We move in this chapter from an overview of the institutional setting of
the criminal trial jury to consideration of one very important aspect of the
jury’s social role: the jury as law finder. I shall show that the medieval
criminal trial jury imposed upon the courts the community’s—or the
communities’—concepts of liability for felony. In doing so, the jury
exercised a de facto power, since its legal role was to find and declare fact
and to leave to the bench judgment according to law. This extended role
is one of the two main themes of this book. The second theme—the effect
of such jury behavior on the development of the law and on the way
official and lay Englishmen viewed the jury—is introduced in Chapter 3.

Early juries obviously nullified at least to some degree the reach of the
capital laws. It would be more extraordinary, and possibly more interest­ing,
had they not done so. But it is not easy to show juries playing this role
in specific cases. Moreover, it is not obvious that this aspect of jury
behavior mattered very much; from the perspective of the bench, other
aspects of jury behavior must have mattered a great deal more.

The great majority of defendants in felony trials were acquitted. Many
of these acquittals were deserved, for the system of presentment often
resulted in prosecutions of the truly innocent, and the means for gathering
evidence were so rudimentary that in many instances a case simply could
not be made. Many acquittals were, on the other hand, undeserved,
arising not from defects in pretrial procedures but from corruption of the
trial process itself. Juries were sometimes bribed and often fear-stricken;
moreover, they might lie out of dishonest partisanship that did not rise to
the level of conscientious nullification. These problems plagued the
bench, and the fact that the judges were at pains to discover whether an
acquittal was of the former, deserved kind, or of the latter, undeserved
kind, only worsened their predicament. Because the jury produced the
evidence, it prevented the bench from seeing exactly what was occurring
in individual cases. The bench, and officialdom in general, lashed out
blindly against the major forms of corruption—the bribing and intimida­tion
of jurors—which it knew played a role in a substantial number of
cases that ended in acquittal.

Somewhere in between the deserved and undeserved acquittals lay the
presumably large number of acquittals based on jury repudiation of the
death sanction. These jury responses were only partly visible to the bench. Many of them were indistinguishable from the other, more or less serious, forms of jury behavior. To speak of them as isolable even in theory is, of course, to engage in oversimplification, for in any given case feelings of simple mercy might have been mixed either with doubts about the evidence or with a purely partisan attitude, or even with fear of retaliation by the defendant's kin or associates.

What follows in this chapter is a tentative exploration of one relatively hidden phenomenon that characterized trial by jury: jury assessment of the nature of the defendant's act. Given the nature of the extant evidence, the greatest amount of attention shall be paid to jury behavior in homicide. I mean to accomplish several things: to demonstrate that in homicide cases juries systematically imposed upon the courts a distinction the formal legal rules did not draw; to establish the presumption that juries played a similar nullifying role in other kinds of cases, especially in theft, the other main felony reflected on the trial rolls; to make possible the drawing of inferences regarding the kinds of nullification in which juries engaged in felonies other than homicide, again mainly in theft; and to suggest that the Angevin revolution in procedure and sanctions had less impact on the actual resolution of cases than is sometimes supposed, and thereby to raise questions (to be addressed in Chapter 3) regarding the reasons for using the jury in the way it was used.¹

I

The early history of English criminal law lies hidden within the laconic formulas of the rolls and law books. The rules of the law, as expounded by the judges, have been the subject of many studies; but their practical application in the courts, where the jury of the community was the final and unbridled arbiter, largely remains a mystery. Only now are we coming to know something about the social mores regarding crime and criminals.²

¹. See below, Chapter 3, section IV.
². Among the recent works that address these latter concerns are Given, Society and Homicide; Hanawalt, Crime and Conflict; McLane, "Royal Courts and the Problem of Disorder"; Carl I. Hammer, "Patterns of Homicide in Fourteenth-Century Oxford," Past and Present, vol. 78 (1978), pp. 1-23. Given's book represents the most detailed analysis to date of the "sociology" of homicide. Its strengths lie in its data on perpetrators and victims, their geographical and social background, and their relationship to each other. Given may overstate the degree to which violence was accepted (see p. 213) rather than the capital sanction repudiated. His sources did not give him much room to investigate the behavior of juries regarding their assessment of the defendant's act. Probably juries reacted to both act and person, their view of one influencing their view of the other. Given's book, as well as the other works cited in this note, should be read alongside this chapter.
The following study attempts to demonstrate that from late Anglo-Saxon times to the end of the Middle Ages there existed a widespread societal distinction between "murder," i.e., homicide perpetrated through stealth, and "simple" homicide, roughly what a later legal age termed "manslaughter." This distinction, which was imposed upon the courts through the instrument of the trial jury, was fundamentally at odds with the letter of the law. It is therefore necessary to state briefly what the rules of law were.

In the early twelfth century, the Crown took exclusive jurisdiction over all homicides and defined them as (1) culpable and thereby capital, (2) excusable and thereby pardonable, (3) justifiable and thereby deserving of acquittal. The last class at first incorporated the slaying of manifest felons (e.g., "hand-having thieves") and outlaws who resisted capture. By the middle of the fourteenth century it came to include the killing of housebreakers and robbers caught in the act, though it was not until the sixteenth century that a statute turned this policy into firm law. Pardonable homicides were those committed by the insane, those committed in self-defense, and those committed unintentionally. The rules of self-defense were rigorous throughout the entire medieval period. The slayer had to have made every possible attempt to escape his attacker, must have reached a point beyond which he could not retreat, and must have retaliated out of literally vital necessity. All other intentional homicides, those deliberate but of a sudden, as well as those planned and stealthily perpetrated, fell into the large category of culpable homicide. According to the rules of the law, there were to be no distinctions made among them. This classification remained intact until the late sixteenth century, when the judicial distinction between murder and manslaughter finally emerged. Originally, of those meriting pardons for excusable homicide, only persons who had tried to flee suffered forfeiture of goods; after 1343, all pardonable slayers were supposed to lose their goods.

We have seen that the king might as a special favor grant a pardon to a felonious slayer, usually for a considerable fee, or as a reward for service abroad in the royal army. These pardons "of grace" (de gratia) were emanations of the royal prerogative. Pardons for self-defense, accident, and insanity were, by the late thirteenth century, pardons "of course" (de cursu): all who deserved them according to the rules of the law were

3. Hurnard, *King's Pardon for Homicide*, pp. 1 et seq.
4. 24 Hen. 8, c. 15 (1532).
5. See below, text at n. 22.
7. For discussion of the rule of automatic forfeiture see below, Chapter 3, n. 105.
to receive them. After 1294, due mainly to the needs of military recruitment, pardons of grace issued in far greater numbers than ever before to perpetrators of felonious slayings of all sorts.

Because of the evidence on which this chapter is based, it has seemed best to proceed in reverse chronological order, to move backward from late-fourteenth-century evidence to a consideration of the rules of criminal liability in the Anglo-Saxon period. Subsection 1 examines jury behavior in the decades immediately following 1390 when some coroners and justices of the peace distinguished in their indictments between "murder" and simple homicide. Although both types of homicide remained felonious, juries appear to have been loath to convict for the latter, while they frequently condemned perpetrators of the former. Before 1390, terms of indictment in all felonious homicides were uniform and no such correlation can be made. Subsection 2, therefore, utilizes another source of evidence: a correlation of fourteenth-century coroners' indictments with their corresponding verdicts for self-defense. It will be shown that many of those who received pardons for self-defense had in fact committed a felonious, simple homicide. The area of pardonable homicide, it appears, served as a possible way out in cases where the community did not believe the defendant deserved to be hanged.

Because coroners' rolls are very sparse in the period before 1300, there exists no trustworthy method of proving that the societal attitudes traced here precede the fourteenth century. In fact, an important study of pardonable homicide in the thirteenth century argues that jurors were fairly scrupulous in giving evidence and that their determinations did not vary substantially from at least the spirit of the law. Nevertheless, in subsection 3 I shall contend that there is reason to believe verdicts were fabricated before the fourteenth century. Moreover, I shall argue that the early history of criminal liability, especially for the period just preceding the imposition of royal jurisdiction in all homicides, suggests that from their very inception the official rules ran counter to and never really became a part of social practice. This argument, admittedly speculative, takes the following form. During the Anglo-Saxon period only those who committed homicide through secrecy or stealth—murder—had to pay for their act with their life. The new, twelfth-century practice subjected to the death penalty not only "murderers" but the large class of open slayers formerly allowed to compensate for their act by payment of the wergeld. The community resisted this harsh extension of capital punishment and subsequently found means—acquittals and verdicts of self-defense—to impose upon the courts their long-held notions of justice, a process that

8. See below, Chapter 3, n. 29 and accompanying text.
becomes visible to us only in the fourteenth century. Thus the societal distinction between murder and simple homicide had its source deep in the English past. The introduction of novel and strict official rules of liability did away with the traditional means of dispute settlement in simple homicide, but it did not erase traditional social attitudes about liability. Nor did the imposition of a new scheme of criminal administration prevent society from acting, within the context of that scheme, in accordance with its traditional attitudes.

Finally, in subsection 4, I shall elaborate upon the nature of the medieval societal concept of "murder" and the place of that concept within the process of dispute settlement.

Throughout the medieval period for which written records are extant, the great majority of defendants who stood trial for homicide were acquitted. While today many are acquitted, one must take into account the fact that most suspects do not now stand trial; the vast majority of them plead guilty. In the Middle Ages few pleaded guilty to any felony since the penalty was invariably capital.¹⁰

Many defendants doubtless deserved acquittal, for many charges were poorly supported. The coroner's report might reflect the testimony of only a few neighbors and might present only the most serious charges that circulated in the wake of a homicide.¹¹ Although coroners were required to list all those present at a homicide, they often failed to do so. In many cases they recorded the details of a slaying, yet maintained that no one had been present except the slain man, who had died immediately, and the slayer, who had thereupon fled.¹² What, or who, then, was the source of those details? There had probably been witnesses who were not anxious to become involved, who did not wish to risk coming under suspicion themselves. To come forward later was to risk a fine for not

¹⁰. Convictions were particularly rare at the eyre, for few would appear who had neither a pardon nor assurance of acquittal by the country. At gaol delivery, where nearly all the defendants had been arrested against their will, the record of conviction was not much better. The roll of Thomas Ingelby and his associates, e.g., compiled at deliveries of Derbyshire, Leicestershire, Lincolnshire, Northamptonshire, Nottinghamshire, and Warwickshire, 40–45 Edward III, contains the trials of 160 individuals accused of homicide (twenty-four were cited as accessories or receivers). Only fifteen were found guilty; seventy-four were acquitted, fifty-nine were given special verdicts of self-defense. The remainder came with pardons or were released for other reasons. Of the principals who denied the charges against them 80 percent were acquitted outright. JUST 3/142, mm.3 ff.


having raised the hue. On the other hand, what they had seen must soon have become the common knowledge of the countryside, and, allowing for the usual exaggerations or alterations of the true story, may have appeared in the coroner’s enrollment as a fairly accurate account of the event. But it is difficult to separate the accurate descriptions from the cases of mere guesswork. The trial jurors probably took a more reasonable view, rejecting unsubstantiated testimony.

Though malicious prosecution and honestly moved but mistaken indictments may account in part for the high rate of acquittals, other factors must also have been at work. It is contended here that, for the most part, those few who were condemned had especially offended against the standards of the community. By discriminating between them and the many who committed homicides of a less serious nature, the jurors were creating a de facto classification roughly similar to the later legal distinction between murder and manslaughter.

The clearest evidence of juries discriminating on the basis of the nature of the slaying dates from the end of the fourteenth century and the first decades of the fifteenth. In 1390 century-long protests against the royal pardoning policy culminated in a statute that restricted the king’s power to grant pardons of grace to those who had committed murder. “Murder,” as a term of art, referred to the most heinous forms of homicide, those perpetrated through stealth, at night, or by ambush. The statute appears to have been directed especially at murderous assaults committed by professional highwaymen and burglars for monetary gain. The king agreed not to use his pardon powers casually; moreover, no pardon for murder would be valid unless it made specific mention of “murder.” Significantly, culpable homicide continued to include both murder and simple homicide. Both were capital; no judicial distinction was made between them. The term “murder” was employed, where relevant, solely for the purpose of administering the Statute of 1390, i.e., for regulating the granting of pardons of grace to felonious slayers. Though the statute’s effectiveness was short-lived, for several decades “murder” found its way into some homicide indictments.

Analysis of several trial rolls that include indictments by coroners and justices of the peace who, despite the courts’ failure to apply the 1390

14. See Hurnard, King’s Pardon for Homicide, pp. 361 et seq. for an analysis of inquisitions, held on a writ de odio et atia, to ascertain the veracity of appeals and indictments.
statute, bothered to discriminate between murder and simple homicide, reveals that juries acquitted the great majority of nonmurderers and sent murderers to the gallows about 50 percent of the time. A gaol delivery roll covering the first eight years of the reign of Henry VI demonstrates the point quite clearly. The roll was compiled for James Strangways and his fellows, who visited the gaols of Lincoln, Nottingham, Northampton, Warwick, and Leicester. A total of 114 defendants came before them to answer indictments for homicide in seventy-seven different cases. Of these, excluding those excused for faulty indictments and those for whom the jury returned special verdicts, eighty-four persons were acquitted and twenty were condemned to death. The latter group, with one exception, had been indicted for murder. Acquittals, on the other hand, were registered for thirty-seven indicted for simple homicide and for forty-seven held for murder. Taking only principals into account, eighteen of the nineteen hanged had been charged with murder, and of the forty-five acquitted only seventeen were murder suspects. Thus, while an indictment for simple homicide practically assured the principal defendant of exculpation (one of twenty-nine was hanged), an allegation of murder put his chances at about fifty-fifty (eighteen of thirty-five were hanged).

Similarly, John Cokayn’s roll, compiled over the years of Henry V’s reign from deliveries of the gaols in Derbyshire, Leicestershire, Lincolnshire, Northamptonshire, Nottinghamshire, Rutland, and Warwickshire, records fifteen convictions based on murder indictments and only four based on simple homicide, despite the fact that there are substantially more simple homicides on the roll. The enrollments for Leicester gaol, based on several deliveries during the reign of Henry IV, show only four convictions, all based on murder allegations. Of the thirteen acquittals, seven of the original indictments were for murder, six for simple homicide. John Martyn’s roll for the far western circuit (1424–30) presents ten simple homicides, nine of which ended in acquittal, and five murders, four of which led to convictions.

16. I have chosen those rolls, or sections of rolls, that contain a substantial number of indictments for homicide and where it seems clear that coroners and justices of the peace inserted, when relevant, *murdravit* or its statutory equivalent: *insidiavit*. On many other rolls, of course, where no distinction was made, indictments not including these terms of art often ended in convictions.

17. JUST 3/203.

18. Two of the seventeen had been indicted for murder by one inquest and for simple homicide by the other: coroners’ indictments often differed from those of the justices of the peace.


20. JUST 3/188.

21. JUST 3/205. The “simple homicide” resulting in conviction was the slaying of a man by his wife, an act the community frequently construed as murder.
Despite the lack of evidence on the point, we might speculate that the judges sometimes urged juries to convict in cases brought on murder indictments. But it is not safe to conclude that the judges encouraged juries to acquit those indicted for simple homicide. Only the grounds of self-defense justified the deliberate slaying of a person who was neither a convicted nor a manifest felon, and the test for self-defense remained quite rigorous. As late as 1454 Prisot, J., stated the test for merely threatening to kill in self defense:

... if a man assaults you in order to beat you it is not lawful for you to say you will kill him and to menace his life and limb: but if the case is such that he has you at such advantage that it may be understood that he is going to kill you as if you seek to flee and he is swifter than you and pursues you so that you are unable to escape; or if you are on the ground under him; or if he chases you to a wall or hedge or dike, so that you cannot escape, then it is lawful for you to say that if he won’t desist, you want to slay him to save your own life, and thus you may menace him for such special cause.22

Our demonstration that juries acted upon their own extralegal notion of culpable homicide based on the distinction between serious and simple homicide is limited thus far to the post-1390 period. It is likely that juries made this distinction earlier, but it is not easy to prove. Before 1390 gaol delivery enrollments, in recording the indictment made before the coroner or justice of the peace, almost invariably used only the unenlightening phrase *felonice interfecit* ("feloniously slew"). Thus it is impossible to show from them that juries distinguished between types of felonious homicides. If we work backward from the trial roll to the indictment as it appeared on the original coroner’s roll, two nearly insuperable problems are presented: the greater part of the original inquests are no longer extant; those that do survive generally contain only the operative phrase, *felonice interfecit*, with few details from which the nature of the act can be deduced. One of the few coroners’ rolls that does supply such details

22. *Year Books, 1422–1461* (Henry VI) (London, 1556–74), 33 Hen. 6, Easter, pl. 10: "... quar si un home vous assaute de vou batre n'e loial pour vous adire que vous voiles luy tuer, et de luy menasser de vie et de membre: mes si l'cas soit tiel, q'il ad vous a tiel advantage que par entendement il voilloit vous tuer come si voiles fuir, et il est plus courrant que vous estes, et alla apres vous, issint que ne vous poies luy escaper; ou autrement que vous estes desouh luy al' terre; ou s'il ad enchace vous a un mure ou un hedge ou dike, issint que vous ne poies luy escape, donq's est loial pour vous adire que s'il ne veut departir de vous, q'vous en salvatio de vostre vie luy voiles tuer, et issint vous poies luy menasser pour tiel special cause."
is the roll of Edmund de Ovyng. It is also the longest (sixty-nine membranes) of the extant coroners’ rolls. Of the twenty-five cases on Ovyng’s roll that present homicides identifiable on the trial rolls, only two ended in convictions. Both show the characteristics of murder, but in one the defendant confessed and turned approver. This sort of piece-meal evidence, drawn from isolated cases on many different rolls over a century or more, does not afford convincing proof.

The only feasible approach to our problem is to compare the coroner’s indictment with the trial enrollment in cases ending in a verdict of self-defense. As we have seen, the law of self-defense was very strict. The slayer had to have acted as a last resort, which meant, in effect, that the jury had to detail the defendant’s attempts to escape his assailant. Verdicts of self-defense appear on the trial rolls as a series of formulas that put the defendant’s actions in the best possible light. The slain man was usually said to have provoked the fight and dealt the first blow; the defendant then had attempted to escape, only to find himself cornered or thrown down and held to the ground; gravely wounded, the defendant as a last resort drew a weapon and saved his life in the only way possible. Often, it was specified that the defendant had retaliated with a single blow. Some of these details doubtless represented embellishments of the truth; some even went beyond the rigorous requirements of the law. It would have been sufficient, for purposes of eligibility for royal pardon, to allege that the defendant had retreated as far as possible and had struck

24. Nine ended in acquittals, eleven in findings of self-defense, one defendant came forward with a pardon, one died in gaol, and one was remanded to gaol pending further proceedings.
25. JUST 2/18, m.21/4 (1349): “... noctanter felonice interfecit R. B. et M. uxorem eius ...” The gaol delivery roll (JUST 3/134, m.38/5) used the form, “felonice et sediciose interfecit ... noctanter.” In the second case, testimony was recorded at the coroner’s inquest [JUST 2/18, m.5d/4 (1346)] that “... post horam cubitus [A] surexit extra cubitum suum ... insultum fecit eidem W. ... W. surexit a tecto suo” and raised the hue, at which point the defendant stabbed him to death. The accused turned approver [i.e., confessed and then appealed others in hope of obtaining their convictions and, in return, of gaining pardon for his own offense. See Pugh, “Reflections of a Medieval Criminologist,” pp. 16-17; F. C. Hamil, “The King’s Approver,” Speculum, vol. II, p. 238; Jens Roehrkasten, “The King’s Approver in the Fourteenth Century” (paper delivered at the British Legal History Conference, Norwich, July, 1983)]. For the gaol delivery enrollment, see JUST 3/134, m.34/4 (1346). Although little can be made of such rare cases, they deserve some comment. They are the only cases that led to conviction. Both have elements of “murder.” The first was secretly done, at night; the second was an attack on a man in his own bed. Though the defendant confessed, it is unlikely he would have done so had the jury not been about to declare him guilty. This is precisely what we would expect to find if a more extensive comparison were possible.
26. E.g. JUST 3/142, m.6d/2 (1367); JUST 3/142, m.10d/2 (1371).
back as a last resort; had he not yet been wounded or had he needed to retaliate with multiple blows, he would still have been eligible.

It thus becomes critical to determine just how much the jury embellished the defendant’s true case. If juries used the category of pardonable homicide to exculpate manslaughterers, they would have fabricated stories of retreat and last resort where in fact there had been neither. They would have cast fights willingly entered by the defendant, possibly ones wherein he had struck the first blow, as struggles in which the defendant was an unwilling participant. If the juries perpetrated such fabrications, it would be visible to us only through a comparison of the trial enrollments with the corresponding coroners’ enrollments. The coroner’s enrollment was often far less formulistic and represented a more candid response from the jury. It was a record that could be contradicted or embellished in court without reprimand to the jury or detriment to the defendant’s case.27

Admittedly, several methodological difficulties arise in employing the coroners’ rolls. In the first place, the coroner’s inquest was held very soon after the homicide occurred, and in some cases additional evidence must have come to light after the inquest had been held. Moreover, the coroners’ enrollments nearly always name only one suspect and set forth only one set of facts as to the circumstances of the homicide. The process by which these unanimous inquest verdicts were reached is unknown. They probably represented the belief of the majority of the jurors. Many inquest votes may have been close, and their outcome may have resulted from the prestige or power of one or two persons. Many coroners (or their clerks) were erratic in the enrollment of details; that only a few facts were set down in a given case does not mean that others were not stated at the inquest. Finally, some enrollments were malicious indictments. This is more likely to have been the case where there had been only one witness, or where there had not been a witness but merely a “first finder.” The witness or finder would have been in a strong position to place the blame where he pleased.

Several steps have been taken in order to mitigate the above problem. Coroners’ inquest juries often stated that a homicide had been committed in self-defense although the evidence they presented did not meet the legal requirements for a pardon. These cases are the best source of evidence of community attitudes, and I have relied heavily upon them. I

27. Some coroners’ enrollments were highly formulistic, the local inquest apparently having already “embellished” a suspect’s defense. Although the coroner’s enrollment could be (implicitly) repudiated, it probably caused the bench in some cases to examine the defendant or the trial jury closely. The testimony given at the inquest must have had some influence; it was not evidence “of record,” however.
have excluded from my study coroners' rolls which include very few details. It is clear that the clerks compiling these rolls did not bother to enroll evidence of self-defense but merely characterized all homicides as felonious. Therefore, it is unsafe to assume that any corresponding trial verdict of self-defense represented an alteration of the facts. Instead, I have relied upon rolls that include a great deal of detail in most cases. This allowed the assumption that where the coroner's inquest did produce testimony of self-defense it was duly enrolled.

In order to justify killing in self-defense, it will be recalled, the man attacked had to retreat until retreat was no longer possible. At the trial the jurors always alleged such a predicament, and though it was sometimes true, a comparison of the coroners' rolls and the trial rolls reveal that it often was not and that a petty jury had so altered the facts as to make pardonable what the law considered nonpardonable. Thus from the community's point of view, a violent attack could be met by a violent response. A man whose life was threatened did not have to seek some means of escape; indeed, he need not do so though he was in no danger of losing his life. The court's concern with last resort indicates a concept of criminal liability clearly at odds with prevailing social norms.

A case from a Norfolk coroner’s roll indicates the looseness of the social concept of self-defense:

William put his hand to his knife in order to draw it and strike Robert. Robert, fearing that William wanted to kill him, in self-defense struck William on the head with a hatchet.

Edmund de Ovyng, the Cambridge coroner, was usually very careful to report inquest findings in detail. He recorded a case of homicide, described by the inquest jurors as homicide se defendendo, in which the

28. For various examples on coroners' rolls of clearly stated last resort see JUST 2/102, m.9d/2: "fugit usque ad quoddam angulum domus" (1363); JUST 2/18, m.5/4: "iacuit super ipsum" (1345); JUST 2/102, m.11d/2 (1364); JUST 2/67, m.5/3: "quandam ripam ubi voluit transisse et non potuit pro profunditate et largitudine dicte aque" (1354); JUST 2/18, m.52d/2: "cessidit ad terram . . . A. fuit in proposito interfecisse . . . B." (1361); JUST 2/18, m.61/l: "supersit dictum J. in ulnas suas" (1364); JUST 2/23, m.2/2: "non potuit evadere propter multitudinem inimicorum suorum" (1373). The fact that the coroner's inquest produced such testimony does not mean that the facts were true; they might have been altered at this early stage. But in such cases the trial jury was not adducing facts contrary to those of the indictment.

29. JUST 2/102, m.9/2: "Willelmus misit manum suum ad cultellum suum abtrahendum et ad percuendum dictum Robertum. Idemque Robertus timens quod idem W. voluit occidisse eum in defensione vite sue percussit eundem W. in capite super cervicem eusdem cum quadam hachia" (1363). The trial record (Oyer and Terminer) has not been located, but the slayer was pardoned for self-defense: Calendar of the Patent Rolls, 1232-1422 (London, 1906), May 6, 1367, p. 395. Hereafter cited as C.P.R. See also JUST 2/58, m.2/2 (1379).

30. E.g. JUST 2/18 (14-39 Edw. III); JUST 2/256, mm.1-4 (44-48 Edw. III).
assailant had seized the defendant’s beard. Walter Clerk and Thomas Clerk argued until Thomas, threatening to kill Walter,

suddenly jumped from the cart and took up an iron fork, intending to run at Walter, but Walter immediately grabbed the fork in his own hand and threw it from Thomas lest he do further damage with it; for which Thomas took Walter by the beard; Walter, because of this, drew his knife and in self-defense struck Thomas in the left arm so that he died.31

Thomas’s attack and intentions, rather than the imminence of danger to Walter’s life, were, apparently, the basis for the community’s view that Walter had acted in self-defense. In a similar instance, Hugh Harpour, chaplain, took John atte Lane, also a chaplain, in his hands and

threw him down feloniously at his feet and wanted to kill him . . . because of this, John, fearing death and getting up, drew his knife and stabbed Hugh in the chest.32

Hugh seems to have been weaponless, so that John was not in imminent danger of death. Nevertheless, he was repelling an attack and, thus, defending himself. The resistance was excessive, but the community did not scruple as to the nature of the retaliation. The trial jury provided an elaborate story of self-defense.33

Jurors at a Leicestershire coroner’s inquest in 1365 told a complicated story with respect to the death of Richard de Sydenfen.34 Richard Ruskin and his son William came to the door of William de Assheby’s house in Melton and the elder Ruskin brought Assheby outside with sword drawn
by calling him a liar. After a struggle, Assheby chased his enemies to the door of their house where the elder Ruskin’s servant, Sydenfen, seeing that his master was in grave danger, felled Assheby with a blow of a club. The latter revived and, drawing a small knife, slew the servant “in self-defense.” Assheby did not retreat once he had risen to his feet, but that was of no consequence. Nor did it matter that he had entered the fray of his own choosing. When he killed Sydenfen he was acting in “self-defense.”

Jurors at the inquest in Aldgate Ward, London, in 1325, described a somewhat one-sided fight which grew out of a sudden quarrel:

John le Marche, “potere,” and Agnes de Wycoumbe after the hour of curfew, were quarreling in the High Street opposite the house of John . . . when the said Agnes taking a staff . . . out of the hand of John . . . therewith struck the said John on the back and sides; that thereupon came Geoffrey de Caxtone . . . and Andrew de Wynton, “potere,” with staves in their hands to assist the said Agnes and struck the said John on the head and body, so that he died a week later.

A trial enrollment is extant only in the case of Andrew. The petty jurors testified that John met Andrew some distance from the place of the slaying and struck him on the head with a staff. Andrew fled until he was up against a wall and forced to retaliate. There was no mention of other principals to the homicide.

Testimony of a more unusual sort was given by inquest jurors at an Aldersgate viewing of a dead man, a certain John de Chiggewell:

John Pentyn would have hanged himself in his solar, and on that account his wife Clemencia raised the cry so that the said John de Chiggewell, John atte Adam de Mersshe, Wykham and other neighbors, names unknown, came to her assistance, and that when the said John de Chiggewell would have entered the solar before the others, . . . Pentyn feloniously struck him on the head . . . inflicting a mortal wound.

At Pentyn’s trial the petty jury alleged that he had argued with his wife and, after she had left the house, had locked the door and gone up to his

35. When Assheby came to trial he already had a pardon. JUST 3/142, m.18/1; C.P.R., Dec. 6, 1366, p. 345.
37. According to the coroner’s roll, Andrew and a certain Robert le Raykere, who had “aided and abetted” the felony, were immediately captured; Agnes and Geoffrey fled.
38. C 260/37, no. 7 (1326). See also JUST 3/43/3, m.2/1 (1326) for the original trial enrollment.
bed in the solar. Clemencia returned in the evening and finding herself locked out raised the hue, at which point Chiggewell arrived, ascended the stairs to the solar, and tried to kill Pentyn with a hatchet. Pentyn, unable to escape, grabbed an iron window bar and in self-defense gave his assailant one blow from which he died fifteen days later. 41

Finally, a simple homicide led to a special verdict of self-defense in the case of John Counte, who, after quarreling with Robert Paunchard in Bishopsgate Ward, London, drew a knife and stabbed Paunchard to death. 42 The trial jury maintained that Paunchard had thrown rocks at Counte and driven him to a wall. 43

By the middle of the fourteenth century, a defendant who had slain a housebreaker might be acquitted by judgment of the court. 44 The same applied where he had slain someone who came to rob him. But the courts were not consistent in their treatment of such cases, and it appears that at least until late into the century acquittal might depend upon clear evidence of self-defense. 45 In this area, the community was ahead of the courts. Trial juries supplied evidence of self-defense where, on the basis of coroner’s inquest testimony, there had been neither true self-defense nor even clear evidence of housebreaking or attempted theft.

In one instance, where self-defense may in fact have been involved, though the jurors at the inquest made no mention of last resort, the deceased had entered the close of William Childerle at the hour of Prime [about one o’clock, a.m.] without the license of William and against the latter’s will. 46

William returned home from the fields and met Richard on the stairs of his solar where a struggle ensued and the intruder was slain. At the trial, the petty jury assured the court that William had fled to a wall near the door of the house where he was finally cornered and forced to strike back in self defense. 47 Thomas Randolph of Braunston, Leicestershire, saw someone standing outside his window at night and demanded to know who it was. 48 Receiving no answer, he took up a club and went outside


42. London Coroners’ Rolls, Roll H, no. 9, pp. 242–43.

43. C 260/50, no. 61 (1339). It is possible that the jury was influenced by the location of the slaying. The fight had taken place in the close of the Earl of Warwick where Robert Artoys, by whom Counte was employed as a cook, resided.

44. See below, Chapter 3, nn. 53–54 and accompanying text.

45. Ibid., text at n. 55.

46. JUST 2/18, m.41d/2: “circa horam prima sine licencia ipsius Willelmi et contra voluntate ipsius Willelmi” (1356).

47. C 260/68, no. 20 (1357); Pardon: C.P.R., May 3, 1357, p. 530.

48. JUST 2/58, m.1/1 (1379).
where the trespasser, John Sherman, attacked him. Standing his ground, Thomas dealt Sherman a fatal blow, which the inquest jurors said was done in self-defense.\textsuperscript{49} Similarly, Henry Priour, attacked by William, son of John Paryn, who came one evening to the door of Henry’s house, retaliated immediately with a club.\textsuperscript{50} At Priour’s trial, the petty jury asserted that William attacked Henry \textquotedblleft \textit{ad domum ipsius Henrici}\textquotedblright and drove him to a wall where he, Henry, happened to find the club he used; he thus had slain in self-defense.\textsuperscript{51}

In a more extreme case, it was considered self-defense where the defendant on his master’s property slew a man who had hurled insults at him.\textsuperscript{52} William de Walynford, \textquoteleft \textit{brewere},\textquoteright quarreled with Simon de Parys in Cheap and the latter followed William home, threatening him as they went. The coroner recorded that William forbade Simon to insult him in his master’s house and then immediately William fetched a knife and plunged it into Simon’s chest. In the petty jury’s account, however, the facts were altered to show that Simon had attacked William with a knife as they stood in the king’s highway. William fled to his master’s house, where, being cornered by his assailant, he had slain him as a last resort.\textsuperscript{53}

One related and extraordinary case, for which coroner’s indictment and trial enrollment are both extant, shows how the community sanctioned the slaying of an adulterer. An aggrieved husband was not permitted to take the adulterer’s life,\textsuperscript{54} but, as in the case of a trespasser upon his land, he would have been able to drive him away. Robert Bousserman returned home at midday, an inquest jury testified, to find John Doughty having sexual intercourse with his wife (\textquoteleft \textit{adfornicandum cum illa}\textquoteright).\textsuperscript{55} Bousserman forthwith dispatched Doughty with a blow of his hatchet. The petty jury altered the facts to make Robert a self-defender who could not escape and to emphasize the aspect of trespass:

\begin{quote}
John Doughty came at night to the house of Robert in the village of Laghscale as Robert and his wife lay asleep in bed in the peace of the King, and he entered Robert’s house; seeing this, Robert’s wife secretly arose from her husband and went to John and John went to bed with Robert’s wife; in the meantime Robert awakened and hearing noise in his house and seeing that his wife had left his bed rose and
\end{quote}

\textsuperscript{49} No trial enrollment has been located for this case. Possibly, the defendant was acquitted as a slayer of a thief.
\textsuperscript{50} \textsc{JUST} 2/18, m.44d/3 (1354).
\textsuperscript{51} \textsc{JUST} 3/139, m.13d/l (1356). Priour was remanded to await a pardon.
\textsuperscript{52} \textit{London Coroners’ Rolls}, Roll C, no. 13, p. 80.
\textsuperscript{53} \textsc{JUST} 3/43/l, m.21/l (1324).
\textsuperscript{54} Pollock and Maitland, \textit{History of English Law}, 2:484. Referring to an earlier period, the authors suggest that the right to slay the adulterer was already doubtful.
\textsuperscript{55} \textsc{JUST} 2/211, m.1d/l (1341).
sought her in his house and found her with John; immediately John attacked Robert with a knife . . . and wounded him and stood between
him and the door of Robert's house continually stabbing and wounding
him and Robert seeing that his life was in danger and that he could in
no way flee further, in order to save his life he took up a hatchet and
gave John one blow in the head.56

The allegation that the slain man had secretly entered a house at night
while the master of the house slept was one of the common elements of
later indictments for "murder."57 In this case it was unnecessary; the
jurors needed to do no more than provide the usual allegations of
homicide se defendendo. Possibly, the elaborations by the trial jury
indicate an especially strong sense of outrage.

The community was also ready to excuse homicide that occurred in
defense of a kinsman though the slayer was not himself in mortal danger.
The petty jury had to alter the true facts by asserting that the accused
himself had come under attack and had slain his assailant as a last resort.58
This may be seen in a number of cases. A Buckinghamshire coroner, John
atte Broke, recorded that John Colles, senior, and his son John stood
talking to William Shepherde when an argument broke out. Shepherde
struck Colles senior with a staff.

Seeing this, John Colles junior drew his knife and struck Shepherde in
the right part of the neck wounding him mortally.59

Broke concluded his enrollment with the phrase, "and thus he slew him
feloniously," and indeed the younger Colles had clearly not been at­tacked. At the trial, however, the petty jury asserted that after Shepherde

56. JUST 3/78 m.2d/l: "infra nocte predictus Johannes Doughty venit ad domum ipsius
Roberti in predicta villa de Laghscales prefato R. cum uxore sua in lecto suo in pace Regis
iacente et sompniente et domum ipsius R. intravit quod perciplenis uxor ipsius R. secrete a
viro suo surexit et ad ipsum J. ivit et predictus J. uxorem ipsius R. ibidem concubiiit . . .
medio tempore predictus R. vigilavit et audiens tumultum in domo sua et perciplenis uxorem
suam a lecto suo abesse surexit et querendo eam in domo sua invenit eam cum predicto J.
et statim predictus J. in ipsum R. cum quodam cultello vocato [tear in membrane] ibidem
insultum fecit et ipsum verberavit vulneravit et inter ipsum et hostium eiusdem domus stetit
semper cum cultello predicto ipsum percuciendo et vulnerando ipsum ibidem ad
intericiendum et predictus R. videns periculum mortis sibi iminere et se ulterior nullo modo
posse diffugere causa mortem suam propriam evitandi sumpsit quoddam polhachet et inde
percussit predictum J. solo ictu in capite usque cerebrum unde statim obiit." (1342).


58. Hurnard states the common law rule as restricting self-defense to defense of one's
own life. She appears to have found no cases where defense solely of one's kin was alleged.

Willelmum in dextera parte collificiens ei plagam mortalem et sic ipsum felonice interficit"
(1393). The coroner's indictment is enrolled on the King's Bench transcript of the trial
proceedings.
had begun the quarrel, and had struck Colles senior, Colles junior intervened to part them. Shepherde then turned on Colles junior, who fled as far as a wall between two houses where he was forced to slay his attacker in self-defense. 60

According to a London coroner's roll, Simon Chaucer and Robert de Uptone quarreled on the street in Cordwainer Street Ward; Simon struck Robert, wounding him on the upper lip (there is no mention of a weapon). John, Robert's son, who was present and saw the incident, seized a "dorbarre" with which he beat Simon on the hands, side, and head, killing him. 61 The petty jury told an elaborate story that made John eligible for a royal pardon:

A quarrel broke out between Simon and Robert over certain pennies which Simon owed the latter. Simon took up a staff and wanted to strike Robert, but Robert grasped it firmly in his hands. . . . Simon drew his knife and stabbed Robert in the mouth so that blood flowed. John, sitting in a shop [shopa], saw the fight and rising and taking up a dorbarre ran to the fight to pacify the two if he could. When Simon saw John coming he left Robert and went after John with the knife . . . he chased John as far as a wall in Aldermannescherche and held him tightly against the wall so that John could not escape. 62

Similarly, Alice, the wife of James Almand, "Pipere," who slew John Langetolft in London, was said at her trial to have entered a fray to save James, only to end by slaying in self-defense. The petty jury added, however, that she slew John in order to save not only her own life but that of her husband. 63 The coroner's indictment copied onto the gaol delivery

60. Idem. Colles junior was released, pending his pardon, in the hands of four men, one of whom was his father.

61. London Coroners' Rolls, Roll F, no. 4, pp. 175–76.

62. C 260/50, no. 60: "... contencio oriebatur inter Simonem et Robertum de Uptone patrem predicti Johannis pro certis denariis eidem Roberto per prefatum Simonem debitis. Ita quod predictus Simon cepit in manu sua quendam baculum ... et inde percussisse voluit predictum Robertum quem baculum predictus Robertus in manibus suis ita firmiter tenuit. ... Simon ... extraxit quandam cultellum suum qui vocatur "Bideu" et inde percussit predictum Robertum in ore ita quod sanguis inde exivit. Predictus Johannes sedens ibidem in quadam shopa et videns dictum patrem suum et prefatum Simonem sic fore in contumelia surrexit et cepit quandam Dorbarre in manu sua et cucurrit eis ad contumeliam illam pacificandam si potuisset. Et cum predictus Simon vidit ipsum Johannem sic venientem reliquit predictum Robertum et se dedit eidem Johanni cum prefato Bideu in manu sua extracto et ipsum inde fugavit ad quandam parietem de Aldermannescherche contra quem parietem predictus Simon ipsum Johannem cum manu sua sinistra ita strite tenuit quod ex nulla parte evadere potuit" (1340). Despite his immediate capture, John did not appear at gaol delivery until 1339, some three years thereafter. John was pardoned in Jan., 1340 (C.P.R., p. 351).

63. C 260/72, no. 15. (1361).
roll states that she slew John feloniously, no mention being made of self-defense.

A Cambridge jury converted a more serious manslaughter into pardonable homicide when it altered the facts of Richard Godmancester’s slaying at the hands of William Holdy. Edmund de Ovyng’s coroner’s roll states that William came upon his brother Thomas and Richard as they quarreled. William drew his knife and stabbed Richard in the back. Ovyng termed the homicide a felony. The trial jury’s reworking of the facts provided ample evidence of last resort and asserted that Godmancester had died of a wound in the stomach, a rather more reasonable place for a self-defender to stab his adversary.

In none of the above cases had the defendant acted out of true premeditation. Where the defendant had supplied the initial provocation, it appears to have been a less than homicidal attack, which then escalated with fatal results. Certainly, these slayings were not “murders” in the sense that term was used by the late fourteenth century. The defendant had not ambushed the deceased or employed other means of stealth. But in none of them would the defendant have merited a royal pardon under the terms of the law. Had the true story come out in court, as the statement of Prisot indicates, the defendant would have been sentenced to death.

One final and difficult question: Are we dealing here with an expanded notion of self-defense, or with a broader attitude that only murderers ought to be hanged? The answer must be that there is evidence of both. In many, perhaps most, of the above cases the community surely believed the slaying was justified even though the official rules of self-defense had not been met. But in others there had been little or no element of

64. JUST 2/18, m.15d/3 (1351).
66. This study remains tentative. The great majority of cases for which I located both an indictment and a trial enrollment could not be used. In hundreds of cases, indictments for felonious homicide led to trial verdicts of self-defense, but it is unclear that the coroner bothered to record details of self-defense. In many others where both indictment and verdict agreed on self-defense the former was so formulistic as to raise suspicion that fact alteration had already taken place. Another possible approach to the problem of demonstrating fact alteration is to analyze the formulistic verdicts of self-defense and to infer alteration from the frequent use of a limited number of excuses. My approach draws attention to the plausibility of such an inference but goes a step further by showing that the formulas were not merely convenient summaries for what were in fact instances of pardonable homicide.
self-defense, and the trial verdict appears to be an entire fiction devised for purposes of saving the defendant's neck.

Perhaps all that can be said is that, given the nature of medieval life, the rules of both self-defense and felonious homicide were unrealistically strict. If firmly applied, they would have meant the condemnation of persons of pride who, when under attack, did not turn tail and flee until cornered beyond all hope of further escape. They would also have meant the hanging of men who, in sudden anger, struck a blow not in itself mortal but which, due to infection or careless treatment, resulted in death. These are different cases, occasioning different motives for leniency. Many homicides must have combined elements of both cases. It is, however, impossible to determine where society drew the line between homicides it viewed as justifiable self-defense and homicides it viewed as unjustifiable but still not deserving capital punishment. Nor, for that matter, is it possible to determine which slayings in the latter class were considered so impetuous as to be akin to accidental homicides. It is likely that some simple homicides were recast by trial jurors as misadventures, and hence made pardonable, but there are too few such special verdicts on the fourteenth-century rolls to make comparison with the coroner's enrollment profitable. The subgroups within the area of simple homicide must have shaded into one another, and distinctions among them probably differed over time and locale. Moreover, as I shall suggest in subsection 4, many social and psychological factors must have played a role in the formation of the community's attitude toward individual defendants and its perception of their deeds.

3

The foregoing suggests that in the fourteenth century trial jurors were not above characterizing as pardonable "simple" homicide, roughly what we would call manslaughter. The present section of this study seeks to assess whether thirteenth-century trial jurors' verdicts closely represented the truth. Naomi D. Hurnard concluded her pioneering and learned study of royal pardons for homicide with the end of the reign of Edward I, but she hinted that jury behavior might have changed in the ensuing period. She pointed out that the sudden increase of pardons de gratia after 1294 caused a fundamental break with earlier practice. The implication of her remarks is that conclusions arrived at on the basis of fourteenth-century evidence cannot be carried back into the earlier

67. Hurnard, King's Pardon for Homicide, p. 268: "[T]he jurors were not yet falling back on one or other of a set of prefabricated tales which could be borrowed, disguised only with minor variants, to substantiate their declaration that slayings had been in self-defense."
period. The specific argument here would be that, after 1294, jurors, with knowledge of the indiscriminate dispensing of pardons to slayers, altered their outlook toward homicide defendants—especially toward those who had committed a simple homicide—and found pardonable circumstances where there had been none. The jury would have reasoned, in effect, that a man who by acting with more dispatch might have made himself invulnerable to prosecution should not be hanged unless he was of the most disreputable sort. In my view, while the new pardoning policy might have increased the jury’s willingness to alter the facts in favor of the defendant, that policy was not the real source of jury attitudes. Jury behavior did not change radically after 1294; from the very outset of the common law period, juries were inclined to structure the evidence in such a way as to save the life of the manslaughterer.

In her chapter on trial jury verdicts Hurnard examined the extent to which juries fabricated facts in order to ensure that the defendant would receive a pardon for excusable homicide. She compared the allegations made by jurors at special inquisitions held for the purpose of deciding whether bail ought to be granted with those set forth at the actual trial before justices in eyre. Her findings support her conclusion that

on the whole, discrepancies between two or more verdicts were over details of location and the sequence of events, the sort of thing on which independent witnesses could easily differ. . . . The impression which these comparisons give is of pretty general agreement on the issue of self-defense or accident.68

In one case of “serious discrepancy,” the eyre jury suppressed the fact that the defendant had retaliated against blows of a staff with a relatively more lethal weapon, a small ax, alleging instead that he had used a staff in self-defense. The inquisition had alleged that the defendant had been struck on the head and cornered and that he had employed his ax because he could not otherwise have escaped death.69 The alteration “may have been literally vital” to the defendant, as Hurnard argues, but this would be true only because of the overly strict rules of self-defense, not because the trial jurors were coming to the aid of a person who had not in fact slain in self-defense.

How much weight ought we to accord to the “pretty general agreement” between special inquisitions and trial enrollments? The former were indeed less formal than the latter; they were not necessarily final and sometimes less attention was paid to the stringent rules of pardonable self-defense. But special inquisitions were directed to the issue of

excusable circumstances and were held at the "request of the accused or his friends, who probably had some reason for confidence in their outcome." They represented a point in the procedure at which the community view of the homicide had become known, and they probably were held only when it was fairly clear that community sympathy lay with the suspect. This may help to explain why Hurnard was able to find only one such commission that determined the defendant had slain feloniously. In fact, the partiality of jurors at special inquisitions sometimes resulted in favorable verdicts that trial jurors later overturned. Hurnard's comparison, therefore, is of limited usefulness. Having set alongside the trial verdicts a body of evidence overwhelmingly favorable to the defendants, i.e., special inquisitions, she concluded that the trial verdicts were relatively scrupulous; where they disagreed with the special inquisitions, they took a more critical, and probably a more objective, view of the circumstances. But Hurnard was unable to establish the relationship between a random selection of indictments and the trial verdicts. That relationship can be established, if at all, only by comparing the coroners' enrollments with the verdicts given at trial. Hurnard recognized the potential value of such a correlation, but rightly concluded that too few thirteenth-century coroners' rolls exist to carry it out.

There exists one important piece of evidence that sheds some light on contemporary practice. A thirteenth-century precedent book, Placita Corone, describes the case of a man indicted for homicide. The defendant, a certain Thomas, came before the court and told his story as follows:

And because I refused him [the deceased] the loan of my horse he ran at me in my own house with a Welsh knife, horn handled, in his right hand and inflicted several wounds on my head, shoulders, feet, and elsewhere on my body wherever he could reach. I did not at first return his blows; but when I realized that he was set on killing me I started to defend myself: that is to say I wounded him in the right arm with a little pointed knife which I carried, making no further onslaught and acting in this way to save my own life.

One justice put the court's impatience with such formulistic defenses quite succinctly:

Thomas, you have greatly embroidered your tale and coloured your defense: for you are telling us only what you think will be to your advantage, and suppressing whatever you think may damage you, and

70. Ibid., p. 110.
71. Ibid., p. 254.
72. Ibid., p. 110.
I do not believe you have told the whole truth.\textsuperscript{74}

Nevertheless, the defendant stood his ground, putting himself upon the country. When the petty jury testified under oath that Thomas's story was true, the court could only remand him to await his pardon.

Thomas's case is perhaps an exaggerated example,\textsuperscript{75} but it is not very different from a great many thirteenth-century enrollments. Moreover, it strongly suggests that the justices were aware that coloration in cases of self-defense was common but that doubts expressed from the Bench would not intimidate juries. Hurnard recognized that formulistic descriptions of self-defense raise "suspicion that some of these circumstances were borrowed from other cases." She admitted:

It may be judged that too many slayers in self-defense pulled stakes from fences and poles from carts, bolted into \textit{culs de sac} or tried and failed to climb walls, were brought up against dykes or rivers, found swords unexpectedly but conveniently to hand or made random knife thrusts that just happened to hit vital spots.\textsuperscript{76}

Hurnard concluded that victims of assault "naturally reacted in a similar manner"; that the "paucity of many of the clerks' Latin vocabulary" led them to fall back on the same terminology. Before 1307, she maintained, the jurors were not yet falling back on one or other set of prefabricated tales which could be borrowed, disguised only with minor variants, to substantiate their declaration that slayings had been in self-defense.\textsuperscript{77}

Perhaps she is correct, but there appears to be little evidence to support her view.\textsuperscript{78} One must still explain the high number of acquittals on the medieval rolls, rather than view pardonable homicides in isolation from other elements of the administration of criminal law. This is so because

\textsuperscript{74} "Thomas, vous avez mut enbeli vostre parole et vostre defens enflori: kar vous pronunciez quant ke vous quidez ke vous poet valer et conceler ce ke grever vos poet, kar je ne quid pas ke vos eiez tote la verite conte" (idem).

\textsuperscript{75} See above, Chapter I, n. 49, for cautionary remarks regarding the use of this source.

\textsuperscript{76} Hurnard, \textit{King's Pardon for Homicide}, p. 267.

\textsuperscript{77} \textit{Ibid.}, p. 268.

\textsuperscript{78} In her analysis of the king's role in the pardoning process, Hurnard argues that "in a sample of well over 500 cases identified on the plea rolls pardon is very unlikely to have been granted to felonious killers in more than twenty percent, and even ten percent may be considerably above the mark" (p. 245). This assumes, of course, that the evidence on the plea rolls is trustworthy. What the author has proved is that the king did not often grant pardons to persons for whom there was not some favorable testimony, not that those who in fact slew feloniously were seldom able to obtain pardons. Hurnard also shows that presenting juries often used the phrase "\textit{mota contencione}" to describe "fatal free fights"; they did not adduce testimony of pardonable circumstances in all such free fights. This does not prove the trial jury would not have done so had the suspect appeared and put his life in their hands.
the possibility that the acquittals resulted from jurors’ failure to tell the truth threatens to undermine the notion that jurors were particularly scrupulous in cases of excusable homicide. There are, in fact, good reasons to believe that fourteenth-century social attitudes were not radically different from those of the preceding period. To explore these reasons, we must turn from the narrow confines of pardonable homicide to the general contours of the early history of liability for homicide.

We have seen that in the Anglo-Saxon period, and for perhaps a century after the Norman Conquest, some homicides were unemendable, leading to punishment—usually capital—at the hands of the Crown. These homicides, secret homicides known as “murders,” were considered particularly heinous and, as outrages against society as a whole, were exclusively royal pleas. It cannot be determined how closely the Anglo-Saxon “murder” corresponded to the “murder” of the late fourteenth century. Probably the term always had connoted stealth; the slayer acted when his victim was off guard. But it appears that any homicide committed in the absence of a witness was presumed to have been committed through stealth. It was in secret and, hence, a murder. Open homicide, on the other hand, remained until the outset of the twelfth century an emendable act. The guilty party or his kin paid wer, bot, and wite. Failure to pay the wer could result in liability to the feud; after the tenth century, only the slayer could be subjected to the vengeance of the slain man’s kin. Although there is no evidence as to the frequency of such feuds, it is likely that settlement in money or in kind was the usual result of sudden and open acts of homicide. If the slaying resulted from a mutual quarrel and involved fighting on both sides, some elements of self-defense probably lay side by side with elements of excessive retaliation. Settlements probably took these elements into account, though in an impressionistic way. The extension of royal jurisdiction in the twelfth century to encompass the entire area of homicide had two revolutionary

79. See above, Chapter I, text at nn. 5–8.
80. See Pollock and Maitland, History of English Law, 2:486; Kaye, “Early History,” Part I, pp. 366 et seq. Kaye argues that “murder” retained its ancient meaning of “secret or stealthy killing” during the twelfth through fourteenth centuries, despite the fact that it was also used as a synonym for the general term “kill” and a fine for an unexplained homicide. It seems clear that the concept was deeply embedded in social attitudes during the entire period. Possibly, the social view of “murder” changed, due to the growth of professional crime, from certain specific acts, e.g., poisoning, to all planned homicides.
81. See below, nn. 100, 102–3, and accompanying text.
82. Hurnard, King’s Pardon for Homicide, p. 8. Hurnard ventures the judgment that “the process may have been completed by the end of the reign of Henry I” (1135). But she cautions: “The date when this occurs is not known.”
effects: many homicides that formerly had not resulted in capital punish-
ment were now made capital under the law; strict and largely unenforce-
able requirements were introduced into a law of self-defense.

The evidence as to jury attitudes in the fourteenth century may aid in
understanding social attitudes toward criminal liability in the entire period
from late Anglo-Saxon times to the end of the Middle Ages. If so, the
argument would run as follows. Originally, the Anglo-Saxons practiced
the feud in homicide cases. The kin of the slain took vengeance upon the
slayer or one of his kin, who were jointly liable for their kinsman’s act.84
Whether the mental element was taken into account is unknown. Secret
homicide was a matter for the king, but all other homicides were
emendable; failure to pay the wergild rendered the slayer and his kin
liable to vendetta, though reduction of the amount of compensation by
agreement was probably common. By the tenth century, the laws
restricted liability to vendetta to the actual slayer. They also mandated a
reduction of wergild compensation where there had been mitigating
circumstances.85 In such cases, where the slayer had acted in self-defense
or through accident, the king relinquished the wite.86 While the kin of the
slain may have taken a narrow view of such mitigating circumstances,
society at large took a broader view of the matter, having nothing to gain
from feud or compensation, and in a day when fights began easily and led
often to death due to sepsis or other results of poor medical techniques.
In its eyes, secret homicide or especially malicious attacks justified
punishment by death. Simple homicides were seen as requiring compen-
sation, with mitigation if the act was unintentional or to some extent
provoked. When all homicides were drawn within the sphere of royal
jurisdiction and made, unless excusable, punishable by death, the com-


85. III Edgar, 1, 2: “[T]here is to be such remission in the compensation as is justifiable
before God and supportable in the State.” Quoted by Hurnard, King’s Pardon for
Homicide, p. 5; VI Ethelred, 52, 1: “[H]e who is an involuntary agent in his misdeeds should
always be entitled to clemency and to better terms.” Idem.
87. Hurnard has traced the use of presentment from the late tenth century to the Assize
Review, vol. 56 (1941), pp. 374–410. On the murdrum fine see ibid., pp. 385 et seq.;
Richardson and Sayles, Governance of Mediaeval England, pp. 195–96. Pollock and
Maitland, History of English Law, 2:487.
88. Groot (“Jury of Presentment,” passim; above, Chapter I, n. 20 and accompanying
the resulting tension between the bonds of friendship and the demands of the pocketbook. By the third decade of the thirteenth century, however, this tension had been relieved: once the slayer had been presented, it was left to the trial jury to state whether he was guilty or not. This provided them with an opportunity to acquit or to adduce circumstances of pardonable homicide. The compromise that resulted is illustrated in *Placita Corone*, where a defendant who successfully pleaded self-defense was asked who put him in prison. He replied:

Sire, my neighbors: for they were afraid of being involved in the affair and suffering loss thereby.90

Thus, from the outset of the common law period, trial juries were prepared to voice a sense of justice fundamentally at odds with the letter of the law. They persisted throughout the thirteenth and fourteenth centuries in using their role as submitters of evidence to condemn many murderers and to acquit or render pardonable those whom a later legal age would term "manslaughterers." Trial juries remained free to say the "truth" as they knew it, to reject the conclusions of both juries of presentment and coroners' inquest juries. Of course, in many cases the process of fact alteration began before the trial jury gave its verdict: it was not uncommon for a coroner's jury to use elaborate formulas to describe a case of self-defense. 91 The trial jurors, drawn from the hundred where the homicide was committed, but not necessarily from the immediate vicinage, probably reflected already settled attitudes of the countryside toward individual defendants. 92 It remains to suggest, by way of conclusion to this preliminary study, what the significant determinants of these societal attitudes were.

The text) has shown that the presenters screened suspects before formally presenting them to make their law. They screened out suspects who they believed had not committed the felony of which the suspects had been accused by someone in the hundred. Presumably, they were obliged to present all whom they suspected of committing homicide; if they failed to present those whom they suspected of having committed simple homicide or even true self-defense, they were nullifying the law and subject to being amerced.

89. Doris M. Stenton, ed., *Rolls of the Justices in Eyre, being the Rolls of Pleas and Assizes for Lincolnshire, 1218–1219, and Worcestershire, 1221*, (London, 1934), pp. lxxviii–lxxi. As Lady Stenton points out, judges had never been partial to the ordeal and had, before 1215, tried to persuade defendants to put themselves upon the country.


91. E.g. JUST 2/58, m. 4/2 (1380).

92. From the 1280s at least, the sheriff, in preparing for a gaol delivery, ordered the hundred bailiffs of his county to supply a panel of sixteen or twenty knights and freeholders for use as jurors. See C 260/4 no. 19 (1288); C 260/5 no. 14 (1289). Trial juries at the eyre were not always drawn from the hundred of the homicide. Meekings, ed., *Wiltshire Eyre*, p. 52.
We have seen that in the Anglo-Saxon period murder meant homicide through secrecy or stealth. Originally, murder was secret in the narrow sense that the slayer hid his victim’s body to conceal the deed, but it probably was soon used more broadly to refer to any homicide whose perpetrator was unknown. It is with this aspect of murder that the murdrum fine was associated, for the hundred was amerced in all cases of unexplained homicide. It is likely, however, that already in Anglo-Saxon times murder sometimes implies that the slayer’s identity was concealed from his victim, so that the latter was taken off guard. Both Glanvill and Bracton refer to murder as homicide wherein the concealment was relative to third parties, but this may be because by the time they wrote the sole function of the allegation of murder was to relieve the appellant from the requirement that he claimed to have seen the deed with his own eyes. For our purposes, of course, the important question is not which acts the official concept of murder encompassed, but which acts society considered so heinous that it believed the perpetrator deserved to be hanged. The answer to this question for the twelfth century will probably never be known.

By the fourteenth century, society’s concept of serious homicide was far broader than that corresponding to the original technical meaning of murder. Evidence shedding light on the notion of serious homicide is sparse and difficult to interpret. The principal sources of such evidence are trial enrollments in verdicts of self-defense. In several cases, all dating from the first half of the fourteenth century, the jurors included elaborate allegations as to the nature of the attack by the deceased upon the defendant:

A. M. was staying at the house of S. . . . and R., knowing M. was staying there, through murder and malice aforethought came to the house of S. and sought M. in order to kill him . . . R. immediately broke the door of the room and entered it and . . . ferociously attacked . . .

94. See above, n. 87.
95. Hurnard assumes too much when she defines murder as “secret and so presumably premediated killing.” King’s Pardon for Homicide, p. 1.
B. M. . . . about noon of that day maliciously entered and afterward, maliciously abusing the said W. and committing hamsoken against him, of his malice aforethought, . . . attacked him there in the house [and] threw him to the ground.99

C. R. left the aforesaid house and stood outside the door of the house of the aforesaid W. beneath the wall of that house lying in wait for A. in order to slay him because of an old quarrel between them, A. knowing nothing at all about R.'s lying in wait.100

D. W. was in his house and W. B. knew this. W. B. entered the close of W. at night and hid there during the night through malice aforethought, and maliciously lay in wait for the said W. in order to kill him, W. being ignorant of this; and when W. arose at dawn and left his house closing the door behind him thinking no evil, W. B. with malice aforethought suddenly and feloniously . . . .101

E. H. and S. fought together in a mill . . . and S. attacked H. with a hatchet and wanted to strike him, but they were separated from one another by certain bystanders and S. was expelled from the mill. . . . S., nevertheless his furious intention continuing, maliciously devised deceitful plans against H., hiding himself outside of the mill. And [when] H., believing that the argument between them had been settled, left a little later thinking he was leaving safely and in peace . . . .102

F. J. [was] lying hidden in ambush with two strangers in the house of H. They saw H. coming along the way and immediately, feloniously and in a deliberate assault, they attacked H. from all sides.103
The chief purpose of the testimony in the above cases was to support a verdict of self-defense. Housebreaking immediately puts those residing within on the defensive. Stealth on the part of the assailant, whose presence was until the last moment unknown to the eventual slayer, is strong evidence that the latter lacked malice (cases C, D, E). It might be argued that the second part of the testimony, the formal allegation of last resort (which I have omitted from the above excerpts), was alone insufficient in proving that the defendant had not provoked the fight. But it should have been enough merely to assert, as most juries did, that A attacked B, wounded B, and drove B to the wall. Whatever additional strength the above details lent to a special verdict, whether they represented the truth or were mere fabrications, the jury was describing what society took to be the most repugnant form of attack.

There can be no doubt that the jurors were alleging that the deceased had attempted to commit what was considered to be serious homicide—what we may call the community's concept of murder. Cases A, C, D, E, and F involved stealth; housebreaking occurs in A and B; and in all these cases there was some measure of planning: malice aforethought was specified in A, B, and D, and seems implicit in C and F; in E, though his mind was in a fury, the assailant "devised deceitful plans." The difficulty lies in discerning whether stealth, housebreaking, or malice aforethought were critical to the societal concept of murder or were merely incidental.

The use of "per murdrum" in case A, which was recorded in 1305, is extremely rare.\(^{104}\) Murdrum at this time was used almost exclusively to refer to the fine for an unexplained homicide; it almost never describes the slayer's act.\(^{105}\) It would appear, then, that the phrase meant "through stealth" in the sense that the slayer acted in such a way as to conceal his identity from third parties. But stealth in C, D, E, and F involves the intended victims knowing nothing of the presence of their ambusher. Murder was no longer conceived, if indeed it ever had been, solely as the concealment of the slayer's identity from third parties.

The only case that does not involve stealth is B. Here the jurors alleged that the would-be slayer committed housebreaking, presumably with intent to kill, an act which in Anglo-Saxon times had been regarded by the law as particularly heinous.\(^{106}\) It may well be that such acts had always been included in the societal view of murder.

\(\ldots\) in domo cuiusdam H. predictum H. transeuntem per viam videbant et statim felonice et insultu premeditato ipsum H. \ldots\) incircuiter insultaverunt."

\(^{104}\) Kaye found a "Latinised form of the English 'to murder,' synonymous with 'to kill'" in a 1281 eyre roll (JUST I/147, m.13a). "Early History," Part I, p. 371.

\(^{105}\) The murdrum fine was effectively abolished in 1340. 14 Edw. 3, stat. 1, c. 4.

\(^{106}\) Pollock and Maitland, History of English Law, 2:457.
The phrase *malicia precogitata* and its variants, which I have translated as "malice aforethought," was used commonly in indictments of homicide throughout the Middle Ages to denote the threshold degree of *mens rea* for felonious homicide: mere deliberateness. As I have demonstrated elsewhere, the phrase could also be used in the fourteenth century to refer to true premeditation. Everything depended upon the context. In case A, the assailant came to the defendant's house with malice aforethought, not mere deliberateness; "*ex malicia sua precogitata*" in case B seems contextually to represent more than the formulistic "*malicia precogitata*"; the ambusher in D, who lay in wait throughout the night "*per maliciam excogitatam,*" exhibited more than mere deliberateness. In case C, the assailant carried an old grudge; like the assailants in E and F, he lay in wait for the defendant. Only the assailant in E appears to have acted in hot blood.

Clearly, the jurors were attentive to the mental state of the assailant. It might be argued, however, that this resulted from their concern to blame the fight on the deceased; or, that planning was merely incidental to most acts of stealth and that premeditation was a common, but not an essential, aspect of murder. The foregoing evidence from the early decades of the fourteenth century is unclear on this point, and, as we shall see, there is reason to believe that even by the end of the century premeditation had not yet become a necessary element in the societal concept of murder.

The Statute of 1390 equated murder with ambush and malice aforethought. Its drafters were undoubtedly concerned mainly with highwaymen and housebreakers who robbed and slew their victims. The official term, "murder," operative only in the administration of pardons, now clearly embraced homicide perpetrated through stealth with respect to the victim. Moreover, true premeditation had come to be conceived officially as at least a common incident of murderous intent. But most murder indictments contain only the operative phrase "*murdravit*" or "*insidiavit*" (ambushed), and are thus insufficiently detailed to provide insight into the social, as opposed to the official, concept of murder.

There is nevertheless some indication that the short lived statute cast murder in terms too narrow for the community. If murder was, *stricto sensu*, homicide through stealth where the victim was taken off guard, it was in its broadest societal use a particularly repugnant homicide. A case from the roll of John Fovyll, coroner in Leicester and one of the first to

109. Later on in the indictment, "*malicia precogitata*" is used in its formulative sense.
110. "*Murdre, Mort d'ome occis par agait, assaut, ou malice purpense.*" Stat. 13 Richard 2, stat. 2, c. 1.
111. See below, Chapter 3, nn. 26-30 and accompanying text.
employ the word "murder" systematically in his indictments, lays to rest the notion that the societal concept of a murderous act was dependent upon secrecy or stealth. John Howetson came upon two boys, Roger and Richard Malynson, working near the road and wanted to strike them because of a long-held grudge. Seeing this, a certain Robert Malesherbe interceded, saying he would take whatever punishment was coming to the boys. Their sister Maud arrived at this point and similarly offered to make amends, but Howetson, calling her a whore, tried to strike her with a hatchet, pursuing her as she fled to her house. Malesherbe followed, imploring Howetson not to strike the woman, at which point Howetson turned upon him, swinging the hatchet "with great force." Malesherbe, thinking no evil, neither having a knife with him nor seeing any other weapon to prevent a blow upon his head, sprang from him and ran into Maud's house to get some weapon for defending himself. Malesherbe grabbed a stake, but Howetson broke this and then, aided it seems by his son and another relative, proceeded to finish the job. While the two held Malesherbe down, the other struck him, and when the victim could no longer struggle, all dealt mortal blows so that "they slew and murdered Robert without any cause." 112

In another case, admittedly a rare one, there was stealth but not premeditation. It was alleged that after a vigorous argument, one of the disputants, B, turned his back to [A] in the field and A ran to B and suddenly drew the dagger of B and feloniously stabbed him twice in the side. . . . The jurors say he slew him feloniously and murdered him. 113

The allegation of murder seems to have turned on the deviousness of the act, which was apparently not premeditated but committed in hot blood. The word "felonia," rather than "murdrum," was later marginated, perhaps indicating that the coroner took a different view of the requisite mens rea.

There is one final point to be made about the late-fourteenth-century murder indictments. The slaying of master by servant and of husband by

112. JUST 2/61, m.12/1 (1409): "... nullum malum cogitans nec super se habens cultellum nec aliqua arma videns ic tum illum supra caput suum eminere saltavit ab eo et cururit in domum ipsius Matilidis ad aliqua arma sibi assumenda pro defensione et salvacione vite sue... absque aliqua causa dictum R. M. interfecerunt et murdraverunt." See also JUST 2/61, m.92/2 (1406), where the slayer's dog attacked the victim, bringing him to the ground, whereupon the slayer "murdered" him.

113. JUST 2/63, m.3/2 (1400): "... verte bat dorsum suum ad eundem in campum, predictus A. cururit ad predictum B., subito extraxit daggarium ipsius B. et felonice percussit... bis in latere... [J]urati dicunt felonice interfecit et murdravit."
wife, two forms of statutory petty treason,\textsuperscript{114} had for centuries counted among the most reprehensible homicides. Such slayings figured prominently in the indictments for murder, and all too frequently the jurors alleged that the victim had been slain while he slept in his bed or taken at night by ambush.\textsuperscript{115} And, what is more revealing, occasionally it was said in such cases that the slayer had attempted to hide the deceased to conceal the act.\textsuperscript{116} Thus, murder had not entirely lost its most ancient meaning, and its stigma, one suspects, could be attached to any homicide that society found particularly repugnant.

The process by which the community determined that a given slayer was a murderer was undoubtedly complex and by no means solely a function of the act itself. Coroners' juries and trial jurors were swayed in many cases by the status and reputations of the combatants and by what was known about past relations between them. Such considerations may have been critical to the determination that the defendant had acted through stealth, that he had caught his victim off guard. Conversely, these factors must sometimes have contributed to the conclusion that the parties had fought together on equal terms, out of sudden and mutual anger. There is, in fact, evidence that in some cases jurors perceived simple homicides as "accidental" ones because the parties were known to have been "friends."\textsuperscript{117} It may be, too, that an informal, extrajudicial system of monetary compensation long outlived the demise of formal wergild settlement.\textsuperscript{118} If so, the relations between the slayer and his victim's kin may have determined the community's perception of the homicide or, at least, of the slayer's just deserts.

We must be careful not to assume too much precision in medieval evidence-gathering techniques. The coroners' rolls leave the impression one would expect: in many cases the inquest jurors were imprecise, confessed lack of knowledge or made little effort to assess blame for a

\textsuperscript{114} Stat. 25 Edw. 3, stat. 5, c. 2 (1352).

\textsuperscript{115} E.g. JUST 3/180, m.23d/6 (Gloucester, 1393); JUST 3/180, m.31/l (Hereford, 1390); JUST 3/203, m.1ld/3 (Lincoln, 1429); JUST 2/190, m.4/3 (Warwickshire, ca. 1390); JUST 2/242, m.5d/6 (Yorkshire, 1388). This last case, recorded by a coroner before the Statute of 1390, was one of many indictments reflecting the use of "murder" in a commission to justices of the peace in 1380. Rotuli Parliamentorum, 3, 84b. For discussion of justice of the peace indictments based on the commission of 1380, see Kaye, "Early History," Part I, pp. 379 et seq. The Statute of 1390, with slight modification, repeated the categories represented in the commission. I have based my discussion upon the Statute to avoid confusion, but it should be noted that indictments began to employ the term "murder" a decade before the Statute. See Green, "Jury and the Law of Homicide," pp. 461–62.

\textsuperscript{116} JUST 2/163, m.1/6 (1389) and m.2/l (1393).

\textsuperscript{117} E.g. JUST l/l185, m.3; C 145, File 59/46.

\textsuperscript{118} Hurnard stated that out of court settlement was common during the twelfth century, but it is unclear how long this continued. Hurnard, King's Pardon for Homicide, p. 9.
fight ending in homicide. Many homicides must have been viewed from a distance or not all. To the extent that facts were unknown, poorly documented, or in conflict with other testimony, social and psychological assessments unrelated to the actual homicide but related instead to the parties involved must have been used.\footnote{119} It may be true that in the fourteenth century trial jurors were more lenient in some cases than they had been before the change in the Crown's pardoning policy.\footnote{120} But it is also possible that with the increase in social mobility and the rise of professional crime trial jurors were called upon more frequently to pass judgment on strangers to the neighborhood and dealt with them more harshly.\footnote{121} In any case, these would be merely two more examples of foreign elements creeping into the verdict process. The essential nature of that process had not suddenly changed. Due to the nature of the extant evidence, it suddenly becomes visible to us, but the available evidence suggests that it had for centuries been integral to the phenomenon of dispute settlement.

II

Theft, in its various forms, was the most common capital offense committed by medieval Englishmen.\footnote{122} To judge from presentments on the thirteenth-century eyre and fourteenth-century gaol delivery rolls, thieving was endemic; and these sources reflect only a fraction of the offenses actually committed. In theft, even more dramatically than in homicide, the formal legal rules prescribed the death sanction for what was commonplace social behavior. It comes as no surprise that most defendants were acquitted—typically two-thirds to three-quarters at gaol

\footnote{119. For extensive discussion of this and related issues, see the important work of Given, McLane, Hanawalt and Hammer, cited above, n. 2.}

\footnote{120. Pugh ("Reflections of a Medieval Criminologist," pp. 102-3) suggests that the "additional impediments" of the later period may have made some difference but cautions against assuming that juries acquitted significantly less in the 1280s.}

\footnote{121. See Hanawalt, Crime and Conflict, p. 54.}

\footnote{122. Hanawalt (ibid., p. 66) found that in the eight counties she studied (1300-48) larceny (38.7 percent), burglary (24.3 percent) and robbery (10.5 percent) accounted for 73.5 percent of all felony indictments. These exclude, of course, thefts not reported as well as thefts prosecuted as criminal or as civil trespasses. See below, n. 135 and accompanying text. Homicide, though less common, accounted for a substantial minority of those felonies actually tried. Hanawalt (idem) found 18 percent. Pugh ("Reflections of a Medieval Criminologist," pp. 86-87) found 22 percent for London gaol deliveries of the 1280s. McLane ("Royal Courts and the Problem of Disorder") noted a very high percentage of homicide indictments (more than half of all felony indictments) but suggests this does not reflect the true rate of occurrence of this felony.}
The forms of theft ranged from violent taking from the person (robbery) to taking upon a housebreaking, often under cover of night (burglary), to a simple taking and carrying off (larceny). Each was practiced by all kinds of persons. Nonetheless, robbers frequently were or were viewed as outsiders and professionals who operated as highwaymen through ambush. They often physically overpowered, injured, or even slew their victims. Compared with robbers, burglars were more often “local,” less often professional, and they less frequently assaulted their victims. They were, however, more likely to be professional or to act in consort than larcenists. Larcenists stole goods of less value than did those who committed the more professionally oriented offenses. Nearly all theft involved stealth or surprise attack. Burglary was frequently nocturnal and its perpetrator had entered, often unseen, the victim’s private domain. Larceny was the act of the pickpocket or casual sneakthief. Ambush characterized much robbery. Although actually committed openly, it usually involved actions that gave its perpetrator an unfair advantage over his victim. Few thefts were responses to what society recognized as provocation on the part of the victim. Some, perhaps many, however, were understood as responses to the hardships of life. As Hanawalt has demonstrated, the juries’ treatment of theft suspects in the royal courts involved a complex of factors having to do with the nature of the actor and his act, the relationship between defendant and victim, and—to put it bluntly—the temper of the times.

Analysis of jury verdicts in cases of felonious theft is doubly complicated by the fact that many thefts were not prosecuted at all and many others were prosecuted as other than felonies. Many minor unlawful takings were settled informally or privately prosecuted as trespass, even though an indictment would have been appropriate. Many other unlawful takings of goods worth 12 pence or more (that were thus felonies) were presented as mere criminal trespasses. At both the private and the

community level, there was a preindictment sorting process that we can discern but not always closely examine.129

Theft and homicide presented different problems for trial juries and for those responsible for the administration of the criminal law. They do as well for historians who seek to understand the behavior both of juries and administrators. Nearly all homicides were reported, and most of them led to indictments. Although many suspects were not taken, virtually all who were taken were tried at the felony level. Some significant distortion is produced by the fact that the least culpable slayers were the most likely to surrender themselves for trial—or to remain where they might easily be taken. But while that distortion affected the acquittal and conviction rates, it does not conceal from us the attitudes of juries toward the least culpable. Quite the opposite: prosecution of homicide at the capital level tended to fall disproportionately on the least culpable. In theft such prosecution fell on the most serious cases, the ones least likely to be handled as lesser offenses.130 Moreover, there was no category of excusable, i.e., pardonable, theft. Juries had either to convict and thus condemn (before the expansion of benefit of clergy in the fifteenth century), or acquit the defendants whom they tried. In homicide, not only was there an intermediate, pardonable category, but juries were required to state the facts in cases falling within that category.131 Finally, coroners were required to hold inquests in homicide, and their records often were far more detailed than the summary indictments recorded by the clerks or sheriffs and justices of the peace.

Thus, conviction and acquittal rates in prosecutions for capital theft tell us far less than the historian of social attitudes would like to know. They confirm the most obvious fact: juries sent relatively few defendants to the gallows. Only about a third of those tried were convicted. More were sentenced to die than in homicide,132 but that may have been due as much to the screening out of "lesser" offenders as to anything else. If we may draw any conclusion it is that with regard to capital sanction, theft, while typically involving stealth, was treated little differently by society at large than was homicide. One ought not make too much of the difference in conviction rates at gaol delivery; certainly there is no evidence that

129. See the important work of McLane, "Royal Courts and the Problem of Disorder," esp. pp. 84–86, 93–95. McLane has carried analysis of this sorting process further than any other student of medieval criminal administration. See also Barbara Hanawalt, "Community Conflict and Social Control," Medieval Studies, vol. 28 (1976), pp. 402–3.
131. Even after 1300 when pardons for homicide in self-defense and through accident were granted de cursu, the verdict had to be sent by the presiding judge to Chancery for consideration. See below, Chapter 3, text at n. 20.
132. Hanawalt, Crime and Conflict, p. 59. See above, Chapter 1, n. 79.
property was more highly prized than life.\textsuperscript{133} Theft was common social behavior, reprehensible but not generally viewed as deserving the ultimate penalty.

Some evidence confirms the commonsense guess that juries distinguished between the professional and the amateur thief, between the truly premeditated and the opportunistic theft, between the most aggravated and the simplest forms of stealthy behavior. The most serious cases were those where the law of theft and the law of homicide converged. Excluding treason, conviction rates in capital cases were highest in trials on indictments for slaying by ambush by professional thieves.\textsuperscript{134} We have seen also that the pardon statutes ostensibly relating to murder were aimed mainly at thieves (i.e., robbers), not at slayers who acted without the motive of pecuniary gain. Once again, there was a substantial overlap between the interests of the administrators of the criminal law and the attitudes of trial juries. Nonetheless, not all such defendants were convicted: frequently fearful juries could be managed by them or their powerful patrons. This, presumably, posed a serious problem for legal officials and the classes that sought to reduce the disorder that plagued the land. We shall return to this issue in the next chapter.

Jury behavior in the less serious forms of theft is difficult to analyze. There is little to relate beyond the bare record of massive acquittals, a record that, as we shall see, in slightly different form extends down to modern times. As in the case of homicide, juries were influenced as much by the defendant’s reputation and social position as by the act with which he had been charged. Indeed, it is likely that in theft, even more than in homicide, who the defendant was counted for more than what he had done, for even the lesser forms of theft were regarded as very wrongful, insidious behavior that might reflect a disposition to engage in more serious forms of theft.\textsuperscript{135} In homicide, by contrast, many defendants were considered to have acted justifiably, in defense of their honor, their family, or their friends. We have seen how difficult it is to determine in a given case whether the jury approved of the defendant’s behavior, merely “accepted” it, or disapproved of it but nonetheless thought it did not merit the defendant’s execution. Whereas some acquittals or self-defense verdicts in homicide cases reflected the view that, despite the official rules, the defendant had acted “lawfully” (true rule nullification), perhaps

\textsuperscript{133} See the remarks of McLane, “Royal Courts and the Problem of Disorder,” pp. 109–10.

\textsuperscript{134} See Given, \textit{Society and Homicide}, p. 133: 42.6 percent of those who were accused of both robbery and homicide and who appeared for trial were condemned.

virtually all nullification in theft occurred in cases involving socially disapproved behavior. Acquittals in theft cases typically represented what we may term systemic nullification of the prescribed sanction, the phenomenon of the purely "merciful acquittal."

Because theft was by definition both insidious and wrongful behavior, juries were bound to pay close attention to the defendant's social standing. The stranger who committed casual theft was perhaps necessarily more vulnerable to conviction than the one who committed simple homicide. Local communities with some justice believed they were constantly under threat from roving brigands. Moreover, within the community, status differences between jurors and the defendant probably counted for more in theft than in homicide. And this fact must be kept in mind also when one assesses the conviction and acquittal rates in the more highly stratified urban areas.

There are, then, few concrete conclusions to be drawn about jury nullification in theft. We are left for the most part to draw inferences from our study of jury behavior in homicide and to test them against what we do know regarding the prevalence of theft and the outcome of trials of thieves.

First, as noted above, the most serious forms of homicide, from the perspective of the Crown, legal officials, Parliament, and trial juries, involved slayings by professional thieves, mainly highway robbers and burglars. It is reasonable to suppose that jurors convicted a substantial number of such thieves even when the offenders did not slay their victims and that such convictions represent a fair percentage of the total number of convictions for theft. Second, jurors probably came down hard on strangers and others whose ties to the local community were attenuated for one reason or another. The leniency accorded villagers by their neighbors may be put down to favoritism, but given what jury behavior in homicide suggests, that may be just another way of saying that jurors thought the rules too harsh when forced to apply them to persons whom they knew well enough to identify with.136

I have earlier suggested that social mores reflected in traditional, private forms of dispute resolution in homicide influenced the handling of cases at common law. A similar hypothesis probably ought to be put forward in the case of theft. In pre-Angevin times, many forms of theft had been emendable. There is every reason to suppose that in theft the revolution in sanctions was as out of step with social attitudes as it was in homicide. The nearly blanket rule mandating capital punishment never

136. Hanawalt's preliminary study of indictment and conviction patterns in Ramsey Abbey is of great interest. Crime and Conflict, esp. pp. 53–54. I have drawn heavily upon her conclusions regarding the importance of status and residence to the outcome of theft cases.
truly took hold within the community, which imposed its own standards both outside of and within the formal legal system. The hypothesis is strengthened by what we know about the substantial amount of downgrading of felony to trespass, and what we might expect to result from such a potentially arbitrary process. Very likely, many whom the indictment jury left to be tried by authorities for the capital offense were viewed by the community at large as perhaps less savory but as no more deserving of death than many who were prosecuted merely for trespass.

Finally, the acquittal rate speaks for itself. It is of course possible that most acquittals were the product of bribery, fear, and belief in the defendant’s innocence. But it is likely that just as many sprang from mercy and from deeply ingrained notions of how social harmony was to be maintained through composition with, rather than ultimate rejection of, the offender. Much thieving was opportunistic and committed against one’s neighbor. Much of it was committed by the desperate and destitute of the local community, and it was these locals who were the most likely to be apprehended and made to stand trial. Some of them, no doubt, suffered as a result of the community’s frustration at not being able to bring all of the truly evil persons to justice. Many others of them, however, must have been spared simply because they were not among the truly evil in the eyes of their neighbors.

137. Ibid., p. 253.