in a translation undertaken in the first half of the fourteenth century by Yorkshire preacher and hermit, Richard Rolle. In translating the psalms of David, Rolle repeatedly substitutes the word felony for the Latin *nequitia*, or evil. Thus, we find the following translation of Psalm 7:10 in Rolle:

Ended by the felony of the sinful; and you shall right the righteous,
searching hearts and kidneys, God.

¹⁴⁶ Y.B. Pasch. 15 Edw. 2, fol. 463a, no. 4 (1322), *Seipp's Abridgement*, no. 1322.018. The maxim is traceable to Justinian's *Institutes* and is typically applied to treason. See *Latin for Lawyers* (New York: Lawbook Exchange, 1992), 255. Both these cases (servant killing master, wife killing husband) implicated a notion of treason.

¹⁴⁷ Lib. Ass., 12 Edw. 3, fol. 37a, no. 30 (1338), *Seipp's Abridgement*, no. 1338.278. The Year Books also record a 1319 case in which a child was hanged after being found guilty by a jury of house-breaking. See Y.B. Trin. 12 Edw. 2 (1319), as found in John P. Collas, ed., *Year Books of Edward II*, vol. 25 (1319) (London: Bernard Quaritch, 1964), 123 and *Seipp's Abridgement*, no. 1319.151. In some instances, age might weigh in favor of a pardon, as is likely the case with William son of John de Burbank, not yet nine years old, who received a pardon for homicide in 1310 "on account of good service in Scotland by Henry de Greystok". See H. C. Maxwell Lyte, *Calendar of the Patent Rolls, Edward II, A.D. 1307-1313* (Nendeln: Kraus Reprint, 1971; first published 1894), 349.

(Consumetur *nequitia* peccatorum & diriges iustum, scrutans corda
& renes deus.)

(Endid be the *felony* of synful; and thou sall right the rightwis,
ransakand hertes & neris god.)¹⁴⁸

A late fourteenth-century sermon, recorded in a fifteenth-century manuscript, described the many different meanings of the word “wicked,” or *nequam*, highlighting its ability to reference sloth or laziness in work, envy or jealousy toward others, or a lack of mercy and inclination to oppress needy men.¹⁴⁹ To return to Rolle, he also employed felony as a synonym for *nequitia* in translating Psalm 27:5:

Give to them according to their works, and according to the felony
of their doings.

(Da illis secundum opera eorum & secundum *nequitiam*
adinuencionum ipsorum.)

(Gif til thaim eftere thaire werkis, and eftere the *felony* of thaire
fyndyngis.)

Rolle glossed this psalm translation with the observation that an actor’s “ill will” mattered more than the product of his or her “ill deed.” To illustrate this, he provided an example of an ill deed resulting in a good outcome: “for the Jews slayed Christ. That was the greatest sin, and the greatest good came thereof” (*for the iowes sloghe crist. That was the mast syn : and the mast goed come tharof*).¹⁵⁰ Rolle again situated felony in the mind and equated it with evil in

¹⁴⁸ Bramley, H. R., ed. *The Psalter or Psalms of David With a Translation and Exposition in English by Richard Rolle of Hampole* (Oxford: Clarendon, 1884), 26 (emphasis added). As odd as my modernization or “neris” to “kidneys” might seem, I believe that this is the sense of Rolle’s translation. By referencing these two body parts, heart and kidney, Rolle metaphorically gestured to the thoughts and emotions of men, the kidneys being perceived to be the seat of emotion or temperament. See the Middle English Dictionary and the OED.

¹⁴⁹ Woodburn O. Ross, ed., *Middle English Sermons Edited from British Museum MS. Royal 18 B. xxiii* (London: Oxford University Press, 1940), 39.

¹⁵⁰ Bramley, ed., *Psalter or Psalms of David*, 99.

translating Psalm 72:8 as: “They thought and spoke felony: wickedness on high they spoke” (*Thai thocht and thai spake felony : wickedness in heigh they spake.*)¹⁵¹ For Robert Mannyng, writing at the beginning of the fourteenth century, felony similarly signified a state of mind. Tempting thoughts planted in a sleeper’s dreams through “the fiend’s malice” (*þe fendes malyce*) chipped away at a person’s resistance to sin first through sight and then through thought, which were the two elements of dreams: “For such thing you may see with the eye,” observed Mannyng, “that it turns to thought of felony.”¹⁵² Felony, for Rolle and Mannyng alike, was situated in a sinner’s thoughts. It was also to be found in a person’s heart, which could be pure and charitable or full of wrath.

A loaded term, felony might all at once denote the presence of deliberation and forethought, the exercise of reason and will, and the absence of necessity or chance. In some instances, felony involved great movements of passion, to be discussed further in the next chapter. Moreover, even when employed in legal records, “felony” often conjured an image of moral blameworthiness, sometimes rising to the level of wickedness or depravity. In the next section of this chapter, I will test this hypothesis against cases in which the nexus between *actus reus* and *mens rea* is somehow in doubt.

The Nexus Between *Actus Reus* and *Mens Rea*

A broad reading of criminal responsibility has deep roots in England. A passage in the *Leges Henrici Primi* indicates that “not only is the perpetrator (*auctor*) of the crime himself to be punished, but anyone who by giving or receiving or defending (*dando uel recipiendo uel*

¹⁵¹ Bramley, ed., *Psalter or Psalms of David*, 258. (“Cognitauerunt & locuti sunt nequitiam : iniquitatem in excelso locuti sunt.”)

¹⁵² Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 242. (“For swyche þyng þou mayst se with ye, / Ðat hyt turneþ to þoght of felonye.”)

defendendo) or by accident (*casu*) or by providing advice (*consilio*) has knowledge of it or consents (*consciis fuerit aut... consentaneus*) to it in any respect shall be subject to the same punishment.”¹⁵³ A similar idea comes through in *Bracton*, which expands liability for homicide to accomplices in a quarrel when the actual, weapon-wielding actor cannot be identified:

Several may be guilty of homicide just as one may be, as where several have quarreled among themselves in some dispute and one of them is slain; if it does not appear by whom nor by whose blow it was done all may be called homicides, those who struck (*illi qui percusserunt*), those who with evil intent held while he was struck (*qui tenuerunt malo animo dum percussus fuit*), and those who came with the intention of slaying though they struck no blow (*illi qui voluntate occidendi venerunt licet non percusserunt*).¹⁵⁴

Most remarkable is the final phrase, condemning individuals who possessed the intent to kill (*voluntate occidendi*), even if they did not physically participate in the act of homicide. *Bracton* focuses on intentionality, condemning those who held a person down with evil intent or who came to the scene with the intent of slaying.¹⁵⁵ The text emphasizes *mens rea* more than direct participation in the proximate *actus reus* of committing homicide. Of course, one could envision broadening our understanding of *actus reus* to encompass speech acts or merely showing up at the scene of a crime. In that case, there might be an identifiable *actus reus* even in the case of a co-conspirator who stood aside and did nothing.¹⁵⁶ Even so, one would have to concede that showing up alone would not give rise to culpability—one would need to show up with the

¹⁵³ Downer, ed. and trans., *Leges Henrici Primi*, 262-263, §85.2a.

¹⁵⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 341-342.

¹⁵⁵ For a remarkable Year Book report of a 1320 appeal in King’s Bench before Justice Henry le Spigurnel using strikingly similar language, see Y.B. Hil. 13 Edw. 2, fol. 403c, no. 6 (K.B. 1320), *Seipp’s Abridgement*, no. 1320.006. For example, the report indicates that the female plaintiff appealed several individuals for her husband’s death, including one “who was holding her husband by the right shoulder while another, whose outlawry was defeated, beheaded him” (“quil avoit tenu son baroun per lespaule deitre tantcome celuy que fuit utlag’ defet luy decolla”).

¹⁵⁶ In modern law, doctrines like felony murder operate in a similar fashion. The felony murder doctrine allows a prosecutor to sweep up all accessories and charge them with homicide even if they did not fire the fatal shot and/or did not know that the principal was armed.

requisite intent to commit the underlying crime. A person stumbling onto a crime scene unwittingly, for example, and witnessing a killing in action, could not thereby be convicted of homicide. Presumably, a person wishing deathly harm towards another while sitting in the privacy of his home would also not be indictable for felonious homicide, but then how could such felonious intent come to light until some action, however minor, had been undertaken to further that desire? Such a crime or sin of pure intentionality was left to the realm of the internal forum of conscience, to be explored by an individual and his or her confessor.¹⁵⁷

Nevertheless, the law of accomplice liability did bring the idea of intent-based culpability—a common feature of legal treatises and confessional literature—into the courtroom. In a 1316 case tried before the Kent Keepers of the Peace, John de Elherst, a cleric, was found guilty as an accomplice to several thieves. The jury was clear about John’s level of culpability: they stated that he “is aware, knowing them to be thieves, and a harbinger of them and a partner, and he fosters them in their felonies” (*consciens est, sciens ipsos esse latrones et receptor eorundem et particeps et fouet eos in suis feloniiis*).¹⁵⁸ John need not have sullied his hands stealing the goods, coins, and horse brought in by his partners in crime; his guilt rested instead on his knowing complicity. In some cases, a guilty accomplice, unlike the more passive cleric above, might have been at the scene of the crime. At the 1329 Northamptonshire eyre, for example, a jury found that, although Henry of Dunchirche had actually killed Thomas fitz Walter

¹⁵⁷ Treason law, however, would develop along lines more conducive to prosecuting on the basis of thought derived through *fama* alone). A 1440 Year Book report records Chief Justice Newton exclaiming that one might be killed, drawn, and hanged without taking any action, consenting, or aiding, but merely, according to reputation (“en son fame”), having contemplated the death of the king (“imagine la mort le Roy”). See Y.B. Mich., 19 Hen. 6, fol. 47b, no. 103 (D. Assizes 1440) *Seipp’s Abridgement*, no. 1440.121.

¹⁵⁸ Putnam, ed., *Kent Keepers of the Peace*, 48.

in 1298-99 by striking him with a pole-axe, two other men lent support to Henry.¹⁵⁹ The court held all the men guilty after the jurors agreed that the other two men “would have assisted their companion if he had been getting the worst of it.”¹⁶⁰ No *actus reus* beyond standing ready to assist was deemed necessary to convict the two on-lookers, but only the will to assist Henry in committing homicide. The court ordered the arrest of the men, who were still residing in the county.¹⁶¹ Similarly, in a much earlier 1272 coroner’s roll entry, dealing with a drunken homicide committed by Robert Bernard against Ralph son of Ralph vicar of Bromham, three other men were also ordered to be arrested after three townships present at the coroner’s inquest indicated that the other men had “consented to do any other misdeed and were waiting to do injury to someone else there”, even if they had not actually struck any blow against Ralph.¹⁶²

In another case, a jury observed that two men had been present at a homicide, although only one had actually committed the act; the second man struck the victim after he had already died. After deliberating for some time, the justices concluded that the second man “was at fault for the way in which he became involved in the affair, and since he struck the victim out of ill-will.”¹⁶³ It was decided that he should be held to ransom. Moreover, because he was present at the homicide and did not arrest the killer, he should have been amerced. The guilty verdict fell short of condemning the accessory to death, but it nevertheless ascribed liability for complicity in the homicide. *Bracton* again offers something of a parallel idea of guilt by association,

¹⁵⁹ Sutherland, ed. and trans., *Eyre of Northamptonshire*, vol. 1, 186 (“in societate cum predicto Henrico ad partem ipsius Henrici manutenendam”).

¹⁶⁰ Sutherland, ed. and trans., *Eyre of Northamptonshire*, vol. 1, 186.

¹⁶¹ This occurred after long debate, suggesting that the outcome might have been controversial. Moreover, it is not clear whether the men might be convicted of felonious homicide and hanged, or whether they would have been subject only to amercement for failing to intervene or raise the hue.

¹⁶² Hunnissett, ed. and trans., *Bedfordshire Coroners’ Rolls*, 55-56, no. 123.

¹⁶³ Sutherland, ed. and trans., *Eyre of Northamptonshire*, vol. 1, 203.

ascribing guilt to “those who neither slew nor had any intention of slaying but came to lend counsel and aid to the slayers, sometimes even though their [the slayers’] violence is repulsed.”¹⁶⁴ In the case described above, it was the non-actor’s malice or “ill will” in striking the deceased that proved to be damning.

In an earlier case, dating to the 1249 Wiltshire eyre, a man was actually condemned to death by hanging despite his circumstantial connection to the underlying homicide. The case presents a complicated narrative, which will be only partly presented here. Adam le Bel appealed Peter Griffyn for coming along “wickedly and in felony and with premeditated assault and against the King’s peace” and commanding another man named Adam, Adam le Lechur, to kill Adam le Bel’s nephew, Hugh de Mara.¹⁶⁵ As if this story were not complicated enough, the jury that ultimately decided the case fleshed out many more details surrounding Hugh’s death. For example, the homicide was precipitated by an argument over the carcass of “a certain beast”, which had been hunted, skinned, and butchered. Hugh and his uncle Adam had allegedly tried to seize a limb of the beast from the groom who was delivering it to the sergeant of the local town. The groom raised the hue, which attracted the attention of Peter, Adam le Lechur, and several others. According to the jury, someone did command Adam le Lechur to strike Hugh, but that individual was not Peter.¹⁶⁶ Peter was busy trying to seize the limb, only to be intercepted by Adam le Bel. Remarkably, the jury still found Peter guilty of homicide. The jurors argued that

¹⁶⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 342.

¹⁶⁵ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 226-26.

¹⁶⁶ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 227 (Robert of Poterne had commanded Adam to strike Hugh with a staff). For another example of an appeal in which the jury substantially revised the facts as presented by the original appellor, see *ibid.*, 235. Appeals were sometimes motivated by underlying disputes between two parties and might be maliciously fabricated for the sake of revenge. See also *ibid.*, 250 (a false appeal in which the jury substantially revised the facts as presented by the appellor to suggest that the appealed man had been provoked by offensive words into striking; questions of honor might have been at stake).

“after Peter was released from...Adam le Bel he raised no hue nor made any pursuit after those who had killed Hugh.”¹⁶⁷ Moreover, Hugh’s companions, who presumably wished to assist the wounded man, “were impeded by Peter, by which they were less able to help Hugh.”¹⁶⁸ As a result, Peter was adjudged guilty of Hugh’s death and sentenced to hang. If the crime included an *actus reus*, it was an act of omission, in failing to raise the hue, and of commission only to the extent that Peter delayed the arrival of help to an already fatally wounded man. Peter’s case, calling to mind literary passages condemning all sinners as complicit in the death of Jesus, confirmed the practical application of a principle expounded in *Bracton*, according to which one could be guilty of slaying “by word, as where one dissuades another and by such dissuasion restrains him from doing the good he intended when he wished to rescue someone from death; thus in an indirect way he commits homicide.”¹⁶⁹ *Bracton* argued that a person who could rescue another from death but failed to do so should not escape punishment.¹⁷⁰ Regrettably for Peter, *Bracton*’s principles, roughly contemporaneous with his trial, were applied by this jury wholeheartedly.

A Felonious State of Mind

In the world of Robert Mannyng, author of the early fourteenth-century *Handlyng Synne*, felony resided firmly in the thoughts of man. “Envious man,” Mannyng observes, “is so full of suspicion, that evil he thinks of all, like a felon” (*Enuyus man ys so ful of susspecyun / Ðat euyl hym þenketh al, as a felun.*)¹⁷¹ Felony lay hidden below the surface, such that a traitor or

¹⁶⁷ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 227.

¹⁶⁸ Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 227.

¹⁶⁹ Thorne, ed. and trans., *Bracton*, vol. 2, 341.

¹⁷⁰ Thorne, ed. and trans., *Bracton*, vol. 2, 342.

¹⁷¹ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 135, lines 3971-3972.

backbiter might deceive others “with fair words and a felon heart” (*with feyrë wurdys, and felun herte*).¹⁷² Literary references to felony reinforce the notion that felony resided in the intellect or heart, rather than simply in the exterior world of action. For example, in the *Cursor Mundi* (c. 1300), the author ponders the downfall of powerful kings such as David and Solomon at the hands of tempting women, cautioning others to beware “false and fell felons in intent” (*fals and fell, / Feluns in entent*).¹⁷³ The story of Sodom likewise involves the idea of felonious intent. Abraham beseeched God to spare the righteous people of Sodom rather than killing them along with the wicked. Two angels were sent to the home of Lot, Abraham’s nephew, in Sodom. The text describes how a crowd gathered outside Lot’s home, trying to persuade him to send his guests outside:

Folk gathered out of the town,
Foul felons with wicked intent,
About Lot’s house they went.¹⁷⁴

The author emphasizes the wicked intent of the gathered crowd, who wished to have illicit relations with Lot’s houseguests.

Not confined to Old Testament narratives, this notion of felonious thought comes through strongly in the *Cursor Mundi*’s description of the Jews who, according to the narrative, betrayed Christ. The poet expounds:

Foreign was this folk felon,
Of little wit, of poor reason,
Given over entirely to the enemy,
Was never there an adder of more venom;
Of wicked will, of evil mood,
Against their own flesh and blood.
What he was they did not understand,

¹⁷² Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 143, line 4216.

¹⁷³ Morris, ed., *Cursor Mundi*, part 2, 520, lines 9030-9031.

¹⁷⁴ Morris, ed., *Cursor Mundi*, part 2, 168, lines 2776-2778. (“Folke gedered out of þe toun / Foule felouns wiþ wicked entent / Aboute lothus hous þei went”.)

That reason he gave to men who were mad,
To all the needy did he good,
And to their folk sent wonderful food;
But all for naught against him they stood,
Til they at the end did him on the rood.¹⁷⁵

Thus, the author describes the Jewish “*felun folk*” as faulty in their ability to reason, such that they could not recognize the person of Jesus or even acknowledge his good works. Instead, they were given over to a wicked will and evil mood, opposing Jesus to the point of taking his life. This capacity for felonious thought appears as well in Richard Rolle’s fourteenth-century commentary on the Psalms, in which he glosses Psalm 73 with: “They thought and they spoke felony; wickedness on high they spoke” (*Thai thoght and thai spake felony: wickedness in heigh they spake*).¹⁷⁶

Chronicle sources, too, occasionally invoke this idea of felonious thought in describing long-past tragedies. The mid- or late-thirteenth-century chronicle of Robert of Gloucester, for example, refers to a Roman commander bethinking himself of felony.¹⁷⁷ In his famous chronicle, Peter Langtoft (d. 1307) describes the brief reign of Edward the Martyr in the late tenth century, calling attention to the king’s untimely end due to the felonious machinations of his stepmother:

A good man he was, and a knight stalwart as steel.
In England never before was a king loved so well,
Nor of the foreign folk honored so much.
The right laws did he secure for men false and fickle.
Both rich and poor he governed in equality,
None should do another wrong for covetousness or dread.

¹⁷⁵ Morris, ed., *Cursor Mundi*, part 3, 850-852, lines 14868-14879. (“Strangli was þis folk felun, / O littel wijt, o pour resun, / Bitaght al to þe wiþer-win, / Was nedder nan o mar wenim; / O wicked wil of iuel mode, / A-gain þair aun flesche and blode. / Quat he was þai nocht vnderstode, / Þat wijt to men gaf þat war wode, / Til all þe nedi did he gode, / And to þair folk fand ferli fode; / Bot all for nocht enent him stode, / Til þai at end him did on rode.”)

¹⁷⁶ Bramley, ed., *Psalter or Psalms of David*, 258.

¹⁷⁷ Wright, ed., *Metrical Chronicle of Robert of Gloucester*, 104. (“He biþoʒte him of felonie...”)

Estrild his stepmother she thought on felony.
To wicked men she spoke, on Edward to spy.
They did as she bad them, and wrought themselves woe,
At Corvesgate through deceit King Edward they slew.¹⁷⁸

Thus, King Edward's assassination was brought about by wicked men, who in turn were goaded along by Edward's stepmother, whose betrayal of the young king was prompted by thoughts of felony.

Felonious thoughts also provided grist for the authors of religious manuals. In *Handlyng Synne*, Robert Mannyng used the story of Beatrice's martyrdom at the hands of Lucretius to explicate the dangers of the sin of covetousness. In a passage with a limerick-like opening, Mannyng describes Lucretius' plotting:

There was a man named Lucretius,
A mighty rich and a covetous man;
Beside him lived a maiden wise,
Her name was called Beatrice.
Lucretius thought in felony;
Her lands he would by any means buy.
And, shortly for to tell,
This lady would not to him sell.
When he understood that, then was he grieved;
He waited for her, and did her slew.
When he had done her that pain,
In all her lands he took seisin,
And was then a rich lord
And bore himself stoutly as a king.¹⁷⁹

¹⁷⁸ Hearne, ed., *Peter Langtoft's Chronicle*, vol. 2, 36-37. ("A gode man he was, & stalworth knyght als stele. / In Ingland neuer before was kyng lufed so wele, / Ne of þe folk strange non honourd so mykelle. / þe right lawes did he loke for fals men & fikelle. / Boþe riche & pouere he 3emed in euenhede, / Non suld do oþer wrong for couetise no drede. / Estrild his stepmoder scho þouht on felonie. / Tille wikked men scho spak, Edward to asprie. / Þei did als scho þam bad, & wrouht þam seluen wouh, / At Koruesgate þorgh desceit Edward kyng þei slouh.")

¹⁷⁹ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 194-195, lines 6001-6014. ("Þyr was a man þat hyght Lucrecyus, / A swyþe ryche and a coueytous; / Besyde hym woned a mayden wys, / Here name was kalled Beatrys. / Lucrecyus þoght on felonye; / Here landes he wulde algate bye. / And, shortly 3ow for to telle, / Þys lady wuldē nat hem selle. / When he wyst hyt, þan was hym wo; / He weyted here, and ded here slo. / Whan he had do here þat pyne, / Yn alle here landes he toke sesyne, / And was þan a ryche lordyng / And bare hym stoutē as a kyng.")

But felonious thoughts were not only the purview of literary villains; ordinary people had to guard against thoughts of felony as well. In contemplating Jesus' death on the cross, a penitent was expected to expel felony from his or her mind, again reflecting the idea that felony signified more than a wrongful act. In a prayer focused on the hour of Christ's passion, one finds the following exhortation:

Do wickedness out of our thought,
And felony that gains naught,
And envy and anger;
That we may take this flesh,
Lord! If your will it is,
With body and heart clean;
And that it be our protection,
On doomsday when you shall rise,
All this world to deem.¹⁸⁰

The poem suggests that, in preparation for the Last Judgment, a penitent individual had to expel thoughts of wickedness and felony, thereby cleansing both body and heart.

Importance of Assessing State of Mind

Reum non facit nisi mens rea.
—*Leges Henrici Primi*¹⁸¹

We now return from the world of literary felons to the realm of legal texts. As early as the *Leges Henrici Primi* in the early twelfth century, legal sources emphasized the importance of one's state of mind in committing a sinful or criminal act. At times, the *Leges* reads like a

¹⁸⁰ Morris, ed., *Cursor Mundi*, part 5, 1466, lines 25590-25606 (from the Prayer for the Hours of the Passion, in the appendix to the *Cursor Mundi*). (“Do wickednes vte of vr thoght, / And feluni þat gains noght, / And envie and tene; / Þat we mai tak þat ilk flexs, / Lauerd! If þi will it es, / With bodi and hert clene; / And þat it be vr warantise, / On domesdai quen þou sal rise, / Al þis world to deme.”) See also “The Matins of the Cross,” in Carleton Brown, ed., *Religious Lyrics of the XIVth Century* (Oxford: Clarendon Press, 1952), 43, lines 112-120 (from the pre-1350 Cotton MS. Vespas. A. iii).

¹⁸¹ Downer, ed. and trans., *Leges Henrici Primi*, 94-95, §5.28b. “A person is not to be considered guilty unless he has a guilty intention.” The author of the *Leges* might have borrowed this from Ivo, *Pan.* viii. 111 and 116, although Downer has traced the statement to Augustine, *Sermones* 180.2. The maxim might have been intended to apply only to perjury. *Ibid.*, 311-312.

penitential, partly due to its own borrowings from texts like the *Pseudo Isidore libri poenitentialis*. According to the *Leges*, a slayer of a monk or cleric must abandon his arms to enter God's service. If he killed "accidentally and unintentionally," he should do penance for seven years; if intentionally, he owed penance for life.¹⁸² It is again noteworthy that even unintentional killings required some measure of penance. An unintentional bad act bore the mark of venial sin. In another provision, we find that no one need "make amends for his own child whom he did not kill intentionally (*uoluntarie*), neither by way of money compensation nor by physical mutilation."¹⁸³ Elsewhere the *Leges* indicates that a person killing a relative shall make amends, with the actual "measure of penance" to "depend on whether his action was intentional or unintentional."¹⁸⁴ In other words, in assigning punishment, the intent of the accused determined the severity.

This idea can be traced right up to the early thirteenth century in *Bracton*, which emphasizes the paramount importance of assessing intent:

Remove will (*voluntatem*) and every act will be indifferent. It is your intent (*affectio*) that differentiates your acts, nor is a crime committed unless an intention to injure (*voluntas nocendi*) exists; it is will and purpose (*voluntas et propositum*) which distinguish *maleficia*.¹⁸⁵

Looking back at the various cases presented above, some patterns begin to emerge that hint at how medieval jurors theorized homicide. The categorization to follow, however, is introduced with the caveat that it imposes an aura of order upon evidence that is messy, sometimes contradictory, and not easily organized. Succumbing to the desire to systematize, I have

¹⁸² Downer, ed. and trans., *Leges Henrici Primi*, 216-17, §68.7. See also the *Leges* provision regarding murder of parents: "Anyone who kills his father or mother accidentally shall do penance for fifteen years; if he did it intentionally, he shall do penance until his life's end." *Ibid.*, 216-17, §68.9.

¹⁸³ Downer, ed. and trans., *Leges Henrici Primi*, 272-273, §88.8.

¹⁸⁴ Downer, ed. and trans., *Leges Henrici Primi*, 234-235, §75.5.

¹⁸⁵ Thorne, ed. and trans., *Bracton*, vol. 2, 23.

introduced a rudimentary sliding scale, ranging from no guilt at one extreme to felony on the other. Three measurements situate an act along the scale: 1) intentionality, 2) freedom to act, and 3) rationality. The measure of intentionality could range from pure accident without carelessness or negligence (i.e. misadventure with no extenuating circumstances), to harm caused by negligence, to harm caused by recklessness, to a deliberate but unplanned act, and finally to a premeditated act. The second category, freedom of action, might range from absolute necessity (e.g., self-defense where the homicidal actor has absolutely no possibility of retreat), to duress or an overborne will (e.g., a wife acting as an unwilling accomplice to her husband's crime), to some more attenuated pressure on the actor (e.g., a theft compelled by poverty), to total freedom of action.¹⁸⁶ Finally, the third measurement, rationality, might range from insanity or infancy, where rationality is impeded by illness or cognitive development; to sudden anger or other strong emotion that might impede an otherwise rational actor's ability to reason; down to a fully reasoned act. At the far end of this tripartite scale, a *malum in se* act (e.g. theft, homicide) that exhibits a high measure of intentionality, unhampered freedom of action, and the mature exercise of reason falls within the purview of felony punishable by death. As we move toward the other end of the scale along these three measures, we enter the realm in which individuals, though still partially culpable, might find themselves eligible for a pardon *de cursu* (e.g., for self-defense, insanity, infancy) or *de gratia* (for more discretionary reasons), or for a straight-out acquittal.

¹⁸⁶ I leave the free will/determinism question, relevant though it is, entirely aside in this analysis, although I believe it is a question that could be thoroughly explored in medieval sources. The "Old English Honorius" puts the question this way: "Hwæt is frigdom to geceosan god oððe yfel?" (What is freedom to choose good or evil?) Warner, Rubie D.-N., ed. *Early English Homilies from the Twelfth Century MS. Vesp. D. XIV* (Millwood: Kraus Reprint, 1981; first published 1917), 141. A much later Lollard sermon would warn against falling into the complacency of determinism: "Anoþer condicion is þis: þat a man bileue þat euery synne comeþ prinspaly of þe feend, and none of God, as þei þat seyne in excusacion of hemself: 'it wes my desteny, or þe sterre of my birþe; it wes shapid to me tofore ony cloþe', turnyng þus þe feendis temptacion and her owne foly consenting into God.") Gloria Cigman, ed., *Lollard Sermons* (Oxford: Oxford University Press, 1989), 159.

Most assuredly medieval juries did not have a checklist to assess a defendant's intentionality, freedom to act, and rationality, yet these factors do appear often enough in trial evidence to suggest that they were among the multiplicity of norms that influenced jury decision-making.

It is the last category of potential outcome—the acquittal—that complicates any analysis of the meaning of felony in the thirteenth and fourteenth centuries. Looking at the cases presented above, one might be tempted to impose categories like those proposed by George Fletcher, who distinguishes between the inculpatory and exculpatory dimensions of wrongful conduct.¹⁸⁷ The inculpatory dimension evokes the elements of a crime, or what the prosecution has to prove. The exculpatory dimension refers to the excuses or justifications that might enable one to escape conviction. The medieval English criminal law has frequently been described in exculpatory terms. In other words, by committing a proscribed act, such as homicide, one placed oneself at the mercy of the law. Only by convincing a jury that you fit within a justificatory or excusatory exception—self-defense, duress, minor age, insanity, killing of an outlaw in flight—could one escape the penalty of the law. Under this view, *mens rea* would not be a necessary element of felonious homicide; no appellant or prosecuting authority would have to *prove* that a defendant committed an act intentionally. Rather, a defendant could bring *mens rea* to bear only by raising its absence as an exculpatory or justificatory condition.

Yet I am not convinced that this exculpatory/inculpatory distinction fits so neatly with the medieval evidence. If we imagine the medieval English justice system as exculpatory in nature, we might expect to find a handful of acquittals where an excuse or justification was successfully raised, and a vastly larger percentage of cases resulting in guilty verdicts. This chapter's focus on what I have termed "outlier" cases perhaps obscures the reality that the most typical

¹⁸⁷ George P. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000), 553.

thirteenth- or fourteenth-century felony cases involved neither a guilty verdict nor a recommendation for pardon, but instead a simple, unexplained verdict of “*quietus*,” or acquittal.¹⁸⁸ While outlier cases frequently provide some reasoning behind an acquittal or recommendation for pardon, the vast majority of acquittals involve no further explanation. How do we explain these acquittals? Returning to our crude sliding scale of culpability—with its measurements of intentionality, freedom, and rationality—we might consider the grey area lying between the two extremes, with less than fully reasoned, less than fully freely willed, less than fully intentional, and less than nastily motivated homicides on one end, and clearly felonious homicide on the other end.

Within this vast grey area, competing narratives and conflicting values and attitudes toward the death penalty might give a jury great pause in handing down a guilty verdict. One can imagine instances in which a case that seemed to meet the threshold for felony might be recategorized by a sympathetic jury as self-defense or duress, as demonstrated by Thomas Green in *Verdict According to Conscience*.¹⁸⁹ To return to this chapter’s opening lines, might we say in such instances that a person technically committed a felony, but did so nonfeloniously in the

¹⁸⁸ To take one example, I have tabulated that in the gaol delivery rolls calendared by Bertha Putnam, a total of 101 accusations resulted in an astonishing 89 acquittals and only nine hangings. Of the three remaining individuals, two have no recorded verdict, and the third was a cleric who was remanded to prison as a convicted felon. Admittedly, these cases mostly involve theft, rather than homicide. See Putnam, ed., *Kent Keepers of the Peace*, 80-103. Barbara Hanawalt’s calendar of fourteenth-century East Anglian gaol delivery rolls shows the following conviction rates: 23% for homicide, 30% for larceny, 38% for burglary, 50% for robbery, 30% for arson, 25% for rape, 14% for receiving, and 54% for counterfeiting. Hanawalt, ed. and trans., *Crime in East Anglia*, 20. Perhaps the most comprehensive summary of conviction rates can be found in Bellamy, in which he documents a remarkable decline in felony conviction rates in the late fourteenth century, when rates averaged roughly 15-16% throughout England. Bellamy, *Criminal Trial in Later Medieval England*, 93-95.

¹⁸⁹ See, e.g., Green, *Verdict According to Conscience*, 36-46; “Societal Concepts of Criminal Liability,” 679-682.

minds of the jurors, or at least not so feloniously that he or she deserved to hang?¹⁹⁰ Even more crucially, how do we explain the thousands of silent acquittals, the capital *Q*s for *quietus* that dot the margins of gaol delivery rolls, that make the rival *S*s for *suspensus* (hanged) seem rare and disquieting?¹⁹¹ Some of the above explanations for pardons may also apply to acquittals. At the same time, acquittals may point to an over-active prosecutory system, in which the slightest unsubstantiated suspicion could bring a person before the law. They might also reveal the workings of patronage systems, as demonstrated by the knight who stood as pledge for his peasants in the case that opened this chapter.¹⁹² Yet I think we explain the predominance of acquittals by rethinking the parameters within which we define medieval English felony law. A narrow, technical reading of felony cannot explain these silent acquittals, but an understanding of felony rooted in the word's etymological and contextual complexity might begin to explain why a *Q* would have been more palatable than an *S* when the alleged crime somehow fell short of the extreme, felonious end of the sliding scale. While felony carried a widely understood categorical meaning—an unexcused homicide, a theft over a certain value—it also carried a deeper, perhaps more intrinsic meaning, a meaning that jurors worked out as they grappled with competing prudential concerns within the grey zone created by complicated fact patterns and opaque intentions, all the time deliberating in the shadow of a law that allowed only one punishment—death—upon conviction. Sometimes the jurors manipulated the narrative to make a pardon

¹⁹⁰ Might jurors in other instances convict an individual (e.g. a thief caught red-handed) of felony despite their belief that the actor acted in a nonfelonious manner (e.g. compelled by starvation)? If so, does this turn my definition of felony on its head?

¹⁹¹ In addition to the acquittals, we could broaden our scope and consider the practices of sanctuary, abjuration, and benefit of clergy, all of which fall outside the scope of this chapter yet are all crucial components of a more holistic approach to defining felony.

¹⁹² John Bellamy makes a strong case for the influence of such relationship obligations. See Bellamy, *Criminal Trial in Later Medieval England*, 118.

attainable, and sometimes, with no further explanation inscribed on the historical record, they simply let the accused walk away. *Quietus*.

Conclusion

Never was I a killer, certainly not by my will,
Nor one of those evil robbers, out to harm people.¹⁹³
—*Outlaw's Song of Trailbaston*

Like many poems, these lines from the early fourteenth-century Anglo-Norman poem, the *Outlaw's Song of Trailbaston*, are laden with ambiguity. The plain sense of this excerpt, however, suggests that this popular literary outlaw considered himself neither a murderer nor a robber not because he had never thieved or killed, but because he had never killed willingly or robbed with intent to harm. Applied to cases of felony more broadly, the suggestion is that felony connoted wickedness and intentionality, such that the outlaw could admit homicide but relieve himself of responsibility by arguing that he did not commit the act willfully or maliciously.

As this chapter has tried to demonstrate, the word “felony” was layered with meaning in thirteenth- and fourteenth-century England. In legal terms, it could conjure up images of the immediate after-effects of a felony conviction: forfeiture of property to the crown and capital punishment. Although these would eventually become defining elements of felony, they were incidental to the deeper meaning of the term in this period. In legal as well as literary and religious texts, felony often connoted wickedness, sinfulness, and deliberate wrongdoing.

¹⁹³ “The Outlaw’s Song of Trailbaston,” in Thomas Wright, ed., *Political Songs of England from the Reign of John to that of Edward II* (Cambridge: Cambridge University Press, 1996), 236. (“Unqe ne fu homicide, certes à moun voler, / Ne mal robberes pur gent damager.”) My translation is awkward due to my befuddlement over the apparently plural *robberes*. An alternative translation: “I was never a murderer, or never meant to be, / Nor a thief out of malice to do people harm.” Carter Revard, trans. “The Outlaw’s Song of Trailbaston,” in *Medieval Outlaws: Twelve Tales in Modern English Translation*, ed. Thomas H. Olgren (West Lafayette: Parlor Press, 2005), 163.

Felony was applied broadly in homiletical texts, which referred to every human as a sinner in the eyes of the ultimate judge.¹⁹⁴ Despite this universal felonious identity, legal accusations of felony involved great danger, both to the accused individual and to the accuser. As homiletical writings remind us, Jesus himself was misjudged and crucified as a felon.¹⁹⁵ No sensible juror wanted to repeat such grievous error.

Before we dismiss such references to felons and felony as mere religious metaphor, we might consider again the multiple uses of the terms in contemporary legal records. This, in turn, might explain how sermon writers could borrow the language of felony so fluidly in describing sin and its consequences. At times, felony was used as little more than a convenient signifier for a heinous crime. At other times, however, the context allows for a deeper reading of the term. Legal records frequently place the language of felony in opposition with acts that were unwilled, compelled, unwitting, or accidental. Certain individuals, by virtue of their status as minors, lunatics, or married women under duress, might be deemed virtually incapable of engaging in felonious behavior. Felony required a freely made choice, and it connoted an action that in its very essence was wicked or evil, frequently described in legal terms by references to premeditation, malice, or deliberation. Typically an *actus reus* alone could not produce a felony conviction; one had to have a felonious *mens rea* to merit the death penalty. This helps explain the ease with which medieval jurors convicted mere accessories to crime—those who counseled,

¹⁹⁴ See, e.g., Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 15 (“For on earth there is not so holy a man who might perfectly shun all manner of sin”) (Vor in erþe / ne ys zuo holi man : þet moze /parfitliche be-uly / alle maneres of zenne.)

¹⁹⁵ The dangers of judging, often connected to the misjudgment of Christ, fall outside the scope of this chapter. To take just a single example of this type of sentiment, an early fifteenth-century sermon invited the listener to comprehend how “the highest and just judge should be arraigned as a felon,” and “the author of life, the innocent one, should be damned to death.” See Patrick J. Horner, ed., *A Macaronic Sermon Collection from Late Medieval England: Oxford, MS Bodley 649* (Toronto: Pontifical Institute of Mediaeval Studies, 2006), 478-79 (“summus et iustus iudex schuld be areynyd sicut a pheloun, quod auctor vite, vnus innocens, dampnaretur morti.”) For the most comprehensive discussion of the dangers of judging in the medieval period, see Whitman, *Origins of Reasonable Doubt*.

accompanied, or commanded—as felons along with the actual perpetrators of a homicidal act.

Felony was, perhaps in its very essence, a state of mind.

CHAPTER THREE

Be Deuylys Doghtyr of Hellë Fyre: Anger in Felony Adjudication

Introduction

Dies irae dies illa, dies tribulationis et angustiae, dies calamitatis et miseriae, dies tenebrarum et caliginis, dies nebulae et turbinis. Dies tubae et clangoris super civitates munitas, et super angulos excelsos. Et tribulabo homines, et ambulabunt ut caeci, quia Domino peccaverunt; et effundetur sanguis eorum sicut humus, et corpora eorum sicut stercora.

— Zephaniah 1:15-17¹

A day of wrath, of tribulation and anguish, calamity and misery, such was the day of judgment seen to await all medieval English men and women at the end of earthly time. This day of sorting, of winnowing the chaff, of separating the sheep from the goats, the day when all creation would awaken to respond to the ultimate Judge, this day was identified as a time of God's anger and wrath.² Anger was allied with justice and right judgment, albeit a righteousness

¹ Latin text from the Vulgate. "A day of wrath [will be] that day, a day of tribulation and anguish, a day of calamity and misery, a day of darkness and gloom, a day of fog and whirlwind, / A day of trumpet and clamor against the walled cities, and against the high corners. / And I will trouble men, and they will walk like the blind, because they have sinned against God; and their blood will flow out like soil, and their body as if excrement."

² Phrases borrowed from Luke 3:17, Matthew 25:32, and the thirteenth-century Franciscan poem, "Dies Irae," in Abraham Coles, ed., *Dies Irae in Thirteen Original Versions* (New York: Appleton, 1859), 1. (Mors stupebit et natura, / Cum resurget creatura, / Judicanti responsura.) See also Holthausen, ed., *Vices and Virtues*, 60-61 (a c. 1200 text describing how the Holy Spirit "looks wrathfully upon them that do evil, and who will not cease through His fear. Therefore will God's wrath come upon them, ere they know it, and cut them off, both body and soul, from this mortal land wherein they dwell and which they love so much."). I rely here on Holthausen's modernization.

to be feared even by the contrite: as a thirteenth-century Franciscan poet would exclaim, “How much trembling there will be, when the Judge shall come, striking down all severely!”³

Anger played a central role in medieval understandings of divine judgment. Its role in earthly judgment was less clear, particularly when it was the anger of the judged, as opposed to the judge, that was at issue. A prominent stoical strain in medieval thought, also rooted firmly in scripture,⁴ warned against the dangers of extreme emotion: “If you in ire a man hate, and that wrath will not abate,” cautioned English monk and chronicler Robert Mannyng in an early fourteenth-century penitential manual, “grievously you are in sin, unless you forgive, and thereof blinn.”⁵ This passage, employing the now-defunct verb “blynne,” meaning “to cease,” cautioned against nurturing wrath or hatred. Such hatred, which could be felonious in some circumstances, placed an individual at risk of being escorted metaphorically to hell by ire, “the devil’s daughter of hell fire.”⁶ Mannyng’s point, in essence, was that long-held wrath increased in severity with the passage of time. Left unabated, it would lead a person to the “ghostly” or spiritual slaying of the object of hatred.⁷

³ Coles, ed., *Dies Irae*, 1. (“Quantus tremor est futurus, / Quando Judex est venturus, / Cuncta stricte discussurus!”)

⁴ See, e.g., Ephesians 4:26 for the well-known caution against letting the sun set upon one’s wrath.

⁵ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 128, lines 3729-3732. (“Ȝyf þou yn yre a man hate, / And þat wrappþe wylt nat late, / Greusly þou art yn synne, / But þou forȝeue, and þer-of blynne.”)

⁶ On felonious hatred, see Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 172, lines 5246-5248, discussing how a particular Saracen “hated this man [i.e. a priest named Carpus] feloniously, and prayed God he would send him damnation without end” (“hatyd þys man felunly, And preydē God he wuld hym sende / Dampnacyun with-outyn end”). See also *ibid.*, 127, line 3704, for the phrase “þe deuylys doghtyr of hellē fyre”. For the notion that one might shift one’s kinship from God to the devil, see also Holthausen, ed., *Vices and Virtues*, 110-111 (c. 1200 English text describing how a man indulging in serious sins is the devil’s son, just as a man who followed the right path was God’s son, and arguing that the world had been the devil’s house before Christ’s coming).

⁷ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 128, lines 3732-3734. (“þe holy man seyþ hardly, / þat þou hast slayn hym gostly.”) For another example of “ghostly” slaying, see Gustaf Holmstedt, ed., *Speculum Christiani: A Middle English Religious Treatise of the 14th Century* (London:

Ghostly homicide was one thing, bodily homicide another. As medieval English coroner and plea roll evidence testifies, anger did spill over into the physical world, spurring violence and even homicide. A perpetrator of an anger-fueled act, if caught, faced an earthly judgment day that might soberly remind the defendant of the *dies irae* yet to come. Brought to trial, the defendant faced a jury of peers tasked with weighing the evidence and issuing a verdict. Such jurors brought with them an understanding of the nature of anger and its corollaries—hatred, wrath, and the like—that inevitably influenced how they approached the judging process.

This chapter will explore the connection between anger and homicide in thirteenth- and fourteenth-century England, drawing both upon formulaic appearances of anger in the plea rolls, and upon the characterization of anger's relationship to violence in literary and religious sources. It will ask how jurors conceptualized anger, hatred, wrath, and related emotions, and how this influenced felony verdicts. The medieval English legal and social concept of felony, as I have argued above, paradigmatically involved deliberation and forethought, an exercise of a person's reason and volition in the absence of necessity, and some measure of moral blameworthiness or even evil.⁸ In the absence of one or more of these factors, jurors might either acquit a person of felony or recommend pardon. Anger, which might relate to any one of the above factors, played a complicating role in delimiting the boundaries of felonious behavior.

On the one hand, anger was understood to be a mark of poor character formation, particularly when a person exhibited a habitual predilection toward it. This would seem to increase the felonious nature of an anger-driven offense. On the other hand, medieval authors

Oxford University Press, 1933), 26 (“And he that hate3 his brother es a man-sleer. Iohannes III: He that hate3 his brother, he slee3 hym gostly.”)

⁸ See Elizabeth Papp Kamali, “*Felonia felonice facta*: Felony and Intentionality in Medieval England,” *Journal of Criminal Law and Philosophy* (2013), 1-25, advance online publication, DOI 10.1007/s11572-013-9273-2. For a broader discussion of felony and its development over time, see Kamali, “Felonies,” in *Encyclopedia of Criminology and Criminal Justice*.

described the effects of extreme anger—whether due to a predilection toward intemperate ire, or in immediate response to a provocation—as hindering a person’s ability to think rationally and act sanely. This pushed in the direction of exculpation, just as children and the insane were not seen to be entirely responsible for their harmful actions. Anger might reflect a depraved heart and a prior failure to temper one’s emotions. It might also be excusatory insofar as it hampered an individual’s capacity to reason and exercise sound judgment. Anger presented some of the same complexities as drunkenness, which could also aggravate or alleviate the culpability of an actor. Jurors were in the unenviable position of having to weigh these possibilities. Anger placed an undue strain upon the medieval English system of felony adjudication by forcing jurors to balance such competing issues as prior character formation, innate temperamental idiosyncrasies, and reasonable responses to provocative circumstances. It is perhaps due in part to this complex treatment of anger that English felony law would not carve out an explicit doctrine of provocation until the seventeenth century. Focusing on the thirteenth and fourteenth centuries, a time after the heyday of the bloodfeud in medieval Europe and before the development of provocation doctrine, this chapter explores the confluence of anger and violence during the crucial first two centuries of the English criminal trial jury.

Methodology

This chapter relies upon a combination of legal, religious, and literary evidence to hypothesize about the attitudes toward anger exhibited by English jurors in thirteenth- and fourteenth-century felony cases. Excavated from the plea rolls themselves are examples of the kinds of formulaic phrases relied upon by scribes tasked with describing fact patterns involving the operation of underlying anger, hatred, or wrath. Because these formulae are never explicitly defined within the rolls or contemporary legal treatises, the chapter also looks to a wide variety

of theological, pastoral, and literary texts to fill out a more comprehensive picture of jurors' likely understandings of anger. This is done with both confidence and circumspection, confidence due to the consistency observed in the treatment of anger in a variety of genres, circumspection due to the fact that some genres would have been far beyond the reach of the average medieval English juror. To take one example, Thomas Aquinas' *Summa Theologica* was not likely read by any jurors, many of whom were incapable of reading even in the vernacular. Nevertheless, Aquinas' writings directly influenced the authors of manuals for parish priests,⁹ who in turn transmitted ideas to the laity. Jurors, counting themselves among the post-Lateran IV faithful, gained exposure to ideas regarding anger both by listening to sermons and participating in the sacrament of confession. In fact, while Gower's five daughters of Ire, to be discussed below, made their home in the realm of literary imagination, they represented a skillful poetic distillation of ideas long in circulation in contemporary penitential practice.

Even before Lateran IV, which inspired an outburst of penitential texts geared at assisting parish priests with confessions, English scholars were writing about such issues thanks in part to the efforts of reform-minded bishops like Richard Poore.¹⁰ In his *Liber Poenitentialis* (1208-1213), written at Poore's suggestion a decade or two before Aquinas' birth, Robert of Flamborough devoted considerable space to the ire-related questions a priest might pose to elicit a full confession. Beginning with the simple question, "do you labor under ire?" (*Ira laborasti?*), the priest was urged to list the various forms ire might take:

⁹ See, e.g., Marc B. Cels, "Interrogating Anger in the New Penitential Literature of the Thirteenth Century," *Viator* 45:1 (2014): 212-213.

¹⁰ On Poore and his reforming agenda, see "Poore, Richard (*d.* 1237)," Philippa Hoskin in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004); online ed., ed. Lawrence Goldman, October 2009, <http://www.oxforddnb.com.proxy.lib.umich.edu/view/article/22525>, accessed March 30, 2014.

To ire pertain the following: impatience, indignation, injury, brawling, insult, blasphemy (when, namely, a person speaks against God or His saints), discord (when a person is bad-tempered, and cannot have peace with anyone), distress (when, namely, a person is always in some anxiety), rashness, rage (when a person is in fury in his home or wherever he is in charge; he strikes this one, he beats that one), shouting (when a person is given to yelling in his home or wherever he is in charge, now against this, now against that).¹¹

The priest was then to inquire whether the penitent had sinned in any of those varied ways. The vocabulary of ire was rich and wide-ranging, and included some emotions that we would not immediately associate today with anger, such as anxiety and blasphemy. Ire was also associated by Flamborough with men in positions of authority, namely heads of household and the like who might exercise anger toward those in their charge. In this way, Flamborough perhaps anticipated the attribute of “excellence” (*excellencia*) emphasized by Aquinas in describing persons most temperamentally inclined toward anger later in the century.¹² Flamborough’s categories of ire, like those of Gower writing in the vernacular well over a century later, capture the emotion’s presence in thoughts, words, and deeds alike. Written in Latin, Flamborough’s instructions were aimed for a literate audience who might then be expected to translate such questions into the vernacular for use in a confession setting.

¹¹ Robert of Flamborough, *Liber Poenitentialis*, ed. J. J. Francis Firth (Toronto: Pontifical Institute of Mediaeval Studies, 1971), 181 (book 4, ch. 4, De ira). (“Ad iram pertinent ista: impatientia, indignatio, injuria, rixa, contumelia, blasphemia (quando scilicet homo obloquitur Deo vel sanctis ejus), discordia (quando homo est dyscolus, nec potest cum aliquo pacem habere), luctus (quando scilicet homo semper est in anxietate quadam), temeritas, furor (quando homo se habet furiose in domo sua vel ubi ipse praeest; istum percutit, illum verberat), clamor (quando homo clamorus est in domo sua vel ubi ipse praeest, modo contra istum, modo contra illum).”)

¹² See Aquinas, *Summa Theologica*, vol. 2, 786 (Pt. I-II Q. 47, Art. 3).

John Mirk, writing his vernacular *Instructions for Parish Priests* in the late fourteenth century, most likely shortly after Gower's *Mirour*,¹³ also detailed the many-faceted nature of ire in his sample questions to be posed by priest to penitent:

Hast thou, for hate or for ire, any things set on fire? Hast thou any time been so wroth that thy wit has been gone? Hast thou, by malice of thy doing, raged toward thy neighbor in any matter? Hast thou in wrath and with strife grieved any Christian life? Hast thou, with words bitter and shrewd, harmed any man, learned or lewd? Hast thou, in wrath and evil heart, made any man to smart? Hast thou cursed or blamed, or any man to wrath tempted? Hast thou in wrath any man slain, or helped thereto by thy hand?¹⁴

Mirk's discussion of wrath touched upon many facets of the emotion, including its ability to transform a neutral act into an evil one, such that firesetting would become arson, for example; its close correlation with witlessness or inability to reason; its location within the heart; and its tendency to bring harm to others, due in part to its location on a slippery slope leading to homicide. These themes, and others, recur frequently in literary and religious sources and will be explored further below. Through questions like those posed by Flamborough and Mirk, thirteenth- and fourteenth-century confessors were trained to tease out anger's manifold manifestations in human thought and behavior, and in doing so taught penitents—jurors among them—how to recognize anger in their own person and in relationships with others.

¹³ Susan Powell argues that the *Instructions* may have been written earlier than either the *Festial* or the *Manuale sacerdotis*, which both exhibit concern with Lollardism that is comparatively absent in the *Instructions*. See Powell, Susan. "Mirk, John (fl. c.1382–c.1414)." In *Oxford Dictionary of National Biography*, online edition. Ed. Lawrence Goldman. Oxford: Oxford University Press, 2004. <http://www.oxforddnb.com.proxy.lib.umich.edu/view/article/18818>, last accessed December 4, 2013.

¹⁴ Peacock, Edward, ed., *Instructions for Parish Priests By John Myrc* (London: K. Paul, Trench, Trübner & Co., 1902), 35, lines 1137-1152. ("Hast þou, for hate or for yre, / Any þyngus set on fuyre? / Hast þow any tyme be wroth so / Þat þy wyt hath be a-go? / Hast þou, by malys of þy doynge, / Wrathþed þy neþbore in any þynge? / Hast þow in wrathþe and wyth stryf / I-greuet any crystene lyf? / Hast þow, wyþ wordes bytter & schrewede, / I-tened any mon, lered or lewede? / Hast þow, in wrappe & euel herte, / I-made any mon to smerte? / Hast þow I-corsed or I-blamet, / Or any mon to wrathþe I-taimet? / Hast þow in wrappe any mon slayn, / Or holpe þer-to by thy mayn?")

The penetration of a common corpus of ideas about anger through a wide-ranging hierarchy of literature, from the elevated Latin of Aquinas, to the less sophisticated Latin of sermon exempla, to the Anglo-Norman French of elite literary texts, to the more humble English vernacular of manuals for similarly humble parish priests, provides further evidence of a shared cultural understanding of the nature of emotion. Material evidence also hints at some of the ideas in circulation among those who attended Mass. Among the relatively few Old Testament scenes frequently found in English church frescoes was the image of the murder of Abel by his brother Cain, who killed out of jealousy and later experienced a violent death himself.¹⁵ Moreover, despite relatively low literacy rates, ideas circulated within families and among neighbors, both through stories shared around the hearth, as well as instances in which those who could read read to those who could not. This chapter will typically present examples from elite literature and place them in comparison with less elite texts, not making a claim, however, for a “trickle down” as opposed to a “percolate up” method of idea transmission. It will highlight a remarkable consistency in the approach to anger in elite and non-elite texts alike, suggesting that these sources can offer insight into jury mindsets on issues where the plea rolls are doggedly silent.

The History of Emotion

Medieval English anger, as an antecedent to monumental doctrinal developments, merits historical analysis. Its study promises to elucidate the historical contingencies upon which later black-letter doctrine was founded. At the same time, this chapter participates in a broader dialogue on the history of emotion, which historians have come to recognize as a meaningful subject for historical study. Although Lucian Febvre, responding to the exigencies of war,

¹⁵ Roger Rosewell, *Medieval Wall Paintings* (Woodbridge: Boydell, 2008), 33-34, 36.

famously called upon historians to produce histories of emotion in 1941,¹⁶ it was not until the turn of the next century that the history of emotion became a central focus of western historical scholarship.¹⁷ In recent decades, medieval historians have undertaken studies on such diverse issues as the role of enmity and hatred in interpersonal relations,¹⁸ royal anger as part of aristocratic expression and rulership practice,¹⁹ and the legislative and judicial regulation of expressions of grief and disdain.²⁰ The history of emotion has not yet provided a major focal point for historians of the common law, where histories have tended more toward the institutional, procedural, and doctrinal.

The history of emotion does have its dangers, including the risk of producing anachronistic accounts of human motivation and oversimplifying change over time. Due in large part to the influence of Johan Huizinga and Norbert Elias,²¹ historians have sometimes described a teleological progress toward greater civility and self-control. For the medieval period, an

¹⁶ See Barbara H. Rosenwein, "Worrying about Emotions in History," *American Historical Review* 107:3 (2002), 821.

¹⁷ For a wide-ranging discussion of approaches to the field by western and non-western scholars alike, see "AHR Conversation: The Historical Study of Emotion," *American Historical Review* 117:5 (2012), 1487-1531.

¹⁸ See, e.g., Robert Bartlett, "'Mortal Enmities': The Legal Aspect of Hostility in the Middle Ages," in *Feud, Violence and Practice: Essays in Medieval Studies in Honor of Stephen White*, ed. Belle S. Tuten and Tracey L. Billado (Farnham: Ashgate, 2010), 197-212; Daniel Lord Smail, "Hatred as a Social Institution in Late-Medieval Society," *Speculum* 76:1 (2001), 90-126.

¹⁹ See, e.g., Gerd Althoff, "*Ira regis*: Prolegomena to a History of Royal Anger," in *Anger's Past: The Social Uses of an Emotion in the Middle Ages*, ed. Barbara H. Rosenwein (Ithaca: Cornell University Press, 1988), 59-74; Paul Hyams, "What did Henry III of England Think in Bed and in French about Kingship and Anger?" in *ibid.*, 92-126; and Stephen D. White, "The Politics of Anger," in *ibid.*, 127-152.

²⁰ See, e.g., Carol Lansing, *Passion and Order: Restraint of Grief in the Medieval Italian Communes* (Ithaca: Cornell University Press, 2008); Sandy Bardsley, "Sin, Speech, and Scolding in Late Medieval England," in *Fama: The Politics of Talk and Reputation*, ed. Thelma Fenster and Daniel Lord Smail (Ithaca: Cornell University Press, 2003), 145-164.

²¹ See, e.g., Johann Huizinga, *The Autumn of the Middle Ages*, trans. Rodney J. Payton and Ulrich Mammitzsch (Chicago: University of Chicago Press, 1996); Norbert Elias, *The Civilizing Process*, trans. Edmund Jephcott (Oxford: Blackwell, 1994). On this issue of influence, including the rediscovery of Elias' concept of the civilizing process after the translation of his work, see Rosenwein, "Worrying about Emotions in History," 823, 826.

example of this approach may be found in Stephen Jaeger's *Origins of Courtliness*, which posits a civilizing process culminating in the twelfth-century flowering of courtly literature with its chivalric ideals.²² Elias' approach has influenced modern history as well: Carol and Peter Stearns, for example, argue that American history shows a discernable trend toward "growing restraint of anger," such that "Americans moved from relative unconcern with anger per se to an increasing insistence that the emotion be denoted and reproved."²³ According to the Stearns' narrative, "Western people before the eighteenth century were not particularly conscious of emotions, among other things lacking a vocabulary to discuss emotional experience articulately."²⁴ Responding critically to this work and others in her 2002 review essay, "Worrying about Emotions in History," Barbara Rosenwein summarized the prevailing narrative: "the history of the West is the history of increasing emotional constraint."²⁵ This chapter will not posit medieval England as a plot point on this hypothetical upward trajectory toward greater emotional control.

Another risk involved in the history of emotion lies in the subject matter's nebulous nature, which results in the use of novel terminology to corral an otherwise amorphous subject into analyzable shape. In their study of anger, for example, Carol and Peter Stearns coined the

²² See Stephen C. Jaeger, *The Origins of Courtliness: Civilizing Trends and the Formation of Courtly Ideals, 939-1210* (Philadelphia: University of Pennsylvania Press, 1985).

²³ Carol Zisowitch Stearns and Peter N. Stearns, *Anger: The Struggle for Emotional Control in America's History* (Chicago: University of Chicago Press, 1989), 2. If modern Americans tend to view themselves as an angry bunch, this is "a symptom of the national effort to repress and not the consequence of a particularly angry culture." *Ibid.*, 3. See also *ibid.*, 237 ("We are told, by people who should know better, that we live in an age of emotional liberation, one in which—at last—the damaging forces of age-old repressions can be identified and reversed. This is not the case. The modern impulse to tolerate wider emotional expression is highly selective; it carefully excludes anger.") In addition to relying on Elias, Carol and Peter Stearns also channel Huizinga with his emphasis on the premodern world as the childhood of man. See Rosenwein, "Worrying about Emotions in History," 825 and n. 19.

²⁴ Stearns & Stearns, *Anger: The Struggle for Emotional Control*, 14.

²⁵ Rosenwein, "Worrying about Emotions in History," 827.

term “emotionology” to capture “the conventions and standards by which Americans evaluated anger, and the institutions they developed to reflect and encourage these standards”.²⁶ My primary concern with the concept of emotionology is that, like other forms of academese,²⁷ it places a barrier between the non-specialist reader and the text. Moreover, it threatens to take us a step further from the actual language of the historical record. Also critical of the concept and of the Stearns’ approach to the history of emotion more generally, Rosenwein cautions that the methodology may not be as readily applicable to premodern subjects. She describes emotionology as “an unlovely word but extremely useful, with its scientific panache recalling ‘sociology’ or ‘psychology,’” yet argues that emotionology fails to accomplish its promised analytical work due to the underlying assumption “that what people *think* about feelings they will eventually actually feel.”²⁸ With regard to emotionology’s premodern limits, Rosenwein contends that, by requiring access to emotional standards, emotionology relies on popular advice manuals which, while non-elite, succeed only in revealing the emotional aspirations of the middle classes and limit the science of emotionology to the modern period, when such advice manuals became available.²⁹ Arguably, however, emotionology can be applied to medieval English evidence, insofar as confessor’s manuals can offer a parallel to middle-class advice manuals, and literary and legal sources can reveal some of the strategies and tactics, to borrow the language of Michel de Certeau,³⁰ employed by men and women on the ground in adapting

²⁶ Stearns & Stearns, *Anger: The Struggle for Emotional Control*, 14.

²⁷ Another example of such terminology, one which I will not explore here, is the notion of “emotional practices”, as discussed in Monique Scheer, “Are Emotions a Kind of Practice (and Is That What Makes Them Have a History)” A Bourdieuan Approach to Understanding Emotion,” *History and Theory* 51:2 (2012), 193-220.

²⁸ Rosenwein, “Worrying about Emotions in History,” 824 (emphasis in original).

²⁹ See Rosenwein, “Worrying about Emotions in History,” 824-825.

³⁰ See, generally, Michel de Certeau, *The Practice of Everyday Life*, translated by Steven Rendall (Berkeley: University of California Press, 1984).

these standards to their lived experience. Rosenwein's critique may be colored by her own work as an early medieval scholar, whose textual source base is necessarily more limited in scope than mine.³¹ Nevertheless, the second aspect of her critique—that emotionology may conflate exhortation with actual felt emotion—must be borne in mind when drawing conclusions about medieval English society from didactic and legal literature.

Complementing her critique with a critical intervention, Rosenwein recommends an approach that, like emotionology, requires new terminology: “emotional communities.”³² This method “takes into account the new non-hydraulic theories of emotions, focuses on more than power and politics, and recognizes the complexity of emotional life.”³³ Future histories of emotion, Rosenwein predicts, will produce a coherent narrative which “will not be a narrative based on the progress of (self-)control but rather on the interactions and transformations of communities holding various values and ideas, practicing various forms of sociability, and privileging various emotions and styles of expression.”³⁴ Rather than looking for a teleological outcome, historians might instead look for emotional diversity within a particular epoch and geographical space.

This concept of “emotional communities” serves as a reminder that attitudes toward anger and other extreme emotions may have differed dramatically in various geographical, temporal, and social contexts, such that Thomas Aquinas may not mirror the views of a parish

³¹ Her source base does include such materials as conciliar legislation, charters, hagiography, letters, histories, chronicles, and even funerary epitaphs, but it is comparably limited and therefore does not lend itself as readily to an approach like emotionology. For a description of her sources, see Rosenwein, *Emotional Communities*, 26.

³² One critic of this approach, Monique Scheer, argues that “community” can run into the same trouble as terms like “culture” insofar as they imply “a static system of shared values”. Scheer proposes using a more flexible concept like “emotional style”. See Scheer, “Are Emotions a Kind of Practice?”, 216.

³³ Rosenwein, “Worrying about Emotions in History,” 842.

³⁴ Rosenwein, “Worrying about Emotions in History,” 845.

priest in Northumberland, who may in turn not mirror the views of the king's closest advisors and justices, much less those of a juror in Dorset or a man involved in a brawl after curfew outside a London tavern. Moreover, any one of these individuals may belong to any number of distinct emotional communities. As Rosenwein describes it, people moved from one emotional community to another, "from taverns to law courts," for example, adjusting their emotional responses accordingly.³⁵ By adding nuance, Rosenwein's methodology avoids essentializing the emotional approach of any given time period or community, arguing instead for temporal and geographical diversity in experiences of emotion.

While I take Rosenwein's critique most seriously, this chapter will reveal that I nevertheless believe some generalizations may safely be drawn in the medieval English context, insofar as the surviving religious literature reveals a remarkable consistency in parish-level instruction after Lateran IV, and insofar as the common law system of itinerant justices imported a relatively uniform standard of felony adjudication to distant corners of the realm. Admittedly, the historical record can sometimes, through the formality and uniformity of its language, present an alluring aura of consistency that may disguise greater diversity on the ground.³⁶ Furthermore, as alluded to above, historians may conflate societal standards regarding an emotion like anger with the actual experience of emotion.³⁷ This is a particular temptation with regard to the

³⁵ Rosenwein, "Worrying about Emotions in History," 842, 844. For an example of what we might term an "emotional community," although this is not the language employed by him, see Stephen White's discussion of the collective anger and enmity displayed by a party to a bloodfeud in the Touraine c. 1100. Stephen D. White, "Feuding and Peace-Making in the Touraine Around the Year 1100," *Traditio* 42 (1986), 250.

³⁶ On this potential pitfall for the historian of the common law, see Hyams, *Rancor and Reconciliation*, 190. ("Clerks were expected to launder out the passions of the litigants who appeared in their courtrooms, to excise these as mere noise that tended to obscure the genuine 'legal' issues (a largely new idea) on which the judicial decisions were supposed to turn.")

³⁷ For a perspective on this as it relates to anger in American society, see Stearns & Stearns, *Anger: The Struggle for Emotional Control*, 13.

medieval evidence I have amassed: the religious guidance regarding anger is so widespread and consistent both in confessor's manuals and in popular literature, that one might easily assume it informed the ethos of the period in general, and defendants' behavior and jurors' attitudes in particular.

Bearing these risks in mind, this chapter will deal in some generalities that posit thirteenth- and fourteenth-century English society—and perhaps western Christendom more broadly—as an “emotional community” all its own. In the present chapter, I intend to combine the Stearns and Rosenwein approaches, although I will avoid using terminology like “emotionology” and “emotional communities” for the sake of reader accessibility. The Stearns' focus on social conventions and institutional responses designed to implement these standards can complement Rosenwein's emphasis on the great diversity of emotional experience among various communities of individuals in geographic and temporal space.

Anger's Operation in Medieval England

This chapter has taken shape due to the frequent appearance of references to anger and argument in the records of medieval English felony cases.³⁸ Just as coroners' inquests might refer to the type of weapon employed in a homicidal assault, and trial records might specify the nature and price of stolen goods, medieval English scribes also took pains to note when a felony had been preceded by long-standing hatred or resulted from a sudden argument. Anger mattered in the eyes of the law, yet anger also had a life outside the law. This chapter will simultaneously

³⁸ In one small volume of published coroner's rolls, references to quarreling and fighting appear throughout. See Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 16-17, 26, 29-30, 37, 67, 71-72, 74-75, 77, 97, 104, 105, 106, 107, 110. In the introduction to his volume on the 1238 Devon Eyre, Henry Summerson observes that most homicides were the result of quarrels among men of relatively low status, with domestic homicides rarely reported, by comparison. Summerson, ed. *Crown Pleas of the Devon Eyre*, xxix, xxxi.

shine a light upon appearances of anger in the plea rolls and reflect upon how anger was understood in the broader elite and popular culture of England.

Legal historians interested in anger's role in felony cases must necessarily look to culture given the fact that plea rolls and other legal records rarely provide the color we would need to identify instigators or allocate blame in a conflict, with the exception of self-defense narratives where blame is typically assigned in order to exculpate the alleged self defender. As Paul Hyams observes, "Only the workmanlike skills of plea-roll clerks expunge the accompanying passions from case records and so drive them mostly from our sight."³⁹ The legal record, in other words, fails to reveal to the legal historian either the accepted social conventions underlying emotional outbursts or the criteria upon which jurors would have assigned culpability in the wake of anger-fueled violence. This does not mean that these social conventions and jury considerations are entirely inaccessible. It does mean that a legal historian studying such issues must venture into speculative territory, positing conclusions about defendant behavior and juror attitudes from alternative legal sources as well as non-legal evidence such as religious manuals and popular fiction. This chapter, therefore, will venture into terrain that may strike the average lawyer-trained legal historian (a category within which I include myself) as so distant from the law as to strain credibility. Yet I believe that many of the mysteries yet unsolved behind the early common law system of felony adjudication—Why the relatively high acquittal rate? Why the lack of statutory development? Why call these incidents felonies at all, instead of merely homicides, thefts, arsons, and so forth?—may only be accessible if we take a step beyond the threshold of the legal historian's typical comfort zone. On the negative side, this leaves my legal analysis of anger open to far-reaching criticism, criticism that I welcome in order to open a

³⁹ Hyams, *Rancor and Reconciliation*, 162. On the phenomenon of frugality in record-keeping, see Butler, *Forensic Medicine in Medieval England*, 145.

broader dialogue among historians of the English common law. On the positive side, the material I will explore in the duration of this chapter—from old Irish penitentials to Aquinas, and from Chaucer to Gower—is incredibly rich and entertaining. Be patient, not wrathful, and come along.

An Etymological Excursion: The Language of Anger

Few, I suspect, would pay a high ticket price for an etymological excursion. Yet as with my earlier work on felony, some discussion of word meanings will help clarify the use of emotion words that may carry a different valence today. Etymology must be central to any history of emotion given the fact that emotion words may remain static over the centuries, while their meanings may change dramatically. At times, this chapter will interchange such words as ire, wrath, anger, and even hatred. This reflects the use of these terms in the primary sources, which often conflated, or at least treated as intimately related, these varied emotions. When the sources allow me to distinguish among them, I will do so, remaining faithful to the text where possible. Thomas Aquinas, for example, treated anger and hatred as two very distinct passions; while the former might be ennobling and rightful, the latter was entirely condemned.⁴⁰ Other writers, however, used these two terms interchangeably.

In Middle English, “ire” signified anger or wrath, or alternatively a jealous rage or even the wrath of God; it might also refer specifically to a fit of anger or anger’s personification, a common trope in prescriptive literature.⁴¹ These meanings tracked closely with the use of “ira” in Latin, which might refer to anger, rage, or indignation, as well as righteous anger or the wrath

⁴⁰ See, generally, Thomas Aquinas, *Summa Theologica*, vol. 2, translated by Fathers of the English Dominican Province (New York: Benziger, 1948), 782 (Pt. I-II Q. 46, Art. 6). See also Robert Miner, *Thomas Aquinas on the Passions: A Study of Summa Theologiae, 1a2ae 22-48* (Cambridge: Cambridge University Press, 2009), 276.

⁴¹ *Middle English Dictionary*, s.v. ‘ire’.

of God; it might also denote the physical effect of anger, or choler, and a grudge or resentment.⁴² The Latin “iracundus” described an individual prone to anger or aggression, inclined toward “iracundia” or characterized by “irascibilitas”.⁴³ In Anglo-Norman French—one of medieval England’s three primary languages alongside English and Latin—anger or wrath was typically signified by the word “ire”.⁴⁴

The Middle English “wrath”, a word of Germanic origin, was closely related to ire, insofar as texts might refer to Judgment Day as the “dai of ire” or the “dai of wrath”, or might signify sinful persons as either “children of ire” or “children of wrath”.⁴⁵ “Anger”, which had Old Norse rather than Latinate roots, carried a somewhat different valence of meaning, possibly referring to distress or agony, including the anguish of love, a meaning no longer in common use today, but also referring to a generally hostile attitude or surliness, resentment, rage, wrath, or a fit of anger.⁴⁶ Although also having its own distinct range of meaning, the Middle English “hate” (or “haine” in Anglo-Norman French, “odium” in Latin) often appeared in vernacular discussions of the sins related to ire, anger, and wrath. In fact, the *Middle English Dictionary* defines “hate” as the emotion of extreme anger or the deadly sin of wrath, while the *Anglo-Norman Dictionary* includes hatred and malice among the definitions of “haine”.⁴⁷ In other words, medieval England had overlapping semantic fields with regard to the issue of anger.

⁴² *Dictionary of Medieval Latin from British Sources*, Fascicule V, s.v. ‘ira’.

⁴³ *Dictionary of Medieval Latin from British Sources*, Fascicule V, s.v. ‘iracundus’, ‘iracundia’, and ‘irascibilitas’.

⁴⁴ *Anglo-Norman Dictionary*, s.v. ‘ire’.

⁴⁵ *Middle English Dictionary*, s.v. ‘ire’ and ‘wrath’; *Oxford English Dictionary* (3rd edition), s.v. ‘wrath’.

⁴⁶ *Middle English Dictionary*, s.v. ‘anger’; *Oxford English Dictionary* (3rd Edition), s.v. ‘anger’.

⁴⁷ *Middle English Dictionary*, s.v. ‘hate’; *Anglo-Norman Dictionary*, s.v. ‘haine’. A person accused of felony might allege that he or she had been charged with a crime out of “odio et atia”, typically translated as hate and spite. For example, a jury at a 1276 gaol delivery in Old Salisbury found that one John and his mother Joan, arrested for stealing and receiving a pot, respectively, had been indicted

Anger in the Plea Rolls: Fiction in the Archives?

We begin with the plea rolls. The medieval English common law made no explicit concession to anger or any other emotion in denoting the bounds of felony, with the possible exception of fear, which is often operative in self-defense narratives. The modern distinction between murder and manslaughter, often described colloquially as killing in cold versus hot blood, had no formal place in medieval English law.⁴⁸ Yet we know that anger mattered, insofar as parchment-conserving scribes bothered to highlight, in subtle ways, the operation of heated emotion in homicide cases. Rather than simply noting that one individual had fatally struck another, the plea rolls frequently specify that the perpetrator and victim had been fighting together (e.g., *litigaverunt adinvicem*), or that a dispute had arisen suddenly (e.g., *mota contentione*).⁴⁹ In other instances, a scribe might allude to ancient hatred (i.e., *antiqui odii*) existing between two individuals. Such phrases served no technical purpose, not being required to establish jurisdiction or otherwise perfect an indictment or private action. Nevertheless, they were conventional, insofar as one can find these same phrases employed across temporally and geographically diverse plea rolls. The phrases may not easily be matched with patterns of verdict outcomes. This is not due to the fact that these phrases were indeed interchangeable, but

because of the hatred (*pro hatia*) of two men. See Pugh, ed., *Wiltshire Gaol Delivery*, 46. Similarly, at the 1263 Surrey eyre, Eudo le Jop was found to have been appealed by Peter de Polesden of assault and robbery out of hate and spite (*odio et hatya*). Stewart, ed. and trans., *1263 Surrey Eyre*, 268. On the writ *de odio et atia*, see Hurnard, *King's Pardon for Homicide*, 79-83, 339-374. On the role of hatred in medieval Marseilles, see generally, Smail, "Hatred as a Social Institution," 90-126, arguing, in part, that litigants learned to temper their hatred due to the Roman-canonical provision allowing a lawsuit or a witness' testimony to be invalidated due to the existence of hatred.

⁴⁸ But see Green, *Verdict According to Conscience*, for the implicit effect of emotion and other sympathetic factors on medieval English jury verdicts.

⁴⁹ It is not entirely clear whether the very *litigare*, when used in felony records, routinely refers to a physical fight, as opposed to an argument or quarrel. This is difficult to discern in light of the formulaic nature of the records, although cases of *litigando* that make it into the coroners' rolls or plea rolls at the very least eventually devolved into a physical altercation. Although *mota* does not necessarily imply suddenness, this does seem to be the manner in which the word is used in felony narratives. See *infra*, n. 57 and accompanying text.

rather to the frustratingly incomplete nature of the plea roll evidence, analysis of which is complicated by the manifold factors that make a simple accusation-verdict calculus nearly impossible: felony suspects often fled before they could be arrested, preliminary accusations made by coroners' inquests or juries of presentment can seldom be matched with later verdicts, and records of verdicts rarely indicate the circumstances of the underlying felony accusation.

Nevertheless, I contend that these phrases were meaningful. They were employed formulaically and fairly consistently across time and geographic space in thirteenth- and fourteenth-century England. Some plea rolls contain examples of all these various forms of phrasing, suggesting that an individual scribe would have been choosing from this range of options in order to pigeon-hole a fact pattern to a corresponding formulaic description.⁵⁰ As such, these were consequential word choices made by scribes, who undoubtedly were trying to take more complicated fact patterns and fit them into the simplified formula most closely resembling those facts. These phrases, difficult to pin down without further evidence of their specific meaning, may be the predecessors to later categories such as *chaude melle* or chance medley, as well as to the doctrine of provocation, a foundation of the murder/manslaughter distinction. They may have signaled to jurors the gist of a homicide case, which would be particularly helpful if a trial followed months or even years after an initial coroner's report.⁵¹

⁵⁰ For an example of the use of varieties of anger-involved phrases, see *Calendar of Inquisitions Miscellaneous (Chancery)*, vol. 2 (1308-1348), (London: Her Majesty's Stationery Office, 1916), 113 (entry 85, describing a 1320 inquest's response to a writ inquiring into the cause of death of several men; two were described as killed due to "an old quarrel," and another on account of "insulting language".) One need only scroll through a particular plea roll, such as the following eyre roll from the reign of Edward I, to find some instances of "mota contentione" and others of "litigare" in the same roll. See <http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/>, accessed June 19, 2015.

⁵¹ Delays could be lengthy. Consider, for instance, the 1276 eyre case involving a homicide accusation brought against Ralph the Parmenter for the death of William Gille over twenty years earlier during an argument. Ralph had been living in the city in the intervening decades and was ultimately acquitted by a local jury. Weinbaum, ed. and trans., *London Eyre of 1276*, 11-12, no. 37. The delay in resolving another homicide case at the same eyre is indicated by the fact that all the neighbors had died by

My focus here will be on some of the commonplace phrases that signaled the presence of anger within a felony narrative. While honor-induced anger may appear most often in more elite, chivalric literature, this is not to deny that men and women of lesser social standing were also moved to violent action by anger, and that in some instances their stories elicited sympathy from a coroner's inquest or trial jury. As Natalie Zemon Davis, in *Fiction in the Archives*, has observed with regard to early modern France, one might find evidence of "male peasant honor" not in any explicit discussion of honor per se, but rather in coded language such as allusions to hats and hair, a reference to the trope of a peasant offended by having his hat knocked off his head or his hair pulled by an enemy, or in unspoken assumptions, such as "a peasant's right to a legitimate share in family property," a right vital enough "to arouse deadly anger."⁵² Of course, Davis's focus was on pardon narratives, while my focus here is on pre-trial and trial narratives, which would typically have been less obviously skewed to reflect positively on the accused's behavior.

One of the most common anger-related phrases employed by medieval English scribes was that of "an argument arising between" two individuals, usually involving some form of "*mota contentione*".⁵³ One coroner's roll entry from 1336, for example, records that an argument had arisen (*contencione mota*) between two men, William son of William Muschet and Thomas Holebrok, at a tavern. William struck Thomas with his hand, throwing him to the

the time it reached the ears of the justices. See *ibid.*, 13, no. 41. On this notion of the coroner's record as a mnemonic device, see Butler, *Forensic Medicine in Medieval England*, 272.

⁵² Davis, *Fiction in the Archives*, 38-39. On the relationship between honor and anger in ancient Greece particularly, see William V. Harris, *Restraining Rage: The Ideology of Anger Control in Classical Antiquity* (Cambridge: Harvard University Press, 2002), 60.

⁵³ Occasionally one will instead find the phrase "lite mota", *lite* being a form of *lis*, meaning lawsuit or quarrel. See, e.g. Alan Harding, ed., *The Roll of the Shropshire Eyre of 1256* (London: Selden Society, 1981), 225-226.

ground. Thomas, standing back up, took out his knife and issued a fatal wound to William, killing him feloniously (*felonice*).⁵⁴ Thomas fled but was soon captured.

The inquest narrative, being a pre-trial record, fails to satisfy our curiosity as to the fate of Thomas, and I am not aware of any corresponding trial record. It does reveal that William and Thomas had been drinking together before the argument arose, a common scenario in the coroners' rolls;⁵⁵ alcohol may have fueled the conflict. If the narrative holds true, William struck Thomas with his hand alone, although the blow must have been severe to leave Thomas on the

⁵⁴ For an image of the original Latin record, see JUST2/17 AALT 0012 (1336), accessed January 28, 2015, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no17/aJUST2no17fronts/IMG_0012.htm. This case also appears at JUST 2/17 AALT 0033 (1336), accessed June 19, 2015, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no17/aJUST2no17fronts/IMG_0033.htm. The deceased may have been a relation of an attorney by the same name who appears in the Close Rolls on business related to the nearby port of Boston. See *Calendar of the Close Rolls*, Edward III, vol. 9, 1349-1354, 8 (entry for Feb. 23, 1346). Here is my full translation of the first case record: "It happened in the vill of Lynton Magna on the Wednesday immediately before the feast of Saint Edward the King in the tenth year since the succession of King Edward III [i.e. 1336] that William son of William Muschet of Lynton Magna was found killed (*inventus fuit interfectus*)... The jurors say upon oath that on Tuesday immediately before the feast of Saint Edward in the above stated year the aforesaid William son of William Muschet and Thomas Holebrok of Ashdon were together at tavern (*simul ad tabernam*) in the home of Roger Landet in Lynton Magna, and an argument arose between them (*contencione mota inter eos*). The aforesaid William son of William struck (*percussit*) the aforesaid Thomas with his right hand and threw him to the ground (*proiecit eum ad terram*). And the same Thomas, in rising from the ground (*in surgendo de terra*), took out his knife priced at one pence and wounded (*vulneravit*) the aforesaid William son of William in the throat with the aforesaid knife and feloniously killed him (*ipsum felonice interfecit*). And they say that the same Thomas Holebrok fled, and men from the vill of Lynton Magna were pursuing him until the vill of Ashdon in the County of Essex in the liberty of the Bishop of Ely, and they captured him (*eum ceperunt*) and released him to the bailiff of the same aforesaid liberty. They also say that on the day the felony was perpetrated the aforesaid Thomas Holebrok did not have lands or rents, goods or chattels, etc..."

⁵⁵ For example, a similar case came to the attention of the king's itinerant justices at the Surrey Eyre in 1279. William Deny and William Accre had been together at a tavern when an argument arose between them (*mota contentione inter eos*). The former William killed the latter. The case never made it to trial because William took sanctuary and abjured the realm. More remains unknown than not, but William's flight to sanctuary may indicate a likelihood that trial would have led to conviction and hanging. JUST1/876 AALT 9663 (1279), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no876/aJUST1no876fronts/IMG_9663.htm (penultimate entry). For additional examples of this language within this same eyre roll, see the case of John and William (*incipit*: "Johannes de Ketecrofte et Willhelmus...") and another case involving three unknown strangers (*incipit*: "Tres extranei ignoti..."). See also Just1/664 AALT 3768 (1280), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3768.htm (Nottinghamshire Eyre case with the *incipit* "Rogerus filius Ricardi de Gyngoley..." involving an argument arising among three men together at a tavern; Roger, who struck another Roger with an axe in the head, was probably wise to flee town in the incident's wake).

floor. We also know that Thomas responded by drawing his knife, possibly going straight for the jugular. Based on other cases, we can speculate that, barring a rewrite of the altercation between William and Thomas (i.e., changing the narrative to place Thomas' life more immediately at risk), Thomas would have failed if he tried to plead self-defense. Typically the use of disproportionate force, such as wielding a knife in response to a punch, would have been fatal to a self-defense plea.⁵⁶

One other conclusion we might tease out from this relatively unimaginative entry on the coroner's roll is that the reference to "*contencione mota inter eos*" signaled something of import to a potential future trial jury. What may appear to be boilerplate could be an *aide-mémoire*, helping jurors and court officials to remember exactly which homicide they were discussing if a trial followed months or even years after the initial coroner's report. For one thing, it rules out the possibility of a premeditated homicide, which was further reinforced by the fact that the deceased struck first, and that the killer, Thomas, drew his knife only after having been pushed to the ground. Furthermore, although we know the men had been drinking together, and that such behavior lent itself to surges of emotion, there is something of the element of chance or the unexpected encapsulated in the word "*mota*", a passive form of the verb *movere*, to move, set in motion, or disturb.⁵⁷ Rather than saying William started an argument with Thomas, or vice versa, the choice of phrasing suggested that the commotion had arisen suddenly, as if of its own accord, leaving the assignment of blame more ambiguous.⁵⁸

⁵⁶ See Hurnard, *King's Pardon for Homicide*, 92-93.

⁵⁷ See *Lewis & Short*, s.v. "moveo".

⁵⁸ Naomi Hurnard also suggests that phrases like "*mota contentione*" and, she adds, "*orta lite*" left some ambiguity. See Hurnard, *King's Pardon for Homicide*, 240. ("It was precisely in these fatal free fights that it was most difficult to determine what degree of responsibility for starting the scrap or for turning it into something more serious rested on the survivors.")

To my knowledge, no one has yet undertaken a thorough analysis of how cases with this phrasing played out in terms of final verdicts; the task would be monumental. Naomi Hurnard, in her study of the royal pardon, observed that when pardons were secured in cases of slaying *mota contentione* but without reference to self-defense, it was typically with the assistance of a patron. “Thus help was secured in a very high proportion” of these cases, Hurnard concluded, “and this suggests that there was real need for it.”⁵⁹ Hurnard argued that the claim of an excusable slaying might be plausible, but that it would have been unwise to rely on such a claim without outside help. In the case of William and Thomas above, a self-defense claim would have been hard to make given Thomas’ use of a knife in response to a fist; presumably Thomas might have had to engage an influential patron if he wished to secure a pardon based on the narrative as presented in the coroner’s roll.

Hurnard further argued that in cases where it was impossible that a killing resulting from a fight had been in self-defense, juries inclined to acquit might “fall back on the notion of a fortuitous cause—a chance rather than an accident in the modern sense.”⁶⁰ Malice aforethought might be downplayed according to Hurnard if the parties were strangers to each other who quarreled over a small matter, thereby ruling out long-standing enmity.⁶¹ This may be the case, but it seems that coroners’ rolls and eyre records that use the phrase ‘*mota contentione*’ do not often describe the actors as strangers explicitly.⁶² On top of that, however, the “man who killed

⁵⁹ Hurnard, *King’s Pardon for Homicide*, 240-241

⁶⁰ Hurnard, *King’s Pardon for Homicide*, 94.

⁶¹ Hurnard, *King’s Pardon for Homicide*, 94. For one “*mota contentione*” case that may involve strangers, namely, three overnight guests, including a married couple, in what was likely a tavern, see Page, ed., *Three Early Assize Rolls for Northumberland*, 76.

⁶² To offer an example to the contrary, the following homicide case involved a sudden fight (*mota contentione*) among three men, all of whom were from the same town and two of whom were brothers. No verdict is available since the alleged perpetrator fled town after the victim died. See Just1/664 AALT 3769 (1280), accessed August 3, 2014,

mota contentione needed to be able to show that he had not been the aggressor but a reluctant participant.”⁶³ Like Hurnard, I am inclined to draw a connection between chance medley and killings resulting from “*mota contentione*” fact patterns. However, Hurnard emphasized the importance of the parties being strangers to each other, while I would contend that the element of chance involved in *mota contentione* cases was present whether or not the parties were strangers.⁶⁴ Two acquaintances or friends drinking in a tavern, for instance, might have an argument arise suddenly between them, just the same as two strangers might. What made it a sudden argument and not otherwise was the absence of pre-existing enmity or hatred, not the level of familiarity between the individuals.

While “*mota contentione*” raised an element of passivity and chance, another common phrase evoked anger in a more active sense. Frequently the verb *litigare* was used to describe a

http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3769.htm (Nottinghamshire case with the *incipit* “Rogerus filius Ricardi de Gryngoley, Rogerus Shyp de eadem et Willelmus frater eius...”). Similarly, a case from Bedfordshire in 1272 described a homicide resulting after a quarrel arose between two men, part of a larger band of thieves that had been offering a pelt for sale earlier that day throughout the town of Dunton (Beds.), clearly not strangers to one another. See Hunnisett, ed. and trans., *Bedfordshire Coroners’ Rolls*, 48, no. 108. See also *ibid.*, 71, no. 159 (quarrel between two brothers resulting in homicide). In another contemporary case, a quarrel arose between two familiars, leading to a fatal attack; before the man died, however, he told his confessor that he died from illness and not from the wound, most likely attempting to spare his friend’s life. Royal authorities likely took a less sympathetic view; although the coroner’s inquest had taken the dying man’s word at face value, the eyre justices ordered the alleged killer, who had fled, to be exacted and outlawed. See *ibid.*, 50-51, no. 115. For another homicide case invoking “*mota contentione*” and involving two men from the same town, with the perpetrator fleeing after the killing, see Page, ed., *Three Early Assize Rolls for Northumberland*, 97.

⁶³ Hurnard, *King’s Pardon for Homicide*, 95.

⁶⁴ Hurnard, *King’s Pardon for Homicide*, 95. (“The idea of a chance medley or chance encounter between strangers was not the only form in which the element of fortuity could be introduced into cases of what was primarily self-defense. They could be emphasized with the object of ruling out premeditation and pre-existing hatred, but some untoward and unintended happening in the course of a fight, or, better still, in the course of flight and pursuit could also be asserted in the hope of convincing the king or his justices that the slayer had no immediate intention of killing even when under sustained attack, that only the intervention of chance had foiled his attempt to persuade his assailant to desist or to elude him altogether.”) For examples of *mota contentione* cases involving familiars, see Hunnisett, ed., *Bedfordshire Coroners’ Rolls*, 48, 50-51; Page, ed., *Three Early Assize Rolls for Northumberland*, 97.

conflict leading to a homicide. Although the primary meaning of litigare was “to go to law, to litigate,” much as it is today, the verb had a secondary meaning, “to quarrel, argue, dispute.”⁶⁵ One assumed the risk of a felony conviction and hanging when engaging in a fight. This does not mean that medieval English individuals eschewed fighting, but it most certainly did inspire many to flee town or seek sanctuary in a scuffle’s aftermath.⁶⁶ To stay behind could be deadly. In the 1279 case of William Faber, for example, William was hanged, perhaps summarily, before the justices itinerant. According to the record, William and Alan fought together (*litigaverunt ad invicem*), and Alan died immediately after William struck him on the head with a pickaxe. William was immediately captured and hanged before the justices, and the record notes that he had chattels valued at 21 shillings as well as some landed property.⁶⁷

⁶⁵ *DMLBS*, s.v. litigare. Other phrases that appear in felony records include “inter se certaverunt,” meaning “they fought among themselves”; and “contendebant adinvicem”, or “they were disputing together”. See, e.g., Harding, ed., *Shopshire Eyre of 1256*, 226-228, 234-235, 239, 241-243, 265-266.

⁶⁶ See, e.g., the 1263 Surrey case over the death of John de Denenesbire, who been fighting (*litigando*) with Thomas le Soper, who immediately fled to a church, admitted the homicide, and abjured the realm. Stewart, ed. and trans., *1263 Surrey Eyre*, 250-251, no. 516. See also *ibid.*, 258, no. 535.

⁶⁷ For the manuscript image, see JUST1/876 AALT 9658 (1279), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no876/aJUST1no876fronts/IMG_9658.htm. The record is brief enough to repeat in full: “William Faber [and] Alan Land fought together (*litigaverunt ad invicem*)...such that the aforesaid William struck (*percussit*) the aforesaid Alan with a certain pickaxe in the head so that he immediately died...And the aforesaid William was immediately captured and hanged before the assigned justices, his chattels valued at 21 shillings for which the sheriff will respond. He also had lands...and waste of 20 shillings for which the sheriff will respond. No Englishry. Judgment is murder on the hundred.” For other instances of felony cases employing the verb “litigare”, see JUST1/876 AALT 9663 (1279), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no876/aJUST1no876fronts/IMG_9663.htm (Surrey Eyre case with the *incipit* “Willelmus Wolgar et Radulphus de Herewaldesle litigaverunt...”; William was outlawed after fleeing); JUST1/664 AALT 3769 (1280), accessed June 16, 2015 http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3769.htm (Nottinghamshire Eyre of 1280-1281, a case with the *incipit* “Robertus filius Andrei de Grane et Willelmus filius Henrici...” and involving a fight within a house leading to death by an axe blow to the head, and another beginning “Radulphus filius Rogeri de Grene et Galfridus filius Ricardi de eadem litigaverunt adiuncte...”, similarly involving a fatal blow to the head; Ralph fled after the incident and was outlawed at the eyre). See also Page, ed., *Three Early Assize Rolls for Northumberland*, 89 (describing a homicide following from Richard Faber and Adam son of Robert fighting together (*litigaverunt adinvicem*)).

Typically terse, this entry does not reveal the nature of the argument, the existence of preexisting enmity, or even the identity of the instigator of the fight.⁶⁸ It does give the impression, however, of lop-sided and excessive force; it is unusual to read about an attack with a pickaxe, and also somewhat rare for a homicide victim to die on the spot. While the record tells us relatively little, it does reveal that William held land and would therefore have been known locally prior to the incident. It is not clear whether there had been direct witnesses, or whether perhaps William had confessed. The fact of his hanging suggests that there had been little doubt as to William's culpability. Frequently, in cases involving a homicide preceded by quarreling (*litigando*), the alleged perpetrator fled either immediately after the attack or once the victim had died.⁶⁹ While one might speculate that cases invoking *litigare* might not involve sudden encounters such as those described as *mota contentione*, no such generalization can safely be drawn.⁷⁰ In one case described in a 1268 Bedfordshire coroner's roll, two brothers, Henry and William, sons of Richard Carpenter of Goldington, quarreled (*litigaverunt*) over a

⁶⁸ In its formulaic language, the entry reveals that neither the first person to see Alan's corpse nor the four nearest neighbors were suspected of involvement (a portion of the entry I did not include above), and that the locality had to pay a murder fine because Alan had not been shown to be of English, as opposed to Franco-Norman, descent. It is curious that the murder fine had not been waived given the successful capture of William. Regardless, the record provides little information of assistance to the historian interested in underlying anger. On the editing of self-defense cases in particular, see Hyams, *Rancor and Reconciliation*, 190. ("Yet every plea of self-defense was capable of concealing a history of tit-for-tat rancor and violence. It is easy to imagine judges insisting on the exclusion of the personal histories that might have revealed that the alleged malefactors, the perpetrators of appeals and indictments, had a good claim to be considered the true victim.")

⁶⁹ See, e.g., JUST1/664 AALT 3777 (1280), accessed August 3, 2014, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3777.htm (case with the *incipit* Willelmus Cotus de Clyda...); JUST1/664 AALT 3782 (1280), accessed August 3, 2014, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3782.htm (case with the *incipit* "Hugo filius Syman de Cotum et Ricardus Freman de eadem..."). For another example of flight, in this case after the homicide of a man who had tried to break up two men who had been fighting (*litigaverunt*), see Stewart, ed., *1263 Surrey Eyre*, 313. See also Page, ed., *Three Early Assize Rolls for Northumberland*, 95, for an additional *litigare*-flight combination.

⁷⁰ For a 1256 case involving a chance meeting resulting in a scuffle, described using the phrase "litigaverunt adinvicem," see Page, ed., *Three Early Assize Rolls for Northumberland*, 70.

mere halfpenny lent by one to the other. Henry died the day after William struck him on the head with a stick. The coroner's roll entry suggests that the inquest jurors may have been unsure how to handle the situation: although they described William as giving the fatal blow, they also stated that the Henry died "by misadventure" (*per infortunium*).⁷¹ William was ordered to be arrested, but his fate is not known.

Occasionally, both these phrases were combined to describe a particularly contentious incident. At the 1329-1330 Northamptonshire Eyre, for example, Simon Osbern appeared in court in response to an indictment, and the jurors described how Simon had quarreled with the deceased, Nicholas fitz Simon, on the way to a tavern.⁷² A fight ensued (described as: *litigauerunt ad inuicem et mota contencione inter eos*), and Nicholas struck Simon's head with an ashen staff. Although Simon managed to stand and flee, Nicholas pursued him and, as the standard self-defense formula indicates, intended to kill him (*ad ipsum Simonem interficiendum si potuisset*). Caught between two houses with no means of escape, Simon struck back at Nicholas with a small pole-axe, killing him on the spot. The jurors were clear in indicating that Simon acted to save his life, and not in felony or malice aforethought (*non per feloniam aut maliciam precogitatum*). Simon, as a result, was pardoned. While an argument alone would not excuse homicidal behavior, an argument that led someone to homicidal behavior could provide a partial excuse if it resulted in an act of homicide purportedly driven by self-preservation.

In rare instances, scribes might employ the language of discord in describing the underlying dynamic to a homicide. In a 1279 eyre case, for example, the itinerant justices heard about a vengeful homicide perpetrated by one Elyas Duballe, servant (*garçon*) of Henry Foun.

⁷¹ Charles Gross, ed. and trans., *Select Cases from the Coroner's Rolls, A.D. 1265-1413* (London: Bernard Quaritch, 1896), 11-12.

⁷² Sutherland, ed. and trans., *Eyre of Northamptonshire*, vol. 1, 164.

On account of some discord (*pro quadam discordia*) between Elyas and Henry, the servant set fire to Henry's home. A woman named Agnes de Warre as well as Henry's daughter Alice were burned (*combuste fuerunt*) in the house, and Elyas immediately fled the scene.⁷³ Elyas' story could be mistaken for a cautionary tale out of a sermon or confessor's manual, illustrating how unresolved discord and anger could erupt in violence, in this case aggravated by Elyas' lashing out not only against his master but also indirectly and perhaps unintentionally against innocent women in the lord's household.

Similarly, a 1300 Bedfordshire eyre case used the verb *contendere* to describe a fatal disagreement between a husband and wife. The eyre record notes only that William le Swon of Bedford had been quarreling (*contendebat*) with his wife Isabella, whom William stabbed in the back while she was preparing his bed for him.⁷⁴ Having taken flight, William was suspected by the eyre jury and outlawed, thereby forfeiting his chattels. The preceding coroner's record offers astonishing insight into the source of William's discord with Isabella.⁷⁵ Namely, Nicholas had returned home and grown irritated when his daughter let him know that Isabella was at Robert Asplon's house, giving milk to Robert's son. Nicholas felt that Isabella was spending more time at Robert's home than her work as a nursemaid required, and he therefore went in pursuit of her and told her to return home to bed. As the trial record produced at the eyre confirms, Nicholas allegedly stabbed Isabella in the back while she was preparing his bed for him. Nicholas' outlawry suggests that violent resolutions to spousal disharmony were not tolerated in this Bedfordshire community, particularly when violence rose to the level of homicide.

⁷³ JUST1/876 AALT 9669 (1279), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no876/aJUST1no876fronts/IMG_9669.htm.

⁷⁴ See JUST1/26 AALT 899 (1300), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no26/bJUST1no26dorses/IMG_0899.htm, and Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 105, no. 255.

⁷⁵ See Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 105, no. 255.

In his work on the bloodfeud in the Touraine, Stephen White observes that a homicide alone did not necessarily give rise to vengeance. Rather, a feud often reflected pre-existing enmity between the two parties.⁷⁶ This may be what underlies references to long-standing hatred or wrath in medieval English jury narratives. In a case of self-defense from 1309, for example, the jury indicated that Thomas le Shepherd, the homicide victim, had nursed ancient hatred (*antiqui odii*) toward William Boton. It is unclear whether the long-standing hatred was mutual, but according to the narrative the ratcheting up from hatred toward violence was a one-sided affair, damning to Thomas' memory. Seeing William on the road, Thomas lay in wait intending to kill him. As William drew near, Thomas jumped from hiding and attacked him with a staff; William raised the hue and fled. Followed by the murderous Thomas, William found himself cornered between a hedge and a dike. Unable to flee further and fearing his imminent death, he struck Thomas a single time on the head, inflicting a fatal injury. Employing the typical self-defense formula, the jurors stated that William did not kill Thomas in assault or felony aforethought (*insultu seu feloniam precogitatam*) but rather in defending himself and avoiding his own death. William, who did not flee, was remanded to gaol to await the king's pardon.⁷⁷ In this instance, and many others like it,⁷⁸ the jury presented the homicide victim as acting out of

⁷⁶ See White, "Feuding and Peacemaking in the Touraine," 249. See also Hyams, *Rancor and Reconciliation*, 193-194, for references to long-standing hatred.

⁷⁷ JUST3/1_1 AALT 0050 (1309), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no1_1/bJUST3no1_1dorses/IMG_0050.htm. For another example of this language of ancient hatred, see JUST2/4 AALT 0099 (1276), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no4/IMG_0099.htm (with the *incipit* "Contigit apud Scotfolde die Jovis proxima..."). And for a 1256 case framed as self-defense based on an attack by the deceased, motivated by sudden yet long-standing conflict ("quadam contentione inter eos mota ex antiquo"), see Page, ed., *Three Early Assize Rolls for Northumberland*, 322-323.

⁷⁸ In one colorful case from 1289, the homicide victim, chaplain Hugh de Weston, was said by the jury to have hated ("odio habebat") the accused for some time "because he sang well and desired to have the love of certain women whose love the said Hugh very much wished to have". Alan B. Somerset, ed., *Records of Early English Drama: Shropshire* (Toronto: University of Toronto Press, 1994), vol. 1 (The Records), 10-11 and vol. 2 (Editorial Apparatus), 519-520.

long-standing enmity, which had boiled over into premeditated violence, and portrayed the self-defender as comparably restrained and peaceable, stirred to violence only to avert his own death.

In some instances, a scribe might add additional verbiage to emphasize the damning nature of a homicide involving ancient hatred. In a late thirteenth-century Bedfordshire case, for example, the description of an attack carried out *pro antiquo odio* was accentuated with the adverb *nequiter* (evilly) modifying the verb *insultavit* (assaulted).⁷⁹ Likewise, in the clause enumerating chattels, the alleged killer, Geoffrey Scot, was identified as “the said felon” (*predictus felonus*), thereby emphasizing his preordained guilty state. Such details appearing in a coroner’s roll might have sealed the defendant’s fate should the case have proceeded to trial. Furthermore, local knowledge of pre-existing hatred between two individuals might lead to a person’s arrest on suspicion of felony. For example, in a 1270 Bedfordshire case, a coroner’s inquest stated that they suspected a man named Gilbert of having brutally killed Robert Gomelot, going so far as to cut off two fingers and nearly sever his left arm. Their suspicion was due to their knowledge that “there was previously a quarrel between them and they had a hatred of each other.”⁸⁰ In another Bedfordshire homicide case from 1276, Geoffrey son of William Scot of Stotfold, a smith, was accused by a coroner’s inquest of having killed Stephen son of Geoffrey Yve of Stotfold “because of an old hatred”, going so far as to split his head to the bone, gouge an

⁷⁹ See Just2/4 AALT 0099 (1276), accessed June 16, 2015 http://aalt.law.uh.edu/AALT7/JUST2/JUST2no4/IMG_0099.htm (case with the *incipit* “Contigit apud Scotfolde die Jovis proxima post festum sancte Trinitatis...”)

⁸⁰ Hunnisett, ed. and trans., *Bedfordshire Coroners’ Rolls*, 26. See also *ibid.*, 37-38, for a case where two men were suspected of a brutal homicide by an inquest jury because one of the men had threatened the deceased’s life less than a week prior to the incident.

eye, and sever his tongue.⁸¹ Defendants might also use accusations of hatred defensively to counter a felony allegation.⁸² Beware the neighbor nursing an ancient grudge.

Even where anger might seem to be an appropriate response to the situation at hand, plea roll evidence suggests an unwillingness to rely on righteous anger as a defense to felonious homicide. In a salacious homicide case from 1311, the jury narrated how Robert Mahen, the indicted, had left his wife Alice and Richard de Fenlake alone while engaging in local business. Later, failing to find Alice at home, Robert went looking for her and found her alone with Richard (*solum cum sola*) in a field off the highway, “hiding and illicitly and dishonestly sitting and speaking together”.⁸³ Robert accused Alice of committing adultery (*adulterium*) with Richard and, in order to castigate her, struck her in the face with the palm of his hand, at which point Alice cried out for help to Richard.⁸⁴ Matters quickly escalated, with Richard rushing toward Robert, sword drawn, while Robert, fearful (*metuens*) and wishing to flee but pursued through the field by Richard, eventually responded in kind. Fearing for his life, according to the jury narrative, Robert raised the hue and ultimately issued Richard a fatal blow. The jury specified that Robert did not kill Richard through felony or malice aforethought (*per feloniam aut maliciam excogitatam*) but only in defending himself and avoiding his own death (*se ipsum*

⁸¹ Hunnisett, ed. and trans., *Bedfordshire Coroners’ Rolls*, 98-99. The killer may have been incensed by the fact that the deceased was walking home with the irons for his plough, which had been crafted by another local smith.

⁸² For an appeal of rape leading to acquittal due to a countercharge that the appeal was inspired by “odium”, see Stenton, ed. and trans., *Rolls of the Justices in Eyre for Yorkshire*, 250-251. See also *ibid.*, 266-267 (for an appeal of maiming in which the accused said the appeal was brought “per odium et atyam” on account of a pending case of novel disseisin), 268-272 and 273-274 (for additional accusations that an appeal was undertaken “for hatred and spite”).

⁸³ JUST3/1_1 AALT 0055 (1311), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no1_1/bJUST3no1_1dorses/IMG_0055.htm. (“...absconditos et illicite et inhoneste adinvicem consedentes et colloquentes...”)

⁸⁴ *Ibid.* (“...causa castigacionis cum palma sua semel percussit ipsam Aliciam uxorem suam in facie...exclamando petiit auxilium a predicto Ricardo...”)

defendendo et mortem suam propriam evitando). Thus, despite the fact that Robert would have reasonably been angered with Richard, the jury did not make an argument based on such righteous anger in recommending that Robert be returned to gaol to await the king's pardon. In fact, the jury narrative suggests that Robert's anger was directed initially toward his wife, at whom he lashed out first, more so than at Richard. Rather, the jury relied on the typical self-defense formula. Admittedly, the background facts may have placed Robert's predicament in a more sympathetic light and influenced the jury in choosing to issue a verdict of self-defense. Moreover, the narrative here may reflect the white-washing of Robert's story by a sympathetic jury.⁸⁵ This required that the verdict be phrased in terms of necessity rather than anger. If the narrative concedes that Robert was compelled to kill by emotion, it was fear and not anger that was allegedly at work.⁸⁶ In this way, the common law of felony reflected the long-standing tradition of approaching the issue of anger, even apparently justified anger, as a cause for circumspection.

The complexities of anger made jury decision-making difficult. In a 1272 Bedfordshire case, William son of William Fraunceys was collecting his cattle along with his 10-year-old son when he encountered Ranulf Bene. The two men argued suddenly (*mota contentione*) over seisin of the cattle, and ultimately Ranulf struck William a fatal blow above the ear. Faced with making sense of the incident, the coroner's jury recounted the killing as having occurred by misadventure, in self-defense, and unwillingly.⁸⁷ One senses that the inquest jury simply did not

⁸⁵ See, generally, Green, *Verdict According to Conscience*.

⁸⁶ This is a reverse of the Stoic views of Seneca, who argued that fear (*timor*) led to flight (*fugam*), while anger led to assault (*impetum*). Seneca, "De Ira," I, in *Moral Essays*, transl. Basore, 172-173.

⁸⁷ Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 29-31. I rely here on Hunnisett's synopsis of the records. One faded eyre entry regarding this case may be found at JUST1/10 AALT 0802 (1272), accessed August 3, 2014, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no10/aJUST1no10fronts/IMG_0802.htm.

know what to make of the facts. The crown took a harsh view of the matter and quickly began granting away the possessions of Ranulf, who was outlawed at the next eyre.⁸⁸ And in another Bedfordshire case, a favorable coroner's narrative was replaced with a more damning story at the eyre. Brother Richard from Newnham priory had come across Philip son of Nicholas le Wannere gathering grain in a field and, according to the coroner's inquest, had "jokingly" told him that it was the prior's corn.⁸⁹ He threw a stone "in jest," but it accidentally struck Philip on the head, inflicting a fatal wound. While the inquest narrative painted the incident in a favorable light, the eyre found that the lay brother had been moved by anger when he threw the stone, and that he had consequently been stripped of his vestments and expelled from the priory. In this instance, anger was used to inculcate a person previously exculpated by a comparably sympathetic coroners' inquest.

If the above examples from the plea rolls leave the reader confused as to the extent to which anger might be an exacerbating or alleviating factor in guilt assessment, rest assured that such is indeed the lesson to be drawn from the legal record. English felony law had no simple answer as to how the factor of anger should affect trial outcomes, leaving this matter largely to jury discretion. In contrast to the later development of provocation doctrine, with its tidy reliance on a mitigating notion of anger as "loss of self control" by the seventeenth century, medieval understandings of anger reflect complexity and contradiction, making assessments of anger-fueled homicidal actions dependent upon the jury's interpretation of the circumstantial facts surrounding the defendant and the deceased both as individuals and in relationship with each other. While felony law made explicit concessions in cases involving insanity, infancy, and self-defense, it made no comparable exceptions for anger. Yet anger mattered, as indicated by

⁸⁸ See Hunnisett's notes on the case at *Bedfordshire Coroners' Rolls*, 30.

⁸⁹ Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 100-101.

scribes' frequent use of formulaic phrases to point to its operation in homicide fact patterns. An exploration of the treatment of anger in non-legal sources helps to explain why anger mattered, and why felony law offered no simple answers as to its impact on verdicts.

Ire in Gower's *Mirour de l'Omme*

In striking contrast to the fairly limited vocabulary of anger employed in the plea rolls, late medieval English allegorical writing introduced an array of anger-related terminology. Writing in the 1370s, for example, English poet John Gower (c. 1325-1408) played upon this rich vocabulary of anger and hatred in his *Mirour de l'Omme* (Mirror of Mankind) or *Speculum Meditantis*, an Anglo-Norman poem containing personifications of anger and other emotions. Although the *Mirour* survives in a single manuscript copy, and therefore cannot be assumed to have had a wide readership, it nevertheless offers an unusually comprehensive window onto late fourteenth-century conceptions of the semantic range of various words related to anger. Although emotions like anger, ire, wrath, and hatred were often discussed interchangeably in contemporary literature and legal records, Gower presented these various passions as a wide-ranging panoply of related but nevertheless distinct phenomena in his elaborate discussion of *les cinq filles de Ire*, the five daughters of Ire: Melancholy (*Malencolie*), Quarrel (*Tençoun*), Hatred (*Hange*), Discord (*Contek*), and Homicide (*Homicide*).⁹⁰

⁹⁰ For a full English translation of the poem's section on the Five Daughters of Ire, see John Gower, *Mirour de l'Omme (The Mirror of Mankind)*, trans. William Burton Wilson (East Lansing: Colleagues Press, 1992), 57 ff. I have chosen to translate using as my basis the original French text as edited in the 1960 dissertation of Dorothy Troendle, ed., *John Gower's Mirour de l'Omme* (Dissertation, Brown University, 1960), 157-207, lines 3853-5124. Available online is the Macauley 1899 edition, which has also been consulted for confirmation of phrasing and for its glossary. See G. C. Macauley, ed., "Mirour de l'Omme," in *The Complete Works of John Gower*, vol. 1 (Oxford: Clarendon Press, 1899), 1-334. For an introduction to the corresponding visual imagery in personifications of the virtues and vices, see generally Adolf Katzenellenbogen, *Allegories of the Virtues and Vices in Mediaeval Art: From Early Christian Times to the Thirteenth Century* (New York: W.W. Norton, 1964; first published 1939); Rosemon Tuve, *Allegorical Imagery: Some Mediaeval Books and Their Posterity* (Princeton: Princeton

Such concepts as these played an influential role in medieval English guilt assessment, whether by confessors or by judges and jurors, and Gower's explication can therefore illuminate some of the weight placed upon these factors in the process of judging. Gower's image of Ire and her daughters draws upon a cultural reservoir influenced by classical authors such as Seneca, medieval theologians like Aquinas, and penitential manuals.⁹¹ The poem serves as a rich repository for cultural norms, ready for excavation by the legal as well as the literary historian. Ire, according to the *Mirour*, might be expressed in deed or word, a point similarly made by Chaucer's parson,⁹² but also in thought (*En fais, en dis, et en pensés*).⁹³ This aligns well with contemporary descriptions of homicide and sin in general, which typically begin with this tripartite division of thought, deed, and word.⁹⁴ Thus, in describing the daughters as successively more physical—starting with thoughts, rising to words, and ultimately breaking out in harmful actions—the *Mirour* largely followed the framework of contemporary penitential literature.

University Press, 1966); Colum Hourihane, ed., *Virtue & Vice: The Personifications in the Index of Christian Art* (Princeton: Princeton University Press, 2000).

⁹¹ Thomas Aquinas' *Summa Theologica*, although written by an Italian Dominican scholastic, offers a helpful baseline for a discussion of medieval English emotion. His theory of the passions, marked by a heavy Aristotelian emphasis, continues to inform our own discussions of emotion. See Miner, *Thomas Aquinas on the Passions*, 1. Aquinas and others, in turn, who wrote about the nature of anger frequently drew upon ideas fleshed out during the age of Nero (1st century AD) by Seneca in his work *De Ira*. For the dating and sources of *De Ira*, see Seneca, "De Ira", in *Moral Essays*, vol. 1, trans. John W. Basore (London: W. Heinemann, 1928), xi, xiii.

⁹² According to Chaucer's parson, ire might manifest itself in word or deed: "This synne of Ire, after the discryvyng of Seint Augustyn, is wikked wil to been avenged by word or by dede." "Parson's Tale," in *The Riverside Chaucer*, ed. Larry D. Benson (New York: Houghton Mifflin, 1987), 305. Of course, the parson may not be ruling out ire in the mind, but merely observing that when transformed to vengeance it took the form of word or deed.

⁹³ Troendle, ed., *Gower's Mirour de l'Omme*, 157, line 3860.

⁹⁴ See, e.g., the tripartite division of homicide into act, word, and thought in A. D. Wilshire, ed., *Mirour de Seinte Eglyse: St. Edmund of Abingdon's Speculum Ecclesie* (London: Anglo-Norman Text Society, 1982), 30, lines 32-41 ("Le second comandement est itel: vus ne tuerez nul homme. Ci devez savoir ke homicide est en mut de maneres. Il i a homicide de main, de launge, de quor.")

The first daughter, Melancholy, was characterized by her easy tendency toward anger, becoming irritated even over a single objectionable word.⁹⁵ This aspect of ire appears in the Stoical writings of Seneca, who described how an ire-driven person might “be exasperated by trifling and paltry incidents.”⁹⁶ Offering some wonderful color on upper-class first-century Roman society, Seneca listed examples of irritants: “A slave is too slow, or the water for the wine is lukewarm, or the couch-cushion disarranged, or the table too carelessly set—it is madness to be incensed by such things.”⁹⁷ Seneca attributed such quick-temperedness not to the severity of the suffering involved, but rather to the softness of the sufferer. “For why is it,” Seneca asked, “that we are thrown into a rage by somebody’s cough or sneeze, by negligence in chasing a fly away, by a dog’s hanging around, or by the dropping of a key that has slipped from the hands of a careless servant?”⁹⁸ A short fuse in response to such minor provocations reflected a defect in character.

Similarly, the meaning of melancholy evoked by Gower was that of irritability and quick-temperedness, as opposed to the sense in which we use the word melancholic to describe a person who is depressed or sad today.⁹⁹ Reason (*resoun*), which might have a tempering influence in normal circumstances, proved powerless against Melancholy “because ire rises up in her thoughts like the bubbling of a fountain”.¹⁰⁰ Melancholy would therefore seem to capture a temperamental inclination toward angered responses, something that Aquinas associated in part

⁹⁵ Troendle, ed., *Gower’s Mirour de l’Omme*, 158, lines 3866-3868.

⁹⁶ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 218-219. Cicero similarly took a Stoical approach to the issue of anger and other extreme emotion. See Harris, *Restraining Rage*, 110.

⁹⁷ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 218-219.

⁹⁸ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 218-219.

⁹⁹ Both these meanings, and others, were in use in the fourteenth century. See *Anglo-Norman Dictionary*, s.v. “melancolie”; *Oxford English Dictionary* (3rd edition), s.v. “melancholy”.

¹⁰⁰ Troendle, ed., *Gower’s Mirour de l’Omme*, 158, lines 3875-3876. (“Car l’ire sourt deinz son penser / Comme du fontaine la buillie”.)

with excellence (*excellencia*) or perhaps honor but which other contemporary texts connected as well with a failure to cultivate a patient, charitable temperament. Seneca likewise argued that some individuals were naturally inclined toward anger and therefore had to make life choices—such as drinking only in moderation, and not eating to excess—that might mitigate an innate tendency toward impatience.¹⁰¹ At the same time, Seneca, like Aquinas, recognized that anger and irritability could be an acquired habit and might also be associated with wealth and high social standing.¹⁰²

According to Gower's schema, Melancholy had two vices serving in her retinue: Affront (*Offense*) and Impatience (*Inpacience*). The former was described as hotter than fire (*pluschald que le fu*), and the latter as both wicked (*fel*) and hostile (*contrarious*).¹⁰³ These qualities, too, may be found in the classical writings of Seneca, who urged individuals to avoid anger-driven responses by not too easily giving credence to “an impression of injury”.¹⁰⁴ Even when an injury was openly committed, Seneca advised circumspection, noting, “some things are false that have the appearance of truth.”¹⁰⁵ By allowing time to pass and ignoring the advice of those who might urge a hasty response, a person might “form a judgment” and thereby hold anger in abeyance.¹⁰⁶ Ire's first daughter, by contrast, was inclined to take offence and to respond impatiently. Two servants in turn, aided impatience: Irritation (*Irritacioun*) and Provocation to Anger (*Provocacioun d'Irrour*), within whose heart anger burned and who drove others to anger and

¹⁰¹ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 206-209.

¹⁰² See Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 206-207, 210-213.

¹⁰³ Troendle, ed., *Gower's Mirour de l'Omme*, 161-162, lines 3954, 3962.

¹⁰⁴ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 214-215.

¹⁰⁵ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 214-215.

¹⁰⁶ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 214-215.

discord (*corous et descordement*).¹⁰⁷ Above all, Melancholy was characterized by anger in her thoughts (*irouse en son penser*).¹⁰⁸ Melancholy and her retinue represented the human tendency to harbor ill will, easily take umbrage at even a small slight, fester with internal discord, and drive others to similar feelings of impatience and anger.

Ire's second daughter, *Tençoun*, which I have translated as Quarrel due to her verbal outbursts, exhibited language characterized by strife and contention (*D'estrif et de contencioun*) and was seen to be so felonious (*si feloun*) as to be friends with the devil.¹⁰⁹ Quarrel's relationship with felony was further bolstered by the poet's use of the phrase "felon serpent" (*serpente felonesse*) in his description of the tendentious daughter, presumably highlighting her secretive, subversive, and yet suddenly and fatally poisonous tendencies.¹¹⁰ Richard Rolle's psalm translation similarly used the metaphor of snakes' venom to describe how evil people might speak words of felony (*thai polyst the wordis of their felony as neddirs*), thereby disguising the hidden venom of snakes (*thai hafe pryue venym of snakis*) and revealing "incurable malice in their heart" (*malice vncurabil in thaire hert*).¹¹¹ Where Melancholy's anger was centered in thought, Quarrel's anger was characterized by speech.¹¹² Thus, she represented a step forward on the progression from mere thought to action.

¹⁰⁷ Troendle, ed., *Gower's Mirour de l'Omme*, 162, lines 3975, 3985, 3987, 3990.

¹⁰⁸ Troendle, ed., *Gower's Mirour de l'Omme*, 190, line 4669.

¹⁰⁹ Troendle, ed., *Gower's Mirour de l'Omme*, 165-166, lines 4047, 4073-4074. This word may be translated as dispute, quarrel; reproof; or contentiousness, quarrelsomeness. *Anglo-Norman Dictionary*, s.v. "tençun".

¹¹⁰ Troendle, ed., *Gower's Mirour de l'Omme*, 168, line 4124. Additional references to "feloun" appear in lines 4134 and 4302.

¹¹¹ Bramley, ed., *Psalter or Psalms of David*, 467.

¹¹² Troendle, ed., *Gower's Mirour de l'Omme*, 190, lines 4669-4670. Incendiary speech may have given particular cause for concern in Gower's time, as suggested by Sandy Bardsley, who argues that there was increasing concern about the power of speech in thirteenth- and fourteenth-century England, when discourse on sins of the tongue entered popular vernacular literature, a new crime of scolding appeared on the manorial court level. See, generally, Bardsley, "Sin Speech, and Scolding," 145-164.

The third daughter, Hatred, held in her breast hidden ire (*que deinz sa pectrine / Ire ad covert*) and conspired day and night until she brought about the ruin of her neighbor.¹¹³ This aligns well with Aquinas' understanding of hatred, which similarly viewed it as a more permanent disposition that sought evil for its own sake.¹¹⁴ According to Gower, because ire had so overtaken the interior of Hatred, she was unable to foster love.¹¹⁵ While Hatred might seem to be a break from the thought-word-deed progression established by Melancholy and Quarrel, she also represented a step forward in anger's progress toward overtaking a person's heart and transforming him or her into a habitual hater. In other words, what might start out as an impulsive feeling of anger might evolve into an entertained thought of anger, but by the time it reached the level of Ire's third daughter, it had festered into full-blown heart disease, in the sense of shutting out charitable sentiment. While simple anger might be remedied, Hatred was comparably irredeemable. Hatred associated herself with Malice and Evil (*Malice et Maligneté*), the former characterized by lips full of felony (*les lievres plain due felonie*) and maleficent hands of envy (*malfesantes main d'envie*).¹¹⁶ Moreover, Hatred counted two servants in her retinue, Rancor (*Rancour*) and Evil Will (*Maltalent*).¹¹⁷ The former servant held enclosed in his heart little causes of ire written on paper, which Evil Will sealed with wax (*Maltalent y met la cire*).¹¹⁸ Again, Gower's personification of Hatred emphasized the cumulative nature of Hatred, with its many grievances carefully tallied and then permanently sealed by a will inclined toward evil.

¹¹³ Troendle, ed., *Gower's Mirour de l'Omme*, 176, lines 4339-4343. ("Ainz nuyt et jour sur ce conspire, / Jusques atant que la ruine / De son voisin ou sa voisine...")

¹¹⁴ See Aquinas, *Summa Theologica*, vol. 2, 782 (Pt. I-II Q. 46, Art. 6, Reply Obj. 1).

¹¹⁵ Troendle, ed., *Gower's Mirour de l'Omme*, 177, lines 4345-4347. ("Cil a'ad ce vice est sanz amour, / Car l'Ire q'est interieur / Ne souffre pas que l'amour dure").

¹¹⁶ Troendle, ed., *Gower's Mirour de l'Omme*, 183, lines 4501-4502, 4506-4507.

¹¹⁷ Troendle, ed., *Gower's Mirour de l'Omme*, 185, lines 4573-4575.

¹¹⁸ Troendle, ed., *Gower's Mirour de l'Omme*, 186, lines 4586-4589. ("Qe les petites causes d'ire / En un papir trestout enclos / Dedeinz son cuer les fait escrire".)

Ever worsening in severity, the fourth daughter of Ire, Discord (*Contek*),¹¹⁹ gave no thought to reason but rather was boldly inclined to combat.¹²⁰ Discord, in other words, represented the final step in the progression from thought to word to action, although the fifth daughter would magnify the severity of action even further. Not only was Discord a step beyond word and thought, but it described a stage of ire where the individual no longer was able to engage with his or her reason to determine the appropriate level of response to a perceived or real affront. Seneca would have recognized this stage of ire. Unlike Aristotle, who felt that anger could draw men to virtue, Seneca urged his audience to bear in mind the “foulness and fierceness” of anger, setting before their eyes “what an utter monster a man is when he is enraged against a fellow-man, with what fury he rushes on working destruction—destructive of himself as well and wrecking what cannot be sunk unless he sinks it.”¹²¹ Seneca viewed a man in this stage of anger as someone who no longer acted like a sane individual but rather, “just as if seized by a hurricane” was driven along “at the mercy of a raging demon, who entrusts not his revenge to another, but himself exacts it”.¹²²

It was at this stage of anger that, Gower and Seneca might agree, a person transitioned into the terrain of Ire’s fifth daughter, Homicide. Opening his discussion of Homicide, Gower regretted that his language could no longer suffice in description.¹²³ Seneca described the raging person who, “bloodthirsty alike in purpose and in deed, becomes the murderer of those persons

¹¹⁹ *Contek*, in Anglo-Norman French, might refer to a quarrel or discord, but could also indicate a legal dispute or litigation, or alternatively an outright brawl. See *Anglo-Norman Dictionary*, s.v. ‘conteck’.

¹²⁰ Troendle, ed., *Gower’s Mirour de l’Omme*, 188, lines 4643-4644. (“De nulle resoun est pensive, / Tant a combatre est coragouse”.)

¹²¹ Seneca, “De Ira,” III, in *Moral Essays*, vol. 1, trans. Basore, 258-259.

¹²² Seneca, “De Ira,” III, in *Moral Essays*, vol. 1, trans. Basore, 258-259.

¹²³ Troendle, ed., *Gower’s Mirour de l’Omme*, 194, line 4791. (“Ma langue a ce ne me souffist”.)

who are dearest and the destroyer of those things for which, when lost, he is destined ere to weep".¹²⁴ Similarly, Gower described how Homicide's servant, Murder (*Moerdre*) would spare no one, whether old, young, or even pregnant, offering compassion to none (*Cist ad du rien compassioun*) and acting treacherously and feloniously (*traitres et feloun*), even going so far as to kill with poison (*tue l'omme par poisoun*) or kill a sleeping victim (*tue l'omme en son dormant*).¹²⁵ In addition to this treacherous servant, Homicide had a secretary, Cruelty, who lacked mercy (*sans mercy*) and was compared by Gower to Herod in his slaying of the infants in Bethlehem.¹²⁶ Homicide, in this sense, represented a natural progression from the third daughter, Hatred, who exhibited a heart that was closed off to feelings of charity. Homicide, which seems to be used by Gower in a sense closer to felonious homicide as opposed to man-slaying generally, was the inevitable outcome once a person's heart had been overwhelmed by malice, and when any innate tendency toward mercy had been fully eradicated.

Gower's description of Ire's five daughters and their diverse retinue of servants and secretaries captures the complex way in which an emotion like anger was understood in late fourteenth-century England. His allegory of Ire and her daughters reaches an impressive level of density and detail but represents a genre with widespread currency in medieval England. Earlier and later texts alike echo this allegory of Ire in simpler terms. For example, the thirteenth-century *Ancrene Wisse* employs the unicorn as a metaphor for wrath, giving him offspring much like Gower's Ire:

The unicorn of wrath, who bears on his nose the horn with which he pierces all that he reaches, has six whelps. The first is Conflict or Strife. The other is Madness. Behold the eyes and the nose

¹²⁴ Seneca, "De Ira," III, in *Moral Essays*, vol. 1, trans. Basore, 258-259.

¹²⁵ Troendle, ed., *Gower's Mirour de l'Omme*, 197, lines 4861-4872. ("Cist tue viel, cist tue enfant, / cist tue femmes enpreignant".)

¹²⁶ Troendle, ed., *Gower's Mirour de l'Omme*, 202, lines 4981-4986.

when mad wrath is in mind; behold her countenance, look on her gestures, hearken how the mouth goes, and you might deem her well out of her mind. The third is Shameful Reproach. The fourth is Cursing. The fifth is Violence. The sixth is desire that evil befalls another, either on himself, or on his friend, or on his property...¹²⁷

Despite his many whelps, the unicorn could not match the complexity of Gower's depiction of Ire with all its servants and administrators.

In a later text in a wholly different genre, namely a poem likely penned shortly after the 1298 Battle of Falkirk, the poet described the increasingly malicious world around him and, in a lengthy aside, described the stages of ire and its related emotions:

Ire, if it remains, crosses over into envy;
Envy not checked stirs up madness;
Madness shortens days, leading to anguish;
Ire begets hatred, concord nourishes love.
Love dies childless, poison is in town;
There proceeds from hatred a plague not insignificant;
The bringer of homicide raises its standard:
Nothing is more sharp than envy, nothing worse than that.¹²⁸

¹²⁷ Millet, ed. and trans., *Ancrene Wisse: Guide for Anchoresses* (Exeter: University of Exeter Press, 2009), Part 4, 77, lines 337-349. (“Þe vnicorne of wreaððe, þe bereð on his nease þe [h]orn þet he asneaseð wið al þet he areacheð, haueð six hwelpe. Þe earste is Chast oðer Strif. Þe oðer is Wodschipe. Bihald te ehnen ant te neb hwen wod wreaððe is imunt; bihald hire contenemenz, loke on hire lates, hercne hu þe muð geað, ant tu maht demen hire wel ut of hire witte. Þe þridde is Schentful Upbrud. Þe feorðe is Wariunge. Þe fifte is Dunt. Þe seste is wil þet him uuel tidde, oðer on him seolf, oðer on his freond, oðer on his ahte.”) Although the unicorn is initially charged with six whelps, a seventh is added: “The seventh whelp is to commit sin for wrath, or leave well to be done; forgo meat or drink; revenge herself with tears if she may not do otherwise, and with curses; kill her servant or child, or in another way to harm her in soul or in body both—this is homicide, and murder of herself.” (“Þe seouede hwelp is don for wreaððe mis, oðer leauen wel to don; forgan mete oðer drunch; wreoken hire wið teares ʒef ha elles ne mei, ant wið wearunges; hire heued spillen o grome, oðer on oþer wise hearmin hire i sale ant i bodi baðe—þeos is homicide, ant morðre of hire seoluen.”)

¹²⁸ “Song on the Scottish Wars,” in Wright, ed., *Political Songs of England*, 161. (“Ira si duraverit, transit in livorem; / Livor non cohibitus agitate furorem; / Furor dies breuiat, ducene in anguorem; / Ira odium generat, concordia nutrit amorem. / Amor orbis obiit, virus est in villa; / Prodiit ex odio pestis non pusilla; / Lator homicidii levavit vexilla: / Acrius invidia nichil est, nil nequius illa.”) Alternate translation at foot of page.

Envy similarly led to tragedy in accounts of Jesus' passion, such as Nicholas Love's discussion in *The Mirror of the Blessed Life of Jesus Christ*. According to Love's account, Jesus' raising of Lazarus stirred men against him, men who would eventually plot his death: "And especially by occasion of these good and virtuous works, but chiefly for the raising of Lazarus, envy kindled in their hearts more and more, to such an extent that they might no longer bear their madness without carrying it out against Jesus."¹²⁹ In summation, "anger" is a blunt term in discussing a spectrum of passions that built upon and in some instances even birthed each other. In the coming sections, this chapter will distill some of the themes that arise both in Gower and in other literary, theological, and pastoral works, thereby illuminating some of the manifold ideas about anger that informed jurors' understanding of the passion's role in exacerbating or alleviating guilt in felony cases.

Themes of Anger

Positive Manifestations of the Passion

Before delving into the various negative aspects of anger and her progeny, it is important to acknowledge that anger was not condemned wholesale in medieval England. It simply could not be. Stoical ideas propounded by Seneca, while informing medieval English thought extensively,¹³⁰ were never adopted entirely, thereby complicating how judges and jurors approached the issue of anger in judging felony cases. Seneca had criticized Aristotle for arguing that anger was necessary in some measure, insofar as it could spur men to righteous

¹²⁹ Love, *Mirror of the Blessed Life of Jesus Christ*, ed. Sargent, 134. ("And specialy by occasion of hese gude & vertuese wyrkyngis, bot souereynly for þe reisyng of lazare, enuye kyndelet in hir hertes more & more, in so mykel þat þei miht no lengere bere hir wodenes without execucion þerof aʒeynus Jesu.")

¹³⁰ It is not uncommon to find Seneca quoted in vernacular texts. See, e.g., "Tale of Melibee," in *Riverside Chaucer*, ed. Benson, 222. ("The thridde is this, that he that is irous and wrooth, as seith Senec, ne may nat speke but blameful thynges, and with his viciouse wordes he stireth oother folk to angre and to ire.")

acts.¹³¹ Taken to its extreme, Seneca’s uncompromising vision of anger’s ills would have raised serious concerns for the medieval English person of faith, who would not have to look far in either the Hebrew or Christian scriptures to find examples of divine anger. “Ye shall understand that some wrath is sin and some not sin,” observed a late fourteenth-century sermon author, “for God himself is called both wrathful and mad (*vrath and vode*) by David in the Psalter”.¹³² As Aquinas recognized, anger could not be universally condemned because it could be used in the service of justice.¹³³ The sermon author mentioned above elaborated, “in God’s cause a man may be wroth and yet do no sin.”¹³⁴ Confessors, too, were keenly aware of the biblical example of righteous wrath. Jesus, after all, had been motivated by anger when he threw the moneychangers out of the temple, a point made by English theologian Thomas de Chobham (d. 1233x6) in his *Summa Confessorum*.¹³⁵ “Zealous ire,” as Chobham called it, “is when one is angered against vices and against those full of vice, and we can hope this ire grows, because it is a virtue.”¹³⁶ In Nicholas Love’s rendition of the temple scene, Jesus is described as burning with zeal and displaying a dreadful countenance that made the pharisees and scribes fearful.¹³⁷ Such zealous ire might also be found in descriptions of God the Father throughout the Hebrew

¹³¹ See Seneca, “De Ira,” III, in *Moral Essays*, vol. 1, trans. Basore, 258-259.

¹³² Ross, ed., *Middle English Sermons*, 51. (“Ȝe shall vnderstond þat som vrath is synne and som no synne, for God hym-selfe is called both vrath and vode by Daud in þe Sawtur, Psalmo sixto.”)

¹³³ See Miner, *Thomas Aquinas on the Passions*, 275-276.

¹³⁴ Ross, ed., *Middle English Sermons*, 51. (“...in Goddes cause a man may be wrothe and ȝitt do no synne.”)

¹³⁵ Thomas de Chobham, *Summa Confessorum*, ed. F. Broomfield (Louvain: Editions Nauwelaerts, 1968), 414. “Disturbed by such ire, the Lord ejected buyers and sellers from the temple.” (“Tali ira commotus dominus eiecit ementes et vendentes de templo.”)

¹³⁶ Chobham, *Summa Confessorum*, ed. Broomfield, 414. (“Ira autem per zelum est quando irascimur contra vitia et contra vitiosos, et possumus optare quod talis ira crescat, quia virtus est.”)

¹³⁷ Love, *Mirror of the Blessed Life of Jesus Christ*, ed., Sargent, 115 (“And þe cause was, for þe gostly fire of his zele brennyng withinforþ, for þe vnwirchipyng of his fadere, specialy in þat place, where he owede most to be wirchipe de shewe de him so dredful in his face without forþ, þat þei were wondurfully adredde, & disconfyted, & had no powere to wiþstande him.”)

Scriptures. Given the fact that God, both as the Father and the Son, might express anger openly, human beings made in His image and likeness might also, in at least limited circumstances, make appropriate use of anger.

This ambiguous nature of anger is reflected in the fact that it was not universally condemned like other vices, such as avarice or lust, and did not have a clear contrasting virtue. Aquinas, for example, pointed out that many of the passions had a contrary passion. Love might be contrasted with hatred, hope with despair, and fear with daring.¹³⁸ Anger, however, had no contrary passion; calm described the absence of anger, not its contrary.¹³⁹ Similarly, meekness signified the tempering and control of anger, not its opposite.¹⁴⁰ Thus, anger, although often listed among the seven deadly sins, could be either a vice or a virtue depending upon the circumstances involved.

There were limits to the positive potentiality of anger. Ideally, righteous anger should not rise to the level of overt action according to some English authors, such as poet and historian Robert Mannyng (d. c. 1338). Wrath could only be forgivable, and might even be commendable, in the right context and in good measure. While a person might feel angered or even speak angry words toward a sinful person, they should not take any physical action. For Mannyng, the difference between rightful and wrongful ire was that the latter was driven by pride and characterized by wickedness, while the former was used to chide or reprove a person for some

¹³⁸ Aquinas, *Summa Theologica*, vol. 2, 696 (Q. 23, Art. 4).

¹³⁹ Aquinas, *Summa Theologica*, vol. 2, 696 (Q. 23, Art. 4). For an analysis of this issue, see Miner, *Thomas Aquinas on the Passions*, 270-271.

¹⁴⁰ For a discussion of anger's relationship to meekness, ranging from Aristotle to recent psychological experiments on anger, see Glen Pettigrove, "Meekness and 'Moral' Anger," *Ethics* 122:2 (2012), 341-370. Gregory the Great contrasted the meek with the choleric, but treated both as potential targets for admonition. See Gregory the Great, *Pastoral Care*, trans. Henry Davis, S.J. (Westminster, MD: Newman Press, 1950), part 3, ch. 16, 136-137. Gregory warned that a person who believed his or her anger to be righteous might be at risk of accumulating guilt. In art, *ira* might sometimes be placed in contrast with patience. Tuve, *Allegorical Imagery*, 60, 95.

form of vile behavior, driven by concern and righteousness.¹⁴¹ Similarly, the fourteenth-century *Speculum Christiani* noted, “wrath discreetly taken for chastising of wickedness is not forbidden.”¹⁴² One might rightfully direct wrath “against villainy and sin”, but the same wrath would become condemnable if directed physically toward a sinner’s person or if motivated by envy of a person’s righteous behavior: “wrath thee with man’s villainy,” Mannyng wrote, “but not against his good [i.e. deeds] or his body.”¹⁴³ Chaucer, too, through the voice of the parson, described a good form of ire, which was characterized by “zeal for goodness through which a man is wroth with wickedness” and without bitterness, never “wroth against the person but wroth with the misdeed of the person.”¹⁴⁴ In a similar vein, Mannyng further advised: “Love every man in his good deed; his wickedness shalt thou hate and dread.”¹⁴⁵ Likewise, Mannyng noted that chastising was fine as long as the chastiser did not permit hate to settle in his or her heart, which would otherwise separate the individual from God:

¹⁴¹ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 127-128, lines 3721-3724. “If thou for wrath made chiding, or reprovod a man of a vile thing, ire hath cast the in this case another grace from hell to pass.” (“Ȝyf þou for wrappe madyst chydyng, / Or repreuedyst a man of vyle þyng, / Yre haþ kast þe yn þys kas / Anoþer grece to hellē pas.”)

¹⁴² Holmstedt, ed., *Speculum Christiani*, 62. (“Wreth dyscretly taken for chastisyng of wickednes es not forboden”.)

¹⁴³ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 129, lines 3771-3772. (“wrappe þe with mannys vyleynye, / But nat with his gode ne hys body.”) See also *ibid.*, 129, lines 3767-3770. “Thou shall understand and know with reason, mayest thou thee wrath and chide against villainy and sin, if thou mayest not do other but therein...” (“þou shal vnderstand and wete, / with resun, mayst þou þe wrappe and flyte / Aȝens vyleynye and synne, / Ȝyf þou ne mayst do oþer bote þerynne...”) It is unclear whether “gode” is referring to the person’s “good”, as in good deeds or even well being, as opposed to his “goods” or possessions, but I believe it is referring to the former based in part on the ensuing lines 3681-3682.

¹⁴⁴ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 305. (“The goode Ire is by jalousie of goodnesse, thurgh which a man is wrooth with wikkednesse and agayns wikkednesse; and therefore seith a wys man that Ire is bet than pley. / This Ire is with debonairetee, and it is wrooth withouten bitternesse; nat wrooth agayns the man, but wrooth with the mysdede of the man...”) I would translate “jalousie of goodnesse” as “zeal for goodness” to capture the contemporary understanding of jealousy, which could connote zeal, love, devotion, indignation, solicitude, or watchfulness. See *Middle English Dictionary*, s.v. “jalousie”.

¹⁴⁵ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 129, lines 3781-3782. (“Loue euery man yn hys gode dede; / hys wykkesnes shalt þou hate & drede”.)

Thou mayest speak words harsh
Though wrath be not in thine heart;
Thou mayest be wroth, somebody to chastise,
Though hate not in thy heart rise;
And if thou hate and soon forgiuest,
With God himself then thou livest...¹⁴⁶

Mannyng thereby expressed the same concern with hatred as a habit and an inclination of a person's heart as found in Aquinas's *Summa* and Gower's *Mirour*.¹⁴⁷ Anger could potentially be put to good use, but only at the peril of descending into a state of hatred that could condemn a person's soul.

Anger's Relationship with Reason

Pardons based on a defendant's insanity or infancy rested in part upon recognition that the individual was lacking full capacity to reason. Could anger operate similarly, such that a jury might be inclined toward leniency if the angered individual was not fully capable of rational decision-making? As demonstrated by Jeremy Horder's study of provocation, which will be discussed below, one central issue in discussions of anger has historically been whether anger responds to reason.¹⁴⁸ This relates to Aquinas' vision of the passions, which held that anger might evince either good or evil. Insofar as a passion resulted from "movements of the irrational appetite," a condition humans shared with non-human animals, no moral good or evil attached.¹⁴⁹

¹⁴⁶ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 129, lines 3783-3788. ("þou mayst spekē wurdys smerte / Þogh wrappē be nat yn þyn herte / Þou mayst be wroþe, sum body to chastyse, / Þogh hate nat yn þy hertē ryse; / And 3yf þou hate and sone for3yuyt, / with God hymself þan þou lyuyt...")

¹⁴⁷ See also Holthausen, ed., *Vices and Virtues*, 38-41 (a vernacular text describing the dangers of hating even one person, and how hatred and wrath distanced a person from God and drew the person instead toward the devil).

¹⁴⁸ See, e.g., Jeremy Horder, *Provocation and Responsibility* (Oxford: Oxford University Press, 1992), 40.

¹⁴⁹ See Aquinas, *Summa Theologica*, vol. 2, 697 (Q. 24, Art. 1). On the issue of animals, see Reply Obj. 1.

Perhaps this might include spontaneous anger in response to a sudden provocation, although moral approbation or blame might attach once the provoked individual had a moment to process the incident. When a passion was instead subject to the command of reason and the will, and therefore characteristic of humans alone, then the passion could be defined as morally good or evil.¹⁵⁰ It was, indeed, the voluntariness of a passion—“either from being commanded by the will, or from not being checked by the will”—that made the qualitative moral difference.¹⁵¹

With regard to anger in particular, Aquinas relied on Aristotle when he argued, “anger listens to reason somewhat.”¹⁵² As a “desire for vengeance,” anger involved “a comparison between the punishment to be inflicted and the hurt done”.¹⁵³ This required an inference, which was itself “an act of reason.”¹⁵⁴ For Seneca, taking the Stoical approach, anger’s relationship to reason ruled out the possibility of excusing anger-inspired actions based on a theory such as heat of passion. “Our opinion,” wrote Seneca, “is that [anger] ventures nothing by itself, but acts only with the approval of the mind.”¹⁵⁵ Seneca contended that reason and volition were both at play when a person acted in anger: “For to form the impression of having received an injury and to long to avenge it, and then to couple together the two propositions that one ought not to have been wronged and that one ought to be avenged—this is not a mere impulse of the mind acting without our volition.”¹⁵⁶ Because actions in anger involved a multi-step mental process, Seneca

¹⁵⁰ See Aquinas, *Summa Theologica*, vol. 2, 697 (Q. 24, Art. 1).

¹⁵¹ Aquinas, *Summa Theologica*, vol. 2, 697 (Q. 24, Art. 1).

¹⁵² Aquinas, *Summa Theologica*, vol. 2, 780 (Pt. I-II Q. 46, Art. 4).

¹⁵³ Aquinas, *Summa Theologica*, vol. 2, 780 (Pt. I-II Q. 46, Art. 4). See also *ibid.*, 784-785 (Pt. I-II, Q. 47, Art. 1).

¹⁵⁴ Aquinas, *Summa Theologica*, vol. 2, 780 (Pt. I-II Q. 46, Art. 4).

¹⁵⁵ Seneca, “De Ira,” I, in *Moral Essays*, vol. 1, trans. Basore, 169.

¹⁵⁶ Seneca, “De Ira,” I, in *Moral Essays*, vol. 1, trans. Basore, 169.

argued that the mind assented to the response.¹⁵⁷ This Stoical approach is in some sense reminiscent of the medieval blood feud, which had never given license for striking out in hot blood against one's enemy. William Ian Miller, in an analysis of bloodfeud in Iceland and England, observes that the talion, or something similar, was the typical rule in bloodfeuding societies: "Taking ten lives for one was not feud;" he argues, "it was either war or anarchy."¹⁵⁸ Rather, responses were typically calculated, measured, and doled out in a rational and completely non-instinctive fashion.¹⁵⁹

Aquinas took a less strictly Stoical view of the matter. Aristotle's qualification, i.e., that anger listens *somewhat* to reason, was attributed by Aquinas to the fact that reason "listens not perfectly" in determining the "measure of vengeance."¹⁶⁰ Elsewhere Aquinas elaborated: "The beginning of anger is in the reason... But the passion of anger forestalls the perfect judgment of

¹⁵⁷ See Seneca, "De Ira," I, in *Moral Essays*, vol. 1, trans. Basore, 169.

¹⁵⁸ William Ian Miller, "Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England," *Law and History Review* 1:2 (1983), 160. This rational, talionic approach would be extinct by the early modern period, which saw the introduction of a perversion of the talion, what I might describe as "two eyes for an eye"—the idea that an "injury in words" could only be righted by an "injury of deed" or a lie redressed "with a boxe on the eare". Horder, *Provocation and Responsibility*, 27. These quotes are taken from Horder's quotation drawn from *Rex v. Mawgridge* (1707). This idea of responding in more-than-kind would have been utterly mystifying to the medieval English man or woman, who might understand that "the injury of deeds is greater than that of words", but who would never use this as a moral basis for responding in more than kind to an affront. In fact, this talionic rewrite might be even less recognizable to the pre-conquest English society in which the bloodfeud played a more measurable role. Justice would not be on the side of one who responded beyond the bounds of due measure, and disproportionate violence would fuel continuation of a feud rather than its resolution.

¹⁵⁹ On the rational underpinning of blood feud, particularly as it pertains to medieval Iceland, see Miller, "Choosing the Avenger," 160-161. For a similar rationality of moves and counter-moves underlying the feud in the Touraine c. 1100, see White, "Feuding and Peacemaking in the Touraine," 247-248. For England, see Hyams, *Rancor and Reconciliation*, 8-9.

¹⁶⁰ Aquinas, *Summa Theologica*, vol. 2, 780-781 (Pt. I-II Q. 46, Art. 4, Reply Obj. 3); 781 (Pt. I-II, Q. 46, Art. 5, Reply Obj. 1). This is a concept discussed by Jeremy Horder, who distinguishes between the initial judgment at the moment of provocation, and the final judgment of appropriate response: "A defendant's adherence to or departure from the mean, where outrage is concerned, is primarily dependent on the judgment of appropriate response. It is this judgment, not the initial judgment of wrongdoing, that ultimately guides the will where outrage is concerned." Where action in provocation is couched in terms of loss of self-control, however, there is no comparable mediation between the initial desire for retaliation and the enacted measure of appropriate response. Horder, *Provocation and Responsibility*, 105.

reason” due to “the commotion of the heat urging to instant action”.¹⁶¹ In the heat of the moment, Aquinas observes, “anger withdraws the light of understanding, while by agitating it troubles the mind.”¹⁶² Moreover, by withdrawing a person from his or her capacity to reason, anger inspired acting “openly, without thought of hiding himself.”¹⁶³ Anger, therefore, might negate the planning, lying in wait, and other insidious characteristics of premeditation that we associate today with murder rather than manslaughter. We can find evidence of this effect in some felony fact patterns, including instances where an enraged individual lashes out at a third-party intervener who is attempting to quell a violent argument.¹⁶⁴

Madness, Animality, and Unreason

Thus, an angered person might engage with reason in order to choose an appropriate response, but excessive anger might also lead a person to act in a way seemingly contrary to good sense and without prudent consideration of the consequences. Anger was inherently dangerous due to this transformative potential. In one famous incident of an anger-inspired attack, to be discussed in greater detail below, the Earl of Warenne’s men were described as

¹⁶¹ Aquinas, *Summa Theologica*, vol. 2, 789 (Pt. I-II Q. 48, Art. 3, Reply Obj. 1). See also *ibid.*, 790 (Pt. I-II Q. 48, Art. 4) (“...anger both follows an act of reason, and hinders the reason”).

¹⁶² Aquinas, *Summa Theologica*, vol. 2, 789 (Pt. I-II Q. 48, Art. 3). Aquinas is here quoting from the *Moralia* of Gregory the Great. For a mid-fourteenth-century literary example of the importance of reason in containing anger, see *Ayenbite of Inwyt*, a translation of the thirteenth-century *Somme le Roi*, in which the author advises that the peaceable are those who control the stirrings of their hearts, placing them “under the lordship of right reason and of the Holy Spirit” (“Þo byeþ payzible / þet alle þe steriinges of þe herte ordaneþ / and zetteþ onder þe lhordssipe of rihte scele and of þe goste.”) Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 261. See also Morris, ed., *Cursor Mundi*, Part 5, 1537-1539, lines 27728-27761.

¹⁶³ Aquinas, *Summa Theologica*, vol. 2, 789 (Pt. I-II Q. 48, Art. 3, Reply Obj. 2). Seneca also makes this point: anger, according to Seneca, removed a person’s inhibitions and inclination toward self-preservation, causing them to act rashly and without any thought for concealment. See Seneca, “De Ira,” I, in *Moral Essays*, transl. Basore, 108-109.

¹⁶⁴ In a 1263 Surrey eyre case, for example, it was found that Sagrin de West Horsley had been arguing with Henry le Bold, and that Andrew Capellanus, presumably a chaplain, had attempted to intervene and quell the quarrel. Unfortunately for Andrew, Sagrin responded by hitting the peacemaker fatally on the head, immediately fleeing afterwards. Stewart, ed. and trans., *1263 Surrey Eyre*, 313, no. 661.

acting at the devil’s instigation when they attacked the Earl’s rival in a formal courtroom setting.¹⁶⁵ Similarly, Chaucer’s parson argued that ire “chaceth the Hooly Goost out of mannes soule, and wasteth and destroyeth the liknesse of God—that is to seyn, the vertu that is in mannes soule—/ and put in hym the liknesse of the devel, and vynymeth [i.e., cuts off] the man fro God, that is his rightful lord.”¹⁶⁶ The devil provided a convenient shorthand to describe the rift between an individual and his or her reasoning capacity in the face of serious anger.¹⁶⁷ Chobham, in discussing righteous anger (*ira per zelum*) observed that Jesus never suffered loss of reason due to anger, but that men in general might find themselves disturbed in their reasoning capacity due to the fragility of the flesh and the disturbance which was born from gall (*nascuntur ex felle*), thereby drawing a connection between anger-inspired irrationality and the bitterness of gall or fellness.¹⁶⁸

In other instances, the metaphor of insanity helped characterize an enraged actor. Wendy Turner, in her study of emotion in medieval English legal and administrative records, offers the

¹⁶⁵ Henry Richard Luard, ed., *Annales Monastici*, vol. 4 (London: Longmans, Green, 1869), 234.

¹⁶⁶ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 305. For an earlier, thirteenth-century example of anger’s association with the devils, see Millet, ed. and trans., *Ancrene Wisse*, part 4, 81, lines 499-506. “The wrathful person before the fiend plays with knives, and is his knife-thrower, and plays with swords; he bears them by the sharp words upon his tongue. Both sword and knife are sharp and cutting words that he throws from him and tosses toward others; and it forbodes how the devils will play with him with their sharp awls, tossing with them about and casting them as a scrap of hide each toward the other, and with hell swords stab him throughout, that are keen and hideous and piercing pains.” (“Þe wreaðfule biuore þe feond skirmeð mid cniues, ant is his cnif-warpere, ant pleieð mid sweordes; bereð ham bi þe scharp ord upon his tunge. Sweord ant cnif eiðer beoð scharpe ant keoruinde word þet he warpeð from him ant skirmeð toward oþre; ant he bodeð hu þe deoflen schulen pleien wið him mid hare scharpe eawles, skirmi wið him abuten ant dusten ase pilche-clut euch toward oðer, ant wið helle sweordes asneasen him þurh-ut, þet beoð kene ant eateliche ant keoruinde pinen.”)

¹⁶⁷ This idea, too, had deep roots. For example, St. Gregory the Great warned that sowers of discord are “the children of Satan”. See *Pastoral Care*, part 3, ch. 23, 169.

¹⁶⁸ Chobham, *Summa confessorum*, 414. “Such perturbation never existed in Christ, because he never had perturbed reason, but in all men reason is often disturbed due to the fragility of flesh and by the disturbance that his born from gall.” (“Talis perturbatio nunquam fuit in Christo, quia nunquam habuit rationem perturbatam, sed in aliis hominibus sepe perturbatur ratio per fragilitatem carnalem et per motus qui nascuntur ex felle.”)

example of the son described as “*furiosus*” when, in a rage, he attacked his mentally unstable father with a sword; it is noteworthy that the son’s actions were also said to have been motivated by fear of his father, said to have been “led by an evil spirit” (*ductus est per spiritum maledictum*).¹⁶⁹ In the fourteenth-century *Speculum Christiani*, for example, the author cited St. Jerome for the idea that wrath greatly troubled the mind and gave the appearance of insanity or madness.¹⁷⁰ Chaucer’s parson explained the physiology behind this phenomenon: “For certes, the herte of man, by eschawfyng and moevyng [i.e., heating and moving] of his blood, wexeth so trouble that he is out of alle juggement of resoun.”¹⁷¹ Gower, in the *Mirour de l’Omme*, also described how reason was unable to mitigate the fiery nature of Melancholy, the first of the five daughters of Anger.¹⁷² In his treatise on anger, Seneca described anger as revealing itself on a person’s countenance, which was at once hideous and rabid (*taetrum ac rabidum*) and akin to temporary insanity (*brevem insaniam*).¹⁷³ Seneca contended that an angered man resembled a madman in the following ways:

[H]is eyes blaze and sparkle, his whole face is crimson with the blood that surges from the lowest depths of the heart, his lips quiver, his teeth are clenched, his hair bristles and stands on end, his breathing is forced and harsh, his joints crack from writhing, he groans and bellows, bursts out into speech with scarcely intelligible words, strikes his hands together continually, and stamps the ground with his feet; his whole body is excited and performs great threats; it is an ugly and horrible picture of distorted and swollen frenzy...¹⁷⁴

¹⁶⁹ Turner, “Silent Testimony”, in *Madness in Medieval Law and Custom*, ed. Turner, 90-91.

¹⁷⁰ Holmstedt, ed., *Speculum Christiani*, 62. (“Wreth of man werkeþ nocht ryghtfulnes of god, whyche troubleþ so the mynde that it semeþ to be pure wodneþ or madnes”.)

¹⁷¹ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 305.

¹⁷² Troendle, ed., *Gower’s Mirour de l’Omme*, 158, lines 3875-3876.

¹⁷³ Seneca, “De Ira,” I, in *Moral Essays*, transl. Basore, 106-107.

¹⁷⁴ Seneca, “De Ira,” I, in *Moral Essays*, trans. Basore, 108-109.

Such an understanding of anger's effects was not a relic of a distant Stoical past. Ideas like this still carried great currency in medieval England, as demonstrated by the early thirteenth-century *Ancrene Wisse*'s use of the analogy of madness ("wodschiþe") to characterize anger. According to the *Ancrene Wisse*, a wrathful person lost touch with his humanity ("monnes cunde"), as "wrath...transformed him into a beast"(wreaððe... forschuppeð him into beast").¹⁷⁵

Such madness might take the form of illogically destructive acts, as evidenced by the literary trope of the enraged man who destroyed his household goods, such as drinking vessels, pots, and pans, and then moved on to beat his spouse, children, and servants.¹⁷⁶ Similarly, in a strikingly visual passage, the *Ancrene Wisse* urged anchoresses to be "softe ant milde" of heart, employing the imagery of the pelican to describe a wrathful anchoress.¹⁷⁷ Not unlike a man trashing his household, the wrathful anchoress might be "so wrathful as to slay her own birds" ("so wreaðful þet hit sleað ofte o grome his ahne briddes"), namely, "her good works" ("hire gode werkes").¹⁷⁸ A mid thirteenth-century bestiary described, by contrast, the dove, who avoided all thieving and went so far as to care for other birds' offspring, having in herself no gall.¹⁷⁹ The angry bird of the *Ancrene Wisse*, however, exhibited wrath of such intensity as to have the effect of so blinding the heart that it might not discern the truth.¹⁸⁰ In the twelfth-

¹⁷⁵ Millett, ed. and trans., *Ancrene Wisse*, Part 3, 49, lines 39, 43-44.

¹⁷⁶ Wright, in her microhistorical study of a late fourteenth-century domestic violence case from the manor court at Wakefield, observes that vernacular discussions of wrath often include this trope of the domestically destructive angry husband. Sharon Wright, "Broken Cups, Men's Wrath, and the Neighbours' Revenge: The Case of Thomas and Alice Dey of Alverthorpe (1383)," *Canadian Journal of History* 43 (2008), 241-251, esp. 244-247.

¹⁷⁷ Millett, ed. and trans., *Ancrene Wisse*, Part 3, 48, line 2.

¹⁷⁸ Millett, ed. and trans., *Ancrene Wisse*, Part 3, 48, lines 7-8, 12-13.

¹⁷⁹ "A Bestiary," in Richard Morris, ed., *An Old English Miscellany Containing a Bestiary, Kentish Sermons, Proverbs of Alfred, Religious Poems of the Thirteenth Century* (New York: Greenwood Press, 1969; first published 1872), 25. ("...ne haveð in hire non galle...")

¹⁸⁰ Millett, ed. and trans., *Ancrene Wisse*, Part 3, 48, line 31. ("...ablindedð swa þe heorte þet ha ne mei soð icnawen.")

century *Owl and the Nightingale*, the latter bird contemplated the effects of anger and, having done so, allowed her wrathful mood to pass. “For wrath causes the heart blood to flow into a wild flood so that all the heart overflows, such that one knows nothing but wrath, and so loses all its light, that one sees neither truth nor light.”¹⁸¹ Wrath was seen to promote unreason.

Just as words related to madness might be used to describe a person overwhelmed by anger or wrath, such passions might also be used as signifiers for the mentally insane. For example, a legal record might refer to an insane person as “enraged” (*enrage*) or “furious” (*furiosus*).¹⁸² Nevertheless, anger was not equated with madness for the purpose of felony adjudication at common law. In the thirteenth and fourteenth centuries, insanity offered explicit grounds for a pardon recommendation in felony cases; anger did not. This may be due in part to the complicated nature of anger, which might be justifiable but might also reflect an overweening response to a small provocation. It may also reflect a concern with the antecedent factors giving rise to anger: while insanity might be perceived to be a state outside a person’s control, anger could be characterized instead as a character flaw for which a person should rightly be condemned. Although in the heat of the moment anger might manifest itself in a loss of self-control or even something resembling a state of madness, it was not to be equated with mental illness in its legal treatment due to the preceding culpability of the person who cultivated a habit toward anger.

¹⁸¹ J. W. H. Atkins, ed., *The Owl and the Nightingale* (New York: Russell & Russell, 1971; first published 1922), 81, lines 945-950. (“For wrappe meynþ þe heorte blod / Þat hit floweþ so wilde flod, / & al þe heorte ouergeþ, / Þat heo naueþ naþing bute breþ, / & so uorleost al his lyht, / Þat ho ne syþ soþ ne riht.”) For an alternative to my translation, see *ibid.*, 167.

¹⁸² See Lib. Ass., 22 Edw. 3, fol. 98a, no. 56 (1348), *Seipp’s Abridgement*, no. 1348.264 (describing a person as acting in a mad fit, “en arage”). And see Lib. Ass., 26 Edw. 3, fol. 123b, no. 27 (1352), *Seipp’s Abridgement*, no. 1352.091. See also KB27/471 AALT 362 (1378), accessed June 15, 2015, http://aalt.law.uh.edu/AALT3/R2/KB27no471/bKB27no471dorses/IMG_0362.htm (case of John le Botyler, described variously as “furiosus” and “extra memoriam”). Thanks to Jonathan Rose for the latter cite.

Anger as Habit and the Danger of Escalation

In some instances, evidence of habit could prove damning to a felony defendant. Most commonly, this was the case with individuals described as a “notorious” thief or felon.¹⁸³ Notoriety implied repeat offenses, and concerns for recidivism may have encouraged juries to convict. Emotions might also be habitual, and anger, if cultivated as habit, could escalate. Confessor’s manuals from the thirteenth century emphasize a concern with this tendency of anger to become a habit due to the cumulative nature of wrath.¹⁸⁴ Wrath’s progressive phases inspired English theologian Thomas de Chobham to map distinct species of “vicious ire” (*ira per vitium*) in his *Summa Confessorum*. On the one hand, there was the sort of ire that might move one to harm or injure another, but if reason intervened so that one did not proceed to give injury, the sin remained only venial.¹⁸⁵ Here Chobham advised his audience to follow the guidance of the famous biblical passage, “let not the sun set upon your wrath” (*sol non occidat super iracundiam vestram*).¹⁸⁶ If, however, moved in this way, a person proceeded to insult or injury, then the offense was transformed into mortal sin.¹⁸⁷ Thomas distinguished among three grades of ire: 1) ire in hatred (*ira in odium*), presumably referring to ire that remained latent, in thought alone, 2) ire breaking forth in general contumelia (*ira prorumpens in contumeliam generalem*),

¹⁸³ See Bellamy, *Criminal Trial in Later Medieval England*, 29-30.

¹⁸⁴ This theme appears in other forms of literature as well. See, e.g., Siegfried Wenzel, *Fasciculus Morum: A Fourteenth-Century Preacher’s Handbook* (University Park: Pennsylvania State University Press, 1989), 129.

¹⁸⁵ Chobham, *Summa Confessorum*, ed. Broomfield, 414-415. (“Est iterum ira per vitium quando aliquis movetur ad nocendum alii vel ad iniuriandum, et si ratio statim refrenat motum illum ne procedat ad iniurias, tunc est veniale peccatum.”)

¹⁸⁶ This passage is frequently quoted in discussions of serious sin. See, e.g., Holthausen, ed., *Vices and Virtues*, 88-89.

¹⁸⁷ Chobham, *Summa confessorum*, ed. Broomfield, 415. (“Si autem motus ille procedat usque ad contumeliam vel iniuriam, tunc est illa ira mortale peccatum...”)

and 3) ire erupting in special contumelia (*ira in contumeliam prorumpens specialem*).¹⁸⁸ The distinction between general and special contumelia is not entirely clear. Chobham may have been using the term contumelia in its Roman law sense of a type of *iniuria* or wrong; contumelia in this context was charged with the idea of outrage borrowed from the Greek *hubris*.¹⁸⁹ In D.47.10pr, Ulpian distinguished between *iniuria generaliter* and *iniuria specialiter*, the former referring to any wrong, and the latter more specifically to contumelia.¹⁹⁰ Chobham in part seems to be distinguishing between ire that resides in the heart alone and ire that has erupted in insults and affronts toward others.

These concerns about the danger of untreated anger may also be found in vernacular texts. For example, Chaucer's parson, like Chobham, subdivided ire, but into four types: 1) hate, or old wrath, 2) discord, or the forsaking of old friends, 3) war, in which he included all manner of wrongdoing toward one's neighbor's body or possession, and 4) manslaughter.¹⁹¹ The idea behind such mappings of ire was that wrath, left unchecked, might "engender homicide," a point that Chaucer felt should be obvious even to a simple vicar.¹⁹² Left unaddressed, ire could

¹⁸⁸ Chobham, *Summa confessorum*, ed. Broomfield, 415. In his sermons, William of Auvergne (bishop of Paris, 1228-1249) similarly alludes to general and special contumelia. See "Dominica Sexta Post Festum SS. Trinitatis, Sermo Primus," in Guilielmi Alverni, *Opera Omnia*, book 2 (Paris: Lacaille, 1674), 302. This division may also be found in the much later *Vita Christi* (1374) of Ludolph of Saxony, who indicated that the penalty for ire differed based on three gradations: "prima culpa est, ira vel odium, in corde latens; secunda culpa est, ira in generalem contumeliam prorumpens; tertia culpa est, ira in specialem contumeliam procedens." Ludolf von Sachsen, *Vita Jesu Christi e Quatuor Evangeliiis et Scriptoribus Orthodoxis Concinnata* (Paris: Victorem Palme, 1865), part 1, ch. 34, 156.

¹⁸⁹ On this meaning of contumelia, see Paschalis Paschalidis, "What Did *Iniuria* in the *Lex Aquilia* Actually Mean?" *Revue Internationale des Droits de l'Antiquité* 55 (2008), 332.

¹⁹⁰ See Paschalidis, "What Did *Iniuria* in the *Lex Aquilia* Actually Mean?", 331.

¹⁹¹ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 306. ("Of Ire comen this synkyng engendures: First, hate, that is oold wratthe; discord, thurgh which a man forsaketh his olde freend that he hath loved ful longe;/ and thanne cometh werre and every manere of wrong that man dooth to his neighebor, in body or in catel./ Of this cursed synne of Ire cometh eek manslaughtere.")

¹⁹² "Summoner's Tale," in *Riverside Chaucer*, ed. Benson, 133. ("This every lewed viker or person/ Kan seye, how ire engendreth homycide.")

flare up within a person's heart and reach irremediable proportions, as described by Chaucer's parson:

Looke how that fir of smale gleeedes [i.e., fire of small coals] that been almost dede under asshen wollen quike agayn when they been touched with brymstoon; right so Ire wol everemo quyken agayn when it is touched by the pride that is covered in mannes herte. For certes, fir ne may nat comen out of no thyng... Ther is a maner of tree, as seith Seint Ysidre, that whan men maken fir of thilke tree and covere the coles of it with asshen, soothly the fir of it wol lasten al a yeer or moore. and right so fareth it of rancour; whan it is ones conceyved in the hertes of som men, certein, it wol lasten peraventure from oon Estre day unto another Estre day, and moore.¹⁹³

Continuing with the fire metaphor, the parson described how the devil had three evildoers working the forge in his furnace: pride, which stoked and increased the fire through chiding and wicked words; envy, which used a pair of long tongs to hold a hot iron upon a person's heart, symbolizing rancor; and contumelia, characterized by villainous reprisings and culminating in injury, both of the hateful person and his or her neighbor.¹⁹⁴ Chaucer's parson, like Chobham, associated ire with the Roman law idea of *contumelia*, or insult. In Chaucer's formulation, nearly all the harm caused to a person's neighbor originated in wrath. By using this analogy between anger and hot coals, Chaucer was drawing upon a Latinate tradition, exemplified by the fourteenth-century preachers' handbook, *Fasciculus Morum*, which described how wrath (*ira*)

¹⁹³ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 305.

¹⁹⁴ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 305. ("In this forseide develes fourneys [i.e., devil's furnace] ther forgen three shrewes [i.e., evildoers]: Pride, that ay bloweth and encreeseth the fir by chidyng and wikked wordes;/ thanne stant Envye and holdeth the hote iren upon the herte of man with a peire of longe toonges of long rancour;/ and thanne stant the synne of Contumelie, or strif and cheeste, and batereth and forgeth by vileyns reprevynges./ Certes, this cursed synne anoyeth bothe to the man hymself and eek to his neighebor. For soothly, almoost al the harm that any man dooth to his neighebor comth of wratthe.")

might quickly burst into flames, “just as a fire that is given dry sticks is easily kindled and cannot stop of itself until all the sticks are burnt.”¹⁹⁵

The parson’s description of a wrathful heart made visible the slippery-slope nature of ire and wrath. Quoting St. Bernard, the *Speculum Christiani* defined hateful wrath as “the gate of all vices.”¹⁹⁶ “Just as a boar runs from madness against a sword,” the *Speculum* cautioned, “so runs an ireful man to sin.”¹⁹⁷ Mannyng used the metaphor of ire as “the devil’s daughter of hell fire” to capture the escalating nature of ire, warning that one who loathed another and failed to repent was hell bound.¹⁹⁸ In choosing such a powerful metaphor, Mannyng carried forward the tradition of Seneca, who emphasized the horrible aspect of anger, urging his audience to keep the image of unbridled anger close at hand to remind themselves of its true nature:

To the end that no one may be deceived into supposing that at any time, in any place, it will be profitable, the unbridled and frenzied madness of anger must be exposed, and there must be restored to it the trappings that are its very own—the torture-horse, the cord, the jail, the cross, and fires encircling living bodies implanted in the ground, the drag-hook that seizes even corpses, and all the different kinds of chains and the different kinds of punishment, the rending of limbs, the branding of foreheads, the dens of frightful beasts—in the midst of these her implements let anger be placed, while she hisses forth her dread and hideous sounds, a creature more loathsome even than all the instruments through which she vents her rage.¹⁹⁹

Although Seneca’s vivid description emphasized the horrific nature of anger, he was careful to emphasize that it was quotidian habit that most impacted a person’s inclination toward the

¹⁹⁵ Wenzel, *Fasciculus Morum*, 116-117.

¹⁹⁶ Holmstedt, ed., *Speculum Christiani*, 62. (“Hatful wreth es the gate of al vices”.)

¹⁹⁷ Holmstedt, ed., *Speculum Christiani*, 62 (“Right as a boore rynnnes of wodnes a-3eyns a swerde, so renne3 an ireful man to synne.”)

¹⁹⁸ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 127, lines 3703-3708.

¹⁹⁹ Seneca, “De Ira,” III, in *Moral Essays*, vol. 1, trans. Basore, 260-261.

passion. Natural temperament and accidental causes, such as sickness or anxiety, might contribute to a person's inclination toward anger, but it was habit that had the greatest effect.²⁰⁰

Following in this Senecan tradition, Chobham, in his *Summa confessorum*, described long-held ire as so damnable as to rank among the most serious mortal sins, thereby placing it alongside sacrilege, homicide, adultery, and a host of other serious offenses.²⁰¹ Similarly, the *Ayenbite of Inwyt* argued that one who bore long-standing wrath toward another in his or her heart was guilty of deadly sin.²⁰² Culpability was further aggravated if one's wrath spilled over to influence others: "If thy wrath thou will not cease, but bring another to thy sin," wrote Mannyng, "thou shalt have charge of you both, for through your wrath is the other wroth."²⁰³

²⁰⁰ Seneca, "De Ira," II, in *Moral Essays*, vol. 1, trans. Basore, 206-207. "But while nature makes certain persons prone to anger, there are likewise many accidental causes which are just as effective as nature. Some are brought into this condition by sickness or injury of the body, others by toil or unceasing vigils, by nights of anxiety, by yearnings and the affairs of love; whatever else impairs either body or mind, produces a diseased mental state prone to complaint. But these are all only beginnings and causes; habit counts for most, and if this is deep-seated, it fosters the fault."

²⁰¹ Chobham, *Summa confessorum*, ed. Broomfield, 18. "Sacrilege, homicide, adultery, fornication, false testimony, rape, theft, pride, hatred, avarice, and anger if held for a long time, and drunkenness, if constantly repeated, in their number it is to be reckoned." ("Sacrilegium, homicidium, adulterium, fornicatio, falsum testimonium, rapina, furtum, superbia, invidia, avaritia, et si longo tempore teneatur iracundia, et ebrietas, si assidua sit, in eorum numero computatur.") For an earlier warning against "iram longo tempore in corde," see Carine van Rhijn, ed., *Paenitentiale Pseudo-Theodori* (Turnhout: Brepols, 2009), 7. A text on the vices and virtues, c. 1200, similarly placed long-held wrath among deadly sins, alongside habitual fornication, usury, witchcraft, and unjust judging. See Holthausen, ed., *Vices and Virtues*, 120-121.

²⁰² Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 9. "One who bears long wrath against others, for such wrath long-held and treasured in the heart, is in wrath and in hate: that is deadly sin." ("þ ilke / þet bereth longe wreþe / ayens oþren . vor zuich wreþe / longe y-hyealde / and byuealde ine herte : is ine wreþe / and ine hate : þet is dyadlich zenne.")

²⁰³ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 128, lines 3735-3738. ("Ȝyf þy wrappe þou wylt not blynne, / but bryngest anoþer to þy synne, / Þou shalt have chargē of þo boþe, / For þurgh ȝoure wrappe are oþer wroþe...") See also *ibid.*, lines 3741-3746, for the idea that a wrathful person might be damned even if his or her responsibility for another's downfall were indirect, taking place through counsel or advice: "If you gave counsel or advice / Out of ire, that a man should die; / Or if you in any fight, / For ire wound or hurt a man, / In this sin is outrage, / To hell you make your voyage." ("Ȝyf þou ȝaue euer cunsel or rede / for yre, þat a man were dede: / Or ȝyf þou yn any strut, / for Ire wundedyst a man, or hurt, / yn þys synnē ys outrage, / to helle þou makyst þy vyage.")

This image of wrath's slippery slope, starting with simple uncontrolled anger, whether innate or acquired, and culminating in homicide and war, compelled confessors to urge penitents to cultivate habits of patience and forgiveness. For example, while becoming angered easily (*wrappyþ hym lyghtly*) might be a lesser sin, Mannyng nevertheless advised that a wise man should avoid such emotion (*wysman schulde nat wrap hym sone*) to prevent the formation of condemnable habits.²⁰⁴ Likewise, occasional cursing during a game, unaccompanied by the desire to bring shame, did not give rise to deadly sin; it became damnable, however, if done habitually.²⁰⁵ Therefore, it was best to refrain altogether. The reason for such avoidance lay in the cumulative power of wrath and ire, which might grow in intensity (*strenkþe*) and duration (*lenþe*) if left unaddressed, thereby turning into powerful sin (*synnē strong*) by virtue of its long-lasting nature.²⁰⁶ Similarly, after discussing the manifold nature of wrath, Robert of

²⁰⁴ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 127, lines 3709, 3714.

²⁰⁵ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 129, lines 3761-3766. "If a man curse as in a game, and in his heart wills himself no shame, he sinneth not then deadly, for it is said all in ribaldry. This sin is not damnable unless it be said customarily." ("Ȝyf a man curse as yn game, / And yn hys herte wyl hym no shame, / he ne synneþ nat þan dedly, / For hyt ys seyð al yn rybaudy. / Þys synne ys nat dampnable / But hyt be seyð custummable.")

²⁰⁶ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 127, lines 3717-3720. A similar ladder vision of wrath, or "fellhead of heart" (*felhede of herte*), by which one climbs from chiding to strife all the way to manslaughter and deadly war, can be found in the *Ayenbite of Inwyrt* (c. 1340). According to the author, when wrath arises between two men (*huanne wreþe arist / betuene tuay men*), the first result is rebuking (*chidinge*), followed thereafter by conflict (*strif*) and then desire for the other's downfall (*wylninge of wreche*). Sometimes this could escalate all the way to manslaughter (*manslawte*) and even deadly war (*werre dyadlich*). See Michel, *Ayenbite of Inwyrt*, vol. 1, ed. Gradon, 30. For a discussion of the medieval English understanding of anger and envy-hatred and its progression from thought to violence, see Hyams, *Rancor and Reconciliation*, 50-51. For a later, Wycliffite summation of the varieties of ire, see Anne Hudson, ed., *English Wycliffite Sermons* (Oxford: Clarendon, 1983), 246-247 (emphasis in original). ("...And so þe false pharisees tauȝten men þat *Godes lawe forfendith not but manslawtre or oþur sensible wrong*, and not oþur priue wrong þat is worse rote herof; and þis were blasfemye in God to leue þe worse and dampne þe bettute. And herfore declareþ Crist þre maner of wykkyd ire. *Be fyrst maner of ire is wan a man is wrapthed withoute resoun, and sych is coupable aȝen God to be iuged to helle*. For þis vnkyndely venym aȝeyn þe stat of innocens is rote of malice whan þey drawe to þer deth to forȝyue men alle wrongus and axe men mercy of her synne. *The secunde degre of þis ire is whan a man hath conceyued wrapthe, and brekith owht in scornful wordis of his fyrste conceyued ire*. Soply ire may falle to men for to venge Godus cawse, and so may men scorne oþur for þey follyly synne in God, as Hely scornede þe prestys of Baal. But boþe þese ben perilouse. And herfore he þat

Flamborough advised confessors to lecture on the importance of peacemaking. “See that you are peaceful,” (*Vide quod...sis pacificus*), urged the hypothetical priest in Flamborough’s mock dialogue, “that is, that you have peace with yourself and with others, working toward peace amid discord”²⁰⁷ The priest was to advise the penitent as well toward the attributes of modesty (*modestus*), long-suffering (*longanimis*), and patience in adversity (*patiens adversitatum*), drawing upon David in the last instance as a lived example of grace in adversity (*in adversitate gratiarum*).²⁰⁸ By focusing on these attributes, the priest was highlighting those things most contrary to ire.

The Culpability of Long-Held Versus Sudden Anger

A mid fourteenth century sermon demonstrates how this vision of wrath’s cumulative nature reached lay audiences. John Gaytryge described how wrath, “a wicked stirring or boiling of the heart,” might lead a person to vengeance, proceeding from quarreling and swearing, to slander and fighting, and even to “felony and often manslaughter”.²⁰⁹ By cultivating charity and

scorneth þus is coupable to fallen in counseyl, where his folly schal be hardyd til þat he falle to more synne. *þe bridde degre of þis ire is whan a man spekith folily, as he þat sclawndriþ a man, or repreueþ hym falsely and þat man, as Crist seith, is cowpable of þe fuyr of helle, for his ire is turnyd to hate; and, as syn loon seiþ, alle syche ben mansleerus þat ben worþi to be dampnyd. And so schulden men kepe charite, boþe in wille and in word, and not only spare strokys as pharisees falsely seyden.*”

²⁰⁷ Flamborough, *Liber Poenitentialis*, ed. Firth, 181 (book 4, ch. 4, De ira). (“...id est pacem habens tecum et cum aliis, et ad pacem labores inter discordes”). This connection between anger control and peace also comes through in this c. 1200 discussion of vices and virtues: Holthausen, ed. *Vices and Virtues*, 98-99.

²⁰⁸ Flamborough, *Liber Poenitentialis*, ed. Firth, 181-182 (book 4, ch. 4, De ira). Richard Rolle took a prayerful approach to the mitigation of anger, exhorting God, “send me the grace to prevent any immoderate anger, hatred, or malice from breaking my rope of Christian love,” thereby acknowledging the disruptive power such an emotion might have on an otherwise God-fearing individual. “Meditations on the Passion,” in *Richard Rolle: The English Writings*, ed. Allen, 110.

²⁰⁹ “John Gaytryge’s Sermon,” in N. F. Blake, ed., *Middle English Religious Prose* (Evanston: Northwestern University Press, 1972), 85. (“The thirde dedly synn or heuede syn es wrethe, that es a wykkede stirrynge or bollenynge of herte wharefore a man wilnes for to wreke hym or wykkydly to venge hym appon his evyn-cristyn. And of this wykkede syn commes struyunge and flytynge with many false athes and many foule wordes, sclaunder for to fordo a man’s gude fame, feghtyng and felony and ofte

patience, individuals might fight against innate or acquired tendencies toward anger. Penitents were encouraged not to allow hatred or ill will to fester, but rather to choose forgiveness over vengeance, which belonged to God alone according to Deuteronomy 32:35. As one late fourteenth-century sermon author reminded his congregation, one might not safely pray the Our Father, saying “Lord, thy will be done,” if he “desires by wrath to take vengeance against his brother whom God biddeth him to love”.²¹⁰ As a result, for the purpose of weighing sin, long-held anger was treated more severely than anger spontaneously ignited. This was nothing new. In a line of thought traceable to the early medieval penitential tradition, homicide differed in quality if motivated by long-held hatred as opposed to occurring on a sudden. The Penitential of Finnian (ca. 525-550), for example, assigned more severe penance for homicides motivated by hatred than for homicides occurring on a sudden. A cleric who killed his neighbor had to enter exile for ten years and enact penance for seven years.²¹¹ After ten years, if approved by his abbot or superior priest, he might return from exile and make reparations with the friends and family of the deceased, even offering to serve the deceased’s parents in place of their son.²¹² However, if the homicide had been motivated not by hatred, but had instead occurred on a sudden, prompted by the devil or inadvertently, “the two having formerly been friends,” penance was shortened to three years on bread and water and three additional years abstaining from wine and meat,

manes-slaughter, and many ma than nowe es nede for to be nevenede.”) The 1357 sermon is a translation of and expansion upon the Latin catechism of Archbishop Thoresby of York. See *ibid.*, 73. On the Aristotelian origins of this concept of blood boiling around the heart, see Harris, *Restraining Rage*, 68.

²¹⁰ Ross, ed., *Middle English Sermons*, 51 (“...how þan may anny man sey in is Pater Noster, ‘Lord, þi will be do,’ whan he desireþ by wrath to take veniaunce of is brothere þat God biddeþ hym love?”)

²¹¹ John T. McNeill and Helena M. Gamer, eds. and trans., *Medieval Handbooks of Penance: A Translation of the Principal Libri Poenitentiales* (New York: Columbia University Press, 1990), 91, §23. This included three years on bread and water and four years abstaining from wine and meat.

²¹² McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 91, §23. Essentially the same penance was prescribed for homicide by clerics in the Penitential of Columban (ca. 600) as well. See *ibid.*, 252, §1.

although the killer was still obliged to enter temporary exile.²¹³ Sudden anger provided grounds for a steep reduction in penance.

As we saw earlier, Aquinas described anger as listening imperfectly to reason in determining the due measure of punishment to inflict in response to a slight.²¹⁴ He also argued that in the heat of the moment a person's capacity to reason might be hindered by anger.²¹⁵ It is such a belief about anger's effects in the heat of passion that would eventually lead to the early modern doctrinal development of provocation as a partial excuse to homicide, which treated sudden anger like other grounds of excuse, such as insanity. Yet Aquinas' ideas were already circulating in popular vernacular literature in fourteenth-century England, as demonstrated by this excerpt from Chaucer's *Parson's Tale*:

Now understondeth that wikked Ire is in two maneres; that is to seyn, sodeyn Ire or hastif Ire, withouten avisement [i.e., deliberation] and consentynge of resoun./ The menyng and the sens of this is that the resoun of a man ne consente nat to thilke sodeyn Ire, and thanne is it venial./ Another Ire is ful wikked, that comth of felonie of herte avysed and cast biforn [i.e. deliberate and set beforehand], with wikked wil to do vengeance, and therto his resoun consenteth; and soothly this is deedly synne.²¹⁶

Chaucer thus differentiated between sudden ire and ire emerging from felony of heart. This felony of heart might be contrasted with the self-defender's sorrow of heart, as described in the *Bracton* treatise.²¹⁷ In Chaucer's tale, sudden ire was venial sin, while long-cherished ire was a mortal sin transforming a person from the image of God to the image of the devil.

²¹³ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 91, §24.

²¹⁴ See Aquinas, *Summa Theologica*, vol. 2, 780 (Pt. I-II Q. 46, Art. 4).

²¹⁵ Aquinas, *Summa Theologica*, vol. 2, 789 (Pt. I-II Q. 48, Art. 3).

²¹⁶ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 305.

²¹⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 340-41. Namely, *Bracton* described the self-defender as acting "without premeditated hatred" ("sine odii meditatione") but with "sorrow of heart" ("dolore animi"), which might also be translated as pain or sorrow of the soul or intellect. But see Guillaume de Lorris, *Le Roman de la Rose*, ed. Stephen G. Nichols, Jr. (New York: Appleton, 1967), 24-25, and

The idea of sudden anger merits more extensive analysis than possible within this chapter, as it underpins the modern doctrine of provocation, which Jeremy Horder analyzed in his 1992 study, *Provocation and Responsibility*. Horder summarized the modern doctrine succinctly:

defendants are entitled to a verdict of manslaughter even if they have intentionally killed, if (a) when they killed they did so as a result of a ‘loss of self-control’ and (b) if the jury finds that a reasonable person might well have done as the defendants did (namely, lost self-control and intentionally killed).²¹⁸

The first doctrinal prong takes a view of emotion-driven behavior that is neither Stoical nor Thomistic in approach, but closer to the latter than the former. Seneca, for example, took the view that there was no such thing as acting purely in the heat of passion, as reason and volition were always at play.²¹⁹ Aquinas conceded that in extreme cases, a person’s ability to reason might be hampered by the overwhelming influence of anger.²²⁰ Yet even he would not go so far as to describe an anger-induced actor as exculpable or altogether devoid of self-control, partly due to an inclination to place blame upon an individual who failed to counteract a growing tendency toward ire. The doctrine’s second prong adds a common-sense element, requiring that a person seeking mitigation on the basis of provocation not be behaviorally too far from the mean.

Horder observes that the seventeenth-century understanding of provocation required killing in hot blood, the subjective element, as well as the presence of one of four categories of

Chaucer’s translation at *ibid.*, 161-162 (describing “tristesse” or “sorrow” as characterized by ire and anger, and contrary to the passion of joy).

²¹⁸ Horder, *Provocation and Responsibility*, 1.

²¹⁹ See Seneca, “De Ira,” I, in *Moral Essays*, vol. 1, trans. Basore, 169. See also *ibid.*, 126-127, 166-169, where Seneca argues that anger only resulted in action with the approval of the mind (*animo adprobante*). Volition (*voluntate*) intervened when a person determined first that they had been wronged and then that they should be avenged.

²²⁰ See Aquinas, *Summa Theologica*, vol. 2, 789 (Pt. I-II Q. 48, Art. 3).

provocation: 1) “a grossly insulting assault”, 2) witnessing an attack against a friend or relation, 3) witnessing an Englishman “unlawfully deprived of his liberty”, or 4) witnessing a man committing adultery with one’s wife.²²¹ Horder argues that the first, second, and fourth categories “were firmly rooted in the moral theory and practice of medieval juries and Renaissance judges”, while the third was comparatively novel.²²² He also contends that seventeenth-century provocation cases rested upon an understanding of anger-inspired action as engaging the actor’s capacity for reason, while by Victorian times the doctrine would change fundamentally to a “loss of self-control” model, thereby downplaying the role of reason.²²³

In considering the doctrine’s roots, Horder puzzles over how in the post-Victorian age anger came to be equated with “loss of self-control,” itself a peculiarly Victorian concept in his estimation.²²⁴ On the contrary, I would argue that loss of self-control had been associated with extreme anger long before the Victorian “discovery” of the self.²²⁵ In fact, in the period at issue here, the thirteenth and fourteenth centuries, anger left unchecked and cultivated as habit threatened to rob an individual of his or her capacity to reason and exercise free will, thereby leading to behavior associated with madness and, indeed, an absence of self-control. The difference between the medieval and Victorian conceptions of this potentiality of anger was in

²²¹ See Horder, *Provocation and Responsibility*, 23-24. For further explication of these categories with case evidence, see *ibid.*, 31-39. Horder does not argue that these categories were all spelled out from the beginning, but rather that they gradually emerged during the century.

²²² Horder, *Provocation and Responsibility*, 24. For medieval examples of these various forms of provocation, see Green, *Verdict According to Conscience*, 38-39 (assault), 42-43 (adultery), 44-45 (defense of kin). For examples arising in papal petitions, see, e.g., the petition of John de Stanton, who intervened in a fight between his brother and another man. W. H. Bliss, ed. *Calendar of Entries in the Papal Registers Relating to Great Britain and Ireland: Petitions to the Pope*, vol. 1, A.D. 1342-1419 (London: Eyre and Spottiswoode, 1896), 446 (1 Urban V, 1363). See also the case of John Thome of the Scottish diocese of Glasgow, who became embroiled in violence in anger for a layman’s sexual involvement with John’s mother. *Ibid.*, 543-544 (1 Clement VII, Anti-Pope, 1379).

²²³ See Horder, *Provocation and Responsibility*, 40-42, 72-80.

²²⁴ Horder, *Provocation and Responsibility*, 2.

²²⁵ On the subject of premodern subjectivity, see Aers, “Whisper in the Ear of Early Modernists.”

the societal and de facto legal tendency during the former period to hold individuals to a high standard with regard to the appropriate formation of conscience, such that a person who reached a level of anger characterized by a loss of self-control or incapacity for reason might nevertheless be held legally accountable for failing to curb earlier, less deep-seated inclinations toward anger and hatred.²²⁶ In other words, “losing it” by responding heatedly to a provocation did not necessarily give rise to jury mitigation in medieval English felony cases in the way that it would under later provocation doctrine. I would contend as well that this difference may be due in part to the increased role played by a more widespread culture of honor in the early modern and modern periods, a culture which might be found in the medieval courts of chivalric literature but which was comparably understated in broader medieval English culture. This is not to say that the average medieval English man or woman did not possess and defend a sense of honor. In fact, honor comes through very strongly as a theme in manorial court records and in defamation proceedings within the ecclesiastical courts. Oddly, however, when it came to culpability for felony, the law did not explicitly make concessions to that aspect of social interactions, even if issues of honor may have been operating quietly in the background dynamics of fact patterns.²²⁷ Heated responses to affronts to honor surely played a role in medieval English altercations, likely eliciting jury sympathy and mitigation in some instances, but did so without achieving the broader level of social acceptance or even approbation Horder identifies in early modern and

²²⁶ I describe this as the de facto legal tendency, insofar as societal norms influenced how jurors approached such scenarios in adjudicating felony cases, and insofar as the law did not yet have a formal mitigation of murder to manslaughter in cases involving what would later be called provocation.

²²⁷ For examples of language related to honor in manor court records, see, e.g., Marian K. Dale, ed., *Court Role of Chalgrave Manor, 1278-1313* (Luton: Bedfordshire Historical Record Society, 1950), 4 (*pudorem domini*, offended by oat stealing), 12 (*violenter dispersonavit et defamauit*), 40 (defamation), 60 (charges and countercharges regarding an assault and defamation).

Victorian era felony cases. This may help explain the lengthy delay in the development of a formal doctrine of provocation.

To his great credit, Horder does not fall into the easy trap of assuming that provocation doctrine sprang up as something wholly new when it entered judicial dialogue in the early modern period. Rather, he argues that it is manifest error to suppose that, “if there was no doctrine of provocation before early modern times, provocation cannot have had an important effect on criminal responsibility in medieval times.”²²⁸ Relying heavily on the work of Thomas Green, Horder acknowledges that mercy would sometimes lead juries to present the facts of technically felonious killings as homicides in self-defense or accidents in order to ensure the defendant’s ability to access a pardon.²²⁹ He correctly points out one of the mysteries of the medieval common law understanding of felonious homicide: while the law carved out an area of excuse or pardon for killings in self-defense, which might be motivated by fear or duress, it did not carve out a similar area of excuse for what might be an “instinctive” killing in anger upon provocation.²³⁰ As a result, he argues, early modern lawyers would later split anger off from other categories within murder’s scope, thereby choosing to treat anger as an instinctive action akin to killing out of fear.²³¹ By that point, “anger upon grave provocation was no longer regarded as corrupting an intention to kill in the same way as it had before, despite remaining a deadly sin.”²³² Horder may be correct in conflating the treatment of anger and fear in this later period, but I would argue that neither anger nor fear was seen as a purely instinctive emotion in

²²⁸ Horder, *Provocation and Responsibility*, 5.

²²⁹ Horder, *Provocation and Responsibility*, 7.

²³⁰ Horder, *Provocation and Responsibility*, 20. Where anger was excusatory, however, it likely was most often dealt with through self-defense.

²³¹ Horder, *Provocation and Responsibility*, 20-21.

²³² Horder, *Provocation and Responsibility*, 21.

medieval England. Rather, as described in self-defense narratives, both of these passions were viewed as controlled largely by a person's sense of reason, even when circumstances demanded a hasty decision about whether to employ lethal force. One might reasonably fear death when attacked with lethal violence, but if coroners' narratives reflect societal understandings, such fear was rational in its basis and generated by a calculation of the likelihood of escaping grave bodily harm. Of course, coroners' narratives may be written in such a way as to emphasize the rationality of fear responses, while social understandings might instead see passionate responses as irrational and uncontrollable. Nevertheless, I contend that the rolls likely mirror actual belief about the nature of the passions, insofar as theological and literary sources reinforce an understanding of emotion as responsive to reason and only reaching animalistic, out-of-control proportions when one has failed to temper earlier tendencies toward anger said passions.²³³

Heat of Passion and the Earl of Warenne

While the English common law would eventually make doctrinal room for righteous anger in the form of the provocation doctrine,²³⁴ during the period at issue here anger very rarely served explicitly as a mitigating circumstance. In one well-known example to the contrary, cited by Maitland as an unusual instance of a distinction being made between what would later be called murder versus manslaughter, the Earl of Warenne was allowed to make peace after his men wounded Alan de la Zouche during a courtroom argument in 1270.²³⁵ According to Maitland, the Earl of Warenne was engaged in litigation with Alan before the justices in

²³³ See *supra*, sections II and III.

²³⁴ See, generally, Horder, *Provocation and Responsibility*.

²³⁵ See Pollock & Maitland, *History of English Law*, vol. 2, 485-486, note 5. See also Frederic William Maitland, *Collected Papers*, vol. 1, ed. H. A. L. Fisher (Cambridge: Cambridge University Press, 1911), 308-309, for Maitland's perspective on the unusual case. For the original chronicle source, cited by Maitland, see Luard, ed., *Annales Monastici*, vol. 4, 233-235.

Westminster Hall; the chronicle of Thomas Wykes relates that the dispute involved a manor. As Gower and our penitential sources might have predicted, angry words gave way to angry blows. Warenne's men fatally wounded Alan, thereby violating the sanctity of the courtroom. According to the chronicle, the men, instigated by the devil himself, exchanged contumelious words (*se invicem instigante diabolis verbis contumeliosis*), and later drew weapons.²³⁶ The chronicler's description of the words as *contumeliosis* suggests a connection with the idea of affront and insult found in classical Roman law, Chobham's late twelfth-century confessor's manual, and Chaucer's *Parson's Tale* alike. Unable to deny his guilt, Warenne "placed himself in the king's mercy" (*posuit se in misericordia regis*); he paid 5,000 marks to the king and another 2,000 marks to compensate for injuries inflicted on Alan and his son.²³⁷ The chronicle also reported that Warenne, along with 50 knights, described by Maitland as compurgators, walked on foot from New Temple in London to Westminster, where they all swore that the wounding had not been done from malice aforethought (*non ex praecogitata malitia*) but rather "from the movement of anger greatly kindled" (*sed ex motu iracundiae nimis accensae*).²³⁸ In the oath's phrasing, malice aforethought was contrasted with sudden anger, and the suggestion was that the latter was less outrageous than the former. The phrasing is also reminiscent of the *mota contentione* formula so often found in felony cases.

Nevertheless, several factors weigh against interpreting this narrative as indicative of standard homicide practice. First and most obvious, the case was not one of homicide, as Alan de la Zouche was alive at the time of the settlement.²³⁹ Second, the Earl of Warenne was a man

²³⁶ Luard, ed., *Annales Monastici*, vol. 4, 234.

²³⁷ Luard, ed., *Annales Monastici*, vol. 4, 235.

²³⁸ Luard, ed., *Annales Monastici*, vol. 4, 235.

²³⁹ A point made by Maitland in *Collected Papers*, vol. 1, ed. Fisher, 308. He would die not long after.

of tremendous standing—a man of “excellence,” if we were to borrow Aquinas’ language—whose experience was certainly atypical, as demonstrated by the compurgation of 50 knights gathered to clear his name. Undoubtedly, the audacity of his men in starting a courtroom brawl—at Westminster, no less, in the presence of royal justices as well as the chancellor—would have been inconceivable for a lesser litigant. If a conclusion can be drawn, it is merely that a premeditated attack was considered even more damning than one motivated by a sudden rush of anger; the anecdote does not suggest that sudden anger was generally a grounds for exoneration or partial excuse.

Anger, Excellence, and Feuding Behavior

One area of historical study that has generated considerable insight into emotion’s role in conflict and its resolution has been the medieval bloodfeud. William Ian Miller’s work on Iceland has highlighted the sophisticated calculus involved in feuding behavior. In *Bloodtaking and Peacemaking*, Miller describes a medieval Iceland in which people were “ever anxious about the state of their own positions and ever jealous of the attainments of others.”²⁴⁰ The “inherent insecurity of social rank and status” played itself out in moments of discord, when honor was at stake.²⁴¹ Although medieval Icelandic society was not highly stratified, social rank did come into play in determining whether a dispute placed an individual’s honor at risk: honor was at stake in interactions with one’s equals, but a person of higher status could ignore an affront from

²⁴⁰ William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago: University of Chicago Press, 1990), 29.

²⁴¹ Miller, *Bloodtaking and Peacemaking*, 29.

a person of lesser status, whether a slave, small farmer, child, or woman, none of whom had any measurable honor to lose.²⁴²

Although his scholarship focuses primarily on Iceland, Miller has been careful to point out that feuding culture can differ markedly from place to place. Most bloodfeuding societies, however, “recognize a rough rule of equivalence in the prosecution of the feud,” a rule encapsulated in the talion.²⁴³ Notions of requital or repayment underlay the Icelandic system of bloodfeud, making for ready comparison with gift exchange.²⁴⁴ In his study of feuding culture in the Touraine c. 1100, Stephen White describes a system similarly directed toward a return to the status quo ex ante, but in the form of reconciliation more so than requital: he describes “a continuous process that began with a killing, continued on with retaliation for the killing, and ended with compensation for the killing and a reconciliation.”²⁴⁵

In his own work, also dealing in part with reconciliation, Paul Hyams argues for the survival of English feuding culture across the conquest’s divide and into the thirteenth century.²⁴⁶ While new common law forms provided remedies at law, this did not extinguish “the urge to vengeance”; rather, Hyams argues for the harmonious coexistence of extralegal processes, often dismissed as uncivilized, with official legal procedures for dispute resolution.²⁴⁷ This may be the

²⁴² Miller, *Bloodtaking and Peacemaking*, 32, 185-186. On the relatively high social status of bloodfeud participants in the Touraine c. 1100, see White, “Feuding and Peacemaking in the Touraine,” 197-198, 202.

²⁴³ Miller, “Choosing the Avenger,” 160.

²⁴⁴ Miller, *Bloodtaking and Peacemaking*, 182. For a brilliant discussion of gift exchange in the context of a gem of a saga, see William Ian Miller, *Audun and the Polar Bear: Luck, Law, and Largesse in a Medieval Tale of Risky Business* (Leiden: Brill, 2008).

²⁴⁵ White, “Feuding and Peacemaking,” 247. For a description of reconciliation ceremony, see *ibid.*, 256.

²⁴⁶ Paul Hyams, “Feud and the State in Late Anglo-Saxon England,” *Journal of British Studies* 40:1 (2001), 2-3. See also Hyams, *Rancor and Reconciliation*, 72, 191.

²⁴⁷ Hyams, *Rancor and Reconciliation*, 8.

dynamic at play in the late thirteenth-century story of the Earl of Warenne above and in the fourteenth-century papal petitions to be discussed below, suggesting that this coexistence may have continued well into the fourteenth century. Taken together, Miller, White, and Hyams have encouraged historians to acknowledge the sophistication and calculation involved in feuding practice, and the compatibility of the bloodfeud with other formal legal processes. In fact, litigation itself could be used as a form of feuding vengeance.²⁴⁸ All three focus on an earlier period, and in the case of Miller and White, a different geographical terrain. Nevertheless, I believe that their analysis of feuding behavior can be placed in conversation with the work of early modern historians like Jeremy Horder on the development of provocation doctrine. Between these two areas of analysis—the early and high medieval bloodfeud, on the one hand, and early modern provocation, on the other—lies the period at issue here, the thirteenth and fourteenth centuries, when the common law first grappled with the use of juries for felony adjudication at a time when there was relatively little black-letter law to guide outcomes.

In the above narrative, the Earl of Warenne and his men argued that their precipitous attack upon Alan de la Zouche had been inspired by anger, and my interpretation suggested that this partial excuse was available to them in part due to the earl's status as a man of considerable standing. This interplay of provocation, anger, and relatively high status may be found in other contemporary sources as well, namely papal records of English clerics requesting dispensation to serve in orders and hold benefices following their involvement in bloodshed. While eyre and gaol delivery records do not invoke the language of honor or vengeance in describing homicides, such ideas seem to underpin the narratives presented by these clerics to the papacy.

²⁴⁸ See Hyams, *Rancor and Reconciliation*, 192; Smail, "Hatred as a Social Institution," 96.

In one such petition, Richard de Middleton, a priest from the Hereford diocese and a member of the bishop of Ely's household, described with remorse the source of his clerical irregularity. Earlier in his life, when he had been in the retinue of a certain unidentified lord, he became embroiled in a sudden scuffle: while walking with the lord, he came upon an enemy who had "despoiled the said lord of certain tenements and possessions."²⁴⁹ Just as with the case of the Earl of Warenne, the underlying dispute involved landed property. Also like the earl and like Richard's master, this enemy appears to have had his own retinue, as the petition describes how Richard "struck one of them, who was a layman."²⁵⁰ Although the typical progression according to literary sources was from angered thoughts to words to actions, Richard had in a sense jumped the gun by lashing out physically at the layman. "No other blow having been given," the men "soon after came to words, and then to blows" according to the petition. At that point, another one of the enemies, a cleric, attacked Richard's lord fatally with a sword. Richard, in turn, "in defense of his master, struck the aggressor, who followed and tried to kill him." Richard emphasized in his narrative that he did not have homicidal designs on this wayward cleric. Rather, other members of the lord's household, who were under the impression that their lord was already dead (he would be later that evening) followed the cleric and killed him "without Richard's knowledge or assistance". Richard argued that he personally had no direct involvement in the cleric's death, as he had been ministering to his dying master at the time of the fatal attack. Nevertheless, out of an abundance of caution, Richard had not approached the altar since the incident. In making his case to the pope, Richard did not completely whitewash

²⁴⁹ Bliss, ed. *Calendar of Entries in the Papal Registers*, vol. 1,102 (4 Clement VI, 1345). In translation only. It is unclear what import to place upon the description of an enemy, although it does not seem that 'enmity' was treated here as a distinct legal status, such that harm done to an enemy would be materially different from harm done to anyone else. On this alternative view of enmity, see generally, Bartlett, "Mortal Enmities," 197-212.

²⁵⁰ Bliss, ed. *Calendar of Entries in the Papal Registers*, vol. 1,102 (4 Clement VI, 1345).

his involvement—he admitted striking the first blow—but also did not take responsibility for the ensuing homicide. He urged the pope to recognize that he had only been acting out of duty, and he added the further persuasive evidence that he had no other means of earning his subsistence. Richard’s narrative appears to have been persuasive, as he was granted a dispensation to minister in minor orders and hold a benefice without cure of souls, a limit likely due to the continued stain of his past transgression. Richard’s story demonstrates the kinds of alliances lords might forge with members of their household and retinue, and the kind of extralegal violence that might arise over property-related disputes. It also illuminates the interplay of anger, high social standing, and honor, and might even be described as a feuding narrative.

A second petition similarly involves individuals of relatively high status. While Richard petitioned directly to the pope, this second petition was instigated by Thomas de Wetenalle, a knight and lord. Thomas petitioned on behalf of his kinsman, Thomas Aleyn, a priest. The petitioner described an instance of strife between Thomas Aleyn and a layman, John Blac, both of whom appear to have had some kind of supporting retinue acting in their defense. Thomas was seized by John and several archers and armed men in the public road, where he was “robbed of goods and money, bound, beaten, and wounded by arrows, and delivered over to death.”²⁵¹ Thomas broke free and, in familiar bloodfeud style, set upon John with the assistance of some armed friends. The narrative indicates that Thomas commanded his friends not to kill John, but merely to beat him in revenge; the friends beat John “so effectually” that he soon died of his wounds. Thomas had previously petitioned the pope, receiving dispensation to exercise minor orders and hold a benefice without cure of souls, much like Richard in the case above. Devotion inspiring him to remain in sacred ministry, Thomas was now petitioning, through his kinsman

²⁵¹ Bliss, ed. *Calendar of Entries in the Papal Registers, vol. 1*, 523 (4 Urban V, 1366).

the knight, for removal of “the stain of irregularity” and for restoration “to his orders, and to the exercise of the sacraments,” or to allow him two benefices without cure of souls, presumably for the sake of additional income. Thomas’ petition was granted.

These two examples demonstrate the continued use of private vengeance to resolve conflict between factional kin and household groups in late medieval England. However, I believe it is dangerous to extrapolate from these sources to draw conclusions about English society writ large. What was acceptable behavior for a well-connected cleric and his kin, or for a nobleman as in the case of the Earl of Warenne, was not necessarily acceptable behavior for broader society in terms of translating into felony acquittals or pardons. Moreover, what was persuasive for the sake of petitioning the pope might not reflect what would be most persuasive to a trial jury. In part, the anger described in these comparably elite narratives may reflect the association between anger, honor, and excellence made by theologians like Aquinas and even by Seneca. In his discussion of anger and temperament, Seneca asked, “Do you not observe that with each advancing grade of fortune there goes the greater tendency to anger (*ira*)?”²⁵² Seneca found that an inclination toward anger was particularly common among the rich, the nobility, and officials. “Prosperity fosters wrath (*iracundiam*),” Seneca argued, “when the crowd of flatterers, gathered around, whispers to the proud ear: ‘What, should that man answer you back?’”²⁵³ Seneca appears to be describing a dynamic not unlike that prevalent in the retinues of men like the Earl of Warenne, whose entourage not only reinforced his sense of justified anger but also took up arms on his behalf. Vernacular literature provides further evidence of different

²⁵² Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 210-211.

²⁵³ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 210-213. On anger and medieval rulership, see the essays by Althoff, Hyams, and White in Rosenwein, *Anger’s Past*.

expectations for “men of great degree” and “poor men” with regard to controlling their passions.²⁵⁴

Although my own reading of the legal and popular literary record from the period has led me to question the extent to which honor served as a source of exculpation, Aquinas does place emphasis on what we might term honor in his argument that slights inspire anger due to their negative impact on a person’s excellence: “whatever injury is inflicted on us, in so far as it is derogatory to our excellence, seems to savor of a slight.”²⁵⁵ In fact, according to Aristotle, excellence actually “makes men prone to anger.”²⁵⁶ Aquinas interpreted Aristotle here to mean that “the more excellent a man is, the more unjust is a slight offered him in the matter in which he excels.”²⁵⁷ Whether I am correct in conflating excellence with honor remains to be seen, but it does appear that Aquinas felt that some individuals were more temperamentally inclined to anger due to something fundamental about their status as a person of excellence.

Anger and Temperament

Anger was also understood to be more generally situated in the temperaments of certain individuals and possibly more prevalent among, but not entirely limited to, the privileged classes. “There is nothing more baleful than enmity, yet it is anger that breeds it;” Seneca wrote, and

²⁵⁴ See “Suffer in Time and That is Best,” in Brown, ed., *Religious Lyrics of the XIVth Century*, 200, lines 25-36. The text argues that if a poor man wrongs a “man of great degree,” then “the country,” the term used to describe a jury, would be able to see clearly that the latter man might be avenged. However, the poem goes on to suggest that it would be preferable for the man of high degree to take pity and spare the poor man his vengeance. (“Ȝif þou be mon of gret degre, / and a pore mon in his place / Ful wrongfully has greued þe, / And don þe gref wiþ his trespace, / Þe cuntrey con wel knowe and se, / Þou mai be venget in þat case; / Ȝif þou be perset wiþ pite, / Ȝit woltou spare him for a space. / Ȝif þou so goodly schewe þi grace, / Þe holigost is in þe feste; / Þen godes blessing schaltou in-brace, / And suffre (in) tyme and þat is beste.”)

²⁵⁵ Aquinas, *Summa Theologica*, vol. 2, 785 (Pt. I-II Q. 47, Art. 2).

²⁵⁶ Aquinas, *Summa Theologica*, vol. 2, 786 (Pt. I-II Q. 47, Art. 3).

²⁵⁷ Aquinas, *Summa Theologica*, vol. 2, 786 (Pt. I-II Q. 47, Art. 3).

“nothing is more deadly than war, yet in that the anger of the powerful finds its vent; none the less anger in the common folk or private persons is also war—war without arms and without resources.”²⁵⁸ Thus, both the powerful and the common person might be prone to the disruptive force of anger. One French chronicler suggested that the English were peculiarly inclined toward anger, but this is not a view generally corroborated in English sources.²⁵⁹ Aquinas’ analysis of anger was complicated by his view of the complex nature of human beings, who might be temperamentally patient, volcanic, or something in between these two extremes. Aquinas took temperament into account in determining the culpability that should attach to an anger-driven act. While many writers, Aquinas included, emphasized the long-term development of habitual wrath, Aquinas also described a kind of malice or wrath that might be part of an individual’s nature: “The malice of some men can be called natural,” he wrote, “either because of custom which is a second nature; or on account of the natural proclivity on the part of the sensitive nature to some inordinate passion, as some people are said to be naturally wrathful or lustful; not on the part of the intellectual nature.”²⁶⁰ Aquinas, in other words, felt that some people were more naturally inclined toward anger, but that anger also had an acquired component, insofar as a person might cultivate a habit toward wrath.

Temperament also came into play in Aquinas’ distinction between hatred and anger, two emotions or passions that were often interchanged in contemporary sources. Hatred signified a permanent disposition, while anger was by comparison a more fleeting passion. Aquinas’ vision of anger restricted the emotion to moments of reaction to some form of hurt: “anger arises,” he

²⁵⁸ Seneca, “De Ira,” III, in *Moral Essays*, vol. 1, trans. Basore, 266-267.

²⁵⁹ For this anecdote from the writings of Froissart, possibly reflecting a viewpoint also held by Gower, see Kaeuper, *War, Justice and Public Order*, 136-137.

²⁶⁰ Thomas Aquinas, *Summa Theologica*, vol. 2, 315 (Pt. 1, Q. 63, Art. 4).

observed, “from an emotion of the soul due to the wrong inflicted”.²⁶¹ Hatred, by comparison, “ensues from a disposition in a man, by reason of which he considers that which he hates to be contrary and hurtful to him.”²⁶² As such, hatred was more incurable and anger more transitory.²⁶³ The difference between anger and hatred might also be reflected in the body, and in discussing this aspect of anger Aquinas seems to concede that anger, like hatred, could be temperamental in addition to describing an immediate response to a slight. According to Aquinas, a disposition toward anger reflected “a bilious temperament;” bile was the fastest-moving of all the humors, and could therefore be likened to fire.²⁶⁴ Relying on John Damascene, Aquinas observed: “anger is fervor of the blood around the heart, resulting from an exhalation of the bile.”²⁶⁵ Aquinas quoted the *Moralia* of Gregory the Great for the proposition that a heart inflamed with anger “beats quick, the body trembles, the tongue stammers, the countenance takes fire, the eyes grow fierce, they that are well known are not recognized.”²⁶⁶

This view of the bodily manifestation of anger had deep roots, as demonstrated by Seneca’s description of the interaction of temperature and temperament in the human body:

A fiery constitution of mind will produce wrathful men, for fire is active and stubborn; a mixture of cold makes cowards, for cold is sluggish and shrunken. Consequently, some of our school hold that anger is aroused in the breast by the boiling of the blood about the heart; the reason why this particular spot is assigned to anger is

²⁶¹ Aquinas, *Summa Theologica*, vol. 2, 782 (Pt. I-II Q. 46, Art. 6, Reply Obj. 3). See also *ibid.*, 784 (Pt. I-II, Q. 47, Art. 1) (quoting Aristotle: “anger is always due to something done to oneself”, while “hatred may arise without anything being done to us”).

²⁶² Aquinas, *Summa Theologica*, vol. 2, 782 (Pt. I-II Q. 46, Art. 6, Reply Obj. 3).

²⁶³ Aquinas, *Summa Theologica*, vol. 2, 782 (Pt. I-II Q. 46, Art. 6, Reply Obj. 3).

²⁶⁴ Aquinas, *Summa Theologica*, vol. 2, 781 (Pt. I-II Q. 46, Art. 5). For the application of these ideas of hot bile in early modern France, see Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France* (Stanford: Stanford University Press, 1987), 37.

²⁶⁵ Aquinas, *Summa Theologica*, vol. 2, 788 (Pt. I-II Q. 48, Art. 2).

²⁶⁶ Aquinas, *Summa Theologica*, vol. 2, 788 (Pt. I-II Q. 48, Art. 2).

none other than the fact that the warmest part of the whole body is the breast.²⁶⁷

Seneca proceeded to draw generalizations based upon the functioning of moisture and temperature. For example, women and children had vehement but less serious anger because they had more moisture and less heat within them.²⁶⁸ Old men, as well as invalids, might be testy and irritable, but not powerfully angered due to their lack of heat. Wine had the effect of increasing bodily heat and fostering anger, such that “some boil over when they are drunk, others when they are tipsy, each according to his nature.” Seneca even characterized red-haired and ruddy-skinned people as “extremely hot-tempered,” having “by nature the color which others are wont to assume in anger,” as well as “active and restless” blood.²⁶⁹ For Seneca, anger was a matter of flesh and blood.

Similarly, medieval English authors situated the progression from anger to murder within a person’s body, along with the reverse movement from anger toward patience and charity. Just as felony, derived from the word “fell” or gall, was located in the body, anger was truly a visceral emotion in the writings of authors like Chobham and Chaucer. “Jesus Christ, who suffered for me pains and angers bitter and fell,” entreated one poem, “let me never be parted from thee, nor suffer the bitter pains of hell.”²⁷⁰ In characterizing Saul prior to his conversion, John Mirk described how “he would froth at the nose and the mouth for anger” upon hearing

²⁶⁷ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 204-205.

²⁶⁸ On this gendered nature of anger as it pertains to early modern France, see Davis, *Fiction in the Archives*, 79-81.

²⁶⁹ Seneca, “De Ira,” II, in *Moral Essays*, vol. 1, trans. Basore, 204-207.

²⁷⁰ “Hymn to Jesus Christ,” in Patterson, ed., *Middle English Penitential Lyric*, 132 (“Ihesu Crist, þat tholed for me / Paynes and angers bitter and felle, / Late me neuer be partede fra þe, / Ne thole þe bitter paynes of helle!”)

people speak of Christians, who in turn were frightened by Saul's menacing appearance.²⁷¹ Most often, medieval authors situated anger less visibly within a person's heart. This understanding of anger and other emotion's bodily manifestations was not new; we have seen it already in Aquinas' discussion of bile, but the idea had much deeper roots in Western Christendom.²⁷² In the *Mirour de l'omme*, John Gower compared the effects of anger to a heart attack (*cardiacre*), which would desiccate the heart (*Le Cuer ensecche*) beyond repair.²⁷³ "In the heart is this sinning" (*Inne herte hys pys sennezing*), remarked Kentish poet William of Shoreham in a fourteenth-century discourse on wrath.²⁷⁴ Wrath, he wrote, "makes blood and breath about the heart burn" (*makeþ blod and brethe / Aboute þe herte aneld*), leading ultimately to the compassing of vengeance (*compasyþ veniaunce*). Once this wrath produced much heat (*wanne hy het to meche hete*), it left charity behind (*Hyt letteþ charite*) and replaced it with misdoing (*mysdoynge*) and the "withdrawing of God" (*wyþ-drawynge of god*).²⁷⁵ Chaucer's parson, too, described the heart as the site of ire, relying on Aristotelian thought: "Ire, according to the Philosopher, is the fervent blood of man quickened in his heart, through which he wills harm

²⁷¹ Susan Powell, ed., *John Mirk's Festial: Edited from British Library MS Cotton Claudius A.II*, vol. 1 (Oxford: Oxford University Press, 2009), 52, lines 35-37. ("...he wold frepon at þ[e] nese and at þe mowþe for angur, þretyng and manaschyng so heghly toward ham þat vch cryston mon was wondur sore aferd of hym".) Chaucer also employs this image of the angered man frothing at the mouth: "Thou myghtest wene that this Palamon / In his fightyng were a wood leon, / And as a crueel tigre was Arcite; / As wilde bores gonne they to smyte, / That frothen whit as foom for ire wood. / Up to the ancle foghte they in hir blood." "Knight's Tale," in *Riverside Chaucer*, ed. Benson, 47.

²⁷² See Aquinas, *Summa Theologica*, vol. 2, 781 (Pt. I-II Q. 46, Art. 5). On earlier conceptions of the heart as a locus of emotion, see generally, Firey, *Contrite Heart* (discussing Carolingian prosecutorial and penitential practice).

²⁷³ Gower, *Mirour de l'Omme*, trans. Wilson, 74; Troendle, ed., *Gower's Mirour de l'Omme*, 157, line 3860

²⁷⁴ M. Konrath, ed., *Poems of William of Shoreham*, part 1 (London: K. Paul, Trench, Trübner & Co., 1902), 111, line 341.

²⁷⁵ Konrath, ed., *Poems of William of Shoreham*, part 1, 110-11, lines 329-344. It is unclear whether "god" here refers to God or good.

toward him that he hateth”.²⁷⁶ A graceful heart would attract angels and repel demons, while a wrathful heart was a magnet for evil and repellent of angelic influence. According to John Mirk, a person might resist the overwhelming power of wrath by observing its undesirable and even painful influence:

Against wrath his help shall be, if he has grace in heart to see, how
angels, when he is wroth, from him quickly flee and goeth, and
fiends fast to him runneth, and with fire of hell his heart burneth,
and maketh him so hot and proud, that no man may abide him
near, and maketh him such as are not of God’s children, the devil’s
offspring, wherefore he may with suffering, quench in him such
burning, against wrath sufferance may be much his penance.²⁷⁷

Anger, in other words, was a cardiac event of monumental proportions, and afflicted individuals were cautioned to heed its early warning signs and seek rehabilitative treatment.

Compared with hatred, anger was more inclined toward mercy because it might be satisfied with a finite, just level of vengeance, while hatred desired “another’s evil for evil’s sake” and would therefore never be sated.²⁷⁸ With regard to “the intensity of the desire,” however, anger would more easily exclude mercy “because the movement of anger is more impetuous, through the heating of the bile.”²⁷⁹ Quoting Aristotle, Aquinas asked, “Who can bear the violence of one provoked?”²⁸⁰ Incidentally, this humoral model of anger has left an enduring legacy in the “hydraulic” model of emotions, which likens emotions to “great liquids within each

²⁷⁶ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 305. (“Ire, after the Philosophre, is the fervent blood of man yquyked [i.e., quickened] in his herte, thurgh which he wole harm to hym that he hateth.”)

²⁷⁷ Peacock, ed., *Instructions for Parish Priests*, 48-49, lines 1567-1580. (“Agaynes wrappe hys helpe schal be, / 3ef he haue grace in herte to se / How aungelus, when he ys wroth, / From hym faste flen and goth, / And fendes faste to hym renneth, / And wyþ fuyre of helle hys herte breneth / And maketh hym so hote & hegh, / þat no mon may byde hym negh, / and makeþ hym syche as þet arn, / Of goodes chylde, þe deueles barn, / Wharfore he mote wyth sofferynge, / Quenche in hym syche brennynge, / Agaynus wrathþe soferance / Mote be myche hys penaunce.”)

²⁷⁸ Aquinas, *Summa Theologica*, vol. 2, 782 (Pt. I-II Q. 46, Art. 6, Reply Obj. 1).

²⁷⁹ Aquinas, *Summa Theologica*, vol. 2, 782 (Pt. I-II Q. 46, Art. 6, Reply Obj. 1).

²⁸⁰ Aquinas, *Summa Theologica*, vol. 2, 782 (Pt. I-II Q. 46, Art. 6, Reply Obj. 1).

person, heaving and frothing, eager to be let out.”²⁸¹ Although neuroscience and cognitive studies have complicated our current understanding of anger, we can recognize Aquinas’ humoral and hydraulic ideas in the way we describe emotions: fits of anger, boiling mad, a short fuse, and so on.

With regard to anger in particular, historians have typically divided into two camps, one viewing emotions like anger as innate and others describing them as “social constructions.”²⁸² Some advocate compromise. In their work on anger in America, Carol and Peter Stearns, for example, encourage historians to bear in mind that “anger is partly biological...and also partly cognitive and therefore social,” varying across societies and sometimes within a particular society.²⁸³ Incidentally, the latter point seems to accord with Rosenwein’s emotional communities approach. Rosenwein observes that the prevailing biological view of emotion, the hydraulic model, was replaced in the 1960s and 1970s by a cognitive view, whereby “emotions are part of a process of perception and appraisal, not forces striving for release,” and a social constructionist view, whereby “emotions and their display are constructed, that is, formed and shaped, by the society in which they operate.”²⁸⁴ More recently, scholars have urged the abandonment of this “false dichotomy” between biology and culture.²⁸⁵ In his study of anger in classical antiquity, William Harris reaches, to my mind, a reasonable conclusion after surveying the debate: “what will lead to an understanding of the history of anger within a given culture is

²⁸¹ See Rosenwein, “Worrying about Emotions in History,” 834. On the related theory of “ventilationism,” see Harris, *Restraining Rage*, 44-45.

²⁸² “Introduction,” in *Anger’s Past*, ed. Rosenwein, 2. For a classicist’s contribution to this debate, see Harris, *Restraining Rage*, 36-39.

²⁸³ Stearns & Stearns, *Anger: The Struggle for Emotional Control*, 9, 218 (“We emerge from the historical consideration persuaded of the importance of both biological and social components of anger.”)

²⁸⁴ Rosenwein, “Worrying about Emotions in History,” 836-837.

²⁸⁵ See, e.g., “AHR Conversation: The Historical Study of Emotions,” 1506. See also Scheer, “Are Emotions a Kind of Practice?”, 195-197.

not the limbic system but an appreciation of the fact that anger is indeed judgmental, and that the judgments it expresses are the product of culture as well as of nature.”²⁸⁶ In this chapter, I am less concerned with where I stand on this issue—I will note, however, that the dichotomous view of emotion dates back to Aquinas and further back to Aristotle, and is unlikely to be fully abandoned anytime soon—than on how thirteenth- and fourteenth-century English people understood the nature of emotion or passion. Medieval English understandings of anger reflect a notion that different individuals may be more or less naturally prone to anger, coupled with a moral conviction, grounded in theology, that individuals could and should actively form their consciences and work to replace anger with patience and charity. Anger, in other words, was viewed as both a nature and nurture phenomenon in medieval England, thereby complicating efforts to determine culpability.

Slights, Affronts, and Provocations

Temperament was fundamental, yet for anger to result in violence typically some kind of catalyst had to intervene. Aquinas argued that all the causes of anger could be reduced to the category of “slight” (*parvipensionem*), which in turn could be divided into three kinds: “contempt (*despectus*), spiteful treatment (*epereasmus*), i.e., hindering one from doing one’s will, and insolence (*contumeliatio*)”, all of which would give rise to a desire for just vengeance.²⁸⁷ These types of slights may be compared with the categories that would eventually form the common law doctrine of provocation, namely terrible assaults, witnessing assaults against family or friends, seeing someone deprived of their liberty, or witnessing an act of

²⁸⁶ Harris, *Restraining Rage*, 39.

²⁸⁷ Aquinas, *Summa Theologica*, vol. 2, 785 (Pt. I-II Q. 47, Art. 2).

adultery involving one's spouse, all of which will be discussed in greater detail below.²⁸⁸ In fact, Aquinas was very clear that anger could arise due to affronts directed toward the subject as well as affronts directed toward others: "If we are angry with those who harm others," Aquinas observed, "and seek to be avenged on them, it is because those who are injured belong in some way to us: either by some kinship or by friendship, or at least because of the nature we have in common."²⁸⁹ The last category of "common nature" would seem to draw a broad enough circle to encompass such affronts as the early modern provocation doctrine's theoretical Englishman deprived of his liberty. By offering these examples of slights, or provocations to anger, Aquinas was choosing a path distinct from the Stoical tradition embodied by Seneca, who argued that a good man would avenge the killing of his father or rape of his mother not out of anger, but out of duty. "The good man will perform his duties undisturbed and unafraid," argued Seneca, "and he will in such a way do all that is worthy of a good man as to do nothing that is unworthy of a man."²⁹⁰ Anger, in Seneca's estimation, was absolutely unworthy and unbecoming. By comparison, a calm, reasoned response was commendable: "For a man to stand forth as the defender of parents, children, friends, and fellow-citizens," observed Seneca, "led merely by his sense of duty, acting voluntarily (*volentem*), using judgment (*iudicantem*), using foresight (*providentem*), moved neither by impulse nor by fury (*non impulsus et rabidus*)—this is noble and becoming."²⁹¹

In considering this issue of varying responses to different types of provocation, Seneca cautioned against "manufactur[ing] grievances either by suspecting the untrue or by exaggerating

²⁸⁸ See Horder, *Provocation and Responsibility*, 23-24.

²⁸⁹ Aquinas, *Summa Theologica*, vol. 2, 785 (Pt. I-II Q. 47, Art. 1, Reply Obj. 2).

²⁹⁰ Seneca, "De Ira," I, in *Moral Essays*, vol. 1, trans. Basore, 136-137.

²⁹¹ Seneca, "De Ira," I, in *Moral Essays*, vol. 1, trans. Basore, 138-139.

the trivial.”²⁹² He regretted that men do not typically consider that they might have done the same thing as the provoking actor, and that they often failed to reflect upon the intention of the doer rather than merely the deed itself. “Yet it is to the doer that we should give thought,” Seneca argued, “whether he did it intentionally or by accident, whether under compulsion or by mistake, whether he was led on by hatred or by the hope of reward, whether he was pleasing himself or lending aid to another.”²⁹³ Similarly, Aquinas argued that injury could be done in three ways: “through ignorance, through passion, and through choice.”²⁹⁴ Aquinas’ tripartite vision of injury maps onto the categories of misadventure, acts committed upon provocation, and intentional (in the stronger sense of premeditated) wrongdoing. Applying the term “deliberate malice” to the third category, Aquinas observed that injuries committed through choice elicited the greatest anger in response: “we are most of all angry with those who, in our opinion, have hurt us on purpose.”²⁹⁵ By comparison, we are slower to anger with those who have done injury “through ignorance or through passion,” as such factors incline the injured party toward “mercy and forgiveness.”²⁹⁶ Aquinas included in the category of passion those motivated by anger, relying on Aristotle for the proposition that “we are either not angry at all, or not very angry with those who have acted through anger, because they do not seem to have acted slightly.”²⁹⁷

If Aquinas’ tripartite division—into ignorance, passion, and choice—were mapped onto felony trials, it would suggest, quite predictably, that jurors would be most forgiving of accidental and perhaps negligent acts, somewhat less forgiving of passion-driven acts, and least

²⁹² Seneca, “De Ira,” III, in *Moral Essays*, vol. 1, trans. Basore, 282-283.

²⁹³ Seneca, “De Ira,” III, in *Moral Essays*, vol. 1, trans. Basore, 282-285.

²⁹⁴ Aquinas, *Summa Theologica*, vol. 2, 785 (Pt. I-II Q. 47, Art. 2).

²⁹⁵ Aquinas, *Summa Theologica*, vol. 2, 785 (Pt. I-II Q. 47, Art. 2).

²⁹⁶ Aquinas, *Summa Theologica*, vol. 2, 785 (Pt. I-II Q. 47, Art. 2).

²⁹⁷ Aquinas, *Summa Theologica*, vol. 2, 785 (Pt. I-II Q. 47, Art. 2).

forgiving of deliberate acts. Of course, other factors would enter into the calculation. Seneca, for instance, acknowledged that an offender's age and station in life would influence judgment.²⁹⁸ As discussed above, examples of thirteenth- and fourteenth-century narratives involving elite men suggest that some measure of anger might be tolerated in response to an affront or a challenge to a person's honor. Yet by and large, the common law declined to recognize such allowances in any formal way. Jurors may have loosened the law's constraints when faced with sympathetic fact patterns, even when an allegedly felonious actor happened to be a person of lesser social standing, but the law was designed to communicate an expectation that anger not be resolved with violent action. Even in the remarkable case of the Earl of Warenne, where anger offered a partial excuse, the penalty for his rash actions was monumental. In this sense, the common law appears to have operated, on the surface, along more Stoical than Thomistic lines, with background rules that encouraged circumspection and restraint by holding the dagger of the gallows over the head of the man or woman who contemplated responding to an insult with lethal violence. We might imagine the common law personifying, in a way, the words of Seneca: "Let us put ourselves in the place of the man with whom we are angry; as it is an unwarranted opinion of self that makes us prone to anger, and we are unwilling to bear what we ourselves would have been willing to inflict."²⁹⁹ An offended individual, mindful of the severity of English felony law, might agree with Seneca that "the best cure for anger is waiting, to allow the first ardor to abate and let the darkness that clouds the reason either subside or be less dense."³⁰⁰ Yet we legal historians know, of course, that anger did motivate homicide in medieval England, that men and women faced with arguments, affronts, and other offenses did

²⁹⁸ Seneca, "De Ira," III, in *Moral Essays*, vol. 1, trans. Basore, 282-285.

²⁹⁹ Seneca, "De Ira," III, in *Moral Essays*, vol. 1, trans. Basore, 284-285.

³⁰⁰ Seneca, "De Ira," III, in *Moral Essays*, vol. 1, trans. Basore, 284-285.

lash out violently despite the brutal consequences of a felony conviction.³⁰¹ Having the privilege of historical hindsight, we also know that the common law would later change to accommodate the Thomistic understanding of anger's operation, allowing for some mitigation of punishment in order to treat impassioned actors less harshly than premeditated actors. The seeds of this doctrinal change were evident in the admittedly laconic records of medieval felony cases.

Conclusion

Ire cooks the raven, its cooked color indicates ire,
And a bitter plague of gall bursts forth.
— William de Montibus, *De septem vitiis*³⁰²

Ther saugh I first the derke ymaginyng
Of Felonye, and al the compassyng;
The crueel Ire, reed as any gleede...
— Chaucer, *The Knight's Tale*, lines 1995-1997³⁰³

Black as a raven, red as an ember, the threatening colors of ire reinforced its association with the bitterness of gall and felony. Yet anger occupied an ambiguous space in medieval English felony cases, where it might mitigate an actor's guilt but might just as easily intensify it. Understandings of honor and natural sensitivity to affronts undoubtedly stirred individuals to respond, sometimes with vengeful thoughts and, in cases that made it into the coroners' and trial rolls, with incendiary words and irrevocable violent acts. By the seventeenth century, some

³⁰¹ Frequently referring to men and women together, although the legal evidence is largely from cases involving men, this chapter does not expand upon the gendered dimension of anger, a topic that merits closer study. There is some evidence from pastoral literature that men and women were viewed as equally capable of falling prey to the sin of wrath. See Beth Allison Barr, *The Pastoral Care of Women in Late Medieval England* (Woodbridge: Boydell, 2008), 62-63.

³⁰² William de Montibus, "De septem vitiis," in Joseph Goering, *William de Montibus (c. 1140-1213): The Schools and the Literature of Pastoral Care* (Toronto: Pontifical Institute of Mediaeval Studies, 1992), 177. ("Ira coquit coruum, coctus color indicat iram, / Erumpitque foras fellis amara lues.")

³⁰³ "Knight's Tale," in *Riverside Chaucer*, ed. Benson, 52. Chaucer's "reed as any gleede" translates into "red as any ember," and the text here describes a mural painted in the Temple of Mars within the stadium built by Theseus for the battle between Arcite and Palamon for the love of Emily. The text goes on to detail many grisly scenes of homicide, suicide, and accidental death.

anger-fueled attacks would qualify for mitigation under the black-letter law, as long as the person had indeed been moved to anger, and as long as the provoking incident fit one of a small list of recognized sufficient provocations.³⁰⁴ These types of provocation echoed some of the fact patterns, such as a gross assault or adultery with one's spouse, that elicited the sympathy of medieval juries disinclined to send an accused individual to the gallows under such circumstances.³⁰⁵ Nevertheless, medieval English law did not carve out a formal space for provocation-based partial excuses, leaving—de facto—the prudential handling of such cases up to jurors, who applied their knowledge of the facts and their moral convictions regarding anger to morally ambiguous, difficult cases.

Moreover, while on the surface a parallel might be drawn between the early modern provocation category of a grossly insulting assault and the medieval category of killing in self-defense, the legal grounds for the two were entirely different: while the seventeenth-century understanding of assault as a provocation was based upon the “indignity” involved in such an affront, the legal grounds for a medieval self-defense claim was the avoidance of death. In other words, it was not enough for a medieval self-defender to claim that his honor had been grossly compromised by an assault, but rather he had to make the case that he had no alternative but deadly force to avoid his own death. We know, thanks to the work of Thomas Green, that juries were willing to tweak a homicide narrative to modify self-defense that fell short of this extreme standard to pardonable self-defense. Yet even this less duress-driven form of self-defense—enough to earn jury sympathy but not enough to merit a pardon without modification of the

³⁰⁴ Horder, *Provocation and Responsibility*, 23-24, 31-39.

³⁰⁵ Consider, for example, the case of Master Adam de Lynton, who initially fled but later secured a pardon and resided unmolested in London for many years after taking the life of a silk merchant, William Asshebof, whom he had found alone with his wife. Weinbaum, ed. and trans., *London Eyre of 1276*, 22-23, no. 75.

facts—was still perceived to be an act undertaken *in extremis* and not in response to a mere insult to one's honor.

To sum up some of this chapter's findings, words like anger, wrath, ire, and rage were often used interchangeably in medieval English literature. Penitential literature, too, closely related these terms, often connecting them with the sin of homicide. Anger or wrath might be justifiable. This was most often true when exercised in a divine cause, such as the famous scene of Jesus angrily expelling moneychangers from the temple. Occasionally a mere mortal might also be described as justifiably angered, typically in response to an injustice or grave sin. More often, however, anger was a fatal character flaw, one that penitential literature went to great lengths to address, and which jurors and judges were not inclined to view too readily as exculpatory.³⁰⁶ Among its dangers, anger or ire tended to engender a domino effect: simple anger might ratchet up to vengeful thoughts, hurtful words, blows, manslaughter, and even war.³⁰⁷ Most damning was long-held wrath, which might lie hidden at first but later flare into violence. Part of anger's danger lay in its tendency to produce a state of witlessness, madness, or unreason, as well as its connection with hatred and provocation. Such problematic passions were

³⁰⁶ See, e.g., the hanging of Ralph de Worstede for the quarrel-inspired killing of Peter de Richemund with a sword, a case discussed at the 1276 London eyre. Weinbaum, ed. and trans., *London Eyre of 1276*, 13, no. 41. On the unacceptable nature of anger as a motivation for homicide, see also *Bracton's* treatment of anger as a component of a condemnable, intentional homicide. Thorne, ed. and trans., *Bracton*, vol. 2, 341. Even under the earlier homicide procedure recorded in the *Leges Henrici Primi*, it appears that inquiry was made precisely into the presence of anger between the killer and the deceased. In addition to inquiring whether the victim and the killer had an appointed time to meet, questions were to be posed as to “whether anger or hatred or threats intruded.” Downer, ed. and trans., *Leges Henrici Primi*, 290-291, §92.14.

³⁰⁷ On anger's connection with defamation, see R. H. Helmholz, ed., *Select Cases on Defamation to 1600* (London: Selden Society, 1985), xxxii-xxxiii (describing how anger might be used to counter an allegation of malice). Anger was not exculpatory, however, as demonstrated by the fact that a person accused of defamation might offer anger as a partial excuse, but in the context of making public penance for his or her spoken words. See *ibid.*, xl.

seen to reside in an individual's heart, where they might only be manifest to God until revealed in bitter words or actions.

Medieval England's sophisticated vision of ire, the devil's daughter of hell fire, may help us bridge the gap between the period of bloodfeud documented by Miller, Hyams, and others, and the early modern provocation doctrine, as described by Horder. Questions left unanswered here include the extent to which the bloodfeud continued to coexist alongside legal remedies during the thirteenth and fourteenth centuries,³⁰⁸ whether it was a reasonable dispute resolution open to all or only to the relatively privileged,³⁰⁹ whether understandings of honor influenced juries' understandings of homicide cases even for humble defendants, how much early modern provocation doctrine was foreshadowed by medieval jury decisions, and the extent to which provocation doctrine, once established, was a refuge for the privileged or a "common" law doctrine in the true sense of that term. It is unclear whether concessions to anger were ever equally available in medieval English felony cases, and these are questions I hope to explore further.

I suspect that concessions to anger as a response to affronts were available as well to lesser men of good repute who resorted to anger-fueled violence in medieval England, albeit possibly with less assurance of a favorable outcome. In determining a verdict, jurors would have

³⁰⁸ What little evidence can be obtained regarding feuding behavior in this interim period suggests that a bloodfeud mentality continued to coexist alongside available legal remedies. See, e.g., Kaeuper, *War, Justice and Public Order*, 142 (describing changing attitudes toward royal justice in the twelfth to thirteenth centuries, with sources showing "not a simple replacement of violent self-help by royal legal process, not the feud and midnight thrashing giving way directly to courtroom pleading, but instead an intermediate step involving a more complex combination of more or less extra-legal violence with vigorous lawsuits.")

³⁰⁹ Some evidence suggests that feuding was, in part, a reasonable dispute resolution tactic for the relatively privileged. In the story of the Earl of Warenne, and the mid to late fourteenth-century papal petitions discussed above, the privileged included knights and clerics from well-connected families. If feud-driven homicides did make it to trial, they may have been treated differently from other homicides, particularly when men of influence were implicated.

weighed any number of factors, and in part they would have been forced to consider the weight of evidence regarding the allegedly felonious actor's exercise of volition. Horder proposes a theory for the very "distinctive structure of excusable homicide" in medieval England: he attributes it to the level of importance attached to "purity of the will" in assessing culpability.³¹⁰ As an example, Horder suggests that accidents were excusable because the defendant's will had not been directed toward harm and therefore could be seen as "blameless or pure."³¹¹ He attributes this, in turn, to the preoccupation of the "medieval mind" with "the role of fate in human affairs," which led it to place ultimate blame on the mere instrument of death—whether cart, horse, sword, or arrow—rather than the actor wielding the instrument.³¹² According to Horder's formulation, if either sorrow of heart or instinctive fear, categories borrowed from *Bracton* and *Fleta*, respectively, were "presumed to be the defendant's motives, their admirable or understandable character could be regarded as in some measure purifying the defendant's will, tainted as it was by the deliberate character of the violence employed."³¹³ By contrast, one who killed in anger, hatred, or for the sake of gain, categories again taken from *Bracton*, would more readily be viewed as culpable of felonious homicide.³¹⁴

Attractive though Horder's thesis about "purity of the will" may be, it suffers from a misunderstanding of the *mentalité* of medieval English men and women, assuming that such a *mentalité* can legitimately be divined at all. The very fact that accidental and self-defense homicide were pardonable and not acquittable offenses up through the late fourteenth century³¹⁵

³¹⁰ Horder, *Provocation and Responsibility*, 8.

³¹¹ Horder, *Provocation and Responsibility*, 8.

³¹² Horder, *Provocation and Responsibility*, 8.

³¹³ Horder, *Provocation and Responsibility*, 20.

³¹⁴ Horder, *Provocation and Responsibility*, 20.

³¹⁵ On this shift in the treatment of misadventure, see Green, *Verdict According to Conscience*, 86.

demonstrates that culpability *did* in fact attach to the accidental slayer, just as it also might attach to the cart, horse, sword, or arrow whose value might be forfeited as deodand.³¹⁶ A medieval understanding of culpability grounded in a notion of original sin, the fallen nature of man, and the real presence of evil in the world, led to the attaching of some measure of guilt to acts that we might be inclined to categorize as non-culpable accident. Perhaps, if we are truly honest with ourselves, we might recognize our own inclination to harbor the sense that the accident-prone are not truly innocent, but rather might bear some responsibility for their apparently involuntary mishaps.³¹⁷ Rather than purity of the will, the more accurate concept for thirteenth- and fourteenth-century English men and women might be its polar opposite, impurity of the will, such that both the accidental slayer and the self-defender might not be seen to be wholly free of guilt in a slaying and therefore in need of pardon.³¹⁸ Anger, too, fell into this ambiguous calculus; while it might be an understandable response to *contumelia* or an affront, it was still perceived to be a character flaw. While jurors might have felt that such homicides did not merit capital punishment, they nevertheless acquiesced in a legal regime in which pardon was necessary and some measure of punishment occurred through the triple processes of pre-trial detention, the exigencies of trial itself, and forfeiture of chattels. While the first might be relieved by release upon mainprise and the third by misvaluation or concealment of chattels, they nevertheless added to the reputational and financial impact of a homicide accusation.

³¹⁶ The use of pardon rather than acquittal might have also been designed to preserve the kin's ability to bring a private action, or appeal. See Hurnard, *King's Pardon for Homicide*, 29-30 ("The system of pardoning was apparently meant to strike a fair balance between the needs of public order, the slayer's deserts and the rights of the victim's kin...")

³¹⁷ This point was raised by William Ian Miller in conversation. He suggests that we are inclined to look askance at the accident prone, assuming that they are somehow responsible for their apparently accidental acts.

³¹⁸ For a discussion of the sinful nature of even negligent homicide and the inclination toward penance *ad cautelam*, see Hurnard, *King's Pardon for Homicide*, 69.

Jury verdicts, of course, are too terse to tell us precisely what transpired in deliberations, and we have only a high acquittal rate and some evidence of nullification to suggest to us that jurors exercised some leniency in felony trials. To imagine what jurors might have considered as they listened to a narrative of anger-fueled homicide, whether within the courtroom or in pre-trial gossip with neighbors, we necessarily must look beyond the legal record to other sources which, taken together, give us a sense of the broader ethos of the period. In literary and religious texts—and not just elite texts, but those designed to guide parish priests in hearing confessions—we find a nuanced understanding of anger that, on the one hand, saw the emotion as a guilt-ridden character flaw when practiced as habit and, on the other, understood that a person in the heat of anger might not be able to engage his or her capacity for reason and volition fully. If Horder's characterization of the early modern period is accurate, then what we might be witnessing with seventeenth-century provocation doctrine is a shift away from a complex medieval moral calculus in which the will was never pure and in which decisions *in extremis* were never black and white, to a conception of right and wrong behavior as a stark decision driven by an individual's rightful sense of honor and justice. By the Victorian period, as argued by Horder, this would eventually be captured in the idea of loss of self-control.

But in the thirteenth and fourteenth centuries, it was a much more complicated calculus that determined whether a man or woman accused of anger-inspired felony should hang or walk free, the only two options available. Anger was too dangerous a force to be recognized officially as a legitimate partial excuse in felony cases. The failure of the medieval English common law to carve out an explicit exception for homicide upon grave provocation may lie in such killing's inexcusability according to contemporary notions of appropriate comportment and proper formation of conscience and demeanor. Where the early modern man of honor was expected "to

resent [an] affront, and to retaliate *in anger*”,³¹⁹ I would argue that the average medieval man of honor was expected to lump it or to curtail his anger and respond in a manner driven by reason and a well-ordered will. This is not to suggest that jurors never looked favorably upon a killer who had been driven to homicide by anger. Horder himself provides a sampling of pardons given for anger-driven homicide, drawing upon the work of Thomas Green and J. M. Kaye.³²⁰

Yet for each of these examples of anger depicted in exculpatory terms, one can easily find descriptions of homicide attributed to arguments, contentious words, and the like without any implication that such emotional descriptions were intended to reduce the killer’s culpability.³²¹ Although anger was most often analogized to insanity, it was treated more like drunkenness, which similarly had the combination of reducing a person’s ability to reason and exercise willpower in the moment, while also reflecting a prior culpable act or series of acts, namely, the development of a habit of drinking and/or a decision to engage in heavy drinking on a particular occasion. Just as a drunken assault, though apparently done while the actor lacked self control, might not be excused in light of the actor’s previous decision to begin drinking, so too might an angry felon be condemned due to his or her long-standing failure to engage in the correct formation of conscience even if he or she were seen to be in a state of madness at the

³¹⁹ Horder, *Provocation and Responsibility*, 27 (emphasis in original).

³²⁰ Horder, *Provocation and Responsibility*, 8-9; 21, n. 71. To offer one example from mid thirteenth-century Wiltshire, from an assault rather than a homicide case, Clement of Odestok appealed Roger of Langeford of striking him on the head feloniously and stealing from him a hood and silver clasp. Roger denied the charges and also opposed the appeal on a technicality, arguing that Clement had failed to name the day and hour. Although the appeal was nullified, a jury did inquire into the facts of the case, concluding that Roger did not commit robbery but, due to “some offensive and opprobrious words which Clement used in quarrelling with him,” he did strike Clement with the handle of an earthenware pitcher. Roger was eventually pardoned, suggesting that his response to Clement’s insulting words was excusable. For the full case narrative in translation, see Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 250, no. 526.

³²¹ See, e.g., *Calendar of Inquisitions Miscellaneous (Chancery)*, vol. 7 (1399-1422) (London: Her Majesty’s Stationery Office, 1968), 154, no. 285 (describing a quarrel-fueled homicide and concluding that the killer had feloniously slain his victim on account of the unsettled quarrel).

time of the offense. Furthermore, the elephant in the room—the death penalty applicable to all felony convictions—may help explain the occasional acquittal or pardon for an anger-driven homicide, rather than any broader societal understanding that killing in anger was generally excusable.

Given the binary nature of felony trial outcomes, combined with the unpredictable black box of jury verdicts, angry English men and women would have been wise to commit the words of Robert Mannyng to heart:

If you for ire a man slay
That might have left well enough,
That it was not yourself defending,
But for wrath and ire burning,
All that ever God created to be
Shall come and fight against you
At the day of judgement,
And, against all, you shall be destroyed.³²²

Even if, thanks to a merciful jury, the gallows did not claim the wrathful person, the ultimate *dies irae* was seen to await those who let the sun set on their wrath.

³²² Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 128, lines 3749-3756. (“Ȝyf þou for yre a man slogh / þat myghtyst haue lefte weyl ynogh,— / þat hyt was nat þe defendyng, / But for wrapþe and yre brennyng,— / al þat euer God shope to be / shal come and fyȝt aȝens þe / At þe day of iugement, / And aȝens alle þou shalt be shent.”)

CHAPTER FOUR

Handlyng Synne: Guilt Assessment in Medieval England

Introduction

The Fourth Lateran Council indirectly transformed English criminal procedure, as it marked the decisive end to trial by ordeal in England and led to the adoption of jury trial as the standard method for felony adjudication. At the same time, Lateran IV revolutionized lay piety by setting stringent standards for the education of parish clergy and new expectations for the kind of learning to be relayed to the laity through sermons and the practice of confession. The council's decree *Omnis utriusque sexus*, to be discussed at greater length below, required annual confession to one's parish priest and, relatedly, emphasized the importance of training parish priests in doctrinal orthodoxy and confessorial technique. This, in turn, resulted in an explosion of the literary genre of *summae* for confessors, a genre already gaining influence in the twelfth century but now expanded upon and produced in vernacular as well as Latin texts to increase accessibility to humble clerics and laity alike. We might say, in the end, that the thirteenth century was a time of preoccupation with guilt assessment, with giving priests and laity the tools to recognize sin and respond in productive ways to atone and reform lives. Felony law, with its monolithic death penalty, risked running afoul of this emphasis on nuanced treatment of sin. Nevertheless, jurors managed to apply their lessons in handling sin to the defendants who appeared before them.

The preceding chapters explored the meaning of felony, emphasizing the centrality of *mens rea*, as well as the complicating role played by anger in felony adjudication. This chapter will explore the mechanisms of guilt assessment employed by juries tasked with weighing the possibility of a felony conviction, focusing most of all on popular perceptions of sin. In part one, the focus will be on building a general portrait of how guilt and innocence were understood in medieval England, illuminating the paradigms of sins of thought, speech, and deed, while also considering the role of volition, free will, and intentionality in the understanding of sin and crime. Part two will apply these principles to specific crimes, focusing on approaches to defining felonious theft and homicide. Part three will consider strategies for accessing and assessing intentionality, demonstrating that confession and a study of the circumstances surrounding an alleged crime offered two alternative approaches to the problem. Part four will focus more narrowly on confession, highlighting the extensive use of confession in medieval English felony adjudication and downplaying the more standard historiographical division between a continental system dependent upon confession in the absence of witness testimony, as opposed to an English system able to eschew confession thanks to the availability of jury adjudication. This section will evaluate the role of confession in sanctuary and abjuration, turning king's evidence as an approver, and making pleas for mercy, most typically through narratives of self-defense, accident, and duress. This chapter will set the stage for chapter five, which will move on to broader questions related to the process of judging, which posed a challenge to justices and jurors alike in light of the difficulties involved in assessing a defendant's state of mind.

General Understandings of Guilt and Innocence

Medieval England's system of felony adjudication was distinctive in its reliance on lay jurors to issue a verdict as to an accused person's guilt or innocence. In contrast to the ecclesiastical courts and to continental procedure, English law gave extraordinary power to ordinary men in determining who should be subject to the full weight of a felony conviction, and who should walk free. This section will grapple with the question of how jurors assessed the guilt of accused individuals, looking to legal records as well as other sources to draw inferences about jury decision-making. As in prior chapters, the analysis will involve a close reading of legal texts alongside religious and literary sources in the hopes of elucidating the manifold factors that informed jury decision-making.

Medieval English felony law was, by some accounts, a blunt instrument. The law, what little there was, presented a binary of felony/non-felony which has been interpreted as devolving into two distinct questions: 1) was the alleged crime categorically a felony, and 2) did the accused individual commit it? As I have argued in the preceding chapters, this binary oversimplifies the actual operation of the law as applied by inquest and trial juries. First, the issue of whether an alleged crime was a felony did not involve comparing the crime to an undisputed list of qualifying acts. Yes, homicide, arson, and theft over a certain value categorically amounted to felony in the bluntest sense of that term. Yet we know that this is not the full extent of jurors' concerns in applying the law; rather, they asked or were called upon to answer more sophisticated questions regarding culpability. Some questions might be raised in the context of a coroner's inquest, while others arose at trial. In addition to considering the basic issues of act and actor, jurors grappled with questions such as: was the accused fully in charge of his or her wits, or did he or she act instead out of simplicity? Did this female defendant act

freely in committing this crime, or was she merely playing the role of dutiful wife in supporting her criminal husband? Was this individual, known to have been mentally ill the past decade, in the throes of his or her illness at the time he or she committed the alleged crime, or was the crime instead undertaken during a period of lucidity? Did this person set fire to his neighbor's house deliberately, or did he accidentally fall asleep next to a lit candle after a late night drinking session? If the latter, should he be held accountable for having gotten drunk in the first place? In the case of theft, the record seldom reveals the reason behind an acquittal, but contemporary religious and popular texts suggest that jurors would have been inclined to query, for example, whether a person stole out of desperation and hunger as opposed to greed, or was a newcomer to theft as opposed to a "notorious" thief who robbed to make an illicit living. Trial records demonstrate that judges and jurors were often moved to leniency in judging thefts of small value, particularly if the alleged thief had already experienced the punishing effects of prison while awaiting trial. In sum, we would be wrong to let the streamlined nature of felony law deceive us as to the sophistication of the questions jurors brought to the deliberating table.

Sins of Thought, Speech, Deed

Modern criminal law tends to think of crime in categorical terms, specifying particular acts or omissions as wrongful and assigning culpability when said act or omission was accompanied by the necessary intent. Medieval understandings of crime were, to some extent, quite similar to this model, looking both to the nature of particular acts but also considering a person's state of mind at the time of commission. Factors that we associate today with the sentencing process might have played an earlier role in determining trial outcomes in medieval English felony cases. When the sole punishment available was the gallows, reputation and character might have tipped the scales in the pre-verdict phase, if only because there was no

room for modifying the punishment after conviction aside from pursuing a pardon. As is still the case arguably today, religious understandings of sin condemned a more expansive range of behavior and states of mind than encompassed within the category of felony or crime: we might condemn some acts and states of mind as unacceptable or even reprehensible, yet choose not to prosecute them as crimes. Some might fall within the realm of wrongful acts to be dealt with through civil means, such as a tort suit, and others through public shaming, shunning, or simple private disapproval. One might be a detestable person, even a villain, yet not be a criminal. This is true now, and was also true in medieval England, where the priorities in assessing guilt were shaped in part by social mores and in part by church teaching that, over the course of the thirteenth century, reached more systematically into the parish level.

In a 2002 article, Leo Katz puzzled over the line society has drawn between non-criminal villainy and criminal felony. He took as his starting point a comparison between two historical figures whose biographies revealed unsavory private lives. The first, Karl Marx, was described by a biographer as greedy, cruel, and intolerably egocentric in his brash dealings with Engels and an unpaid household helper, whom he allegedly impregnated, later refusing to acknowledge the child.¹ The second, Jean-Jacques Rousseau, was a self-described petty thief and exhibitionist prone to exposing himself to women in dark alleyways.² Comparing the two vignettes, Katz argued that most people would be inclined to condemn Marx more forcibly than Rousseau, although only the latter's actions would be criminally prosecutable. "How can punishment and condemnation, " asks Katz, "be so out of sync with one another?"³ In trying to find a rationale behind the lines drawn between felony and villainy, Katz ultimately concluded that what

¹ Katz, "Villainy and Felony," 452-453.

² Katz, "Villainy and Felony," 454-455.

³ Katz, "Villainy and Felony," 455.

prompted criminalization of certain offenses was “invasiveness”: “Non-felonious villainies—like mendacity, selfishness, treachery, greed, cruelty, hypocrisy, or manipulativeness—seem by and large distinctly less invasive than prototypical crimes like murder, rape, and theft.”⁴ Katz acknowledged the fluidity of a term like “invasive” but concluded that this offered a more plausible explanation than hypotheses based on utilitarianism, harm theory, or legal moralism.

The paradox described by Katz resonates with medieval categorization of sins and crimes.⁵ Something might be categorized among the sins most deadly to an individual’s soul, demanding great penance, yet not fall within the bounds of acts for which a person might be criminally prosecuted. Conversely, some prosecutable crimes might not merit the most severe condemnation in a confessor’s manual compared with other non-prosecutable offenses. A Wycliffite sermon from the feast of Holy Trinity captures this sentiment, explaining how, according to the Gospel, a rich man was damned not for the practice of extortion or other wrongs committed against his neighbors, but rather for failure in carrying out the works of mercy.⁶ While fornication and adultery garnered tremendous condemnation from a religious perspective, they were not matters dealt with by the central royal courts unless they came to bear on a case indirectly.⁷ Perhaps this reflected resignation on the part of the secular courts to allow these kinds of offenses to be handled by church courts, which already had an established practice of dealing with such issues. Conversely, the ecclesiastical courts may have stepped in when the

⁴ Katz, “Villainy and Felony,” 470.

⁵ The line between villainy and felony blurs in the writings of Guillaume de Lorris, translated by Chaucer. See the personification of the two categories in Guillaume de Lorris, *Roman de la Rose*, ed. Nichols, 20, 45, and in Chaucer’s translation, *ibid.*, 157, 178.

⁶ Hudson, ed. *English Wycliffite Sermons*, vol. 1, 226. (“And marke we how þis gospel tellith þat þis riche man was not dampned for extorcion or wrongys þat he dude to his ney3bore, but for he faylede in werkys of mercy.”)

⁷ See, e.g., adultery as motivation for homicide, which in turn gets prosecuted, in Green, *Verdict According to Conscience*, 42-43.

royal courts proved inadequate to handle certain kinds of offenses.⁸ Moreover, one cannot assume that royal officials were by any means approving of behavior that was left unprosecuted by the royal courts.⁹ Trial by jury helped ease this paradoxical emphasis on prosecuting only those villainies (or even non-villainies, in some instances) classified as felonies. Jurors might, for instance, allow knowledge of an individual's despicable character—the Marxes of the Middle Ages—to color their judgment, or might conversely allow the medieval Rousseau to walk free despite his technical violation of the law if he otherwise seemed to be a non-villainous, upstanding member of society. Yet the law nevertheless offered no means for prosecuting a Marx unless he undertook an act that fell within the purview of felony. Why were and are people content to prosecute this limited range of felonies and leave other egregiously sinful acts unprosecuted?

Katz's theory of invasiveness might get us partway to an explanation. However, other factors were at play as well in medieval England. For one thing, an interest in family privacy might have led to some matters—such as inheritance disputes or adultery—being left to the realm of civil law, ecclesiastical law, or self help rather than criminal prosecution. Family privacy concerns might have dominated when it came to issues of violence in particular, which might have been overlooked by prosecuting authorities when intrafamilial in nature, whether in terms of spousal or child abuse or other forms of domestic violence.¹⁰ The presence or absence

⁸ For this view, see Helmholz, "Crime, Compurgation and the Courts of the Medieval Church," 25.

⁹ See Richard H. Helmholz, "Infanticide in the Province of Canterbury During the Fifteenth Century," *History of Childhood Quarterly* 2:3 (1975), 386. ("It does not follow that because the royal courts did not regularly punish a particular type of conduct, the conduct was therefore permissible according to Common Law. What it does show is that in contemporary eyes, jurisdiction over the crime was properly lodged outside the royal courts.")

¹⁰ To take one example, infanticide, particularly by smothering in bed or "overlying", was of immense concern to theologians, yet seldom arises in felony records. This may or may not reflect a low incidence of infanticide; it may demonstrate a reluctance to prosecute such cases. For the theological emphasis on the topic, see, e.g., Flamborough, *Liber Poenitentialis*, ed. Firth, 222 (book 4, §258). ("Si

of violence might have also provided a tipping point between non-criminal and criminal, and this might be what Katz is hinting at in his use of the term invasive. Related to this, wrongdoing that merited public prosecution was often something that disturbed the social order, as described by *Bracton*, thereby breaching the king's peace.¹¹ While adultery might breach the peace and bring *fama* upon the accused adulterer,¹² for example, this was limited to the domestic sphere and therefore did not merit the involvement of public prosecutory authorities until, of course, a cuckold decided to take violent revenge.

mater filium suum sponte oppresserit vel occiderit, quindecim annis poeniteat, et numquam mutet nisi die dominico. Mulier autem paupercula, si pro difficultate nutriendi fecerit, septem annos poeniteat. Hi qui infantem oppresserunt tres annos poeniteant, unum ex his in pane et aqua; si clericus fuerit, quatuor annos, unum ex his in pane et aqua.”) Robert distinguished between a mother who willfully overlay or otherwise killed her child, for which the appropriate penance was fifteen years in duration, and an impoverished mother who did so due to difficulty in feeding the child, in which case seven years was recommended. If someone other than the mother overlay an infant, his or her penance was only three years, or four in the case of a cleric, including one year on bread and water. Mothers, in other words, were held to a stricter standard with regard to ensuring the safety of their children. This topic even shows up in Chaucer's *Parson's Tale*, where the parson includes within the category of homicide “a womman by necligence overlyeth hire child in hir slepyng, it is homycide and deedly synne.” See “Parson's Tale,” in *Riverside Chaucer*, ed. Benson, 306. For discussion of infanticide in secular and ecclesiastical courts, see Helmholz, “Infanticide in the Province of Canterbury,” 381-382, 384 (describing suffocation as the principal means of infanticide appearing in church court records, noting that negligence rather than willful intent might be enough to merit a conviction, and arguing that the nature of the prescribed punishments demonstrates that infanticide was treated less severely than other forms of homicide); Helmholz, “Crime, Compurgation and the Church Courts,” 11 (describing the ecclesiastical courts as the “principal forum” for handling infanticide cases); Barbara A. Hanawalt, “Childrearing Among the Lower Classes of Late Medieval England,” *The Journal of Interdisciplinary History* 8:1 (1977), 9-10 (finding only two cases of infanticide out of 4,000 homicide cases in a sample of coroners' and gaol delivery rolls, but acknowledging that this does not mean the practice was rare); Sara M. Butler, “A Case of Indifference? Child Murder in Later Medieval England,” *Journal of Women's History* 19:4 (2007), 74-75 (arguing that infanticide, frequently committed by single women, was investigated diligently and treated severely, in contrast to earlier claims that the practice was condoned).

¹¹ See, e.g., *Bracton's* definition of homicide, which invoked this idea of the king's peace. Thorne, ed. and trans., *Bracton*, vol. 2, 340.

¹² It is this concern with *fama* that motivated the purgation of Agnes, wife of knight Henry de Herlington, who had been defamed for committing adultery. Just like a pardoned felony defendant who received a letter as proof of the pardon, Agnes was issued a letter patent from Archbishop Thomas of Corbridge to show that she had been restored to good fame. See Brown, ed., *Register of Thomas of Corbridge*, part 1, 112-113.

Perhaps the area of greatest divergence between understandings of sin and the realm of crime was the tendency for the latter sphere to require some form of action, while the former sphere might condemn mental and verbal transgressions as deserving of great censure even in the absence of a corresponding action. Although lists of major sins focused on sinful acts, religious literature generally reminded people that sins were not by deed alone, but could be performed by all five senses.¹³ A poem surviving in a single leaf from a late-fourteenth-century manuscript described how sinning might occur not only through bodily acts, such as hugging and kissing, but also in passive acts of listening and viewing:

Too often I have, in my life, sinned with my wits five, with ears
heard, with eyes seen, with sinful speech day and night, with
embracing, with kissing also, with hands handled, with feet gone,
with heart sinfully thought, with all my body evilly wrought; and
of all my great folly, mercy, Lord, mercy, I cry!¹⁴

This aid to the examination of conscience called attention to the fact that sinful acts were preceded by sinful thoughts, a phenomenon recognized by early medieval penitential writers as well. In the Penitential of Finnian (ca. 525-550), for example, a penitent who had sinned “in the thoughts of his heart”, even if he immediately repented, was required to beat his breast and seek pardon.¹⁵ Similarly, a person who frequently entertained illicit thoughts “and hesitated to act on

¹³ See, e.g., Holthausen, ed., *Vices and Virtues*, part 1, 16-17. Moreover, both deed and intent would be judged on the last day. See “But Thou Say Sooth Thou Shalt Be Shent,” in Brown, ed., *Religious Lyrics of the XIVth Century*, 205, lines 9-10 (“Þat day þat eueri mon schal se / His dedes schewed & his entent”).

¹⁴ Furnivall, ed., *Minor Poems of the Vernon MS*, part 2, 785, lines 9-18. (“To ofte ich habbe, yn myne lyue, / Ysenzed wit my wittes fyue, / Wit eren yhered, wit ezen syzt, / Wit senfol speche dey & nyzt, / Wit cleppinges, wit kessenge also, / Wit hondes yhandled, wit fet ygwo, / Wit herte senfolliche yþozt, / wit al my body euele ywrozt; / And of al my [grete] folye, / Mercy, lord, mercy, ich crye!”)

¹⁵ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 87, §1. Similarly, a slightly later Irish penitential, that of Columban (ca. 600), urged penance of bread and water for half a year, or alternatively for forty days for lesser sins, when a person sinned by planning a sinful act, whether by desiring to kill, fornicate, steal, secretly feast and drink, beat another, leave the monastery, etc., preparing “with his whole heart” to undertake such actions. *Ibid.*, 250, §2.

them” was urged to seek pardon through prayer and fasting until such thoughts ceased to trouble him.¹⁶ A sin ratcheted up in severity if someone contemplated and fully intended to carry out an evil act only to have the opportunity fail; however, while the sin was commensurate in severity with the completed act, the penalty was less. Because the intention was not followed by the deed, the sinner might be helped if he quickly undertook to perform penance, including abstention from wine and meat for a year.¹⁷ In other words, there existed a long-standing tradition in Western Christendom that urged redress for sins even when situated only in a person’s thoughts, but which recognized a need for greater penance when thoughts proceeded to words and acts.

A twelfth-century vernacular homily extrapolated on this theme and on the “heart-sorrow” (*herte sor*) one should feel for past sins committed and for one’s fellow Christian’s suffering. Listeners were encouraged to recall that they had often sinned, “with his eyes he has beheld what he ought not... with his nose hath sniffed, and with his ears hath heard, and with his mouth spoken sinfully”, not to mention having committed excesses in eating and drinking. Such reflections were to help the individual “sorrowfully in his heart bemourneth” his own sins and therefore feel greater compassion toward his fellow Christians.¹⁸

This categorization of sin—frequently into sins of thought, speech, and deed—carried through into the later medieval period. William Shoreham, whose didactic poems survive in a single manuscript dating to the first half of the fourteenth century, distinguished between original

¹⁶ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 87-88, §2.

¹⁷ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 88, §3. Columban’s penitential ratcheted up the penance for one who undertook a planned sin: in the case of homicide or sodomy to ten years, and for fornication to three or seven years, respectively, depending upon whether the act was an isolated or repeated incident. *Ibid.*, 250, §3.

¹⁸ Morris, Richard, ed., *Old English Homilies of the Twelfth Century* (London: N. Trübner & Co., 1873), 206-209.

and actual sin, the former part of each person's heritage, and the latter committed daily.

Shoreham summoned up ideas of individual responsibility in contrasting actual sin with sin deriving instead from one's kin, or original sin:

This sin comes not from your kin, but [from] your self each day; so sayeth learned men, and call it 'actual.' This manner of sin is not of one kind, but is found in three: in thought, in speech, in deed amiss, this may each man see.¹⁹

Original sin was a common human legacy, while actual sin, to borrow Shoreham's terminology, was a matter of individual responsibility. Authors like Shoreham urged prayer and behavioral modification to mitigate the pervasiveness of sin. Going beyond Shoreham's tripartite categories of thought, speech, and deed, a late fourteenth century prayer begged forgiveness for sins committed in four manners:

Lord Jesus, who made me and with your blessed blood bought me,
forgive me for having grieved you with word, work, will, and
thought.²⁰

The category of will likely represented a step higher in severity than thought, with an illicit thought progressing to the point of desire and perhaps even firm intention to undertake the act.

As Chaucer's parson described the progression, "ther is no deedly synne that it nas first in mannes thought and after that in his delit, and so forth into consentynge and into dede."²¹ It was

¹⁹ Konrath, ed., *Poems of William Shoreham*, part 1, 104, lines 173-180. ("Þys senne comeþ nauzt of þy ken, / Ac þy self ech del; / Þo seggeþ þys lerede men, / And clypyeþ hyt 'actual.' / Þys manere senne nys nauzt ones, / Ac hys ischyt in þry, / In þouzt, in speche, in dede amys, / Þys may ech man ysy.") Much later sermons continue this theme. See, e.g., Cigman, ed., *Lollard Sermons*, 224 ("The þrid cause whi þis acounte may be seyde grete is þis: for in þat day alle men shullen reken of alle þing þat euer þei diden in her lyue, in þouzt, worde, and ded.")

²⁰ Brown, ed., *Religious Lyrics of the XIVth Century*, 124, lines 17-20 (from Stonyhurst Coll. MS XLIII, c. 1375). ("Ihesu lord, þat madyst me / & wyth þi blyssed blod me bouzt, / Forþeue me þat I hav greuyd þe / Wyth wurd, worke, wyle, and thouzt.") Cp. The English text of the *Confiteor*, which expressed regret for sins committed "In thoght, in speche, & in delite, / In worde, & werk I am to wite / and worth to blame..." Thomas Frederick Simmons, ed., *The Lay Folks Mass Book* (London: Oxford University Press, 1968; first published 1879), 8.

²¹ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 295.

with this dual interest in act and will that *The Matins of the Cross*, preserved in a pre-1350 manuscript, described how meditation on the passion might affect both action and will, drawing the person to love outwardly and internally:

Thou give us, Lord, might and mind
To love all that is so good,
And think upon thy suffering;
With hand and work, heart and will,
Aye, thee to love both aloud and silently,
To thee with heart incline.²²

Prayer and private behavioral modification, or loving God “both loud and still” were one thing, criminal prosecution another. In the realm of felony law, the equivalent of a sin of will might be counseling another to commit a crime, or aiding and abetting a crime, in both instances moving beyond a mere thought or desire to a more active intentionality geared toward bringing a crime to fruition. Sins of mere thought were not criminally prosecuted, but sins of will might be.²³

Complicating matters was the fact that thought and will were notoriously difficult to extricate from one another, easily being subsumed within the general category of intent or *mens rea* even still today. Jurors tasked with judging an alleged crime might be able to evaluate an act and perhaps even words spoken and heard by witnesses, but issues of mind and will remained a further step removed from the investigatory scope of a self-informing jury.

Reason and understanding added a further layer to assessing the severity of sin. Thomas Aquinas, for example, placed greatest emphasis on reason in measuring culpability: the more a

²² “The Matins of the Holy Cross,” in Brown, ed., *Religious Lyrics of the XIV Century*, 40, lines 25-30. (“Þou giue vs, lauerd, might and mode / To luue ai þat es sa god, / And thinc apon þi pine; / Wit hand and werck, hert and will, / <Ay þe to luue bath lude and still,> / to þe wit hert encline.”)

²³ Maud Pykhorn and her daughter Agnes, for example, were hanged for counseling and inciting the death of John Reyd of Ravensden, who was killed during a home invasion. See Hunnisett, ed. and trans., *Bedfordshire Coroners’ Rolls*, 14, no. 37.

sin reflected disorder in a higher order of reason, the more serious it was as a consequence.²⁴ A twelfth-century vernacular homily described how sins might occur “through ignorance, or through weakness,” in which case they could be easily repented; “or through recklessness, which is harder to repent of; or through evil thought which is much harder to repent of,” unless sinners pray for mercy and undertake considerable penance.²⁵ Sin involved, above all, a violation of good conscience.²⁶ According to Alain de Lille’s *Liber poenitentialis*, in weighing sin it was necessary to consider whether the sin was done knowingly or in ignorance, because knowledge (*scientia*) was seen to aggravate guilt, and ignorance (*ignorantia*) to alleviate it.²⁷ Unfortunately, such intentionality was difficult to measure. While a person’s acts might be witnessed, his or her motivation might not. In the words of Richard Rolle, writing in the first half of the fourteenth century, “our works men may see, but why we do them and whither we think in doing them, only God sees”.²⁸ Rolle, drawing upon the psalms, observed that it fell only to God to search hearts and kidneys, the locus of one’s thoughts and emotions, respectively; only God could determine

²⁴ Aquinas, *Summa Theologica*, Vol. 2, Q. 73, Art. 3.

²⁵ Morris, ed. and trans., *Old English Homilies of the Twelfth Century*, 63. Robert Grosseteste touched upon the nature of recklessness in a letter on election to a parochial benefice, commenting: “The one who shoots arrows into a place through which he knows people are accustomed often to pass and thereby kills someone, even though he is unaware of what he has done, is not excused by his ignorance; no, he is guilty of committing murder, because before shooting his arrow he should have carefully taken into account that perhaps someone was there at the time.” Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 293.

²⁶ See, e.g., “A Confessioun to Ihesu Crist,” in Patterson, *Middle English Penitential Lyric*, 51, lines 9-10. (“I-broken Ichaue þi Comaundemens / Aʒeynes myn owne Conciens...”)

²⁷ “Praeterea inquirendum est utrum peccatum factum sit scienter vel ignoranter, quia scientia culpam aggravat, ignorantia alleviat, quia cui datum est donum majoris scientiae, transgressor majori subjacet culpae.” Alain de Lille, *Liber Poenitentialis*, vol. 2, ed. Jean Longère (Louvain: Editions Nauwelaerts, 1965), 33.

²⁸ Bramley, ed., *Psalter or Psalms of David*, 26. (“Oure werkis may men see; bot whi we doe thaim and whidere we thynk in doand thaim, anly god sees”).

how a man thought and in what he took pleasure.²⁹ A person's state of mind might be deduced circumstantially, however. For example, a person habituated toward cursing for little reason thereby made his wrathful nature visible to observers, according to Robert Mannyng.³⁰ In some instances an inquest jury might draw an inference about the level of *scienter* involved in an offense. For example, in a 1271 Bedfordshire homicide case, a coroner's inquest found that a woman named Beatrice, at whose home the alleged felon was taken, "well knew that he was a felon and received him of her own free will."³¹

I have already dealt with the issue of habit in my earlier discussion of anger, but suffice it to say that habit served as an aggravating factor more generally in determining the severity of a persons's guilt. As with so many aspects of sin and crime, this idea, too, can be traced back to the early penitentials. In the Penitential of Finnian (c. 525-550), for example, a cleric who fornicated only once and whose sinful act was hidden from others was obliged to do penance for a year on bread and water and abstain from wine and meat for an additional year, but could keep his clerical office. However, his penance was expanded to three years on bread and water and three more years without wine and meat, plus loss of his clerical office, if his fornication was a long-standing habit, even when it remained unknown to others.³² In similar fashion, the penitential prescribed a year of penance on bread and water and four-fold restitution if a cleric

²⁹ Bramley, ed., *Psalter or Psalms of David*, 26. ("...it anly falles til god to ransake hertis and neris, that is thoghtis and delites...what ilk man thynkis...what thynghe his delite is in...") See also Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 178. ("But only he who probes our thoughts and hearts [Rv 2:23] can censure you for this, because he alone knows with what intention a person undertakes such responsibilities.")

³⁰ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 129, lines 3757-3760. "If thou art wont customarily for to curse for little reason, thy tongue beareth thereof witness that men now will wrath in thee perceive." ("Ȝyf þou art wunt custummably / For to curse for lytyl why, / Þy tunge bereþ þerof wytnesse / Þat men nowe weyl wraþ yn þe gesse.")

³¹ Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 20-21, no. 45. "Free will" here may refer to the mere absence of coercion.

³² McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 89, §§10-11.

committed a theft of a sheep, hog or other animal once or twice; if he thieved habitually, however, his penance was extended to three years.³³

We can find this same concern with sinful habits in a late medieval macaronic sermon's reflection on Peter's denial of Jesus. The sermon observes that Peter first denied Jesus "simply without swearing," while the second time he denied him and "in addition took an oath." On the third denial, Peter "perjured and anathematized himself too." According to the sermon author, "this signifies that a smaller sin, unless a man corrects himself of it, draws him to a greater one, and especially when a man is in bad company as Peter was, because bad company makes a man deny Christ. And therefore Gregory says that a sin that is not eradicated through penance soon, by its own weight, draws to another."³⁴ Bad habits, left uncorrected, corrupted the will, inclining it toward ever greater sin.³⁵

Volition and Will

Yet understanding an alleged perpetrator's will was crucial to accurate guilt assessment. As a poem dated 1401 put it, "you have free will, choose your adventure"³⁶ The will was key to understanding a person's motivation in a particular undertaking, while it also provided insight

³³ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 92, §§25-26. The same penitential cautioned against the entertainment of sinful ways of living, driven by wrath, envy, gloominess or greed, which unchecked might kill the soul; clerics were urged to fight against such tendencies unceasingly until they were replaced with patience, love of God and neighbor, and liberality. *Ibid.*, 92-93, §29.

³⁴ Holly Johnson, *The Grammar of Good Friday: Macaronic Sermons of Late Medieval England* (Turnhout: Brepols, 2012), 141, 197. The translation is Johnson's. The sermon, in London, Lambeth Palace, MS 352, fols 216r-224v, is believed to date to the fifteenth or possibly late fourteenth century.

³⁵ On repetitive sin and the development of habit, see "Remembering the Samaritan, Remembering Semyuief: Salvation and Sin in Piers Plowman (the C Version)," in David Aers, *Salvation and Sin: Augustine, Langland, and Fourteenth-Century Theology* (Notre Dame: University of Notre Dame Press, 2009), 102.

³⁶ "What Profits a Kingdom," in Robbins, ed., *Historical Poems of the XIVth and XVth Centuries*, 44. ("Ȝe haue fre wille, chese ȝoure chaunce / To haue wiȝ god werre or pes.") The poem referred specifically to the choices to be made by those in charge of governing a kingdom.

into the level of consent and deliberateness involved. Habit might have an effect upon the formation of a person's will, making it easier to slip into patterns of habitual sin or crime. At the time that England was moving toward a jury system for criminal trials, and that the church was moving toward abolition of the ordeal, these were issues that stimulated debate among theologians and seeped into homilies. For example, the relationship between the will and sinful acts was taken up in the later letters of Peter of Blois (1125-1212), who studied Roman law in Bologna and theology in Paris before serving in the administration of Henry II and as Archdeacon of Bath and then London in the decades leading up to Lateran IV.³⁷ Peter argued that the will was productive of greater sin than the act.³⁸ He offered as an example a man who, wishing to kill his father and a Jew, never found an opportunity to kill the former but did manage to kill the latter. Peter argued that the will to kill the father, which made him a parricide, was more damning than the act of killing the Jew.³⁹ For Peter, *voluntas* trumped *actus*. The relational aspect of the former homicide, although never actuated, trumped the actual homicide of a Jew, who was presumably neither a relation of the killer nor a Christian, thereby placing him doubly outside Peter's sympathy. The troubling nature of the will had to do with its tendency to produce the intended effect, such that one who wished not to love God in turn failed to love God, failing to love God counting as a deed according to Peter's logic.⁴⁰ Peter's point may have been

³⁷ "Blois, Peter of (1125x30–1212)," R. W. Southern in *Oxford Dictionary of National Biography*, see online ed., ed. Lawrence Goldman, Oxford: OUP, <http://www.oxforddnb.com.proxy.lib.umich.edu/view/article/22012>, accessed October 9, 2013.

³⁸ "Evenit autem ut voluntas maius peccatum est quam opus." Elizabeth Revell, ed. *The Later Letters of Peter of Blois* (Oxford: Oxford University Press, 1993), 158, letter 30a.

³⁹ "Verbi causa: iste vult occidere patrem suum et Iudeum. Non potest habere opportunitatem occidendi patrem; si Iudeum occidit, magis est reus pro voluntate quam habet contra patrem, quia inde parricidia est, quam homicidio Iudei, et sic voluntas hic maius peccatum est quam opus." Revell, ed., *Later Letters of Peter of Blois*, 158, letter 30a.

⁴⁰ "Item hic vult non diligere deum, et peccat mortaliter, et sic ista voluntas ducta est ad effectum." Revell, ed., *Later Letters of Peter of Blois*, 158, letter 30a.

in part that one should take sins of the will very seriously, insofar as they naturally tended toward consummated acts.

Alain de Lille (1116/17-1202), a contemporary of Peter of Blois, took a different stance on the act-will divide. According to Alain, priests serving in the role of spiritual doctor should count as more serious a sin engaging both the will and an act, as opposed to will alone, a view more aligned with the practice of criminal prosecution.⁴¹ Where Peter of Blois was more troubled by a wicked will, e.g., the willed but inchoate parricide, Alain de Lille was inclined to

⁴¹ “Investigari etiam oportet, utrum peccatum tantum sit voluntatis, vel voluntatis vel operis. Gravius etenim est peccatum voluntatis et operis, quam voluntatis tamen.” de Lille, *Liber Poenitentialis*, ed., Longère, 33. Blackstone’s pronouncement that, “to make a complete crime, cognizable by human laws, there must be both a will and an act,” therefore had its medieval forebear. Blackstone recognized that “*in foro conscientiae*,” a will determined to commit an illicit act might be considered “almost as heinous as the commission of [the act],” but argued that no worldly tribunal might “search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions.” Blackstone therefore urged reliance on an overt act before imposing punishment. He cautiously added, too, that an illicit act “without a vicious will” did not constitute a crime. For him, will and act were inseparably bound up in the very definition of crime. Blackstone, *Commentaries*, vol. 4, 20-21. Blackstone hypothesized that there were three distinct situations in which will and act might not be joined: 1) where there was “a defect of understanding”, such as in cases involving infancy, idiocy, lunacy, and intoxication; 2) where there is understanding and will, but an offense occurs “by chance or ignorance,” as in cases of misfortune or ignorance; and 3) where “action is constrained by some outward force or violence”, such as cases involving compulsion or necessity. In such instances, the will was seen to be in opposition with the deed. Blackstone, *Commentaries*, vol. 4, 21. But see Dana Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (Houndmills: Palgrave Macmillan, 2004), 78-85 (discussing drunkenness in eighteenth-century cases, and arguing that drunkenness, for Blackstone, was never a mitigating factor). Intoxication provided no excuse in medieval England. In fact, intoxication might be evidence of a prior confluence of a reprehensible will and act at the time when the individual, while still sober, chose the path to inebriation. See, for example, JUST1/664 AALT 3782 (1280), accessed October 9, 2013, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3782.htm, a case in which one man wounded another after they left a tavern drunk and arguing. The one who inflicted a fatal wound fled, suggestive of the probable outcome of a homicide trial. But note that intoxication leading to an accidental death might be classified as misfortune rather than culpable homicide. See, e.g., JUST2/128 AALT 0004 (1297), accessed October 9, 2013, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no128/IMG_0004.htm, describing the death of Margery, wife of Adam Gold, who died the day after succumbing to a fire that enveloped her bed when she fell asleep with a candle burning at her bedside. The coroner’s inquest explained that Adam and Margery had been at tavern and were inebriated (*fuert ad tabernam et inebriati erant*) on the night of the incident. For a similar case of an inebriated woman burning to death, which might not have been an uncommon phenomenon in late thirteenth-century Oxford, see JUST2/128 AALT 0006 (1298), accessed October 9, 2013, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no128/IMG_0006.htm.

condemn more harshly the will brought to fruition in bodily action. By comparison, Thomas de Chobham, writing a *summa confessorum* for an English clerical audience in the early thirteenth century, saw the will and act as so very intertwined that the Fifth Commandment prohibition on killing applied to will and act alike; he relied on John's Gospel for the idea that one who hated his brother was in fact a manslayer.⁴² Yet Chobham's motivation in equating act with will does not seem to have been inspired by a view like Peter of Blois', which attempted to measure the comparative harm of killing a Jew versus killing one's father. Rather, Chobham's view of the will revealed an understanding of human nature in which some actions were naturally odious, and others naturally more tempting. As a result, some of the Ten Commandments were more critical than others in shaping a person's behavior insofar as they addressed acts to which the will might easily be inclined. Some commandments that might appear to be superfluous were instead crucial, in Chobham's estimation, given the natural weakness of the will. Specifically, he pointed out that the prohibition on killing would seem, at first glance, to take precedence over the prohibitions on fornication and theft. However, the latter two prohibitions were actually more important than the first insofar as the act of killing was contrary to nature, horrible, and not pleasurable, while riches and fornication were comparably attractive to the will.⁴³ If homicide took greater willpower than theft or fornication, both of which were by nature more pleasurable, presumably it compounded the severity of sin involved. Nevertheless, Chobham might advise

⁴² "Quintum preceptum est: non occides, in quo prohibetur tam homicidium voluntatis quam homicidium actus, quia homicida est qui vult occidere licet non occidat, sicut dicit Iohannes: qui odit fratrem suum homicida est." Chobham, *Summa Confessorum*, ed. Broomfield, 29. See also *ibid.*, 20-21: "Homicidiis: pluraliter dicit quia sunt homicidia actus et voluntatis."

⁴³ "Videntur autem hec duo precepta ultima superflua, quia sicut prohibita est voluntas occidendi cum dictum est: non occides, eodem modo prohibita est voluntas fornicandi et voluntas furandi cum dictum est: non mechaberis, non furtum facies. Ad quod dicendum quod occidere contra naturam est, et horribile, et non delectabile, et ideo non est attractivum voluntatis. Sed luxuria et divitie delectabiles sunt nature corrupte, et ideo multum attrahunt voluntatem et appetitum fornicandi et habendi divitias, et ideo magis necesse fuit prohibere voluntatem et concupiscentiam fornicandi et habendi divitias quam prohibendi voluntatem homicidii." Chobham, *Summa Confessorum*, ed. Broomfield, 30.

priests to rail more severely against theft and fornication than homicide under the presumption that most individuals would be naturally inclined to avoid fatal violence but naturally drawn toward material goods and carnal pleasures.

Discussion below of the categorization of types of homicide will demonstrate that one of the primary variables in determining the severity of a killing was precisely the extent to which the homicidal actor's volitional capacity had been exercised. While the common law mostly concerned itself with homicide in the form of physical violence, the church advised potential confessants that they might be guilty of manslaughter in manifold ways, with the principal division often being between bodily and ghostly, or spiritual, manslaughter.⁴⁴ One late fourteenth-century sermon, recorded in a fifteenth-century manuscript, paraphrased the fifth commandment, "Thou shalt slay no man, that is to say, without law. No sir, neither bodily nor ghostly, neither in word by backbiting, nor in will by envy, nor in deed doing".⁴⁵ According to the *Mirour de Seinte Eglyse* (c. 1213-1214), homicide could occur in three forms: by hand, tongue, and heart. Homicide by hand included obvious direct bodily homicide but also more indirect forms such as occasioning a man's death by placing him in prison. Homicide by tongue included commanding and inciting another to commit homicide. Lastly, homicide by heart

⁴⁴ See, e.g., Holmstedt, ed. *Speculum Christiani*, 26. ("A man-sleer is seide in many maners, bothe bodyly and gostly..."). This was also the basic division offered by Raymond of Peñafort, who divided homicide into two major categories: "aliud spirituale, aliud corporale." Raymond of Peñafort, *Summa de poenitentia et matrimonio cum glossis Ioannis de Friburgo* (Farnborough: Gregg Press, 1967; facsimile of edition from Rome: Sumptibus J. Tallini, 1603), 147 (de homicidio, tit. 1). Spiritual homicide might be committed in five ways: "odiendo, detrahendo, male consulendo, nocendo, victum subtrahendo" (by hating, backbiting, giving wicked counsel, harming, withdrawing sustenance). Bodily homicide could be committed in two ways: "lingua et facto" (by tongue and by deed). The former category included homicide committed "praecepto, consilio et defensione" (by command, by counsel, and defensively), while the latter included homicide committed "iustitia, necessitate, casu, et voluntate" (through justice, out of necessity, by accident, and voluntarily). *Ibid.*, 147-148.

⁴⁵ Ross, ed., *Middle English Sermons*, 24. ("þou shalte slee no man—þat is to seye, with-owte lawe. No, sir, noþur bodely ne goostely, noþur in worde by bakbytynge, noþur in vill by envye, noþur in dede doynge...")

involved desiring the death of another as well as failing to deliver a man from death when it was within one's power to do so.⁴⁶ These formulations of homicide were unlikely to have been interpreted literally by medieval churchgoing men and women, yet they served as a frequently emphasized reminder that the common law of felony was at once underinclusive in focusing only on bodily homicide, and severely overinclusive in prescribing death as the sole penalty. We cannot know the extent to which men and women paid attention in church and confessional and incorporated such messages into the formation of individual conscience, but these themes were widespread and long-standing. In fact, this tripartite formulation continued to carry currency through at least the fifteenth century when, for example, a Middle English sermon enumerated three forms of manslaughter: by violence, slander, or hatred.⁴⁷ Similarly, an early fifteenth-century sermon described three forms of manslaughter, by hand, tongue, and heart. While the first resulted in the loss of another person's life and the second destroyed another person's good name, the third slaughtered the soul of the individual driven to hatred. According to the sermon, homicide might be directed outward toward others, both physically and through slander, but might also be directed inwards insofar as a hateful heart amounted to spiritual death for the person experiencing the emotion. As a consequence, in addition to not killing, individuals were urged to cabin their anger.⁴⁸

⁴⁶ Wilshere, ed., *Mirour de Seinte Eglyse*, 30, lines 32-41. ("Le second comandement est itel: vus ne tuerez nul homme. Ci devez savoir ke homicide est en mut de maneres. Il i a homicide de main, de launge, de quor. Homicide de meyn est quant homme tue autre de sa meyn e quant il [le met en liu] de mort, si cum en prisun u en autre lu ke puse estre occasion de sa mort. Homicide de launge est en deu[s] maneres, par comandement u par enticement. Homicide de quor est ausi en deu[s] maneres, ço est a saver, quant homme desire e coveite autri mort, e quant il sufre homme murir e nel vot delivrer s'il ad le poer.")

⁴⁷ V. M. O'Mara and Suzanne Paul, eds., *A Repertorium of Middle English Prose Sermons* (Turnhout: Brepols, 2007), vol. 4, 2228.

⁴⁸ O'Mara and Paul, eds., *Repertorium of Middle English Prose Sermons*, vol. 1, 109 (Cam/StJo/G.22/006, early fifteenth century).

The fourteenth-century *Speculum Christiani* suggested a tripartite division as well, emphasizing word, deed, and thought—described elsewhere in the text as mind, tongue, and hands, suggesting the order was not essential—plus the additional categorization of manslaughter by consent. In a handy rhyme, the text advised, “Of mankind shall thou no one slay, nor harm with word nor will nor deed, nor suffer no one forlorn nor lost to be, if thou will [and] may, him help at need.”⁴⁹ This last phrase was reinforced by the poem’s admonition against manslaughter by “withdrawal of livelihood.”⁵⁰ In examining their conscience with regard to the fifth commandment, penitents were urged to consider a variety of factors, from actual commission of homicide to failure to share one’s food with the hungry. John Mirk, writing in the late fourteenth or early fifteenth century, provided the following guidance for examination of conscience:

Have you slain any man, or helped thereto by your might?
 Have you counseled or given succor to any man to do that deed?
 Have you wounded any man in debate, or had toward him any deadly hate?
 Have you given any man of your meat, when he had hunger and need to eat?
 By evil example you might also another man’s soul slay;
 therefore take heed of your living, if you have trespassed in such things.⁵¹

⁴⁹ Holmstedt, ed., *Speculum Christiani*, 24. (“Of mankynde schal thou noon slee, / Ne harme with worde ne wyl ner dede, / Ne suffyr noon lorne ne lost to be; / If thou wyl may, hym helpe at nede.”) The fifth commandment is summarized as follows: “Thou schalt not sle. In this every maner slaughtur es unlesful, es for-boden, which es som-tyme to consente, som-tyme of word, som-tyme of dede, and som-tyme of thought.” For the alternate formulation of the tripartite division, see *ibid.*, 26 (“be mynde, be tunge, be handes, and be wyth-drawynge of lyuelode”).

⁵⁰ Holmstedt, ed., *Speculum Christiani*, 26.

⁵¹ Peacock, ed., *Instructions for Parish Priests*, 29, lines 917-928. (“Hast þow any mon I-slayn, / Or holpe þer-to by þy mayn; // Hast þou counceled or ʒeue mede / Ton any mon to do þat dede? // Hast þou any mon wowndet in debate, / Or had to hym any dedly hate? // Hast þou ʒeue any mon of þy mete, / When he hade hongur and nede to ete? // By euel esaumpulle þow myʒt also, / A-noþer monnes sowle slo; // Perfore take hede on þy lyuyng / ʒef þou haue trespaset in syche þynge.”) For more on Mirk’s career and writings, see “Mirk, John (*fl.* c.1382–c.1414),” Susan Powell in *Oxford Dictionary of National Biography*, online ed., ed. Lawrence Goldman, Oxford: OUP, <http://www.oxforddnb.com.proxy.lib.umich.edu/view/article/18818>, accessed September 10, 2013.

Mirk's questions aimed to elicit confessions of homicide by deed (slaying or aiding in slaying), word (telling another to slay), and indirect killing (e.g. withholding food), while also calling attention to "ghostly" forms of violence, such as harsh words or the setting of bad examples.

Other fourteenth-century religious writings also emphasized the word/deed distinction in discussions of homicide. Robert Mannyng, writing in 1303, proffered a definition of manslaughter that included directly slaying with one's hand without justice, for felony or robbery.⁵² The *Speculum Christiani* gave the example of Cain and Abel to describe slaying by hand, and added as an aggravating factor the use of venom or poison.⁵³ Mannyng also included in the category of bodily slaying the act of placing a man in prison "wickedly, as a false felon".⁵⁴ Furthermore, slaying might take place indirectly, through a person's counsel. Mannyng considered a man who counseled another to attack the direct cause (*enchesun*) of the sinful deed.⁵⁵ The *Speculum Christiani*, too, relying on the examples of the Jews slaying Christ and

⁵² Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 47-48, lines 1307-1312. "To the fifth now shall we go, that is, 'thou shalt no man slay.' The fifth, shalt thou understand, is 'slay no man with thine hand, without justice, for felony, nor for any manner of robbery.'" ("To þe fyfþe now shul we go, / Þat ys, 'þou shalt no man slo.' / Þe fyfþe, shalt þou vndyrstonde, / Ys, 'sle no man with þyn honde, / with-outyn iustyce, for felonye, / Ne for no manere of robbrye."')

⁵³ Holmstedt, ed., *Speculum Christiani*, 26 ("Som man sleeþ wyth hande, as Kaym slew Abel. Also som men sleyng vnrightly, and thei thata sleen any body wyth venyme or poyson.")

⁵⁴ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 47-48, lines 1313-1318. "The fifth, shalt thou understand, is 'slay no man with thine hande, without justice, for felony, nor for any manner of robbery.' If you do any many in prison, wickedly, as a false felon, or bind him in upland or in town, that he have his death therethrough,— certainly thee shall nothing keep, that for his death thou shalt answer." ("Ȝyf þou do any man yn prysun, / wykkedly, as a fals felun, / Or bynde yn upland or in burgh, / Þat he haue hys deþe þer-þurgh,— / Certeyn þe shal no þyng were, / Þat for hys deþ þou shalt answe."')

⁵⁵ Furnivall, ed. *Robert of Brunne's "Handlyng Synne,"* 48, lines 1319-1324. "If thou ever in any time deprived any man his limb or it was deprived through thy counsel, thou art the cause of his deed. If it be against his will or his assent, thou sinnest full ill." ("Ȝyf þou euer yn any tyme / Reftē any man hys lyme, / Or hyt was refētē þurgh þy rede, / Þou art enchesun of hys dede. / Ȝyf hyt be aȝens hys wylle / Or hys asent, þou synnest ful ylle.") I have modernized *refētē* to "deprived" based on a contextual reading of the word, as well as due to the use of the verb *tolir* (to take away, deprive of) in the Anglo Norman version of the text.

Herod slaying John the Baptist, described as a manslayer one who by word brought about another's death, for "he that biddeth does in deed."⁵⁶

Taking matters a step further, "false flatterers and backbiters" also fell under the *Speculum Christiani*'s homicide divisions.⁵⁷ For some authors, backbiting was a method of slaying by word, a form of vengeance according to a poem on keeping Christ's commandments found in the Vernon manuscript (c. 1400). The poem suggested that vengeance might be taken bodily or by word, and that people should therefore strive to halt the spread of idle gossip:

Slay no man with wicked will;
Beware, and vengeance take thou none,
Neither in word nor deed, loudly nor silently.
Backbite thou no man, blood nor bone,
But on the contrary, let idle talk pass and go
Away where it will miss the mark or glance;
And help that all men be atoned,
And keep well Christ's commandment.⁵⁸

Another poem in the same manuscript advised the reader "always to say the best," as a wicked word might have the effect of slaying one's neighbor.⁵⁹ Robert Mannyng, writing contemporaneously, extended the caution against backbiting to those who brought false accusations, accepted bribes in exchange for letting thieves walk free, or spoke falsely in general about their neighbors; false accusers and unfaithful jurymen, as well as false and felonious traitors (*Falsē treytours & feloune*) who stealthily spread false rumors about their fellow

⁵⁶ Holmstedt, ed., *Speculum Christiani*, 26 ("Som men sle wyth tonge, as Iues slown Cryste and Herode slewe Iohanne the Baptist; for [he] that bydde3 doos in dede.")

⁵⁷ Holmstedt, ed., *Speculum Christiani*, 26 ("Also fals flaterrers and wyked bacbiters be man-sleers.")

⁵⁸ Brown, ed., *Religious Lyrics of the XIVth Century*, 150, lines 49-56 (from the Vernon MS, c. 1400, West Midlands). ("Sle no mon wiþ wikked wille; / Be war and vengeaunce tak þou non, / In word ne dede, loude ne stille. / Bakbyte þou no mon, blod ny bon, / But ay let gabbynges glyde and gon / A-way where þei wol glace or glent; / And help þat alle men ben aton, / And kep wel cristes comaundement.")

⁵⁹ Furnivall, ed., *Minor Poems of the Vernon MS*, part 2, 724 ("euermore to sey þe beste...Wiþ a wikked word þi neiþebor to spil").

townspeople, were guilty of the greatest felony.⁶⁰ As the *Speculum Christiani* would describe it, “he who justifies a wicked man and he who damns a rightful man, both are abominable against God.”⁶¹

In addition to involving direct commands or counsel to kill, slaying by word could be a form of ghostly or spiritual manslaughter, particularly when a priest or master set a bad example. “Curates and wicked masters,” cautioned the *Speculum Christiani*, “slay their subjects by evil example.”⁶² The author of the *Speculum* cited Gregory for the proposition that prelates deserved death if they set a bad example for their subjects.⁶³ Yet it was not only church figureheads who earned the *Speculum* author’s scorn for setting a misguided example or giving bad advice: anyone might slay his or her own soul as well as a neighbor’s through such ill-advised words and actions.⁶⁴

⁶⁰ Furnivall, ed. *Robert of Brunne’s “Handlyng Synne,”* 48-49, lines 1335-1352. “What shall we say of these accusers, these false men who are jurymen of assize, who, for hate, a true man will indict, and a thief for silver acquit? Be he never so serious a thief, if he may give, he shall be favored; a poor man that may not do so, the death they will damn him to. Also it is of these stealthy people in town,— False traitors and felonious, who falsely, for envy, about their neighbors will gladly lie, and say forsooth that he hath wrought things that never it was done nor thought, when their goods lose they forever. In all the world, there is no greater felony, than from thy neighbor next thee acquire.” (“what shul we sey of þys dytours, / Þys fals men, þat beyn sysours, / Þat, for hate, a trewman wyl endyte, / And a þefe for syluer quyte? / Be he neuer so strong a þefe, / Ȝyf he may ȝyue, he shal be lefe; / A porē man þat may nat so, / Þe deþē þey wyl dampne hym to. / Also hyt ys of þys dormers yn tounne,— / Falsē treytours & feloune,— / þat falslychē, for enuye, / On here neghburs wyl gladly lye, / And seye forsoþe þat he haþ wrought / Þyng þat neuer ȝyt was do ne þoght. / þey sle hem allē þat þey may, / whan here gode los þey fordo for ay. / yn alle þe wrlde, no ys more felonye, / Þan of þy neghbur next þe by.”) I have translated *by* as “acquire,” assuming it is derived from the verb *bien*, to acquire, which can have the connotation of acquisition by illicit means.

⁶¹ Holmstedt, ed., *Speculum Christiani*, 26 (“Proverbiorum: He that iustifiez a wycked man and he that dampnes a rightful man, both be abominable anenste god.”)

⁶² Holmstedt, ed., *Speculum Christiani*, 26 (“Curates and wycked maistres sle her subietes by euyl ensauple.”)

⁶³ Holmstedt, ed., *Speculum Christiani*, 26 (“Gregorius: Prelatys be worthy as many dethes as thei ȝeue euyl ensauple to her subietes.”)

⁶⁴ Holmstedt, ed., *Speculum Christiani*, 26 (“He that defoules or blemyscheþ his neighbours conscience wyth euyl conseyl or ensauple, he sleeþ mym-selfe gostly and his neghbour.”)

As touched on above, another form of indirect manslaughter was the denial of food and sustenance to a person in need. Robert Mannyng, relying on Saint Ambrose, argued that it was “ghostly slaying” (*slaghtyr gostly*) to deprive a poor man of food, whether by ignoring his plea for assistance or through the passage of wicked laws (*wykked ordynaunce*). Here, ghostly manslaughter might reference an indirect form of killing, or it might suggest that it was the perpetrator’s soul that died when a starving person physically died through neglect. Mannyng did not go so far as to argue that such a perpetrator, who had sinned “before God”, should lose his or her life in turn. Rather, he suggested that this sin might be atoned through charitable giving, “a gift ye give” (*a zyfte y zyue*), as he termed it.⁶⁵ The *Speculum Christiani* reinforced Mannyng’s view on the deprivation of sustenance but took it to a further level of abstraction: not only was it manslaughter to deny food to a hungry person, but it was also a form of manslaughter to withdraw “soul food” by failing to carry out one’s obligation to preach God’s word.⁶⁶ The common law, of course, never prosecuted denial of sustenance as a felony, but even religious authors like Mannyng do not seem to suggest that such legal recourse would be the appropriate response to these human failures. What these texts reveal is that medieval England had a capacious understanding of homicide that encompassed literal and figurative slayings alike. While medieval English felony law also took a capacious approach to defining felonious

⁶⁵ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 48, lines 1325-1334. “If thou through wicked ordinance destroy a man's sustenance that afterward he may not live, thou art culpable,—a gift ye give. If a poor man craves from thee a meal's food, his life to save,— if thou might give it to him and will not, before God thou has him killed. Saint Ambrose sayeth firmly, that it is manslaughter ghostly.” (“Ȝyf þou þurgh wykked ordynaunce / Fordost pore mannys sustynaunce / þat aftyrward he may nat lyue, / þou art coupable,—a zyfte y zyue. Ȝyf a porē man þe craue / A melys mete, hys lyfe to saue,— / Ȝyf þou mayst zyue hym, & nat wylt, / Beforē god þou hast hym spylt. / Seynt Ambrosē seyþ hardly, / þat hyt ys slaghtyr gostly.”)

⁶⁶ Holmstedt, ed., *Speculum Christiani*, 26 (“A man that wyth-drauyth wylfully bodyly lyelode from any man in tyme of grete nede, to whom he myght zeue, he is clepid a man-sleer. As es seid in decret: Fede the hungre; if thou fede hym not, thou haste slayne hym. And ther-to es wyth-drauyng of foode of saule, levyng of prechyng of goodes word when man es bounde thar-to.”)

homicide, countenancing few technical exceptions to the law, these rival cultural understandings of homicide and sin may have inclined jurors toward mechanisms of guilt assessment that had to do as much with a person's inward disposition as with any actual acts imputed to that individual. Such ideas, too, gave jurors a capacity for a legal realist approach to the entire process of felony adjudication, insofar as it placed the dire fates of defendants in stark contrast with the potentially corrupted motivations of litigants, judges, and jurors alike. For every death on the gallows, there were possibilities for a great deal of ghostly manslaughter in the gaol, courtroom, and wider community. We cannot know whether jurors took any of these ideas very seriously, or whether they thought beyond the immediate concerns with crime control and prevention, or even beyond their next meal, when faced with a felony defendant, but we can surmise that these ideas, prevalent in Latin and vernacular texts in varying registers of accessibility, made an impact on jurors' attitudes toward felony adjudication.

Guilt Assessment of Specific Crimes

Religious sources are frequently quite vivid in creating a hierarchy of sin. A tract on "The XI Pains of Hell," for example, described hell as containing a lake with "boiling hot water... blacker than the darkest pitch" (*water wallinde hot...Blakkure þan þe swarte pich*).⁶⁷ In this pool, filled with stinging adders and patrolled by fiends, one might view men and women standing at various depths according to the severity of their earthly trespasses:

Some I might there see
Who stand up to their knees.
And some to their mid-thigh.
And some to their eyebrows.
And some right to their teeth.⁶⁸

⁶⁷ "The XI Pains of Hell," in Morris, ed., *Old English Miscellany*, 149.

⁶⁸ "The XI Pains of Hell," in Morris, ed., *Old English Miscellany*, 149-150, lines 95-99.

The depth provided a visual ranking of the various sins represented in hell's lake: backbiters were submerged to their knees, those glad of another's harm to their arms, adulterers and those who spoke in church to their mouths, those who betrayed relatives to their eyes, and those who acted with a wrongful will were completely covered by the black water.⁶⁹

Legal treatises and records are far less vivid in ranking crimes. In rare instances, the historical record offers a glimpse of how royal authorities categorized crime, or at least who was considered most culpable by such authorities. In 1219, faced with the prospect of designing a new system of criminal adjudication once trials by fire and water were no longer an option, the counselors of the pre-teen king Henry III issued instructions to the king's itinerant justices.⁷⁰ The instructions distinguished between major crimes (*criminibus...majoribus*)—including theft, murder, arson, and the like (*latrocinio, murdro, incendio & hiis similibus*), medium crimes (*mediis criminibus*), and minor crimes (*minoribus...criminibus*), without specifying any particular types of medium or minor crimes.⁷¹ It is not clear from the text whether the enumerated major crimes would be categorized as medium or minor crimes when accompanied by extenuating circumstances, or whether a distinct enumeration were imagined for the latter two categories, as was the case with the rankings of sins to be discussed below. One gets the sense from the slapdash nature of the instructions that the king's council might not have been entirely clear on this point either. The categories appear to have been intended to allow for a simple,

⁶⁹ "The XI Pains of Hell," in Morris, ed., *Old English Miscellany*, 150.

⁷⁰ For a succinct introduction to this period of post-ordeal procedural innovation in the years 1217-1222, see generally Groot, "Teaching Each Other," 17-32.

⁷¹ "Regis justic' suis, de modo puniendi malificos, cum sit prohibitum per ecclesiam Romanam judicium ignis & aquae," in Thomas Rymer, ed., *Fædera, Conventiones, Litteræ, et Cujuscunque Generis Acta Publica*, vol. 1, part 1 (London, 1816), 154. See also, generally, C. R. Cheney, *English Synodalia of the Thirteenth Century* (Oxford: Oxford University Press, 1968).

crude sorting to determine who should be held for trial, presumably prior to the consideration of the more detailed circumstances of the particular crime in question.

Contemporary with these instructions were the synodal statutes of Bishop Richard Poore for the diocese of Salisbury, first issued c. 1217-1219 and expanded upon in subsequent years. They reflect a similar approach to categorizing sin as exhibited in Robert of Flamborough's *Liber poenitentialis*, written c. 1208-1215, which divided sin or crime into three levels of severity: 1) maximum, which included incest, simony, heresy, apostasy, and homicide; 2) medium, including adultery and perjury; and 3) minimum, including simple fornication.⁷² These categories were explicitly geared toward assessing the impact of sin on priestly ordination. In the statutes, Poore provided a list of "the major sins" (*de maioribus peccatis*), a convenient point for comparison with the royal list. Among the major sins, Poore enumerated: homicide, sacrilege, sins against nature, incest, fornication with virgins and nuns, beating one's parents or clerics, breaking vows, and so forth.⁷³ Even more serious, insofar as they required dispensation from the pope or his legate, were the sins of striking clerics or other religious (repeated from the earlier list), arson of churches, and simony.⁷⁴ In contrast to Henry III's list, which placed property crimes and serious bodily violence at the top of the list, Poore's emphasis was decidedly less on property, and more concerned with bodily violence (also privileging homicide), religious affronts, and sexual deviance. He particularly emphasized violence against clerics, but arson

⁷² Flamborough, *Liber poenitentialis*, ed. Firth, book 3, 118.

⁷³ "Synodal Statutes of Bishop Richard Poore for the Diocese of Salisbury," in F. M. Powicke and C. R. Cheney, eds., *Councils and Synods with Other Documents Relating to the English Church, A.D. 1205-1313*, vol. 2, part 1 (1205-1265), (Oxford: Clarendon, 1964), 73-74, §41. ("Sunt autem ista maiora: homicidia, sacrilegia, peccata contra naturam, incestus, stupra virginum et monialium, iniectio manuum in parentes, in clericos, vota fracta, et huiusmodi.")

⁷⁴ "Synodal Statutes of Bishop Richard Poore for the Diocese of Salisbury," in Powicke & Cheney, eds., *Councils and Synods*, vol. 2, part 1, 73-74, §41. ("Sunt autem (ista) in quibus nullus nisi solus papa potestatem habet (dispensandi) vel eius legatus, (videlicet, iniectio manuum in clericos vel quoscunque religiosos, incendia ecclesiarum, simonia).")

only insofar as it targeted churches, and property violations to the extent that they implicated the greed of clerics in the form of simony. In any event, the bishop's list bore little resemblance to the rankings of crime under Henry III, aside from the fact that both lists demonstrated an approach to sin or crime that focused on the gradation of offenses, and both were likely compiled at least partly in response to the canons of Lateran IV, which withdrew priests from involvement in trial by ordeal on the one hand, and which on the other hand held clerics to higher standards of behavior.

In both the secular and ecclesiastical spheres, procedural developments in the thirteenth century allowed for taking action against an individual on the basis of reputation, typically described as suspicion or infamy.⁷⁵ For example, one additional layer of complexity in the guidelines issued under Henry III was the issue of suspicion (*suspicio*): if the justices suspected that a person was guilty of a major crime and might do further evil (*postea malefacere*) if allowed to abjure the realm, then they were to imprison him or her. Such a weight given to suspicion continued through the thirteenth century, as evidenced by the Statute of Westminster I (1275), which singled out “known felons and those who are manifestly of bad repute” as people who should be subject to *prison forte et dure* should they refuse a jury; by contrast, such treatment was not prescribed for those “taken upon slight suspicion,” the point being to prevent hardened criminals from invoking procedural delays.⁷⁶ This interest in suspicion paralleled the use of *fama* to trigger due process shortcuts in ecclesiastical adjudication. A series of decretals issued under Pope Innocent III beginning in 1198 introduced a novel procedure, *processus per inquisitionem*, affirmed by Lateran IV in 1215, whereby a judge could,

⁷⁵ On the role of reputation in English criminal trials, see Trevor Dean, *Crime in Medieval Europe, 1200-1550* (Harlow: Pearson, 2001), 13.

⁷⁶ English translation from “Statute of Westminster I (3 Edw. I, 1275), in Rothwell, ed., *English Historical Documents*, vol. 3, 1189-1327 (London: Eyre and Spottiswoode, 1975), 400, §12.

in the absence of an accuser, summon and arrest, bring witnesses against, and even convict a cleric found to have preexisting infamy through a preliminary procedure known as the *inquisitio infamia praecedens*.⁷⁷ Lateran IV's eighth canon explained the rationale behind this form of prosecution by judge: "But when anyone shall have been accused on account of his excesses, so that the reports and whisperings arising therefrom cannot any longer be ignored without scandal or tolerated without danger, then steps, inspired not by hatred but by charity, must be taken without scruple toward an inquiry and punishment of his excesses."⁷⁸ Motivated not by a concern with heretics but by fear of scandal due to recalcitrant clerics, the new procedure was designed to extirpate clerical abuse that might otherwise remain unprosecuted.⁷⁹ Shortly before Lateran IV, this concern with infamous clerics appeared in the statutes of Archbishop Stephen Langton, who ordered that those maligned by public fame (*diffamati fama publica*) should first be approached up to three times to encourage them to confess and reform their ways. Further steps toward purgation were to be taken if the infamous cleric remained recalcitrant.⁸⁰ *Fama*

⁷⁷ On this procedural development, see Adhémar Esmein, *A History of Continental Criminal Procedure*, trans. John Simpson (Boston: Little, Brown, 1913), 80-81. See also McAuley, "Canon Law and the End of the Ordeal," 490-491; Fraher, "IV Lateran's Revolution in Criminal Procedure," 108; Fraher, "Conviction According to Conscience," 33-38; Richard H. Helmholz, "Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune," *NYU Law Review* 65 (1990), 975-976.

⁷⁸ Translation from Henry Joseph Schroeder, ed., *Disciplinary Decrees of the General Councils, Text, Translation, and Commentary* (St. Louis: B. Herder, 1937), 256.

⁷⁹ On the clerical rather than heretical focus of the procedural innovation, see Esmein, *History of Continental Criminal Procedure*, 81.

⁸⁰ "Statutes of Archbishop Stephen Langton for the Diocese of Canterbury (July 1213 X July 1214)," in Powicke and Cheney, eds., *Councils and Synods*, vol. 2, part 1, 35. ("Diffamati fama publica vel verisimilibus indiciis super crimine aliquo, de quo vinci non possunt, moneantur semel, secundo, et tertio ut confiteantur et satisfaciant. Si vero incorrecti in negatione perstiterint, indicatur eis purgatio, que occasione captande peccunie de die in diem nullatenus differatur, sed statim primo die, si parata fuerit, recipiatur et canonicum numerum non excedat. Archidiaconus seu officialis vel decanus contra hoc statum veniens se noverit ab officio suspendendum, nec sine speciali auctoritate domini archiepiscopi relaxandum.") This is the same Stephen Langton whose contested election to the Archbishopric of

played an increasingly large role in ecclesiastical adjudication, while it also continued to be a central consideration in the evaluation of criminal defendants both on the continent and in England.⁸¹ Where intentionality was unclear, *fama* might provide a basis for a reasonable inference regarding a person's state of mind, insofar as a person with a reputation for committing offenses might be presumed to have a guilty mind, *fama* thereby offering a shortcut to measuring the extent of their culpability.

To return to the 1219 instructions to the royal justices on how to proceed in adjudicating felonies without recourse to trial by ordeal—instructions which enumerated major crimes but referred only categorically to medium and minor crimes—it is striking that the death penalty was left off the table. In the case of medium crimes, a category never defined in the instructions, suspects might abjure the realm in the absence of suspicion that they might engage in further evil (*malo*).⁸² Abjuration, from this perspective, was a middling penalty appropriate only for lesser offenders lacking a sinister reputation; it was not a means to purge the realm of the most serious offenders. Finally, with minor crimes involving no suspicion of evil, a category again not explicitly defined, the alleged criminal could walk free as long as he or she secured pledges as to future fidelity and willingness to keep the king's peace. The instructions were vague, and perhaps deliberately so; the closing lines urged the justices to act according to their discretion

Canterbury, opposed by King John, led to years of papal interdict, finally lifted in 1213. For a chronicle account of this episode, see Thomas Wright, ed., *Chronicle of Pierre de Langtoft*, vol. 2 (Kraus Reprint, 1964), 127-133.

⁸¹ For further intriguing connections between canonical and secular criminal theory and procedure, see Richard Helmholz, "The Early History of the Grand Jury and the Common Law," *The University of Chicago Law Review* 50:2 (1983), 613-627; Kuttner, *Kanonistische Schuldlehre*, 39-62. Helmholz wisely argues that legal historians ignore ecclesiastical evidence at their peril, and that such evidence points to "a habit of mind that saw no radical disjunction between the correction of secular and spiritual offenses." Helmholz, "Early History of the Grand Jury," 625, 627.

⁸² Lyte, ed., *Patent Rolls of the Reign of Henry III, A.D. 1216-1225*, 186.

and conscience (*secundum discreciones et consciencias vestras*).⁸³ While this concession to the judges partly reflected a desire to allow judicial experimentation in an age of post-ordeal uncertainty, it also articulated a fundamental underpinning of English felony law: its very harshness assumed the availability of escape valves, whether in the form of benefit of clergy, royal pardons, or judicial and juror discretion. Many such escape valves were available in the case of felony, but not necessarily for trespass, where the defendant's life was not at risk.⁸⁴

Later in the thirteenth century, the Statute of Westminster I provided a more detailed enumeration of those crimes to be taken most seriously by the king's justices. This list was part of a provision aimed at regularizing the process by which sheriffs and other officials decided whom to maintain in prison and whom to release. Those deemed not replevisable, or releasable on bail, included the following: "prisoners previously outlawed, those who have abjured the land, approvers, all who are taken with the mainour, those who have broken the king's prison, common and notorious thieves, those appealed by approvers as long as the approver is alive (if they are not of good repute), those arrested for arson feloniously done or for counterfeiting money or forging the king's seal, persons excommunicate arrested at the request of the bishop, those arrested for manifest crime and those arrested for treason touching the king himself".⁸⁵ This provision aimed to keep under lock and key those whose guilt was more or less clear—whether due to a prior outlawing, confession, general notoriety, or the like—, those who were of ill repute within the church or society more broadly, and those guilty of the crimes most threatening to realm-wide law and order, namely counterfeiting, forgery, and treason. The

⁸³ Lyte, ed., *Patent Rolls of the Reign of Henry III, A.D. 1216-1225*, 186.

⁸⁴ See, e.g., Y.B. 14 Edw. 2 (London Eyre, 1321), as it appears in Cam, ed. and trans., *London Eyre of 1321*, vol. 2, 126-127 and 335 and *Seipp's Abridgement*, nos. 1321.169 and 1321.281 (the latter describing how self-defense is relevant in felony pleas, not but not in trespass).

⁸⁵ English translation from "Statute of Westminster I (3 Edw. I, 1275)," in Rothwell, ed., *English Historical Documents*, 401, §15.

category of notoriety invoked here, and commonly found in the plea rolls, reflected a commonality with church practice, whereby a judge might hand down a sentence without examining the accused or evaluating evidence, as long as the crime at issue was widely known to have been committed, and the accused was a person of notoriety.⁸⁶

By contrast, those to be allowed out on bail according to the Statute of Westminster included “those indicted for larceny by inquests of sheriffs and bailiffs... either on slight suspicion or for petty larceny amounting to not more than twelve pence,” although an exception was made for repeat offenders who had previously been accused of larceny or of harboring, inciting, supporting, or helping felons. In other words, lesser suspicion or a lesser value of stolen goods translated into a get out of gaol free pass, while repeated indirect involvement in thieving was taken seriously. Also replevisable were those accused of an offense for which the punishment would not be loss of life or limb—perhaps in recognition of the fact that a gaol sentence often had fatal consequences—as well as individuals appealed by an approver after the approver’s death, again with the caveat that common thieves were not eligible. A dead approver’s accusations were called into doubt by his failure to succeed in another private prosecution, thereby forfeiting his reprieve from capital punishment. This would have placed his veracity in question and reduced the level of suspicion attached to those whom he identified as accomplices.

⁸⁶ See McAuley, “Canon Law and the End of the Ordeal,” 487-488; Richard M. Fraher, “Preventing Crime in the High Middle Ages,: The Medieval Lawyers’ Search for Deterrence,” in *Popes, Teachers, and Canon Law in the Middle Ages*, ed. James Ross Sweeney and Stanley Chodorow (Ithaca: Cornell University Press, 1989), 224-225; Fraher, “Theoretical Justification for the New Criminal Law,” 581, 587; Fraher, “Conviction According to Conscience,” 34. On the development of notoriety as a common law concept, see Scase, *Literature and Complaint in England*, 45-46. See also *Calendar of Inquisitions Miscellaneous*, vol. 7, 22-23, no. 31 (describing how a man named John Taverner is “a common wanderer by night” such that “a great multitude of the people hold him suspect”). Notoriety appears in *Glanvill*, which states that a person may be attached based upon public notoriety (*fama*) if a specific accuser does not appear. G. D. G. Hall, ed. and trans. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford: Clarendon, 1993), 171.

By examining the categories of alleged criminals eligible for release from gaol pending trial, we can get some sense of the kinds of crimes weighted as more severe in the official English legal imaginary. To what extent did this legal imaginary align with the moral imaginary of the average juror? From childhood forward, jurors would have been indoctrinated with the means of examining their own consciences, and with the tools for categorizing sin as mortal or venial.⁸⁷ In the ensuing paragraphs, I will focus on the two most prevalent felonies, theft and homicide, and will attempt to parse out the medieval English understanding of those crimes in their varying forms of manifestation. This, in turn, might shed some light indirectly upon the factors jurors weighed in handing down felony verdicts.

Theft

Medieval English law took a blunt approach to defining felonious theft: to count as felony, thereby placing the defendant's life in peril in the case of a guilty verdict, a theft had to exceed one shilling (twelve pence) in value. *Bracton* took a more complex view of the matter, borrowing a tidy definition of theft from Azo's *Summa codicis*: "the fraudulent mishandling of another's property without the owner's consent, with the intention of stealing, for without the *animus furandi* it is not committed."⁸⁸ Different in wording but similar in essence, the *Mirror of Justices*, a shorter legal treatise, defined larceny as taking from another a movable material object (*moeble corporel*) treacherously (*trecherousement*) and against the will (*contre la volunte*)

⁸⁷ My description here is necessarily oversimplified. Medieval discussions of the types of sins are complicated by the fact that cardinal sins are often equated with mortal sins, although the two categories are indeed distinct, and that the virtues and vices are concepts that developed distinctly from each other, such that attempts to list them in opposition require adjustments to make the categories complement each other. For an introduction to these difficulties, see Morton W. Bloomfield, *The Seven Deadly Sins: An Introduction to the History of a Concept, with Special Reference to Medieval English Literature* (East Lansing: Michigan State College Press, 1952), 43-67.

⁸⁸ Thorne, ed. and trans., *Bracton*, vol. 2, 425 and n. 1.

of the person from whom, by evil (*pur male*), one gained the possession or use.⁸⁹ The crime of larceny required a taking (*prise*) according to the *Mirror*—such that a bailment could not give rise to larceny—and it had to be of a physical object, as opposed to real estate or rents.⁹⁰ Trial records frequently refer to asportation, emphasizing that the stolen goods were carried off by the alleged thief.⁹¹

Bracton has frequently come under criticism as providing a less than accurate view of medieval English felony law due to the treatise's heavy reliance on Roman law texts,⁹² yet its definition of theft does appear to coincide with how other treatises treated felony and how the law worked in actuality. Those accused of theft might, for example, defend themselves by demonstrating that they had lawfully come by the allegedly stolen goods, thereby disproving the necessary mental element.⁹³ In a 1238 Devon eyre case, for example, a jury acquitted several men of robbery when it was found that they carried off Hamelin de Havecumbe's tools, corn, and pigs to distrain him, and “not with the intention of robbing him (*non animo ipsum robandi*)”.⁹⁴ Likewise, Philip le Taillur, accused at the 1276 London eyre of robbery and receiving stolen horses, was able to produce written evidence in the form of a letter testifying to the fact that he

⁸⁹ William Joseph Whittaker, ed. and trans., *The Mirror of Justices* (London: Bernard Quaritch, 1895), 25. (“Larcin est prise dautri moeble corporel trecherousement contre la volunte celi a qi il est pur male gaigne de la possession ou del us.”)

⁹⁰ Whittaker, ed., *Mirror of Justices*, 25.

⁹¹ See, e.g., JUST2/4 AALT 0095 (1275/6), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no4/IMG_0095.htm (describing a housebreak, assault, and theft in Farnedygs (likely modern-day Farndish), where the thieves carried off all the goods (*asportaverunt omnia bona*) in question).

⁹² See, e.g., Pollock & Maitland, *History of English Law*, vol. 2, 475-476.

⁹³ See, e.g., Kaye, ed. and trans., *Placita Corone*, 18 (offering a mock dialogue between a justice and an alleged cattle thief, who argues that he acquired the allegedly stolen livestock lawfully).

⁹⁴ Summerson, ed., *Crown Pleas of the Devon Eyre*, 87, no. 527.

had lawfully kept one of the horses for its owner and later returned it.⁹⁵ The *Mirror of Justices* author similarly elaborated on the requirement of treachery, noting that larceny could not arise if a person believed he or she could rightfully take the object.⁹⁶ An accused person might also be acquitted of larceny if he or she could show that he believed he was acting according to the alleged victim's will, an excuse he could prove by open presumption and evidence (*aperte presumpcion e evidence*).⁹⁷ And conversely, a trial record might allege that items were taken "against the will" (*contra voluntatem*) of the rightful owner.⁹⁸

Within the broader category of theft *Bracton* included robbery, which added the use of force.⁹⁹ Trial records treat some cases distinctly as robbery.¹⁰⁰ *Bracton's* two primary subdivisions of theft, however, were open (*publicum*) and secret (*privatum*), or manifest versus

⁹⁵ Weinbaum, ed. and trans., *London Eyre of 1276*, no. 278.

⁹⁶ Whittaker, ed. and trans., *Mirror of Justices*, 25. ("Trecherousement est dist, por ceo qe si loignour entendi les biens estre fiens a qi il les poeit bien prendre, en tel cas ne sei fet mie cest pecchie.")

⁹⁷ Whittaker, ed. and trans., *Mirror of Justices*, 25.

⁹⁸ See, e.g., JUST1/876 AALT 9661 (1279), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no876/aJUST1no876fronts/IMG_9661.htm (case describing how John le Poleter, Gilbert de la Pende, William le Waleys, Nicholas de Hopitre, et William Slyre took things against the will of the rightful owners).

⁹⁹ Thorne, ed. and trans., *Bracton*, vol. 2, 425. The treatment of robbery as more serious has a long heritage. For example, in gradating theft for the purpose of assigning penance, Burchard of Worms, writing in the early eleventh century, argued that stealing by force in the owner's sight was more reprehensible than stealing from him in his sleep or absence. Perhaps non-stealthy theft heightened the potential for physical violence. See McNeill and Gamer, *Medieval Handbooks of Penance*, 329, *Corrector and Physician of Burchard of Worms*, §40.

¹⁰⁰ See, e.g., JUST1/664 AALT 3768 (1280), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3768.htm. In this instance, use of the verb *burgare* may highlight the fact that the theft occurred at night and involved housebreaking: "Henricus filius Radulfi de Northskepwyk et Ricardus filius Alicie de eadem noctanter burgaverunt domum Henrici le Theker et ipsum Henricum occiderunt et statim post factum furgerunt et malecreditur." The verb *burgare* appears frequently throughout this roll, as well as references to what seems to be simple theft (e.g., detailing that someone "furatus fuit" certain goods).

not manifest, a classification also described in the *Mirror*.¹⁰¹ Secret thefts were typically carried out by one who was “suspected of theft through ill-repute in the countryside (*per famam patriae*), through indictment and accusation, where serious presumptions lie against him but he is not found seised of any stolen property.”¹⁰² Trial records bear out this concern with *fama*.¹⁰³ One who was caught in possession of stolen property, often described as “hand-having and back-bearing” (*hondhabbende et bacberende*)—*Bracton* resorting here to English phrases in an otherwise Latin treatise—might be sued by the person whose property was taken.¹⁰⁴ *Bracton* seems to suggest that the manifestness of a theft had procedural ramifications, determining whether one had the possibility of proceeding with a private suit as opposed to having to rely on indictment, presumably because an appellor had to be able to speak as a first-person witness to a crime.

To return to Katz’s distinction between villainy and felony, the legal definition of theft as crime fell far short of the breadth of religious condemnations of theft as sin. While the common law largely limited the criminal prosecution of theft to direct takings of actual money or goods,

¹⁰¹ Thorne, ed. and trans., *Bracton*, vol. 2, 425. Whittaker, ed. and trans., *Mirror of Justices*, 25. (“Deux membres sunt de larcin, lun qe se fet apertement par robbetrie, lautre qe se fet nuttantre our privement de jour.”)

¹⁰² Thorne, ed. and trans., *Bracton*, vol. 2, 425.

¹⁰³ See, e.g., JUST3/119 AALT 0007 (1327), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no119/aJUST3no119fronts/IMG_0007.htm (describing how three men appealed by an approver, Henry Blunt, of being accomplices in theft were released on mainprise due to their being “of good fame,” *bone fame*). A 1309 Year Book case also relies on a notion of *fama* in rejecting a claim of false imprisonment. The plaintiff had been arrested by the bailiff after a coroner’s inquest had determined that he was guilty (*coupable*) of murdering a woman, and that the “common fame was that he had killed her” (“comune fame fut qu’il avoit tue”). See Y.B. 2 Edw. 2 (C.P. 1309), as it appears in Frederic William Maitland, ed., *Year Books of Edward II*, vol. 1, 1307-1309 (London: Bernard Quaritch, 1903), 56-57 and *Seipp’s Abridgment*, no. 1309.010.

¹⁰⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 425. In the plea rolls, Latin phrasing is often used to describe a thief caught red-handed: for example, a mid-thirteenth-century describes how a thief caught with the stolen goods (“captus cum manuopere”) broke prison only to be recaptured and hanged. See JUST1/1185 AALT 0758 (1256), accessed June 16, 2015, http://aalt.law.uh.edu/AALT3/JUST1/JUST1no1185/IMG_0758.htm.

sermons cautioned against any form of unjust acquisition. Theft, according to one late medieval sermon, might occur through open or secret robbery, but also through the maintenance of false litigation.¹⁰⁵ Moreover, not only theft but also covetousness was strictly forbidden, just as both lecherous acts and desires were sanctioned in other sermons.¹⁰⁶ The *Mirror of Justices*, while purporting to represent the law, took a similarly capacious view of the possible types of theft, including such varied acts as purse stealing, receipt of stolen goods, harboring thieves, using false weights or measures, stealing from prisoners, demanding excessive tolls, denying Exchequer receipts to those who have paid debts, poaching, usury, and many other acts enumerated in the treatise.¹⁰⁷

Robert Mannyng presented a similarly expansive view of theft in *Handlyng Synne* (1303). According to *holy cherche*, by which Mannyng might have been distinguishing his categorization from that prevalent in secular criminal prosecution, it was theft to withdraw from one's work or to undertake sub-standard labor.¹⁰⁸ In the secular realm, such notions of labor obligations would become legally enforceable after the Black Death with the Statute of Laborers (1351). In fact, religious notions of theft might have impacted such legal developments.¹⁰⁹ Furthermore, in a classic formulation of two wrongs do not make a right, it was no excuse to

¹⁰⁵ O'Mara and Paul, eds., *Repertorium of Middle English Prose Sermons*, vol. 4, 2229.

¹⁰⁶ O'Mara and Paul, eds., *Repertorium of Middle English Prose Sermons*, vol. 4, 2229. For lechery, see *A Repertorium of Middle English Prose Sermons*, Part 1, 109 (Cam/StJo/G.22/006, early 15th century). Such prohibitions of lecherous thoughts can be found as early as the Penitential of Finnian (ca. 525-550), in which a cleric who habitually lusts after a woman and never fulfills his desire is nevertheless guilty of committing adultery in his heart and should therefore do penance for 40 days on bread and water. See McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 90, §17.

¹⁰⁷ See Whittaker, ed. and trans., *Mirror of Justices*, 27-28.

¹⁰⁸ "If thou ever thy work withdraw, or did it not to good effect, at a time that thou should work, 'thou art a thief, sayeth holy church." ("Ȝyf þou euer þy werke withdrowe, / Or dedyst hyt nat weyl to prowē, / Tyde or tyme þat þou shuldest werche, / 'þou art a þefe,' seyþ holy cherche.") Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 85, lines 2379-2382.

¹⁰⁹ But see generally, Robert C. Palmer, *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law* (Chapel Hill: University of North Carolina Press, 1993).

claim that others similarly acted faithlessly toward their masters.¹¹⁰ It was also theft if one leased an item for a term and held onto it past the pre-agreed length of time.¹¹¹ Mannyng defined theft to include those who took wrongfully from usurers (*okerers*), although he described this as a form of ghostly (*gostely*) theft only, presumably due to the usurer's antecedent sin.¹¹² Passivity could also merit one the label of thief, as in the case of finders who played keepers rather than announcing their find in the church and marketplace, or failing to give a man his due or

¹¹⁰ "If thou do customarily such like, to beguile thy master behind his back, thou mayest not excuse thee with ruse, and say, 'all the world so does.' The world may not save thee: shrive by default, and let the world be." ("Ȝyf þou do custummablyche swych lak, / To begyle þy mayster be-hynde hys bak, / Þou mayst nat excuse þe with rous, / And sey, 'al þe worlde so dous.' / Þe worldē may not savē þe: / Shyrue þy defaute, and late þe world be.") Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 85, lines 2383-2388.

¹¹¹ "If thou have a thing in farm (i.e. at lease), to a certain day of term, and if thou over that term day use it against his wishes, thou hast sinned in that time, in theft thou art fallen from grace." ("Ȝyf þou haue a þyng yn ferme, / to a certeyn day of terme, / And ȝyf þou ouer þat terme day / Travelyst hyt azens hys pay, / Þou hast synned yn a spece, / yn þeftē ou art come a grece.") Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 86, lines 2409-2414. This also appears among the categories of theft in the *Mirror of Justices*. See Whittaker, ed. and trans., *Mirror of Justices*, 27 (describing as thieves "all those who receive land, tenement, horse, or other thing and use it beyond the time fixed at the hiring").

¹¹² "If thou of any usurer with wrong his thing away dost bear, though he be no Christian man, theft unto thy self thou [brought?]; Thou should not from his to have with wrong, if thou thy self will save." ("Ȝyf þou of any okerere / wyþ wrong hys þyng away dest bere, / Þoghe he be no cristyn man, / Þefte vnto þy self þou wan; / Þou ne owyst nat of hys to have / with wrong, ȝyf þou þy self wylt saue.") Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 86, lines 2419-2424.

withdrawing his pay.¹¹³ Likewise, those who falsely deprived a man of his land were guilty of “both theft and robbery” according to Mannyng.¹¹⁴

In advising priests to assist penitents in examination of conscience, John Mirk, writing in the late 14th or early 15th century, urged the following line of questioning:

Have you stolen anything, or been at any robbing?
Have you, by mastery or by craft, any man his goods bereft?
Have you found anything, and held onto it at asking?
Have you used measures false, or weights that were as
by the more to buy, and by the less to sell?
If you have done so you must it tell.”¹¹⁵

Mirk’s queries were aimed at capturing not only conventional theft but also the machinations of tradesmen and merchants who might be inclined to tweak their interactions with customers and colleagues in subtle acts of deceit, such as inaccuracies in weights and measures. Theft, in other words, was not only a matter to be confessed by highway robbers and burglars, but also a sin one might fall into in the dishonest practice of one’s trade or in failing to do right when called upon, as in the case of finder’s keepers, when a person denied knowledge of an object they had

¹¹³ “If thou withdrawest a man’s right stealthily, that it be not in sight, though a man perceive it not, thou stealest it, and theft has wrought. If thou withholdest a man’s service for evil heart or false cunning, or withdrawest any manner of pay, and ledest him forth from day to day, but if it be with great reason, of theft thou art the cause. For the gospel commandeth right ‘hold not his service over night;’ when the man hath done his deed, God desires that he have his mead.” (“Ȝyf þou withdrawest a mannys ryȝt / Stylyche, þat hyt be nat yn syght, / Þogh a man parseyue hyt noght, / Þou stelyst hyt, and þefte hast wrought. / Ȝyf þou wyþholdest a mannys seruyse / For euy l herte or fals queyntyse, / Or withdrawest any manere pay, / And ledyst hym furþe fro day to day, / But ȝyf hyt be with grete resun, / Of þeftē þou art enchesun. / For þe gospel commaundeþ ryȝt / ‘holde nat hys seruyse ouer nyght;’ / whan þe man haþ do hys dede, / God wol þat he haue hys mede.”) Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 86-87, lines 2431-2444. Similar concerns arise in the *Mirror of Justices*. See Whittaker, ed. and trans., *Mirror of Justices*, 26, for the condemnation of those who knowingly fail to restore something to the rightful owner.

¹¹⁴ “What say men of these false husbands that plow falsely men’s lands; ... that is both theft and robbery, and it full dear shall he obey.” (“...what sey men of þes fals husbandys / Þat ere aweye falsly mennys landys; / ... / Þat ys boþe thefte and robberye, / And hyt ful derē shal he a-bye.”) Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 87, lines 2445-2456, 2449-2450.

¹¹⁵ Peacock, ed., *Instructions for Parish Priests*, 29, lines 937-946. (“Hast þou stolen any þynge, / Or ben at any robberyng; / Hast þou, by maystry or by craft, / Any mon hys good be-raft? / Hast þou I-founde any þynge / And helet hyt at askynge? / Hast þou vset mesures fals, / Or wyghtes þat were als / By þe more to bye, & by þe lasse to selle? / Ȝef þou haue so done þow moste hyt telle.”)

acquired by chance. Unjust enrichment lay at the heart of Mirk's understanding of the commandment against theft, demonstrating parallels both with Robert Mannyng's writings on theft as well as the *Mirror of Justices* treatment of theft as crime.

Some factors might mitigate the culpability attached to a theft. Need was one such factor. Burchard of Worms, writing in the early eleventh century, argued that the severity of theft was greatly reduced, and penance lightened to restitution plus three Fridays on bread and water, when a theft was committed out of great necessity, driven by acute hunger and not out of habit.¹¹⁶ The *Bracton* treatise may be getting at a similar concern with poverty as a motivation in emphasizing quantity (*quantitate*) in determining the culpability of an act of theft. For example, the treatise indicated that one should distinguish among thieves and cattle-lifters, such as a person who stole a pig, versus another who stole an entire herd of swine.¹¹⁷ Even the one-shilling minimum for felonious stealing appears to have been motivated by an understanding that treating lesser thefts as capital felony would be unjust.¹¹⁸ Gaol delivery rolls provide evidence that jurors believed that a few days in prison were often sufficient punishment for those who stole things of small value, with such thefts frequently described in the rolls as "delicts" rather than felonies.¹¹⁹ In some instances, the record describes specifically how the preceding punishment had been sufficient punishment (*satis punitus*) for such a delict (*pro tanto dilecto*),

¹¹⁶ "Corrector and Physician of Burchard of Worms," in McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 329, §40.

¹¹⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 299.

¹¹⁸ See Summerson, ed., *Crown Pleas of the Devon Eyre*, xxxiv (citing to *Britton* in observing that the 12d. floor for felonious theft was based upon the sum needed for a man to survive for a week).

¹¹⁹ See, e.g., the roll of the 1308-1310 Yorkshire gaol deliveries commencing at http://aalt.law.uh.edu/AALT7/JUST3/JUST3no74_3/IMG_0050.htm, accessed June 16, 2015, for numerous instances of thieves being let off with time served due to prison being a sufficient punishment, and endangerment of life and limbs too severe.

and that the bailiff was ordered to release the thief from prison.¹²⁰ Incidentally, these records, describing prison specifically as punishment, place into context the *Bracton* author's concern that prisons, which should be used only to contain people, were frequently used to punish.¹²¹ In some cases, a petty thief might be required to secure pledges to ensure his future fidelity.¹²² In other instances, a petty thief might be maimed, thereby marking him or her as a past offender and presumably adding an incentive to avoid future temptations to thievery, insofar as a maimed individual might not be treated leniently after a second or third offense.¹²³

Even where a theft exceeded the felonious floor of twelve pence, it is unlikely that jurors felt that capital punishment was warranted in any but the most serious of cases. Debate over whether or not thieves should be killed had long been transpiring in western Europe. Writing in the early eleventh century, Burchard of Worms expressed discomfort with the slaying of robbers. He enjoined penance on those who killed robbers, noting that even thieves were made in the image and likeness of God and baptized in his name, a point that could admittedly be made about

¹²⁰ See, e.g., the case of Thomas son of Peter de Akum, JUST3/74/3 AALT 0056 (1309), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no74_3/IMG_0056.htm (“Postea testatum est quod satis punitus est pro tanto delicto ideo preceptum est ballivus etc quod deliberent eum a prisona.”) Similarly treated in the same roll due to the small value of the stolen goods were Ernisius (Ernest) of Riplingham (Yorks.), Alan son of Robert Wysman, William son of Stephen de Bartone, Walter de Craven, John Wyot, Roger le Schephirde of Gilling (Yorks.), John de Waldon, and several others. In other words, at this particular gaol delivery session, many thieves were found guilty but deemed sufficiently punished by prison alone based on the putative value of the goods stolen.

¹²¹ Thorne, ed. and trans., *Bracton*, vol. 2, 299 (“It is the custom of the authorities to injure those detained in prisons by keeping them in chains, but such things are forbidden by law, for a prison ought to be used to detain men not to punish them.”)

¹²² See, e.g., the mid-thirteenth-century case of Richard son of John Raven, who was taken for theft of some sheaves of grain, which were found to be of relatively low value. As a result, Richard was acquitted, although he was taken into custody for the trespass and required to find pledges of fidelity (*invenit plegios de fidelitate*). Page, ed., *Three Early Assize Rolls for Northumberland*, 100-101.

¹²³ See, e.g., Stewart, ed., *1263 Surrey Eyre*, 320, no. 678 (case in which Peter Strangters, arrested for a larceny of the value of three and a half pence, was let off with loss of his ear “so he could enjoy his liberty.”)

murderers as well.¹²⁴ Following in this vein in the late twelfth century, Paris theologian Peter the Chanter, whose views on this issue did not triumph over the long term, argued that theft should not be a capital crime, although he did recognize a few exceptions: it was acceptable to kill a thief in self-defense or in the process of capturing armed bandits, and capital punishment might also be appropriate for particularly incorrigible wrongdoers.¹²⁵ Then again, if we could discern the motivations behind the frequent acquittals for allegedly felonious theft, we might find that English jurors more or less matched the sentiments of Peter the Chanter in their application of the law to the facts on the ground.

Less lenient on the issue of theft was Robert Mannyng of Brunne. Writing in 1303, Mannyng approved of capital punishment for theft, arguing that thieves, as felons, were to be hanged “for right reason.”¹²⁶ Mannyng’s approval of capital punishment came in a context both didactic and entertaining, namely the tale of an abbot named Zenon who was tempted to pluck a ripe piece of fruit from a tree during his travels to Palestine. Zenon, though sorely tempted in his heart,¹²⁷ exercised self restraint while pondering whether he would be willing to accept the consequences of thievery. To test himself, he tried to mimic the punishment of a thief, with admittedly less permanent consequences, by hanging by his hands from a height.¹²⁸ After five

¹²⁴ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 328, §27.

¹²⁵ Baldwin, *Masters, Princes and Merchants*, 318. On Peter the Chanter’s influence, see also Nicole Bériou, *L’avènement des maîtres de la Parole: La prédication à Paris au XIIIe siècle*, vol. 1 (Paris: Institut d’Études Augustiniennes, 1998), 30-48.

¹²⁶ “And if I steal, I am a felon; hanged I shall be through right reason.” (“And Ȝyf y stele, y am a felun; hanged y shal be þurgh ryȝt resun.”) Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 76, lines 2111-2112.

¹²⁷ “This very fruit he desired intently, and his heart greatly thereto he cast”. (“Þys yche fruyt he desyred faste, / And hys herte moche þarto he caste”). Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 75, lines 2103-2104.

¹²⁸ Lest the reader fear for the abbot’s well being, the author remarks that Zenon hanged “not by the neck, I understand.” (“Nat by þe nekke, y vndyrstonde”). Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 76, line 2122.

days of hanging in the sun, Zenon resolved not to pick the tempting fruit. The lesson was intended to give would-be thieves pause as they contemplated a felon's bitter end.

Similarly strict on theft was the *Mirour de l'Omme*, Gower's translation of an Anglo-Norman text first written c. 1376-1379. The *Mirour* pointed to the Hebrew Scriptures for evidence that robbery merited capital punishment: the example was given of Joshua demanding restitution from and then slaying Achan, who had stolen a red mantle and a bar of gold.¹²⁹ Both Mannyng and the *Mirour*, with their acceptance of capital punishment for theft, may have reflected a hardening of attitudes toward property crimes by the fourteenth century. While Peter the Chanter might argue for leniency in the late twelfth century, by the turn of the century Innocent III would be promoting the idea that crimes should not remain unpunished.¹³⁰

This idea appears in *Bracton*, where it is raised in the context of a discussion of the need to vary the punishment for a theft based on the value of the item stolen. The treatise author makes it clear that some punishment is required even for thefts of small value due to the potential ramifications of leaving a crime unpunished:

Since there is theft of a large thing and of a very small thing, account must therefore be taken of the property stolen, what and of what kind it is. No christian is to be put to death for petty theft or for a trifle, but let him be punished in another way, lest ease of pardon furnish others with the occasion for offending and lest wrongdoing remain unpunished (*ne maleficia remaneant impunita*). Thus if a thief has been convicted, depending upon the kind of thing stolen and its value let him either be put to death or abjure the realm or the *patria*, the county, city, borough or vill, or let him be flogged and after such flogging released.¹³¹

¹²⁹ Gower, *Mirour de l'Omme*, trans. Wilson, 97.

¹³⁰ See McAuley, "Canon Law and the End of the Ordeal," 494-495 (describing this principle as expressed in the decretal *Ut fame* and later repeated in Durantis' *Speculum iudiciale*).

¹³¹ Thorne, ed. and trans., *Bracton*, vol. 2, 427-428.

As demonstrated by this passage, England took a relatively tough stance on property crime. While one needed a pardon for killing in self-defense and other situations of exigency, the plea rolls show some evidence of a willingness to acquit outright when a person committed homicide in the course of defending property interests. A Year Book case of 1352 indicated that a man who killed a violent thief might be acquitted, rather than recommended for pardon, at least if such a thief assaulted him and pursued him persistently (*luy pursuy durement*).¹³² Similarly, in a 1309 gaol delivery case, the jury described how the accused, Richard de Aylesbury, was acting in his capacity as servant to the parson of the church at Melchbourne (Beds.) and custodian of the parson's grange when he killed William Haule of Chalford (Oxon.). William had broken into the grange at night, entering as a thief intent on stealing (*tanquam fur ad furandum intravit*). Richard, perceiving this (*hoc percipiens*) entered the grange hoping to capture William, who in turn attacked Richard feloniously and against the king's peace with the intent of killing him (*felonice et contra pacem domini Regis ipsum Ricardum insultavit ad ipsum interficiendum*). The jury concluded that Richard had acted within the king's peace (*cum pace domini regis*) when he "killed William as a felon who had entered the aforesaid grange at night and had attacked to kill him feloniously and against the king's peace".¹³³ Richard was acquitted outright. Furthermore, while an assault alone would not amount to felony, an assault combined with an intent to steal might send a man to the gallows. According to a 1353 King's Bench report, a man might be hanged for felony if he had assaulted a man with the intent of robbing him (*entent*

¹³² See Lib. Ass., 26 Edw. 3, fol. 123b-124a, no. 32 (1352), *Seipp's Abridgement*, no. 1352.096.

¹³³ JUST3/1_1 AALT 0050 (1309), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no1_1/bJUST3no1_1dorses/IMG_0050.htm. ("...interfecit predictam Willelmum tanquam felonem qui se intravit noctanter grangiam predictam et ipsum felonice et contra pacem domini rex insultavit ad interficiendum...")

haver luy robbe), even if he did not succeed in absconding with any goods.¹³⁴ Non-lethal assault alone was typically handled outside the royal courts, but it was the intent to rob that placed this act within the realm of capital felony.

Theft was a crime in which poverty might serve as a form of mitigation, but notoriety or repeat offending might send a suspect to the gallows.¹³⁵ Unlike homicide, which might occur as a one-off crime committed, for instance, in the heat of passion, theft lent itself to a way of life.

Thus we find in the rolls examples like this one:

William le Just de Clyda taken for suspicion of robbery committed against Eli de Sintone comes and denies everything, etc., and for good and ill puts himself on the country. The jurors say under oath that he is not guilty of that robbery but of many other thefts. Therefore, etc. His chattels are 9 pence for which the sheriff will answer.¹³⁶

A marginal capital S confirms that William was hanged based on his reputation for thievery. In other instances, a jury might call attention to a thief's desert of capital punishment by recording that he was guilty of a specific charged theft as well as of the status of being a common thief, as in the case of William Surolf, who was indicted for being a common thief of sheep and other animals, as well as for the specific crime of stealing a particular sheep from Robert son of Henry del Doghes. Having put himself on the country, William was found guilty of having stolen the

¹³⁴ See Lib. Ass., 27 Edw. 3, fol. 137b, no. 38 (K.B. 1353), *Seipp's Abridgement*, no. 1353.163.

¹³⁵ Or, in other instances, might help a defendant make a successful self-defense claim after slaying such a notorious person. See, e.g., Stewart, ed., *1263 Surrey Eyre*, 297, no. 627 (case involving death of Walter le Rus, who had broken into William son of Jordan's grange at night, and who, confronted by Walter and his wife, attacked William. William defended himself with a knife, with fatal consequences for Walter, and the jurors testified that Walter "was a well known thief and burglar" who might not have been taken in any other way).

¹³⁶ JUST1/664 AALT 3777 (1280), accessed June 15, 2016, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no664/aJUST1no664fronts/IMG_3777.htm. ("Willelmus le Just de Clyda captus pro suspicione roberie facte Elye de Sintone venit et defendit totum etc. et de bono et malo ponit se super patriam. Juratores dicunt super sacramentum suum quod non est culp' de illa roberia set de pluribus aliis latroc' Ideo etc. Cat' eius ix d unde vic' r'.")

aforesaid sheep as well as others in Barningham (Yorks.), as well as being “a common thief of sheep and other animals” (*communis latro bidentium et aliorum animalium*). He was hanged as a result.¹³⁷ Although one might assume that strangers to a locality might more easily fall under suspicion of thieving,¹³⁸ in a 1238 Devon eyre case it was an accused’s status as an outsider that helped him achieve an acquittal: William le Turnur, a shipman of Shoreham in Sussex, arrested on suspicion of theft, was released when he was found not to be in possession of stolen goods, and not known to be generally suspected of thieving, being a stranger to the locality.¹³⁹

William, incidentally, had been tried under indictment despite the fact that there was a known victim who might have brought a private suit against him. *Bracton* summarized some of the instances in which an individual might be able to bring a private right of action against a thief. Although he employed Roman law terminology not in keeping with the language in use in English courts, he nevertheless captured the law accurately: he indicated that the *actio furti* or *condictio* was available to the owner of the stolen property against the thief, his successor, and any receivers of the stolen goods, and that the *actio vi bonorum raptorum* provided a remedy for those robbed of goods by force, whether the person robbed was the owner or someone to whom the goods had been entrusted.¹⁴⁰ Later the treatise dropped the Roman law references in describing how one might bring an appeal for robbery, providing a sample appeal that specified a

¹³⁷ JUST3/74/3 AALT 0098 (1309/10), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no74_3/IMG_0098.htm.

¹³⁸ Consider, for example, the imprisonment of Robert de Cregling and Jacob le Escoc, “two strangers” (*duo extranei*) on suspicion of thieving (*pro suspicione latrocinii*). Robert escaped from prison and abjured the realm, while Jacob was freed by the sheriff. Page, ed., *Three Early Assize Rolls for Northumberland*, 74-75.

¹³⁹ Summerson, ed., *Devon Eyre of 1238*, 120, no. 750.

¹⁴⁰ Thorne, ed. and trans., *Bracton*, vol. 2, 295.

breach of the king's peace, the use of force "wickedly and feloniously" (*nequiter et in feloniam*), and the nature and value of the stolen goods.¹⁴¹

Homicide

If we take medieval English felony case records, from coroners' rolls to trial records, as our guide, we might loosely divide the category of homicide into felonious and not felonious, the latter category comprising those forms of homicide not actionable at law or actionable but likely to end in acquittal or pardon.¹⁴² Non-felonious homicide, described in this broad manner, might include the lawful execution of a criminal, lawful in the sense of having been undertaken with due process, or a homicide occurring in the context of war. Also non-felonious, in the sense that a pardon or acquittal would be the likely outcome at trial, were homicides committed in self-defense, by accident, under extreme duress, or by a child or insane person. For further guidance on how the category of homicide was understood in medieval England, we might look to contemporary legal treatises.

Bracton, in describing the capital crime (*crimen capitale*) of homicide—thereby distinguishing it from non-capital forms of homicide—defined it as an offense against the king, whose peace had been broken (*cuius pax infringitur*) and against the private person (*in parte privatam personam*) who had been killed wickedly (*nequiter*) and against the king's peace.¹⁴³ *Bracton* also distinguished between spiritual (*spirituale*) and corporal (*corporale*) homicide, thereby drawing upon a distinction employed by Raymond of Peñafort in his *Summa de casibus*,

¹⁴¹ Thorne, ed. and trans., *Bracton*, vol. 2, 412.

¹⁴² In a future project I intend to take up the longer-term view of the development of homicide classifications at greater length, working forward in time from the early medieval penitentials.

¹⁴³ Thorne, ed. and trans., *Bracton*, vol. 2, 340.

but this appears to have been superfluous to *Bracton*'s ensuing discussion, as the author did not pursue the issue of spiritual homicide any further.¹⁴⁴

Setting aside spiritual homicide, *Bracton* subdivided corporal homicide into killing by word or by deed (*lingua vel facto*), a division that echoed the homicide categorization of Robert of Flamborough and others. Writing with an eye toward gauging the impact of sin on priestly ordination, Robert of Flamborough presented a ranking of homicide in his *Liber poenitentialis* in which homicide might occur by deed (*facto*), including the deed itself (*ipso facto*) and assistance (*auxilio*), or by word (*lingua*), including command or authority as well as counsel (*tum praecepto vel auctoritate, tum consilio*).¹⁴⁵ To return to *Bracton*, homicide by word might occur in three ways: by order or command (*praecepto*), by counsel (*consilio*), or by what Thorne translated as “denial or restraint” (*defensione sive tentione*), again more or less tracking the divisions of penitential writers like Robert of Flamborough, and sometimes reflected in felony prosecutions.¹⁴⁶ In *Bracton*, homicide by deed might occur in four ways: 1) out of justice (*justicia*), 2) out of necessity (*necessitate*), 3) by chance (*casu*), and 4) willfully (*voluntate*).¹⁴⁷

¹⁴⁴ A link made by Thorne in his edition of *Bracton*, vol. 2, 340, n. 6-7.

¹⁴⁵ Flamborough, *Liber Poenitentialis*, ed. Firth, 119 (book 3, de homicidio, §103).

¹⁴⁶ Thorne, ed. and trans., *Bracton*, vol. 2, 340. This language is followed fairly closely in the *Mirror of Justices*, which divided homicide into two primary categories: by word and by deed (*par langue e par fete*). Homicide by word was, in turn, divided into three sub-categories: 1) by counsel (*conseil*), which the treatise author described as advising another to kill, 2) command (*comandement*), i.e., ordering another to kill, and 3) by denial or refusal (*defense*), generally referring to such issues as the refusal of sustenance to a starving individual. Whittaker, ed. and trans., *Mirror of Justices*, 22. For the application of these principles in felony adjudication, see Y.B. Hil. 13 Edw. 2, fol. 403c, no. 6 (K.B. 1320), *Seipp's Abridgment*, no. 1320.006, detailing an appeal brought in King's Bench by a woman for the death of her husband, and accusing various individuals of having beheaded him, held him down while he was beheaded, and commanding the death. The Year Book report includes language of assent (*assent*) and command (“*la feme de ceo quele comanda*”, accusing the wife of one of the other defendants of having commanded the homicide) to demonstrate the ways in which non-physical involvement in a felony might make one liable to prosecution.

¹⁴⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 340.

These categories tracked closely those of Thomas of Chobham, with the additional category of homicide in the exercise of justice.

A contemporary of Robert of Flamborough, Thomas of Chobham is also believed to have studied at Paris, where he came under the influence of Peter the Chanter's circle of theologians. For the purpose of ruling on clerical irregularity in the wake of homicide, Thomas de Chobham divided homicide into three categories: 1) voluntary (*voluntarium*), 2) against one's will (*invitum*), or 3) by chance (*casuale*). In the case of voluntary homicide, a cleric was to remain irregular forever, thereby unable to exercise clerical office.¹⁴⁸ If the homicide were against the cleric's will, in the looser sense that could encapsulate a willed act done out of necessity—self-defense comes to mind—the distinction was between whether or not the homicide could have been avoided and, if so, whether this was known to the actor. If the homicide could have been avoided *and* this was known, then the individual would be permanently irregular.¹⁴⁹ Thomas, therefore, took a hard-line stance on self-defense that mirrored the treatment of the excuse on the secular criminal law side, where self-defense was also supposed to be undertaken only as an absolute last resort. Where the common law rules on self-defense have been described as overly formulaic and strict, they may reflect ecclesiastical treatment of self-defenders, which aimed at deterring any unnecessary killings by holding individuals to a high standard.

Bracton offered as an example of a homicide committed out of justice the case of a judge or minister killing one rightfully condemned (*iuste damnatum*). If done out of a love of justice

¹⁴⁸ Chobham, *Summa Confessorum*, ed. Broomfield, 70. (“Item, ad perpendendam irregularitatem sanguinis sciendum est quod homicidium quoddam est voluntarium, quoddam invitum, quoddam casuale. Si quis voluntarium committit homicidium, semper remanebit irregularis, nec ministrare poterit in sacris ordinibus.”)

¹⁴⁹ Chobham, *Summa Confessorum*, ed. Broomfield, 70. (“Si autem invitus occidit aliquem, ut in defensione proprii corporis, ibi distinguunt quidam quod si aliter evadere potuit et hoc scivit, semper erit irregularis.”)

(*ex amore iustitiae*), such a homicide did not involve sin. However, if a judge or minister acted out of envy or malice (*ex livore*, which references a medieval sense of envy well beyond the current connotation of mere jealousy), or out of pleasure in shedding human blood (*delectatione effundendi humanum sanguinem*), the homicide might technically be lawful but the judge or minister would have sinned mortally due to his corrupt intention (*propter intentionem corruptam*). In either case, the judge or minister was guilty of sin if lawful procedure had not been followed. Therefore, *Bracton* recognized the need for what we might term procedural due process, while also requiring that a judge—and by extension a jury—approach the disposition of the case with the appropriate internal disposition. The judge’s state of mind might separate a sinful from an unobjectionable execution.

Moving onto necessity, *Bracton* distinguished between avoidable and unavoidable homicides, a distinction also made by Thomas of Chobham.¹⁵⁰ If a person could escape without killing, then he would be guilty of homicide (*reus homicidii*) if he killed. This lines up neatly with the formulaic presentation of self-defense claims in which accused killers employed the same language as *Bracton* (add a *non* to *Bracton’s evadere posset absque occisione*, and one will be close to the language of the plea rolls) in explaining how they had no alternative but to employ lethal force. Unavoidable (*inevitabilis*) necessity did not make one liable to the penalty for homicide (*ad poenam homicidii*) insofar as the person killed without premeditated hatred (*sine odii meditatione*) but with sorrow of heart (*dolore animi*), a phrase discussed earlier in chapter two and redolent with notions of contrition. To borrow a line from Chaucer’s parson:

¹⁵⁰ In the category of necessity, the *Mirror of Justices*, like *Bracton*, distinguished between avoidable (*eschuable*) and unavoidable necessities, with only the former rising to the level of mortal sin. Whittaker, ed. and trans., *Mirror of Justices*, 23. Like *Bracton*, too, the *Mirror* failed to specify that the killer had to have known that the homicide was unavoidable, an extra precaution written into Thomas of Chobham’s rules regarding self-defense as it pertained to clerical irregularity. See Chobham, *Summa Confessorum*, ed. Broomfield, 70.

“that Contricioun is the verray sorwe that a man receyveth in his herte for his synnes”.¹⁵¹

Bracton’s category of necessity implicitly evoked cases of perfect and imperfect self-defense, while failing to address other situations we might place under necessity, such as a wife acting under spousal duress or a servant acting under command from a superior.

In the case of chance (*casu*) or misadventure (*infortunium*), *Bracton* introduced a notion of negligence and due care, although those were not his choice of words.¹⁵² As basic examples of accidental killings, *Bracton* discussed the case of a person throwing a stone at a bird or other animal and inadvertently striking a passerby, or the case of a person crushing another individual unexpectedly while felling trees.¹⁵³ This dovetails closely with Thomas de Chobham’s accidental homicide examples, which included felling trees and throwing rocks, although in the process of clearing a garden rather than trying to strike an animal. On the matter of homicide by chance, Chobham encouraged an inquiry into two factors which together produced an excuse, namely, whether the person was engaged in necessary work (*operi necessario*) and exercised all due diligence (*omnem diligentiam*) possible.¹⁵⁴ For example, a cleric whose work did not involve use of a bow and arrow could not rely on the excuse of misadventure and would be liable

¹⁵¹ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 290.

¹⁵² Thorne, ed. and trans., *Bracton*, vol. 2, 341.

¹⁵³ In discussing the category of accident, the *Mirror of Justices* likely drew upon *Bracton* in offering the following examples: killing someone accidentally (*par mescheaunce*) while throwing or shooting at a bird (*gette ou trete a oisel, ou a autre chose*) or felling trees (*cheir de arbre*), this last example being traceable both to Roman law and Alfred’s Code. For the latter, see Attenborough, ed. and transl., *Laws of the Earliest English Kings*, 71 (no. 13). Like *Bracton*, the treatise author urged a distinction between instances where the killer was engaged in an activity that he might do by right, therefore not sinning, or whether he was doing something he should not do and nevertheless exercised due care by calling out and issuing a warning, thereby not sinning greatly, or finally whether he failed altogether, thereby sinning mortally. Whittaker, ed. and trans., *Mirror of Justices*, 22-23. “Mes distinctex ou li occisour fet chose qe il poet de droit e dunc ne pecche il nient: ou il fet chose qe il ne deit e met nequedent la diligence qil poet criaunt e garnissant, e uncore ne pecche il mie grantement; mes cil ne fet il pecche mortelment.”

¹⁵⁴ Chobham, *Summa Confessorum*, ed. Broomfield, 71. (“De casuali autem homicidio hoc sciendum est quod duo exiguntur ad excusationem, scilicet quod ille qui casualiter occidit opponat operam *operi necessario* et omnem diligentiam quam potest et debet ne alius occidatur.”)

to perpetual irregularity if he shot someone accidentally.¹⁵⁵ If, however, someone were throwing stones while clearing his garden and did so with care, he would not be liable to irregularity if a foolish person happened to be hiding and were inadvertently struck and killed as a result.¹⁵⁶ Nevertheless, one who killed accidentally—such as while tossing stones or felling trees with due care—might still be required to undergo penance, not because of the fact of committing homicide so much as for the sheer horror of blood and homicide.¹⁵⁷ In Thomas’ account, penance was purifying in the wake of such an event, and presumably also served to restore harmony within the broader community that had been disturbed by bloodshed.

Like Chobham, the *Bracton* author introduced a distinction between licit and illicit acts (*operam rei licitae vel illicitae*) in discussing accidental deaths. Returning to the stone-throwing example, liability would be imputed if the stone were thrown where people were known to pass (*per quem consueverunt homines transitum facere*); liability would similarly be imputed if a person were engaged in a clearly dangerous activity, such as pursuing a horse or ox, which in turn trampled someone.¹⁵⁸ An example of a lawful act resulting in homicide included a schoolmaster striking his pupil to discipline him, with death accidentally resulting. Similarly, *Bracton* viewed as presumptively licit deaths that followed from loading hay onto a cart or

¹⁵⁵ Chobham, *Summa Confessorum*, ed. Broomfield, 71. (“Si alterum defuerit, irregularis efficitur qui casualiter occidit: verbi gratia; si clericus iaciat sagittam cum ad eius officium non pertineat arcum tractare, irregularis efficitur.”)

¹⁵⁶ Chobham, *Summa Confessorum*, ed. Broomfield, 71. (“Si autem adhibeat operam operi necessario, irregularis efficitur in perpetuum. Si autem aliquis adhibeat operam *operi necessario*, ut purgando hortum suum eiciendo inde lapides et premuniat transeuntes, licet aliquis se ibi stulte occultaverit et occidatur, ille qui lapides eiecit non efficitur irregularis.”)

¹⁵⁷ For the rationale behind penance for accidental death, see Chobham, *Summa Confessorum*, ed. Broomfield, 234. (“Similiter aliquis occidit hominem sine aliquo peccato, forte in iactu lapidis, apposita tamen diligentia quam debuit, vel succisione alicuius arboris, iniungitur ei penitentia non quia peccavit, sed propter horrorem sanguinis et homicidii.”)

¹⁵⁸ Thorne, ed. and trans., *Bracton*, vol. 2, 341. The *Mirror*’s distinctions of accidental death varied from *Bracton*’s, however, insofar as the former treatise did not adopt *Bracton*’s strict liability approach for accidental deaths resulting from illicit, intrinsically dangerous activities.

falling trees. This presumption might be traversed, however, if the actor failed to act with all possible diligence (*diligentiam*), such as looking about and calling out (*respicendo et proclamando*), neither too late nor too softly, to allow a passerby the opportunity to avert the falling tree. In the case of the teacher, he would not be liable for the homicide penalty as long as he did not exceed the customary extent of flogging. Just like a judge who, though motivated by a love of justice, might be condemned in putting a man to death if proper procedure had not been followed, so too a tree cutter or *magister* might be condemned if he carried out a licit act but without employing due care (*diligentiam debitam*). *Bracton's* homicide divisions served as a reminder of how an individual's choices and state of mind might move a homicide up or down the scale of sinfulness and liability for punishment.¹⁵⁹

Bracton minced no words in defining the odious category of willful homicide, making it clear that he was using the term *voluntate* in a rich sense, invoking premeditation, and not in the thinner sense of a mere willful act, a category that might otherwise include homicides in the administration of justice and self-defense. Willful homicide was where one out of certain knowledge (*ex certa scientia*, i.e., deliberately) and in premeditated assault (*in assultu praemeditato*), out of anger or hatred or on account of avarice (*ira vel odio vel causa lucri*), wickedly and in felony and against the peace of the lord king (*nequiter et in feloniam et contra pacem domini regis*) killed anyone (*aliquem interfecerit*).¹⁶⁰ *Bracton* failed to dissect this definition further, such as clarifying what level of deliberateness or hatred would bring a homicide across the threshold. He merely distinguished between those committed publicly with many standing and watching (*astantibus et videntibus*) and those done secretly (*clanculo*) and

¹⁵⁹ This was also true with regard to homicide in the context of war. Even if a war were just, a person might be liable for homicide if he acted with corrupt intent (*corrupta intentione*) in slaying. Thorne, ed. and trans., *Bracton*, vol. 2, 342.

¹⁶⁰ Thorne, ed. and trans., *Bracton*, vol. 2, 341.

with no one seeing (*nemine vidente*), an echo of the treatise's division of theft into manifest and not manifest.¹⁶¹ *Bracton* would later expand on the matter of secret homicide, which raised difficulties in identifying the slayer. He would classify as murder (*murdrum*) those homicides that occurred with no one present, no one knowing, no one hearing, no one seeing (*nullo praesente, nullo sciente, nullo audiente, nullo vidente*), although the treatise author acknowledged that the killer's coadjutors and supporters (*coadiutores et fautores*) might be privy to the crime.¹⁶²

In general, *Bracton* was careful to extend homicide liability broadly enough to capture, for instance, all parties to a quarrel that turned lethal. In cases where it was unclear who struck the fatal blow, *Bracton* advised sweeping up those who struck, those who with bad intent held while the deceased was struck, as well as those who came with the intent to kill but were not able to strike.¹⁶³ *Bracton* would further extend liability to those who, while they neither killed nor intended to kill, came in order to offer counsel and aid to the killers, even if the violence were repelled.¹⁶⁴ Furthermore, according to *Bracton*, one who ordered another to kill shared guilt (*culpa*) and should therefore also share in the homicide penalty (*poena*). *Bracton* drew from penitential theory, a text Thorne traced back to Raymond of Peñafort, when he added that also deserving of punishment was a person who could have saved another from death but failed to do

¹⁶¹ Thorne, ed. and trans., *Bracton*, vol. 2, 341. On theft, see *ibid.*, 425.

¹⁶² Thorne, ed. and trans., *Bracton*, vol. 2, 379.

¹⁶³ Thorne, ed. and trans., *Bracton*, vol. 2, 341-342. ("Possunt etiam esse plures culpabiles de homicidio sicut unus, ut si plures rixati fuerint inter se in alicuo conflictu, et aliquis sit interfectus inter tales, nec appareat a quo nec ex cuius vulnere, omnes dici poterunt homicidae, et illi qui percusserunt et qui tenuerunt malo animo dum percussus fuit. Item et illi qui voluntate occidendi venerunt licet non percusserent.")

¹⁶⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 342. ("Item et illi qui nec occiderunt nec voluntatem occidendi habuerunt, sed venerunt ut praestarent consilium et auxilium occisoribus, quamvis aliquando eorum violentiam repellatur.")

so.¹⁶⁵ Although the common law might not convict of felony for such acts of omission, it did regularly impose some measure of punishment, typically pecuniary, for those who failed to raise the hue or otherwise intervene. Another treatise, the *Mirror of Justices*, went a step further in defining who might be guilty of voluntary homicide: also deserving of condemnation were false jurors (*faus jurours*) and those who appealed others or slandered them by indictment or in some other manner accused them falsely (*ceux qi apelent autres ou esclandrent par enditement ou en autre manere encusent fausement*), as well as those who placed a person under such conditions of imprisonment that his or her death was thereby hastened.¹⁶⁶

One factor noticeably absent from *Bracton*'s homicide divisions and from the apparent operation of medieval English felony law was the status of the victim and perpetrator. Special attention was of course paid to spousal homicide, which might merit a more gruesome death due to its parallel with treason, but by and large medieval English homicide law did not take explicit notice of the status of persons. This marked a break with earlier penitential traditions and reflected a shift in understandings of homicide also apparent in theological texts. For example, Robert of Flamborough argued that, with regard to priestly irregularity, it did not matter whether the person killed a Christian, Jew, Gentile, heretic, or anyone else;¹⁶⁷ this stood in contrast with earlier writings of such figures as Peter of Blois, discussed above,¹⁶⁸ and in general with the

¹⁶⁵ Thorne, ed. and trans., *Bracton*, vol. 2, 342. ("Nec etiam ille qui cum posset hominem a morte liberare non liberavit.")

¹⁶⁶ Whittaker, ed. and trans., *Mirror of Justices*, 23. ("E ausi ceo fet cest pecchie par ceux qe enprisouent gent en tiex lus ou en teles peynes les mettent ou lem purra trovir par enqueste qil estoient plus prees de la mort par ceux mauveis lus ou celes peines.")

¹⁶⁷ Flamborough, *Liber Poenitentialis*, ed. Firth, 119 (book 3, de homicidio, §103). ("Sive interficiatur christianus, sive judaeus, sive gentilis, sive haereticus, sive alius quicumque, indifferens est quantum ad promotionis impedimentum.")

¹⁶⁸ Revell, ed., *Later Letters of Peter of Blois*, 158, letter 30a.

emphasis of early medieval penitential literature on the relational aspect of homicide.¹⁶⁹ Robert would touch upon family relationships related to homicide in determining penance, but for the purpose of clerical irregularity a homicide was, quite simply, a homicide.¹⁷⁰ Robert wished to draw a sweeping line that would disallow clerical ordination to anyone who had been even remotely involved in a blood cause, requiring in all instances papal dispensation.¹⁷¹ His closing line of the section on homicide, however, belied the possibly non-mainstream nature of his views: “may those who wish to laugh, laugh” (*rideat qui velit*).¹⁷² Whether or not Robert’s views were mainstream, they do seem to line up with something quite fundamental to medieval English felony law, namely, the treatment of all homicide perpetrators and victims as presumptively equal before the law.

Means of Accessing Intentionality

As chapter two demonstrated, understanding intentionality was central to determining the severity of an alleged homicide. Sometimes intentionality was fairly apparent, particularly if a

¹⁶⁹ For an example of a penitential from c. 800 that placed heavy emphasis on family relationships in measuring the severity of homicide, see McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 165-167, §§2-5, 7, 10-11. Note that, if we take seven years’ penance as the homicide baseline in the penitentials, the only other form of homicide (aside from child and parent killing) meriting greater penance than the baseline was the slaying of a sibling, aunt, or uncle. In fact, even killing by drugs or poison, treated elsewhere as especially vile, received the baseline seven years’ penance.

¹⁷⁰ In determining the proper measure of penance, Robert weighed the status of victims (e.g., clerics, parents, infants, spouses, public penitents. See Flamborough, *Liber Poenitentialis*, ed. Firth, 222 (book 4, §§258-259) (treating homicide distinctly if, for example, it involved a mother overlaying her infant, a person striking his or her parent, or a woman committing infanticide).

¹⁷¹ Flamborough, *Liber Poenitentialis*, ed. Firth, 120 (book 3, de homicidio, §103). (“Si igitur occidisti, vel mutilasti, vel in casua sanguinis signasti, vel auctoritatem vel consilium vel auxilium vel aliquod adminiculum ad hoc praestitisti, non ordinaberis. Si in conflictu fuisti in quo ex adversa parte aliquis interfectus fuerit, non promoveberis. Si alicubi ad hoc interfuisti ut caperetur vel judicaretur vel signaretur aliquis mutilandus, vel acutoritatem vel consilium vel auxilium ad hoc praestitisti, non ordinaberis. Si litteras legisti vel scripsisti vel dictasti vel sigillasti ad aliquem mutilandum el interficiendum vel signandum, vel si ad tales litteras incaustum praestitisti vel cultellum vel pennam vel pluteum (dico cum effectum), de consilio meo sine papae dispensatione non ordinaberis. Rideat qui velit.”)

¹⁷² Flamborough, *Liber Poenitentialis*, ed. Firth, 120 (book 3, de homicidio, §103).

person confessed to a crime, and other times it had to be discerned from an examination of the circumstances surrounding an alleged crime. In this section I will discuss these two avenues to understanding intentionality—confession and an examination of the circumstances—and demonstrate how these operated in felony cases.

Confession

The fourth sacrament is penance,
That is for sin a quittance;
God grant us all penance to do,
For we have great need thereto.
— Robert Mannyng, *Handlyng Synne* (1303)¹⁷³

Using the language of the law—the promise of a “quittance,” or what an accused criminal might receive if a jury found him or her innocent—Mannyng solicited God’s help in encouraging people to seek penance given the “great need” shared by all to seek acquittal in the ultimate tribunal. Lateran IV, which mandated annual confession, also forbade priests from involvement in trial by ordeal. In England, this rapidly led to the use of trial juries, already used elsewhere in English legal processes, in lieu of ordeal. In the absence of the ordeal, through which God might reveal the truth of a person’s guilt or innocence directly, confession offered an increasingly attractive alternative means to accessing an individual’s conscience. To understand a person’s state of mind, the most obvious route was to seek a confession. As a text on the virtues and vices described it c. 1200, through confession, a person might reveal what previously had lay hidden in his or her heart, the heart being the site of thought.¹⁷⁴ Biblical passages reminded people that

¹⁷³ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 335, lines 10811-10814. (“The fourþe sacrament ys penaunce, / þat ys for synnē a quyttaunce; / God graunte vs alle, penaunce to do, / For we haue gretē nede þarto.”)

¹⁷⁴ Holthausen, ed., *Vices and Virtues*, 120-123. (“Here follows another holy virtue, which is called *confessio*, that is, confession; that is, when the man opens his heart, and tells his confessor his sins through his mouth, which were before concealed in his heart.”) As for the relationship between heart and

only God could know the mind of man, but certainly man might reveal something of his mind both through his actions themselves, and through verbal communication.

It is an oversimplification to say that in the wake of Lateran IV, England moved toward jury trial, while the continent moved toward inquisition and torture geared to elicit a confession. Whitman contends that England did not follow the route of continental law in pursuing judicial torture, observing that accused individuals might be compelled to plead guilty or not guilty, but “were not compelled to confess.”¹⁷⁵ Whitman argues: “Instead of being a system that rested on compelled confession, it was a system that rested on compelled witness testimony and compelled accusation.”¹⁷⁶ In practice, the story is more complicated. On the one hand, continental European trial procedure also relied heavily on witness testimony to gather evidence about an alleged crime. And on the other hand, England was no stranger to the use of torture, employing it to persuade recalcitrant defendants to consent to trial by jury, for example. Moreover, England also made extensive use of confessions. We have indirect evidence that justices leaned on defendants, particularly those less savvy about criminal procedure, to encourage them to unburden their consciences.¹⁷⁷ Just as criminal defendants today might be encouraged to confess in exchange for a plea bargain, medieval English felony procedure promoted confession by dangling the promise of a reprieve from the gallows to those who confessed in order to abjure the realm or turn king’s evidence. Whitman is correct that medieval English individuals were compelled to accuse others, but for approvers confessing was prerequisite to taking this route.

mind, the same text described how the eyes of the heart are “*intellectus et ratio*”, intellect and reason. *Ibid.*, 124-125. I rely here on Holthausen’s modernization.

¹⁷⁵ Whitman, *Origins of Reasonable Doubt*, 128-129. On the role of torture in continental criminal procedure, see Dean, *Crime in Medieval Europe*, 15-16.

¹⁷⁶ Whitman, *Origins of Reasonable Doubt*, 129.

¹⁷⁷ See *infra*, e.g., the confession of a first-time thief in the *Placita Corone*. Kaye, ed. and trans., *Placita Corone*, 16-17.

As a result, the presence or absence of judicial torture does not tell the whole story of confession's place within English versus continental criminal procedure. Claiming self-defense or other partial excuses might also involve confession, insofar as the accused individual might essentially admit to having done the act but then deny having done so with a fully culpable state of mind.

“Western man has become a confessing animal,” observed Michel Foucault in the *History of Sexuality*.¹⁷⁸ With the twenty-first canon of the Fourth Lateran Council, annual confession became a requirement for all adult men and women in western Christendom. “All the faithful of both sexes,” recited the decree *Omnis utriusque sexus*, “shall after they have reached the age of discretion faithfully confess all their sins at least once a year”.¹⁷⁹ If Foucault has it right, this set in motion the forces of change that would result, by the twentieth century, in what might fairly be described “a singularly confessing society.”¹⁸⁰ Yet perhaps Western Europe, due in part to an Augustinian legacy, was already such a confessing society even before the issuance of *Omnis utriusque sexus*. In fact, scholars disagree on the extent to which Lateran IV's requirement of annual confession mandated what was already *de rigueur* or introduced an entirely new practice. Alexander Murray, for example, has argued that Lateran IV merely

¹⁷⁸ Michel Foucault, *History of Sexuality: An Introduction*, vol. 1, transl. Robert Hurley, (New York: Vintage Books, 1990; first published 1976), 59. Foucault rightly points out the centrality of confession in western culture. One need only look at pop culture—can one imagine an episode of Perry Mason in which the revealed criminal did not confess?—and even political culture and its seemingly endless queue of unfaithful spouses compelled to confess their transgressions on CNN to understand that confession continues to serve as a means of resolution and a necessary first step toward rehabilitation or, in the case of said politicians, a fleeting notoriety followed by career implosion.

¹⁷⁹ Schroeder, ed. and transl., *Disciplinary Decrees of the General Councils*, 259. The decree specified that confession should be made to one's parish priest and be followed up by penance, and that the Eucharist should ideally be received at least at Easter. The punishment for non-compliance was to be excommunication and denial of Christian burial. Moreover, the decree was to be publicized often in churches so that no one might plead ignorance.

¹⁸⁰ Foucault, *History of Sexuality*, vol. 1, trans. Hurley, 59.

institutionalized standard Parisian confessional practice, pointing to evidence that “regular lay confession” was already the norm in and around Paris for at least a half century prior to Lateran IV.¹⁸¹ Confession as a practice had deep roots in Western Christianity, in which Augustine’s confessional autobiography represented what was right in the church: its openness to embracing even the most prodigal of prodigal souls.

Perhaps Lateran IV marks a turning point, perhaps not, but regardless of when confession became a universal paradigm, we can agree with the likes of Michel Foucault and Peter Brooks that western society today is thoroughly suffused with the practice of confession.¹⁸² Admittedly, the Catholic church may no longer be able to ensure willing compliance with the continued requirement that Catholics confess annually—perhaps it never was—yet upon reflection it seems that we, as a society, have embraced confession as a social good.¹⁸³ Modern psychology persuades us that confessing will unburden us, improve our relationships, enable us to move forward and leave behind troubling old habits of thought and action. Modern criminology has become so enamored of confession that, despite the Miranda protections that limit the use of confession in police practice, most cases resolve themselves through plea bargaining, in which

¹⁸¹ Alexander Murray, “Confession Before 1215,” *Transactions of the Royal Historical Society*, Sixth Series 3 (1993): 65. In England, there is the evidence that prior to Lateran IV, Archbishop of Canterbury Stephen Langton enjoined upon people within the Diocese of Canterbury the practice of confession and the receipt of the Eucharist several times annually. Whether or not such practice became common is another question. Powicke and Cheney, eds., *Councils & Synods*, vol. 2, part 1, 32, no. 43. (“Moneantur laici statim in principio Quadragesime vel pluries in anno cito post lapsum confiteri, et ut ter in anno, scilicet in Pascha, Natali, Pentecoste, communicent, prius tamen preparati per aliquantulam abstinentiam de consilio sacerdotis faciendam et per confessionem.”) Shortly after Lateran IV, Bishop Richard Poore would similarly call for triannual confession and communion. *Ibid.*, vol. 2, part 1, 72, no. 38.

¹⁸² See, e.g., Foucault, *History of Sexuality*, vol. 1, trans. Hurley:58-59, 63; Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2000), 2, 90.

¹⁸³ We can confidently state, however, that confession was a routine part of deathbed ritual in medieval England, as demonstrated by the many, many references to homicide victims having died “*confessus et communicatus*,” or having received last rites, in the following mid-fourteenth-century Berkshire coroners’ roll, accessed June 16, 2015,

<http://aalt.law.uh.edu/AALT7/JUST2/JUST2no18/aJUST2no18fronts/index.htm> and <http://aalt.law.uh.edu/AALT7/JUST2/JUST2no18/aJUST2no18dorses/index.htm>

an accused individual trades a confession of guilt for a preordained sentence rather than face the vagaries of jury trial.

Medieval confession can, of course, be found within the ecclesiastical context, where it has been neatly summarized as “a Christian’s private identification of his sins to a priest, receipt of a penance, and absolution from those sins in the name of the church.”¹⁸⁴ Alexander Murray also relates that, as a source for historians, confession serves “as an ‘interface’ between external and internal history, and hence able to reveal contours in both.”¹⁸⁵ It would, of course, prove an even more fruitful avenue for analysis if it were not so difficult to penetrate. As Murray argues: “The area is almost pitch-black. Like most medieval statements, confessions were spoken, not written; and they were spoken in secret, under a seal whose breach was one of the gravest sins on the list.”¹⁸⁶ As such, the historian interested in confession must rely on manuals for confessors and literature aimed at helping the layperson examine his or her conscience, rather than on records of actual confessions. In this sense, the study of confession is troubled by some of the same evidentiary difficulties as the study of jurors’ attitudes, which are also largely missing from the historical record. Nevertheless, the subject is worth pursuing even by indirect means due to its centrality in the medieval conception of personhood and culpability. Moreover, where records of actual confessions to priests may not exist, we do have records of confessions made on the secular side to coroners, which can help round out our understanding of the significance of confession within its broader social context.

As alluded to above, Michel Foucault depicted the medieval period as a time in which confession “remained firmly entrenched in the practice of penance.” According to Foucault, it

¹⁸⁴ Murray, “Confession Before 1215,” 51.

¹⁸⁵ Murray, “Confession Before 1215,” 51-52.

¹⁸⁶ Murray, “Confession Before 1215,” 52.

was only with the rise of “Protestantism, the Counter Reformation, eighteenth-century pedagogy, and nineteenth-century medicine” that confession “gradually lost its ritualistic and exclusive localization” and spread to such diverse relationships as that between “children and parents, students and educators, patients and psychiatrists, delinquents and experts.”¹⁸⁷ Foucault certainly has a point, yet his emphasis on early modern, modern, and postmodern developments in societal reliance on confession may obscure the extent to which medieval man, too, was a confessing animal.

Medieval England, and medieval Western Europe more broadly, like modern America, was a society comprised of Foucault’s curious confessing animals. Within medieval texts, one can find moments of confession between students and educators (consider, for example, the use of the confessional as a locus for testing and instruction in Catholic teaching), patients and physicians (as suggested by the trope describing the confessor as a physician of the soul, and also by Venus’ cure for Amans’ love-sickness in Gower’s *Confessio Amantis*), delinquents and experts (such as accused felons’ confessions before the coroner prior to abjuring the realm or turning king’s evidence), and even between lovers (as in the famous epistolary exchange between Abelard and Heloise, who confessed to her former lover her true reasons for entering a convent and her continuing desire to, as she put it, be Abelard’s whore). In other words, Foucault’s restriction of medieval confession to the practice of penance overlooks the manifold uses of confession in medieval discourse and lived experience.

Inquiry into the Circumstances

Access to intentionality was a much more daunting feat in the absence of a direct confession. Even with a confession, state of mind might prove elusive: priests were trained in

¹⁸⁷ Foucault, *History of Sexuality*, vol. 1, trans. Hurley, 63.

the art of questioning sinners so that the full weight of a sin, including issues of mind, might be revealed. Such questions did not typically go directly to the issue of mind, like a modern-day therapist aiding a client in unearthing subconscious or semi-conscious motivations, but rather relied on indirect, circumstantial evidence to illuminate the sinner's heart. The Lateran IV decree *Omnis utriusque sexus* directed: "Let the priest be discreet and cautious that he may pour wine and oil into the wounds of the one injured after the manner of a skillful physician, carefully inquiring into the circumstances of the sinner and the sin, from the nature of which he may understand what kind of advice to give and what remedy to apply, making use of different experiments to heal the sick one."¹⁸⁸ These circumstances of sin were echoed in English felony procedure, albeit with a healing goal directed not so much toward the sinner as toward the crime victim and community. *Bracton* indicated, for example, that crimes were to be evaluated from seven perspectives: "motive, person, place, time, quality, quantity and fortuity."¹⁸⁹ Narratives found in coroners' rolls and trial records similarly demonstrate a piecemeal account of a crime from the circumstantial ground up, as exemplified in the case excerpt to follow.

Late in the half-century-long reign of Henry III, at a springtime assize in Northamptonshire in 1271, a court scribe recorded a royal order demanding that Gilbert de Preston, an experienced justice traveling in eyre and from a prominent Northamptonshire family,¹⁹⁰ inquire by an inquest of good and lawful local men into whether one Lawrence de Brok had killed his brother, Walter de Brok, "by accident or by felony and malice aforethought

¹⁸⁸ Schroeder, ed., *Disciplinary Decrees of the General Councils*, 259.

¹⁸⁹ Thorne, ed. and trans., *Bracton*, vol. 2, 299. ("...causa, persona, loco, tempore qualitate, quantitate et eventu.")

¹⁹⁰ "Preston, Sir Gilbert of (*b.* in or before 1209, *d.* 1274)," Paul Brand in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004); online ed., ed. Lawrence Goldman, January 2008, <http://www.oxforddnb.com.proxy.lib.umich.edu/view/article/22724>, accessed December 14, 2012.

and, if by accident what kind of accident and if by felony and malice aforethought by what felony and what malice and how (*qualiter*) and in what way (*quo modo*).”¹⁹¹ The phrasing of the decree emphasized issues of volition and mind in its proposed inquiry into accident versus felony and malice. The inquest of twelve men stated under oath that Agnes atte Brok had given her son Lawrence a dwelling house and a half acre of appurtenant land. The gift did not go unnoticed by Agnes’ other offspring: on the same day that she put Lawrence in seisin, another son, Walter de Brok, came and ejected (*eiecit*) Lawrence from the property. Although the verb “*eiicere*” is ambiguous as to the use of physical force, the narrative described a violent scenario. Namely, Lawrence fled from his newly acquired property and was pursued by Walter, who struck him in the neck so that he fell to the ground. The assize record provides a rare glimpse of dialogue between aggressor and victim, dialogue redolent with echoes of the Cain and Abel narrative: Walter would have struck Lawrence again (*alias voluit dictum Laurencium percussisse*), but the fallen brother shouted, “my brother, do not kill me” (*frater mi noli me interficere*). Walter responded, “traitor, you will die; you want to disinherit me” (*traditor, mortuus eris; vis me exheredare*). At this, Lawrence recovered (*reciperavit*) and struck Walter in the head with a hatchet in self-defense (*se defendendo*), whence he died. The jurors emphasized again that Lawrence acted in self-defense and not by malice aforethought (*non per maliciam excogitatam*).

In their narrative of the event, the jurors described who had committed the act (*quis*); what type of act it was, namely self-defense as opposed to felony (*quid*); approximately where it occurred in relation to the bequeathed dwelling house (*ubi*); with what aids (*quibus auxiliis*) the deed had been done, namely various weapons, but no enlisted associates; why the initial

¹⁹¹ JUST1/1206 AALT 2007 (1271), accessed June 16, 2015, http://aalt.law.uh.edu/AALT4/JUST1/Just1no1206/bJUST1no1206dorses/IMG_2007.htm. (“...utrum Laurencius de Brok interfecit Walterum de Brok per infortunium aut per feloniam et maliciam excogitatam et si per infortunium per quod infortunium et si per feloniam et maliciam excogitatam per quam feloniam et quam maliciam et qualiter et quo modo.”)

aggressor had been driven to act, namely out of jealousy and greed, and why the second aggressor responded, i.e., for self preservation (*cur*); how (*quomodo*) the event transpired, from ejection to flight to pursuit and so on; and finally, when the event had occurred (*quando*). In other words, the jury's narrative more or less covered the circumstances familiar to confessors accustomed to probing a penitent's description of a sin to uncover all the relevant details and to bring hidden intent to the surface. This particular record covers the circumstances quite thoroughly, which may reflect a heightened level of interest in this relatively high-profile homicide case.

By the thirteenth century, confession had come a long way from the laundry list of sins characteristic of the early medieval penitentials. The system of penitentials had encouraged a checklist approach to examination of conscience, in which sins could be located on a prefixed menu of possible violations. This is, of course, an oversimplification of the penitential genre, which did take into account issues of mind and other factors.¹⁹² Nevertheless, the emphasis in guides for penitents and confessors changed by the time of Lateran IV to focus more intensively on the peculiar circumstances of a particular crime and particular sinner, a shift that was admittedly long in the making. To prescribe the optimal penance, a parish priest would need to understand both circumstance and status, which would determine the severity of the sin and the corresponding severity of the requisite penance.¹⁹³ As Thomas de Chobham would describe it, without knowing the circumstances of a sin, one could not estimate the quantity of sin (*quantitas*

¹⁹² Some old penitentials offered little more than rudimentary tariffs, or lists of sins with their corresponding penances, while others were deeply concerned with the particulars of an individual sinner's status and the circumstances of a sin.

¹⁹³ On the use of circumstances to evaluate the severity of sin, see generally, Marjorie Curry Woods and Rita Copeland, "Classroom and Confession," in *The Cambridge History of Medieval English Literature*, ed. David Wallace, vol. 1 (Cambridge: Cambridge University Press, 1999), 376-406; D. W. Robertson, Jr., "A Note on the Classical Origin of 'Circumstances' in the Medieval Confessional," *Studies in Philology* 43:1 (1946), 6-14.

peccati), and without knowing the quantity, one could not figure out how much penance to assign.¹⁹⁴ Even before Lateran IV, diocesan statutes such as those of Stephen Langton in Canterbury placed emphasis on a thorough consideration of circumstances.¹⁹⁵ Nevertheless, the Lateran IV decree *Omnis utriusque sexus* reinforced this emphasis on sin's circumstantiality, a theme that would be wholly embraced in thirteenth-century theology.¹⁹⁶ In the twelfth and thirteenth centuries, one can find these lists of circumstances in such Latin texts as Alain de Lille's *Liber poenitentialis*, Thomas de Chobham's *Summa confessorum*, and a multitude of confessor's manuals and post-Lateran IV diocesan statutes. Although the precise formulation of circumstances might vary slightly, most began with "who, what, where;" the version of Alexander de Stavensby,¹⁹⁷ bishop of Coventry, is fairly standard:

Generally in every declaration these circumstances must be considered, which are noted by these words:
Who, what, where, with what aids, why, how, when?¹⁹⁸

¹⁹⁴ Chobham, *Summa Confessorum*, ed. Broomfield, 45. "After this we must speak of the circumstances of sin, without which we cannot know the quantity of sin, and unless the quantity of sin is known, it is not possible to know how much penance for any sin is to be imposed." ("Post hec dicendum est de circumstantiis peccatorum, sine quibus non potest sciri quantitas peccati, et nisi sciatur quantitas peccati, non potest sciri quanta penitentia alicui peccato sit iniungenda.")

¹⁹⁵ Powicke and Cheney, eds., *Councils & Synods*, vol. 2, part 1, 32. "We also order, according to the statutes of the sacred canons, that priests in giving penance ought diligently to attend to the qualities, namely, of a person, and the quantity of the harm, time place, cause, delay in committing sin, devotion of a penitent's mind..." ("Precipimus autem, sacrorum canonum statuta sequentes, ut sacerdotes in penitentia danda diligenter attendant qualitatem scilicet persone, quantitatem delicti, tempus, locum, causam, moram in peccato factam, devotionem animi penitentis...")

¹⁹⁶ Robertson, "A Note on the Classical Origin of 'Circumstances'," 6.

¹⁹⁷ Alexander of Stavensby (d. 1238), bishop of Coventry, taught theology at Toulouse, possibly counting Dominic among his students. He also taught at Bologna and served as a chamber clerk for Honorius III and as a diplomat for Henry III. Nicholas Vincent, "Stainsby, Alexander of (d. 1238)," in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004); online ed., ed. Lawrence Goldman, <http://www.oxforddnb.com.proxy.lib.umich.edu/view/article/37103>, accessed December 1, 2012.

¹⁹⁸ David Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1 (London, 1737), 645. ("Generaliter in omni professione considerandae sunt istae circumstantiae, quae notantur per hunc verbum: Quis, quid, ubi, quibus auxiliis, cur, quomodo, quando?") This same formulation of the circumstances can be found in Victorinus' fourth-century commentary on Cicero, whence it makes it into Thomas de Chobham's *Summa*. See Chobham, *Summa Confessorum*, ed. Broomfield, 48.

These circumstantial categories were grounded in the Greek and Roman rhetorical traditions and can be traced from Hermagoras of Temnos in the first century BC, though Cicero in his *De inventione*, and by means of Augustine and Boethius directly into the medieval rhetorical tradition.¹⁹⁹

In his *De inventione*, written early in his rhetorical career, Cicero outlined tips for producing a legal narrative. An “exposition of a case at law”, he wrote, ought to be “brief, clear, and plausible.”²⁰⁰ For brevity’s sake, it should state what needs to be said without hearkening back to overly remote events, stating superfluous facts, or engaging in repetition.²⁰¹ The narrator should present the facts in chronological sequence for the sake of brevity and clarity.²⁰² Most relevant here was Cicero’s exposition of the attributes of persons, emphasizing such characteristics as sex, age, and occupation, as well as attributes of actions, in which he urged inquiry into “place, time, occasion, manner, and means.”²⁰³ For example, an act would differ in quality if performed in a sacred or profane space, at a particular time of the month or day, or at a public event like a festival.²⁰⁴

Augustine adapted this rhetorical tool, specifying a total of seven circumstances: who, what, when, where, why, in what manner, with what aids?²⁰⁵ Boethius, in turn, would apply

¹⁹⁹ Robertson, Jr., “A Note on the Classical Origin of Circumstances,” 8-12. For the influence of Cicero’s *De Inventione*, see also Woods and Copeland, “Classroom and Confession,” 386-387.

²⁰⁰ Marcus Tullus Cicero, *De Inventione*, trans. Harry Mortimer Hubbell (Cambridge: Harvard University Press, 1976), 56-57 (I. xix. 28) (“...ut brevio, ut aperta, ut probabilis sit.”)

²⁰¹ Cicero, *De Inventione*, trans. Hubbell, 56-59 (I. xx. 28).

²⁰² Cicero, *De Inventione*, trans. Hubbell, 58-59 (I. xx. 29).

²⁰³ Cicero, *De Inventione*, trans. Hubbell, 70-75 (I. xxiv. 34-35, xxv. 35, xxvi. 38) (“locus, tempus, occasio, modus, facultas”). Hubbell translates “facultas” as “facilities”.

²⁰⁴ Cicero, *De Inventione*, trans. Hubbell, 75-81 (I. xxvi. 38, xxvii. 40-41).

²⁰⁵ Robertson, “A Note on the Classical Origin of ‘Circumstances,’” 9 (“quis, quid, quando, ubi, cur, quem ad modum, quibus adminiculis”).

these same seven circumstances to legal prosecution and defense, continuing in the tradition of Cicero.²⁰⁶ Boethius argued that without the particular circumstances of time, place, and so forth, there would be no case for trial. He further categorized the circumstances into attributes of the person (who) and attributes of the act (what, why, how, where, when, with what means).²⁰⁷ Stavensby's mnemonic for circumstances aligns with that provided in Alain de Lille's late twelfth-century *Liber poenitentialis*, which directly linked a probing of circumstances with the ability to reach a right judgment (*rectum iudicium*).²⁰⁸ In associating the circumstances with judgment, Alain de Lille was applying the rhetorical tradition outlined by Boethius in his *De topicis differentiis*.

To return to Bishop Stavensby's formulation of the circumstances, designed to guide priests in his bishopric, he elaborated on the meaning of each factor, "quis, quid, ubi, quibus auxiliis, cur, quomodo, quando". In terms of who, Stavensby explained:

Who? What kind of person, whether cleric, or lay. If a cleric, whether regular or secular. If in a position of authority, or outside. If in holy orders, or outside. If religious, of which profession. If young, or old. If servile or free.²⁰⁹

Stavensby's emphasized issues of clerical and authoritative status; presumably a sin committed by a person in authority would weigh more heavily than one committed by someone not in such a high position. His concerns extended as well to whether or not a cleric had taken holy orders, as some clerics might earn that title without proceeding through all the steps toward ordination.

²⁰⁶ Robertson, "A Note on the Classical Origin of 'Circumstances'," 11-12 ("quis, quid, cur, quomodo, ubi, quando, quibus auxiliis").

²⁰⁷ Boethius, *De Topicis Differentiis*, trans. Eleonore Stump (Ithaca: Cornell University Press, 1978), 89.

²⁰⁸ Alain de Lille, *Liber Poenitentialis*, vol. 2, ed. Longère, 15.

²⁰⁹ Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1, 645. ("Quis? Cuiusmodi persona, si clericus, vel laicus. Si clericus, utrum regularis, vel secularis. Si in dignitate constitutus, vel extra. Si in sacris ordinibus, vel extra. Si religiosus, cuius professionis sit. Si juvenis, vel senex. Si servus, vel liber.")

The list gave no heed to non-clerical professions or gender. This weighting of sin as more severe when committed by clerics had a long-standing pedigree, being traceable to the penitential tradition centuries earlier. In the Penitential of Finnian (c. 525-550), for example, a cleric who struck another or shed blood was deemed to be as guilty as if he had killed, although his penance was lighter, limited to a diet of bread and water and deprivation of clerical office for a year. A layman, on the other hand, only had to do penance for a week in such an instance, “since he is a man of this world and his guilt is lighter in this world and his reward less in the world to come.”²¹⁰ Similarly, the Penitential of Columban (ca. 600) imposed ten years of exile on a cleric who committed homicide, but only three years for a layperson who committed the same crime.²¹¹ Status may have been linked partly with issues of intentionality; a cleric, by virtue of his religious training,²¹² was expected to have a more sophisticated understanding of right and wrong than a layman. Thomas Aquinas, rather than focusing on clerics specifically, emphasized the heightened gravity of a sin committed by a person of “excellence.” For example, where sins could be attributed to deliberation, Aquinas argued that an excellent person should be held to a higher standard.²¹³ This was due to the fact that such a person should resist sin more easily and be grateful for that which makes him or her excellent, as well as due to the sheer incongruity of a sin with the excellence of the sinner, and the danger of setting a bad example or creating scandal.

While Stavensby highlighted age and servile status as additional markers of identity, some other confessor manuals took the *quis* question even further. Drawing upon Cicero, for example, Thomas de Chobham elaborated upon the variety of people a confessor might

²¹⁰ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 88, §7-8.

²¹¹ McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 252, §1 and 254, §13.

²¹² For the idea that penance should be adjusted to reflect the level of a person’s education, see McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 116-117.

²¹³ Aquinas, *Summa Theologica*, vol. 2, Q. 73 Art. 10.

encounter in early thirteenth-century England: someone might be Welsh (heaven forbid!) or English, strong or weak, young or old, a farmer, merchant, soldier, actor or prostitute, orator, or cobbler.²¹⁴ Moreover, people could differ in terms of their inborn nature, gender, fortune (e.g., whether born servile or free), emotions (both habitual and of a sudden), and so forth.²¹⁵ Compared to the earlier penitential tradition, where sins were listed by *genus*, this emphasis on the circumstances offered the possibility that a similar sinful act could be judged more or less severely based upon the identity of the perpetrating individual.

Authors like Stavensby and Chobham were not, however, introducing an entirely new approach to confession: Alain de Lille, for example, in his late twelfth-century *Liber poenitentialis*, encouraged priests to consider a penitent's status, whether "the ordained or unordained, the poor, wealthy, a child, a youth, an old person, the decrepit, healthy, ill, of all ages, of both sexes".²¹⁶ Moreover, these guidelines for assessing *quis* were not limited to the realm of Latin treatises, but even found their vernacular expression in such places as Chaucer's *Parson's Tale*, which advised:

²¹⁴ Chobham, *Summa Confessorum*, ed. Broomfield, 51. ("Alia enim penitentia est iniungenda Walensi, alia Anglico, alia forti, alia debili, alia iuveni, alia seni, et ita de ceteris. Similiter in convictu alia penitentia iniungenda est agricolae, alia mercatori, alia militi, alia histrioni sive meretrici qui in sordido questu versantur, alia oratori, alia sutori, et ita de ceteris.")

²¹⁵ Chobham, *Summa Confessorum*, ed. Broomfield, 50-54.

²¹⁶ Alain de Lille, *Liber Poenitentialis*, vol. 2, ed. Longère 15 ("ordinato vel sine ordine, pauperi, diviti, puero, juveni, seni, decrepito, sano, infirmo, in omni aetate, in utroque sexu"). He further expanded upon the possible status categories later on in his prologue, encouraging priests to make distinctions "between free and servile, infant, child, young adolescent, old age, the dim-witted, the knowing, lay, cleric, monk, priest, bishop, deacon, subdeacon, lector, in a position of authority or not, married or unmarried, pilgrim, native, virgin, widowed, canon, nun, frail, infirm, healthy, a fornicator with animals or with humans against nature, continent or incontinent," while also specifying sins that are "voluntary, by necessity, or by accident, or sin in public, or in secret" ("inter liberum et servum, infantem, puerum, juvenem adolescentulum, aetate senem, hebetem, gnarum, laicum, clericum, monachum, presbyterum, episcopum, diaconum, subdiaconum, lectorem, in gradu vel sine gradu, conjugatum vel sine conjugio, peregrinum, indigenam, virginem, viduam, canonicam, monacham, debilem, infirmum, sanum, fornicantem cum animalibus vel cum hominibus contra naturam, continentem, vel incontinentem, voluntate, necessitate, vel casu, seu in publico peccantem, vel in abscondito").

Thou shalt considere what thow art that doost the synne, wheither thou be male or femele, yong or oold, gentil or thral, free or servant, hool or syk, wedded or sengle, ordred [i.e., in Holy Orders] or unordred, wys or fool, clerk or seculeer; if she be of thy kynrede, bodily or goostly, or noon; if any of thy kynrede have synned with hire, or noon; and manye mo things.²¹⁷

The question of *quis* went a long way toward determining the severity of the sin, as demonstrated by John Mirk's late-fourteenth-century description of the circumstance, which focused on gender, age, freedom, wealth, clerical status, and office, before clarifying that: "The higher that a man is in degree, the more grievously, in truth, falls he."²¹⁸ What applied to sin in the confessional, of course, might not apply in felony cases, where presumably men of lower status made up the bulk of defendants. Moreover, status does not appear to have had an explicit impact on secular criminal prosecutions, insofar as records do not consistently record extensive biographical details about particular individuals. Then again, local trial juries may not have needed much information on a defendant's status, as people would either be known within the community, in which case such information would be extraneous, or might be strangers, in which case their background might not be known. Where it was exceedingly relevant, status was noted, as in the case of wives acting under the duress of their husbands, as well as young children implicated in thefts or homicides. Where it went unnoted, it may have been operating behind the scenes. For example, literary references suggest that well-connected and wealthy offenders might bribe

²¹⁷ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 322.

²¹⁸ Peacock, ed., *Instructions for Parish Priests*, 44, lines 1405-1416. ("Þe herre þat a mon ys in degre, / Þe sarrer forsophe falleþ he.") Mirk elaborated: "First you must extract this: who he is that did the sin, whether it be she or he, young or old, bond or free, poor or rich, or in office, or man of dignity if he is, single or wedded, or cloistered, clerk or lay, or secular, bishop or priest, or man of state, you must know these entirely." ("Fyrst þow moste þys mynne, / What he ys þat doth þe synne, / Wheþer hyt be heo or he, / 3onge or olde, bonde or fre, / Pore or ryche, or in offys, / Or mon of dygnyte 3ef he ys, / Sengul or weddet, or cloystrere, / Clerke, or lewed, or seculere, / Byschope or prest, or mon of state, / Þow moste wyte þese al gate.")

judges and jurors, using their influence to gain preferential treatment.²¹⁹ This interest in the issue of *quis* found its way into legal treatises as well, such as *Bracton*, which observed that person (*persona*) may refer to the person who committed the act or the victim. For one thing, the age of the victim or perpetrator might affect the gravity of the crime. *Bracton* also suggested that the same acts might be punished differently when committed by a bondsman versus a free man, or when committed against a lord or father versus a stranger, or magistrate versus a private citizen.²²⁰

After who (*quis*) came the question of what (*quid*), a category more familiar to the old penitentials. According to Stavensby, for example, a confessor might categorize illicit sexual behavior as simple fornication, adultery or incest. Although the focus of the question was on the nature of the act, the status of the sinner might also come into play, as a sexual act by a man in clerical orders might be heightened in gravity.²²¹ Moreover, as Thomas de Chobham elaborated, relying upon Victorinus, one needed to consider not only the principal sinful act but also any antecedent and subsequent related acts.²²² This echoed Boethius' Ciceronian division of *quid* into four parts: the essence of the deed (e.g., killing one's parents), before the deed (e.g., seizing

²¹⁹ See, e.g., Gower, "Mirour de l'Omme," in *Complete Works of John Gower*, vol. 1, ed. Macauley, 276-277, lines 25017-25025, 25031-25032, discussed in the next chapter.

²²⁰ Thorne, ed. and trans., *Bracton*, vol. 2, 299. ("Aliter enim puniuntur ex eisdem factionibus servi quam liberi, et aliter qui quid in dominum parentemve commiserit quam in extraneum, in magistratum quam privatum.")

²²¹ Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1, 645. "What? Consider the type of sin. Whether simple fornication, or adultery, or incest. Or in clerical orders, because the type of sin greatly aggravates the quantity of sin." ("Quid? Considerandum est genus peccati. Utrum fornicatio simplex, vel adulterium, vel incestus. Vel in clericis, quia genus peccati maxime aggravat quantitatem peccati.") Chaucer's parson similarly divided sexual sins into sub-categories in addressing the *quid* question: "Another circumstaunce is this: wheither it be doon in fornicacioun or in avowtrie [i.e., adultery] or noon, incest or noon, mayden [i.e., with a virgin] or noon, in manere of homicide or noon, horrible grete synnes or smale, and how long thou hast continued in synne." "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 322.

²²² Chobham, *Summa Confessorum*, ed. Broomfield, 55. Chobham distinguishes among the "ante factum", the principal act itself, and "post principale factum".

a sword in excitement), during the deed (e.g., striking with violence), and after the deed (e.g., hiding).²²³ This approach bore some resemblance to the typical coroner's inquest narrative, which might, for example, describe a homicidal act, preceding enmity, further damning details regarding the attack, and the suspect's attempt to flee after the fact.

The emphasis of Stavensby's next question, "where" (*ubi*), was straightforward: "Where? In what place? Sacred or not sacred?"²²⁴ As John Mirk would put it: "Where it was, know thou also, in holy place or no".²²⁵ Thomas de Chobham, for example, noted that fornication within a sacred space was more serious than the same act committed elsewhere.²²⁶ Alain de Lille's earlier discussion of *ubi* in the late twelfth century had specified not only sacred versus profane space, but also a well-known versus an obscure space (*in loco celebri vel obsoleto*) and public versus private spaces (*in loco publico vel secreto*), possibly belying a concern with premeditation and with secret versus open sins, the latter being more likely to create scandal.²²⁷ Chaucer's parson emphasized sacred space as well but also curiously added the possibility of sinning in one's own home versus another's.²²⁸ The *Bracton* treatise appears to

²²³ Boethius, *De Topicis Differentiis*, trans. Stump, 90.

²²⁴ Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1, 645. ("Ubi? In quo loco? Sacro vel non sacro?")

²²⁵ Peacock, ed., *Instructions for Parish Priests*, 45, lines 1451-1452. ("Were hyt was, wyte þou also / In holy place or no...")

²²⁶ Chobham, *Summa Confessorum*, ed. Broomfield, 47. "For some circumstances augment sins, while others diminish sins: thus if one fornicates in a sacred space or on a holy day the sin is augmented." ("Quedam enim circumstantie augent peccata, quedam diminuunt peccata: ut si quis fornicetur in loco sacro vel in die sancta augetur peccatum.")

²²⁷ Alain de Lille, *Liber poenitentialis*, vol. 2, ed. Longère, 28.

²²⁸ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 322-323. "The thridde circumstance is the place ther thou hast do synne, wheither in oother mennes hous or in thyn owene, in feeld or in chirche or in chirchewawe [i.e., in churchyard], in chirche dedicaat [i.e., consecrated] or noon./ For if the chirche be halwed, and man or womman spille his kynde [i.e., spill his/her fluid] in with that place by wey of synne or by wikked temtacioun, the chirche is entredited [i.e., interdicted] til it be reconciled by the bysshop./ And the preest sholde be enterdited that dide swich a vileynye; to terme of al his lif he sholde namoore syngge masse, and if he dide, he sholde doon deedly synne at every time that he so songe masse."

be drawing upon similar inspiration in discussing the circumstance of *loco* or place, which might determine whether an act were either theft or sacrilege (*furtum vel sacrilegium*).²²⁹

Also of concern to the confessor, in Stavensby's formulation, was whether a sin was committed alone or with the help of an accomplice. According to Stavensby, the confessor was to inquire with what aids (*Quibus auxiliis?*) a sin was committed, such as whether a sinner had been driven to agreement (*Quibus consentientibus impellentibus?*), and relatedly whether an act had been committed of the sinner's own will alone, or with outside counsel, or by admonition (*Utrum tantum propria voluntate; vel alieno consilio, vel monitione?*). The nature of the act as either accidental or deliberate was also relevant, and Stavensby added that many more questions might be posed to flesh out this circumstance.²³⁰ The confessor's questions were designed to probe whether the sinner acted alone and deliberately, as opposed to with lesser or greater outside influence or even accidentally. Similarly concerned with potential accomplices, Chaucer's parson condemned those who incited or consented to a sin as full partners in the illicit act.²³¹

Thomas de Chobham elaborated extensively on the question of *quibus auxiliis*, defining the phrase as any means of action by which it would not be possible to commit the deed in question (*facultas aliquid faciendi sine qua factum fieri non potuit*).²³² Chobham's interest extended to advance preparation, such as engaging partners in crime or devising an easier and quicker way to do the illicit deed. Damning factors included the preparation of the actor, the unsuspecting nature of the victim (such as the unarmed neighbor, taken unawares by the armed

²²⁹ Thorne, ed. and trans., *Bracton*, vol. 2, 299.

²³⁰ Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1, 645. ("Utrum casu, vel deliberatione? Multa enim alia possunt inquiri hic.")

²³¹ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 323. ("Wherfore they that eggen or consenten to the synne been parteners of the synne, and of the damnacioun of the synnere.")

²³² Chobham, *Summa Confessorum*, ed. Broomfield, 56.

perpetrator), the use of illicit harming agents such as poison, and the enlistment of partners in crime, by means of which the principal actor became responsible for killing the souls of those he enticed to participate.²³³ Many of these factors pointed to the issue of deliberate action. Stavensby, too, in his simpler formulation, inquired into the sinner's volition, such as whether an act was done accidentally or on purpose. As demonstrated by the *Bracton* treatise, these issues of intentionality were key to defining felony in this period: *Bracton* listed among the circumstances of crime the issue of *eventus*, or fortuity, noting that an act differed when committed "intentionally and with full understanding" (*ex voluntate et conscientia certa*) as opposed to "accidentally" (*ex eventu*), thereby falling within the category of felony or misadventure (*felonia aut infortunium*).²³⁴

Related to this issue of accident versus deliberate act was the issue of "why" (*cur*). As Stavensby would formulate it, the confessor should ask why and to what end a sin was committed (*Cur? Propter quem finem?*). The bishop distinguished between three ends: acts that are useful, honorable, or enjoyable (*utile, honestum, delectabile*). He further clarified that, while many commit sin for utilitarian ends, and many for pleasure, it was not possible for one to

²³³ Chobham, *Summa Confessorum*, ed. Broomfield, 56. "We ought to consider the means of acting; so that if an armed person kills an unarmed neighbor, if he set forth strong poison to someone so that he could have killed him more quickly and easily. Likewise, if he had associates in committing his wicked deed, homicide or theft or adultery, through which help he could commit his wicked deed more easily, and if he invited and sought out those associates to fulfill his wicked deed, because he killed the souls of all those whom he enticed to the partnership or conspiracy of crime." ("Considerari debent facultates facti; ut si armatas occidit vicinum inermem, si forte venenum proposuit alicui quo citius et facilius potuit occidi. Item, si habuit socios ad faciendum scelus suum, homicidium vel furtum vel adulterium, quorum auxilio facilius potuit crimen suum committere, et si socios illos invitavit et perquisivit ad scelus suum complendum, quia omnium eorum animas occidit quos sibi ad consortium vel consensum criminis illexit.")

²³⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 299-300. See also *ibid.*, 372, 375, for this distinction between felony and misadventure.

commit sin for the sake of increasing one's righteousness or respectability.²³⁵ Stavensby may have been suggesting that an affront to honor might give reason to exculpate a person who committed an act in response that, under different circumstances, might be considered a sin; alternatively, he may have been speaking of honorable causes for committing what might otherwise be a sin. For example, Thomas de Chobham might have been referencing a more honorable act when he observed that the level of sin is diminished when one steals due to the anguish of hunger.²³⁶ Furthermore, adding a Thomist angle, Chobham distinguished between two different types of causality: impulsive and reasoned causes (*causa impulsiva et causa rationaliter*). Impulsive causes for Chobham included "drunkenness, anger, love, the figure of a woman, hunger, thirst, nudity, and similar", all of which were seen to arise suddenly and to compel a person to commit an illicit act.²³⁷ Reasoned causes, on the other hand, connoted something closer to what we would describe as motive: Chobham's examples, which emphasized deliberation and foresight, included stealing to augment one's wealth, as opposed to theft aimed at destroying one's neighbor.²³⁸ Chobham's reference to drunkenness as a source of impulsivity might have been qualified by Aquinas, who drew upon Aristotle in observing "that those who are very drunk, so as to be incapable of the use of reason, do not get angry," while "those who are slightly drunk, do get angry, through being still able, though hampered, to form a

²³⁵ Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1, 645. ("Multi committunt peccatum propter utilitatem, multi propter delectationem; nullus potest committere peccatum propter honestatem.")

²³⁶ Chobham, *Summa Confessorum*, ed. Broomfield, 47. ("...si quis furetur pre angustia famis diminuitur peccatum...")

²³⁷ Chobham, *Summa Confessorum*, ed. Broomfield, 56. ("Causa impulsiva est que subito nata impellit hominem ad aliquod scelus, ut ebrietas, ira, amor, forma muliebris, fames, sitis, nuditas et similia.")

²³⁸ Chobham, *Summa Confessorum*, ed. Broomfield, 56. (Causa rationativa est causa finalis propter quam aliquid fit, ita quod per deliberationem magnam et providentiam illa causa finalis diu previsa est; ut si fecit furtum propter ampliandam substantiam suam, vel ad destruendum vicinum suum vel similia.")

judgment of reason.”²³⁹ Elsewhere Chobham linked the state of drunkenness specifically with the crime of homicide, observing that homicide was born from drunkenness.²⁴⁰ There is some evidence that drunkenness might not mitigate a homicide allegation in contemporary felony cases.²⁴¹ Like Chobham and Aquinas, John Mirk similarly distinguished between pre-planned and sudden sins, advising that the sinner “who plans to do a deed, more penance he must necessarily need, than he who does it suddenly, and afterward rues himself greatly”.²⁴²

In discussing the issue of “why,” Chaucer’s parson underscored the role of temptation, whether inborn or prompted by others, once again placing emphasis on sexual sins and on the extent of a woman’s complicity in the act.²⁴³ John Mirk, on the other hand, provided a much more capacious understanding of the possible motivations for sin in his late fourteenth-century instructions: a priest should inquire why the penitent committed the particular sin, “whether it

²³⁹ Aquinas, *Summa Theologica*, vol. 2, 781 (Pt. I-II Q. 46, Art. 4, Reply Obj. 3).

²⁴⁰ Chobham, *Summa Confessorum*, ed. Broomfield, 22 (“ex ebrietate [nascitur] homicidium”). This appears in a passage dealing with greed (cupiditas) as the root of all sin. Due to the perilous effects of alcohol, the penitential tradition offered harsh sanctions to those who facilitated the drunkenness of others. In the Penitential of Cummean (c. 650), one who compelled another to become drunk was obliged to endure the same penance as the drunkard. If, however, he did so “on account of hatred,” he was to be “judged as a homicide.” McNeill and Gamer, eds. and trans., *Medieval Handbooks of Penance*, 101, §§2-3. For a successful plea of self-defense premised on a murderous attack by a drunk man (“per ebrietatem contendeat”), see JUST3/74/3 AALT 0078 (1310), accessed June 16, 2015, http://aalt.law.uh.edu/AALT7/JUST3/JUST3no74_3/IMG_0078.htm (case of Galfridus filius Odonis).

²⁴¹ See, e.g., Hunnisett, ed. and trans., *Bedfordshire Coroners’ Rolls*, 55-56, no. 123 (detailing a homicide by a drunken man, Robert Bernard, against Ralph son of Ralph vicar of Bromham). According to the coroner’s inquest, Robert had asked Ralph who he was, to which Ralph replied, “a man, who are you?” The inquest narrative indicates that Robert then, “because he was drunk,” struck Ralph on the head with an axe.

²⁴² Peacock, ed., *Instructions for Parish Priests*, 46, lines 1483-1486. (“For he þat casteth hym to do a dede, / More penaunce he mote haue nede / Þen he þat doth hyt sodenlyche, / And afterwarde hym reweth myche...”)

²⁴³ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 323. “The sixte circumstaunce is why that a man synneth, as by which temtacioun, and if hymself procure thilke temtacioun, or by the excitynge of oother folk; or if he synne with a womman by force, or by hire owene assent;/ or if the womman, maugree hir hed [i.e., in spite of her efforts], hath been afforced, or noon. This shal she telle: for coveitise, or for poverte, and if it was hire procurynge, or noon; and swich manere harneys [i.e., such manner of trappings].”

were for love or dread, or covetousness of the world's wealth, or for envy, or for a quarrel, or for wrath of old hate".²⁴⁴ Old hatred or long-simmering quarrels were, of course, frequently mentioned in contemporary criminal law records as motivation for a homicide. In discussing motive (*causa*), *Bracton* highlighted the fact that whippings might not be punishable when undertaken with moderation by a master or parent to correct, but might be treated punitively "when one is struck in anger (*per iram*) by a stranger."²⁴⁵

The question of *quomodo*, or "how," lent itself to revisiting the nature of the type of sin. As Bishop Stavensby observed, sins came in many varieties (*diversa genera peccatorum*) that reflected the lubricious nature of flesh (*lubricum carnis*).²⁴⁶ Thomas de Chobham's exposition of *quomodo*, or the means of acting (*modus facti*), also revealed some concern with the dangers of the flesh but went to discuss variants on homicide, such as killing a sleeping person who could not engage in self-defense, or tormenting a victim out of hatred.²⁴⁷ Chaucer's parson placed emphasis on sexual sins, such as the distinction between sleeping with a common prostitute versus an honorable woman.²⁴⁸ Both Chobham and Chaucer suggested that the issue of *quomodo* might go a long way in determining the severity of an offense.

²⁴⁴ Peacock, ed., *Instructions for Parish Priests*, 46, lines 1475-1478. ("Wheþer hyt were for loue or drede, / Or couetyse of worldes mede, / Or for enuye, or for debate, / Or for wrathþe of olde hate...")

²⁴⁵ Thorne, ed. and trans., *Bracton*, vol. 2, 299.

²⁴⁶ Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1, 645.

²⁴⁷ Chobham, *Summa Confessorum*, ed. Broomfield, 57. "By 'quomodo' (how) is understood the means of acting. However, this circumstance should be considered the most, because an ugly means of acting most greatly aggravates and deforms the very deed or sin; as if one perverts the natural use of sleeping with a woman. Similarly, with the sleeping, if one were to kill in betrayal, when he could not defend himself, or if one kills someone with long torture or torments to satisfy his hatred." ("Per 'quomodo' intelligitur modus facti. Hec autem circumstantia plurimum considerata est, quia turpis modus facti plurimum aggravat et deformat ipsum factum vel peccatum; ut si pervertat quis usum naturalem dormiendo cum muliere. Similiter cum dormientem in proditione occiderit cum se defendere non potuit, vel si longo cruciatu aliquem occidat vel torqueat ad saturandum odium suum.")

²⁴⁸ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 323. ("The seventh circumstance is in what manere he hath doon his synne, or how that she hath suffred that folk han doon to hire./ and the same shal

Chobham further distinguished between sins committed secretly or openly (*occulte vel manifeste*). While criminal law distinctions would sometimes damn a secret crime—such as theft by stealth or murder by ambush—Chobham instead damned manifest sin as more troubling due to its impact on the larger community. While a sin committed secretly might damn the souls of one or two people involved, an open sin could infect a larger group of people, indeed the entire neighborhood (*totam...viciniam*), which might be inclined to imitate the act.²⁴⁹ Open sins were pernicious in two ways, according to Chobham: they set an example which might be imitated, and they created disruptive scandal (*conturbat per scandalum*).²⁵⁰ Chobham’s emphasis on public sins may reflect the contemporary interest in securing the public order by clamping down on crime. While stealth crimes may have given greatest cause for worry in an earlier period, Chobham’s overriding concern appears to lie instead with manifest crime that might draw other potential sinners into its orbit.

The final question of “when” (*quando*) hearkened back to the earlier question of “where” with its emphasis on sacred versus non-sacred space. Not interested in the time of day, such as a theft committed by night versus in daylight, the question of when focused instead on whether a

the man telle pleynly with alle circumstaunces; and wheither he hath syned with comune bordel women or noon,/ or doon his synne in hooly tymes or noon, in fastyng tymes or noon, or biforn his shrifte, or after his latter shrifte,/ and hath peraventure broken therfore his penance enjoyned, by whos help and whos conseil, by sorcerie or craft; al moste be toold./ Alle these thynges, after that they have been grete or smale, engreggen [i.e., worsen] the conscience of man.”)

²⁴⁹ Chobham, *Summa Confessorum*, ed. Broomfield, 57-58. “But in the means two things must be considered, namely in what manner the deed is done, namely secretly or manifestly. For the lord hates most greatly the manifestation of sin, because sin committed secretly kills one soul or two, namely the soul of the actor and of the sufferer, and the turpitude of the conspirators. Truly the manifestation of sin corrupts the entire neighborhood through imitation.” (In modo autem duo consideranda sunt, scilicet quemadmodum res facta sit, scilicet utrum occulte vel manifeste. Plurimum enim odit dominus publicationem peccati, quia peccatum occulte commissum unicam animam occidit vel duas, scilicet animam agentis et patientis, et turpitudinem consentientis. Publicatio vero peccati totam sepe viciniam corrumpit per imitationem. Sepe enim vicini exemplum alterius in malo sequuntur, quia proclivior usus in peiora datur.)

²⁵⁰ Chobham, *Summa Confessorum*, ed. Broomfield, 59.

sin transpired during a sacred time. According to Stavenbsy, a thorough confessor should inquire whether a deed was committed during Lent or on a feast day, in which case greater penance might be enjoined.²⁵¹ Chobham offered a similar warning against sinning during holy times, broadening his prohibition to encompass times of fasting and abstinence as well as the hour of the Mass, particularly the time of consecration. While emphasizing that sins were prohibited at all times, Chobham argued that the time of commission could aggravate the gravity of the offense.²⁵² With this circumstance of when, Stavenbsy and Chobham both took a viewpoint markedly different from Boethius' Ciceronian discussion of *quando*, which distinguished between time (e.g., acting at night) and opportunity (e.g., striking while one's

²⁵¹ Wilkins, ed., *Concilia Magnae Britanniae et Hiberniae*, vol. 1, 245. "When? At what time? Whether outside Lent, or in Lent? Whether on a feast day, or ordinary day, and if on a feast day, for instance on a great feast day, then penance would be appropriate, as the vigil of that feast day one fasts on bread and water, if one sinned greatly in hazard of the flesh." ("Quando? In quo tempore? Utrum extra Quadragesimam, vel in Quadragesima? Utrum diebus festivus, vel profestis, et si in diebus festivis, puta in magnis festivitibus, tunc esset competens poenitentia, ut vigilia festivitatis illius jejundet in pane et aqua, maxime si peccaverit in lubrico carnis.") This concern with feast days is found as well in Alain de Lille's *Liber poenitentialis*: "Then, with known disease, detected sin, he should investigate the time whether namely it he perpetrated sin on a feast day, when specifically he was resting from servile labor, or on an ordinary day. It is more serious sin indeed that is committed on feast days than in ordinary days." ("Deinde cognito morbo, peccato detecto, investigare debet tempus utrum scilicet perpetratum fuerit peccatum in die festo, quando specialiter feriandum est a servili opere, an in profesto. Gravius est enim peccatum quod fit in diebus festis quam in diebus profestis.") See also Alain de Lille, *Liber Poenitentialis*, vol. 2, ed. Longère, 28. He further distinguishes between times of mourning and non-mourning, as well as hours of prayer and non-praying times.

²⁵² Chobham, *Summa Confessorum*, ed. Broomfield, 59. "By 'time' is to be understood delay itself in committing sin and also every inopportunity or opportunity of time suitable for deforming sin: so that if a crime were committed on a feast day at which feast, also if in that time in which fasting and abstinence were declared for Christians, also if in that hour during which Mass is celebrated, because greatly offending is one who, at the least, does not venerate the hour in which the body of Christ is consecrated. Although at all times sin is prohibited, nevertheless there are certain times and certain hours of the day that have a special prohibition, whence it is possible to aggravate sin most greatly." ("Per 'tempus' intelligitur et ipsa mora in peccato facta et omnis etiam inopportunitas sive opportunitas temporis ad deformandum peccatum idonea: ut si fuerit crimen commissum in die festo et quo festo, si etiam in illo tempore in quo indictum fuit christianis ieiunium et abstinentia, si etiam in illa hora in qua missa celebrabatur, quia multum delinquit qui saltem illam horam non veneratur in qua corpus Christi consecratur. Licet enim omni tempore peccatum sit prohibitum, sunt tamen quedam tempora et quedam hore diei specialem habentes prohibitionem, unde plurimum potest aggravari peccatum.")

victim is asleep).²⁵³ Criminal law records, too, displayed a greater concern with a crime's commission at night (*noctanter*) than with the timing of holy days, although court records and crime narratives were necessarily calendared according to the feast days on or which they fell, reflecting dating conventions. *Bracton* confirms the criminal law's interest in time of day in his discussion of the circumstance of *tempore*, indicating that time might distinguish a deserter from one who "exceeds his furlough", as well as a daytime thief or burglar from a nighttime one.²⁵⁴ The "when" issue could provide great relief to a defendant when it was found that a homicide took place under circumstances of war: at the 1238 Devon eyre, for example, Serlo de Bikebire was acquitted by a jury of a homicide when it was found that he had killed during wartime.²⁵⁵

Chaucer's parson's fifth circumstance, perhaps not surprisingly, fell outside the *quis, quid* formulation of Stavensby and others. The parson emphasized the frequency of sin, cautioning the reader that a person who often falls into sin was more likely to avoid confession or to be tempted to make confession more palatable by dividing it among several confessors rather than admitting all sins to a single priest.²⁵⁶ This concern with a single confession to a single priest pointed toward the same concern addressed by the mnemonic devices used to elicit the circumstances. Namely, a penitent had to divulge all the relevant circumstances of a sin, and should do so to a single priest so as to capture the entirety in one confession. A Kentish poem

²⁵³ Boethius, *De topicis differentiis*, trans. Stump, 90.

²⁵⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 299.

²⁵⁵ Summerson, ed., *Crown Pleas of the Devon Eyre*, 94, no. 577.

²⁵⁶ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 323. ("The fifthe circumstaunce is how manye tymes that he hath synned, if it be in his mynde, and how ofte that he hath falle./ For he that ofte falleth in synne, he despiseth the mercy of God, and increeseth hys synne, and is unkynde to Crist; and he wexeth the moore fieble withstonde synne, and synneth the moore lightly, / and the latter ariseth, and is the moore eschew [i.e., is more disinclined] for to shryven hym, and namely, to hym that is his confessour./ For which that folk, whan they falle agayn in hir olde folies, outhur they forleten hir olde confessours al outrely [i.e., utterly] or elles they departen hir shrift in diverse places [i.e., divide their confession among multiple confessors]; but soothly, swich departed shrift deserveth no mercy of God of his synnes.")

composed by William of Shoreham in the first half of the fourteenth century highlighted this concern: “And understand that whole must be your shrift, brother; not therefore a part to one priest and a part to another; and then tell, if you might bethink yourself, what, who, where, and when.”²⁵⁷

Shortly after Lateran IV, Bishop Richard Poore issued statutes for the diocese of Salisbury in which he directly tied the power of the keys to the priest’s skill at eliciting a true confession through the thorough investigation of circumstances:

Whose sins your remit, they are remitted; and whose sins you hold bound, they are held bound. But since we arrive at the remission of sins through true confession, we enjoin, following the statutes of the sacred canons, that the priest, in giving penance, diligently attend to the quality of person, quantity of the offense, time, place, cause, and delay in doing sin, devotion of the penitent soul, the signs of contrition.²⁵⁸

In this formulation, Bishop Poore reminded priests of their weighty power over sinners’ fates while also cautioning them that such power might be worthless if a priest were to neglect a full inquiry into the circumstances of sin and thereby fail to receive a true confession. Poore’s caution moved beyond the circumstances, however, in its emphasis on the state of the sinner in the wake of the sinful act. Rather than simply focusing on the *quis, quid, ubi* of the sin itself, Poore also suggested that confessors might attend to a penitent’s devotion and contrition in the wake of sin.

²⁵⁷ Konrath, ed., *Poems of William of Shoreham*, part 1, 33, lines 904-910. (“And vnderstand þat al ihol / Mot be þy schryfte, broþer; / Naȝt þar-of a kantel to a prest, / And a kantel to an-oþer; / And þanne / Tele, ȝef þou myȝt by-þenche þe, / wet, hou, and wer, And wanne.”)

²⁵⁸ Powicke and Cheney, eds., *Councils & Synods*, vol. 2, part 1 (1205-1265), 70. (“Quorum remiseritis peccata, remittuntur eis; et quorum retinueritis, retenta sunt. Set quoniam remissionem peccatorum consequimur per veram confessionem, precipimus, sacrorum canonum statuta sequentes, ut sacerdos in penitentia danda diligenter attendat qualitatem persone, quantitatem delicti, tempus, locum, causam, et moram in peccato factam, devotionem animi penitentis, signa contritionis.”)

John Mirk advised parish priests to consider carefully the gravity of a sin and to abridge the assigned penance in emulation of God's own mercy. Moreover, he, too, like Poore, suggested that contrition might factor into a confessor's weighing of sin and assignment of penance:

All these points you must know, that are written here before you; or else you might not give good judgment to men that confess to you, so you should know sum and all, whether the sin is great or small, and if the sin be foul and grim, the greater penance give you him; and if the sin be but light, the lesser penance you should impose upon him; but first take heed, by good counsel, of what [state of] contrition that he is; if he be sorry for his sin, and fully contrite as you might know, if he weeps earnestly and is sorry, and asks sincerely for mercy, abridge his penance then by much, for God himself forgives such.²⁵⁹

Attention to the circumstances of sin made good sense in the confessional context, where penances needed to be tailored appropriately to the nature of sinner and sin alike. In the felony law context, however, punishment could not typically be tailored: if one were found guilty, the prescribed outcome was hanging. One would expect, therefore, a lack of interest in the precise circumstances of a crime. Judging from instructions for coroners, however, felony procedure took great interest in the circumstances of an alleged felony. Once a coroner and the assembled inquest had determined that an unnatural death was a felony rather than misadventure, the coroner was expected to inquire into the details of the offence, namely:

whether the felony was committed in or out of a house, or whether in a tavern, or at a wrestling-match or other meeting. Then let it be inquired, who were present at the fact, great and small, male and female; and who are guilty of the fact, and who of aid, or of force,

²⁵⁹ Peacock, ed., *Instructions for Parish Priests*, 46-47, 1501-1518. ("Alle þese poyntus þow moste wyte, / Pat here be-fore ben I-wryte; / Or elles gode dome þou myzt not ʒeue / Of men þat beth to the I-schryue, / So þow myzt knowe sum and al, / Wheþer þe synne be gret or smal, / And ʒef þe synne be fowle & grym, / the gratter penaunce ʒeue þou hym; And ʒef þe synne be but luyte, / To þe lasse penaunce þou hym putte; / But fyrst take hede, by gode a-vys, / Of what contrycyone þat he ys, / ʒef he be sory for hys synne, / And fulle contryte as þou myzt kenne; Wepeþ faaste, and ys sory, / And asketh ʒerne of mercy, / A-bregge hys penaunce þen by myche, / For god hym self for-ʒeueþ syche.")

or of commandment or consent, or of knowingly receiving such felons...And further, he must inquire of the manner of the killing, and with what weapon, and of all the circumstances.²⁶⁰

Roughly speaking, *Britton's* guide to the coroner's inquest covered the issue of *ubi*, whether in a domestic space, tavern, or other locale; *quis* and *quibus auxiliis*, with regard to the nature of the witnesses' age and gender, as well as those involved in aiding, commanding, or assisting after the fact; *quomodo*, in terms of how the killing occurred, and the nature of the weapon involved. *Britton's* guide, just like a confessor's manual, was intended to provide a mere starting point, while the actual inquest was expected to uncover "*totes les cirumstaunces*."²⁶¹ The coroner, of course, was interested in a finite range of circumstances, and understanding the limits of this range will further elucidate the priorities of royal authorities in stamping out crime. For example, the issue of "who" was of limited interest beyond knowing whether an alleged criminal was a cleric, or whether the person's status—e.g., as a wife under duress, a child, an insane person—might make him or her a candidate for acquittal or pardon. The issue of "when" demonstrated concern with pinning the precise date of an alleged crime down, perhaps for its later inclusion in an indictment. This circumstance may have been tracked for the sake of accuracy in dealing with alibis and identifying potential suspects. Compared with confessor's manuals, coroners' rolls demonstrate a greater interest in whether crimes were committed at night than whether, for example, a homicide was committed on a holy day. This may reflect the priorities of keeping the king's peace, which presumably was a more difficult task after

²⁶⁰ Nichols, ed. and trans., *Britton*, vol. 1, 10-11. ("le quel la felonie fust fete de eynz mesoun ou de hors, et si a taverne ou a lute ou a autre assemblé. Et peus soit enquis quels furent al fet, grauntz ou petiz, males ou femeles, et qi sont coupables del fet, et qi del ayde, ou de la force, ou del comaundement, ou del consentment, ou del recettement de ceux felons a escient...Et si enquerge de la manere del occisioun, et de quel arme, et totes les cirumstaunces.")

²⁶¹ For the use of this same phrase in inquests into death by misadventure or necessity, as well as rape inquests, see Nichols, ed. and trans., *Britton*, vol. 1, 15-17.

sundown, when witnesses would be fewer and suspects more difficult to track. Nevertheless, the coroner was tasked with building a circumstantial portrait of an alleged crime, albeit one which may leave out circumstances we, from our twenty-first-century vantage point, think he should have considered.

To return once again to the coroners' rolls, we can see how the circumstances played out in felony procedure. It is these criminal law records to which I would now like to turn. As alluded to above, contemporary common law criminal procedure channeled felony trials toward two possible outcomes: relief through acquittal or pardon or, the less desirable alternative, death by hanging. Despite this blunt, binary outcome, the narratives produced by coroners' inquests were, in all their terseness, comparably rich in circumstantial detail. To take one representative example from mid-fourteenth-century Berkshire, on a Friday in September 1346, the hue was raised when a wounded man, Thomas de Barenton, died after receiving his last rites.²⁶² The coroner assembled an inquest from four neighboring vills, and twelve jurors stated under oath that Thomas had been at tavern on Thursday, a day earlier, with one John Pricke in the home of another John, John de Ratford, at bedtime (*hora cubitus*). Thomas, the deceased, had asked John Pricke for 10 shillings. John, the jurors tell us, "from malice aforethought" (*ex malicia precogitata*) "feloniously struck" (*felonice percussit*) Thomas in the belly with a large knife he held in his gloved hand. The jurors further explained that Thomas had languished until his death, and concluded that John had feloniously killed (*felonice interfecit*) Thomas. Already, in the inquest's narrative, we have a full explication of the *quis, quid, ubi, quando*, or who, what, where, when, in addition to a description of *quomodo* (how), and perhaps even a nod to why (*cur*) in the mention of the request for money and the malice aforethought with which John

²⁶² For the manuscript image of the official trial record, see JUST2/18 AALT 0134 (1346), accessed May 1, 2013, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no18/aJUST2no18fronts/IMG_0134.htm.

allegedly attacked Thomas.²⁶³ The jurors then went on to discuss the seventh circumstance familiar to confessors: *quibus auxiliis*, or with what assistance. The inquest stated that no one had abetted, procured, counseled, or aided (*auxiliens*) the felony. Thus, in the narrative prepared by the coroner's inquest in anticipation of trial, the entire set of rhetorical circumstances had been completed, and in true Ciceronian fashion the narrative had been kept brief, chronological, and had eschewed any prior events deemed too remote for relevance.

Coroners' homicide narratives typically followed the mnemonic order of the *quis, quid, ubi* formulation, beginning with the identity of the deceased and the circumstances in which he was found and where, followed by a chronological narrative account of what transpired between the homicide victim and the alleged perpetrator, and sometimes with a brief discussion of the motivation behind the homicidal act, such as longstanding enmity or a sudden quarrel. Often, as in the example above, the narrative ended with the capstone issue of "*quibus auxiliis*", namely a discussion of whether anyone aided, abetted, or procured the felony. Moreover, just as Boethius would divide the issue of *quid* into parts to cover the essence of the deed, any preceding acts, the deed itself, and any subsequent deeds,²⁶⁴ coroners' narratives often described the homicidal act, any preceding enmity, further damning details regarding the act, and the suspect's attempt to flee after the fact. This ordering of inquiry may be nothing more than coincidence, reflecting the natural order one would take in questioning someone about an incident, but the pattern suggests that it reflects a common cultural approach to building a narrative, an approach employed by coroners and confessors alike because this was how one was supposed to try to understand an

²⁶³ Butler summarizes the goals of coroners' investigations into suspicious deaths, including the perpetrator and victim's identities, the nature and chronology of death, descriptions of wounds, the perpetrator's actions in the aftermath, the financial factors such as value of forfeited property, and lists of names of people who might need to be summoned should the case proceed to trial. See Butler, *Forensic Medicine in Medieval England*, 127-128.

²⁶⁴ Boethius, *De topicis differentiis*, trans. Stump, 90.

event and, indirectly, gain insight into an actor's state of mind.²⁶⁵ As the *Mirror of Justices* described it, in conducting an inquest into a homicide, the coroner was to acquire the material facts that could be observed or measured from the corpse, such as the length of a wound or whether it appeared to have been inflicted by a staff, stone, or arm.²⁶⁶ By inquiring into the circumstances surrounding a death—the nature of the wound, who was present, who had previously threatened the victim, and so forth—the coroner could arrive at presumptions.²⁶⁷

In some instances, we can hear through the scribal record the voice of the coroner who, like a confessor interrogating a penitent sinner, might pose additional questions to the inquest to ensure a comprehensive narrative of the alleged crime. In an early fourteenth-century inquiry into the death of Daniel Fonbriht, a Flanders merchant in London, the inquest described how one William Walle had struck Daniel in the head with his sword while one of William's accomplices amputated a finger from Daniel's right hand with a poleaxe, and how Daniel had then been stripped of his belongings.²⁶⁸ Although the narrative goes into great detail, much of which I have not included here, the coroner persisted in inquiring of the jurors what had become of William Walle and his accomplices following the felony. The jurors explained that the hue had been raised against them, and that they had scattered (*diffugerunt*) with Daniel's goods in their possession. The coroner also asked (*requisiti*) the inquest who else had been present at the time of the attack, and they responded that it had simply been William and two accomplices, as well as Daniel's friend who had raised the hue. The coroner's questions were geared toward

²⁶⁵ For further hypothesizing about this question and answer format, relating it to the Socratic method popularized by the Scholastics, see Butler, *Forensic Medicine in Medieval England*, 145.

²⁶⁶ Whittaker, ed. and trans., *Mirror of Justices*, 30 (advising determination of whether a wound was from a blow “de bastoun, ou de piere, ou darne.”) On measuring wounds, see *ibid.*, 32-33.

²⁶⁷ Whittaker, ed. and trans., *Mirror of Justices*, 30-31. (“E issi de tutes les circumstaunces qe valer iporrunt par presumpcions.”)

²⁶⁸ JUST 2/94a AALT 0007 (1315/16), accessed June 17, 2015, http://aalt.law.uh.edu/aalt7/just2/just2no94a/IMG_0007.htm.

explaining what had occurred in the aftermath, and who else might have been involved in aiding or abetting. This type of inquest narrative—with an initial story presented by the jurors and then responses to further questions from the coroner—is not at all uncommon and suggests that the coroner, like a confessor, was tasked with using inquisitorial strategy—inquisitorial not in the continental criminal procedure sense, but in the broader sense of a question-and-answer approach—to build as full a portrait as possible of an alleged crime by questioning the jurors about ambiguous circumstances.

To what end? If all that might be expected were a binary outcome—hanging or not—why bother with such a rich narrative account? Looking back at the rhetorical texts with which this paper opened, we find that the circumstances were ultimately intended to elucidate an actor’s intent. Lack of intent, according to Cicero, might lead to justification in cases involving ignorance, accident, or necessity; lack of intent might also be found in instances involving powerful emotions, such as annoyance, anger, and love.²⁶⁹ In his *De doctrina Christiana*, Augustine offered guidance for the interpretation of scripture, suggesting that the circumstances behind a text might offer revelation into authorial intent, as described by Kathy Eden in her work on hermeneutics and rhetoric.²⁷⁰ In a similar fashion, when used by confessors and coroners, the circumstances could help to reveal an actor’s otherwise potentially ambiguous intent. Just as Augustine would differentiate between the letter and the spirit of the law, confessors and coroners would look beyond the simple *actus reus*, or act itself, to the surrounding circumstances

²⁶⁹ Cicero, *De Inventione*, trans. Hubbell, 78-81 (I. xxvi. 41). (“Imprudencia autem in purgationem conferetur, cuius partes sunt inscientia, casus, necitas, in affectionem animi, hoc est, molestiam, iracundiam, amorem et cetera quae in simili genere versantur.”)

²⁷⁰ See, generally, Kathy Eden, *Hermeneutics and the Rhetorical Tradition: Chapters in the Ancient Legacy and Its Humanist Reception* (New Haven: Yale University Press, 1997), 55-58.

and intent.²⁷¹ By elucidating intent, this inquiry allowed for a more nuanced and accurate assessment of guilt, which in turn facilitated reaching an equitable judgment.

The questions were a means to an end. For confessors, they were intended to serve as a convenient mnemonic device to recall the types of questions which, posed skillfully, would elicit a full narration of the sin and facilitate the appropriate assignment of penance.²⁷² In a system in which penance could be set at will by the priest, a full understanding of the nature of the sin, with all its incidental detail, was required to get the penalty right. This connection with circumstances and judging would carry forward into fourteenth century vernacular texts as well. Chaucer's parson, for example, advised the repentant sinner to reveal the circumstances so that "the priest who is your judge may be better advised of his judgment in giving penance".²⁷³

Although felony law, unlike church law, countenanced a single punishment for those convicted, I believe that coroners nevertheless employed inquisitorial techniques similar to those used by confessors. Justices, too, might employ such strategies in trying to elicit information from a criminal defendant. In doing so, justices treated defendants similarly to jurors, both of whom were exhorted to offer a true narrative, and both of whom were reminded to keep God before their eyes while testifying. In the case of the coroner, his interest in building a narrative through inquiry into the circumstances makes sense when one considers that coroners, in addition to assembling inquests to inquire into unnatural deaths, were tasked with receiving

²⁷¹ In defending an action for which he was later criticized, Bishop Robert Grosseteste demonstrated how the circumstances of an act could wholly determine whether culpability attached, and that the same act may be either praiseworthy or condemnable depending upon the immediate circumstances. See Frank Anthony Carl Mantello and Joseph Ward Goering, eds. and trans., *The Letters of Robert Grosseteste, Bishop of Lincoln* (Toronto: University of Toronto Press, 2010), 57-58.

²⁷² See Robertson, "A Note on the Classical Origin of 'Circumstances'," 7. This use of mnemonics and even verse would be extended to penitential texts intended for a broader audience as well, such as William de Montibus' *Peniteas Cito*. See Woods and Copeland, "Classroom and Confession," 385.

²⁷³ "Parson's Tale," in *Riverside Chaucer*, ed. Benson, 323. ("And eek the preest, that is thy juge, may the bettre been avysef of his juggement in yevynge of thy penaunce, and that is after thy contricioun.")

confessions of individuals hoping to abjure the realm or planning to turn king's evidence.

Although, as a royal official, the coroner perhaps should not have been facilitating the process of jury nullification described by Green, in actuality the coroner's narrative output may have offered trial jurors a nuanced enough story to jog their memories about a particular incident and to assist them in channeling accused individuals toward the hanging, acquittal, or pardon outcomes.

In some instances, it is abundantly clear that the circumstantial portrait drawn by a jury narrative had a direct impact on the outcome of a felony case. In a mid-thirteenth-century Northumberland assize, for example, Gilbert, a servant, stood accused of the death of Thomas de Gunwarten, a "demented chaplain" (*capellanus demens*), according to the record. The jury narrative detailed that Thomas, "in a demonical state," (*in demonicia sua*) came by night to the home of Hugo de Burton, where Hugo and his family were sleeping. Wishing to enter the home, Thomas broke three boards in a wall. "Hearing the noise and believing thieves were present" (*audiens tumultum credebat latrones esse ibidem praesentes*), and then seeing Thomas' head coming into the house, Gilbert struck the intruder with a yoke for carrying pails, which presumably was lying close to hand. Gilbert himself confessed (*congnoicit*) to the act, and the jurors and representatives from the nearest villis concluded that Gilbert did not strike Thomas with evil intent (*non percussit eum nequiter*), but because he believed he was a thief (*credebat ipsum esse latronem*). As a result, he was acquitted.²⁷⁴ It is not clear why Gilbert did not need to seek a pardon, but it may be due to the extenuating circumstances of a nighttime invasion by a mentally deranged individual, as well as Gilbert's role in defending his master's home and family from a domestic intruder. What is clear is that the circumstances surrounding the

²⁷⁴ Page, ed., *Three Early Assize Rolls for Northumberland*, 94.

incident, as presented in the trial narrative, enabled the jury to conclude that Gilbert did not act evilly (*nequiter*), but rather out of a credible belief that Thomas was a thief and home intruder.

In conclusion, while English criminal law purported to treat all ‘felony’ alike, coroners and jurors, like confessors, were operating in the shadow of a rhetorical tradition that emphasized the importance of contextualizing a text to understand its meaning. This technique might easily be applied wholesale to the contextualization of human acts. This explains why the circumstances of Cicero and Boethius may be found in confessor’s manuals and coroners’ inquests alike, reflecting how contemporary individuals approached the measurement of crime and sin. In the case of coroners’ rolls, the crafting of a narrative could have a direct impact upon the outcome of a later felony trial. When royal justices came through town to sit in judgment at an eyre or a session of gaol delivery, the coroner had to produce his rolls, which were likely laid before the justices and presumably read to the jury to acquaint them with or remind them of the details of a particular homicide. Although felony was technically defined as a list of criminal acts—homicide, theft of goods over a certain value, arson, etc.—felony adjudication was driven by broader concerns exemplified by this inquiry into the circumstances and ultimately focused on issues of intent.

Role of Confession in Felony Adjudication

Confession played a central role in sacramental life within the church, but it was also a central practice within the realm of medieval English felony prosecution.²⁷⁵ Popular understandings of felony were bound up with issues of *mens rea*, such that confession offered the most direct avenue to determining culpability. It also offered the most direct avenue to the gallows, as will be explained below. Mandatory for all Christians after Lateran IV, annual

²⁷⁵ For a general introduction to the use of confession in felony cases, see Butler, *Forensic Medicine in Medieval England*, 150-156.

ecclesiastical confession became a familiar ritual, and one which enabled parish priests to test their parishioners' knowledge of and adherence to Christian doctrine. As Peter Brooks has pointed out, confession has had seismic ramifications for modern western culture, in which confession, "a verbal act of self-recognition as a wrongdoer," marks the first step toward rehabilitation.²⁷⁶ In *Troubling Confessions*, Brooks makes the following observations about confession: it enables a wrongdoer to acknowledge the wrongdoing, commences the process of rehabilitation and reunion with the wronged community, and liberates the judge from the burden of conscience involved in issuing a verdict with less than complete confidence in the accused's desert of and willingness to accept punishment.²⁷⁷

Given these manifold effects of confession, one might expect it to be central to medieval English criminal law procedures. Rather than reintegrating a criminal into society, however, a confession might place a suspected felon on the fast-track to execution.²⁷⁸ More commonly, an alleged felon might confess as a predicate to abjuring the realm or turning king's evidence; in the latter case, the confession would be followed by accusations against alleged partners in crime. In these three instances, confession served as a catalyst for the next phase of criminal procedure, whether execution, abjuration, or the appeal of alleged accomplices. Confession represented a liminal moment between a tentative state of suspicion and accusation to a state of confirmed

²⁷⁶ Brooks, *Troubling Confessions*, 2.

²⁷⁷ Brooks, *Troubling Confessions*, 2. "It is the precondition of the end to ostracism, reentry into one's desired place in the human community. To refuse confession is to be obdurate, hard of heart, resistant to amendment. Refusal of confession can be taken as a defiance of one's judges..., whereas confession allows those judges to pass their sentences in security, knowing that the guilty party not only deserves and accepts but perhaps in some sense wants punishment, as the penance that follows confession."

²⁷⁸ As one might suspect, few felons confessed outright to hasten their execution.

guilt and the possibility of resolution.²⁷⁹ These uses of confession will be explored below.

Although a confession might itself mainly enumerate non-mind factors, such as place, time, and the nature of the act, the demeanor of the confessing person communicated their contrition and sorrow for their past actions.²⁸⁰

It is important to bear in mind that ecclesiastical confession was, however, fundamentally different from confession in the criminal context. Confession in the ecclesiastical sphere had become, by the thirteenth century, a private affair between a person and his or her parish priest (with the exception of particularly serious sins, which had to be confessed instead to a bishop). Confession in the secular sphere, however, was a quasi-public affair, frequently occurring in the presence of the coroner (*coram coronatore*) and many other witnesses from the vicinity. Moreover, criminal confessions were inscribed, whether on coroners' rolls, plea rolls, etc., making a record that could be accessed at will, much to the chagrin of an abjurer who returned home without having first secured a pardon. Confession in the ecclesiastical sphere was typically followed by absolution and the assignment of penance. Confession in the secular sphere could also afford some measure of reprieve, most notably in the case of approvers who might escape, at least temporarily, the gallows. Typically, however, a confession to felony made

²⁷⁹ Confession was by no means necessary, however, to secure a conviction in doubtful cases. Sibyl, wife of John de Arbrook, for example, was arrested on suspicion of the death of Cecilia de Arbrook, and put herself on the country. She was found guilty by a jury of twelve plus representatives from four neighboring vills and sentenced to be hanged. Stewart, ed., *1263 Surrey Eyre*, 298, no. 629.

²⁸⁰ On this point in the context of ecclesiastical confession, see Patterson, *Middle English Penitential Lyric*, 9. (“...confessions early in the thirteenth century or before took conventionalized forms in which the main element was a rehearsal of sins; but the fact that a sinner enumerates his sins implies contrition on his part as the cause of such enumeration. It would be strange indeed if expressions of this fundamental cause—a sorrow for sin—did not at times enter into the strictest of confessions.”)

one immediately susceptible to capital punishment, unless said confession happened to be made by a cleric within an ecclesiastical setting.²⁸¹

In a 1238 Devon eyre case, a confession made informally at a social gathering was enough to exculpate the two men involved in the ensuing homicide of the confessing individual. According to the jury narrative produced at the eyre, a forester named Hugh le Criur announced at a party that the men gathered there should return to their bailiwicks to stand guard due to news that a woman had been robbed within the forest. Hearing his announcement, another forester, Geoffrey Rugeleon, stood up and confessed that he had robbed the woman of five shillings and had raped her as well. When yet another forester later approached Geoffrey to ask for a pledge, Geoffrey struck David in the stomach with a knife. Both David and another man, Eliot, pursued Geoffrey, David striking Geoffrey on the head with a stick, and Eliot finishing him off with a fatal knife thrust. When the case came before the eyre justices, David and Eliot were absolved of guilt in the matter “because it was established that Geoffrey had, on his own confession, done felony to the woman, robbing and raping her”. It was Geoffrey’s confession in the sight of a gathering that enabled the two men to avoid a felony conviction for the homicide.²⁸²

In rare instances, a felon might confess in order to exculpate others who might otherwise come under suspicion. In a 1267 Bedfordshire coroners’ roll, a narrative recorded how a dozen or more felons and thieves (*felones et latrones*) came to the home of a man named Simon Read, assaulting Simon with swords and striking his daughter Matilda and son John as well. Seeing that the men intended to kill him, his father, and his sister, John grabbed an axe and struck one of

²⁸¹ See, e.g., the discussion of degraded clerics confessing to homicide and thievery, and in some instances being released from ecclesiastical prison, in Brown, ed., *Register of Thomas of Corbridge*, part 2, 17-18. For other degradations of criminous clerks, see *ibid.*, 23-24, 70, 85.

²⁸² For the translation of the case record, see Summerson, ed., *Crown Pleas of the Devon Eyre*, 68-69, no. 403.

the intruders, Roger of Benfield, in the head, causing the rest of the felons to flee. Roger survived until the following day, and before he died he confessed in the presence of witnesses that he had come to the house to kill Simon and all his family.²⁸³ We cannot know whether fear for his soul or another emotion motivated him, but Roger's confession removed any shadow of doubt about the justification of John's fatal blow.

Confession as a Shortcut to the Gallows

Presumably most criminal defendants, even in the absence of legal counsel, knew enough to refrain from confessing a crime when to do so would put the death penalty immediately on the table.²⁸⁴ Occasionally an individual confessed outright in court, as in the case of Simon Bidun, who broke into the grange of William de bello Campo and, having been caught with the stolen goods in his possession, admitted the deed at the County Court and was hanged.²⁸⁵ Similarly, in a late-thirteenth-century Northumberland case, a woman named Edith, accused of involvement in her husband's theft of a cow, was captured and led into court, where she confessed to having participated in the theft (*cognovit se esse participem de praedicto latrocinio*); the judgment of the court was that she should be hanged.²⁸⁶ The *Placita Corone*, a brief mid-thirteenth-century treatise describing the procedures for initiating pleas of the crown and likely written as an instructional text for young lawyers, provides some evidence that occasionally an unwitting

²⁸³ For the original Latin and translation, see Gross, ed. and trans., *Select Cases from the Coroners' Rolls*, 6-7. See also Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 5, no. 15.

²⁸⁴ On this issue, see Butler, *Forensic Medicine in Medieval England*, 151.

²⁸⁵ Fowler, ed., *Calendar of the Roll of the Justices on Eyre*, 188, no. 802. At the 1263 Surrey eyre, the jurors from the hundred of Brixton presented that three robbers had been hanged "by their own admission without suit of anyone", but this was later called into doubt when it was found that they had been prosecuted by one of the crime victims; the Brixton jurors were sentenced to gaol for false presentment. See Stewart, ed., *1263 Surrey Eyre*, 256, no. 529. See also *ibid.*, 276, no. 572, for a similar case involving a jury falsely presenting that a thief had been hanged after confessing, when he had actually been tried by a crime victim.

²⁸⁶ Page, ed., *Three Early Assize Rolls for Northumberland*, 332.

defendant might be cajoled into incriminating himself. In a section detailing a scenario involving a horse thief, the *Placita* describes how the victim of the theft brought a count against a man named Hugh, accusing him of taking his mare on a particular day, at a certain hour, in a given year, to a specific house, and of furnishing an alibi to inquiring neighbors. As required by appeal procedure, the count covered all the relevant circumstances down to the nature of the horse itself, described as three years old, worth twenty shillings, and having four foal-teeth. A mock dialogue ensues between the royal justice appointed to hear the case and the alleged thief.

The dialogue is striking in the way it mimics the strategies of a priest trying to encourage a reluctant confessant to reveal his or her sins in order to ensure a full confession, which in the ecclesiastical context would have offered the promise of absolution. First, the justice attempted to win the trust of Hugh, addressing him familiarly by his first name and advising him on how best to proceed in responding to the accusation: “‘Hugh,’ says the justice, ‘have you heard what John has counted against you?’ ‘Yes, sir.’ ‘Then answer him as you think good.’”²⁸⁷ Next the accused thief requested learned counsel, which was immediately denied as “against the law and against right” (*encontre ley de terre et econtre dreiture*).²⁸⁸ The justice argued that only Hugh himself could best reveal his actions, a suggestion reminiscent of clerical prohibitions against confessing on behalf of others, a theme to be discussed below. The self-described “unlettered man” (*simples homs*) was advised to act wisely, lawfully, and with God before his eyes, the

²⁸⁷ Kaye, ed. and trans., *Placita Corone*, 16-17. Other evidence corroborates the role of justices in questioning a defendant hauled before them. See, e.g., “The Execution of Sir Simon Fraser (1306),” in *Historical Poems of the XIVth and XVth Centuries*, ed. Robbins, 19 (“penne saide þe iustice, þat gentil is ant fre, / ‘sire simond ffrysel, þe kynges traytour hast þou be, / In water ant in londe, þat monie myhten se. / what sayst þou þareto? Hou wolt þou quite þe?”)

²⁸⁸ Kaye, ed. and trans., *Placita Corone*, 17. It is unclear, however, whether providing counsel to Hugh would indeed have been against the law, as presumably he could have had outside legal advice in responding to a private action, as opposed to a trial on indictment.

justice employing a phrase more commonly connected with judicial instructions to jurors.²⁸⁹

Further reinforcing the parallels with ecclesiastical confession, the justice reassured Hugh that mercy would be sought: “we shall be as merciful as we can, according to the law.”²⁹⁰ Hugh, simple man that he was, may have played up the merciful and downplayed the foreboding phrase “according to the law” in determining his next course of action.

In fact, Hugh’s response, as described by the treatise author, was one of trusting gratitude. If he were, as suggested here, a first-time thief, perhaps he foolishly trusted that the justice might seek an alternate outcome to hanging even in the face of a full confession. Hugh went on to describe the circumstances that drove him to theft, the why (*cur*) of the confessor’s manual:

‘Sir, in God's name I thank you. The great poverty and distress, which I have for long undergone, pressed me so hard that I thought to be relieved of my troubles by the value of this horse: and it was for this reason that I took it, by temptation of the Devil, otherwise than I ought to have done.’²⁹¹

Continuing in the manner of a priest eliciting a comprehensive confession, the justice next tried to discern whether Hugh were a habitual or first-time thief. Such inquiry might have further confirmed to Hugh the idea that he might be treated mercifully if he presented his situation in the

²⁸⁹ Thorne, ed. and trans., *Bracton*, vol. 2, 405. (“And therefore we tell you that on the faith that binds you to God and by the oath that you have taken you are to let us know the truth thereof, nor are you to fail in saying whether or not he is guilty of what is alleged against him (or of the other crimes) through fear or love or hate but with God only before your eyes, nor are you to oppress him if he be innocent of the said offense.”)

²⁹⁰ Kaye, ed. and trans., *Placita Corone*, 17.

²⁹¹ Kaye, ed. and trans., *Placita Corone*, 17. By referencing the temptation of the Devil, the fictional defendant drew upon a common theme in medieval literature, one which acknowledged “the fiend’s” influence without, however, taking it to the extreme of denying human agency. For a later example of this theme, see Cigman, ed., *Lollard Sermons*, 219. (“Ȝit holde hym oute at þe poynte, and answeze him in þis wise: ‘Cursid feend! Þe synne þat þou didest, þou didest it of þin owne malice, and þe synne þat I did, I did it at þe stiring of þee, enuyous feend, þat lyst in wayte nyȝt and day vupon me, for grete enuy þat þou hast þat I shulde restore þe place þat þou fel fro; and also at þe stiring of my fleishe, fro whiche I may not fle away; and at þe stiring of þe worlde, þat is euere before myn yȝen.”)

best possible light. Hugh responded: “Truly, sir, I never acted in this way, no matter what poverty or distress I suffered, before this occasion.”²⁹² If Hugh’s prior experience of confession had been limited to the ecclesiastical sphere, he might have expected a first-time offense to be viewed as less contemptible than an oft-repeated sin. However, the justice instead chided Hugh that this first offense was undertaken “too early” (*trop par tens*), and asked for confirmation that Hugh had indeed acknowledged openly and in the king’s court that he had acted wrongly and as a thief, an accusation the first-time felon could not deny. In this medieval version of “gotcha”, the justice secured a confession through questionable means, thereby averting the need to allow the case to proceed to trial by jury, where mercy might indeed have been the outcome.

Far from proffering mercy, the justice responded with the tepid interjection that God might forgive Hugh, “if it pleases Him” (*si li plect*). Once again, playing the role of both confessor and anti-confessor, the justice advised Hugh to reveal his accomplices, seeming to doubt Hugh’s claim that this was a first offense: “Now Hugh [sic], tell us in peril of your soul whether you had any accomplice in carrying out this theft, or any other you may have committed. If so, tell us who he is and where he can be found.”²⁹³ Were this an ecclesiastical confession, Hugh would not have been encouraged to identify accomplices, a practice frowned upon by church authorities. Regardless, the fictional Hugh, as it turns out, had no accomplices and could therefore sidestep the unsavory business of accusation. Lack of accomplices, however, also removed from Hugh the possibility that he could at least postpone his execution by turning king’s evidence. Finally dropping the pseudo-priestly charade, the justice, having received Hugh’s complete and damning confession, passed him along to the bailiff to see a priest, presumably to make an efficacious confession for the sake of his soul. The outcome for

²⁹² Kaye, ed. and trans., *Placita Corone*, 17.

²⁹³ Kaye, ed. and trans., *Placita Corone*, 17.

poor Hugh could not be more starkly in contrast with the absolution and mercy expected of an honest confessant in the religious context: the treatise passage concludes, “So let him be hanged.”²⁹⁴ Perhaps, however, the process of confessing before the royal justice, however perverse in outcome, may have helped prepare Hugh to open himself to the workings of divine mercy as he met abruptly the end of his earthly life.

This troubling dialogue illuminates some of the manifold concerns that drove the movement of theologians, exemplified by Peter the Chanter but carried on long after his death by similarly minded clerics in England and on the continent, who opposed the involvement of priests in secular criminal justice. Not only might a royal justice involve himself in blood judgments, but he also potentially acted in a perverted, quasi-priestly manner in trying to finagle damning confessions from unlearned and uncounseled felons. Rather than engaging in the work of mercy, the justice was called upon to enforce the harsh letter of English felony law, under which a confession made outside sanctuary typically led straight to the gallows.²⁹⁵ This tension between judging and pastoral care made priests particularly ill-suited for service as justices in felony cases, even if they might also be the people best situated to interrogate sinners and derive an understanding of guilty mind from an inquiry into the circumstances of a crime.

²⁹⁴ Kaye, ed. and trans., *Placita Corone*, 17.

²⁹⁵ Consider, by way of contrast, this advice from Bishop Robert Grosseteste to Simon de Montfort, written c. 1237, and providing advice on punishing a burgess: “Now, punishing the guilty short of what they deserve is justice with mercy and an imitation of Christ, who punishes everyone in this way. Punishing the guilty with attention to achieving an exact correspondence and balance with what they deserve is justice applied inflexibly, or perhaps not justice at all, for it wants the intermingling of mercy, and only makes one deserving of being judged without mercy, since it is written that judgment will be without mercy for the one who has shown no mercy [Jas 2:13].” Mantello and Goering, *Letters of Robert Grosseteste*, 170.

Confession as Precursor to Abjuration

Confession might, therefore, lead to immediate capital punishment. In other circumstances, confession offered a reprieve from capital punishment and served as a prerequisite for access to mercy. In such instances, confession was a means to an end, typically to avoid the gallows by taking the path of abjuration or turning king's evidence. To begin with the former, a person who took sanctuary in a church had the option of confessing any crimes to the coroner in exchange for permission to abjure the realm.²⁹⁶ In such instances, the coroner would typically command the local bailiff to summon the neighbors and representatives of four neighboring towns to appear at the church to stand witness as he received the felon's confession. In the 1378 abjuration of Richard Tebbe of Steeple Morden, Cambridgeshire, for example, the coroner's record notes that "he was clearly and openly examined before William of Fancott, county coroner," as well as representatives from three neighboring towns, confessing to killing John Muleward of Hook's Mill, Cambridgeshire, a few days earlier.²⁹⁷ Following the confession, the fugitive could either ask to abjure the realm, or instead be handed over to the township "to keep at their peril" (*a garder sour lour peril*).²⁹⁸ In Richard Tebbe's case, he requested the port of Dover at the church door, which would have had him walking southeast, but was assigned instead to the slightly more distant port of Chester to the northwest.²⁹⁹ If a sanctuary seeker chose abjuration, the penitential overtones of the ritual were unmistakable: the abjurer would don simple, unbelted clothes and walk on foot to a pre-assigned port, holding or wearing a cross to broadcast his or her status. This penitential garb was meant to signal the

²⁹⁶ For a comprehensive discussion of sanctuary procedure, see Karl Shoemaker, *Sanctuary and Crime in the Middle Ages, 400-1500* (New York: Fordham University Press, 2011). On confession as a precursor to abjuration, see also Butler, *Forensic Medicine in Medieval England*, 152-153.

²⁹⁷ Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 120, no. 293.

²⁹⁸ See Nichols, ed. and trans., *Britton*, 17.

²⁹⁹ Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 120, no. 293.

abjuror's protected status, such that would-be avengers were required to leave them unmolested.³⁰⁰

Confessor's manuals reveal a simultaneous interest in the specifics of individual sinful acts as well as a sensitivity to the status of particular individuals. In the secular criminal sphere, one might in fact confess to a criminal status as opposed to confessing to specific incidents of crime. For instance, some sanctuary seekers confessed to being a thief or to having killed someone, without going into greater detail. In the 1263 Surrey eyre, for example, Simon de Burford, having taken sanctuary in the Church of the Blessed Mary in Southwark, confessed to being a thief who had committed many larcenies (*cognovit se esse latronem de pluribus latrociniis*). He abjured the realm.³⁰¹ It is possible that his confession did offer more detail, however, and that the scribe simplified for purposes of the written record.

Occasionally a faithful scribe recorded an abjuror's confession in greater detail, offering a more complete sense of the process involved in confessing to the coroner and the kinds of specifics a person might divulge in the hope of abjuring the realm. For example, in a 1356 Suffolk coroner's roll, it was recorded that John Somer of Kent, who had taken refuge in the church of Ufford (possibly modern-day Otford), was approached by the coroner and "good men (*proborum hominum*) of the said township of Ufford" and of neighboring townships after ten

³⁰⁰ This did not always work out in practice, however. In a 1267 Bedfordshire coroners' roll, for example, it was recorded that a prison escapee who took sanctuary and elected abjuration was fatally wounded while making his way toward the port of Dover. His attackers wounded him in the heart and then decapitated him, suggesting that vengeance may have been a motivation. See Gross, ed. and trans., *Select Cases from the Coroners' Rolls*, 9. Moreover, not all abjurors undertook the process with penitential seriousness. For a case of "musical sanctuaries," in which an accused took refuge in a church, purported to abjure the realm, left the assigned road, was thrown back into prison, escaped to the Carmelites' church, and then took off from the church overnight, see *Calendar of Inquisitions Miscellaneous*, vol. 7, 83-84, no. 177. In rare instances, a felon might be aided by local officials in reaching sanctuary, as was alleged by Robert Grosseteste in his description of a brutal and unprovoked murderous attack on "a scholar of noble birth and virtuous way of life" in Oxford. See Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 447.

³⁰¹ Stewart, ed., *1263 Surrey Eyre*, 259.

days and was asked by the coroner “why he tarried in that church.”³⁰² John responded, “for having committed a felony (*pro feloniam facta*)”.³⁰³ John refused to surrender himself to the king’s peace, choosing instead to make a public confession in exchange for permission to abjure the realm from the port of Bawdsey. John’s confession provided detail as to the essential circumstances of his crimes:

...there before the coroner and the subjects of the king he confessed that he was a thief, for that on Monday next before the feast of the Nativity of St. John the Baptist in the twenty-ninth year of King Edward the Third he had as a thief stolen woolen and linen cloths worth 6s. 8d. in Sternfield (Suff.) from a certain Eustace, the servant of John of Amundeville of Sternfield. He also confessed that, in contempt of the lord king, he together with Henry of Selsey and another man, whose name is unknown, had feloniously broken the king’s prison at Melton (Suff.) on the night of Tuesday next before the said feast of St. Thomas in the said year.³⁰⁴

While still in Ufford, the coroner assembled an inquest of twelve jurors to assess the chattels and lands of John and his accomplices. While John presumably donned penitential garb and took the road toward his assigned port, his accomplices were likely attached for possible trial and outlawed if they failed to respond to the summons.

Sanctuary seekers usually seem to have understood the rules, including the forty-day limit on their reprieve within the church walls and the requirement that they have committed a felony to avail themselves of abjuration.³⁰⁵ Occasionally, however, the practice of sanctuary

³⁰² Gross, ed. and trans., *Select Cases from the Coroners’ Rolls*, 103. He was asked specifically “qualiter et qua de causa in dicta ecclesia moram fecit.”

³⁰³ Gross, ed. and trans., *Select Cases from the Coroners’ Rolls*, 103.

³⁰⁴ Gross, ed. and trans., *Select Cases from the Coroners’ Rolls*, 103.

³⁰⁵ Consider, for example, the mid-thirteenth-century case of William de Nutel, a cleric who wounded an unknown Scotsman, whose life was despaired of (*ita quod desparabatur de vita ipsius ignoti*), and then sought sanctuary. Rather than confessing only to wounding the man, William elaborated that he had been a malefactor in his home county, Nottingham, receiving thieves and other malefactors. It may be that the Scotsman had not yet died, in which case the assault itself might not alone amount to felony so as to allow William to abjure. See Page, ed., *Three Early Assize Rolls for Northumberland*, 76.

gave rise to confusion. In an unusual mid-fourteenth-century Berkshire case, recorded in the coroner's rolls, a man named John son of Robert from the town of Orwell fled to the local church seeking sanctuary.³⁰⁶ When approached by the coroner a couple days later, John confessed to having killed William son of John de Caldecote, also of Orwell, on the same day that he took sanctuary. Pressed by the coroner as to what he wished to do next, John indicated that he wished neither to return to the king's peace (*nec se vult reddere paci domini Regis*) nor to abjure the realm (*nec abiurare regnum Angliae*) at that time. John's refusal to submit or to abjure was unexpected, and the coroner ordered local men to keep watch (*vigiliam facere*) over the church. The coroner gave John until the end of the week to mull things over, at which time John claimed, quite remarkably, that at the time that he confessed having committed felony, he was not of sound mind (*non fuerat sane mentis*), and that he now wished to return to the king's peace because he was not guilty. John was led to gaol to await further process.³⁰⁷

In a mid-fourteenth-century Year Book case, one Gilbert Gower appears to have tried to bend the rules, with dire consequences. Gower had abjured the realm after confessing to having been an accomplice to homicide. He reappeared in England and tried, alternatively, to offer a general charter of pardon, to claim he was not guilty, and to argue that he was not the same person who had abjured the realm. In the end, although the justices did not believe his claim of mistaken identity, out of an abundance of caution (*ex abundantia cautela*), they decided to inquire whether the principal in the underlying homicide case had been convicted. Having determined in the end that the charter of pardon had preceded the abjuration in time, the justices determined

³⁰⁶ Spelled "Orewell" in the roll, this may be the town of Orwell in either Cambridgeshire or Suffolk.

³⁰⁷ For the full record, see JUST2/18 AALT 0335 (1344), accessed June 17, 2015, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no18/bJUST2no18dorses/IMG_0335.htm.

that Gower's confession should be enough to send him to the gallows.³⁰⁸ Confessing a felony pursuant to seeking abjuration was therefore a risky business, as a person captured within the realm after such a confession might face immediate execution.³⁰⁹ In a 1263 Surrey eyre case, William Serle, who had recently been acquitted of involvement in the homicide of Simon le Kapiere, placed himself in the church of Chipstead and confessed to having killed his wife, Joan. During the abjuration process, William tried to leave the king's highway and was pursued and captured through the hue and cry. Oddly enough, William's wife appeared at gaol delivery and William was returned to gaol, eventually receiving a pardon.³¹⁰ It is unclear why he lied and began the abjuration process, but he was fortunate not to have met the fate of other abjurors who found themselves decapitated after they veered off the king's highway.

Confession as a Route to Turning King's Evidence

Perhaps driven by a desire to leave no crime unpunished, English felony law allowed self-confessed felons to avoid (or, more realistically in most cases, postpone) the gallows in exchange for bringing accusations against accomplices in crime. The legal treatise *Britton* explains: "If any felons will confess their crimes and accuse others and become approvers, let them be put out of penance, and let their confessions be presently received and enrolled by the coroner, and from that day forward let them have of the sheriffs three halfpence a day for their

³⁰⁸ See Y.B. Trin. 19 Edw. 3 (K.B. 1345), available at Luke Owen Pike, *Year Books of the Reign of King Edward the Third: Year XIX* (London, 1906), 175-177 and *Seipp's Abridgement*, no. 1345.119.

³⁰⁹ For another case of a confession gone awry, see Y.B. Mich. 8 Hen. 4, fol. 3a, no. 5 (K.B., 1406), *Seipp's Abridgement*, no. 1406.104, a case involving a felon who confessed to abjure the realm and was then, according to his account, forcefully removed from the church. When hauled into court, the man stood mute, but this was not well received by the justices who observed that he had spoken previously to make his confession, which suggested that he was therefore mute by malice (*muet de malice*). In a last-ditch and unsuccessful attempt to avoid the gallows, the man tried to claim benefit of clergy.

³¹⁰ Stewart, ed., *1263 Surrey Eyre*, 279-280, nos. 581-582.

support.”³¹¹ By the early fifteenth century, this was described in the Year Books as solely designed to benefit the king, and only incidentally enabling the approver to avert a trip to the gallows: a justice of King’s Bench explained that it was not for the approver’s advantage, but for the king’s.³¹² Plea rolls, of course, demonstrate that approvers often chose that route precisely to prolong their lives.³¹³ *Bracton* described the process by which one caught with the proceeds of theft, or more or less manifestly guilty of some other felony, might confess his offense and turn king’s evidence, bringing appeals against his accomplices in exchange for reprieve from the death penalty.³¹⁴ Unluckily for the legal historian interested in the use of confession in the criminal law sphere, the surviving records of confession to the coroner are typically brief, lacking the narrative richness of the stories produced by coroner inquests. The coroner’s initial record of a confession may have been lengthier when first handed over to the justices, but the final record kept in the rolls was necessarily limited in scope. Where confession was made to the coroner by someone wishing to abjure the realm or turn king’s evidence as an approver, the record frequently tells us little more than that the individual confessed either to a specific crime, typically a homicide or theft, or to a specific status, such as being a felon of the lord king or a thief (*latro*). The record’s terseness as to the details of such confessions may be due to the fact that adjudication had come to an end point: once a confession had been secured, the accused or suspected individual’s status changed from suspect to abjurer or approver, and no further

³¹¹ Nichols, ed. and trans., *Britton*, vol. 1, 28-29. See also Butler, *Forensic Medicine in Medieval England*, 151-152.

³¹² Y.B. Trin. 3 Hen. 6, fol. 50b-51a, no. 16 (K.B. 1425), *Seipp’s Abridgement*, no. 1425.078 (“...n’est my pur son avantage, eins pur l’avantage du Roy...”).

³¹³ See, e.g., Page, ed., *Three Early Assize Rolls for Northumberland*, 106 (describing the appeals brought by approver Gilbert Grom, a grain thief, who was said to have appealed several faithful individuals (*fideles*) in order to extend his own life (*pro vita ipsius Gilberti elonganda appellat eos*)).

³¹⁴ See Thorne, ed. and trans., *Bracton*, vol. 2, 429-431.

elucidation of intent was required. No trial would follow.³¹⁵ Intent, moreover, should have been manifest from the felon's contrite demeanor, particularly in the sanctuary context, which was pregnant with penitential under- and overtones.

By comparison, intent would be at issue when a felon, having confessed a crime to turn approver, then proceeded to bring accusations against alleged partners in crime. Here, in the absence of a direct confession from the accused accomplice, intent would be murky. Surviving records of approver accusations hint that this was indeed a concern for the court, giving rise to the formulaic introduction of words of *scienter* in approver accusations. For example, an approver might appeal an accomplice of harboring him, *knowing* that he was a felon, or of receiving goods, *knowing* that they had been stolen, or of committing a particular crime “feloniously as a felon.”³¹⁶ In the absence of a direct confession, some nod to the accused individual's guilty or felonious state of mind was required formulaically. One might compare these formulaic phrasings with the approver's earlier confession, which simply pointed to a theft or some other crime without any qualifying phrases as to state of mind, which was presumed to have been of the guilty variety under the circumstances. This is not to suggest that an approver's perspective as to his accomplice's state of mind was dispositive. Far from it, indeed, as the word of a confessed felon was not taken as reliable, such that the vast majority of these accusations

³¹⁵ One might not otherwise be deemed a felon in the absence of a confession or trial. See, e.g., Y.B. Pasch. 21 Edw. 1 (C.P. 1293), as it appears in Alfred J. Horwood, ed., *Year Books of the Reign of Edward the First: Years XXI and XXII (1293-1294)*, vol. 2 (London: Longman, 1873), 57 and *Seipp's Abridgement*, no. 1293.133, a case in which it was observed that felony does not attach to a person before he is convicted as guilty (“Nota, ke felonie nest jammes asteynt en nulli persone avant ke la persone seyt asteynt par Jugement, coupable de fet.”)

³¹⁶ For *Bracton's* formula for accusations of knowing receipt of stolen goods (*de receptamento scienter*), see Thorne, ed. and trans., *Bracton*, 431. *Britton* suggests that accusations might be made that an accomplice had committed a particular crime “feloniously as a felon,” a formulation that also would have implied a condemnable state of mind. Nichols, ed. and trans., *Britton*, vol. 1, 83.

brought by approvers failed to result in convictions.³¹⁷ *Bracton* suggests that approver procedure was designed to mitigate these concerns, requiring the approver to “describe some specific thing and all the circumstances (*omnes circumstantias*),” in addition to being able to recognize the appellee in court as a confirmation of their past relationship.³¹⁸ Of course, there is also the possibility that these references to scienter were added in by the courtroom scribe rather than reflecting the actual statements of the approver. Even so, they point to a recognition of the fact that the weakness of an accusation as opposed to a confession was the second-hand nature of the access to the accused person’s state of mind.

This practice of accusation made subsequent to an approver confession stood in direct conflict with church teaching on the appropriate demeanor of a confessing penitent. By its very nature, confession was intended to be an ego-centered event, focused on the sins of the confessing party and not on the faults of others. *Ego confiteor*, not *j’accuse*. A penitent should reveal personal failings only, a theme that comes across in Chaucer’s *Parson’s Tale*. There, the protagonist urges “that no other man tell his sin but he himself”.³¹⁹ Such restrictions invoked the repeated refrain of the Psalms, that only God knows man’s innermost thoughts.³²⁰ A third-party may have knowledge of another individual’s actions, but only the individual himself or herself could make known his or her state of mind.

³¹⁷ On distrust of approver’s testimony, see Butler, *Forensic Medicine in Medieval England*, 130.

³¹⁸ Thorne, ed. and trans., *Bracton*, vol. 2, 431. Year Book evidence also suggests that approvers were required to swear on a Bible that he would appeal all those who were guilty only, not bring false accusations out of malice. See Y.B. Mich. 9 Hen. 5 (Newgate Gaol Delivery 1421), available in Ralph V. Rogers, *Year Books of the Reign of King Henry the Fifth* (Wurzburg, 1948), 22 and *Seipp’s Abridgement*, no. 1421.102.

³¹⁹ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 325 (“that noon oother man telle his synne but he hymself...”)

³²⁰ See, e.g., Psalm 44:21, 69:5, 139:1-2. See also Jeremiah 17:10.

This restriction on accusations in confession was taken very seriously. Thomas de Chobham, an English theologian writing in the early 13th century, spoke to the issue at length and described the pressures under which a condemned person might be placed in the hope of implicating partners in crime. Chobham devoted a brief section of his *Summa confessorum* to the issue of confessions made by accused or condemned individuals. He disapproved of gallows confessions, which he feared did nothing to aid the felon's soul and ran the risk of producing scandal.³²¹ Even more adamantly, he railed against those who pressured felons to reveal their partners in crime. "Even worse," he wrote, "is that they persuade the condemned so that he would say who were his associates and reveal their sins. For no one should confide in confession unless it's his own sins and not another's, nor should he accuse anyone but himself."³²² He described it as the general rule (*generalis regula*) "that one never expose another's sin, although one confesses one's own sin."³²³ Moreover, as John Mirk would argue, such accusations evoked the sin of pride, insofar as the confessing individual might try to appear less culpable by pinning blame on others.³²⁴ A later sermon from the Second Sunday in Lent, identified as Lollard,

³²¹ Chobham, *Summa Confessorum*, ed. Broomfield, 203-204. "From this it is evident that the laity sin greatly who incite and invite the condemned to the gallows so that they might confess in the presence of all people whatever he had ever done, and who say to him that this benefits his soul, which is not true, especially if he committed many egregious crimes, the hearing of which would scandalize the entire public, just as if it happened at some time that someone, so incited, confessed he had slept with his mother, and still his mother was living, from which there was great scandal in the populace." ("Ex hoc patet quod multum peccant laici qui incitant et invitant damnatum ad patibulum ut confiteatur coram omni populo quicquid ipse unquam fecerit, et dicunt ei quod hoc prodest anime sue, quod non est verum, precipue si fecerit multa enormia crimina, quibus auditis totus populus scandalizaretur, sicut contigit aliquando quod aliquis ita incitatus confessus est se concubuisse cum matre sua, et vivebat adhuc mater eius, unde magnum scandalum fuit in populo.")

³²² Chobham, *Summa Confessorum*, ed. Broomfield, 204. ("Deterius etiam est quod persuadent damnata ut dicat qui fuerint socii eius et revelat peccata eorum. Nullus enim in confessione debet confiteri nisi propria peccata et non aliena, nec debet accusare alium sed seipsum.")

³²³ Chobham, *Summa Confessorum*, ed. Broomfield, 204. ("Hec est autem generalis regula quod nunquam detegat alienum peccatum quamvis confiteatur suum proprium peccatum.")

³²⁴ See Peacock, ed., *Instructions for Parish Priests*, 32, lines 1025-1028. "Hast thou any time witt heart proud / Another's sin spoken out / And thine intencion such was, / That they sin should seem the

preached a similar message, arguing that it is crucial “that a man accuse only himself, and not his neighbor,” in confessing, complaining that some men confess their neighbor’s sins rather than their own, as if their neighbor had given them power of attorney to confess on his or her behalf.³²⁵

Surely individuals would have recognized some difference between sacramental confession, made privately to one’s priest, and confession to the coroner before witnesses with no promise of absolution. Nevertheless, the merging of confession and accusation in the secular criminal law context gave rise to clerical discomfort, and may also have troubled coroners, justices, and jurors familiar with the ecclesiastical stipulation against accusation within confession. This discomfort may have been heightened when the confession-accusation combination took place within sacred space, as in the 1263 case of Henry de Mitcham, who confessed to abjure the realm but also indicted William de Tooting of being his partner in crime, all while within the chapel of the hospital of Merton.³²⁶ While Anthony Musson has already fleshed out many of the likely reasons for the high acquittal rate of individuals accused by approvers,³²⁷ I would like to add the additional possibility that approver accusations simply did

less?” (“Hast þou any tyme wyth herte prowð / A-noþeres synne I-spoken owt, / and þyn entencyone syche was, / Þat þy synne schulde seme þe las?”)

³²⁵ Cigman, ed., *Lollard Sermons*, 159. (“Þe iiij condicion is þat a man acuse oonly himself, and not his neiþbore, as summe men done þat tellen her neiþboris synnys or shrift, and leuen her owne, 3e! þou3 her neiþboris haue 3ouen hem no lettris of atroune to seie for hem in þat caas!”)

³²⁶ Henry abjured the realm, and William, who had not initially been attached by the sheriff, was eventually brought to the eyre where he put himself on the country and was acquitted. Stewart, ed., *1263 Surrey Eyre*, 248-249, no. 512.

³²⁷ An acquittal rate as shockingly high as 98%. See, generally, Anthony Musson, “Turning King’s Evidence: The Prosecution of Crime in Late Medieval England,” *Oxford Journal of Legal Studies* 19 (1999), 467-479, especially 478 (arguing that the high acquittal rate may reflect the low esteem in which approvers were held, public concern with system-wide abuses, and the fact that, by design, the system of approvers was intended mainly to deter future crimes by alleged accomplices). On the tradition of approvers generally, see also Frederick C. Hamil, “The King’s Approvers: A Chapter in the History of English Criminal Law,” *Speculum* 11:2 (1936), 238-258. This concern with the reliability of accusations brought by criminals has deep roots in western thought. Seneca, writing about the effects of anger in the

not sit well with jurors, who were likely to be familiar with the church's prohibition on accusations made during confessions. The system for felony prosecution was, of course, built upon accusations of others, whether through presentment or private prosecutions. But accusations took on a different light when brought by someone who was himself confessing to felony. In fact, such accusations may not have sat well with approvers either, who were often coerced into bringing appeals in the first place,³²⁸ and who so very often declined to follow through with prosecuting their appeals.³²⁹ While one might argue that approvers who dropped their suits were simply keen to avoid trial, this seems less than entirely plausible a motivation in light of the alternative: an immediate trip to the gallows.

It is well known that approvers sometimes turned king's evidence under great duress, not simply to postpone capital punishment.³³⁰ One Year Book case from the late thirteenth century,

first century A.D., described as one of its effects "the vile countercharge of criminals," a reference to a practice not unlike the use of approvers, or self-confessed felons, to bring accusations against others. Seneca, "De Ira", I, in *Moral Essays*, transl. Basore, 110-111.

³²⁸ See, e.g., Hamil, "The King's Approvers," 248-251 (describing the use of extortion by gaolers and other officials). See also Musson, "Turning King's Evidence," 470-471.

³²⁹ A phenomenon which Hamil attributes to shame at betraying accomplices, fear of battle, or because the accused was innocent and had appealed under duress. Hamil, "The King's Approvers," 251. Musson describes instances where an approver withdrew an appeal and testified as to prior coercion in gaol. Musson, "Turning King's Evidence," 470. For examples of this frequent phenomenon, see Stewart, ed., *1263 Surrey Eyre*, 334, no. 706; 345, no. 735.

³³⁰ See, e.g., Musson, "Turning King's Evidence," 470. See also *Calendar of Inquisitions Miscellaneous (Chancery)*, vol. 3 (1348-1377) (London: His Majesty's Stationery Office, 1937), 275, no. 731 (stating that one Robert of Humberston, arrested for stealing a pair of boots, was put in the stocks and "so tormented" that he lost both feet, all for refusing to accuse others and turn king's evidence). And see Y.B. 1 Hen. 5 (Exeter Gaol Delivery, 1413) as appears in Fitzherbert *Corone* 441 and *Seipp's Abridgement*, no. 1413.084, detailing a 1413 gaol delivery case in which a defendant requested a coroner and was hanged after refusing to confess before the justices without a coroner present, presumably fearing that abjuration or becoming an approver might be precluded if he confessed without the coroner in attendance. But see Y.B. (Hil.) 12 Hen. 4 (Salisbury Gaol Delivery 1411), as it appears in J. H. Baker, "John Bryt's Reports (1410-1411) and the Year Books of Henry IV," *Cambridge Law Journal* 48 (1989), 105 and *Seipp's Abridgement*, no. 1411.103, a case in which a justice, out of conscience (*de conscience*), explained to a potential approver that he should not confess to felony thinking this would help him delay his trip to the gallows. The defendant appears not to have understood the procedure behind turning king's

for example, details how one Richard le Botiler claimed to have made a felony confession, turning king's evidence, due to the exigencies of prison. Richard was the eldest son and heir apparent of Robert le Botiler, a local landowner. His father claimed that Richard had been roughly taken off to prison, where he had admitted being a thief. The coroner was brought in to record an official confession; the Year Book reports that the coroner "wrote his confession word for word, and handed it over thus written to the justices."³³¹ The justices, in turn, sent for Richard "to see if he wished to admit that he confessed before the coroner."³³² Richard denied the truth of the confession, saying that "he made it under the strain and duress that he endured in prison, so that he thus might relieve himself from anguish."³³³ The Year Book purports to record Richard's actual words in pleading for mercy: "I am good and faithful, and I know nothing evil of anyone, and that confession I made was due to the duress of prison; and I am a cleric, so that for good and evil, saving to me my clerical privilege, I place myself on the country."³³⁴ Richard was remanded to prison, and his story was further complicated when his father died, leaving him as heir of his estate. The justices' dialogue suggests that the case was complicated due to the multitude of factors involved, particular Richard's prior confession, which was officially recorded by the coroner, and his subsequent claim of benefit of clergy. Richard's family's

evidence, believing that he might bring appeals against others to save his life without having himself confessed first to a felony before the coroner.

³³¹ Alfred J. Horwood, ed., *Year Books of the Reign of Edward the First: Years XXX and XXXI (1302-1303)*, vol. 3 (London: Longman, 1863), 543 and *Seipp's Abridgement*, 1295.023. ("Et coronator scripsit confessionem suam de verbo ad verbum, et eam tradidit sic scriptam Justiciariis.")

³³² Horwood, ed., *Year Books of Edward I (1302-1303)*, vol. 3, 543. ("...ad videndum si fateri vellet quod cognovit coram coronatore.")

³³³ Horwood, ed., *Year Books of Edward I (1302-1303)*, vol. 3, 543. ("...dixit quod eam fecit rigore et dirricione quam sustinuit in prisona, ut sic relevari posset ab angustia.")

³³⁴ Horwood, ed., *Year Books of Edward I (1302-1303)*, vol. 3, 543-544. ("Sum bonus et fidelis, et nil mali scio de aliquo, et illam confessionem quam feci propter duritiam prisoniae; et clericus sum, unde de bono et malo, salvo meo privilegio clericali, me pono in patriam.")

stature within the community may also have placed pressure on the justices, which may explain why his confession did not result in an immediate bee-line toward the gallows.

Self-Defense, Duress, and Other Pleas for Mercy

While the legal record does not tend to identify these narratives as confessions, pleas geared toward access to an acquittal or pardon often involved some form of confession.³³⁵ For example, in the absence of eye witnesses, a person wishing to claim self-defense might admit to having committed a homicide, but then qualify this admission with a description of a preceding attack by the deceased. The idea was not that the self-defender was free of guilt, but that he or she acted, to borrow *Bracton's* phrase, with sorrow of heart, and therefore was not as culpable as a person who committed a homicide with a felonious heart. This process of admission or confession also underpins many other pleas for mercy, such as women claiming to have acted under duress from their husbands, or persons claiming to have killed accidentally rather than deliberately. Confessions therefore underpin many cases that proceeded to acquittal or pardon, and confession may frequently have been requisite in the absence of eyewitnesses to secure a merciful outcome.

In a 1249 Wiltshire case, for example, Walter, the bishop of Winchester's shepherd, put himself on the country when accused of the homicide of Roger de Fonte. The narrative that emerged at trial described how Roger had entered the bishop's sheepfold, trussed up a sheep, and had begun to carry it away furtively. Witnessing this, Walter chased Roger, who in turn struck Walter with a staff. Walter struck back, killing Roger. Faced with a felony accusation, Walter chose to confess having committed the fatal violence against Roger. However, he argued that he struck Roger "not to kill him but to defend himself from him and to save his lord's sheep." The

³³⁵ This point is also made with regard to self-defense pleas in Butler, *Forensic Medicine in Medieval England*, 152-156.

jury viewed Walter's plight sympathetically, concluding that Walter was a thief bent on stealing the bishop's sheep, and that Walter not only chased him but also raised the hue. The jury concluded that Walter had not killed Roger by felony, but only in self-defense, and Walter was acquitted outright.³³⁶

In some instances, a confession combined with a claim of self-defense might prove insufficiently compelling to merit mercy. In a 1321 case that arose during the London Eyre, a woman named Isabel demonstrated a fairly sophisticated understanding of felony procedure, insofar as she committed homicide within a church and then remained within its walls, attempting to claim sanctuary.³³⁷ Unsure how to respond, the coroner and sheriffs sought advice from the justices in eyre, who in turn approached the local ordinary for advice, and then took a respite in order to send queries to the Archbishop of Canterbury and others. The record notes that the ordinary produced a decretal indicating that such persons as Isabel should not be awarded sanctuary due to the boldness and calculation involved in committing a crime within sanctuary walls. After being hauled before the justices in eyre, Isabel initially tried to stand mute, but the justices warned her that this could be to her detriment if it were later determined that she had done so falsely. She finally relented and admitted to having committed the homicide, but saying that it was in self-defense. The justices, in turn, advised her to plead not guilty and put herself on a jury, which ultimately issued a guilty verdict. Although the record claims that the justices treated Isabel with extra gentleness, not hanging her immediately as they might have done with a man, it seems that the woman's bald attempts to work the system may have placed her in disfavor with the verdict-delivering jury.

³³⁶ For the full translation of the case narrative, see Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 184, no. 165.

³³⁷ See Y.B. 14 Edw. 2 (London Eyre 1321), as it appears in Cam, ed. and trans., *London Eyre of 1321*, vol. 1, 73-76 and *Seipp's Abridgement*, no. 1321.124.

Education of Jurors

Finally, confession played another less obvious but influential role in all felony cases that proceeded to trial by jury: as a teaching tool, confession was one of the central avenues through which medieval English jurors learned to examine their own consciences and to familiarize themselves with the church's teachings on the nature of guilt and sin. In fact, confession's ubiquity may be due in part to its role as a locus for teaching. Whether practiced in the church or criminal law sphere, confession served as a teaching moment. Within the church confessional, remorseful individuals were instructed in the complexities of sin and the requirements for salvation; they were also potentially tested on the basic tenets of the faith, which were to be reinforced through the parish priest's preaching regimen. One might be skeptical as to the extent of the learning imparted through confession, but even the simple act of examining one's conscience prior to confession involved reflection upon the nature of guilt and innocence, one which might stand to be corrected by a priest if a person confessed to things that were not truly sins, or failed to confess fully to more troubling behavior. The recipient of a confession also stood to learn: the confessor, coroner, or justice receiving a confession gained insight into an otherwise secret and sacred realm, that could only be laid bare for others once a penitent individual made the decision to articulate his or her failings. Confessions made in the open, whether before the coroner and others gathered in a sanctuary space, or even at the gallows in a convicted criminal's final moments, had the potential to instruct others in paths best left unfollowed.

In her study of confession in late medieval England, Katherine Little argued that confession was designed to work alongside preaching as a means to instructing the laity in the essentials of their faith. In fact, confession and sermons were intended to work in tandem:

laypeople would hear the basic required beliefs in sermons, and were expected to demonstrate their understanding of and compliance with these beliefs in the confessional context in a private conversation with their confessors. According to Little, pastoral texts presented “preaching and confession as two sides of the same coin for instructing the laity.”³³⁸ Marjorie Woods and Rita Copeland have made the case for an even more pervasive connection between confession and education: they suggest that the thirteenth century was a time of growth both in the exercise of confession and in the development of elementary education, beginning with the creation of the preaching and teaching orders of Franciscans and Dominicans early in the century, down to the insertion of penitential texts into school textbooks.³³⁹ According to Woods and Copeland, the idea of *disciplina*, or “the regulation of knowledge and the regulation of the self,” connected classroom and confessional.³⁴⁰ Some penitential texts, such as the *Peniteas cito* of William de Montibus (c. 1140-1213), were written in mnemonic verse conducive to classroom instruction; the *Peniteas cito* became increasingly popular a century after its author’s death and remained a mainstay of educational texts in the fourteenth and fifteenth centuries.³⁴¹ By engaging with the penitent and testing him or her on the fundamentals of the faith, the practice described by Little above, the confessor also assisted the penitent in developing *disciplina*, “an internalized system of self-regulation” that might, in turn, help in averting future occasions of sin.³⁴²

³³⁸ Little, *Confession and Resistance*, 5-6.

³³⁹ Woods and Copeland, “Classroom and Confession,” 376. See also A. G. Little, *Studies in English Franciscan History* (Manchester: University Press, 1917), 158-192. On the Dominican order, its dissemination of ideas and texts, and its role in education and preaching, see generally, M. Michèle Mulchahey, “*First the Bow is Bent in Study: Dominican Education before 1350*” (Toronto: Pontifical Institute of Mediaeval Studies, 1998).

³⁴⁰ Woods and Copeland, “Classroom and Confession,” 376-377.

³⁴¹ Woods and Copeland, “Classroom and Confession,” 385-386.

³⁴² Woods and Copeland, “Classroom and Confession,” 377.

Thomas Tentler has summarized the development of private penance in the late twelfth and early thirteenth centuries, also focusing on the relationship between confession and education. According to Tentler, penance was lightened, contrition became essential, Lateran IV made private confession obligatory, and the priest's role in forgiveness became better defined in the ensuing years.³⁴³ Indeed, Lateran IV affirmed the humble parish priest's power to absolve sins and administer penance. Post-Lateran IV sources suggest that some effort was made on the parish level to impose these new requirements for lay education. Only a few years after Lateran IV, for example, the Council of Oxford (1222) encouraged pastoral teaching about the Ten Commandments, sacraments, vices and virtues, and other essentials.³⁴⁴ The synodal statutes of Richard Poore, issued in the diocese of Salisbury shortly after Lateran IV, specified that priests should inculcate in their parishioners, both in confession and in preaching, that "all commingling of men and women, unless excused by marriage, is a mortal sin." A priest who failed to use the dual opportunities of confession and preaching to spread the word about the mortal peril involved in fornication could be "punished canonically as a fornicator or as one consenting to fornication."³⁴⁵ On a broader level, the 1224 Statutes of Winchester, issued by Bishop Peter des Roches, advised priests to take the opportunity of confession to instruct the laity in such core issues as the Trinity, the passion, and the incarnation, and to ensure that they knew the Our

³⁴³ Tentler, *Sin And Confession On the Eve of the Reformation*, 16.

³⁴⁴ See Miri Rubin, "What did the Eucharist Mean to Thirteenth-Century Villagers?" *Thirteenth Century England IV: Proceedings of the Newcastle Upon Tyne Conference, 1991*, P. R. Coss and S. D. Lloyd, eds. (Woodbridge: Boydell, 1992), 50.

³⁴⁵ Powicke and Cheney, eds., *Councils & Synods*, vol. 2, part 1 (1205-1265), 72. "In confessions and sermons it is to be inculcated often to the laity, and especially on major holy days, that all commingling of men and women, unless excused by marriage, is a mortal sin. And if a priest is found to be negligent in announcing this salutary doctrine, then he is to be punished canonically as a fornicator or as one consenting to fornication." ("In confessionibus et predicationibus sepius laicis inculcetur, et precipue maioribus solempnitatibus, quod omnis commixtio maris et femine, nisi per matrimonium excusetur, est mortale peccatum. Et si in denuntiatione huius salubris doctrine sacerdos negligens inventus fuerit, tanquam fornicator vel consentiens fornicatoribus canonice punietur.")

Father and Apostles Creed in the vernacular.³⁴⁶ Similarly, in a c. 1238 letter to the clergy of the diocese of Lincoln, Robert Grosseteste instructed, with regard to basic prayers and the creed: “when people come to confession they are to be carefully examined as to whether they know them and be instructed in them when appropriate by their priests.”³⁴⁷ This advice was repeated later in the Peckham Constitutions (1281), which required priests to instruct parishioners in such foundational topics as the creed, commandments, and sacraments four times annually.³⁴⁸ While sermon manuals incorporated these basic teachings, the *summa* literature focused largely on helping priests to differentiate mortal from venial sin within the context of the new annual confession framework.³⁴⁹ Whether or not bishops’ directives were implemented on the parish level cannot easily be gleaned from the surviving evidence, but we do at least know that the church hierarchy was intent upon educating the laity more extensively on a range of matters pertaining to sin and conscience.

Conclusion

Other factors were surely at play in medieval English guilt assessment. For example, some consideration must have been given to a defendant’s comportment in a crime’s aftermath. A pardon might be conditioned on a killer making peace with the homicide victim’s kin.³⁵⁰ A homicide resulting from a quarrel between acquaintances or friends might be treated differently if the two had reconciled prior to the death. For example, in a late thirteenth-century

³⁴⁶ Powicke and Cheney, ed., *Councils & Synods*, vol. 2, part 1 (1205-1265), 134, no. 51. (“Sacerdotes in penitentiis dandis diligenter parochianos suos de fide trinitatis, passionis, et incarnationis, secundum quod convenit laicis, instruant, et caute provideant ut orationem dominicam non ignorant, et symbolum apostolorum saltem in materna lingua.”)

³⁴⁷ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 184-185.

³⁴⁸ Pfander, *Popular Sermon of the Medieval Friar*, 3 (n. 11), 44.

³⁴⁹ Tentler, “Summa for Confessors as an Instrument of Social Control,” 109, 113-117.

³⁵⁰ See Summerson, ed., *Crown Pleas of the Devon Eyre*, 77, no. 466.

Bedfordshire case, the initial coroner's record indicated that John son of Moses of Henlow had been arguing with William Hunfrey of Stotfold as they traveled from London to Shoreditch. Presumably in anger, John hit William's head with a staff. The two men reconciled, however, and according to the inquest William died twenty-five days later.³⁵¹ Remarkably, the eyre record survives detailing a later trial, in which the narrative changed. The trial narrative did relate a sudden quarrel (*mota contencione inter eos*) followed by a later death, but the death was said to have occurred not a few weeks later but a full half year (*per dimidium annum postea*). This may have signaled a desire by the trial jury to attenuate the causal connection between John's attack on William and the subsequent death, further bolstered by the fact that the trial record notes that John had permission to return to the locality, and that his only punishment would be forfeiture of his chattels for having taken flight.³⁵² One might reasonably conclude that the jury, having weighed all the circumstances, decided that forfeiture alone was sufficient punishment for a death resulting from an injury sustained during a heated argument, particularly when the victim had reconciled with his attacker. Juries likely took an expansive view of a defendant's comportment in a crime's aftermath, including this issue of reconciliation with crime victim and kin, but also taking into account flight from justice, the seeking of sanctuary, and confession.

In addition to such considerations of a crime's aftermath, medieval English juries must have weighed a variety of other factors in assessing the guilt of the alleged felons hauled before them. To the extent they could access such information, a jury would have considered factors antecedent to the alleged crime, including the defendant's reputation within the community, possibly the victim's reputation within the community, any prior criminal incidents, and other

³⁵¹ Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 104, no. 254.

³⁵² Hunnisett, ed. and trans., *Bedfordshire Coroners' Rolls*, 104, no. 254. The eyre record may be viewed at JUST1/10 AALT (1276), accessed May 10, 2015, http://aalt.law.uh.edu/AALT4/JUST1/JUST1no10/aJUST1no10fronts/IMG_0798.htm.

relevant conditions, such as long-standing enmity between the defendant and the crime victim. Great weight, as we have seen above, was attached to the circumstances of the alleged crime itself, both in terms of the nature of the actus reus and with regard to the defendant's state of mind, often accessible only indirectly through a fleshing out of the circumstances. Furthermore, I contend that juries, when possible, would have weighed an accused individual's states of mind antecedent and subsequent to the alleged crime, antecedent states including such things as a long-term habituation toward wrath or shorter-term premeditation, and subsequent states including demonstrations of contrition, remorse, or defiance. In the next chapter, I take this complex vision of guilt assessment and place it in the context of the act of judging itself, exploring the mechanisms involved in judging, and the fear and familiarity bound up in the process.

CHAPTER FIVE

Mens Iudicis et Iuratis: The Mind of Judge and Jury

Introduction

“Therefore do not judge before that time, until the time when the Lord comes, He who will illuminate the hidden recesses, and make manifest the intentions of hearts”.¹ Such was the caution against earthly judgment from Paul’s first letter to the Corinthians, one of many such warnings throughout the Hebrew and Christian scriptures. A passage from Jeremiah similarly declared, “I, the Lord, search the heart and examine the kidneys,” a reference to the mind and emotions, respectively, “so as to give to each according to his ways and according to the fruits of his inventions”.² To the extent that mortal sin—and felony—was defined in large part by a sinner’s interior state, judging would more safely have been left to an omniscient God. A poem in a late fourteenth-century English manuscript captured this sentiment, suggesting that individuals might take more kindly to their neighbors if only they relinquished judging to God:

All such judging, as I suppose,
Should be reserved to God’s power;
So I think it best to be,

¹ 1 Corinthians 4:5 (“Itaque nolite ante tempus judicare, quoadusque veniat Dominus: qui et illuminabit abscondita tenebrarum, et manifestabit consilia cordium...”)

² Jeremiah 17:10 (“ego Dominus scrutans cor et probans renes qui do uniuersis iuxta viam et iuxta fructum adinventionum suarum”). “Adinventionum” seems to capture the idea of imagination, the product of human thought. See also 2 Esdras 16:55 (“ecce Dominus cognoscit omnia opera hominis et adinventiones illorum et cogitatum illorum et corda illorum.”)

For then shall charity be most dear...³

A roughly contemporary vernacular sermon quoted Saint Paul admonishing Christians not to judge before the Lord's final coming: "Will ye not deem before [that] time."⁴

Of course, judging was never left entirely to God in medieval England, nor has it ever been in any other human society, for that matter. Right judging was a hallmark of good kingship, and wrong judging the subject of many a medieval English morality tale. What becomes clear from an examination of literary sources is that the mind of a judge mattered—"judge" in England being a category within which we might include jurors as well—because a person's interiority determined his or her culpability. Judging on earth was a matter that would in turn be judged on the last day. Some of these literary tales offered little more than a critical commentary on contemporary elite judges, a genre that sometimes set its sights on mendicants, bishops, sheriffs, and other men prone to abuse their authority. Other stories were designed to offer guidance, through parable and metaphor, to elite men in authority and to the common man and woman who also engaged in the act of judging on a daily basis while navigating the vagaries of urban or rural life. The dangers of human judging struck a popular theme in medieval English literature, where stories often cautioned against the consequences for those who judged without mercy. The unmerciful would receive no mercy themselves at the Last Judgment. Despite these dangers, people did judge their neighbors in medieval England, influenced perhaps by these cautions, but not crippled by them. They judged others in quotidian matters, such as arguments

³ "Charity is no longer dear," in Furnivall, ed., *Minor Poems of the Vernon MS*, part 2, 704, lines 101-104. ("Al such demyng, as I wene, / Schulde beo reseruet to godes poueere; / So me þinkeþ hit best to beone, / Ffor þen schal charite ben most cheere.")

⁴ Ross, ed., *Middle English Sermons*, 121 ("Frendes, þise been þe wordes of þe holy apostell Seynt Poule and ben þus myche to sey to youre vndirstondyng: 'Will 3e not deme be-fore tyme.'") The sermon drew upon 1 Corinthians 4:5, quoted at the beginning of this chapter.

over etiquette on the streets, and they even judged one another in felony cases involving blood sanctions.

In this chapter, I will argue that two competing forces were at work in medieval English criminal trials. On the one hand, there was an overwhelming societal concern with the dangers of judging, which could place the soul of the judge or witness—whether a justice or juror—at risk of damnation, at the same time that it jeopardized the life of a felony defendant and his or her family’s future livelihood. This concern influenced the push to ban priestly involvement in the ordeal, and the efforts of influential clerics like Peter the Chanter and Robert Grosseteste to get priests entirely out of the business of blood judgments. In England, it may also have helped tip the balance in favor of a jury system of felony adjudication, which added the moral comfort element of removing from judges the burden of pronouncing a defendant’s guilt, and which distributed the burden of issuing a verdict among twelve or more men.⁵ On the continent, this concern with judging weighed in favor of inquisitorial procedures dependent upon witness testimony and confession, again shifting some of the burden from judges. On the other hand, there existed—presumably in England and on the continent alike—a widespread norm of communal involvement in day-to-day prudential decision-making, a phenomenon perhaps reflected most clearly in the widespread use of juries and other communal decision-making bodies.⁶ While James Whitman attributes the ease with which England adopted trial by jury for felony cases after Lateran IV to a preexisting custom of compulsory accusation, James Masschaele emphasizes instead the cultural practice of using juries for all kinds of factual issues

⁵ On the transfer of the verdict burden from judge to jury, see Whitman, *Origins of Reasonable Doubt*, 150.

⁶ See Reynolds, *Kingdoms and Communities*, 7 (“My third argument is that there was much less difference in social and political organization—not least in its collective manifestations—between different parts of western Europe than seems to be generally thought.”), 33-36.

both within and beyond the area of criminal adjudication.⁷ Rather than focusing on royal coercion, Masschaele highlights the grassroots, cultural underpinnings of a widespread adoption of juries.⁸ I believe both these factors—a history of compelled accusation, and a precedent of widespread use of juries—were at work, and I would add a third, drawing in part upon the observations made by Daniel Lord Smail regarding social interactions in late medieval Marseille:⁹ namely, in medieval England, as in contemporary southern France, individuals commonly intervened spontaneously in disputes, a phenomenon I refer to here as third-party interventions. These interventions, which were sometimes taken under peril of death, reflect a communal norm according to which even the common man and woman on the street had the capacity, through the use of reason, to size up the justice in a particular situation and issue a prudential judgment. One might describe this phenomenon as Good Samaritanism, to put it kindly, or busybodiness, to put it less generously, but it reflected a sense of “communal functionalism”—a term employed by Cary Nederman in his work on John of Salisbury—that informed how jurors would have understood their role in felony adjudication.¹⁰ It was natural, in

⁷ Whitman, *Origins of Reasonable Doubt*, 133-135. Masschaele, *Jury, State, and Society*, 45-87. Masschaele observes: “In addition to making judgments of life and death, medieval trial juries decided a host of other more prosaic affairs: whether someone was free or serf; whether a lord had imposed unfair new burdens on his peasant tenants; whose version of the terms of an endowment was most accurate; whether a charter was genuine or false; whether someone had abused his right to collect tolls and so on.” *Ibid.*, 85. See also Macnair, “Vicinage and the Antecedents of the Jury,” 588 (arguing that even if a strong English monarchy helped bring about self-government, the origins of trial by jury are not part of this phenomenon, as evidenced by the fact that the use of panels of locals was not limited to matters of royal interest).

⁸ Masschaele, *Jury, State, and Society*, 210. “Jury procedures permeated to the very base of society, relying on the courage, wisdom, and intelligence of peasants as well as more privileged individuals. In fostering the jury system, England’s rulers gave the village an active stake in the affairs of the kingdom. They charted a course defined by inclusiveness rather than exclusiveness, emphasizing participation rather than exclusion.”

⁹ See Smail, *The Consumption of Justice*, 6, 165-167.

¹⁰ See, generally, Cary J. Nederman, “Freedom, Community, and Function: Communitarian Lessons of Medieval Political Theory,” *The American Political Science Review* 86:4 (1992): 977-986.

other words, to testify to the guilt of another individual. After all, the English system of felony adjudication was built upon the accusations of one man against another, both in terms of allowing for private prosecution, but more broadly in the very idea of a jury of presentment bringing accusations against suspicious individuals. This played against, but also worked in relationship with, the reluctance to judge in blood sanction cases so aptly described by Whitman in *The Origins of Reasonable Doubt* and to be discussed below.

Also working to counter the effects of religious exhortations against judging was the widespread understanding that it was the king's obligation to keep the peace, a duty that was delegated to his royal justices and other public servants, as described in the *Bracton* treatise in its discussion of the king's delegated authority:

[But] since he cannot unaided determine all caused [and] jurisdictions, that his labor may be lessened, the burden being divided among many, he must select from his realm wise and god-fearing men in whom there is the truth of eloquence, who shun avarice which breeds covetousness, and make of them justices, sheriffs, and other ministers and officials, to whom there may be referred doubtful questions and complaints of wrongdoing; men who will not stray either to the left or the right from the straight path of justice for material prosperity or fear of adversity but who will judge the people of God equitably, so that one may say of them, with the psalmist, that from their countenance came the judgment of equity.¹¹

This duty was delegated further, according to the terms of the Assize of Clarendon, to the lay juries called upon to gather information, name all suspects, speak the truth about an alleged crime, and issue a felony verdict. At a time when roving bandits and criminal gangs might terrorize villages and travelers, many jurors must have taken their role in the maintenance of the king's peace very seriously. Added to this was the growing commitment to leaving no crime unpunished, an ethos inspiring the criminal procedural reforms undertaken during the papacy of

¹¹ Thorne, ed. and trans., *Bracton*, vol. 2, 306-307.

Innocent III,¹² and one which likely had a ripple effect on the criminal prosecution efforts of kings and other rulers in England and on the continent.

Complicating all this was the issue of mind, which cut both ways in evaluating medieval English approaches to judging. On the one hand, there existed the common idea that *mens rea* was a matter not easily accessible to human judgment, and something that should therefore be approached with caution and circumspection. On the other hand, there was the idea that a true guilty mind made a person deserving of punishment, a factor that pushed in the direction of severe judging. Judges and jurors were tasked with getting this balancing right, taking care lest, to borrow the words of the *Bracton* treatise:

By judging perversely and against the laws, because of prayer or price, for the advantage of a temporary and insignificant gain, he dare to bring upon himself sorrow and lamentation everlasting, and lest in the day of the wrath of the Lord he feel the vengeance of Him who said, 'Vengeance is mine, I will repay,' on that day when kings and princes of the earth shall weep and bewail when they behold the Son of Man, because of fear of his torments, where gold and silver will be of no avail to set them free.¹³

Judging was not without its risks.

Methodology

As in earlier chapters, I rely heavily on literary evidence to bolster my claims about how jurors likely approached the task of felony adjudication. Here, in fact, my reliance on extra-legal sources, both religious and more purely literary in variety, is even more pronounced than elsewhere due to the limited self-conscious discussion of approaches to judge and jury decision-making within the legal literature. This is not a problem unique to thirteenth- and fourteenth-century England. A legal historian wishing to capture the anxieties and concerns of jurors today

¹² See Fraher, "Preventing Crime in the High Middle Ages," 222.

¹³ Thorne, ed. and trans., *Bracton*, vol. 2, 21.

might similarly come up against evidentiary constraints, insofar as jurors are not required to explain how and why they reached a particular conclusion. Exit interviews and journalistic investigation, of course, expand the options for latter-day legal histories but are regrettably unavailable to the medieval legal historian. Instead, this chapter will extrapolate jury mindsets from a diverse array of sources never written with the intention of elucidating jury mindsets. In some instances, I will draw upon literature that may never have been read by a single medieval English juror. Wherever possible, I will bolster such evidence with related examples, albeit sometimes not as fully articulated, from sermons and other forms of literature more likely to be among the various genres accessible—whether directly through personal reading, or more indirectly through listening to sermons, saints’ legends, or advice given in the confessional—to the kinds of men called upon to serve as inquest and trial jurors. I presume some absorption of ideas from these various sources, particularly themes that are harped upon repeatedly in a wide range of genres, themes such as the importance of mercy and the dangers inherent in the act of judging others. I also presume some measure of application of these ideas to the quotidian acts of judging and witnessing undertaken by jurors. Some of these literary sources, even if not readily accessible to the social class of men serving on juries, may also offer a window onto how jurors would have approached the process of judging, or at the very least may offer some evidence of what the author *believed* jurors were doing in handling felony cases. My desire is not to present an image of a simple transmission of ideas from pulpit to jury room, but rather to offer a picture of complexity, in which competing visions of the importance of severe justice and loving mercy must have given jurors great pause in handing down guilty verdicts when faced with difficult felony cases.

Institutional Background

Throughout this chapter, I shall discuss judging as an exercise undertaken both by justices and jurors, at the risk of eliding two differentiated tasks. Jurors might more accurately be described as witnesses whose role was distinct from that of the common law judge; after 1215, jurors combined the role of witness and judge when issuing felony verdicts.¹⁴ Nevertheless, contemporary texts suggest that judges and jurors shared some of the same challenges, pressures, and temptations.¹⁵ Jurors were generally the fact finders in felony cases, but in some instances we can find evidence of justices taking steps to secure background information about a crime.¹⁶ Furthermore, while contemporaries would not have conflated the two roles, both judge and juror were seen to be engaged in a dangerous business which, in felony cases, placed at risk both a defendant's bodily life and the judge's or juror's soul. While judges were seen to be the source of a final judgment, or doom, they were also perceived to be beholden to the verdict of the country.

In fact, great deference was given to juror discretion. As the *Placita Corone* described the judge's role in the second half of the thirteenth century, judges were expected to "give

¹⁴ See Whitman, *Origins of Reasonable Doubt*, 128. See also Macnair, "Vicinage and the Antecedents of the Jury," 538-539, 547, 589-590 (describing the distinct role of judge and juror/witness, but acknowledging that all judges are in part witnesses, and all witnesses partly judges).

¹⁵ See, e.g., Whittaker, ed. and trans., *Mirror of Justices*, 138 (describing judges wrongfully judging out of ignorance, and then noting that "what has been said of judges is to be understood also of jurors who testify in notorious cases.") See also Gerald Robert Owst, *Literature and Pulpit in Medieval England: A Neglected Chapter in the History of English Letters & of the English People* (Oxford: Basil Blackwell, 1966), 342, which describes how lawyers, jurors, and others were lumped together in satirical critiques. (Owst notes that the fox in the tale of Reynard is described by the author of the English version of the *Gesta Romanorum* as personifying "vokettes, prelates of causes temporall, courteers, jurours and wily men".)

¹⁶ At the 1276 London eyre, in a case involving a 1263 double killing, when previous inquests failed to identify the culprits, the justices expressed a desire to interview men from the ward of Thomas de Wymborn, where the homicides had taken place. Weinbaum, ed., *London Eyre of 1276*, 40-41, no. 146.

judgment in accordance with the jury's verdict."¹⁷ *Bracton* suggested that justices might occasionally question jurors if they suspected that the jury had handed over a false verdict. In such circumstances, according to *Bracton*, "the judge, if he is wise, ought first to inquire (if he has doubts and the jury is suspect) from what man or men the twelve jurors have learned what they put forward in their *verdictum* concerning the indicted man," and then decide whether "any deceit or wickedness lies behind it."¹⁸ Nevertheless, jury verdicts were typically final, and the writ of attainder was not yet in use to punish juries for issuing false felony verdicts.¹⁹ The legal record offers limited color on the relationship between judge and jury, but literary evidence suggests that judges typically deferred to juries once a verdict had been issued.²⁰ In the *South English Legendary*, for example, we find a literary account of the trial of Jesus in which Saint Veronica relayed news of Jesus' crucifixion to the Roman emperor. In her description, Pilate served as justice, while the Jews were the equivalent of a jury "naming" their verdict:

Veronica said how the Jews to painful death him named
And how Pilate the Justice the doom gave thereto...²¹

¹⁷ Kaye, ed. and trans., *Placita Corone*, 2 ("solom ce ke la enqueste dit, si rendront lur jugement apres.")

¹⁸ Thorne, ed. and trans., *Bracton*, vol. 2, 404.

¹⁹ Whitman, *Origins of Reasonable Doubt*, 154. See also Green, *Verdict According to Conscience*, 19. Attainder was available in civil cases. See Langbein et al., *History of the Common Law*, 418.

²⁰ On the issue of judge-jury "consensus" as opposed to jury "nullification," see Green, review of *Criminal Trial in Later Medieval England*, by Bellamy, 267 (arguing that what Bellamy calls "consensus" might better be described as "judicial acquiescence in jury nullification that could not easily be prevented.")

²¹ Charlotte D'Evelyn and Anna Jean Mill, eds., *The South English Legendary*, vol. 2 (London: Oxford University Press, 1965), 703, lines 148-149. ("Veroyne sede hou þe Gywes to stronge deþe him nom / & hou Pilatus þe Iustise þe dom 3af þer to".) See also *ibid.*, 697-698, lines 1-20, relaying a story from the childhood of Pilate in which the young boy, described as of illegitimate birth, slayed his half-brother "with guile" (*myd gyle*). On the depiction of Pilate as the quintessential unjust judge in later medieval drama, see Owst, *Literature and Pulpit in Medieval England*, 495-496. See also Sister Mary Aquinas Devlin, ed., *The Sermons of Thomas Brinton, Bishop of Rochester (1373-1389)*, vol. 2 (London: Royal Historical Society, 1954), 246-247. For French vernacular sermon excerpts on the role of Pilate in Jesus' passion, see Nicole Bériou, *L'avènement des maîtres de la Parole: La prédication à Paris au XIIIe siècle*, vol. 2 (Paris: Institut d'Études Augustiniennes, 1998), 794-798.

Veronica implied that Pilate, as judge, was essentially required to obey the wishes of the Jews, as jury. Namely, when the Roman emperor threatened Pilate with death for his role in Jesus' crucifixion, Pilate responded with the excuse that he had only been carrying out the inquest's verdict, as he was obligated to do:

But the hateful Jews, quoth Pilate, to the death him brought.
 Without thee, quoth the emperor, such thing never would they have thought.
 Certainly sire, quoth Pilate, you may not deny this,
 That I did not condemn him to death, but rather I had to certainly
 For the inquest against him said that he destroyed our law
 And law requires that all such I should put to death
 And I there who thy Justice was through thine order and thy decree
 Must need give the doom when the inquest rests [i.e. in judgment]...²²

Nicholas Love similarly created this kind of image of Pilate acceding to the wishes of the Jews collectively speaking, relating how the princes, pharisees, and aldermen of the Jews expressed joy and gladness after Pilate “had their intent fulfilled.”²³ Of course, in Veronica's account, the emperor was not persuaded by Pilate's efforts to distance himself from the Jewish inquest's verdict: he sentenced Pilate to “painful dark prison” (*stronge prison & deork*), the experience of which was so troubling as to push Pilate to suicide by an apple paring knife.²⁴

²² D'Evelyn and Mill, eds., *South English Legendary*, vol. 2, 704, lines 193-200. (“Bote þe lufere Gywes quaþ Pilatus • to þe deþe him brouzte / Wyboute þe quaþ þe emperour • such þing neuere hii ne þouzte / Certes sire quaþ Pilatus • y ne may nozt asake þis / Þat ich ne dempnede him to deþe • ak ich moste nede ywys / Vor þe enqueste vpe him sede • þat he struyde oure lawe / & lawe zef þat alle suche • me scholde brynge of dawe / & ich þar þat þi Iustise was • þorw þin heste & þi rede / Moste nede ziue þe dom • whanne þe enqueste sede...”)

²³ Love, *Mirror of the Blessed Life of Jesus Christ*, ed. Sargent, 170. (“And þan were þe princes & þe pharisees & þe aldermenne ioyful & glade, þat þei hade hir entent fulfillede.”)

²⁴ D'Evelyn and Mill, eds., *South English Legendary*, vol. 2, 705, line 213. For the suicide scene, see *ibid.*, 705-706. A more sympathetic portrait of Pilate appears in a fourteenth-century homily from Bishop Brunton of Rochester, who argued that “Christ had manifold testimony of his own justice from his opponents, namely from Pilate, Pilate's wife, Judas the Betrayer, the thief and the centurion,” and nevertheless “contrary to all justice was betrayed to death” while Barabbas, the “famous thief and murderer,” escaped his deserved death thanks to the unanimous efforts of the Jews. See the summary in Owst, *Literature and Pulpit in Medieval England*, 339.

Generally, however, in contrast to this story of Pilate and the emperor, English justices do not seem to have been punished for carrying out juries' verdicts.²⁵ This may explain why they conceded great discretion to juries. Aside from the occasional Year Book example of a judge ordering an acquitting jury to reveal who actually committed an alleged felony, we find little evidence of judges interfering routinely in jury decision-making.²⁶ One suspects that these examples made it into the Year Books precisely because they were exceptional. In fact, the prevalence of acquittals in the plea rolls suggests that judges were largely complicit in the relatively low felony conviction rate, permitting juries to hand down far more not-guilty verdicts and recommendations for pardon than convictions. This complicity—acquiescing in jury nullification or in acquittals and pardons well within the confines of the law—may reflect a shared concern with the dangerous possibility of wrongfully condemning a person to death. Both judges and jurors might have feared for their souls in such circumstances. “Who shall not fear that trial,” asked *Bracton* of the Last Judgment, “where the Lord shall be the accuser, the advocate and the judge? From his sentence there is no appeal, for the Father has committed all judgment to the Son; he shuts and there is none to open; he opens and there is none to shut.”²⁷ In

²⁵ And yet royal justices were by no means immune from punishment. See, e.g., Ralph V. Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985), 6 (describing Edward I's dismissal of ten judges from King's Bench and Common Pleas for alleged misconduct).

²⁶ See, e.g., Lib. Ass. 22 Edw. 3, fol. 94a, no. 39 (K.B. 1348), *Seipp's Abridgement*, no. 1348.247 (jury being told, after acquitting a person of homicide, that they should name the actual felon since the crime was notorious). See also the direct language of Justice Stanton in criticizing an eyre jury, in a civil plea of trespass, for issuing a not guilty verdict based on self-defense, rather than stating only whether or not the defendant had struck the plaintiff. Stanton called the jurors “evil ribalds” (*malvays ribauds*). Y.B. 14 Edw. 2 (London Eyre 1321), as it appears in Cam, ed. and trans., *London Eyre of 1321*, vol. 2, 142-143 and *Seipp's Abridgement*, no. 1321.184. See also Summerson ed., *Crown Pleas of the Devon Eyre*, xii (describing evidence of justices actively scrutinizing jury activity and interrogating jurors). Also, to the extent that judges did acquiesce in jury nullification, it is unclear whether they did so begrudgingly. See Green, review of *Criminal Trial in Later Medieval England*, by Bellamy, 267.

²⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 21.

short, this chapter will employ the term “judging” in a broad sense that encompasses the work of common law judges and jurors alike.

Concern with Clerics as Judges

The preceding chapter dealt in part with the practice of confession, highlighting parallels and disconnects between sacramental confession and the use of confessors’ techniques by coroners and judges in the secular prosecution of crime. Hearing confessions involved priests in the practice of judging, with the goal of setting an appropriate level of penance in order to ensure efficacious absolution.²⁸ The ideal qualities for a confessor, as outlined in the *Peniteas Cito* of William de Montibus (d. 1213), were as follows:

A confessor should be gentle, affable, and kind,
Wise, just, sweet, and compassionate.
As if the crimes were his own, he should hide the sins of the guilty.
He should be slow to punish, swift towards mercy,
And should grieve as often as he is made to be severe.
He should pour oil mixed with wine, scourging
Now with the father’s rod, at other times offering the mother’s breasts.²⁹

Like a judge called to account for his judgments on the last day, a confessor potentially faced punishment after death for failure to hear confessions thoroughly and assign appropriate

²⁸ On the particular suitability of friars for judging cases of conscience due to their training in Scholastic theology, see d’Avray, *Preaching of the Friars*, 184-185. For a legalistic literary description of a priest bearing a record at the Last Judgment, much like a coroner appearing at trial, see “Love Holy Church and Its Priests,” in Brown, ed., *Religious Lyrics of the XIVth Century*, 190, 49-52 (“On domes-day whon we schul meete / Þat dredful Iuge forte se, / Þen is schrift to vs ful seete— / Þe prest þer-of record beres he”).

²⁹ “Qvalis debeat esse confessor,” in Goering, *William de Montibus (c. 1140-1213)*, 127. (“Confessor mitis, affabilis atque benignus, / Sit sapiens, iustus, sit dulcis, compatiensque. / Vt crimen proprium celet peccata reorum. / Sit piger ad penas, sit uelox ad miserandum, / Et doleat quotiens facit illum culpa ferocem. / Infundat mulcens oleum uinumque flagellans / Nunc uirgam patris, nunc exerat ubera matris.”) I was aided in this translation by referencing that of Tentler in *Sin and Confession on the Eve of the Reformation*, 96. A similar parental, good cop/bad cop metaphor was employed by Robert Grosseteste in warning a priest of his excessive involvement in secular affairs, c. 1235. Grosseteste claimed to be acting “with the concern of a father and the compassion of a mother” in recommending that the cleric scale back on his extra-pastoral activities. See Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 128.

penance.³⁰ Judging was a central attribute of the priesthood. Peter the Chanter, for example, argued that a good prelate should know how to judge well, how to preach well, and how to administer penance.³¹ While the above description of the ideal confessor maps poorly onto contemporary descriptions of the ideal judge, this priestly experience with judging would seem to have made clerics peculiarly well suited to work as judges in other contexts. In some instances, this was indeed the case.³² Henry II, for example, was known to favor clerics over laymen to serve as his royal justices, a practice that also marked the reign of Henry III.³³ Yet involvement in secular judging posed a conflict of interest for priests. While judging in the confessional context facilitated the appropriate assignment of penance and the efficacious granting of absolution from sin, judging on the king's behalf was bereft of such salvific aims. In fact, where the emphasis in ecclesiastical confession was on the imposition of God's mercy, the emphasis in serving as a royal justice was on punishing crime severely, leaving the exercise of mercy up to royal discretion.³⁴ Moreover, a judgment on the secular side might lead to the gallows, thereby risking the taint of blood for any cleric engaged in bringing about that judgment.

³⁰ This duty to shepherd souls, and the dangers of eternal damnation for priests who fell short of this duty, come through in the closing paragraphs of Robert Grosseteste's 1235 letter to Michael Belet, defending Grosseteste's decision to oppose the appointment of an unsuitable candidate as rector of a parish. Grosseteste argued that those who opposed his efforts to hinder the appointment "should be afraid of being charged with the death of those sheep at the Judgment we must all dread." See Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 86.

³¹ Bériou, *L'avènement des maîtres de la Parole*, 35. On Peter the Chanter's concern over the failure of prelates to preach, see d'Avray, *The Preaching of the Friars*, 15.

³² See, e.g., Butler, *Forensic Medicine in Medieval England*, 92-94 (describing continued clerical involvement in royal justice and arguing that clerics may have even played important roles as jurors in coroners' inquests due to their extensive local knowledge).

³³ See Baldwin, *Masters, Princes, and Merchants*, vol. 1, 186. But see Turner, *English Judiciary in the Age of Glanvill and Bracton*, 291 ("Scholars have long assumed that clerics predominated among the royal justices until laymen began to be recruited from the ranks of professional lawyers by the time of Edward I. As we have seen, however, about half the judges were laymen (25/49), even as early as the time of Henry II.") On Henry III, see *infra*, n. 57 and accompanying text.

³⁴ Some adjudicators declined to exercise such severe justice. See, e.g., the story of the "soft on crime" abbot who allowed a woman to go free after she had been caught red-handed with a sliver belt

This is not to suggest that church authorities were opposed to the imposition of harsh judgments on criminals.³⁵ Richard Fraher, offering a revisionist view of the purportedly “new” criminal jurisprudence of the twelfth and thirteenth centuries, argues that “the commitment to criminal deterrence” may be traced even further back to the time of the Gregorian reforms and to the fact that the early church fathers had adopted Roman law vocabulary and concepts without adopting the Roman predilection toward “maintaining social control through harsh penal sanctions.”³⁶ As a result, later church authorities had to find means to crack down on serious clerical wrongdoing without running afoul of the due process principles borrowed from Roman law—most notably the requirement of two witnesses or a confession for conviction—that threatened to undermine attempts to clamp down on scandalous clerical transgressions.³⁷ Under Innocent III, the maxim “it is in the public interest that no crime be left unpunished” gained popularity among canonists and civil jurists alike, providing impetus to procedural reforms both within the church and in the Italian communes, and promoting the importance of the “public interest” in defining crime more broadly.³⁸ The church essentially may be partly responsible for the fact that secular authorities moved toward harsher sanctions and fewer procedural protections for criminal suspects, a trajectory found on the continent but also reflected in England’s

worth 40s. A complaint was voiced that the abbot and his ministers allowed many notorious thieves thus to escape and grow “bolder in evil-doing”. *Calendar of Inquisitions Miscellaneous*, vol. 7, 19.

³⁵ See, e.g., Y.B. Mich. 12 Edw. 3 (1338), as it appears in Luke Owen Pike, *Year Books of the Reign of King Edward the Third: Years XII and XIII* (London 1885), 68-69 and *Seipp’s Abridgement*, no. 1338.242, a 1338 case in which the local ordinary, directed by his archbishop, refused to claim a cleric seeking to avail himself of benefit of clergy because the cleric had committed sacrilege. The ordinary’s refusal likely resulted in the felonious cleric being hanged.

³⁶ Fraher, “Preventing Crime in the High Middle Ages,” 214.

³⁷ See Fraher, “Preventing Crime in the High Middle Ages,” 216, 218.

³⁸ See, generally, Fraher, “Theoretical Justification for the New Criminal Law,” 577-595. Such reforms included legislating a grant or *arbitrium* to commune leaders, giving them some leeway beyond the strictures of the criminal procedure requirements of the *ius commune* in order to respond effectively to the threat of crime. See Fraher, “Conviction According to Conscience,” 58.

transition from a compensatory system of redress for homicide to a prosecutorial regime in which private prosecutions and public indictments alike led to capital punishment upon conviction for homicide. A fourteenth-century sermon from Bishop Brunton of Rochester depicts clerical disdain for judges perceived to be soft on crime: “If a voluntary murderer or most notorious thief,” Brunton wrote, “who according to every law ought to pay the just penalty of his wickedness, is captured in order that justice may be done upon his person, as though in compassion, they strive to free him from danger, some saying—‘He is young: if the youth has done wrong, the old man will be able to amend’. Others declare—‘He is of our blood: if the Law proceeds against him, the whole of our clan will be shamefully disgraced’.”³⁹ Church authorities were therefore inclined at times to urge secular justices to respond severely to crime.

For clerics, the perceived dangers of judging had a great deal to do with concerns over blood pollution, which James Whitman traces through the canon collections of Burchard of Worms in the eleventh century through Ivo of Chartres, Gratian, Bernard of Pavia, and on down to Raymond of Peñafort in the late twelfth century.⁴⁰ Peter the Chanter’s circle championed the cause that bishops and other clerics should not be involved in the administration of blood judgments.⁴¹ At Lateran IV in 1215, blood pollution remained the focus of concern as theologians tackled the question of clerical involvement in criminal adjudication.⁴² Whitman argues that the decline of the ordeal was not about introducing improved fact-finding methods, although he himself does acknowledge that the ordeal was often used in cases where no

³⁹ Owst, *Literature and Pulpit in Medieval England*, 340.

⁴⁰ Whitman, *Origins of Reasonable Doubt*, 43, 46.

⁴¹ Baldwin, *Masters, Princes, and Merchants*, 190-191.

⁴² Whitman, *Origins of Reasonable Doubt*, 48 (citing Lateran IV, canon 18).

witnesses were available to attest to the truth of an accusation.⁴³ It was instead about drawing the bounds of clerical involvement in secular legal affairs.

Even as church authorities gave heed to a notion of the public interest and the importance of deterring serious crime, they attempted to distance clerics from direct involvement in secular prosecutions, particularly in cases involving corporal punishment. In the years leading up to Lateran IV, decretalists were not in total agreement as to the extent to which clerics might involve themselves in blood judgments, a problem especially relevant to bishops possessing secular jurisdiction. While canonists generally agreed that clerics should not shed blood, some felt that jurisdiction over capital cases might be distinguished from the execution of capital judgments.⁴⁴ Others made exceptions based on particular circumstances. Thomas of Chobham, in his *Summa Confessorum*, indicated that although priests were generally prohibited from involvement in criminal judgments, an exception might be made for them to exercise judgment against thieves and other malefactors as long as they were condemning them to exile or perpetual incarceration, not corporal punishment involving bloodshed.⁴⁵ This was clearly not the case in England during Thomas of Chobham's time, when felony was a capital offense. Robert Grosseteste took a less compromising view of the proper role of clerics as secular judges: "he is

⁴³ See Whitman, *Origins of Reasonable Doubt*, 61. Bartlett, too, argues that the ordeal was used for "only the difficult and intractable cases, the ones where normal evidence failed". Bartlett, *Trial by Fire and Water*, 159. See also *ibid.*, 33.

⁴⁴ See, generally, Robert L. Benson, "The Obligations of Bishops with 'Regalia': Canonistic Views from Gratian to the Early Thirteenth Century," in *Proceedings of the Second International Congress of Medieval Canon Law*, ed. S. Kuttner and J. J. Ryan (Vatican City, 1965), 128-130.

⁴⁵ Chobham, *Summa Confessorum*, ed. Broomfield (Louvain: Editions Nauwelaerts, 1968), 426 ("Uno tamen modo permittunt canones quod viri ecclesiastici tale iudicium exercean, scilicet si principes fecerint omnimodam securitatem de impunitate vite et membrorum, tunc enim possunt episcopi, sacerdotes et diaconi audire causam contra fures et latrones et omnes maleficos et condemnare eos vel ad exilium vel ad carcerem perpetuum, nunquam tamen ad sanguinis effusionem.") Thomas of Chobham took a similarly conciliatory view regarding clerics bearing arms, indicating that it would be acceptable to do so if traveling through a dangerous area during a time of discord, and if used to repel violence. *Ibid.*, 426-427.

not absolved of blame,” Grosseteste wrote of the possibility of a cleric serving as a justice in eyre, “even if it is his practice to rise from his judge’s chair when a sentence of condemnation in a case involving bloodshed is to be pronounced, especially as this rising is an obvious sign to everyone that the accused will certainly incur a judgment of condemnation.”⁴⁶ In Grosseteste’s view, clerics absolutely should not hear crown pleas and ideally should abstain from all involvement in secular judging, rather than from blood judgments alone.⁴⁷ Speaking of abbots in particular, Grosseteste declared, “it is obvious that the use and performance of the office and power of itinerant justice for all pleas concerning the king is illicit for each and every abbot, since this kind of performance and use extends also to judgments in cases involving bloodshed, for these, too, fall within the scope of pleas that concern the lord king.”⁴⁸

The dominant view by the time of Lateran IV was that priests should refrain altogether from involvement in capital cases. Leading up to Lateran IV, Robert of Flamborough in his *Liber poenitentialis* denounced homicide by clerics alongside priestly involvement in blood judgments and bloodshed more generally.⁴⁹ Similarly, Stephen Langton issued statutes for the Diocese of Canterbury restricting priestly involvement in blood judgments prior to the council. The first canon issued by Langton c. 1213-1214 lumped those involved in blood cases with men not born within a legitimate marriage, those who committed homicide, and bigamists.⁵⁰ Involvement in blood judgments was one of several unseemly forms of clerical behavior reformists like Langton sought to remedy through a reform agenda that was largely ratified and

⁴⁶ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 133.

⁴⁷ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 134, 232-233.

⁴⁸ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 232.

⁴⁹ See Flamborough, *Liber Poenitentialis*, ed. Firth, 214 (§247).

⁵⁰ “July 1213 x July 1214 Statutes of Archbishop Stephen Langton for the Diocese of Canterbury,” in Powicke and Cheney, eds, *Councils and Synods*, vol. 2, part 1, 24-25 (§1).

adopted for the universal church at Lateran IV. Diocesan statutes after Lateran IV continued in this reforming tradition. In his constitutions for governing the diocese of Lincoln c. 1238-1239, for example, Robert Grosseteste took an unequivocal stance against clerical involvement in secular judging writ large: “In order to cut away every semblance of greed, I firmly forbid, not merely by the authority of my office but by special apostolic authority, beneficed clerks or those raised to the priesthood to become sheriffs or secular justiciars, or to hold bailiwicks that would make them accountable for those bailiwicks to lay authorities.”⁵¹ Grosseteste was in favor of a priesthood focused on pastoral care rather than secular governance.

Implementation of these reforms would take some time, however. After Lateran IV, clerics continued to express some of the same concerns about blood pollution voiced decades earlier by members of Peter the Chanter’s circle. Peter of Blois’ letters, for example, reveal great worry about the continuing entanglements of clerics in matters of secular justice in the post-Lateran IV period. When Geoffrey de Bocland, archdeacon of Norfolk from 1197/8 until his death in 1225, withdrew from judicial responsibilities, Peter wrote him to commend his decision. Quoting from Deuteronomy, he expressed his wish that other similarly situated clerics might follow suit: “If only they were wise and understood, and also made provision for the last end!”⁵² Peter warned that such clerics, “though they may presently escape human judgment”, would ultimately face the terrible justice of the Last Judgment.⁵³ Grosseteste was engaged in a similar writing campaign against the involvement of clerics in secular affairs. Writing c. 1235 to Hugh of Pattishall, son of the royal justice Simon of Pattishall, Grosseteste claimed that it was clear that Hugh was failing to carry out many of his pastoral responsibilities in light of his “frequent

⁵¹ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 186.

⁵² Revell, ed., *Later Letters of Peter of Blois*, 35. (“Utinam saperent et intelligerent ac novissima providerent!”)

⁵³ Revell, ed., *Later Letters of Peter of Blois*, 35. (“enim nunc humanum iudicium vidantur evadere”)

and uninterrupted involvement in secular affairs”.⁵⁴ Hugh neglected his pastoral flock at great risk to his soul. Grosseteste warned him:

So that you may escape the punishment to be inflicted on the hireling, who seeks the milk and the wool but does not guard the flock, you must either extricate yourself from your entanglement in and preoccupation with secular affairs and apply yourself vigilantly like a good shepherd to your pastoral duties, or you must give them up and involve yourself lawfully in the affairs of the world; you cannot do both at the same time.⁵⁵

Grosseteste also issued epistolary responses to Henry III’s appointment of the Abbot of Ramsey as itinerant justice for the counties of Bedfordshire and Buckinghamshire, and shortly thereafter to the king’s appointment of the abbot of the Benedictine monastery at Croyland to a similar office as itinerant justice.⁵⁶ In one such letter, addressed to the archbishop of Canterbury in 1236, Grosseteste expressed his particular concern that serving as “itinerant justice for all crown pleas” would require the abbot to involve himself “in deciding blood cases.”⁵⁷ In the decades following Lateran IV, in other words, Henry III was still trying to rely on clerics to serve as itinerant justices and faced opposition from reform-minded bishops like Grosseteste.

Nevertheless, it was not uncommon for courts run by priors to be in the business of issuing blood judgments and even executing prisoners on their own gallows.⁵⁸ Occasionally a cleric might be involved in bloodshed in other ways as well, even being engaged in trial by battle,

⁵⁴ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 126.

⁵⁵ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 126.

⁵⁶ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 133, 281.

⁵⁷ Henry Richards Luard, ed., *Roberti Grosseteste Episcopi Quondam Lincolniensis Epistolae* (London: Longman, 1861), 106. See also *ibid.*, 206. Ralph Turner discusses this letter and describes Grosseteste as possibly the strongest opponent of the use of clerics as royal justices. See Ralph V. Turner, “Clerical Judges in English Secular Courts: The Ideal versus the Reality,” in *Judges, Administrators, and the Common Law in Angevin England* (London: Hambledon, 1994), 166-168.

⁵⁸ See, e.g., Stewart, ed., *1263 Surrey Eyre*, 256, no. 529 (a case involving three robbers hanged at the gallows of the prior of Bermondsey), 320, no. 678 (describing the abbot of Winchester raising gallows in the manor of Pyrford, having the privileges of infangentheof and utfangentheof).

although this was severely and unequivocally condemned by church authorities.⁵⁹ By the end of the thirteenth century, some legislative recognition was given to the predicament of clerics compelled to involve themselves in blood judgments: the 1299 Statute of Fines required that assize justices should also be justices of gaol delivery, but provided for the appointment of a knight of the local shire to replace any clerical justice who might otherwise have to hear criminal cases.⁶⁰ The archbishop of York, responsible for the gaol at Beverley, avoided the problem of clerical justices hearing blood cases by appointing knights to deliver the gaol when the royal justices came to town.⁶¹ Ralph Turner attributes the decline of clerics serving as royal justices by the late thirteenth century to the rise of a group of laymen educated in the law.⁶² By the end of the fourteenth century, all the justices of Common Bench and King's Bench would be laymen and serjeants.⁶³

Well into the fourteenth century, when fewer clerics were serving as royal justices,⁶⁴ blood pollution continued to trouble ecclesiastics. Clerics in doubt about their status, or patrons petitioning on their behalf, addressed letters to the pope seeking dispensations. Most often,

⁵⁹ See the case of William called Blund, a cleric, who undertook trial by battle despite canonical prohibitions. Bishop Walter Bronescombe responded severely, excommunicating all those who helped bring the trial by battle about. The bishop even went so far as to impose public penance upon those who came to watch the spectacle, ordering them to walk ungirt, shoeless, and with bare heads from the conventual church of St. Petrock to the Franciscan church, where they were to receive "penitential and solemn discipline" (*disciplinam penitentialem et solempnem*). O. F. Robinson, ed., *The Register of Walter Bronescombe, Bishop of Exeter, 1258-1280*, vol. 1 (Woodbridge: Boydell, 1995), 90-91, no. 266.

⁶⁰ See Turner, "Clerical Judges in English Secular Courts," 178.

⁶¹ See Brown, ed., *Register of Thomas of Corbridge*, part 2, 64, 111.

⁶² Turner, "Clerical Judges in English Secular Courts," 178.

⁶³ Charles Donahue, Jr., "The Legal Professions of Fourteenth-Century England: Serjeants of the Common Bench and Advocates of the Court of Arches," in *Laws, Lawyers and Texts: Studies in Medieval Legal History in Honour of Paul Brand*, ed. Susanne Jenks, Jonathan Rose, and Christopher Whittick (Leiden: Brill, 2012), 230-231.

⁶⁴ On the decline of clerics as justices of the central royal courts by the end of the fourteenth century, see also Charles Donahue, Jr., "What Happened in the English Legal System of the Fourteenth Century and Why Would Anyone Want to Know?" *Southern Methodist University Law Review* 63 (2010), 953.

petitioners asked to obtain or retain benefices after being polluted either by involvement in a homicide, participation in combat, or service as a bailiff or other secular official dealing with capital crimes.⁶⁵ In 1352, for example, John de Akum, a York cleric, petitioned successfully for a benefice with cure of souls, confessing that he, as bailiff of York, had had criminals condemned to death both on his own authority and that of his colleagues.⁶⁶ In 1363, King Edward himself petitioned the pope on behalf of two bishops, those of Ely and Worcester, who wished to offer dispensation to two clerics who had written informations and taken depositions in capital cases. The pope, Urban V, limited his dispensation to those in minor orders, and only allowed for a single benefice without cure of souls.⁶⁷

Such caution reveals continuing discomfort with the mixing of priestly and secular duties. For example, a priest's role as confessor could conflict sharply with his work as a judge tasked with enforcing secular law. Peter of Blois offered the example of a man who committed theft but was released from his sin and granted absolution after confessing and expressing true contrition. If he were then hauled before the judges of civil law over this same sin and legitimately convicted, the judge was in danger of hanging an innocent man.⁶⁸ Yet duty as a royal justice required the judge to send such a defendant to the gallows if found guilty by a trial jury, regardless of the judge's possible inside knowledge about the state of the man's soul.⁶⁹ This

⁶⁵ See Bliss, ed. *Calendar of Entries in the Papal Registers*, vol. 1, 112, 237, 262, 446, 473, 506-507, 523, 543-544 (petitions dated 1345-1379). Many of the underlying homicides seem to involve defense of kin.

⁶⁶ Bliss, ed., *Calendar of Entries in the Papal Register*, vol. 1, 237.

⁶⁷ Bliss, ed., *Calendar of Entries in the Papal Register*, vol. 1, 473.

⁶⁸ Revell, ed., *Later Letters of Peter of Blois*, 279. ("Item, iste commisit furtum, sed post confessionem et veram contritionem quo ad culpam et quo ad penam peccatum ei dimissum est. Si conveniatur coram civili iudice super eodem peccato et legitime vincitur, numquid potest iudex suspendere innocentem?")

⁶⁹ A related problem, widely debated from classical Roman times onward, was whether a judge with independent knowledge of exculpatory facts should attempt to save the accused. See Max Radin, "The

concern with guilt not just at the moment of committing a sinful act or crime, but also at the time of judgment, is a theme developed most thoroughly by Trisha Olson, who has helped illuminate the medieval understanding of the restorative power of contrition and penance.⁷⁰ While we tend to think of judgment as determining guilt or innocence at the time of the commission of a particular act, some medieval English judges, particularly those of clerical status, may have taken a more holistic view that also considered an accused's efforts to make reparations in a crime's aftermath. Furthermore, while this is more difficult to ascertain, it is also possible that jurors, informed by church teachings, were similarly swayed by information about a defendant's contrite behavior in the days leading up to a trial, in which case their verdict might have been informed by post facto guilt assessment rather than merely an analysis of the defendant's actions and state of mind at the time of an alleged felony's commission.

There was also a potentially insurmountable conflict of interest facing a clerical judge tasked with eliciting a confession—a courtroom confession, not a sacramental one—from a defendant. Peter of Blois observed that such a judge faced a catch-22 situation in deciding whether to encourage a person to purge himself by oath or confess: “If he swears he did not commit theft, he sins mortally,” Peter observed, and “if he confesses having done it, he will be hanged.”⁷¹ Clerics involved in judging felony cases faced challenging issues of conscience that pitted their priestly duties against their sworn commitment to promoting the king's peace.⁷² The

Conscience of the Court,” *Law Quarterly Review* 48 (1932), 506-520. Gerald of Wales came down on the side of conscience, although this was seen as the more difficult position to prove. *Ibid.*, 511-512.

⁷⁰ See Olson, “Of Enchantment,” 150-151 (placing emphasis on the corrupting nature of wrongdoing rather than a person's specific past act, and the cleansing nature of contrition and willful suffering).

⁷¹ Revell, ed., *Later Letters of Peter of Blois*, 280. (“Si iurat se non commisisse furtum, peccat mortaliter; si confitetur se commisisse suspenditur.”)

⁷² Even non-capital cases potentially placed judges in conflict between their duty to royal law and “natural and divine law,” as described by Robert Grosseteste in his 1235 letter to chief justice William of Raleigh objecting to the royal law regarding special bastardy, namely, that children born out of wedlock

discomforts expressed by these clerical authors with the duties of judging demonstrate the daunting nature of the task facing judges and jurors alike in trying felonies.

Central to these concerns was the issue of mind. To convict a person of felony, one should be convinced that the accused acted with guilty mind. The common law's focus was on *mens rea* at the time that an alleged felony took place, and perhaps in its immediate aftermath, insofar as taking flight might serve as an *indicium*, albeit not an entirely reliable one, of guilt.⁷³ Jurors may have taken a more capacious view of mind, considering both an accused individual's state of mind at the time of the offense, but also their preceding and succeeding states of mind, often more permanent in nature.⁷⁴ Of concern might be, for example, whether a person cultivated a temperament prone to anger, envy, and lack of charity toward others. Also of concern might be the individual's comportment in a crime's aftermath: whether he or she expressed regret, attempted to reconcile with the victim or the victim's kin, showed contrition and a desire to undertake the penance and reparations that might be necessary to bring things back to the status quo ante, to the extent that a restoration of harmony might be possible. From a clerical perspective, confession was central to this process, yet confession within the secular

would not be legitimated by the subsequent marriage of their parents. Grosseteste cautioned that "judges who by judicial sentence disinherit such a child as spurious and illegitimate will be included in the number of those to whom it was said through the prophet Amos: You are turning judgment into wormwood and forsaking justice in the land [Am 5:7]; and again, through the same prophet: You have turned judgment into bitterness, and the fruit of justice into wormwood [Am 6:13]." Grosseteste also condemned the framers of this "perversion of the law," which he described as "wicked and unjust" and "contrary to natural and divine law and also to canon and civil law." Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 109.

⁷³ Flight was also considered some evidence of guilt according to the *ius commune*, whereby *fama* plus some *indicium* might be enough to justify torture, such possible *indicia* including the testimony of one witness, previous hostility between the suspect and victim, flight, or the suspect's previous commission of a similar offense. Fraher, "Conviction According to Conscience," 37.

⁷⁴ For a sermon exemplum emphasizing the importance of state of mind at the time of the offense, see A. G. Little, ed., *Liber Exemplorum ad Usum Praedicatorum Saeculo XIII Compositus a Quodam Fratре Minore Anglico de Provincia Hiberniae* (Aberdoniae: Typis Academicis, 1908), 24-25 (story detailing a thief devoted the Virgin Mary, praying to her even while thieving, who was saved from death at the gallows by her intercession).

realm of felony prosecution might just as easily lead to the gallows as to the redemptive possibilities of, for example, abjuring the realm and beginning life anew elsewhere.

Religious notions of mind suggested that judges should not only consider a defendant's mind at the moment of committing an offense, but rather should view that moment as one small part of a life-long continuum in which descents into guilty mind could always be repaired by the expression of true contrition—sorrow of heart—and a reorienting of the individual's interior state. To the extent that secular justice did not allow for such redemption, it was incompatible with priestly obligations and created a potential crisis of conscience for the cleric called upon to try blood cases. It came down, ultimately, to issues of mind and blood. The former, in the church's view, held the promise of reform and salvation, while the latter—in the form of capital punishment—brought to an end the possibility of a criminal's redemption while on earth. It is perhaps for this reason that medieval English visions of hell had a special place for criminals hanged at the gallows. "Thereunder is a wall of iron that is all filled with souls," commented one poem. "Upon it is bound many in iron that is hotter than the brand. Therein are the souls brought of those who were beheaded or hanged."⁷⁵ With few exceptions,⁷⁶ there was no further chance of redemption for those who died such an ignominious death on the gallows.

⁷⁵ "The XI Pains of Hell," in Morris, ed., *Old English Miscellany*, 154. ("Her-vnder is of iren a wal / þat is of saulen ifuld al. / On heom is mony yrene beond / þat is hatture þen þe brond. / Þer-inne beoþ þe saulen i-don / þat weren biheaueded oþer an-hon.") For a similarly unforgiving view of the fate of thieves and killers, see "A lutel soth Sermun," in *ibid.*, 187. ("Alle bakbytares. / heo wendeþ to helle. / robbares. And reuares. / and þe Monquelle.") See also Pfander, *Popular Sermon of the Medieval Friar*, 60-61, a sermon by Friar John Gregory, located in an early fifteenth-century manuscript but possibly dating to the fourteenth century, in which the friar distinguished between sinning from sickness, ignorance, and malice. While there was hope for those in the first two categories, one who sinned from malice might live his whole life hoping for mercy at the very end, or might despair of ever receiving God's mercy. As a result, he would be damned, with no hope of redemption.

⁷⁶ Of course, if one's conscience was clean and one nevertheless died such a death, church teaching suggested that one's soul would be redeemed. See "The XI Pains of Hell," in Morris, ed. *Old English Miscellany*, 221 (for the idea that a righteous person will not suffer after death no matter what kind of death he dies). ("Fore he þat leuys here ryztwysly, / On what deþ euer he dey, / His soule neuer paynd

The King as Exemplar of Justice

This is not to suggest that church authorities would have urged abolition of capital punishment, but rather, that the push during the thirteenth century was toward a strict separation in the jurisdictional responsibilities of church and crown with regard to blood sanctions, and toward the protection of the various escape valves that offered alternatives to capital punishment even for those who had committed an offense against the king's peace. Ironically, at a time when the church was normally keen to maximize the bounds of its earthly jurisdiction, this was one area in which the desire was instead to pass the responsibility on to secular authorities, even with regard to limiting clerical involvement as royal justices.⁷⁷ With the demise of trial by ordeal and the introduction of jury trial in England for felony cases, priests stepped back from their earlier central role in trying felonies, while lay judges and jurors took on a new, more direct role in the administration of the king's justice.

The king, of course, was the ultimate judge, God excepted. It was understood that royal justice was necessary to extirpate human malice, and that a king who was tough in responding to criminal behavior would instill fear in subjects who might otherwise be tempted toward a life of

schal be, / No neuer after wit of wo...") For an alternative perspective on the fate of souls of executed men and women, see Olson, "Medieval Blood Sanction," 66 ("...the medieval execution was a ritual that opened the possibility for the condemned to be transfigured in the eyes of the spectators into a holy vessel whose suffering signaled his entry into heaven and his reconciliation with his community.") Purgatory, surprisingly, does not arise in these discussions of the fate of those hanged on the gallows, although the theme of purgatory does arise in contemporary Parisian sermons. See, e.g., the prayers for those who are "in prisone purgatorii," and the caution that "you do not know about the pain of purgatory" ("Nescitis quid est de pena purgatorii"), in a 1273 sermon by Gilles d'Orléans, and the exempla that described how one hour in purgatory would last for years, in Bériou, *L'avènement des maîtres de la Parole*, vol. 2, 805, 815.

⁷⁷ Bishops were, of course, keen to retain influence over the conduct of royal justice, however, as in the case of Robert Grosseteste complaining about capital cases being tried on Sundays. See Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 286. Furthermore, there is evidence, too, of thirteenth- and fourteenth-century encroachments by papal authority into jurisdiction normally reserved to secular authorities. See Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800*, trans. Lydia G. Cochrane (Washington, D.C.: Catholic University of America Press, 1995), 76.

crime. In the early fourteenth-century mirror for kings authored by Walter of Milemete, the following explanation was given:

Truly, it pertains to royal justice to punish despoilers (*spoliantes*) and transgressors (*delinquentes*) for their crimes (*per delictis*), since it is useful to the republic that human malice (*malicie*) be restrained and that the region be purged of malicious people (*a malis purgetur*), so that the punishment of some may create fear and an example for others. And therefore royal justice is a laudable and supremely commendable virtue.⁷⁸

Milemete's vision of royal justice, with its emphasis on deterrence, drew upon a tradition of thought about criminal justice shared by earlier canonists and civil jurists on the continent and exemplified by execution spectacles.⁷⁹ Yet just as the Bible juxtaposed the image of a vengeful God with stories of mercy and forgiveness, Milemete's mirror counterbalanced this call to punishment with a panegyric to royal mercy:

And even though it may be by mere right that transgressors are to be punished for their faults and the demerits of men are to be assailed by penalties, and he may seem to harm the good who

⁷⁸ Cary Nederman, ed. and trans., *Political Thought in Early Fourteenth-Century England: Treatises by Walter of Milemete, William of Pagula, and William of Ockham* (Tempe: Brepols, 2002), 52. The original Latin is accessible through a 1913 facsimile of the original MS. See Montague Rhodes James, ed., *The Treatise of Walter de Milemete: De Nobilitatibus, Sapientiis, et Prudentiis Regum* (Oxford: Oxford University Press, 1913), 106. These perspectives on severe justice, with an emphasis on deterrence, may be found in *Bracton* and on the continent as well in the writings of Gandinus, both likely inspired by the canon law shift toward the idea of leaving no crimes unpunished. See Olson, "Medieval Blood Sanction," 80. For a discussion of tropes of royal justice, see Musson and Ormrod, *Evolution of English Justice*, 162-163. And for a discussion of the gruesome nature of medieval execution practices, see generally, Henry Summerson, "Attitudes to Capital Punishment in England, 1200-1350," in *Thirteenth Century England VIII: Proceedings of the Durham Conference, 1999*, eds. Michael Prestwich, Richard Britnell, and Robin Frame (Woodbridge: Boydell, 2001), 123-134.

⁷⁹ On the spread of these ideas regarding deterrence, see generally Fraher, "Preventing Crime in the High Middle Ages," 212-233. For examples of execution as spectacle, which during this period was typically limited to high-profile criminals, see "The Execution of Sir Simon Fraser (1306)" in *Historical Poems of the XIVth and XVth Centuries*, ed. Robbins, 15 ("Sire edward oure kyng, þat ful ys of piete, / þe waleis quarters sende to is oune contre, / on four half to honge, huere myroure to be, / þer-opon to þenche, þat monie myhten se / ant drede."), 20 ("þo he com to galewes, furst he wes an-honge / al quic byheueded, þah him þohte longe. / seþþe he wes y-opened, is boweles ybrend; þe heued to londone brugge wes send / to shonde.") See also the description of William Wallace's execution in London in Wright, ed., *Chronicle of Pierre de Langtoft*, vol. 2, 362-365.

spares the evil, still it is pious to be kind to captives and prisoners
and to pardon their injuries...⁸⁰

This combination of royal obligations to maintain the peace and punish transgressors, alongside an emphasis on mercy, echoed the medieval English coronation oath. As relayed in the *Bracton* treatise, the king at his coronation promised to secure true peace (*vera pax*) for the church and all Christian peoples within his realm, to forbid all rapacity and evil doing (*rapacitates et omnes iniquitates*), and yet to judge mercifully so as to ensure secure peace (*firma pace*).⁸¹ The king's mercy was demonstrative of his royal power, including the king's power over his subject's "life, death, and limbs", according to Milemete.⁸²

In her 2009 book on the royal pardon, Helen Lacey describes mercy as a practice that permeated medieval English society.⁸³ She counters the traditional view of historians and legal theorists that the royal pardon represented corruption and a deficiency in medieval law.⁸⁴ For instance, Naomi Hurnard's 1969 study presented royal pardoning practice as a hindrance to the common law's development.⁸⁵ Following the example of "new constitutionalists" like Edward Powell, Lacey uncovers "attitudes to pardoning" across a range of institutions through

⁸⁰ Nederman, ed. and trans., *Political Thought in Early Fourteenth-Century England*, 55. For the original Latin MS image, see James, ed., *Treatise of Walter de Milemete*, 115-116. On the "deeply rooted cultural expectation that the good king will be merciful", see Olson, "Medieval Blood Sanction," 76-78.

⁸¹ See Thorne, ed. and trans., *Bracton*, vol. 2, 304. See also H. G. Richardson, "The English Coronation Oath," *Speculum* 24:1 (1949), 44.

⁸² Nederman, ed. and trans., *Political Thought in Early Fourteenth-Century England*, 55. For the original Latin MS image, see James, ed., *Treatise of Walter de Milemete*, 115-116. This vision of royal mercy may not have been equally accessible to all; Milemete went on to argue that "the virtue of gentleness" required the king "to pardon offenses and grant indulgences to his subjects, especially the great men, who (although they transgress) are humble petitioners for forgiveness, unless they are convicted of treason or grave sins."

⁸³ In terms of volume, Lacey estimates that close to 40,000 letters patent for pardon were recorded from the time of Edward I to Richard II.

⁸⁴ Helen Lacey, *The Royal Pardon: Access to Mercy in Fourteenth-Century England* (York: York Medieval Press, 2009), 2-3.

⁸⁵ Lacey, *Royal Pardon*, 3 (citing Hurnard, *The King's Pardon for Homicide*).

examination of a correspondingly diverse range of sources.⁸⁶ She focuses on the people involved at various stages of the pardoning process and, in so doing, she reveals how the exercise of mercy—whether through individual, group, or general pardons—informed broader social understandings of the royal prerogative.⁸⁷ Ultimately, Lacey argues that the idea of mercy permeated medieval culture.⁸⁸ By the late fourteenth century, the evolution of the general pardon demonstrated the permanent place mercy was to occupy in English politics, frequently used to symbolize reconciliation between crown and polity.⁸⁹

The king was the source of mercy and justice alike. Moreover, the idea of the king's role as source of justice was not confined to secular tracts in the mirror for princes genre. A similar vision comes through in a 1374 Good Friday sermon by Thomas Brinton, a Benedictine monk and Bishop of Rochester (c. 1320-1389). According to the sermon, temporal kingship required three qualities: depth of wisdom (*profunditas sapientie*), serenity of mercy (*serenitas clemencie*), and severity of justice (*seueritas iusticie*).⁹⁰ Brinton elaborated:

Beware, therefore, kings and temporal justices who fail to punish theft and homicide, oppress the poor and innocent, and fail to defend ecclesiastical rights, because the power of the king reveals the displeasure of kings, whose wisdom will proffer a sentence, whose justice will exact vengeance, whose clemency now offers mercy...⁹¹

⁸⁶ Lacey, *Royal Pardon*, 8.

⁸⁷ Lacey, *Royal Pardon*, 177.

⁸⁸ Lacey, *Royal Pardon*, 178.

⁸⁹ Lacey, *Royal Pardon*, 179.

⁹⁰ Sister Mary Aquinas Devlin, ed., *The Sermons of Thomas Brinton, Bishop of Rochester (1373-1389)*, vol. 1 (London: Royal Historical Society, 1954), 174.

⁹¹ Devlin, ed., *Sermons of Thomas Brinton*, vol. 1, 174. (“Caueant igitur reges et iudices temporales qui furta et homicidia non puniant, pauperes et innocentes opprimunt, iura ecclesie non defendunt quia regis regum potencia ostendet offensam, cuius sapientia proferet sententiam, cuius iusticia assumet vindictam, quibus nunc clemencia offert misericordiam...”) This pairing of mercy and vengeance (*mildheortnyse* and *wraca*) may be found in much earlier English texts, as exemplified by Warner, ed., *Early English Homilies*, 96.

Brinton expected toughness on crime merged with mercy from kings and justices alike, and by extension these ideas may have informed jurors' approach to cases as well. Jurors, after all, were regularly exposed to sermons like this, and in turn were instrumental in implementing the king's justice in England. Good judgment, according to *Bracton*, "delights the honor of the king, whose person they represent as they sit in justice."⁹² A Wycliffite sermon captured the mercy-and-justice dichotomy in preaching that the human will should be "clothed with mercy," in order that understanding might lead to "right judgment."⁹³ Mercy and judgment were expected to work in tandem.

Bracton argued that judges had a duty "to impose a sentence no more and no less severe than the case demands"—admittedly difficult in a felony system with a sole capital punishment—and that a good judge "must seek a reputation neither for severity nor clemency but, having weighed the circumstances, should determine as each case requires."⁹⁴ *Bracton* further explained that judges should incline toward leniency in less serious cases, a widely known Roman law reference, while they should also strive "in the imposition of the heavier penalties to temper the severity of the law with a degree of benignity."⁹⁵ This was particularly

⁹² Thorne, ed. and trans., *Bracton*, vol. 2, 307.

⁹³ Hudson, ed., *English Wycliffite Sermons*, vol. 1, 237 (emphasis in original). ("...The secoude word of Crist *forbedyth fool iugement*. And resoun of þis stondesth herynne þat God may not iuge folily ony man; and so, as oure wille haþ nede to be clopid wiþ mercy, so oure vndurstandyng hath nede to haue riȝt iugement. for many men wenen to be merciful to ypocrites, and þei don harm to men to whiche þei wenen do profiȝt. And many men wenen to iuge þer breþren, and ȝet þei iugen falsely and cruelly of many. And yche man schulde tempere such iugement aftyr God, for God in his iugement may not faylen fro resoun.")

⁹⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 299. It is noteworthy that *Bracton* explicitly identified abjuration as a form of punishment: "The kinds of punishments visited upon malefactors are these. Some take away life or member; some entail the abjuration of a city, borough or county, others abjuration [of the realm], permanent or temporary, or bodily restraint, that is, imprisonment, for a time or for life. Others entail cudgelling, flogging, the pillory and the ducking-stool and a judgment with infamy." See also Turner, *English Judiciary in the Age of Glanvill and Bracton*, 270.

⁹⁵ Thorne, ed. and trans., *Bracton*, vol. 2, 299. Throne traces this to D. 48.19.11.

true in capital cases: Year Book evidence suggests that the law was expected to be more favorable to a defendant in a felony case, where life was on the line, than in a case of trespass where only money damages were at issue.⁹⁶ Borrowing a maxim from Justinian's *Digest*, possibly by way of Gratian, *Bracton* added, "Punishments are rather to be mitigated than increased."⁹⁷ In part, this view of judging was inspired by a commitment to mercy grounded in scripture. It may also have reflected concern over the consequences of overly severe judgments in a system of felony adjudication dependent upon the death penalty.

Medieval literature is replete with examples of justice done right and justice done wrong. Judges were figures who fed the literary imagination, inspiring stories whose plot lines imparted valuable lessons for those who, though never in judicial office, would nevertheless be called upon to exercise judgment. For example, Pilate served as a cautionary exemplar on the issue of wrongful judging. In Nicholas Love's account of Jesus' trial, Pilate appeared as a weak-spined man more fearful of the Jews than of his soul's fate if he were to condemn a person to death wrongly: "at the last the wretched Justice Pilate, dreading more to offend them than to condemn the innocent wrongfully, gave the sentence upon him at their will, and so damned him to be hanged on the cross."⁹⁸ Just as *Bracton* cautioned that judges should not "beg soundness in judgment from others",⁹⁹ Pilate's weakness as a judge lay in his ability to be swayed too easily by those desiring to convict an innocent man. It is perhaps for this reason that *Bracton* drew

⁹⁶ See Y.B. Pasch. 17 Edw. 2, fol. 531-533, no. 3 (K.B. 1324), *Seipp's Abridgement*, no. 1324.049 (a case of abetting in King's Bench, in which the Year Book report notes that "ley est plus favourable a saver home vie & membre que lui saver des damages ou il est coupable," or "the law is more favorable to save a man's life and members than to save him from damages where he is guilty").

⁹⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 299. Thorne traces these maxims to D. 48.19.42 and Decretum: C. 33, qu. 3, ca. 18.

⁹⁸ Love, *Mirror of the Blessed Life of Jesus Christ*, ed. Sargent, 170. ("...at þe last þe wretchede Justice Pilate dredyng more to offende hem þen to condempne þe innocent wrongwisly 3af þe sentence vpon him at hir wille, & so dampnet him to be hanget on þe crosse.")

⁹⁹ Thorne, ed. and trans., *Bracton*, vol. 2, 307.

upon the analogy of Pilate in cautioning judges to question jurors about the source of their information when a verdict seemed suspicious, arguing that in this way the judge's name might be renowned and it might "not be said, 'Jesus is crucified and Barabbas delivered.'"¹⁰⁰ *Bracton* cautioned against permitting an unsuitable man to serve as judge: "Let no one, unwise and unlearned, presume to ascend the seat of judgment, which is like unto the throne of God, lest for light he bring darkness and for darkness light, and, with unskillful hand, even as a madman, he put the innocent to the sword and set free the guilty, and lest he fall from on high, as from the throne of God, in attempting to fly before he has wings."¹⁰¹ Beware, in other words, the ignominious fate of Pilate.

One can also find the occasional exemplar relaying the tale of an honorable judge's life. The legend of St. Erkenwald, preserved in a single paper manuscript and believed to have been written c. 1386, not only tells of a particularly honorable judge, but remarkably a pagan judge living in the pre-Christian era. While Erkenwald's story may not have been widely known, it is similar in structure to a more popular and widespread tale of the salvation of the Roman emperor Trajan at the hands of Pope Gregory the Great.¹⁰² The legend suggests that rightful judging could be achieved through a kind of natural law approach, using one's reason to arrive at the appropriate means to exercise judicial power, such that a pagan judge might be worthy of posthumous sanctification thanks to his ability to intuit the proper approach to judging even in the absence of Christian spiritual guidance.

The story of Erkenwald takes place in Christian England with narrative flashbacks to a pre-Christian past. It opens with the discovery of an ancient tomb during excavation work for a

¹⁰⁰ Thorne, ed. and trans., *Bracton*, vol. 2, 404.

¹⁰¹ Thorne, ed. and trans., *Bracton*, vol. 2, 21.

¹⁰² See Jennifer L. Sisk, "The Uneasy Orthodoxy of 'St. Erkenwald'," *English Literary History* 74:1 (2007), 91.

building project. The tomb contained a regally attired undecomposed corpse. Approaching the tomb's edge, Erkenwald asked the corpse, "How long have you lain here?" Remarkably, the corpse responded with a woeful tale, relaying how he had served as judge for disputes arising in London under "pagan law," and how he had been called upon "to sit upon said cases".¹⁰³ For over forty years, the judge had acted as "deputy and doomsman", handing down judgments upon a folk who were "felonious and false, and forward to rule".¹⁰⁴ "I never departed from my conscience for covetousness on earth," the judge recalled, and "I strayed never from the right," tempted neither by wealth nor family favor.¹⁰⁵ Upon his death, he had been buried in the livery of a king in recognition of his wisdom in judging. The judge proceeded to lament that, being long dead by the time of Christ, he was not numbered among those whose souls were redeemed by Jesus' passion and death. In fact, he recalled being left behind in limbo when Jesus lifted souls out. Hearing of the good judge's suffering in the "hell-hole" of limbo,¹⁰⁶ Erkenwald leaned over the corpse and spoke tenderly: "I accompany you in the Father's name and his fair Child's, and of the gracious Holy Ghost," thereby speaking words associated with Baptism; among those witnessing the exchange "not one feared any longer."¹⁰⁷ With that, Erkenwald's "tears trilled

¹⁰³ Clifford Peterson, ed., *Saint Erkenwald* (Philadelphia: University of Pennsylvania Press, 1977), 77-78, lines 187 ("How longe þou has layne here"), 201-203 ("I was committid and made a mayster-mon here / To sytte vpon sayd causes, þis cité I zemyd / Vnder a prince of parage of paynymes laghe...").

¹⁰⁴ Peterson, ed., *Saint Erkenwald*, 78, lines 227-231. ("I was deputate and domesmon vnder a duke noble / and in my power þis place was putte al to-geder. / I iustificet þis ioly toun on gentil wise / And euer in fourme of gode faithe more þen fourty wynter. / Þe folke was felonse and fals and frowarde to reule...")

¹⁰⁵ Peterson, ed., *Saint Erkenwald*, 78-79, lines 233-244. ("Bot for wothe ne wele ne wrathe ne drede / Ne for maystrie ne for mede ne for no monnes aghe, / I remewit neuer fro þe riȝt by reson myn awen / For to dresse a wrange dome, no day of my lyue. / Declynet neuer my consciens for couetise on erthe...")

¹⁰⁶ Peterson, ed., *Saint Erkenwald*, 80, line 291 ("helle-hole").

¹⁰⁷ Peterson, ed., *Saint Erkenwald*, 81, lines 318-319. ("I folwe þe in þe Fader nome and His fre Childes, / And of þe gracious Holy Goste' and not one grue lenger...")

down and on the tomb alighted, and one fell on his face, and the man sighed.”¹⁰⁸ Having thus been baptized by Erkenwald’s tears, the judge rejoiced and thanked him for aiding his redemption. In a macabre twist, the judge’s body suddenly decayed, becoming “black as the molds, as rotten as the rot that rises in powder.”¹⁰⁹ The judge’s soul having been “seized in bliss”, his body could finally enter the natural state of human decomposition.¹¹⁰ Even the judge’s fellow pagans had recognized his righteous judging when they enrobed him in royal attire before placing him in a tomb, drawing a visual connection between kingly authority and the power of good judging. Erkenwald and his Christian witnesses to the later exhumation added a further layer of significance: right judging was so powerfully redemptive that it might even save a pre-Christian pagan judge’s soul from eternal torment.

The question remains as to how a contemporary, late fourteenth-century audience, composed in part of potential jurors, might have interpreted tales such as this one. For one thing, such stories offered a counterpoint to the more widespread cynical literary trope detailing the exploits of unsavory lawyers and judges.¹¹¹ Whether or not they also served as an exemplar to jurors faced with the prospect of handing down verdicts in capital cases is a further, more complicated question. Taken to its extreme, the tale of Erkenwald perhaps would have assured a scrupulous juror that correct judging was within reach, insofar as a pagan judge had been able to issue commendable judgments in the pre-Christian era. At the very least, tales like this one emphasized the redemptive power of rightful judging, a hopeful rejoinder to more common

¹⁰⁸ Peterson, ed., *Saint Erkenwald*, 81, lines 322-323. (“And teres trillyd adoun and on þe toumbe lighten, / And one felle on his face and þe freke syked.”) For an analysis of this sacramental scene in the Erkenwald poem, and its relationship to contemporary anxieties over Wycliffite heterodoxy, see Sisk, “The Uneasy Orthodoxy of ‘St. Erkenwald’,” 89-115.

¹⁰⁹ Peterson, ed., *Saint Erkenwald*, 81, lines 343-344. (“...blakke as þe moldes, / As roten as þe rottok þat rises in powdere.”)

¹¹⁰ Peterson, ed., *Saint Erkenwald*, 81, line 345 (“sesyd in blisse”).

¹¹¹ On this issue, see Sisk, “Uneasy Orthodoxy of ‘St. Erkenwald’,” 94.

sermon themes about the damning dangers of the wrong sort of judging. More common, indeed, was the fearful image of the Last Judgment awaiting those who, unlike the pagan judge, issued wrongful judgments. As *Bracton* lamented about the punishments awaiting bad judges:

O how strict shall that judgment be, where we shall give account not only of our acts but even of every idle word that men utter. Who can escape his impending wrath? For the Son of Man shall send His angels and they shall gather out of His kingdom all things that offend and them that do iniquity and bind them into bundles to be burnt, and shall cast them into the fiery furnace, where there will be wailing and gnashing of teeth, groans and screams, outcries, lamentation and torment, roaring and shouting, fear and trembling, sorrow and suffering, fire and stench, doubt and anxiety, violence and cruelty, ruin and poverty, distress and dejection, oblivion and confusion, tortures and woundings, troubles and terrors, hunger and thirst, cold and heat, brimstone and burning fire for ever and ever.¹¹²

After reading such a passage, written in a treatise about law in the central royal courts, who would have dared take on the commission of serving as justice or the responsibility of sitting in judgment as a juror?

Communitarian Emphasis on Local Involvement in Judging

Many individuals, as it turns out, assumed this great responsibility. Behind the very use of inquests and juries is the idea that the common man may employ his reasoning faculty to determine the justice in a situation. In societies employing trial by jury, there is, in some measure, an understanding that everyone is entitled to act as a judge, employing reason to reach a conclusion about the justice of a situation. One need not look at criminal trials alone to find this phenomenon. In fact, a similar ethos underlies what might be described as Good Samaritanism evident in medieval English records, pointing toward the notion that the common person on the street could sum up a situation, make a prudential judgment, and verbally or even physically intervene to effect the desired outcome.

¹¹² Thorne, ed. and trans., *Bracton*, vol. 2, 21-22.

England could have gone the way of granting exclusively to coroners the capacity to view a corpse and issue a preliminary judgment as to the likely location of guilt, perhaps aided by witness interviews. Instead, however, the coroner's narrative was produced by an inquest of local men who were entrusted with the narrative power, mediated by a scribe, that might send an accused man or woman toward trial and possibly the gallows. In his study of the English jury, Masschaele describes the jury system as generally formative of "a relationship between people and state", a relationship that survives to this day in common law jurisdictions.¹¹³ Delving into court records, Masschaele observed that one of the most distinctive features of medieval England's court system was "the extent to which local people, other than those who were litigating or disputing, had to be involved in the process for it to work."¹¹⁴ This involvement most often took the form of jury service, which extended to many contexts beyond criminal litigation and involved a broad cross section of male society, including ranks below the gentry.¹¹⁵ While the criminal trial jury would become a distinguishing feature of English felony procedure in comparison with the continent, it is noteworthy that collective adjudication was widespread in Western European culture throughout this period.¹¹⁶ Jury duty was a routine part of life.

Yet judging was not limited to those summoned to jury duty. From a close reading of a single late thirteenth-century coroner's roll entry, we can get a vivid sense of the manifold ways

¹¹³ Masschaele, *Jury, State, and Society*, 1. His study in part grew out of a desire to understand why the political and social unrest and rebellion that accompanied early state formation in continental Europe was not mirrored in England despite its rapid pre-Black death progress in state formation. See *ibid.*, 2-3.

¹¹⁴ Masschaele, *Jury, State, and Society*, 5.

¹¹⁵ Masschaele, *Jury, State, and Society*, 5, 7, 9, 14. Masschaele observes, for example, that peasants routinely served in juries by the second half of the thirteenth century and probably earlier, partly due to widespread demands for jury involvement in adjudicating disputes. See also Butler, *Forensic Medicine in Medieval England*, 79-83 (arguing, *inter alia*, that the statutory income requirements for trial jurors were not replicated for jurors serving on coroners' inquests; the latter likely only needed to have facility with spoken English).

¹¹⁶ See, generally, Reynolds, *Kingdoms and Communities*.

in which medieval English men and women alike engaged in the quotidian act of prudential judging. Let us consider, then, a single narrative. On a Friday evening in late spring 1297, close to midnight, a woman named Matilda de Crickelade passed away in her home in the Oxford parish of Saint Fredeswide. On Saturday, the local coroner, Adam de Spalding, assembled an inquest drawn from the four nearest parishes, including Matilda's own, to examine her body and articulate a description of the events leading up to her death. Although the coroner's inquest would not issue a final verdict, which could only follow from a trial, the jurors spoke under oath and in a definitive manner, essentially producing an informal verdict—in the literal sense of *vere dictum*, or speaking the truth—as to the assignment of guilt in the matter.¹¹⁷ The jurors unanimously described how the day before, after dusk, an argument had arisen between two men affiliated with the household of a local master (*magister*), William Burnell, possibly a professor. Heated words were exchanged between William de Wydintone, the *magister's* porter (*janitor*), and a cleric named Robert who was living off the alms of the generous *magister*. Robert was described as hailing from Acton Burnell, more than 100 miles away from Oxford. The full coroner's roll entry is reproduced here:

It happened on Friday after the Ascension of the Lord in the 25th regnal year of King Edward that Matilda de Crickelade died in her home where she had been living in the parish of Saint Fredeswide, Oxford, around midnight. And on the following Saturday a view was held by Adam de Spalding, coroner, and [it was found that] she had a wound on the left side of her head which in longitude was two inches and in latitude one inch and of a depth of one inch. An inquest was taken there that same day before the aforesaid coroner by the four nearest parishes, namely St. Fredeswide, Saint Michael South, Saint Aldate, and Saint Ebbe. And all the jurors in the aforesaid inquest say on oath that on Friday in the feast of the

¹¹⁷ Occasionally a coroner's inquest might be quite explicit in assigning guilt. In a 1366 Middlesex case, for example, the jury stated that Walter Newton had killed Hugh the parish clerk with a knife, but that Hugh had been the assailant, and that his death was therefore merited. See Gross, ed., *Select Cases from the Coroners' Rolls*, 54.

Ascension of the Lord in the aforesaid year after dusk that a contention of words arose between William de Wydintone, porter of Magister William Burnel, and a certain cleric named Robert of Acton Burnell who lived off the alms of the aforesaid magister William, and that upon this the aforesaid Robert with a certain staff of ash wood which he carried in his hand struck the aforesaid porter once and again, and when he wished to strike him a third time the aforesaid Matilda, who was standing there next to them, leapt between them so that she received the blow on her head which the aforesaid Robert had intended to give to the aforesaid porter, and thus she had the aforesaid wound of which she died on the night and hour aforesaid having had all her ecclesiastical rites. And the aforesaid Robert immediately fled after the deed so that he could not be attached nor be found to attach. And he did not have any goods.¹¹⁸

As suggested by his surname, the *magister* William was of the prominent Burnell family, the most prominent member of which was William's elder brother Robert, close confidante of Edward I and chancellor until his death in 1292, five years before this unseemly incident.¹¹⁹ The

¹¹⁸ For the record of the coroner's inquest, see JUST2/128/AALT 0004 (1297), accessed Feb. 18, 2014, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no128/IMG_0004.htm. ("Contigit die veneris in crastino Ascensionis Domini anno regni Regis Edwardi xxv^{to} quod Matillis de Crickelade obiit in domo sua ubi manebat in parochia sancte Fredeswide Oxon' circa mediam noctem. Et die Sabati sequente mane visa fuit per Adam de Spalding Coron' et habuit unam plagam ex sinistra parte capitis cuius longitudo erat duorum pollic' latitudo unius pollic' et profunditas unius pollic'. Inquis' inde capta fuit eadem die coram Coron' predicto per quatuor parochia propinquiores videlicet sancte Frides Sancti Michaelis Austral' sancti Aldati et Sancte Ebbe. Et omnes Jur' in dicta Inquis' dicunt super sacramentum suum quod die Jovis in festo Ascensione Domini anno predicto post horam ignitegn' contencio verborum mota fuit inter Willelmum de Wydintone Janitorem Magistri Willelmi Burnel et quemdam clericum nomine Robert de Actone Burnel qui vixit de elemosinis predicti magistri Willelmi et super hoc dictus Robertus cum quadam baculo de fraximo quem portabat in manu sua percussit predictum Janitorem semel et iterum et cum tercio vellet percussisse eum predicta Matillis que stetit ibi iuxta eos prosilunt inter eos ita quod ipsa recepit in capite ictum illum quem dictus Robertus proposuit dedisse dicto Janitori et s' habuit predictam plagam de quo obiit nocte et hora predictus s' habuit omnia Jura ecclesiastica. Et dictus Robertus statim fugit post factum ita quod attachiare non potuit nec inveniri ad attachiare. Et non habuit in bonis.")

¹¹⁹ Alan Harding, 'Burnell, Robert (*d.* 1292)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edition, Oct 2007, <http://www.oxforddnb.com.proxy.lib.umich.edu/view/article/4055>, accessed February 18, 2014. William Burnell died in 1304, and his Oxford holdings were bequeathed by his executors to Balliol College. Henry Anstey, ed. *Monumenta Academica, or Documents Illustrative of Academical Life and Studies at Oxford*, part 1 (*Libri cancellarii et procuratorum*) (London: Longman, Green, Reader, and Dyer, 1868), 105, n. 5. He left books to Merton and Balliol Colleges. See A. B. Emden, *A Biographical Register of the University of Oxford to A.D. 1500*, vol. 1 (Oxford: Clarendon, 1957), 316, s.v. "Burnell, William."

Burnell family gave its name to the town of Acton Burnell, from which the belligerent, alms-seeking cleric hailed. It may have been this hometown connection that obliged the well-situated *magister* to assist the impoverished Robert. Such alms could not have placed too great a strain on the *magister*'s resources, judging from his 1291 acquisition of the real property of a lengthy list of Oxford Jews whose homes escheated to the king upon their expulsion in 1290.¹²⁰ Within Oxford, William Burnell was a big man on campus, and he appears to have owned much of campus to boot.

In the coroner's narrative above, the jury described in sequential detail the events leading up to Matilda's death. The jury specified that the staff was made of ash, a detail perhaps intended to evoke the severity of the blow; the durable hardwood of the ash tree has historically been used to make bows, hurleys, and more recently electric guitars and baseball bats due to its nearly indestructible nature. This may help explain how a single blow from Robert could have produced such a serious, fatal wound. Matilda's imminent death was foreseeable, as suggested by her receipt of last rites and Robert's flight from Oxford.¹²¹ Given the delay between the attack and Matilda's death, the jury likely had access, whether directly or through hearsay, to Matilda's version of the evening's events.

No further record survives, so we do not know whether the cleric was ever brought to trial. Nevertheless, this vignette of an Oxford death has much to reveal about medieval English guilt assessment and judging in daily life. Setting trials aside as only the most obvious of examples, there were manifold circumstances under which medieval English men and women exercised their consciences in sizing up morally problematic situations. At felony trials,

¹²⁰ For the full Latin text of Edward's grant to William Burnell, see Montagu Burrows, ed., *Collectanea, Second Series* (Oxford: Clarendon, 1890), 312.

¹²¹ For the record of the coroner's inquest, see JUST2/128 AALT 0004 (1297), accessed February 18, 2014, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no128/IMG_0004.htm.

admittedly, the stakes were unparalleled given the looming threat of the death penalty. In the story of Matilda's death, the inquest jury compels us to consider several moments of informal and formal guilt assessment. First, Robert and William, confronting one another and exchanging angry words at the home of William Burnell, were engaged in a heat-of-the-moment assessment of their own and their opponents' sides to the argument. Was the argument over the cleric's demand for alms,¹²² or perhaps over the ill-fated Matilda? We cannot know, particularly since the record never identifies Matilda beyond her name, leaving her relationship to the two belligerent men and *magister* William unclear. From the tale told by the inquest jurors, we can surmise that Robert felt right was far enough on his side to justify raising a hardwood staff against the porter, or at least that he was angered enough to strike out reflexively or deliberately at the man. Another moment of guilt assessment arose with the brave but perhaps foolhardy intervention of Matilda, who was troubled enough by the altercation to interpose her own body between the two arguing men. We can conclude from her action that she felt that Robert was wrong to raise his staff menacingly against the porter.

We have a brief glimpse of yet another moment of guilt assessment in the indication that Matilda received her ecclesiastical last rites before succumbing to her wound. The delay between Robert's blow and Matilda's death afforded time for her to unburden her conscience in confession and prepare for a good death, an act which increased her chances of heavenly rest and which, legally speaking, meant that the coroner did not need to summon the "first finders" who

¹²² See, e.g., H. E. Salter, ed., *Records of Mediaeval Oxford: Coroners' Inquests, the Walls of Oxford, etc.* (Oxford: Oxford Chronicle Company, 1912), 4. According to Salter: "Probably we are meant to understand that the 'strife of words' was about the alms of William Burnel; broken meat was called alms, and it may have been the duty of the door keeper to give his master's scraps to the poor scholar."

witnessed her death or initially came upon Matilda's corpse;¹²³ the idea behind this legal formality was presumably that the deceased had had an opportunity to point the finger at the guilty party and give her version of the story before succumbing to death, thereby alleviating any undue suspicion that might otherwise fall upon the first finders.¹²⁴

Finally, of course, we have the guilt assessment of the inquest jury itself, drawn from the four nearest parishes and likely familiar to some extent with the household of the prominent William Burnell. The inquest was unequivocal in ascribing culpability to Robert the cleric. Based on the details provided in their narrative, we can draw inferences as to some of the factors that might have weighed in their judgment: Robert, an apparent outsider—perhaps an Oxford student from Acton Burnell—was dependent on the largesse of William Burnell, which perhaps made his assault upon Burnell's porter all the more outrageous; although Robert and William the porter had both been arguing, it was only Robert who moved from words to blows according to the narrative; Robert had struck so violently at the porter, using an ashen staff no less, as to inflict a fatal wound on the intervenor, Matilda; after fatally striking Matilda, Robert fled the scene rather than standing to right. We can imagine that if Robert's case had gone to trial, he would have been hanged for felony unless the trial jury produced a narrative so strikingly

¹²³ Hunnisett, *Medieval Coroner*, 25. "The 'first finder' of the body, male or female, of whatever age and whatever the cause of the death, had to be attached and his name and those of his sureties enrolled by the coroner, unless the body was found within the verge or the dead man had both received the last rites of the church and spoken between the wounding and the death, when he would presumably have exculpated the 'first finder'."

¹²⁴ Consider, for example, the 1269 deathbed testimony of one Azeline, wife of John Cobbler, who was able to testify to the coroner "that she saw and recognized certain of those who participated in the felony," namely the homicide of her husband and wounding of herself, her daughter, and a servant. She singled out one of the men of the prior of Newham, a group of men who had collected tithes for the prior of Caldwell the previous autumn, as well as the glovers of Bedford. The coroner was able to track down all the accused's names and have the men arrested. See Gross, ed., *Select Cases from the Coroners' Rolls*, 14.

different from that of the coroner's inquest as to justify or excuse his actions, such as describing the porter as initiating the fatal physical altercation with a weapon of his own.¹²⁵

As the story of Matilda's death illustrates, medieval English men and women were called upon to offer assessments of guilt at several stages in criminal procedure and at antecedent and subsequent moments outside the bounds of legal formality. Many of these moments involved guilt assessment with minimal consequences, while others held the potential to send a person to the gallows. In cases of homicide, the first opportunity might arise in the heat of the moment, as a bystander intervened in a brawl outside a tavern, or a person responded to an attack on his or her person by drawing a knife in self-defense. In cases of theft, villagers might eye a stranger suspiciously if she showed up on market day hawking wares that looked too costly to have been come by honestly, or might question an unfamiliar man who tried to sell sheep or chickens at an artificially low price, looking to offload them swiftly and flee town. Formally, guilt assessment occurred in coroner's inquests, where men of the locality were called upon to view a corpse, measure any wounds, and produce a narrative of how, to the best of their knowledge, the deceased had come to his or her end. If a case made it to trial, jurors were again asked to speak to the guilt or innocence of an alleged felon, deciding whether to convict, acquit, or recommend pardon. Handling sin, as Mannyng vividly called it, was part of life, particularly for men obligated to serve on juries. Handling sin was also part of the religious life of all men and women, who were expected to examine their consciences and produce a narrative of sin for the

¹²⁵ Suggestive of the likely outcome of a trial of the cleric, a Year Book report from half a century later (1348) describes a case in King's Bench in which a tailor was arraigned for homicide. The tailor described how he had been arguing with a companion, and how the deceased had received a blow accidentally (*per misaventure*) when he stepped between the two to separate them. The chief justice, Thorp, stated that the tailor was guilty of felony because, when two people fight together, and a third person intervenes and is killed, the person who struck him is guilty for having started the wrong (*pur ceo que il commence le mal*). See Lib. Ass. 22 Edw. 3, fol. 101a, no. 71 (K.B. 1348), *Seipp's Abridgement*, no. 1348.279.

ears of their local parish priest, acting as confessor. In either case—jury service or simple confession—much weighed in the balance, whether an accused individual’s life or a penitent sinner’s soul. When called upon to assess the guilt of a criminal suspect or defendant, the average inquest or trial juror may have employed some of the same strategies learned for the examination of his own conscience in preparation for the sacrament of confession.

Judging as a Communal Norm

Indeed, judging was a part of daily life in medieval England, and also a theme regularly expounded upon by preachers, who admittedly tended to focus more on warning about the Last Judgment rather than advising on day-to-day judging. “Brethren, ye should understand that there are four last things which should principally ever be held in man’s mind,” stated a late medieval English sermon, now identified as Lollard: “the first last thing is man’s bodily death, the second is the Day of Doom, the third is the pains of hell, the fourth is the joys of heaven.”¹²⁶ This was a later manifestation of a theme that appeared frequently throughout the Middle Ages in English preaching, namely, the importance of keeping the Judgment Day in view on the horizon. Given the looming presence of the Last Judgment, along with widespread tales of the grisly fate awaiting those who misjudged their neighbors, how did England’s system of felony adjudication ever manage to work? Acquittal rates were high, yes, but plenty of men and women faced capital punishment upon conviction of felony. Judges and jurors may have been inclined toward acquittals and pardons due in part to some of the concerns outlined above, but they frequently handed down capital sentences. All in all, the system worked according to its own terms, sending some to the gallows as a stark reminder of the law’s severity to those who might be

¹²⁶ Cigman, ed., *Lollard Sermons*, 211. (“Breþeren, 3e shullen vnderstonde þat þere ben foure laste þingis whiche shulden prinsepaly euer be holden in mannys mynde: þe first last þing is mannys bodily deop; þe secound is þe Day of Dome; þe þrid is þe peynes of helle; þe fourþe is þe joyes of heuen.”)

tempted by crime, and offering others reprieve of both the harsh—e.g., forfeiture and abjuration—and lenient—e.g., benefit of clergy and acquittal—varieties.

For one thing, religious exhortations toward mercy and warnings against judging were frequently coupled with the acknowledgement that judging might be undertaken in a righteous manner, as demonstrated above by Erkenwald's tale. A late-fourteenth-century sermon, for example, after warning against judging others, proceeded to contrast foolish judging with righteous judging, which people might undertake "with dread and love of God," recalling that it might be the right path to judge another when one knows that he or she was sinning against God's will.¹²⁷ Righteous judging was to be undertaken with mercy and charity, and not with hate, envy, or evil will.¹²⁸

Judging and bearing witness were familiar practices in medieval England. In analyzing the shift to trial by jury after Lateran IV, James Whitman attributes the swift English transition to juries to the country's history of strong kingship. Powerful twelfth-century English kings had been able to compel testimony and accusation from an early date, and jury trial was a natural outgrowth of this already well-established tradition.¹²⁹ In contrast with the continent, where witnesses' reluctance to testify might have hindered replacement of the ordeal, England already had in place a system for compelling witness testimony: service on presentment juries forced individuals to bring accusations against their neighbors, thereby making it easier to eliminate

¹²⁷ Ross, ed., *Middle English Sermons*, 122. ("But a ryghtwis dome men may deme with drede and loue of God, for Crist biddeþ and þi broþur trespase aþeyns, first, he sais, reforme hym be-twex þe and hym. And þus may euery broþur deme oþur when þat he doþ amys and whan þou knawist þat he synnes aþeyns Goodes will.")

¹²⁸ Ross, ed., *Middle English Sermons*, 122. ("And þus men may deme ryghtfully, but euermore with mercy and charite it oweith to be don... 3iff so be þat we deme not folyly oure ney3ours, as much folke done for hate, envie, and ewill will, we shall not be demed.")

¹²⁹ See Whitman, *Origins of Reasonable Doubt*, 128. See also Kaeuper, *War, Justice and Public Order*, 159.

ordeal procedure.¹³⁰ Masschaele's work adds an additional layer to the story by emphasizing the long-standing and widespread reliance on juries in many facets of English cultural life, and Musson has similarly highlighted the involvement of even lower levels of society in court attendance, and the education of people in the nature of the law through such exposure as well as through sermons and other means of sharing information.¹³¹ English kings could compel testimony in the twelfth century due in part to a long-standing, grassroots tradition of prudential judgment and decision-making on the part of individual English subjects. Those living on manors, for example, had long been called upon to participate in their local manorial court, a call that some residents treated with the same cynicism as modern Americans facing a jury summons.¹³² Members of urban guilds could be called upon to issue judgments on matters involving one of their fellow craftsmen.¹³³ In town and countryside alike, men served on coroners' inquests and juries of presentment. Masschaele suggests that the rise to prominence of the jury was not entirely based on compulsion and coercion, but rather reflects the fact that the jury served both royal and popular interests. He argues, "the jury rose to the fore because it so effectively married the widespread popular sentiment that juries were fair and reliable with the interest of kings and royal administrators in gaining access to local power structures."¹³⁴ Juries were not, therefore, simply a top-down intervention imposed by powerful kings, but rather an institution that benefited king and commoner alike.

¹³⁰ See Whitman, *Origins of Reasonable Doubt*, 138.

¹³¹ See, generally, Masschaele, *Jury, State, and Society*; Musson, *Medieval Law in Context*, 95-120. On levels of literacy and the narrowing cultural gap between clergy and laity in the thirteenth century, see d'Avray, *Preaching of the Friars*, 42-43.

¹³² On jury service potentially being seen as a burden, particularly if it interfered with harvest or involved great travel, see Masschaele, *Jury, State, and Society*, 200-201.

¹³³ Such groups might even have their own courts, as in the case of London's fishmongers. See Cam, ed. and trans., *London Eyre of 1321*, vol. 1, civ.

¹³⁴ Masschaele, *Jury, State, and Society*, 205.

Concerns about the danger of judging and a corresponding tendency toward mercy was likely tempered by jurors' more sober conviction that violent crime needed to be extirpated. Gang violence in particular must have struck fear in the hearts of many a juror, both in anticipating reprisals for handing down a guilty verdict, and desiring to end a gang's rampage before more families were harmed.¹³⁵ A 1267 Bedfordshire coroner's roll, for example, recorded that a group of six thieves seized a boy, Philip, Roger Gold's son, as he was walking home from his father's fold. They beat him and took him to a local home, where they forced Philip to ask to be let in. Recognizing Philip's voice, Ralph, son of Geoffrey of Honeydon, opened the door to the marauders. The six men, in turn, killed Ralph's mother and a servant and robbed the house, then moving on to other homes to commit robbery, murder, and even arson.¹³⁶ Such neighborhood-wide attacks by roving gangs had to have given little cause for sympathy should the gang members have been discovered and brought to trial. A later chronicle aptly warned that leaving violent criminals unpunished would result in a world in which men would not feel safe in their own homes.¹³⁷

Moreover, although texts urging mercy were abundant, so were descriptions of the torments of hell awaiting those who failed to repent on earth. In an Old English poem on the pains of hell, for example, the poet described how "in hell there is a deep gaol" containing,

¹³⁵ See, generally, Kaeuper, *War, Justice and Public Order*. See also Bellamy's chapter on the concept of "riot", for the gentrified equivalent of organized gang violence, in John G. Bellamy, *Criminal Law and Society in Late Medieval and Tudor England* (Gloucester: Alan Sutton, 1984), 54-89. For a chronicle description of early fourteenth-century unrest due to violent men making compacts with one another, see Wright, ed., *Chronicle of Pierre de Langtoft*, vol. 2, 360-361.

¹³⁶ Gross, ed. and trans., *Select Cases from the Coroners' Rolls*, 8-9.

¹³⁷ Wright, ed., *Chronicle of Pierre de Langtoft*, vol. 2, 360-363 ("Si chastiment ne fust de ribaldes et bricouns, / Osé ne serrait homme vivre en mesouns. / O cum Deus est bons de drayturels guerdouns! / Ke taunt sovent nous ad vengé de felouns.") Wright translates: "If there were no chastisement of ribalds and rogues, / A man would not dare to live in house. / O how God is good in his righteous rewards! / Who so often has revenged us on felons."

among other sinners, “those who judged Jesus Christ”, and, quite tellingly, all “who were beheaded or hanged”.¹³⁸ This suggested that such executed criminals not only deserved their earthly punishment of a grisly death, but also merited eternal damnation due to the error of their ways. Medieval jurors therefore might feel justified in handing down a guilty verdict in capital cases when the accused fit the paradigm of the hell-bound, irredeemable wrongdoer.

At the same time, one cannot assume that medieval men and women generally absorbed the mercy-laden messages proffered by mendicant preachers and parish priests. Lateran IV increased the responsibilities of parish priests for educating their parishioners, while also stimulating the growth of the mendicant orders, for whom preaching and hearing confessions provided a livelihood.¹³⁹ The post-Lateran-IV period witnessed an explosion in mendicant establishments within England.¹⁴⁰ The mendicant orders appear to have claimed royal favor, as evidenced by the fact that major patrons tended to be loyal allies of the royal government.¹⁴¹ This may help to explain some of the disdain for mendicants that comes through in popular literature, such as the fourteenth-century poem that comically warns:

Men may see by their countenance,
That they are men of great penance,
And also that their sustenance
Simple is and weak.
I have lived now forty years,
And fatter man about the kidneys

¹³⁸ “The XI Pains of Hell,” in Morris, ed., *Old English Miscellany*, 153-154. (“In helle is a deep gayhol...þeo þat demde iesu crist.” And “...þat weren biheaueded oþer an-hon.”)

¹³⁹ On the popular preaching of Franciscans in particular, see Little, *Studies in English Franciscan History*, 123-157.

¹⁴⁰ For some figures regarding the expansion of mendicant houses, including the Franciscans, Dominicans, Carmelites, Austin Friars, Friars of the Sack, and Pied Friars, see Jens Röhrkasten, “Mendicants in the Metropolis: The Londoners and the Development of the London Friaries,” in *Thirteenth Century England VI: Proceedings of the Durham Conference, 1995*, eds. Michael Prestwich, R. H. Britnell, and Robin Frame (Woodbridge: Boydell Press, 1997), 61-64.

¹⁴¹ Röhrkasten, “Mendicants in the Metropolis,” 71.

Yet saw I never than are these friars.¹⁴²

The mendicants placed great emphasis on the redemptive power of confession and absolution. Literary evidence, however, demonstrates that some people were downright cynical about the mendicants' message that one might make confession and be fully cleansed of sin. As one late fourteenth-century poet bemoaned:

They say that they destroy synne
And they maintain men most therein.
For had a man slain all his kynne,
Go shrive himself at a friary,
And for less than a payre of shoes
He will absolve him, clene and sound...¹⁴³

Of course, the poet's message may have been less a critique of confession as a practice than of the hypocrisy practiced by friars, who, according to him "fill the world full of errors and hypocrisy" and overcrowd hell upon their deaths.¹⁴⁴ Nevertheless, the underlying concern was the possibility that friars might absolve murderers and permit them to walk free rather than receiving the punishment they deserved. In the sections to follow, I will highlight literary tropes about the dangers of judging and the importance of charity and mercy, themes that were widespread but always counterbalanced by fear of crime and competing themes emphasizing the importance of securing the king's peace and enacting justice.

¹⁴² Thomas Wright, ed., *Political Poems and Songs Relating to English History, Composed During the Period from the Accession of Edward III to that of Richard III*, vol. 1 (London: Longman, 1859), 264 (from the fourteenth-century Song Against the Friars). ("Men may se by thair contynance, / That thai are men of grete penaunce, / And also that thair sustynance / Simple is and wayke. / I have lyved now fourty ȝers, / And fatter men about the neres [i.e., kidneys] / Ȝet sawe I never than are these frers.") Friars, of course, were also resented by some diocesan priests, who viewed them as competing for confessions. See, e.g., the late fourteenth-century sermon of Thomas Brinton cautioning against confessing to friars. Devlin, ed., *Sermons of Thomas Brinton*, vol. 2, 454-455.

¹⁴³ "The Orders of Cain" (1382), in Robbins, ed., *Historical Poems of the XIVth and XVth Centuries*, 160. ("Ȝai say þat þai distroye synne, / & þai mayntene men most þer-Inne; / For had a man slayn al his kynne, / go shryue him at a frere, / & for lesse þen a payre of shone / He wyl assoil him, clene & sone...")

¹⁴⁴ "The Orders of Cain," in Robbins, ed., *Historical Poems of the XIVth and XVth Centuries*, 160-161. (describing how the friars "fillen þe world ful of errorrs & of ypocrisy. / Alle wyckedness þat men can tell / regnes ham among; / Þer shal no saule haue rowme in hell, / of frers þer is such þrong.")

The Danger of Judging

While in the Erkenwald tale it was a source of salvation, sitting in judgment was generally a dangerous business. Competing communal norms—such as the emphasis on the king’s obligation to keep the peace, and jurors’ familiarity with and therefore comfort level regarding service as witnesses and judges of fact, combined with fear of roving brigands and incorrigible life-long criminals—must have helped ease some of these concerns about the dangers involved in judging. Yet we cannot discount the impact of the widespread homiletical theme warning against judging one’s neighbor. In his pathbreaking book, *The Origins of Reasonable Doubt*, Whitman argued that the reasonable doubt rule in criminal adjudication was not originally designed to protect the accused, but was rather intended to guard judges’ and jurors’ souls.¹⁴⁵ The act of judging, whether undertaken by a judge or a jury, was seen as “full of menace, both for the judge and for the witnesses who gave testimony against their neighbors.”¹⁴⁶ Damnation loomed as a possible outcome for those involved in capital cases. As the *Bracton* treatise cautioned would-be judges:

Therefore let each beware of that judgment where the judge is terribly strict, intolerably severe, offended beyond measure and vehemently angered, whose sentence none can commute, from whose prison there is no escape, whose punishments are without end, his tormentors horrible, who never grow weary, never pity, whom fear does not disturb, conscience condemn, thoughts reproach, and who may not flee.¹⁴⁷

Where modern legal historians tend to think of the reasonable doubt rule as relating to questions of factual proof (i.e., whether we can be reasonably certain that the defendant committed the alleged crime), Whitman argues that premodern judges were concerned more with “moral

¹⁴⁵ Whitman, *Origins of Reasonable Doubt*, 3.

¹⁴⁶ Whitman, *Origins of Reasonable Doubt*, 3.

¹⁴⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 22.

comfort”, ever mindful that convicting an innocent person was potentially a mortal sin.¹⁴⁸ This use of procedure for the purpose of moral comfort applies to jury trials as well, insofar as the collective verdict issued by a jury decreased the sense of responsibility felt by any individual juror.¹⁴⁹

Looking at treatise evidence, a general concern with judging appears in English legal texts as early as the twelfth century, when the *Leges Henrici Primi* declared that the “danger is so much the greater to the judge than to the person who is being judged to the extent that we know, from the words of the Lord, that any judgment we pass on others is held in store for ourselves.”¹⁵⁰ The author of the *Leges* recognized the difficulty of enforcing this biblical proposition, based on the text of Matthew 7:1-2, when faced with a constant stream of criminals: “Although the endless multitude of evil-doers may hinder a proper measure of compassion,” the *Leges* advised, one should be restrained by remembrance of the golden rule, “Do not do to another what you do not wish to be done to yourself.”¹⁵¹ A century later, *Bracton* similarly emphasized the dangers involved in judging, advising each judge to “take care for himself lest, by judging perversely and against the laws, because of prayer or price, for the advantage of a temporary and insignificant gain, he dare to bring upon himself sorrow and lamentation everlasting”.¹⁵² Judging was downright dangerous, and mercy was perhaps a safer alternative.

¹⁴⁸ Whitman, *Origins of Reasonable Doubt*, 3, 10.

¹⁴⁹ Whitman, *Origins of Reasonable Doubt*, 15. The use of a jury also eased the judge’s sense of personal responsibility. *Ibid.*, 24, 129, 148-149.

¹⁵⁰ Downer, ed. and trans., *Leges Henrici Primi*, 130-31, §28.5. (“Tanto enim maius est periculum iudicantis quam eius qui iudicatur...”)

¹⁵¹ Downer, ed. and trans., *Leges Henrici Primi*, 130-31, §28.6. (“Et licet infinita delinquentium multitudo modum miserationis incommodet, uno uerbo concludimur: quod tibi non uis fieri, alii ne feceris.”) This last biblical quote is based on Matthew 7:12.

¹⁵² Thorne, ed. and trans., *Bracton*, vol. 2, 21 (“He who judges ought to be wise”).

Whitman's emphasis on the dangers inherent in judging finds much support in medieval English prescriptive literature, which warned of the final judgment that would await those who judged with vengeance rather than mercy. "He shall be slain who all will slew, who pain will deem to pain shall go", wrote Robert Mannyng in *Handlyng Synne*.¹⁵³ Mannyng shared the tale of a knight who had a vision of the Last Judgment. Witnessing the sorting of men between heaven and hell, the knight first saw a priest enjoy a gentle passing thanks to the fact that he had lived a virtuous life. Next, however, he watched in horror as a man of local prominence, an officeholder (*bayly*) of some kind, experienced excruciating pain due to his habit of judging out of vengeance:

A man I knew there in pains strong,
 Who feloniously did ever wrong.
 I knew him here in great office,
 He loved vengeance without mercy.
 Piers, I recall, was his name,
 In that water he suffered shame.
 I saw him bear upon his crown.
 Burning iron that bore him down
 Into the water, black as coal.
 Alas, the pains I saw him suffer!¹⁵⁴

The references to Piers being weighted down by burning iron and sinking under water may have been intended to evoke the by-then defunct experience of the judicial ordeal, although in the ordeal sinking under water would have been taken as a sign of innocence, not guilt. Shocked by the vision, the knight inquired about the cause for the man's suffering:

¹⁵³ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 54, lines 1499-1500 ("He shal be slayn, þat al wyle slo; / þat peyne wyl deme, to pyne shal go.") See also the sermon exempla detailing a brother who prayed to God to take vengeance against those who had oppressed his parents during war; in response, God bestowed upon the friar stomach pain, and caused him to drown in a river. See d'Avray, *Preaching of the Friars*, 65-66.

¹⁵⁴ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 52, lines 1441-1450. ("A man y kneugh þere yn peynys strong. / Þat felonlyche dyde euer wrong; / I knegh hym here yn grete bayly, / He loued veniaunce with-oute mercy. / 'Pers,' y wote, was hys name, / Yn þe watyr he suffred shame. / y sagh hym bere vpp-on hys krowne / Brynnyng eryl þat bare hym downe / In-to þe watyr, blak as kole. / Alas, þe paynes y sagh hym þole!")

And promptly it was to me told,
 For to do vengeance was he ever bold;
 And when he should have deemed the right,
 To felony he did his might;
 With him might no man have grace,
 Mildness, nor mercy, for any trespass;
 And because he did so much woe,
 He suffers now shame enough.
 Such is God's ordinance,
 'For vengeance to take vengeance.'¹⁵⁵

The poet was unequivocal in describing the cause of Piers' postmortem suffering: he had acted "feloniously" (*felunlyche*), as described in the first of two excerpts above, in judging without mercy. The moniker of felon might be transferred from accused to judge when the latter did not exercise his office appropriately.

Writing about a century after Mannyng, Gower similarly indicated that those who judged others without charity imperiled their own souls.¹⁵⁶ Gower advised:

Saint James says, those who will render
 Judgment without pity, will be lost
 When they come to the other place,
 Where he will not find pity.¹⁵⁷

Gower's text, written in Anglo-Norman French, had a target audience of relatively elite, chivalric status.¹⁵⁸ Yet similar warnings about the dangers of judging may be found in sermons aimed at a

¹⁵⁵ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 52-53, lines 1453-1462. ("And asswyþe hyt was me tolde, / For to do veniaunce he was euere bolde; / And whan he shuldē deme þe ryzt, / To felunly he dyde hys myzt; / At hym myght no man hauē grace, / Myldenesse, ne mercy, for any trespace; / And for he dede so mochē wogh, / Suffreþ he now shame ynogh. / Swyche ys goddys ordynaunce, / 'For veniaunce to take veniaunce.'")

¹⁵⁶ See Macauley, ed., "Mirour de l'Omme," in *Complete Works of John Gower*, vol. 1, 152, lines 13120-13122 ("Et ceaux qui font malvoisement / Om doit bien charitousement / Redrescer..."); Troendle, ed., *Gower's Mirour de l'Omme*, vol. 2, 516. For a translation, see Gower, *Mirour de l'Omme*, trans. Wilson, 179 ("Those who do evil must be charitably corrected...")

¹⁵⁷ Macauley, ed., "Mirour de l'Omme," in *Complete Works of John Gower*, vol. 1, 162, lines 13929-13932 ("Saint Jake dist, cil qui ferra / Sanz pitē juggement, perdu / Serra quant vient en autre lieu, / U qu'il pitē ne trouuera."); Troendle, ed., *Gower's Mirour de l'Omme*, vol. 2, 548-549. For an alternative translation, see Gower, *Mirour de l'Omme*, trans. Wilson, 190.

broader audience. In a late fourteenth-century sermon, for example, Thomas Wimbleton expounded upon the parable of the workers in the vineyard with observations about the injustices often attendant upon the act of judging. He described how, at the Last Judgment, three “bailiffs” would be asked to render account: priests, temporal lords, and individual Christians. They would be judged according to how they gained office or title, such as whether wealth had been their primary incentive, and the extent to which they treated rich and poor alike in their efforts to extirpate falsehood and wrongdoing. Finally, they would be judged on how they lived their lives. “A man asked Socrates why he laughed,” said Wimbleton. “He said it was because he saw great thieves lead a little thief toward the gallows.”¹⁵⁹ Wimbleton went on to ask: “Is he the greater thief who steals a man’s house and land or he who steals a sheep or a calf out of genuine need?”¹⁶⁰ Wimbleton may have been alluding to wrongful forfeiture pursuant to an unjust outlawry or felony conviction, or alternatively may have had in mind people bringing frivolous lawsuits. Finally, Wimbleton reminded his sermon audience: “Whoever has to judge will also have to make their own reckoning at the time of judgment.”¹⁶¹ The juxtaposition of stealing a man’s house or land, presumably a reference to wrongful seizure of landed property, with stealing a sheep potentially reminded jurors that there were greater thieves than those who might be arraigned for comparatively petty thefts.

Even priests, whose only judging may have been in the confessional, were not exempt from such reckoning at the end of earthly time. As Robert Grosseteste warned a priest in a letter

¹⁵⁸ And possibly a quite small audience, judging from the text’s remarkable survival in a single manuscript. See R. F. Yeager, “Gower’s French Audience: The *Mirour de l’Omme*,” *The Chaucer Review* 41:2 (2006), 111-112. Yeager suggests that the target audience for this text may have been Augustinian canons more than the royal court, as others have tended to assume. *Ibid.*, 122-126.

¹⁵⁹ O’Mara and Paul, eds., *A Repertorium of Middle English Prose Sermons*, Part 1, 57 (from Cambridge, Corpus Christi College, 357 (Cam/Corpus/357/001, f. 5v)).

¹⁶⁰ O’Mara and Paul, eds., *Repertorium of Middle English Prose Sermons*, Part 1, 57.

¹⁶¹ O’Mara and Paul, eds., *Repertorium of Middle English Prose Sermons*, Part 1, 57.

c. 1235, “you are required to give an account of each and every one of the sheep entrusted to you” on the last day.¹⁶² Within the secular sphere of criminal prosecution, judging sometimes involved the hearing of confessions, not formal ecclesiastical confessions but rather the simple admissions of wrongdoing made by accused criminals. A confession simplified the judge’s task, insofar as it eliminated the need to proceed to jury trial. There is indirect evidence that judges were therefore eager to encourage accused individuals to confess.¹⁶³ Nevertheless, conscience sometimes weighed against accepting a confession if the confessing individual gave cause for sympathy. For example, a 1353 law report describes how, when a woman was arraigned for feloniously stealing two shillings worth of bread, she confessed to the criminal act but also indicated that she had acted in conjunction with the man who had then been her husband.¹⁶⁴ Rather than accepting her confession and sending her directly to the gallows, the judges chose to offer her a jury trial. The law report indicates that the judges had been moved by pity (*pur pite*) when they decided to ignore her confession. The inquest, in turn, found that the woman had acted under the compulsion of her husband and against her will; they acquitted her. Because she had merely been answering the command of her husband (*command de baron*), she had committed no manner of felony (*nul manner de felonie*). Expanding upon this case in *Les Plees del Coron* in the sixteenth century, William Staunford would indicate that judges should not record confessions that seemed to derive from fear or duress in order “to quiet the conscience of

¹⁶² Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 127.

¹⁶³ See, e.g., Kaye, ed. and trans., *Placita Corone*, 17.

¹⁶⁴ See Lib. Ass. 27 Edw. 3, fol. 137b, no. 40 (1353), *Seipp’s Abridgement*, no. 1353.165 (law report beginning “Un feme fuit arraine...”).

the judge”.¹⁶⁵ Although judges were commissioned to carry out the king’s mandate to keep the peace through the exercise of justice, conscience sometimes dictated the application of mercy.

No One is Free from Blame

Cautionary comments about judging may often be traced to the Christian and Hebrew scriptures, but they also had classical origins, such as the writings of Seneca, whose stoical philosophy continued to influence writers in medieval England, as illustrated by the discussion of anger in chapter three.¹⁶⁶ “If we are willing in all matters to play the just judge,” wrote Seneca, “let us convince ourselves first of this—that no one of us is free from fault.”¹⁶⁷ Seneca at once argued that no man is entirely blameless—“What man is there who can claim that in the eyes of every law he is innocent?”—and that the law is a poor measure of virtue anyway in comparison with alternative standards such as “duty, humanity, generosity, justice, integrity—all of which lie outside the statute books.”¹⁶⁸ Judges were to remember that they had in the past committed sins, contemplated or desired to sin, and in some cases encouraged other people to sin. Bearing in mind that a judge’s own innocence may be due only to the fact that he did not succeed in sinning,

¹⁶⁵ For a translation of this entry from Staunford, *Les Pleez del Coron*, Confession del crime, ch. 51, fol. 142v (1557 ed.), see *Seipp’s Abridgement* no. 1353.165. Conscience may have similarly influenced the course of action taken by a justice at gaol delivery in Salisbury in 1411. The justice advised a defendant not to confess his felony, as this would have led to immediate hanging rather than a chance to prosecute others as an approver and thereby prolong his life. Realistically, chances were that turning approver would not add a great deal of time to the defendant’s life. See Y.B. (Hil.) 12 Hen. 4 (Salisbury Gaol Delivery 1411), as appears in J.H. Baker, ‘John Bryt’s Reports (1410-1411), 105 and *Seipp’s Abridgement*, no. 1411.103.

¹⁶⁶ Gower, for example, cites Seneca by name nearly thirty times in his *Mirour de l’Omme*. Macauley, ed., *Complete Works of John Gower*, vol. 1, lvii.

¹⁶⁷ Seneca, “De Ira,” I, *Moral Essays*, trans. Basore, 224-225.

¹⁶⁸ Seneca, “De Ira,” I, *Moral Essays*, trans. Basore, 224-225.

the judge was urged to “be more just to transgressors, more heedful to those who rebuke us,” and especially not to cultivate anger toward those who are good.¹⁶⁹

This theme surfaced in the Anglo-Norman French poetry of John Gower, who in his *Mirour de l’Omme* urged a charitable approach toward others, encouraging those inclined to curse another for sinning to reflect instead on the nature of human frailty, and the fact that one who is well today may be worse off tomorrow:

Do not condemn others, because it is foolishness:
If you put remembrance on yourself,
Because you were or are worse,
Or you will be for all you know one day,
Because every man is frail himself.¹⁷⁰

Similar sentiments appear in the English vernacular as well, as demonstrated by these lines from a poem in the late-fourteenth-century Vernon manuscript:

And those who love to find fault,
And judge men all the same,
Unbind the burden on your back,
And look first that you yourself be clean.¹⁷¹

Medieval English jurors would have been unlikely to “judge men all the same,” insofar as they did not have the luxury of distance from the lives of the defendants hauled before them. In many instances, jurors drawn from the local community would have been intimately familiar with the

¹⁶⁹ Seneca, “De Ira,” I, *Moral Essays*, trans. Basore, 224-225.

¹⁷⁰ Gower, “Mirour de l’Omme,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 149, lines 12817-12822 (“Dampner ne dois, car c’est folour: / Si tu prens remembrance a toy, / Par cas tu fus ou es peiour, / Ou tu serras n’en scies le jour, / Car chascun homme est frel du soy.”); Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 2, 504. For an alternative translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 175.

¹⁷¹ “Charity is no longer dear,” in *Minor Poems of the Vernon MS*, part 2, ed. Furnivall, 704, lines 97-100. (“And þo þat leouest is to lak, / And demep men so al bideene, / Vn-bynt þe burþen on 3or bak, / And loke furst þat 3or-self be clene.”) See also Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 15 (“Vor in erþe / ne ys zuo holi man þet moze / parfitliche be-uly / alle maneres of zenne.”) The phrase, translated “For in earth there is not so holy a man who might perfectly shun all manner of sin,” was no doubt inspired by Ecclesiastes 7:20.

lawbreaker and his brother, not to mention his sister, spouse, and children.¹⁷² Familiarity with those being judged must have weighed heavily on the conscience of jurors, who had to gauge the impact of their verdict not only on the defendant but on a broader collection of family members and other dependents. Throw in the possibility of capital punishment, and felony trials created an almost intolerable burden on the conscience of judge and juror.

Added to this was the widespread understanding that indignation should be directed toward the sin, rather than the sinner, who should be afforded a second chance if possible. An excerpt from an eleventh-century canon law collection advised: “Sins should be held in odium, not men.” The canon went on to advise priests to correct sinners “not with a vengeful will but with the intention of healing.”¹⁷³ Eleventh-century canon law was one thing, thirteenth- and fourteenth-century popular attitudes another. Nevertheless, sermon literature from the latter period suggests that these sentiments, and a concomitant concern with the dangers of overly rigid judging, were still in circulation. Sermons sometimes drew upon scriptural sources to argue that a person who is a grave sinner or even a criminal today may be a saint tomorrow. John Mirk, in a homily for the Epiphany, observed: “for now are many hundred great saints in heaven who were previously manslaughterers”.¹⁷⁴ A contemporary sermon argued that “he who does ill today, may repent tomorrow and be right good in the sight of God. For he who is wicked today, tomorrow he may be good.”¹⁷⁵ Mirk relayed an apocryphal tale according to which one of the

¹⁷² See Masschaele, *Jury, State and Society*, 203. “Sitting in judgment is a heavy responsibility even when the individual being judged is a stranger,” Masschaele observes, “it is even heavier without the benefit of anonymity.”

¹⁷³ John Gilchrist, trans., *The Collection in Seventy-Four Titles: A Canon Law Manual of the Gregorian Reform* (Toronto: Pontifical Institute of Mediaeval Studies, 1980), 212 (Titula 55, Capitula 250). On the dating of the collection, see *ibid.*, 1-2.

¹⁷⁴ “De Epiphania domini,” in *John Mirk’s Festial*, vol. 1, ed. Powell, 48, lines 51-52.

¹⁷⁵ Ross, ed., *Middle English Sermons*, 139. (“...he þat dothe to-day ill, to-morowe he may repente hym and be ryght good in þe sight of God. For he þat is to-day wicked, to-morow he may be good.”)

three Magi had previously slain a man. People therefore believed he would not be able to look God in the face.¹⁷⁶ God, however, had other plans, permitting the king to behold the infant Jesus despite his tarnished past. Stories like these encouraged a view of human weakness that imagined the possibility of redemption and reintegration into the community, a vision out of sorts with felony law's sole irreversible punishment.

Sermons were unequivocal on this vision of human potential for change, offering as an example Paul of Tarsus, who martyred Christians only to become a martyr himself later. During his earlier life as Saul, Paul had persecuted Christians vehemently and even oversaw the martyrdom of Saint Stephen. According to Mirk's homily on the Feast of the Conversion of Saint Paul, Saul had "grown in his malice" (*encresud in here malys*) following Stephen's execution.¹⁷⁷ Mirk characterized as greater malice Saul's new recourse to legal means in undertaking his persecutions; namely, he began pursuing Christians with a "letter of warrant" (*lettur of warand*) permitting him to take prisoners to Jerusalem for their execution. As described in the chapter on anger, merely hearing talk of Christians caused Saul to froth at the nose and mouth in anger, instilling fear in all Christians who caught sight of him.¹⁷⁸ The audience for Mirk's sermons, and others like them, would of course have recognized the caution that even a seemingly unredeemable person such as Saul might one day become a legendary saint. To bring such sentiments to a less celestial level, we might look to Chaucer's physician,

¹⁷⁶ "De Epiphania domini," in *John Mirk's Festial*, vol. 1, ed. Powell, 48, lines 48-54. ("Lewet men han opynyon and sayn þat he hadde slayn a mon, wherfore he myght not se God in þe face. But God forbode þat þys opynyon were trewe, for now ys mony hundred of gret seyntes in heuen þat were byfore monsleeres and duden mony an holy martyr to deþe, but aftur þey weren turned and holy marteres hamself and sen God in þe face euermore.")

¹⁷⁷ "De conuersione sancti Pauli apostoli," in *John Mirk's Festial*, vol. 1, ed. Powell, 52, line 26.

¹⁷⁸ "De conuersione sancti Pauli apostoli," in *John Mirk's Festial*, vol. 1, ed. Powell, 52, lines 35-37 ("...he wold freþon at þ[e] nese and at þe mowþe for angur, þretyng and manaschyng so heghly toward ham þat vch cryston mon was wondur sore aferd of hym.")

whose tale colorfully reminded the audience of the possibility of human redemption: “A thief of venison that has forsaken his lustfulness and all his old craft can keep a forest best of any man”.¹⁷⁹ A sinful man or woman might always turn his or her life around, and might in turn be well positioned to reach out to other misdoers. “He may not have the grace of God,” stated one sermon, “who may not suffer the wicked men and women by him. For he that is today sinful, tomorrow may be amended.”¹⁸⁰ A similar theme appears in the fourteenth-century *Ayenbite of Inwyt*, which notes, “for though he be evil today, he may be good tomorrow, and such who is today good, he may be evil tomorrow.”¹⁸¹ Such texts highlighted the dual theme of redemption and the fall: the transformative process worked in both directions.

In addition to this idea of humanity’s redemptive potential was another factor alluded to at the outset of this chapter: the idea that only God could truly know the mind of man. In translating Psalm 7:10, Richard Rolle glossed as follows: “Our works may men see, but why we do them and how we think in doing them only God sees.”¹⁸² Similarly, a late fourteenth-century sermon distinguished between foolish and righteous judging (*folly demynge* and *ryghtwisse demynge*), identifying the former as instances in which a person judges another “regarding such things as he knows not of—the privacy of man’s heart and his deeds—for no man knows with what intent, with what temptation, with what feebleness, or what forethought he had in doing

¹⁷⁹ “Physician’s Tale,” in *Riverside Chaucer*, ed. Benson, 191. (“A theef of venysoun, that hath forlaft / His likerousnesse and al his olde craft, / Kan kepe a forest best of any man.”)

¹⁸⁰ Gretham, *Middle English “Mirror,”* 92. (“He ne may nouȝt haue þe grace of God þat ne may noȝt suffre þe wicked men & wymmen by hym. Ffor he þat is today synneful, tomorwen he may ben amended.”)

¹⁸¹ Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 157. (“uor þaȝ he by kuead [evil] to day : ha may by guod to morȝe. and zuich is to day guod : ha may by kuead to morȝe.”) See also Little, ed., *Liber Exemplorum*, xiv (regarding a habitual thief who later became a monk).

¹⁸² Bramley, ed. *Psalter or Psalms of David*, 26. (“Oure werkis may men see; bot whi we doe thaim and whidere we thynk in doand thaim, anly god sees...”)

it.”¹⁸³ A person could only gain insight into another person’s mind through a direct confession or more indirectly by drawing inferences based on the circumstances of a situation. As described in the previous chapter, this latter tactic allowed oblique access to state of mind through observation of non-mind factors, including the place, time, and type of weapon, as well as the actor’s reputation, character, etc. When a person’s motivation or state of mind in committing an act remained unclear, it was with great peril that a jury would hand down a guilty verdict. They might simply get it wrong. “Often times,” one sermon author noted, “men judge others to be evil men who are fully clean in God’s eyes, or else judge others to be good who are fully foul in the sight of God.”¹⁸⁴ The sheer number of jurors may have alleviated some of these concerns by adding a measure of moral comfort.¹⁸⁵ Nevertheless, biblical references to the difficulties of knowing a man’s mind, combined with religious injunctions against judging others, would have given jurors pause in handing down guilty verdicts based on insufficient information. Furthermore, literary sources, including the well-known story of Susanna, falsely accused of adultery by bad judges, and the perhaps less well-known tale of Erkenwald and the good pagan judge, served as reminders to English audiences of the importance of judging fairly and wisely. Bad judges were hell bound, which placed all the more pressure on judges and jurors alike to get the mind issue right.

Once again, the suffering Christ might serve as an exemplar. Richard Rolle highlighted Jesus’ mercy toward those who condemned him to death, as well as toward the thief hanging

¹⁸³ Ross, ed., *Middle English Sermons*, 121. (“Foly demynge is to deme a man of such þinges as he knaweþ not of—the privete of mans hert and is dedis—for þer knowes no man to what intent, with what temptacion, with what febulnes, or what forþingkyng þat he hath for itt.”)

¹⁸⁴ Ross, ed., *Middle English Sermons*, 121. (“...for often tymes men demen þem for yvell men þat be full clene to-Godward or els demen þem for good þat be full fowle in þe syght of God.”)

¹⁸⁵ Whitman, *Origins of Reasonable Doubt*, 15.

beside him.¹⁸⁶ Rolle placed himself in the role of supplicant, begging to hear the words Jesus spoke in forgiving the penitential thief. “Lord, in your mercy, you who are the fount of mercy,” wrote Rolle, “tell me who am your thief what you said to him”.¹⁸⁷ Rolle even went so far as to accept blame for Jesus’ crucifixion: “Sweet Jesu, in my imagination I will prostrate myself on the soil, and lower still if I can manage, because I am the perpetrator and the criminal in [all your] painful death.”¹⁸⁸ Rolle envisioned himself hanging at Calvary, deeming himself fit to die alongside Jesus “like one of the thieves” due to his own sins and failings.¹⁸⁹ We are all felons, Rolle would remind his reader. As a poem of the Vernon manuscript would describe it, those who commit deadly sin put Jesus to the same pain he suffered at the crucifixion.¹⁹⁰ Such meditations were aimed at compelling individuals to seek repentance and to exercise mercy in their dealings with others.

The Role of Mercy in Judging

Mercy, therefore, was the appropriate demeanor for one tasked with exercising judgment.

It was also the universal aim at the end of earthly life, according to Rolle:

Mercy is so high aloft no sin may take it by surprise.
 To your mercy my heart is moved for in it all my pleasure lies.
 With Mercy may my soul be soothed when I shall come to your Justice;
 To the Judge I am to come but do not know my day.
 Mercy, part and total sum: in it I trust and for it pray.”¹⁹¹

¹⁸⁶ “Meditations on the Passion,” in *Richard Rolle: The English Writings*, ed. Rosamund Allen (New York: Paulist Press, 1988), 100-01.

¹⁸⁷ “Meditations on the Passion,” in Allen, ed., *Richard Rolle: The English Writings*, 101.

¹⁸⁸ “Meditations on the Passion,” in Allen, ed., *Richard Rolle: The English Writings*, 122.

¹⁸⁹ “Meditations on the Passion,” in *Richard Rolle: The English Writings*, ed. Allen, 123. A similar theme is expounded in the *Ayenbite of Inwyt*, which speaks of a man dooming himself “as a thief... to the gibbet of penance” (“ase ane þyef...to þe gybet of penonce”). Michel, *Ayenbite of Inwyt*, vol. 1, ed. Gradon, 138.

¹⁹⁰ Simmons, ed., *The Lay Folks Mass Book*, 129 (“When þou dost a dedly synne, / Al þe while þat þou dwellest þer-Inne, / þou puttest to his payn, / þe same he suffred fur vr sake.”)

¹⁹¹ “Song of Mercy,” in *Richard Rolle: The English Writings*, ed. Allen, 187.

We can again look to earlier medieval texts for evidence of this emphasis on mercy, which ideally was to be extended even toward felons already sent to the gallows. For example, the story of the tenth-century Wiltshire saint, Edith, penned by a monk named Goscelin in a Wiltshire dialect in the mid-eleventh century, emphasized the young saint's sympathy toward all those in need, including the maimed, the poor, and even condemned felons. Edith exerted her influence upon her father, King Edgar, to encourage him to exercise mercy toward those condemned to death:

So meek and humble she was always.
And ever she was full ready
To help each man in his need;
And thieves damned for felony
From the gallows she would them lead...¹⁹²

Thanks to Edith's pleadings, her father exercised mercy at times when his commitment to the law might have urged him to act otherwise:

To her father she would often kneel
Upon her knees down to the ground,
And damned men she saved often,
Though they were condemned in that time.
For her father was righteous to fulfill the law
Throughout all his realm, I understand;
But he would not have any man slain,
For he was so merciful and so piteous...¹⁹³

Mercy potentially stood in conflict with the competing virtue of justice. As a text on the virtues and vices, written in English c. 1200, exhorted, one should ideally reconcile mercy with justice

¹⁹² Horstmann, ed., *S. Editha, sive Chronicon Vilodunense im Wiltshire Dialekt* (Heilbronn: Gebr. Henninger, 1883), 24, lines 1104-1108. ("So meke and humble he was algate. / & euer he was fulle redy / To help ychemon in his nede; & theuys y-dampnyde for felony / From þe Galoys he wolde hem lede...")

¹⁹³ Horstmann, ed., *S. Editha*, 25, lines 1109-1116. ("To hurre fader he wolde ofto knele / Vpone here knen doune to þe grounde, / & dampnyd men he sauede fele, / þaw þey weron dampnyd in þat stounde. / For here fader was ryztwys to forthfulle þe lawe / þorw-ouzt alle his reme y-wys; / Bot he nolde haue nomon y-slawe, / For he was so mercyfulle & so pytewys...")

and judgment with pity.¹⁹⁴ In a c. 1237 letter, Robert Grosseteste advised Simon Montfort to seek such a balance in his judgment of a burgess, urging him: “let your goodness and mercy triumph over judgment [Jas 2:13], that you may be a model of clemency and gentleness and not a master of cruelty.”¹⁹⁵

Even in private life, men and women were called not to condemn sinners, but rather to nudge their friends and neighbors toward the path of right living. Authors like Gower, in his *Mirour de l’Omme*, urged those aware of others’ wrongdoing to approach the sinners charitably to offer correction, and only when this failed to impose punishment.¹⁹⁶ Relying on Seneca, Gower suggested “a sweet ointment” (*un douls oignement*) to help a friend turn away from sin, followed by severe penance if necessary.¹⁹⁷ In the fourteenth-century *Speculum Christiani*, readers were reminded that their duty to give alms included forgiving wrongdoers and helping sinners to amend their lives. “Truly,” the *Speculum* exhorted, “one of the greatest deeds of mercy is to turn and convert sinful souls to God.”¹⁹⁸ Moreover, citing Augustine, the *Speculum* reminded readers: “It is better to make rightful a wicked, sinful man than to make heaven and earth.”¹⁹⁹

The sermon cycle touched on the issue of mercy and forgiveness at various times, but the theme was especially crucial during Lent and Easter, when Christians were called to repent,

¹⁹⁴ Holthausen, ed., *Vices and Virtues*, 114-115.

¹⁹⁵ Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 172.

¹⁹⁶ See Gower, “Mirour de l’Omme,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 152, lines 13120-13128; Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 2, 516. For a translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 179.

¹⁹⁷ See Gower, “Mirour de l’Omme,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 152, lines 13129-13140; Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 2, 516-517. For a translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 179.

¹⁹⁸ Holmstedt, ed., *Speculum Christiani*, 4.

¹⁹⁹ Holmstedt, ed., *Speculum Christiani*, 6.

confess, and make amends with neighbors. John Mirk's vernacular Easter sermon captures the day's sentiments, with an emphasis on being in charity with one's fellow Christians:

This day is also called 'Pashe Day,' that is in the English tongue a passing day, and so it is for two reasons. One: for on this day each Christian man in reverence of God should forgive those who have wronged him, and be in full love and charity toward all God's people beyond all other days of the year, for all that was mis-done all the year before shall be healed this day with the salve of charity.²⁰⁰

Easter was a time for mending fences and letting bygones be bygones, in addition to a time for reorienting one's life to turn from the devil toward God, converting enemies into friends:

It is also a passing day because each Christian man should pass out of evil living into good living, out of vices into virtues, out of pride into meekness, out of covetousness into largesse, out of sloth into holiness or business, out of envy into love and charity, out of wrath into mercy, out of gluttony into abstinence, out of lechery into chastity, out of the fiend's clutches into God's bosom, and so of God's enemy make him his dear friend and darling. Whosoever passes thus is worth to come to that great feast that God makes this day for all who make this passage.²⁰¹

Easter, of course, was the perfect time for such reminders, coming on the heels of the Triduum, during which church-goers were reminded of their role in the suffering of Christ. A late fourteenth-century poem, designed to aid contemplation on the passion, placed particular

²⁰⁰ "De festo Pasche sermo breuis ad parochianos post resurreccionem," in *Mirk's Festial*, vol. 1, ed. Powell, 115, lines 40-45. ("Þis day is also called Pashe Day, þat is in englys tonge a passyng day, and so hit is for too skyllys. One: for þis day vche criston man in reuerens of Godde schulde forþeuen hym þat hath gylte hym, and bene in fule luf and charite to alle Goddys pepul passyng alle oþur dayes of þe 3ere, for alle þat is mysdone allþe 3ere beforeon schal be helud þis day wyth þe salue of scharite.")

²⁰¹ "De festo Pasche sermo breuis ad parochianos post resurreccionem," in *Mirk's Festial*, vol. 1, ed. Powell, 115-116, lines 45-54. ("Hit is also a passyng day, for vche criston man schulde passon owte of euel lyuing into gode lyuynge, owte of vices into vertues, owte of pryde into meknesse, owte of couetyse into largenesse, owte of sclowthe into holynesse or bysines, owte of envye into loue and charite, owte of wrathe into mercy, owte of glotonrye into abstynens, owte of lecherye into chastite, owte of þe fendus clokus into Goddus barme, and so of Goddus enmy make hym hys dere frende and derlynge. Whoso passus þus he is worthy for to cum to þat grete feste þat God makyth þis day to alle þat þis passage makyth.")

emphasis on Jesus' super-human charitableness in continuing to call Judas "friend" despite his foreknowledge of Judas' treachery:

Jesus who has me dearly bought,
Write thou ghostly in my thoughts,
That I may with devotion
Think on thy dear passion:
For though my heart be hard as stone,
Yet mayest thou ghostly write thereon
With nail and with spear keen,
And so shall the letters be seen.
Write in my heart with speeches sweet,
When Judas the traitor can thee meet—
That traitor was full of the fiend,
And yet thou called him thy friend.
Sweet Jesus, how might thou so
Call him thy friend, so fell a foe?²⁰²

By meditating on the passion story and on Jesus' ability to forgive Judas, the poem's audience was supposed to experience a transformation in thought and in heart, a transformation that would have aided in forgoing vengeance and pursuing mercy.

In Mirk's *Festial*, another exemplum highlighted the power of mercy and forgiveness in the context of a feud precipitated by a homicide. According to the tale, a knight's beloved son fell into "debate" or argument with another knight, who in turn killed the young man.²⁰³ In response, the young man's father "gathered a great company" and pursued the knight, who fled for fear of vengeance. On Good Friday, the fugitive knight decided to place himself in Christ's mercy and entered a church during services. Hearing of this, the vengeful father entered the

²⁰² "Ihesu that hast me dere I-boght," in Brown, ed., *Religious Lyrics of the XIVth Century*, 115-116, lines 1-14 (from Langleat MS. 29, Art. 19, c. 1375). ("Ihesu þat hast me dere I-boght, / Write þou gostly in my þoʒt, / Þat I mow with deuocion / Pynke on thy dere passioun: / For þogh my hert be hard as stone, / ʒit maist þou gostly write þer-on / With naill & with spere kene, / And so shullen þe lettres be sene. / Write in my hert with speches swete, / Whan Iudas þe traytour can þe mete— / that traitour was ful of þe feende, / and yit þou caldest hym þy frende. / Swete ihesu, how myʒt þou soo / Cal hym þy frend so fel and foo?") "Foo" is used here as an adjective denoting a person who is hostile and threatening, but I have translated it as a noun to preserve the rhyme scheme.

²⁰³ For the full tale, see "Sermo dicend[us] ad parachianos in Parasceue domini: hoc modo," in *Mirk's Festial*, vol. 1, ed. Powell, 109, lines 122-155. All the quotes have been modernized here.

church “with a great company of men” and “with his sword drawn in his hand.” Approaching the father to express his contrition, the knight “fell down to the ground” and stretched out his arms “as Christ spread his arms on the cross,” beseeching the father to be mindful of Christ’s sacrifice for all mankind and to forgive the knight’s trespass. After pausing to think, the father forgave the knight, helped him up from the ground, kissed him, and accompanied him to worship the cross. At that moment, the image on the cross loosened its arms and reached down to embrace the merciful father, saying, “I forgive thee, as thou hast forgiven for me.” Just as vengeance would be met with vengeance at the Last Judgment, mercy would receive mercy in return.

Wrongful Judgment

Stories of Jesus’ passion, then, spurred reflection on the consequences of wrongful judging. A c. 1200 tract on the vices and virtues emphasized how the devil had urged the heathens to judge Jesus to death unjustly, sentencing him to a particularly shameful death by crucifixion, and then magnifying the insult by placing him between two thieves.²⁰⁴ In a Passion Sunday sermon, John Mirk may have used the event of Christ’s passion as a segue to discussing another instance of wrongful judgment. Drawing upon a Roman legend, Mirk relayed how an emperor appointed a man to serve as justice in a distant land. The land in question was a place where people were of good behavior, most notably not being in the habit of swearing. However, “after this justice came, he made all men swear on books in shires and in hundreds.”²⁰⁵ The

²⁰⁴ Holthausen, ed., *Vices and Virtues*, 50-51. A Dominican sermon collection similarly includes themes on the unjust judging of Jesus. See Mary E. O’Carroll, *A Thirteenth-Century Preacher’s Handbook: Studies in MS Laud Misc. 511* (Toronto: Pontifical Institute of Mediaeval Studies, 1997), 419, 423-427.

²⁰⁵ “Dominica in passione domini: sermo ad parochianos: hoc modo,” in *Mirk’s Festial*, vol. 1, ed. Powell, 99-100, lines 102-121. (“...after þat þis iustice come, he made alle men to sweron on bokus in schyrus [and] in hundrus.”)

justice and his men were in the habit of swearing “by God’s passion, and arms, and sides, and bloody wounds,” a habit that soon spread from the justice’s entourage to the surrounding populace.²⁰⁶ One day, a woman appeared before the justice in court, holding in her arms a bloodied child. She asked the justice what should happen to those who had caused the infant’s wounds. “They are worthy to have death,” responded the justice.²⁰⁷ The woman, revealing herself to be Mary, duly retorted, “thou and thy men with your horrible oaths have thus dismembered my son Jesus Christ to whom I am mother. And so ye have taught now all in this land. Wherefore thou shall have now thine own doom.”²⁰⁸ Immediately, in the sight of all the people, “the earth opened and the justice fell down into hell.”²⁰⁹ This startling result inspired the people to reform their ways immediately.

Mirk’s tale of the foul-mouthed judge falling immediately into hell placed a fantastical tone on a theme commonly found in medieval literature, namely, the idea that one who judged “feloniously”, with neither pity nor mercy, would himself find no mercy at the Last Judgment.

In *Handlyng Synne*, Robert Mannyng warned:

If thou ever carried out thine intent
 In false counsel or commandment,
 That a man to death were condemned
 With wrong doom, or evil judgment;
 Though it seemed within the law
 To give the doom, it is great awe
 Whoso deemeth feloniously

²⁰⁶ “Dominica in passione domini: sermo ad parochianos: hoc modo,” in *Mirk’s Festial*, vol. 1, ed. Powell, 100, lines 107-108. (“...be Goddys passyon, and armes, and sydes, and bloddy woundys...”)

²⁰⁷ “Dominica in passione domini: sermo ad parochianos: hoc modo,” in *Mirk’s Festial*, vol. 1, ed. Powell, 100, line 114. (“...þai ben worthi to haue deth.”)

²⁰⁸ “Dominica in passione domini: sermo ad parochianos: hoc modo,” in *Mirk’s Festial*, vol. 1, ed. Powell, 100, lines 115-118. (“þou and þi men wyth zoure oribul othus haue þus demembrud my Sonne Ihesu Cryste þat I am modur to. And so 3e haue taute now alle þis lande. Wherefore þou schalte haue now þine awne dome.”)

²⁰⁹ “Dominica in passione domini: sermo ad parochianos: hoc modo,” in *Mirk’s Festial*, vol. 1, ed. Powell, 100, line 119. (“...þe erþe oponed and þe iustice fel downe into helle.”)

And neither with pity nor mercy;
He shall no mercy have,
Who all will slay and no man save.²¹⁰

The mind of the judge therefore mattered, and should ideally be motivated by mercy and not by less charitable emotions. Moreover, in wrongfully condemning someone as a felon, a judge might himself earn the status of felon.

Judges were held to a high standard, based in part on their comportment in mind and body. According to the *Mirror of Justices*, a judge should ideally be without sin, as demonstrated by the biblical story of the woman nearly stoned to death by an angry mob. After enumerating all the people disqualified from serving as judges, including women, serfs, those under age twenty-one, lepers, natural fools, attorneys, and so forth, the *Mirror* elaborated on the expectations of a qualified judge:

For God when he was on earth held a consistory where a woman who was a sinner was to be judged to death, and he wrote on the ground and said to the suitors who had to judge her, ‘He of you who is without sin, let him give his judgment,’ an example for judges who undertake to judge people every day, from which they might learn that none should take upon themselves so high an honor as to sit in the chair of God to judge sinners when they themselves are condemnable for sin.²¹¹

Cautionary tales demonstrated how the pollution of a judge’s mind by intemperate desire might lead to the perversion of justice. Overwhelmed by contemptible thoughts, judges might

²¹⁰ Furnivall, ed., *Robert of Brunne’s “Handlyng Synne,”* part 1, 49, lines 1353-1362. (“Ȝyf þou euer dedyst þyn entent / yn fals cunsél or cómaundment, / Þat a man to þe deþe were dyght / with wrong dome, or euyll syght; / Þoght hyt semyd with þe lawe / To ȝeue þe dome, hyt ys grete awe / who-so demyþ felunslly / And noþer wyþ þyte ne mercy; / he shal no mercy haue, / Þat alle wyl sle, and no man saue.”)

²¹¹ Whittaker, ed. and trans., *Mirror of Justices*, 44 (my translation). (“Car dieu quant il fu en terre entra en consistoire ou une peccheresce devoit estre jugee a la mot, ou diez escrist en la terre e dist a siuters q̄i la deivent juger ‘Ki de vous est sanz pecchie la doigne soun jugement,’ en exemple de juges qe empernent a juger la gent chescun jour, dunt il les apprent qa nule nempreigne si haute nobleie a seer en la chaire dieu pur juger les peccheours taunt cum eux meismes sunt de pecchie condempnables.”) Note that this image of judges sitting upon the throne or chair of God appears in *Bracton* as well. See Thorne, ed. and trans., *Bracton*, vol. 2, 21.

abuse their office and fail to hold themselves to a high standard of conduct. In Chaucer's *Physician's Tale*, in a tale borrowed from Livy, a lecherous judge devised a plan to use his judicial office to obtain access to an attractive young woman. According to the tale, when the judge first set eyes upon the woman, he found "his heart changed and his mood," such that "the fiend into his heart ran," enabling him to hatch a disastrous plot.²¹² As so often seen in medieval literature, perception of an object of desire by sight led to internal changes in the viewer, who in this instance became susceptible to the temptations of the devil. The "false judge" chose to put his legal expertise to nefarious use, enlisting "a churl" to bring a false bill to court. The bill claimed that the maiden was the judge's servant, and that she had been wrongfully detained by a knight called Virginius. This knight was in actuality the young woman's father. Virginius woefully relayed the judge's plot to his daughter.²¹³ To avoid handing her over to the lustful and "cursed judge," the two agreed that the father would slay his daughter.²¹⁴ The father, "with full sorrowful heart and will," smote his daughter's head and presented it to the judge in his consistory.²¹⁵ Chaucer's choice of phrasing, "sorrowful heart," echoed the description of self-defenders in the *Bracton* treatise, emphasizing the lack of felonious intent on the part of the homicidal actor, in contrast to the wicked intent of the lecherous judge.

²¹² "Physician's Tale," in *Riverside Chaucer*, ed. Benson, 191. ("Anon his herte chaunged and his mood, / So was he caught with beautee of this mayde, / And to hymself ful pryvely he sayde, / 'This mayde shal be myn, for any man!' / Anon the feend into his herte ran, / And taughte hym sodeynly that he by slyghte / The mayden to his purpos wynne myghte.")

²¹³ "Physician's Tale," in *Riverside Chaucer*, ed. Benson, 192. ("And whan this worthy knyght Virginius / Thurgh sentence of this justice Apius / Moste by force his deere doghter yiven / Unto the juge, in lecherie to lyven, / He gooth hym hoom, and sette him in his halle, / And leet anon his deere doghter calle, / And with a face deed as asshen colde / Upon hir humble face he gan biholde, / With fadres pitee stikyng thurgh his herte, / Al wolde he from his purpos nat converte.")

²¹⁴ "Physician's Tale," in *Riverside Chaucer*, ed. Benson, 192-193.

²¹⁵ "Physician's Tale," in *Riverside Chaucer*, ed. Benson, 193. ("Hir fader, with ful sorweful herte and wil, / Hir heed of smoot, and by the top it hente, / and to the judge he gan it to presente, / As he sat yet in doom in consistorie.")

Tales like that of Virginius and the wicked judge stood within a long tradition of judicial morality stories. A sermon by Bromyard may have drawn upon a tale like that of Virginius' daughter in reporting that certain judges failed to expedite an abbess' lawsuit "until one day she brought with her the more good-looking nuns of her house!"²¹⁶ Some of these cautionary tales about judging emphasized the need for open-mindedness and level-headedness, including the willingness to admit error and the ability to control one's temper. For example, in his essay on anger, Seneca relayed the story of a corrupt judge who failed to reverse a death sentence when the allegedly slain man reappeared. Seneca described the judge, Gnaeus Piso, as "free from many vices, but misguided, in that he mistook inflexibility for firmness."²¹⁷ A good judge, in other words, would have known when to stick to his verdict, and when instead to modify it in light of new evidence. Seneca attributed Piso's poor judgment to anger. During one of these fits of anger, the judge ordered the execution of a soldier who had returned from abroad without his comrade. Although the soldier reasonably asked for time to search for his comrade, the judge insisted that their failure to return together demonstrated that the one soldier must have killed the other. The soldier was led outside, where he presented his neck for execution. At that moment, his comrade appeared on the scene. The centurion overseeing the execution immediately halted the proceedings and escorted the condemned soldier back to Gnaeus Piso. The story suggests that changing one's verdict might typically reflect poorly on a judge. Aware of this, the centurion tried to "free Piso from blame" by emphasizing that "fortune had freed the soldier." Popular acclaim greeted the centurion's actions, as a crowd accompanied the two soldiers to the judge's quarters. Piso, however, "mounted the tribunal in a rage" and ordered both soldiers—the one falsely condemned and his comrade—to be executed.

²¹⁶ As relayed in Owst, *Literature and Pulpit in Medieval England*, 346.

²¹⁷ Seneca, "De Ira," I, *Moral Essays*, trans. Basore, 154-155.

Seneca's commentary leaves little doubt as to his assessment of the matter: "Could anything have been more unjust than this? Two were dying because one had been proved innocent." Furthermore, Piso ordered the execution of the centurion as well. Summing up the unjust outcome, Seneca lamented: "O how clever is anger in devising excuses for its madness! 'You,' it says, 'I order to be executed because you were condemned; you, because you were the cause of your comrade's condemnation; you, because you did not obey your commander when you were ordered to kill.'"²¹⁸ In Seneca's estimation, the outcome was illogical and driven by the effects of ill-temperedness. A good judge, by contrast, would keep anger in check and would be willing to acknowledge error and modify a verdict accordingly.

Thus, just as anger might provide cause for consternation when exhibited by a felony defendant, as discussed in chapter three, anger was also a condemnable attribute in a judge.²¹⁹ Seneca elaborated further on the dangers of judging under the influence of anger. Anger, advised the stoical philosopher, might hamper a judge's desire for the truth and capacity for reason:

Anger, I say, has this great fault—it refuses to be ruled. It is enraged against truth itself if this is shown to be contrary to its desire. With outcry and uproar and gestures that shake the whole body it pursues those whom it has marked out, heaping upon them abuse and curses. Not thus does reason act. But if need should so require, it silently and quietly wipes out whole families root and

²¹⁸ Seneca, "De Ira," I, *Moral Essays*, trans. Basore, 154-157.

²¹⁹ This concern comes through in the writings of Bishop Grosseteste, who cautioned Simon Montfort against allowing anger to cloud his judgment: "For I have heard that you are determined to punish S., a burgess of yours from Leicester, not indeed in a manner consistent with the measure and extent of his fault, but beyond its measure and exceeding it in punishment. I beseech God that this is far from what you intend to do, or there is danger of your putting aside the man and assuming a lion-like or rather a diabolical savageness, becoming one who with bloody hands flays, bones, and then devours men, a companion of Herod and those who crucified Christ, guilty of the crime of theft and plundering, and thereby condemned to hellfire, perhaps in this life to lose, therefore, the strength to plunder and instead to suffer being plundered, and exiled, and to be denied participation in the life of penance common to all humanity. So, do not let savagery vent its rage against this burgess; do not let your conduct be stern and inflexible." Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 171-172.

branch, and households that are baneful to the state it destroys together with wives and children; it tears down their very houses, leveling them to the ground, and exterminates the very names of the foes of liberty.²²⁰

Most troubling to Seneca was the fact that a judge might not exhibit all the telltale physical signs of anger, making it difficult for the observer to realize that the emotion had influenced his verdict. “All this [anger] will do,” wrote Seneca, but with no gnashing of the teeth, no wild tossing of the head, doing nothing that would be unseemly for a judge, whose countenance should at no time be more calm and unmoved than when he is delivering a weighty sentence.”²²¹ Complicating the influence of anger on judging was the judge’s capacity to mask the emotion and give the appearance of equanimity despite his internal imbalance.

Accusations might be called into doubt if motivated by anger, too, an idea with deep roots in Western theology. Eleventh-century canon law urged caution when faced with vengeful accusations. In such circumstances, a judge should not proceed to judgment but should rather introduce delay to allow passions to cool. “If a person in anger rashly hurls an accusation against someone,” the canon indicated, “there should be no outcry for the legal process of accusation; instead let a period of time be allowed in which he who spoke in anger may state in writing that he is prepared to prove it.” This procedural delay afforded the accuser time to “come to his senses” to avoid the possibility of finding himself guilty of a crime due to a hasty, false accusation.²²² Presumably it also allowed time for the parties to reach a concord to resolve the underlying dispute outside the court system, which may explain the delay mechanisms built into the common law system, such as the requirement that persons bringing private prosecutions be

²²⁰ Seneca, “De Ira,” I, *Moral Essays*, trans. Basore, 157.

²²¹ Seneca, “De Ira,” I, *Moral Essays*, trans. Basore, 157.

²²² Gilchrist, trans., *Collection in Seventy-Four Titles*, 215 (Titula 57, Capitula 255).

required to summon the accused to several sessions of the county court before outlawry became a possibility.

Such concerns with anger's influence on accusation and judging were not relics of a distant classical and early medieval past. Rather, such themes may be found as well in thirteenth-century diocesan statutes and later medieval vernacular literature. In his guidance to the diocese of Lincoln c. 1238-1239, for example, Grosseteste threatened excommunication to anyone who brought a malicious accusation out of greed or hatred.²²³ Hatred and greed were the concerns voiced in the *Bracton* treatise as well in considering motivations that might cause jurors to issue false verdicts, often under undue influence from those supplying them with information about an alleged crime, such as when “a lord accuses his tenant, or causes him to be indicted and a crime imputed to him, through a greedy desire to secure his land in demesne, or one neighbor accuses another through hatred and the like.”²²⁴ In a 1276 London eyre case, Miles le Coureur was falsely accused of killing Henry de Kent, the inquest determining that the charge against him was instigated by a servant, Roger le Petite, who “accused him out of hatred”.²²⁵ Similarly, in a poem from the late fourteenth-century Vernon manuscript, the poet cautioned that hatred might distort a person's capacity for judging his neighbor reasonably:

If you have great envy,
And hate a man with all your might,
Live that man ever so righteously,
Yet shall you deem he lives not right...²²⁶

²²³ Mantello and Goering, ed., and trans., *Letters of Robert Grosseteste*, 190.

²²⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 404.

²²⁵ Weinbaum, ed., *London Eyre of 1276*, 70, no. 249.

²²⁶ “Charity is no longer dear,” in *Minor Poems of the Vernon MS*, part 2, ed. Furnivall, 702, lines 41-44. (“Ȝif þou hast an huge envy, / And hatest a mon wiþ al þi miht, / Liue þat mon neuer so rihtwisly, / Ȝit schaltou deme he liueþ not riht...”) This connection between envy and wrong judging appears elsewhere, too, including this late fourteenth-century sermon: “For all evill demyng commep of envie.” Ross, ed., *Middle English Sermons*, 121.

The temperament of an accuser could make all the difference when a jury had to decide on an accused individual's guilt or innocence. In a 1238 Devon eyre case, for example, a woman failed in her appeal against several men for beating her husband when the jury found that the husband was "not maimed by the beating but lies in his bed feloniously, thereby to injure the appellees."²²⁷ The couple was using private prosecution to exact inordinate revenge. Similarly, plea rolls will occasionally record that the hue was raised not out of necessity, but instead out of spite (*odio*), as in the case of the death of William Read of Goldington, who had been wounded during an argument over sheep with John of Goldington, but only died later after suffering from the ague, according to the jury narrative. His wife is said to have raised the hue out of spite, and John argued that William had recovered from the wound and reconciled with John.²²⁸

A temperament inclined toward anger made a person unfit to serve as a judge. "It is a great harm and also a great pity," Chaucer's summoner would opine, "to set an ireful man in high degree."²²⁹ Chaucer's *Summoner's Tale* adapted Seneca's story of the angry judge for a fourteenth-century audience, taking Seneca's nondescript Roman military campaign and transforming it into a tale of a knight returning from crusading. Having arrived home without his partner, the knight immediately came under suspicion of wrongdoing, as rumors spread that he had taken the other man's life. The knight was hauled before the wrathful judge, who decreed, "thus thou hast thy fellow slain, for which I deem thee to death certain."²³⁰ Just as in Seneca's tale, the purportedly dead man suddenly appeared just as the knight was being led to the

²²⁷ Summerson, ed., *Crown Pleas of the Devon Eyre*, 62, no. 364.

²²⁸ Gross, ed. and trans., *Select Cases from the Coroners' Rolls*, 8. The original manuscript entry may be viewed at JUST2/46 AALT 0036 (1267), access May 11, 2015, http://aalt.law.uh.edu/AALT7/JUST2/JUST2no46/IMG_0036.htm.

²²⁹ "Summoner's Tale," in *Riverside Chaucer*, 133. ("It is greet harm and certes greet pitee / To sette an irous man in heigh degree.")

²³⁰ "Summoner's Tale," in *Riverside Chaucer*, 133. ("Anon the knyght bifore the juge is broght, / That seyde thus, 'Thou hast thy felawe slayn, / For which I deme thee to the death, certayn.'")

gallows.²³¹ Returning to the judge to relay the happy news, the knights instead met an unexpected and ire-driven fate. The judge told the first knight that he must proceed to his execution because he had already been condemned to death. He then told the second knight, whose reappearance had called into doubt the initial capital sentence, that he, too, must lose his head, “for thou art cause why thy fellow dieth.”²³² Furthermore, the judge ordered death for the third knight, the first knight’s failed executioner, for not carrying out his command.²³³ Although absurd in its outcome, the tale served as a caution regarding the danger of allowing anger to influence judging, and a sign of the continuing appeal of stoical morality tales.

Other factors besides anger might also pervert the course of justice. The *Speculum Christiani*, for example, outlined the various temptations that might lead justices to fail in right judging:

Know well that man’s doom is perverted in four ways: by dread, by covetousness, by hate, and by love. By dread when we fear to speak truth for dread of any power. By covetousness when we are ravished by the mead of any gift. By hate when we cast ourselves to be an enemy against each man. By love when we intend to give to or to profit friends and neighbors more than right.²³⁴

Gower’s *Mirour de l’Omme* similarly detailed many of the prevailing complaints against late fourteenth-century judges, who stood accused of favoring nobles over the poor, being swayed by

²³¹ Incidentally, Peter the Chanter cited a case of a homicide victim reappearing after a man’s conviction for his homicide through trial by ordeal. In this instance, however, the reappearance occurred after the falsely accused man had been hanged. See Bartlett, *Trial by Fire and Water*, 160 (citing Peter the Chanter, *Verbum abbreviatum*, 78, PL 205, cols. 230-1).

²³² “Summoner’s Tale,” in *Riverside Chaucer*, ed. Benson, 133 (“For thou art cause why they felawe deyth.”)

²³³ “Summoner’s Tale,” in *Riverside Chaucer*, ed. Benson, 133. (“And to the thridde knyght right thus he seith, / ‘Thou hast nat doon that I comanded thee.’ / And thus he dide doon sleen hem alle thre.”)

²³⁴ Holmstedt, ed., *Speculum Christiani*, 236. (“Knowe wel that mannes doome is peruerted by foure maners: bi drede, bi couetyse, bi hate, and bi loue. Bi dred whil we feren to speke truth for drede of eny powere. Bi couetise whil we be rauysched wyth mede of eny zifte. Bi hate whil we casten vs to be enny azeyns eche man. Bi loue whil we entede to zeue or to profite to frendys and neghboris more than ryght.”)

the pleas of friends and noble acquaintances rather than judging all persons equally, and failing to bear in mind that God created all in His image and likeness.²³⁵ These concerns came through in contemporary sermons, such as this one bemoaning judges who accept bribes: “woe to you who for gifts justify the wicked man and do away the righteousness from the righteous man.”²³⁶ Gower had even harsher words for jurors, whose lies and distortions might be bought for a price; looking only to line their pockets with gold, such jurors were seen to neglect preparation for their own deaths.²³⁷ Cases of juror bribery show up occasionally in the plea rolls.²³⁸ In some instances, it might be a juror’s lord who, out of greed, coerced the juror to push for a guilty verdict.²³⁹ In addition, Gower felt weak jurors could easily be swayed by a corrupt foreman, noting that false jurors condemn innocents to death and acquit felons.²⁴⁰ The use of a self-

²³⁵ See, generally, Gower, “Mirour de l’Omme,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 272-274, lines 24625-24816; Troendle, ed., *John Gower’s Mirour de l’Omme*, vol. 3, 924-932. For a translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 323-325.

²³⁶ Ross, ed., *Middle English Sermons*, 122 (“...woo to you þat for ziftes iustifie þe wicked man and don avey þe ryghtwisness fro þe ryghtwis man”, a paraphrasing of Isaiah 5:23.) On the bribery of judges and jurors, see Owst, *Literature and Pulpit in Medieval England*, 346-347.

²³⁷ Gower, “Mirour de l’Omme,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 276-277, lines 25017-25025, 25031-25032; Troendle, ed., *John Gower’s Mirour de l’Omme*, vol. 3, 940. For a translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 328 (“And the worst of all the company are the jurors, for their lying and distortions cause wrong to be magnified. For the expense to which you go in buying their perjury they pay the burdening of their conscience because they take gold for being false and deceiving... They are making a poor provision for the death which comes afterward.”) The word Wilson translates as juror is “questour,” which in Anglo-Norman French may refer to someone bringing a prosecution. The context, however, suggests that Wilson may be correct in believing this is referring to jurors, namely those who sit upon inquests.

²³⁸ See, e.g., Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre, 1249*, 245, no. 489 (Robert de Molendino, a juror, was convicted of accepting nine shillings from a thief in order to save him; Robert served time in gaol and paid a fine of one hundred shillings). Those assigned to keep night watch in towns and cities might also be susceptible to bribery and other forms of unjust influence. See, e.g., *Calendar of Inquisitions Miscellaneous*, vol. 7, 132, no. 356.

²³⁹ According to the legal treatise *Britton*, for example, a defendant might claim “that any one of the jurors is suborned to condemn him by the lord, of whom the accused holds his land, through greediness of the escheat”. Nichols, ed. and trans., *Britton*, 32.

²⁴⁰ Gower, “Mirour de l’Omme,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 277, lines 25069-25072 (“Ly fals questour dont vous endite / Les innocentz au mort endite, / Qui sont sanz culpe

informing jury lent itself to the potential for abuse by individuals eager to “inform” a juror of the facts of a case.²⁴¹ Perhaps due to these difficulties, and to the fact that some crimes might be entirely without witnesses, the treatise *Britton* advised caution: “if the jurors are in doubt of the matter and not certain, the judgment ought always in such case to be for the defendant.”²⁴²

Even when a person was truly guilty, jurors and judges were cautioned to beware lest their own motivation in casting judgment were to condemn them at the Last Judgment. “As you judge another, so you condemn yourself,” cautioned a late fourteenth-century sermon.²⁴³

Namely, a person rendering judgment placed his own soul at risk if he were motivated by an evil will or desire for vengeance, even in cases where a defendant was in actuality guilty of a felony.

As the *Speculum Christiani* described it: “If the minister of the law slays anybody by the law, but more for evil will of vengeance than for love of righteousness, he sins grievously.”²⁴⁴

Conversely, the state of mind of a judge also made all the difference in determining how much guilt attached to wrongfully condemning a man to death. In assessing a situation involving an unjust judgment, the *Leges Henrici Primi* called for consideration of whether the injustice “was

d’enditer, / Et les felouns mortieux acquite...”); Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 3, 942, lines 25069-25072. For a translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 329.

²⁴¹ On this issue, see Nichols, ed. and trans., *Britton*, vol. 1, 32. (“And often a strict examination is necessary; for in such case inquiry may be made, how the jurors are informed of the truth of their verdict; when they will say, by one of their fellows, and he peradventure will say, that he heard it told for truth at the tavern or elsewhere by some ribald or other person unworthy of credit; or it may happen that he, or they, by whom the jurors have been informed, were intreated or suborned by the lords, or by the enemies of the person indicted, to get him condemned; and if the Justices find this to be the fact, let such suborners be apprehended and punished by imprisonment and fine.”)

²⁴² Nichols, ed. and trans., *Britton*, vol. 1, 32-33.

²⁴³ Ross, ed., *Middle English Sermons*, 122. The sermon drew upon several passages from the Hebrew and Christian scriptures, including Romans 2:1: “Et iterum, ‘In quo iudicio alium iudicas, teipsum condempnas—in þat þou demest anopur man, þou condempneþ þi-selfe.’”

²⁴⁴ Holmstedt, ed., *Speculum Christiani*, 28. (“If the mynister of the lawe slee ony-body be the lawe, bot more for euyl wylle of veniaunce than for loue of rightwysnes, he synnes greuoslly.”) Robert Grosseteste, similarly, argued that archdeacons should, in exercising their office, rejoice when able to acquit an accused individual, and feel “compassion when compelled for reasons of justice to condemn someone”. See Mantello and Goering, eds. and trans., *Letters of Robert Grosseteste*, 176.

committed knowingly or unknowingly (*scienter uel inscienter*).”²⁴⁵ The *Mirror of Justices* may have borrowed this idea from the *Leges*: “As to judges who falsely adjudge a man to death,” the *Mirror* observed, “sometimes they do this knowingly, sometimes in ignorance. In the first case they are homicides and should be adjudged to be hanged”.²⁴⁶ Moreover, just as with principals and accessories to a felony, not only the judges might hang but also those “who execute their judgments, sit with them, or consent to their doings, and also those who do not interfere with them when able to do so.”²⁴⁷ Ignorance might be an excuse, although not if the judge was negligent in failing to inform himself of the law: “the judge does not sin by not knowing the law, but he does sin if of his folly he undertakes to judge and does so foolishly or falsely (*folement ou fausement*).”²⁴⁸ The mind of the judge mattered.

With the right state of mind, a judge and jury might hand down a capital sentence without fear of the consequences, particularly when it seemed that a person had chosen a felonious path of his or her own free will. As Gower explained in his *Mirour de l’Omme*: “Man has his free will, as God has ordained, so that he can distinguish the good and the bad.”²⁴⁹ Therefore, under the right circumstances, a severe judgment might be warranted. In discussing Pity, the fifth daughter of Patience, Gower explained that capital punishment was sometimes necessary for the common good when not invoked out of ire. The mind of the judge, jury, and executioner could make the difference between licit and illicit use of the death penalty:

²⁴⁵ Downer, ed. and trans., *Leges Henrici Primi*, 138-39, §34.1b.

²⁴⁶ Whittaker, ed. and trans., *Mirror of Justices*, 137.

²⁴⁷ Whittaker, ed. and trans., *Mirror of Justices*, 137.

²⁴⁸ Whittaker, ed. and trans., *Mirror of Justices*, 137.

²⁴⁹ Gower, “*Mirour de l’Omme*,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 299, lines 26977-26979. (“L’omme ad sa franche volenté, / Solonc que dieus l’ad ordiné, / Dont puet le bien et mal eslire...”); Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 3, 1017. For an alternative translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 354.

The virtue I have sung to you
Does not have a heart enchanted by ire
To kill a man in judgment,
If it is not done through equity,
So as to destroy the iniquity
Of the thief and of bad men
For the common profit...²⁵⁰

Yet even when undertaken for the common profit, the death penalty should only be ordained
with charitable sorrow:

And yet with pity
She always retains her charity:
'Kill,' she says, and nevertheless
Regrets that the other duly
Deserves to be killed.²⁵¹

Like a self-defender slaying an aggressor with “sorrow of heart,” judges and jurors responsible for issuing a capital judgment were not to rejoice in the outcome even when thoroughly justified. *Bracton* acknowledged that homicide might be committed lawfully in the administration of justice, but then qualified this by saying that the killing would not be justifiable “if done out of malice or from pleasure in the shedding of human blood”, in which case even if the accused were lawfully sent to execution, the person who sent him or her to the gallows would be guilty of mortal sin.²⁵² In addition to having the right frame of mind in judging, namely “a love of justice,” an administrator of the law might avoid sin in condemning a person to death by

²⁵⁰ Gower, “*Mirour de l’Omme*,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 162, lines 13933-13939 (“La vertu dont vous ay chanté / N’ad pas le cuer d’ire enchanté / Pour tuer homme en jugement, / Si ce ne soit par equité, / Dont soit destruite iniquité / De laroun et de male gent / Pour le commun profitement...”); Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 2, 549. For an alternative translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 190.

²⁵¹ Gower, “*Mirour de l’Omme*,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 162, lines 13940-13944 (“Et nepourquant pitousement / Toutdis retient sa charité: / ‘Tuetz,’ ce dist, et nequedent / S’en dolt que l’autre duement / Ad deservi d’estre tué.”); Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 2, 549. For an alternative translation, see Gower, *Mirour de l’Omme*, trans. Wilson, 190.

²⁵² Thorne, ed. and trans., *Bracton*, vol. 2, 340.

following appropriate procedures. Without such due process, both the judge and the person ordered to carry out an execution would be guilty of sin.²⁵³

Even actions short of condemning a person to death might place a judge's soul at risk. For example, in *Handlyng Synne*, Mannyng argued that the Fifth Commandment against homicide extended to those who might falsely imprison someone as a felon. "If you place any man in prison, wickedly, as a false felon, or bind him in upland or in town, that he have his death therethrough," Mannyng warned, "certainly thee shall nothing keep, that for his death thou shalt answer."²⁵⁴ The *Mirror of Justices* similarly suggested that judges might incur mortal sin by indirectly causing a defendant's death in prison thanks to delay in pursuing justice.²⁵⁵ This may explain Chief Justice Scrope's harsh tone in responding to an accusation that a false appeal had resulted in wrongful imprisonment in a 1324 King's Bench case. Scrope argued that if the defendant had conspired to bring a completely fabricated appeal against the plaintiff, then his

²⁵³ Thorne, ed. and trans., *Bracton*, vol. 2, 340. The power of due process comes through strongly in the writings of Stephen Langton, who argued that, when a person was about to be executed unjustly without a prior judicial sentence, individuals could in good conscience oppose his execution. However, if the order to execute the person had followed from a judicial sentence, no matter how unjust it seemed, individuals opposed to the execution were to abstain from interfering. Baldwin, *Masters, Princes, and Merchants*, 169. Langton's writings seem to encourage some form of what we might call civil disobedience when faced with defects in due process. In fact, civil disobedience and resistance to royal sovereignty offers an alternative frame within which to analyze issues such as jury nullification within the secular criminal sphere. See, e.g., Green, "Societal Concepts of Criminal Liability," 670 (arguing that the community resisted the imposition of the death penalty for all open slayers by using the self-defense verdict and pardon process).

²⁵⁴ Furnivall, ed., *Robert of Brunne's "Handlyng Synne,"* part 1, 47-48, lines 1307-1318 ("Ȝyf þou do any man yn prysun, / wykkedly, as a fals felun, / Or bynde yn upland or in burgh, / Þat he haue hys deþe þer-þurgh,— / Certeyn þe shal no þyng were, / Þat for hys deþ þou shalt answe.") For a poem written from the perspective of a person pleading to God for help after being wrongly imprisoned, see "The Prisoner's Prayer," in Anglo-Norman and Middle English, from a thirteenth-century Guildhall MS, *Liber de antiquis legibus*. Isabel Stewart Tod Aspin, ed., *Anglo-Norman Political Songs* (Oxford: Anglo-Norman Text Society, 1953), 6-9.

²⁵⁵ Whittaker, ed. and trans., *Mirror of Justices*, 24 ("El pecchie domicide cheent mortelement trestuz ceaux par queus homme moert en prison. E ceo poeit estre ou par les juges qi trop delaiant a fere droit...")

malice was all the greater.²⁵⁶ Those sitting in judgment were obliged to help anyone wrongfully accused so that they might avoid bodily punishment. As John Gower wrote, “One should support good men who suffer accusation wrongly, so that their body should not be put to pain.”²⁵⁷ Those responsible for imprisoning a person might be called to account if a person died in their custody. In a mid-thirteenth-century Northumberland assize case, for example, Gilbert de Hodestone and William son of Roger of Bamburg were accused of the wrongful death of Agnes Goye, who died while in custody for having stolen a small harness. The jury assigned to the case testified that the two men were not guilty of the woman’s death.²⁵⁸ In a 1255 Northumberland case, two women, Emma wife of Simon Rup of Brumpton (possibly Brunton, Northumb.) and Edith of Bykerton (likely modern-day Byker, Northumb.), brought a complaint against Thomas of Bykerton for having imprisoned them falsely; a third woman, Christiana of Bykerton, had also been imprisoned and had died while so detained. Thomas accused the women of having stolen a bushel of malt. A jury concluded that the Emma and Edith were not guilty of the theft, which had instead been committed by the woman who had died in prison. This acquittal likely brought little comfort to Emma, whose infant son (*puer lactans*) had died during her detention, presumably due to his inability to nurse.²⁵⁹ False imprisonment could have disastrous consequences both for the detainee and for the family left behind.

Another clear danger to right judgment was untruth, with literary sources sometimes giving the impression that lying had taken hold as a widespread cultural problem in medieval

²⁵⁶ See Y.B. Pasch. 17 Edw. 2, fol. 544, no. 43 (K.B. 1324), *Seipp’s Abridgement*, no. 1324.089.

²⁵⁷ See Gower, “Mirour de l’Omme,” in *Complete Works of John Gower*, vol. 1, ed. Macauley, 152, lines 13117-13119 (“Om doit supporter bonne gent / Q’au tort portont accusement, / Sique lour corps n’en soit en peine...”); Troendle, ed., *Gower’s Mirour de l’Omme*, vol. 2, 516. For an alternative translation, see Gower, *Mirour de l’Omme*, trans. Martin, 179.

²⁵⁸ Page, ed., *Three Early Assize Rolls for Northumberland*, 72.

²⁵⁹ Page, ed., *Three Early Assize Rolls for Northumberland*, 108.

England. In a mid-thirteenth-century poem, for example, the author expressed grave concern with the level of falsehood that had allegedly arisen in England, possibly a reference specifically to fictitious pleadings in civil cases:

...falseness, I understand,
has driven truth out of the land,
and tort and force as they swear their oaths
that law shall lose its overclothes.²⁶⁰

This image of the law losing its outer garments called attention to the nakedness of legal remedies when process failed to bring truth to light. This is a problem that could arise in either the pre-trial or trial contexts.²⁶¹ In some ways, medieval English felony law was quite dependent upon falsehood, insofar as self-defense verdicts might be accompanied by narratives stretching the bounds of what we might today call factual truth. It is not clear whether jurors would have viewed such narratives as untruthful or leading to wrongful judgment, or rather as “truthful” in the sense of reaching the morally appropriate outcome under the circumstances. The author of the *Speculum Christiani* described wrongful judging as a violation of the seventh commandment against theft as well as the eighth commandment against bearing false witness. “Thou shall do no theft,” advised the *Speculum*. “Here in this commandment is forbidden all false winnings, be it by extortion, by violence, by guile or deceiving, or perjury or false judgment or any other damnable falsehood; all are forbidden as against God and thy fellow Christian.”²⁶² A contemporary sermon bemoaned the verdicts of “the jurors also, that are sworn to determine

²⁶⁰ “The Evils of the Time,” in Brown, ed., *Religious Lyrics of the XIVth Century*, 54, lines 9-12 (mid-century, Merton College, Oxford MS. 248). (“...falsenes, I vnderstande, / haues dreuen trwvte of lande, / and tort and fort as sworn þar owth / þat law sal lose is ouer-cloþe.”) For further discussion of this trope of falsehood and untruth in medieval English legal culture, see Owst, *Literature and Pulpit in Medieval England*, 343.

²⁶¹ Consider, for example, the possibility of inquest jurors failing to bring all evidence to light. See Butler, *Forensic Medicine in Medieval England*, 55.

²⁶² Holmstedt, ed., *Speculum Christiani*, 30.

whether they are thieves or true men, and falsely and knowingly acquit them”.²⁶³ This concern with truth influenced felony procedure, insofar as jurors were required to swear an oath, holding up their hands and pronouncing, “Hear this, ye justices, that we will speak the truth about what is asked of us on the king’s behalf, nor will we for any reason fail to tell the truth, so help us God”.²⁶⁴ God’s help might indeed be necessary should a juror break his oath or a judge act unethically: a poem on the pains of hell made clear that those who “handed down false judgments” (*demde false domes*) would suffer in hell.²⁶⁵ After the members of a jury swore oaths to speak the truth, the justices were to remind the jurors of their obligation to speak the truth and not to be influenced by fear or love or hate, holding God only before their eyes.²⁶⁶ Moreover, if a judge suspected that love, hatred, or fear had driven a particular verdict, he might “separate the jurors one from the other and examine each of them individually in order to establish the truth adequately.”²⁶⁷

Indeed, both judges and jurors might be tempted toward falsehood. The *Mirror of Justices* railed against “those who wrongfully condemn a man to death, and all those assenting thereto, and witnesses who falsely swear mortal sin against an innocent man,” suggesting all such persons were guilty of mortal sin.²⁶⁸ The *Mirror* was unequivocal on the point that jurors might be just as culpable as judges.²⁶⁹ Of particular concern to one poet featured in the late

²⁶³ As quoted in Owst, *Literature and Pulpit in Medieval England*, 343 (quoting from MS. Harl. 45, fols. 65-6) (“...the jorroures also, that beth swore to trye whether thei be theves or trewe men, and falsliche and wityngliche acqyteth hem...”)

²⁶⁴ Thorne, ed. and trans., *Bracton*, vol. 2, 405.

²⁶⁵ “The XI Pains of Hell,” in Morris, ed., *Old English Miscellany*, 149.

²⁶⁶ Thorne, ed. and trans., *Bracton*, vol. 2, 405.

²⁶⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 406.

²⁶⁸ Whittaker, ed. and trans., *Mirror of Justices*, 24.

²⁶⁹ Whittaker, ed. and trans., *Mirror of Justices*, 24 (describing such jurors as “fous”, which could mean mad, ignorant, or foolish; see *AND*, s.v. “fou”).

fourteenth-century Vernon manuscript was the tendency of jurors to give false verdicts at inquests:

Alas! What a cursed life is this,
That men dread more the world now here
Than Him who wrought the word surely,
And all things hath in His power.
As men in inquests say often amiss,
And obstruct suits true and clear;
Such men think not of heaven's bliss,
Who give verdicts in such manner.²⁷⁰

One would be hard pressed to find a coroner's report lodging an accusation against a judge or jury for death by false judgment, but the *Mirror of Justices* suggests that such was part of the coroner's duty.²⁷¹ Even if the threat of prosecution might not serve as a deterrent, the above-mentioned poet from the Vernon manuscript suggested that keeping one's eyes on the goal of heaven would prevent jurors from such misbehavior on inquests. By speaking the truth, people might keep heaven, rather than earthly cares, foremost in mind. If they failed to do so, they might instead succumb to the temptation to defame a man, which was the equivalent of robbery:

Thou might as easily rob a man
As with a lie deprive him of his name.
Whatever thou speakest, where or when,
Look that thou no man defame.²⁷²

²⁷⁰ "But thou say Sooth, thou shalt be shent," in *Minor Poems of the Vernon MS*, part 2, ed. Furnivall, 742, lines 61-68. ("Alas! What corsed lyf is þis, / Þat men dreden more þe world now here / Þen him þat wrouzte þe world I-wys, / And al þing haþ in his pouwere. / As men in questus seyn ofte a-mys, / And stoppen quereles otrewē & clere; / Such men þenkeþ not on heuen blys, / Þat zeuen verdites in such manere.")

²⁷¹ Whittaker, ed. and trans., *Mirror of Justices*, 31 ("And if the person was killed by false judgment, then they are to say who were judges and who officers in executing the judgment, who assessors; and if from false evidence, who were the swearers thereof.") Note, however, that the Wiltshire crown pleas of 1249 do record the amercement of Salisbury's coroners and bailiffs for having a woman named Helen abjure the realm "for so small a crime" (*pro tam modo delicto*). Namely, Helen had confessed in sanctuary that she had stolen a rochet. See Meekings, ed. and trans., *Crown Pleas of the Wiltshire Eyre*, 256.

²⁷² "But thou say Sooth, thou shalt be shent," in *Minor Poems of the Vernon MS*, part 2, ed. Furnivall, 741-742, lines 37-40. ("Þou miht als chep robbe a mon / As with a lesyng lese his name. / What so þou spekest, where or whanne, / Loke þat þou no mon diffame.")

The poet's implication was that lying jurors were just as culpable as thieves, having stolen from the defamed man his rightful reputation.

Year Book evidence suggests that some defendants did fear the possibility of a deceitful jury, as in the 1321 case of a man accused of conspiracy in London. He refused to put himself upon a jury for fear that his enemies held too much sway within London and would therefore bias a jury against him.²⁷³ Similarly, in a 1276 Somersetshire case, Randall de Vallibus, accused of cutting down a thief from the gallows and thereby saving his life, was ultimately acquitted after the king received word that the accusation against Randall had been made by “persons unfriendly” toward him, and that it was his servant who had cut down the thief without his master's knowledge.²⁷⁴ The legal treatise *Britton* describes the recourse available to one who feared a biased jury, particularly in the case where a person who indicted the defendant was slated to act as a trial juror. The defendant might argue to the justice, “Sir, this man ought not to be upon the jury, because he indicted me, and I presume of him and all those who indicted me, that they still bear the same ill will against me as when they indicted me.”²⁷⁵ *Britton* indicates that this form of challenge should always be available to a defendant whose life was at stake. *Bracton* lends credence to the idea that defendants were generally allowed to challenge jurors. The treatise indicates that, “in order that judgment may be reached with greater certainty and risks and doubts removed,” a justice might allow an indicted man to remove a juror for just cause “if he suspects any of the twelve jurors”, as in cases “where there are deadly enmities between

²⁷³ See Y.B. 14 Edw. 2 (London Eyre 1321), *Seipp's Abridgement*, no. 1321.114.

²⁷⁴ Lionel Landon, ed., *Somersetshire Pleas from the Rolls of the Itinerant Justices*, vol. 3 (Frome: Butler & Tanner, 1926), 34-36.

²⁷⁵ Nichols, ed., and trans., *Britton*, vol. 1, 30-31.

some of them and the indicted man, or there is a greedy desire to get his land,” and so forth.²⁷⁶

Bracton specifically described this measure as a means of removing suspicion so that “the inquiry may proceed free of all doubts.”²⁷⁷

Allegories describing the Last Judgment as an assize may have reinforced for judges and jurors the notion that their act of bearing witness or judging prefigured the end times, when those who judged on earth would in turn be judged. “Forgive us all that we have done, as we forgive each other man,” rhymed an English translation of the *Pater Noster*.²⁷⁸ An early fourteenth-century poem by Friar William Herebert (d. 1333), for example, relied on the metaphor of the assize in describing the Last Judgment:

Think, man, yearn in each way,
Ere thou be brought to this assise,
On what thou might depend there.
What good thou hast, man, here done
Pressed there thou shalt understand,
Or else forever thou will be in sorrow...²⁷⁹

Yet another pre-1350 poem, devoted to the Trinity, reminded the reader of a sinner’s unpreparedness for the Last Judgment:

²⁷⁶ Thorne, ed. and trans., *Bracton*, vol. 2, 405. It is unclear to what extent jury challenges were a common feature in felony cases. For a reference to jury challenges in *Glanvill*, see Hall, ed. and trans., *Glanvill*, 31-32 (II.12, describing how a tenant might bring exceptions against one or more of the twelve, using the same grounds as those for the rejection of witnesses in ecclesiastical courts). For some evidence that peremptory challenges and other objections for cause may have been available in civil jury trials in fifteenth-century Southampton, see Tom Olding, *The Common and Piepowder Courts of Southampton, 1426-1483*, part 1 (Bristol, 2011), xxiv-xxv.

²⁷⁷ Thorne, ed. and trans., *Bracton*, vol. 2, 405.

²⁷⁸ “Pater Noster in Anglico,” in Patterson, ed., *Middle English Penitential Lyric*, 108 (“Forgive ous alle þat we haviþ don, / Als we forgivet uch oþir man...”).

²⁷⁹ “Make Ready for the Journey,” in Brown, ed., *Religious Lyrics of the XIVth Century*, 26, lines 22-27 (from Phillipps 8336). (“By-þench, mon, 3oerne on oeuche wyse / Er þou boe broght to þylke asyse, / On what þou shalt trust þare. / what god þou hauest, mon, here ydon / Prest þer þou shalt ounder-uon, / Elles euer þou worst in kare...”). See also *ibid.*, “A Song of Mercy,” (Camb. Univ. Dd. 5. 64. III, School of Richard Rolle, 99, lines 37-44), which states, “...Mery es sa hegh a pynt, / Þar may na syn it suppryse; / To þi mercy es my hert ioynt, / for þer-in al my likyng lyse. / Lord, lat it noght be aloynt, / when þou sal sett þi gret assyse. / With þi mercy my sawle anynt, / when I sal come to þi Iugise...” On these types of legal metaphors, see also d’Avray, *Preaching of the Friars*, 218-219.

...O me, there is naught but sin and strife,
Lord, but thy mercy it make.
Unworthy am I, well thou know,
And all unready for to rise
On doomsday before justice,
There all is risked on a single throw.²⁸⁰

In contrast to this image of a game of chance, the fourteenth-century *Fasciculus Morum* presented the Last Judgment as a tense jury trial, noting that “finally we will be sentenced before God our justicer after the verdict of our jury, to life or death as we have deserved it.”²⁸¹ These varying religious conceptions of the danger of judging and the importance of mercy toward others were familiar to judges and jurors alike, representing widespread themes and tropes in literature and in sermons. These were among the multitude of norms influencing judge and jury behavior, which was influenced as well by fear of crime and criminals and a desire to respond harshly to those who might play fast and loose with the king’s peace.

The Misjudging of Christ and Its Resonance

If frequency of appearance provides an accurate measure, then the story of Christ’s passion was the single most influential narrative on the topic of judging in medieval England. As early as the tenth century, homilies described the chief priests as killing Jesus out of envy and malice, while also presenting the idea that we have all been exiled and banished due to original sin.²⁸² Medieval sermons urged men to reflect on the passion of Christ in order to open their hearts to merciful actions. As one sermon urged its listeners: “Whatever you draw out of the flood of your conscience in thinking of the passion of Christ, it shall turn into the blood of

²⁸⁰ “An Orison to the Trinity,” in Brown, ed., *Religious Lyrics of the XIVth Century*, 39, lines 73-78 (Cotton MS. Vespas. A. iii). (“...O me es noght bot sin and sake, / Lauerd, bot þi merci it mak. / Vnworthi am i, wel þou wast, / And al vnredi for to rise / On domesdai be-for iustise, / Þar all es casten on a cast.”)

²⁸¹ Wenzel, ed. and trans., *Fasciculus Morum*, 105.

²⁸² See, e.g., Richard Morris, ed., *The Blickling Homilies* (London: Early English Text Society, 1967), 22-23, 176-177.

charity.”²⁸³ Wall paintings reinforced the importance of meditation on the passion, a common theme depicted in frescoes in medieval English churches.²⁸⁴ Nicholas Love’s *Mirror of the Blessed Life of Jesus Christ* presented a guide to such meditation, having the reader visualize Jesus as a young man being wrongfully executed:

Wherefore thou shalt imagine and inwardly think of him in his passion as of a fair young man of the age of thirty-three years, who was the fairest, the wisest, the most righteous in living and most Godly and innocent who ever was or might be in this world. So falsely accused, so enviously pursued, so wrongfully judged, and so despitefully slain, as the story of his passion tells, and all for thy love.²⁸⁵

Accounts of the trial and death of Jesus provide a rich resource for excavating the meaning of felony and the medieval understanding of the judging process. To return to the subject of chapter two, words of felony typically appear in several contexts related to Jesus’ death: in some instances Jesus himself was falsely identified as a felon and wrongfully crucified beside genuine felons; even more frequently the Jews who condemned Jesus to death were called felons; Judas himself was counted a felon; and finally, stepping forward in time, all those who wished to meditate upon Christ’s passion were encouraged by medieval authors to recall their own complicity, as felonious actors, in Jesus’ death on the cross. This last example placed strong emphasis on the interiority of felony: even if few medieval English men and women

²⁸³ Homer G. Pfander, *The Popular Sermon of the Medieval Friar in England* (New York, 1937), 61 (from the sermon “Per proprium sanguinem” of Friar John Gregory). (“What euer þou draw out of þe flode of þi conciens in thenkyng of þe passioun of crist, hit shalle turne in to þe blode of charite.”)

²⁸⁴ Rosewell, *Medieval Wall Paintings*, 49-58, 185-187.

²⁸⁵ Love, *Mirror of the Blessed Life of Jesus Christ*, ed. Sargent, 159. (“Wherefore þou shalt ymagine & inwardly þenk of him in his passione as of a faire zonge man of þe age of xxxiiij zere, þat were þe fairest, þe wisest þe moste rihtwise in lyuyng & moste godely & innocent, þat euer was or miht be in þis worlde. So falsly accusede, so enuyously pursuede so wrong[efully] demede, & so despitesly slayne. As þe processe of his passione after telleþ & alle for þi loue.”)

actually committed homicide in their lifetime, for example, many had likely wished for the death of another or harbored vengeful thoughts toward someone who had wronged them.

To take one vivid example of this discourse, in a Middle English apocryphal account of Jesus' childhood, Jesus was falsely accused of felony, foreshadowing his ultimate fate.²⁸⁶ The story loosely paralleled contemporary self-defense narratives—stories in which two men fought, and the more fell-hearted of the two was killed—insofar as it placed blame upon the individuals who ended up dead, while justifying the actions of the homicidal actor, in this instance, the young boy Jesus. As the story related, Jesus one afternoon called out to his playmates, “shall we go play, upon the hills for to leap?” (*wyl we go play / Vpon þe hylles for to lepe?*).²⁸⁶ While it was unclear just how popular Jesus was in his Nazareth neighborhood, the story suggested that not all the local kids were fans of the wunderkind. In fact, “some [of the children] thought of him enviously, with heart as bitter as gall” (*summe thoutyn hym to enuy / Wt herte bytter as ony galle*), gall again being the Middle English equivalent of the Latin *fel*. Trying to rival Jesus in leaping, these overly ambitious and fell-hearted children broke their necks and died. Upon Joseph fell the undesirable duty of informing the fathers that their children were “dead as a stone” (*dede as a ston*). The fathers lamented and accused Jesus of wrongfully killing the children, saying, “Jesus had slain through felony” (*Jhesu had slawyn throu felony*). Mary, wishing to set matters aright, begged her son to restore the children to life, and Jesus dutifully complied. In the end, the newly resurrected children warned others not to attack (*asayle*) Jesus, “for if you do, he will kill you!” (*for, 3yf 3e done, he wyl 3ou spyl*), what I take to be a clever play

²⁸⁶ Although I have used the Middle English version here, there is also a corresponding Anglo-Norman text. See Maureen Boulton, ed., *Les Enfaunces de Jesu Crist* (London: Anglo-Norman Text Society, 1985).

on words with *spilen*, to revel or play, as opposed to *spillen*, to kill.²⁸⁷ In other words, do not provoke Jesus. The narrator credited Jesus with restoring the children to life, but the children themselves suggested that Jesus had also been instrumental in bringing about their deaths in the first place. As in a case of pardonable self-defense, the audience might be reassured of Jesus' ultimate righteousness by recalling that it was the children, and not Jesus, who had been cast as the fell-hearted characters in the story.

As amusing as this tale may be to our ears, and most assuredly it held some humor for its contemporary audience as well, it speaks to the quotidian manner in which words of felony might be employed in literature, even within texts aimed pedagogically at a youthful audience.²⁸⁸ It also speaks to a theme commonly found in contemporary literature, namely an overwhelming concern with the misjudging of Jesus as a felon. The childhood narrative artfully prefigures Jesus' trial before Pontius Pilate, with the Jewish fathers angrily accusing Jesus of killing their children feloniously, just as the Jews assembled before Pilate would urge the prefect to release Barabbas rather than Jesus in the Gospel narrative. The story foreshadowed Jesus' treatment as a felon at the end of his earthly life, a theme brought out in a fourteenth-century poem in which Mary bemoans, "My child is outlawed for thy sin."²⁸⁹

The fourteenth-century hermit and mystic, Richard Rolle, meditating on the suffering of Christ, described how Jesus was subjected to "tortures and distresses and disgraceful treatment

²⁸⁷ The text, called "Kindheit Jesu" or Infancy of Jesus by editor Horstmann, appears in MS Harl. 3954, fol. 70. For this excerpt, see Carl Horstmann, ed., *Sammlung Altenglischer Legenden* (Heildbronn: Gebr. Henninger, 1878), 106-107.

²⁸⁸ For the argument that the *Kindheit Jesu* text (in its MS Laud Misc. 108 form) was geared toward a mixed audience of children and adults, see Daniel T. Kline, "The Audience and Function of the Apocryphal *Infancy of Jesus Christ* in Oxford, Bodleian Library, MS Laud Misc. 108," in *The Texts and Contexts of Oxford, Bodleian Library, MS Laud Misc. 108: The Shaping of English Vernacular Narrative*, eds. Kimberly K. Bell and Julie Nelson Couch (Leiden: Brill, 2011), 138.

²⁸⁹ "Quia Amore Languo," in Brown, ed., *Religious Lyrics of the XIVth Century*, 235, line 49 ("My childe ys outlawed for thy synne").

and felonies” and was bound like a thief “without compassion or sympathy,” and all “in the presence of the bishops and lawyers”.²⁹⁰ Rolle’s text was replete with populist sentiments of this ilk, condemning religious and secular elites, yet it mirrored other fourteenth-century texts in its concern with the unjust judging of Christ and his humiliation in being treated “like a thief carrying his own gallows.”²⁹¹ This description of the crucifixion as a topsy-turvy event, in which the just judge was condemned by elite men while ordinary people looked on in horror, was echoed in mixed Latin and vernacular macaronic sermons of later vintage, dating to the mid-fourteenth to mid-fifteenth century. Indeed, one homilist described the crucifixion as a “concave mirror” in which “the image of man appears upside down.”²⁹² Only through such a metaphor might the listener comprehend how “the highest and just judge should be arraigned as a felon,” and “the author of life, the innocent one, should be damned to death.”²⁹³ The homilist urged his audience to keep this mirror in sight so that the memory of Christ’s passion might move them to pity.

Even more frequently, medieval English narratives applied the word “felony” to describe the community of Jews who were said to have condemned Jesus to death. In his commentary on Psalm 69, Rolle described Jesus calling out to his heavenly father to save him from the “wicked Jews”. Furthermore, Jesus equated “the Jew’s wickedness” with “the felony of men” through which he would be hanged on the cross.²⁹⁴ Mary, too, applied words of felony to the Jews

²⁹⁰ “Meditations on the Passion,” in *Richard Rolle: The English Writings*, ed. Allen, 91-92.

²⁹¹ “Meditations on the Passion,” in *Richard Rolle: The English Writings*, ed. Allen, 115 (mentioning how Jesus had been “judged so unjustly” to an ignominious death and treated like a common criminal in having to bear his cross).

²⁹² Horner, ed., *Macaronic Sermon Collection*, Sermon 22, 478-79 (“speculo concauo...et tunc ymago hominis apparet eversa”).

²⁹³ Horner, ed., *Macaronic Sermon Collection*, Sermon 22, 478-79 (“summus et iustus iudex schuld be areynyd sicut a pheloun, quod aucotr vite, vnus innocens, dampnaretur morti.”)

²⁹⁴ Bramley, ed. *Psalter or Psalms of David*, 238.

collectively in the *Cursor Mundi* (c. 1300), in which the author described a surprise visit to Mary from the apostles some time after Jesus' death on the cross. The apostles had already dispersed for their ministries, making their house call all the more remarkable. After kissing her guests in greeting, Mary "asked them how they had come there, for they were spread so wide and far".²⁹⁵ Learning that Jesus had sent them to her, Mary took the opportunity to express her wishes for the handling of her body after her death. She asked the apostles to have her body guarded day and night so that the Jews might not steal and desecrate it. She explained: "the Jews are full of felony; my son they slew for envy. Fain would they be to do me shame; much they hate my body".²⁹⁶

Judas stood in, of course, as the quintessential felon in medieval versions of Jesus' life story. Jesus himself, in fact, accused Judas of felony in one version of the boyhood story of Jesus. In the apocryphal account, the youthful Jesus and Judas were playing at the waterside with other children, when suddenly Judas fell dead. The children ran off to the alderman and falsely accused Jesus of killing Judas. In response, "all the Jews" agreed that Jesus should be stoned to death. Mary, once again intervening successfully, persuaded Jesus to raise Judas to life. Jesus complied, but took the opportunity to inform his mother of Judas' true character: "Certainly, woman, I tell thee, this traitor full of felony to the Jews shall sell me".²⁹⁷

More commonly, texts described the adult Judas. In the *Cursor Mundi*, the author characterized Judas' kiss of betrayal as an act of felony and treason:

²⁹⁵ Morris, ed., *Cursor Mundi*, part 4, 1171 ("asked hem how þei coom þere / for þei were spred so wide where").

²⁹⁶ Morris, ed., *Cursor Mundi*, part 4, 1171. ("Þe iewes are ful of felonye / My son þei slowþe for envye / Fayn wol þeibe to do me shame / Muche hate þei my licame...")

²⁹⁷ Horstmann, ed., *Sammlung Altenglischer Legenden*, 113-114. This particular story may be found in MS. Harl. 2399, fol. 47. ("Sertynly, dame, y telhyt þe: / þys traytyr ful of felony / To þe Juys schalle syl me...")

When Judas offered to kiss him,
Jesus refused it not,
'Judas, once it was,' he said,
'That much of thee I wrought,
Now you have with felony
And treason me besought,
With a kiss have you man's son
Unto your power brought.'²⁹⁸

Just like his youthful counterpart, the adult Jesus personally identified Judas as a betrayer, who brought about Jesus' death with felony and treason.

Whether hearing these stories by the hearth or in homilies, English judges and jurors were familiar with this literary trope of the misjudgment of Christ, which served as a reminder of the dangers involved in judging and as a spur to the exercise of mercy, particularly when one was in danger of sending an innocent man to the gallows.²⁹⁹ While many accounts assigned blame to Judas or to the Jews collectively for the death of Christ, an act brought about by felonious judging, other texts emphasized the way in which the sins of all men and women were responsible for Jesus' death on the cross. A common trope in literary and homiletical sources was the use of the language of judgment and felony to emphasize the shared criminality—or sinfulness—of all. "Who may say, I am clene from synne?", asked one sermon author.³⁰⁰

Chaucer's parson would opine that Jesus "was wounded for our misdeeds and defouled by our

²⁹⁸ Morris, ed., *Cursor Mundi*, part 3, 902, lines 15773-15780. ("Quen Iudas him bedd to kiss, / Iesus it groched nocht, / 'Judas, quillum was,' he said, / 'þat mikel o þe i roght, / Nu þou has wit felunni / and tresun me bisoght, / Wit a coss has þou mans sun / vn-to þi bandun brought.'")

²⁹⁹ The dangers of judging, often connected to the misjudgment of Christ, fall outside the scope of this paper but will be taken up in a later chapter of my dissertation. For the most comprehensive discussion of the dangers of judging in the medieval period, see Whitman, *Origins of Reasonable Doubt*.

³⁰⁰ Pfander, *Popular Sermon of the Medieval Friar*, 57 (quoting the sermon *Per proprium sanguinem* of Friar John Gregory). Michael Clanchy has suggested that this passage may lie behind the medieval institution of love days. See Michael Clanchy, "Law and Love in the Middle Ages," in *Disputes and Settlements: Law and Human Relations in the West*, ed. John Bossy (Cambridge: Cambridge University Press, 1983), 49. On love days, see also Josephine Waters Bennett, "The Medieval Loveday," *Speculum* 33:3 (1958), 351-370 (arguing that the love day was not a technical legal institution but a custom informed by Christian teaching, and that it was widely available in lower courts, especially courts baron, but not generally in royal courts).

felonies”.³⁰¹ By sinning, an individual became culpable for the death of Jesus. As one late medieval sermon author would remind his audience, “spiritually we are all felons, all pilgrims” (*spiritualiter sumus felons, omnes peregrini*).³⁰² This notion of felony placed emphasis on the guilty mind common to all humankind, both as part of the legacy of original sin, and in terms of unsavory inchoate desires that might or might not ever be put into action. No measure of good works could ever be commensurate with the price paid by Jesus to purchase men’s souls. As one poet described it:

To go to him that hath us bought,
my good deeds are full small;
Of the works that I have wrought,
the best is more bitter than gall.³⁰³

In the words of another sermon, “since all of us are the cause of this offense, all indicted of felony, all have been found wanting in front of the highest judge, no one can excuse himself. Let us flee to the sanctuary seeking grace and mercy.”³⁰⁴ Just as the thought of condemning an innocent man to death might give a juror pause, so too might this alternate image of the common felonious nature of all men and women, a theme discussed at greater length above. Although much of my second chapter was devoted to pointing out the nuances and complexity of felony as a point of law—arguing that felony implied deliberation, a willed act, and even wickedness—I close this section on a very different image, that of the commonplace nature of felony. Insofar as felony was a state of mind—wicked thoughts, ill will toward one’s fellow Christians, anger

³⁰¹ “Parson’s Tale,” in *Riverside Chaucer*, ed. Benson, 295. (“He was wounded for oure mysdedes and defouled for oure felonies.”)

³⁰² Horner, ed., *Macaronic Sermon Collection*, Sermon 12, pp. 326-27.

³⁰³ “God, þat al þis myghtes may,” in *Medieval English Penitential Lyric*, ed. Patterson, 65, lines 9-12. (“To go to him þat haþ ous boht, / my gode deden bueþ fol smalle; / of þe werkes þat ich ha wroht / þe beste is bittrore þen þe galle.”)

³⁰⁴ Horner, ed., *Macaronic Sermon Collection*, 330-331, Sermon 12 (“Ex quo igitur omnes sumus causa huius offense, omnes indictati de feloniam, coram summo iudice deliquimus, nemo potest se excusare.”)

and hatred—no one was truly free of guilt. The common law might limit felony prosecutions to situations in which a wrongful state of mind was fulfilled in a wrongful act, but prosecution at the Last Judgment would be much more wide-reaching for those who failed to confess their inchoate wicked thoughts. Perhaps these seemingly contradictory perspectives on felony—felony as the domain of wicked literary villains, but also a shared and universal human trait—helps to explain the abundance of pardons and acquittals from jurors faced with a law that prescribed the gallows for all convicted of felony. Felony was at once a state of extreme wrongdoing, one for which capital punishment might be justifiable, and at the same time a humbling reminder that any one, exercising poor judgment in undertaking an act within the world, might trip the fine line between a felon of heart and a prosecutable felon of the lord king.

CONCLUSION

Looking Back

In Thomas Smith's late sixteenth-century description of jury trial at gaol delivery, the judge advised: "Good men... ye of the enquest, ye have heard what these men say against the prisoner, you have also heard what the prisoner can say for himself, have an eye to your othe, and to your duetie, to God and the Prince, and doe that which God shall put in your mindes to the discharge of your consciences, and marke well what is saide."¹ We have no equivalent description of a judge's instruction to a jury in medieval England. By the sixteenth century, according to Smith's account, jurors were understood to have a duty to listen to all the evidence presented at trial and exercise a duty to God, the king, and their individual consciences in determining whether to hand down a verdict of guilty or acquittal. "Do that which God shall put in your minds," cautioned the judge in Smith's account, suggesting a touch of divine intervention to shore up the conclusions to be drawn from examination of witnesses and the accused.

Over three centuries earlier, in 1215, when the Fourth Lateran Council abolished priestly involvement in the ordeal, England responded within a few years by replacing the ordeal with trial by jury. The ordeal had been premised upon divine intervention, although human actors had to interpret the signs of a burned hand or a sinking body. When jury trial replaced the ordeal, the burden of interpretation fell squarely on human shoulders. It is difficult to discern precisely how

¹ Thomas Smyth, *De republica Anglorum: The maner of gouvernement or policie of the realme of England* (London, 1583), 80-81.

the crown and royal justices understood the role of jurors in these early days, although evidence suggests that justices, like Smith's judge, advised jurors to take their oaths seriously and to keep God before their eyes.² In deciding whether to send a defendant to the gallows, jurors, in turn, must have leaned in part on whatever access to the divine they might glean from the sermons they had heard, the morality plays they had seen, and in general the tools they had acquired for examination of conscience in preparation for confession. They must also have been swayed by any number of other factors, including personal knowledge of the accused and of the particular crime itself, and fear of unchecked criminal behavior and of the repercussions of convicting an individual who had friends or kin prepared to exact revenge.

Throughout this dissertation, I have argued that jurors drew upon ideas learned through sermons, literature, and the practice of confession, in determining whether the defendants hauled before them were guilty or innocent. By its very nature, this dissertation raises questions that cannot be answered with the assuredness offered by more quantitative methods, and it suggests answers that are broader in their implications than would be the case if the dissertation were limited to doctrinal, legal evidence. As a lawyer myself, I am keenly aware of the criminal law's fundamentally conservative nature, of the way in which changes in the law are often creeping and slow, like tides shaping a groove in a rock, and that they are nevertheless expansive in reach, such that decisions made by royal justices and jurors in the immediate post-Lateran-IV years may be traced through widening circles to our own current model of a jury-based system of criminal justice. Yet at a time when plea bargaining has nearly swallowed the whole of our criminal justice system, an exploration of the earliest use of trial juries in English felony cases

² Thorne, ed. and trans., *Bracton*, vol. 2, 405.

provides perspective on the role juries might once again be called upon to play within the American system of criminal justice.

Several distinct questions are at play throughout my dissertation. First, I ask in part how we might explain jury behavior, and in particular what may account for the relatively high acquittal rate in thirteenth- and fourteenth-century felony cases. Second, I raise obliquely the question of the origins of *mens rea*, although in light of the time frame of my dissertation, I never follow this through to the moment where *mens rea* becomes a distinctly articulated doctrine of the common law.³ Third, and what I have intended to be most central, I raise the question of just how central *mens rea*, or issues of mind—by which I mean to encapsulate what we might call intent, along with volition and free will—drove jury decision-making in these early days of the use of juries to try felony cases.

Have I answered these questions satisfactorily? I do believe I come some distance in answering the question regarding jury behavior and the high acquittal rate. As may be apparent from the preceding chapters, I tend to take a fairly optimistic view of human nature, such that my explanations most often tend toward assuming the operation of mercy and empathy in jurors' handling of difficult felony cases. A high acquittal rate could be driven by a commitment to mercy. Admittedly, it might also reflect other emotional responses, such as fear of vengeance from the kin of a defendant sent to the gallows. Given the pervasiveness of calls to mercy and concerns about the danger of judging in the surviving literature from this period, my perspective privileges the operation of clemency and compassion over fear and compulsion.

As for the origins of *mens rea*, I have not tried to suggest that what I have found in the medieval records is wholly new, but rather I argue that it is part of a continuum that can be traced

³ I hope to treat this in a future book project.

to earlier medieval discussions of the centrality of intentionality in the formation of sin. I argue that *mens rea* was at work in medieval English felony adjudication, but that it operated sub rosa in the sense that there was no explicit doctrine of *mens rea* being discussed by lawyers and justices in thirteenth-century courtrooms. Rather, it was in the ether, so to speak. Jurors were trained to understand the nature of wrongdoing in terms of *mens rea*, and guilty mind was even implicit in the meaning of the word “felony” itself, such that we must be wary of assuming that words like “felony” and “felonious” had the comparatively neutral, categorical meaning that they carry today.

And as for my third question, regarding the centrality of *mens rea*, I hope I have been forceful enough in arguing that it was essential to jurors’ adjudication of felony cases, without artificially downplaying the multitude of other factors—reputation, concerns for recidivism, the nature of the act itself, and so forth—that were no doubt at work as jurors decided whether to send a particular individual to the gallows. A remaining question is what role the jury would play in subsequent centuries, as legal theorists worked out the details of a formalized doctrine of *mens rea*.

Looking Ahead

My dissertation’s timeframe ends in the fourteenth century, well before the development of a clear doctrine of *mens rea*. By the sixteenth and seventeenth centuries, as described by Cynthia Herrup, “the balance of power in the courtroom shifted towards the judiciary.”⁴ In contrast to Green, who found medieval juries inclined toward leniency when faced with particular fact patterns, Herrup describes seventeenth-century jurors exhibiting greater concern

⁴ Herrup, *Common Peace*, 158.

than judges with defendants perceived to present a danger to local peace.⁵ In fact, the jury described by Herrup is relatively severe, differentiating between “those who were too dangerous to remain in the community, and those who despite [sic] misbehavior still deserved some sympathy,” and exhibiting a lesser “reservoir of patience” than justices in mitigating punishments.⁶ This stands in contrast with the comparative leniency of jurors in medieval England, as demonstrated, for example, by the 1285 Statute of Winchester, which specifically condemned jurors for allegedly allowing robbers, killers, and arsonists to walk free rather than punishing felonies as they were obligated to do.⁷ One can find great commonality between the medieval and the early modern in Herrup’s analysis of seventeenth-century understandings of *mens rea*: “Intention was the quality that distinguished not only accidents from felonies but also offenders from real criminals.”⁸ Yet Herrup’s portrait of trial jurors suggests a comparably Puritanical and punitive stance toward criminal defendants, in contrast with the leniency and acquittal-minded nature of medieval English criminal juries. Future research might explore the reasons for such a dramatic shift in juries’ attitudes toward defendants and toward the exercise of mercy.

Doctrinal change provides another avenue for future research. The definition of felony I present in chapter one, having pieced together an understanding of the word from a multitude of sources, will be replaced by clear doctrinal categories by the time of Coke, Hale, and Blackstone. For example, Edward Coke (1552-1634) in his *Third Part of the Institutes of the Laws of England* (first edition, 1644) described the offense of murder as “when a man of sound memory,

⁵ Herrup, *Common Peace*, 162.

⁶ Herrup, *Common Peace*, 166.

⁷ Stephenson and Marcham, eds. and trans., *Sources of English Constitutional History*, 173.

⁸ Herrup, *Common Peace*, 191.

and of the age of discretion, unlawfully killeth within any County of the Realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c., die of the wound, or hurt, &c., within a year and a day after the same.”⁹ Elements of this definition are clearly visible in the medieval evidence, but not as systematically spelled out.

In defining “malice prepensed,” Coke elaborated: it is “when one compasseth to kill, wound, or beat another, & doth it *sedato animo*. This is said in law to be malice forethought, prepensed, *malitia praecogitata*. This malice is so obvious in law, as though it be intended against one, it shall be extended towards another. *Si quis unum percusserit, cum alium percutere vellet, in felonia tenetur.*”¹⁰ This Latin invocation of the notion of transferred intent derives from *Bracton*.¹¹ Malice, according to Coke, might be implied in instances where a person killed another without provocation or with poison; where the victim of the homicide was a magistrate or other known officer; where the person who killed was engaged in theft or some other wrong, and killed in response to the crime victim's attempt to defend him- or herself; and where a gaoler's mistreatment resulted in a prisoner's death.¹²

Looking ahead even further to the seventeenth century, the time period of Herrup's study, we can see how the divisions of crime evolved further. Dividing common law offenses into capital and non-capital offenses, Matthew Hale (1609-1676) described the former category as including offenses immediately against God or immediately against man.¹³ The category of non-

⁹ Edward Coke, *Third Part of the Institutes of the Laws of England* (1644), 47 (ch. 7, Of Murder), accessed through Early English Books Online.

¹⁰ Coke, *Third Part of the Institutes*, 51 (ch. 7, Of Murder). “If a person kills one, when he intended to strike another, he is held [to have acted] in felony.”

¹¹ See Thorne, ed. and trans., *Bracton*, vol. 2, 438.

¹² Coke, *Third Part of the Institutes*, 52 (ch. 7, Of Murder).

¹³ Matthew Hale, *Pleas of the Crown* (1678), 1-2, accessed through Early English Books Online.

capital offenses included misprision (i.e., concealment of one's knowledge of a felony), mayhem, and breach of the peace, while capital offenses against God included heresy and witchcraft, and capital offenses against man included treason, both high and petty, as well as felonies.¹⁴ Here we see a blurring of what had previously been clear divisions between the ecclesiastical and secular jurisdictions: nowhere in *Bracton*, for example, will one find heresy and witchcraft lumped into a discussion of the categories of secular crime. Felonies, in turn, according to Hale, might be common law or statutory, the former category including offenses against life, property, habitation, and "the Protection of Publique Justice", and the latter including many offenses, frequently sexual in nature, previously handled by ecclesiastical courts.¹⁵ Felonies against life included suicide (*felo de se*) and homicide, both involuntary (*infortunium, per necessitatem* in defense of self or justice) and voluntary, either with or without malice.¹⁶ Hale further clarified that an unlawful act undertaken without ill intent and resulting in death would be manslaughter, while an unlawful act done with ill intent would raise the homicide to murder.¹⁷ Again, what we find in seventeenth-century descriptions is an explicit statement of what was implicit in medieval English felony practice.

Elaborating on the meaning and significance of malice, Hale described both implied and express malice. Malice might be implied by the method employed, such as willful poisoning or throwing a rock over a house intending to cause harm.¹⁸ Malice was "an intention of evil," and might include killing another without provocation, such as a robber killing the victim who

¹⁴ Hale, *Pleas of the Crown*, 2-3, 9.

¹⁵ Hale, *Pleas of the Crown*, 26. On the statutory felonies, including bigamy, sodomy, and bestiality, see *ibid.*, 117-125.

¹⁶ Hale, *Pleas of the Crown*, 27.

¹⁷ Hale, *Pleas of the Crown*, 32.

¹⁸ Hale, *Pleas of the Crown*, 44-45.

resisted theft, or a person killing another who made a face at him and laughed.¹⁹ Malice might also be implied by virtue of the status of the person killed, such as in the homicide of a constable or watchman, whose death would be counted murder even if the victim's identity had not been known to the assailant.²⁰ Express malice could be present in different degrees, ranging from the principal actor in a crime who actually committed the act (first degree), to a principal who was present but only aided or abetted (second degree), to an accessory before the fact.²¹ Hale then stepped through a variety of fact patterns to explain the operation of malice and the corresponding division between murder and manslaughter, describing the latter in some instances as characterized by a heating of the blood and a passage of time insufficient to allow the blood to cool.²² Although Hale added a layer of complexity in comparison with the writings of Coke, his examples nevertheless betray a law still in the process of doctrinal definition. To take one example, Hale indicated that, in a case involving preexisting malice between two individuals, A and B, where A assaulted B but later fled to a wall, and then killed B in self-defense, some would classify this homicide as murder, but others not, presumably designating it manslaughter instead.²³

By the time of Blackstone and his *Commentaries*, the full panoply of exceptions to the normal operation of the criminal law had been worked out more systematically, with Blackstone enumerating the various categories of persons who were potentially impaired with regard to the commission of crimes due to defects in understanding or will, including infants, idiots, lunatics,

¹⁹ Hale, *Pleas of the Crown*, 45.

²⁰ Hale, *Pleas of the Crown*, 45.

²¹ Hale, *Pleas of the Crown*, 47.

²² See, generally, Hale, *Pleas of the Crown*, 48-49.

²³ Hale, *Pleas of the Crown*, 47.

drunks, and those acting by accident, out of ignorance, and through compulsion or necessity.²⁴ Blackstone would also neatly distinguish among justifiable, excusable, and felonious homicide, further breaking the last category down into manslaughter and murder, and noting that the latter necessarily involved malice aforethought.²⁵ Moreover, where Blackstone outlined the doctrinal elements of the crime of larceny, he enumerated that simple larceny involved the taking and carrying away of another's personal goods "feloniously," which he described as involving "*animo furandi*," a phrase again traceable to the *Bracton* treatise.²⁶ Most tellingly, Blackstone elaborated: "in cases that may amount to larciny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or *animum furandi*: wherefore they must be left to the due and attentive consideration of the court and jury."²⁷ By the time of Blackstone, we can talk about a doctrine of *mens rea* and of felony more generally, yet still the jury's need to sift out the particular circumstances of a crime, including the mind of the alleged wrongdoer, remained central to the enterprise of describing the common law of crime.

Concluding Thoughts

This dissertation has been premised upon the idea that we might understand how medieval English jurors thought about human behavior and criminal procedure by examining legal records in conjunction with literary and religious evidence. Perhaps this premise was misguided from the outset, not because it was wrong per se, but because there existed no essential divide between the legal and the non-legal, the religious and the literary, and all the

²⁴ See, generally, Blackstone, *Commentaries*, vol. 4, 20-32.

²⁵ Blackstone, *Commentaries*, vol. 4, 177 ff.

²⁶ Blackstone, *Commentaries*, vol. 4, 232; Thorne, ed. and trans., *Bracton*, vol. 2, 425.

²⁷ Blackstone, *Commentaries*, vol. 4, 232.

other permutations we might conceive in combining these various categories. In fact, the categories are more reflective of twenty-first century sensibilities as to the containment of these competing spheres than of thirteenth- and fourteenth-century English culture, which exhibited a comparative comfort with messiness and overlap, apart from fleshing out basic issues of jurisdiction among competing powers.

So often in medieval England, the literary was religious, and the religious was legal. A late fourteenth-century vernacular sermon demonstrates this in dramatic fashion, using the example of a defendant choosing his or her procedural path as a metaphor for the importance of confession and contrition: “But God’s and man’s law,” begins the sermon, “teaches us to perceive that when a man is accused of any crime he may be governed in four ways in his examination.”²⁸ Accusation of crime here represented the taint of sin. The sermon continued: “First, he may put himself to witnessing of his country, as the gospel teaches us: ‘In the mouth of two or three stands every word,’ Matthew 18.” This first hypothetical choice mimicked trial by

²⁸ Ross, ed., *Middle English Sermons*, 269. (“But Goodes and mans lawe techeþ vs to percey[v]e when þat a man is accused vppon any cryme he may be gouerned in foure wize in is exiaminacion. First, he may put hym to witteneshyng of is countre, as þe gospell techeþ vs: ‘In ore duorum vel trium stet omne verbum,’ Mathei 18. The second, he may take hym to is preuilege, as But Goodes and mans lawe techeþ vs to percey[v]e when þat a man is accused vppon any cryme he may be gouerned in foure wize in is exiaminacion. First, he may put hym to witteneshyng of is countre, as þe gospell techeþ vs: ‘In ore duorum vel trium stet omne verbum,’ Mathei 18. The second, he may take hym to is preuilege, as ziff he be a clerke; and þis vey is grounded vppon holywritt, as þe first boke wittenesses. For when þe Egipcians sold þer lond to Ioseph to haue þer sustinaunce in þe dere tyme, þe clerkes lyvyd vppon þe kynges cost and sold not þer liveliold, but were preuileged. The third, a man þat is acused, in ys examinacion he may stond dombe with-owten answere. And of suche myndeth þe gospell, de homine intrante quamquam sine veste nupciali, qui requisitus a domino qualiter intrauit, verbis obmutuit. The fourte vey is þe vey of appell, and of þis wey I fynd also practike in scripture: ‘Tibi soli peccaui, et malum coram te feci,’ Pasmō 50mo. Lo, þe prophete Dauid apeled hym-selfe to God, seinge to þe Lord, ‘I have synned and afore þe I haue don wickednes.’ iff he be a clerke; and þis vey is grounded vppon holywritt, as þe first boke wittenesses. For when þe Egipcians sold þer lond to Ioseph to haue þer sustinaunce in þe dere tyme, þe clerkes lyvyd vppon þe kynges cost and sold not þer liveliold, but were preuileged. The third, a man þat is acused, in ys examinacion he may stond dombe with-owten answere. And of suche myndeth þe gospell, de homine intrante quamquam sine veste nupciali, qui requisitus a domino qualiter intrauit, verbis obmutuit. The fourte vey is þe vey of appell, and of þis wey I fynd also practike in scripture: ‘Tibi soli peccaui, et malum coram te feci,’ Pasmō 50mo. Lo, þe prophete Dauid apeled hym-selfe to God, seinge to þe Lord, ‘I have synned and afore þe I haue don wickednes.’”)

jury, with the accused individual putting himself on the country, much like legal records described the process of consenting to jury trial. Alternatively, the accused might take another path, metaphorically claiming benefit of clergy: “The second, he may take himself to his privilege, as if he is a cleric; and this way is grounded upon holy writ, as the first book witnesses.” The sermon elaborated, in colorful if ahistorical fashion: “For when the Egyptians sold their land to Joseph to have their sustenance in the time of scarcity, the clerics lived upon the king’s cost and sold not their livelihood, but were privileged.” A further choice was inspired by the common law practice of standing mute to avoid consenting to trial by jury: “The third, a man who is accused, in his examination may stand dumb without answering. And of this bear in mind the gospel, of a man entering without a wedding garment who, when asked by the lord how he entered, stood speechless.” Finally, the sermon author engaged in even greater creative liberty in describing the sinner’s final choice: “The fourth way is the way of appeal, and of this way I find also an example in scripture: ‘I have sinned against you only, and have done evil before you,’ Psalm 50.” The sermon elaborated: “Lo, the prophet David appealed himself to God, saying to the Lord, ‘I have sinned and before you I have done wickedness.’”

Taking the analogy to an extreme, the sermon proceeded to rule out the feasibility of putting oneself on the country, observing that the jury would be the twelve apostles, who would necessarily have to find the person at fault given the universal guilt of mankind and the need to present “*trowthe*” in judging righteously.²⁹ It ruled out claiming benefit of clergy because no one should receive other than what is deserved, thereby having a privilege above others, a subtle jab at the potential for abuse in a system that offered an escape valve available only to the clerical class. Finally, standing mute was not a reasonable option, and in fact the “*verst of all*”, insofar as

²⁹ Ross, ed., *Middle English Sermons*, 269-270.

God cast the ill-dressed wedding guest into “utterest darkness, where there is weeping and knashing of teeth” when he failed to answer.³⁰ The only route remaining was the route of appeal, not of others, as was typical in medieval English felony procedure, but of oneself by means of confession: “But whom shalt thou appeal?” asked the sermon author. “I say thyself.”³¹ Drawing upon the metaphor with appeal procedure, which might require the appellor to wage battle against the appellee, the sermon went on to urge its listener to slay the felons represented by the seven deadly sins so as to be “the King of heaven’s champion,” a reference to the identification of approvers as the king’s champions in legal texts.³² By confessing and showing sorrow for sin, one might have a chance of receiving God’s grace and forgiveness, for “God will not despise a sorrowful and a lowly heart”.³³

This Middle English sermon, written in the vernacular for accessibility to a non-elite audience, presumed a familiarity with felony procedure that would enable the listener to comprehend the otherwise abstruse analogies the homilist was making between criminal law procedure and the personal, private decisions a sinner faced in acknowledging wrongdoing and making amends. Just as this particular homilist assumed his audience could grasp these metaphors, I have assumed in this dissertation that medieval English men and women brought ideas they learned from sermons and literature to bear upon the prudential decisions they had to undertake in daily life, including, in the case of some men, service as criminal trial jurors. I have argued that mind was central to medieval understandings of guilt assessment and to methods for

³⁰ Ross, ed., *Middle English Sermons*, 270. (“...God bad bynde hym hondes and foote and cast hym in-to vttest derkenes, where-as is wepyng and knastyng of tethe.”)

³¹ Ross, ed., *Middle English Sermons*, 270. (“But whom shalt þo apeel? I sey þi-selfe.”)

³² Ross, ed., *Middle English Sermons*, 271. (“And when þou hast slayn þise felons, þan þou shalst be þe Kynges of heven champion while þou lyvest here, euer to reigne with hym after þi dethe in þe kyngedam of heven.”)

³³ Ross, ed., *Middle English Sermons*, 271. (“God will not dispise a sorefull and a lowly herte”.)

reaching judgments, including the practice of confession alluded to by the sermon author above. I contend that mind was also central to the process of evaluating whether judges and jurors had carried out their work satisfactorily.

The thirteenth and fourteenth centuries were the centuries of Aquinas, theological debates about intentionality, sophisticated literary personifications of the emotions, and texts designed to aid with the examination of conscience in preparation for confession. These centuries were also a time of growing theorization about the role of public authorities in addressing the issue of crime as an offense against society. Our criminal trial jury began in this milieu. In a legal system typically characterized by glacial, incremental change, the ordeal's abolition—the effective consequence of removing priests from involvement in the procedure—was a rare moment of rupture. The English criminal trial jury emerged from the centrifugal forces created by this explosion, and by happenstance this occurred at a time when there existed a rich discourse on the role of mind in constituting guilt. Jurors, replacing the ordeal and its interpreters as the source of a felony verdict, were tasked with evaluating a defendant's alleged acts as well as his or her state of mind.

Throughout this dissertation, I have focused to a great extent on ideas external to the law in the hope of understanding the law itself. This returns me to a question raised in the introduction regarding the meaning of “the law.”³⁴ From my perspective, the law is not limited to the texts of lawyers, whether plea rolls, Year Books, statutes, or otherwise. A jury system relying on lay jurors with no necessary preexisting knowledge of the lawyers' texts and lawyers' discourse, beyond a basic familiarity thanks to the use of legal themes in literature and sermons,

³⁴ This is a question to which I intend to return in my forthcoming book project, where I hope to explore the apparent distance between “the law” as portrayed in legal treatises and Year Books, as compared with “the law” as an artifact of jury process.

is a system based upon a more capacious understanding of “the law” as necessarily involving the perspective of “the country” or *patria*, to borrow the language of trial by jury. When a felony defendant placed herself *per patria*, or “on the country,” she consented to representative adjudication, to having a subset of the country determine whether she was fundamentally a felon, deserving of capital punishment, or rather instead a person who might be reincorporated into the *patria* following an acquittal or pardon. How the *patria* got from point A to point B, from a first introduction to an accused individual and the basic facts of a case, to a final verdict, in a context where the temporal distance between points A and B might involve a lengthy delay in the royal justices coming to town, yet also the speediest of speedy trials, is ultimately part of the law and yet unknowable without looking beyond legal texts to the broader cultural context within which jurors operated. In the end, medieval English felony law was capacious enough to encompass severity alongside mercy, to be doled out not according to predetermined patterns outlined in precise statutes, but rather by a balancing process involving many factors—reputation, the perceived likelihood of recidivism, the nature of the alleged crime itself, and so forth—central to all of which was the question of mind. While there was no formal doctrine of *mens rea* in medieval England—and hardly any criminal law doctrine in general—issues of mind pervaded medieval understandings of guilt and innocence, and in turn pervaded felony adjudication by lay jurors.

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