We shall never know a great deal about the official response to the law-finding role of the medieval criminal trial jury. Most of what we do know we understand by way of inference from records that do not speak directly to this problem. Our lack of hard evidence, however, should not discourage speculation. In the present essay I shall attempt to put the problem of the law-finding jury into perspective. I shall suggest that the jury behavior described above influenced the bench in its interpretation and development of the substantive law of homicide. I shall also suggest the way authorities might have viewed the place of merciful verdicts in the less serious felonies as they considered the problems of the administration of the criminal law generally.

The difficulties in determining how the Crown, bench, and other officials viewed jury nullification are compounded by the fact that nullification was only one pattern of jury behavior that caused concern. Nor was it likely to have been viewed as the most worrisome. Corruption, though not necessarily determinative in a great number of cases, was undoubtedly perceived as a greater problem. Jury timidity was less serious but perhaps more common, and likely to be present in just those cases in which officials were most anxious to secure convictions. Verdicts resulting from partisanship that did not involve outright graft were serious enough and might have seemed more akin to corrupt verdicts than to merciful ones. By comparison, rule or sanction nullification, whether systemic or ad hoc, may have been—especially in close cases—relatively easy for officials to tolerate.

Two other factors require our constant attention. Pretrial procedures resulted in a substantial amount of overindictment; there could hardly be a presumption against individual defendants in most cases. Even where indictments were justified, the trial jury might not be able to obtain dispositive evidence. Honest acquittals of guilty suspects were probably very common. On the other hand, simple rule or sanction nullification, when it did occur, was not easily distinguished from corrupt, timid, or purely partisan verdicts, and it may not have even captured the bench's

1. For a related discussion of the points raised in these introductory paragraphs see above, Chapter 1, text at nn. 87–97.
attention. If so, from the perspective of the bench the universe of exculpatory verdicts was divided mainly between rightful acquittals of the innocent—or those not proven guilty—and corrupt acquittals of true offenders. By the same token, however, the bench might have overestimated the instances of nullification in close cases. Attention to this form of jury behavior might have blinded the bench to much of the corruption that plagued the system. The procedures that concealed so much from the bench conceal just as much—or more—from us. In reconstructing the perspective of the bench, we come to understand how little insight the judges were allowed into the actual workings of the system they administered. In the end, we cannot be certain whether they hesitated to draw any general conclusions, given their actual position of ignorance, or whether, without real justification, they drew such conclusions. A fortiori, we cannot know whether the bench thought it was more commonly confronting outright jury corruption, or well-intentioned jury nullification, or something in between.

I

The Crown and royal officials were of course aware of the many problems that beset the administration of criminal justice. They sought in a variety of ways to combat the bribing and intimidation of juries, which were among the most serious of those problems. So far as one can tell, however, the official response rarely included either the refusal to enter a verdict or the punishment of a particular trial jury. Grand juries could be fined for intentional concealment when they failed to present a felony, but trial juries were, by and large, immune to penalties for acquittals or verdicts of pardonable homicide. Why should this have been so?

The nature of criminal procedure shielded jurors against judicial monitoring of their behavior. In most cases the bench was dependent upon the jury and the defendant for information concerning the defendant’s guilt or innocence. The judges might have suspected some mode of corruption, but they could not prove that it existed in individual cases. The judges at gaol delivery could invoke the strictest standards of the law but could not impose them upon the jury. They could relieve their frustration only by getting on to the next case, the next county town. Evidence of false testimony lay all about them, but pursuing it would have been very time consuming. Testimony at coroners’ inquests and before sheriffs and justices of the peace could not have been as systematically wrong as the verdicts of petty juries made it appear. Yet if questioned, the jurors would simply have continued to swear on their oaths that the

2. See above, Chapter I, text at n. 62.
defendant was not guilty. The court could have done little, short of undertaking a full-scale investigation of the homicide or theft, and lacking a police force or any sophisticated evidence-gathering techniques, even that seldom would have made the matter any clearer.

Ironically, our best evidence of judicial attempts to get at the truth in individual cases comes from cases about which the bench possibly cared least—cases involving verdicts of self-defense. Here the judges had some leeway in testing verdicts, for the jury had to state the evidence that justified the special verdict; a simple "not guilty" or "self-defense" would not do. There can be little doubt that the bench was aware that in many cases involving verdicts of self-defense the strict rules of the law had not in fact been met. The numbers of such verdicts were sometimes overwhelming; we must infer judicial recognition of realities. Moreover, the rolls themselves reveal judicial caution in self-defense cases and even attempts to trick defendants or to steer juries into an admission that would preclude a judgment of pardonable homicide.

The trial rolls indicate that the judges sometimes questioned the jurors closely, particularly when the jury's original statement left unclear whether the defendant had in fact been placed in a position from which he could escape only through physical retaliation. In a few such cases the jurors responded that the defendant might have turned tail and outrun his assailant, an assertion that condemned the defendant. But usually jurors proved to be made of sterner stuff. In several cases from the early 1290s separate juries resisted what appears to have been a concerted effort to restrict the availability of pardons de cursu to those who truly deserved them under the law. Responding to judicial queries, the juries strengthened their original verdicts: the deceased "lay upon [the defendant's] stomach and held him tightly to the ground"; the defendant was "armed, but had drawn neither weapon," resorting instead to a broken branch;  

3. See below, section IV.
5. C 260/7, no. 46A (1293). In this case, the jurors stated that Gregory le Waleis threw Thomas de Gloucester "to the ground, lay upon him, and drew his knife desiring to kill him. Thomas, perceiving this, and fearing likewise his own death, drew his knife and struck Gregory as the latter lay upon Thomas's stomach." The justices then asked the jury whether in fact Thomas might have escaped without killing Gregory, to which the jury responded, "No, because Gregory lay upon Thomas's stomach and held him tightly and firmly to the ground" ("et ipsum strite et firmiter ad terram tenuit"). Their reply having satisfied the court, the defendant was remanded to prison to await his pardon. The pardon is recorded in C.P.R., Oct. II, 1293, p. 40.
6. C 260/6, no. 6 (1292). The jurors were asked whether Gilbert had a sword or a knife and, if so, whether he had drawn either. When they replied that Gilbert was so armed, but had drawn neither weapon, the court, obviously doubtful as to the lethal nature of Gilbert's
the defendant could not have fled because the deceased was faster than he was. Only in the second case did the bench refuse to accept the verdict the jury insisted upon. A second jury was called, which supported the first jury and ensured that the defendant would receive a royal pardon.

Although the rolls do not reveal it, it is possible that judges frequently badgered juries into returning verdicts of guilty. As Henry Summerson has demonstrated, we may not accept the trial rolls as evidence of all that transpired at the trial. If my depiction of jury behavior in self-defense cases is accurate, then the rolls are patently deceiving guides to the real world of the medieval courtroom. There are, however, strong reasons for doubting that judges successfully steered juries toward capital verdicts. Relatively few defendants, as we have seen, received such verdicts, and too many verdicts of self-defense were registered for us to imagine a coercive bench. We must either assume that the bench was in sympathy with the jury in close cases or that it was powerless to halt a practice it opposed. The latter possibility cannot be rejected out of hand: clearly the bench opposed all forms of outright corruption, but the continuing protests against such practices suggest that they persisted despite official resistance.

The apparent weakness of the bench and of royal officials should come as no surprise. The institutional or procedural bars to establishment of jury corruption or nonadherence to legal rules in given cases—the very fact of a self-informing jury—reflected the limits to royal administration.

attack, asked the jurors once again whether Robert could have escaped without slaying Gilbert. The jurors reiterated their opinion that he could not have done so. This failed to satisfy the court, however, and only after a second jury had been impaneled and had supported the verdict of the original jury was the defendant awarded a special verdict. The enrollment indicates in a later hand that Gilbert was pardoned.

7. C 260/6, no. 16 (1292). The petty jury stated that Alan de la More killed John Tyrel in self-defense after a great chase. The two had argued until John ran home to fetch a sword. "Alan, seeing John approaching, and desiring to evade John's malicious intent, kept himself underneath the horse his father, Robert, was riding. Robert did all in his power to prevent John from striking Alan, but John chased Alan into a certain corner" where, as a last resort, Alan retaliated with a mortal blow. The court asked whether Alan could have fled before John returned from his house armed. The jury replied that the defendant could not have fled because John was faster than he ("Johannes erat celorior predicto Alano"). Compare C 260/23, no. 23 (1332), where the jurors testified that the defendant fled as fast as he could ("velocior curru quo potuit"), but his assailants were even fleeter and caught up with him ("velociores denuum ipsum . . . attinxerunt").

8. Summerson, "Plea Roll and Year Book." Summerson has shown that judges questioned juries at the eyre but that the plea rolls record jury statements as though made sua sponte and not in response to such questions. It does not appear, however, that the bench overturned acquittals; it is possible, however, that judicial attitudes led some juries to convict where otherwise they might not have done so. Whether the bench questioned jurors at gaol delivery (as opposed to the eyre) remains unclear. See above, Chapter 1, n. 58.
In the area of criminal law, the Crown was dependent upon the cooperation of society at large, and continued to be so, though in ever lessening degrees, until modern times. About the best officialdom could hope for was to convert its pervasive weakness into a moderate strength by associating itself with the popular impulses that the jury represented. This it did, though we cannot be sure it did so with any degree of self-consciousness. But it was, in any case, only one of several policies the Crown pursued. We must sort out the contradictory aspects of the royal administration of the criminal law before we can speculate as to why the Crown accepted not only the jury but prevailing jury practices as well.

II

Medieval legislation reveals the preoccupation of England's rulers with serious crime. Homicide and theft were but parts of a larger problem of disorder that attended changes in late medieval society. The periodic demobilization of military forces unleashed unmanageable numbers of potential brigands. Plague and famine created dislocations that taxed the restraining tendencies of medieval social organization. Town life and wealth spawned antipathies for which there was no solvent, and assaults against both were not easily checked. It is difficult to overestimate the rudeness of conditions, the commonness of petty warfare, and the insecurity of life. As time went on conditions worsened, and the elaborate legislative schemes to halt violence became increasingly utopian and fruitless.

There remained of course a world of difference between rural settlements and the populous areas along the most frequented highways. But even peaceful rural villages were subject to occasional pillage by roving gangs and the henchmen of local political magnates. The late medieval rolls of the justices of the peace and the justices of gaol delivery evidence increasing amounts of organized criminal activity in all parts of England. Until a detailed analysis of late medieval crime is undertaken we shall not be able to speak with confidence about levels and locales of criminal activity. Nevertheless, if legislation and the extant trials rolls are a guide to the perspective of the Crown and bench, we must conclude that officialdom perceived a land almost bereft of public order.

9. Hanawalt (Crime and Conflict) has produced such a work for the early fourteenth century. No similarly comprehensive study exists either for the late thirteenth century or for the century following the Black Death. For an important discussion of the role of arbitration as a brake on public disorder in the latter period see Edward Powell, "Arbitration and the Law in England in the Late Middle Ages," Transactions of the Royal Historical Society, 5th ser., vol. 33 (1983), pp. 49-67.

involved, it would seem, a constant struggle to gain the upper hand over a large criminal population.

To understand the degree to which the ruling elites focused their attention on the worst excesses of public disorder, we must examine the history of the attempts to restrain the royal power to grant pardons of grace. We have seen that beginning in the 1290s English monarchs employed their pardon power to raise a military force and to obtain revenue. This flow of pardons immunized large numbers of offenders from prosecution for all offenses committed before the date of the pardon, and many contemporaries apparently believed that the policy encouraged potential offenders, who might expect to secure pardons in the future. Parliamentary statutes set limits on the royal pardoning power, especially for serious homicides, those committed through ambush or other forms of premeditated attack, typically in the course of highway robbery or burglary. The Crown acceded to passage of these statutes but continued to sell pardons to even the worst offenders. Whatever the success of the statutes, it is significant that the attack on royal pardons of grace was aimed not at all felonies in general but only at the most heinous kinds of offenses. The point requires some elaboration for not all historians have viewed the matter in this way.

The earliest statutes declared that the king might pardon only those who slew se defendendo or by accident, the traditional grounds for pardons de cursu. These statutes, therefore, appear to have endeavored to prohibit all pardons of grace, declaring that all felonious homicides lay beyond the scope of the royal power to extend mercy. This, in itself, nearly defies explanation: surely contemporary conceptions of justice required greater latitude than the statutes allowed, and literal application

11. See McLane, "Royal Courts and the Problem of Disorder," p. 76.
12. See above, Chapter 1, text at nn. 88–90.
13. See above, Chapter 2, n. 134.
14. As early as 1309, Parliament petitioned the king about the frequent pardoning of thieves ("larons") who had been indicted for "larcines, roberies, homicides," and other felonies. Those responsible for the indictments, so the petition alleged, feared to remain in their communities; many refused to indict out of similar fear. The petition did not suggest any specific remedy, but the king replied that in the future he would grant pardons only to those found to have slain through misadventure, self-defense, or insanity. Rotuli Parliamentorum, 1:444b (1309). The Ordinances of 1311 carried out the royal response in more general language: "That no felon nor fugitive be from henceforth protected or defended from any manner of felony, by the King's charter of peace . . . unless in a case where the King can give grace according to his oath, and that by process of law and the custom of the realm." Quoted in Hurnard, King's Pardon for Homicide, pp. 323–24. The Statute of Northampton attempted to limit pardons to self-defense and misadventure, Stat. 2 Edw. 3, c. 2 (1328), and in 1336 a new statute ordered that the Statute of Northampton be observed, Stat. 10 Edw. 3, c. 2.
of the wording of these statutes plays havoc with the underlying theory of the king as fount of justice.  

It would be a mistake, I believe, to read the early pardon statutes too literally. They may in fact have been speaking to extreme cases rather than to the large intermediate body of simple homicides, and they may have been assuming a distinction close to the one that the statute of 1390 made explicit. It is worth considering how this legislative perspective may have come about.

As we have seen, the law of self-defense required the defendant to prove that he had acted in extremis. Indeed, by the middle of the thirteenth century it was considered felonious for a person who was able to flee to strike and cause death, even if he had been provoked and was in substantial danger. Yet the early treatise writers, when they considered felonious homicide, dealt mainly with its core element, malice, in the sense of a deliberate, unprovoked attack. They rarely considered the case where the deceased had been the assailant, and the defendant, acting without true malice but in unnecessary haste, had chosen retaliation rather than flight. It is unclear even that these writers discussed homicides committed in the course of a brawl freely joined, where one of the blows dealt produced an unforeseen fatal result. Given their definition of pardonable self-defense, had they been pressed to define the outer limits of excusable homicide they would have had to exclude such acts. But

15. The king sometimes pardoned culpable slayers whose acts either bordered on self-defense or for other reasons were not considered especially heinous. See Hurnard, *King's Pardon for Homicide*, p. 244.

16. Bracton seems to consider an unlawful homicide as one committed "in premeditated assault and felony." *Bracton, De Legibus*, 2:438 (fol. 155). He describes felonious homicide "as where one in anger or hatred or for the sake of gain, deliberately and in premeditated assault, has killed another wickedly and feloniously and in breach of the king's peace." *Ibid.*, p. 341 (fol. 121). Bracton does not here consider the provoked slayer who responds merely to save himself without being in extremis. *Fleta*, written a generation after Bracton, refers to wilful homicide as one in which "a man, with corrupt intention, wickedly and feloniously slays anyone by a deliberate attack, in anger or hatred or for the sake of gain." *Fleta*, 2:60.

17. Bracton describes self-defense (by implication) as follows: "[I]f avoidable and he could escape without slaying, he will then be guilty of homicide." *De Legibus*, 2:340 (fol. 120b). Here, Bracton implies the strict rule of self-defense, but does not specifically refer to provoked slayings where the slayer might not have acted out of malice. Nor does he refer to such acts in his discussion of intentional homicide. See above, n. 16. In his discussion of self-defense, where the slaying was "unavoidable," Bracton states that the slayer acts "with sorrow of heart," 2:341 (fol. 121), and "without premeditated hatred," *ibid.*, p. 340 (fol. 120b). But what of the slayer who acts when it was avoidable, though "without premeditated hatred" and "with sorrow of heart"? Cf. *Fleta*, 2:60: "[I]f the necessity were avoidable, without slaying, a man is guilty of homicide, whereas, should the necessity be unavoidable, he will not be liable to the penalty of homicide, because he has not slain feloniously, but from fear and instinctively, to save himself when he could not otherwise avoid his own death."
their writings do not articulate a reason for treating these acts as capital felonies. 18 Thus the practice of focusing only on extreme cases had begun.

As concern about professional and secret homicide grew, the chasm between those acts singled out for special condemnation and those meriting pardons de cursu grew wider. The attention of both judges and legislators, like that of the treatise writers, may have been diverted from the intermediate category of simple homicide. Indeed, this might have been a result of the prevailing pattern of jury behavior, which, as we have seen, narrowed the courts' focus on homicide to the more extreme cases.

Yet another factor sheds light on the likely intent of the early-fourteenth-century pardon statutes: a parliamentary misconception regarding the granting of pardons de cursu. In the thirteenth century, kings personally oversaw the pardoning process. Under this procedure, a few technically undeserving slayers, in the interests of justice, had received pardons for self-defense after trial. 19 In the early fourteenth century, however, the pardoning procedure changed. Routine royal intercession ceased, and the chancellor was empowered to issue pardons de cursu in the king's name. 20 By virtue of this new procedure, pardons de cursu were issued only in those cases where there had been a judicial determination that the defendant had met the legal standard for self-defense. Thus, although the king retained the power to grant pardons for self-defense to slayers who had not met the formal rules of the law, 21 this power was...
seldom if ever exercised. It was the rare case in which a defendant could convince the judges to carry forward his matter for personal royal consideration. The drafters of the early pardon statutes, however, may not have fully understood this; the statutes may have been drafted under the incorrect assumption that such cases might still go forward after trial for royal consideration.

In sum, we cannot be certain that Parliament intended to deprive the Crown of its traditional power in cases long thought appropriate for royal mercy. By allowing pardons only in cases of accident and self-defense, Parliament may well have thought it was leaving intact the royal power not only to pardon *de cursu* according to the strict rules of the law, but also to pardon *de gratia* those simple homicides that the king, out of true mercy and by appropriate extension of the legal rules, desired to treat as if they met the formal requirements.

In any event, by the middle of the fourteenth century statutory preambles and legislative histories provide a clearer insight into the nature of the protest that Parliament had leveled against the Crown. While the statutes continued to distinguish between pardons *de cursu* and pardons *de gratia*, it appears that Parliament, seeking to combat what was perceived as a dangerous rise in professional crime, was concerned mainly with those pardons *de gratia* obtained by the worst offenders. Notorious malefactors who committed homicide in the course of theft were quite possibly the main targets of the legislation. Persons who had
acted on a sudden impulse or in the course of a common brawl were almost never mentioned, though they were probably responsible for most homicides. Parliament dealt, in short, with those acts that incurred public outrage and fear and seemed beyond the most generous limits of legitimate mercy.

During the later decades of the fourteenth century, parliamentary concern with the problem of professional homicide steadily increased. Possibly as a result of this concern, the terminology of royal commissions to justices of the peace came to define more fully particularly heinous homicide or "murder," as it once again had come to be called in official documents,25 and thus to lend special importance to prosecution in such cases. The commission of 1380, for instance, which empowered justices of the peace to take indictments in cases of "murder," associated that term with ambushing and malice aforethought, or true planning.26 And

had been indicted" for the crimes Parliament sought to prevent. *Rotuli Parliamentorum*, l:444b (1309). The statute of 1336 recited: "Whereas murderers, robbers, and other felons, be greatly encouraged to offend, by reason that Charters of pardon of manslaughters ["homicides"], robbery, felonies, and other trespasses against the peace, have been so lightly granted." Stat. 10 Edw. 3, c. 2. The statute of 1340 (Stat. 14 Edw. 3, c. 15), repeated earlier restrictions on pardons: "Charters have been granted without number to felons and manslayers ["larons et homicides"], to the evil example and fear of good people and lawful, whereby thieves, felons and offenders ["larons et meffesours"] be comforted to do their robberies and manslaughters ["roberies et homicides"] and the same do from day to day." In a petition of 1347, Parliament referred to malefactors without number who received pardons "to the great destruction of the people." *Rotuli Parliamentorum*, 2:171a. See also *Rotuli Parliamentorum*, 2:172a (1347). A similar petition of 1353 stated that the king, in response to "suggestions" which were less than truthful, had granted pardons to many notorious felons ("larons") and to common murderers, who were to fight overseas and who returned and plundered the countryside. *Rotuli Parliamentorum*, 2:253b. Kaye correctly notes that Parliament did not distinguish types of felonious homicide in these statutes and petitions. Kaye, "Early History," Part I, p. 378. It is possible that Parliament had in mind all felonious homicides; but it is unlikely that in its attempt to prevent the pardoning of really serious malefactors, Parliament proscribed pardons even to those of generally good reputation who, in a sudden quarrel, struck and slew another person.

25. For an excellent discussion of the use of "murder" as a term of art in justice of the peace indictments in the 1380s see Kaye, "Early History," Part I, pp. 383–89.

26. "We have assigned you to inquire . . . into all thefts, notorious or open, and mayhems
from about that date, legislative demands for limitations on the royal pondering power may have prompted the frequent insertion in pardons for "all felonies" clauses excepting "treason, murder, and rape." 27 In this context, "murder" was not employed as a catchall for felonious homicide but was a term of art. 28

The statute of 1390 gave these legislative demands their fullest embodiment. Limits were imposed on the king's power to pardon homicides committed through murder, ambush, assault, or malice aforethought. 29

Pardons for these offenses were made quite expensive; they could be obtained only through a request making clear the nature of the killing; and to be effective they had expressly to cover these offenses. A trial was to be held to determine the nature of the slaying when a general pardon for homicide was presented to the court. 30

Like its precursors, the statute of 1390 limited the king's pardon power only in cases of homicide. This supports the view taken here of the kind of homicide to which the legislation referred: if the king might not pardon any slayers save those who qualified for pardons de cursu, why might he pardon virtually all thieves? More likely, the king was allowed to pardon all slayers and thieves, save for the most vicious in either class, i.e., those who slew through stealth or in the course of an assault involving highway robbery or household burglary. For the most part, it was the professional criminal at whom the legislation was aimed. And we must suppose that officialdom not only sought to close the escape route of the royal pardon to such persons but that it also desired to see them brought to justice by the juries that tried them. It was these offenders who truly tested the system, not those lesser offenders who, with a little more time, money, or


27. See e.g. C.P.R., March 20, 1381, p. 610; May 7, 1381, p. 624; Dec. 12, 1385, p. 71; Jan. 8, 1386, p. 79; Jan. 16, 1386, p. 94; Feb. 27, 1386, p. 128.

28. See e.g. JUST 3/177, m.7/3 (1393), discussed in Green, "Jury and the Law of Homicide," p. 466, n. 197.


foresight might, through a pardon of grace, legitimately have immunized themselves altogether against trial and the verdict of the country.31

III

If the bench, reflecting the attitudes of the elites of English society, was concerned for the most part with the most serious offenders, so too were juries. We have seen that few perpetrators of casual homicide were hanged and that fully half of those alleged to have committed "murder" were sent to the gallows.32 Doubtless the bench would have preferred an even higher rate of conviction for these latter defendants. They probably suspected that graft and fear accounted for many acquittals of professional thieves and slayers, persons who frequently moved about in gangs and who possessed the means to buy off or frighten their prospective jurors. Nonetheless, the judges must have recognized that most of the law-abiding populace shared a common point of view in this area. This community of interest regarding the most serious offenders may have conditioned the judicial response to jury leniency toward the least serious ones.

We are unable, however, to determine the extent to which the bench acquiesced in jury leniency in simple homicide and much nonprofessional theft. Before examining the factors that support the view that there was very substantial judicial acceptance of jury behavior, we must take note of a few developments regarding the law of pardonable homicide. These developments provide a more substantial context for understanding the impact of jury leniency than I have thus far set forth. The doctrinal changes we must trace are all the more significant because, in the main, jury behavior in simple homicide tended to prevent development of the substantive law.

First, I shall briefly outline the reasons for this process of doctrinal stultification. Then I shall discuss the changes that did occur and suggest that jury behavior conditioned the shape of the evolving law. This discussion sets forth the main body of evidence that reflects the judicial reaction to jury behavior. I shall argue that jury behavior to some extent slowed the development of a policy aimed at reducing serious crime, an ironic result of the dialectical process created by the combined adoptions of a general capital sanction for felony and a lay criminal trial jury. In the final section of this chapter I shall tentatively explore the reasons why the Crown retained the capital sanction for all grades of felony despite the problems it caused.

31. For further discussion of this theme see below, section IV.
32. See above, Chapter 2, text at nn. 16-21.
That juries manipulated the evidence in a large class of homicide cases can hardly have escaped the bench. Although the justices insisted that nothing less than dire necessity justified killing in self-defense, it is possible that they tolerated with some aplomb the juries' leniency in the face of the strict rules. Nevertheless, from the point of view of the bench, remand to gaol to await a pardon and the loss of goods probably seemed a small price to pay for those who had in fact committed capital felony. This fact, then, may have left the justices loath to undertake any extension of the formal law of self-defense. Rather, in every case in which self-defense was alleged, they pressed the jury on two questions: Had the defendant acted out of total desperation? Had he acted without malice?

The jury's inclination to shape the facts in the most positive way for many favored defendants appears to have significantly retarded development of the substantive criminal law. Doctrinal development in the common-law system depended heavily upon a flow of cases raising problems for which the law had no appropriate answer. This flow was choked off early and effectively by the forms and procedures of the criminal law. The absence of special pleading and the inability to raise questions of law by way of appeal from the courts' decisions were detrimental enough. But jury behavior played an additional and key role: juries' efforts to foreclose the possibility of hanging led them to adopt a few existing and predictable patterns of response to cover a wide variety of situations. Had trial juries put forward in candid terms the details of homicides, as inquest juries often did before a coroner, the history of the law of homicide might have been different.

For example, research reveals no settled doctrine during this period regarding slaying in defense of one's kin, as opposed to the established right to defend oneself. Indeed, no discussion of the question by the bench can be found. It is difficult to believe that slaying in such circumstances was, in practice, a capital felony. If it was lawful, why

34. One late thirteenth-century treatise, in dealing with homicide that was not felonious, refers to a person "who slays a housebreaker, at least if he is defending himself or his household at the time." *Fleta*, 2:61. Compare F. M. Nichols, trans. and ed., *Britton* (London, 1865), vol. 1, p. 113:

Or he may say, that although he committed the act, yet he did not do it by felony prepense, but by necessity, in defending himself, or his wife, or his house, or his family, or his land, or his body, from death; or that he killed the man in defense of our peace, or by some mischance, without any thought of felony; in all which cases, if proved, the appellees shall have judgment of acquittal.

Britton is here concerned only with defenses to an appeal. He does not suggest that all these defenses would result in an acquittal if the trial were pursuant to an indictment. Certainly,
does the legal process hide that from our view? One theory might have it that when a slaying had been in defense of kin, the defendant, after the formulistic “not guilty,” entered a special plea stating the true facts, and the court accepted such a defense when it was corroborated by the jury. The clerk might then have enrolled the details, simply as a matter of form, in a manner consistent with the rules of defense of one’s person. But that theory would have the clerks engaging in deliberate, uniform, and pointless falsification of the record. It is more reasonable to suppose that the defendant expressed his case in the strongest and safest possible terms, or that the jury did so on his behalf, and that the litany of deliberate but excusable homicide was always built upon the foundation of saving one’s own life. Defenders of kin (or of any other person for that matter) were reported as self-defenders. The concealment of the true facts was total, and the courts never had to grapple with the question of defense of another. The formulae of the law had, in the hands of the self-informing jury, indirectly stunted doctrinal growth.

It is also probable that the conclusory character of jury verdicts inhibited the development of more subtle rules on the standards to be met by defendants claiming self-defense. If the judges had had to pass upon a wide variety of fact situations, ranging along a spectrum from murderous attack to genuine last resort, they might have developed a series of doctrinal principles and distinctions. The bench might have developed rules to deal with defendants who had come under attack and feared for their lives but had acted somewhat too hastily in retaliation; or, with those whose temper had gotten the better of them, whose malicious intent was of the moment and less than homicidal, but whose blow had been deadly. Instead, the courts were presented with only two types of homicide defendants: those said to have acted feloniously, with malicia precogitata and without evidence of mitigating circumstances, and those said to have self-defense would not lead to acquittal in such circumstances. Nor, for that matter, is the passage clear evidence for the proposition that one who defended his kin was entitled de cursu to a pardon of the king’s suit.

35. See above, Chapter 2, text at nn. 58–62.

36. In 1506 it was held that a servant might justifiably slay in defense of his master if his master were otherwise unable to escape, Year Book (Henry VII) (London, 1506), Mich., 21 Hen. 7, fol. 39, pl. 50, but the first clear reference to defense of kin that I have found dates approximately from the 1530s. Spelman noted that Fitzherbert showed an indictment [which alleged] that one Parker found a man between his wife’s legs committing lechery, and he killed the man, and all the justices held this to be felony. But suppose a man means to ravish my wife against her will, and I kill him, it seems that I can do so in defence of my wife, just as in the case where he means to kill her.

slain *in extremis*, in self-defense. Both judicial suspicion of the large latter group and the failure of the system to present "close cases" perpetuated the strict division between felonious and nonfelonious homicide. 37

Although the development of the substantive law of pardonable homicide was thus limited, some significant legal developments did arise out of the judge-jury relationship. I shall refer to two of them here, one involving justifiable homicide—in this case, the slaying of thieves caught in the act—the other involving accidental homicide. Together these developments reflect both the conservative tendencies of the bench, for which jury behavior was at least in part responsible, and the area of agreement between bench and jury concerning particularly heinous social behavior.

2

The category of justifiable homicide, meriting acquittal rather than pardon and forfeiture, was extended in the fourteenth century to include the slayers of felons caught in the act of burglary, arson, or robbery. An examination of this development may suggest why those who acted in defense of property fared better under the evolving law than those who acted solely in defense of their person.

The line between justifiable and excusable homicide had long been unclear and prone to inconsistent judicial treatment. 38 From early times, execution upon a legal order was justifiable. 39 Slaying manifest felons

37. The speculative nature of this section should be obvious. The direct evidence on judicial behavior that would provide the most satisfactory support for these conclusions is simply unavailable. My argument concerning jury behavior and judicial response is developed more fully below, subsection 4. The problem is discussed in the light of general developments in the law of nonfelonious homicide and the role that automatic forfeiture came to play in the fourteenth century.


39. See Bracton, *De Legibus*, 2:340 (fol. 120b).

40. These included "hand-having" thieves, notorious malefactors, and slayers attempting to escape from the "hue and cry" raised against them. For slayers of hand-having thieves, see e.g. J. Parker, ed., *A Calendar of the Lancashire Assize Rolls* [Manchester], 1904), p. 87; Maitland, ed., *Pleas of Gloucester*, p. 23, pl. 89; W. Page, ed., *Three Early Assize Rolls for the County of Northumberland* (Durham, 1891), pp. 78–79, 80, 84 (hereafter cited as *Northumberland Assize Rolls*); A. J. Horwood, trans. and ed., *Year Books of the Reign of Edward the First*, (London, 1863), 30–31 Edw. I, p. 512 (1302). For slayers of notorious malefactors, see e.g. JUST I/734, m.22d/9 (1256); JUST I/60, m.23/5 (1272) (keeper of the peace in Buckinghamshire slew a reputed malefactor who refused to give assurance that he would not harm the countryside and who sought, with drawn sword, to avoid arrest); KB 27/297, m.26d/l (1334); C 260/55, no. 58 (1343); C 145/21/36 (undated); G. Wrottesley, trans. and ed., "Plea Rolls of the Reign of Hen. Ill." in *Collections for a History of Staffordshire* (London, 1883), vol. 4, pp. 214–15; J. H. Wigmore, "Responsibility for Tortious Acts; Its History," *Harvard Law Review*, vol. 7 (1894), pp. 315, 323. For
and those formally outlawed, if they resisted arrest, also came to be justified. Initially, this may have represented an attempt to harness the ancient custom of private retaliation—perhaps because it could not be entirely prevented—by legitimating it solely where the wrongdoer refused to submit to the judicial process. As the judicial system and the test for refusal to submit to it developed, these slayings came to be seen as being on behalf of the law (pro lege). While for a time some tension between the private and pro lege deed may have existed, we may suppose that the latter eventually won out.

By the thirteenth century, most localities were no longer allowed to execute captured outlaws and manifest felons without trial; that custom had become, by and large, frontier law. Indeed, so profound was the impress of royal law that thirteenth- and early fourteenth-century judges sometimes insisted that the slayer of a resisting outlaw or manifest felon show that he had acted as a royal official or pursuant to an official order.

slayers of would-be escapers from the hue and cry, see e.g. JUST l/56, m.44d/l (1249); Northumberland Assize Rolls, pp. 80, 84.

41. Bracton, De Legibus, 2:362 (fol. 128b) ("An outlaw also forfeits everything connected with the peace, for from the time he is outlawed he bears the wolf's head, so that he may be slain by anyone with impunity, especially if he resists or takes to flight so that his arrest is difficult").

42. As early as the seventh century, slayers of outlaws or of manifest felons who would not surrender to the "peace of the king" were protected by the law against retaliation by the kin of the slain. See Ine 33, in F. L. Attenborough, trans. and ed., The Laws of the Earliest English Kings (Cambridge, 1922), p. 47: "He who kills a thief shall be allowed to declare with an oath that he whom he killed was a thief trying to escape, and the kinsmen of the dead man shall swear an oath to carry on no vendetta against him. If, however, he keeps it secret, and it afterwards comes to light, then he shall pay for him." Ine's dooms date from about A.D. 694. H. G. Richardson and G. O. Sayles, Law and Legislation from Aethelberht to Magna Carta (Edinburgh, 1966), p. 13. For a later (tenth century) law to the same effect, see 2 Aethelstan 1.2, in Attenborough, ed., Laws of the Earliest English Kings, p. 127 ("If however, [the thief] tries to defend himself, or if he takes to flight, he shall not be spared"). Cf. Alfred 5 to Alfred 5.3, in ibid., p. 67. Alfred employed the ecclesiastical "sanctuary" laws in his own legislation concerning "house protection," i.e., the protection of a suspect who remained in his home and voluntarily gave himself up to stand trial. See generally C. Riggs, Criminal Asylum in Anglo-Saxon Law (Gainesville, Fla., 1963), pp. 31–36.

43. Riggs describes the procedure that had come to replace the automatic prosecution of the feud. Criminal Asylum, pp. 41–42.

44. See e.g. Northumberlnd Assize Rolls, p. 70. In a case where a felon was slain, but not while in flight, local officials informed the court that it was the custom in Northumberland summarily to dispatch robbers taken with goods in hand. The late thirteenth-century law book Britton, (vol. i, pp. 36–37), probably reflects the older rule rather than contemporary practice: "If any man be found killed, and another be found near him with the knife or other weapon in his hand all bloody, wherewith he killed him, the coroner shall be presently fetched, and in his presence the felon shall, upon the testimony of those who saw the felony done, be judged to death."
before he could be acquitted. Other such slayers required royal pardons, usually for self-defense. Here there was confusion. While it appears that it was lawful for anyone to slay an outlaw or manifest felon who resisted arrest, it was not uncommon for nonofficial slayers to be recorded, in addition, as having suffered attack and therefore slain to save their lives. This, indeed, was the surest defense for one seeking to show that he could not otherwise have taken his victim, and it may have been an embellishment intended to allay judicial suspicion of nonofficial slayers. Yet the inclusion of details of self-defense, which ought to have strengthened the defendant’s claim to an acquittal, may well have been responsible for the inconsistent judicial treatment of nonofficial slayers. By the middle of the fourteenth century, however, the confusion was resolved. Most slayers of outlaws and manifest felons were acquitted; the courts required neither a pardon nor a theory of self-defense.

45. See e.g. KB 27/343, m.2/4 (1346) (defendant commissioned by the sheriff of Norfolk was acquitted); JUST 3/139, m.27d/l (1356) (five men joined two constables in arresting a person who laid waste to goods and chattels of a resident of Norfolk; all were acquitted. The court ruled: “And because it seems to the court that what they did in this case, they did through the law ["per legem"] and through maintenance of the law, it is considered that the aforesaid seven ought to go quit”); JUST 3/135, m.16/2 (1343) (defendant and thirty-four others pursued and slew a person who had been indicted for several felonies. The court, after determining that the deceased had been indicted before his death and that the defendant had a commission based on that indictment, acquitted the defendant and his posse); A. Fitzherbert, Graunde Abridgement, “Corone,” pl. 288 (1330); Livre des Assises, 22 Edw. 3, pl. 55 (1349).

46. See Hurnard, King’s Pardon for Homicide, p. 90.

47. See e.g. JUST 1/65, m.47/15 (1286); JUST 3/43/l, m.14d/7 (1325).

48. See Hurnard, King’s Pardon for Homicide, p. 91, suggesting that in the thirteenth century courts may occasionally have seized upon details of self-defense in cases of justifiable homicide and thought, somewhat irrationally, in terms of excusable homicide. Hurnard observes that courts more often acquitted where the alleged felon had been slain while resisting arrest than where he had been slain attempting to commit robbery, and she speculates “that it was all too easy for the courts to assimilate [the latter] cases to slaying in self-defense.”

49. For example, in KB 27/297, m.26d/l (1334), a certain William, son of Ralph, was acquitted for the death of Adam Doughty, whom he had decapitated. According to the jury, Adam was a notorious robber who had feloniously burgled the house of Thomas, son of Jordan, in Lancashire. William tried to arrest Adam, but Adam stabbed William and fled. William pursued and slew Adam. The court specifically asked the jurors whether William could have taken Adam in any other way, to which they replied that he could not. There is no indication that the bench questioned the jury with regard to self-defense. In JUST 3/135, m.13d/3 (1344), the defendant, taking part with others responding to the hue and cry, shot a fleeing suspect with an arrow. The court ruled that the defendant had acted as an executor of the peace (“ut executor pacis”) and acquitted him. In KB 27/528, Rex, m.xlvi/l (1393), according to the indictment, the defendant saw a stranger (“extraneus”) leading away two horses belonging to others. He raised the hue and pursued the stranger and, in apprehending him, struck him on the neck with a sword so that he fell on the ground. Whereupon the
As we have seen, the class of manifest felons included the ancient "hand-having thief"—quite literally, a felon caught with the stolen goods. But it did not include one intercepted in an unlawful attempt to take goods or commit an assault. In the course of the fourteenth century, however, the courts began to acquit as justifiable slayers some of those who had acted to forestall an attempted felony, namely, those who had slain burglars or robbers. The self-defender, on the other hand, was subjected to the rigor of the law of self-defense for at least another two centuries. This uneven development requires explanation. Why the one change without the other?

While thirteenth-century records reveal occasional acquittals of defendants who slew those attempting burglary or robbery, most such cases resulted in the granting of a pardon for actual, or alleged, self-defense. As with the other early cases, embellishment by the defendant, repeated by jurors under oath, produced a sure result where judicial response to the bare truth was uncertain. The judges accepted the implications for legal theory of this factual grafting. Thirteenth-century treatises dealt with defense of property as an extension of self-defense.
In the fourteenth century, however, the judges formulated a new doctrine giving the victim of housebreaking greater latitude in repulsing his assailant. The proposition was first stated laconically, as if an intonement of the hoary law: “It was presented that a man killed another in his own house se defendendo. It was asked whether the deceased came to rob him: for in such a case a man may kill another though it not be in self-defense.”53 Moreover, the court sanctioned outright acquittal in this case, thus bringing the defendant under the ancient rule applicable to slayers of manifest felons. In 1349 Justice Thorpe restated the rule more broadly: “And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to burgle his house, he may safely kill them if he cannot take them.”54

For a time, however, the courts were uncertain about the breadth of the rule. In 1357 Thorpe and his fellow justices were confronted with a defendant who had slain a burglar. The court ruled: “Because . . . what the defendant did he did in saving his own life in circumstances in which anyone ought to be able to do so lawfully, it is considered that he be quit.”55 This seems to indicate that, while a pardon was not necessary, the defendant had to show he acted in self-defense.

The hesitation of the bench to separate such cases from those of excusable homicide was reflected in another case. It seems to have been settled by 1353 that a man might slay someone who had entered upon his property with the intention of setting his house on fire.56 Yet thirteen years later the justices of gaol delivery of Leicester Castle, Thomas de Ingleby and John Cavendish, showed indecision as to treatment of the defendant in Neel’s Case:

Reginald Walshman . . . came at night around midnight to the house of John Neel and called to John who lay there asleep in his bed to let him come in; he wanted to slay John in John’s house; and John refused him entrance, so that Reginald began to break the doors and windows and he said he would burn the house and John’s wife and everything within the house unless John permitted him to enter. And he intended to burn the house, and John for fear of his death and the burning and for salvation of his life and family got out of bed and went to the door; and Reginald was there with a rock which he threw at John’s head, and John ducked and Reginald stood there with a knife drawn in order to

54. Livre des Assises, 22 Edw. 3, pl. 55 (1349). See Fitzherbert, Graunde Abridgement, “Corone,” pl. 261 (1349); Livre des Assises, 26 Edw. 3, pl. 23 (1353).
55. JUST 3/139, m.29d/4 (1357).
kill John and attacked him wanting to kill him, and John being naked and believing that Reginald intended to burn his house and that Reginald wanted to kill him, in saving his own life, stabbed Reginald with a knife wherein Reginald was slain. And the jury say that John could not otherwise have saved his own life.57

Neel was released in surety pending a gaol delivery seven months later, when he was acquitted. The court had evidently first considered requiring Neel to obtain a pardon, and it appears likely that the element of self-defense was crucial to the judgment of acquittal.

Because the natural inclination of the jury was to embellish instances of defense of property with details of defense of one's person, few cases presented the courts with the critical test of pure defense of property. And those cases that did come forward may have been perceived as ordinary homicides with some embellishments concerning defense of home and hearth. The mingling of defense of property with defense of person may have resulted in judicial caution toward allegations of the former, and it may have slowed the expansion of the category of justifiable homicide to include defense of property. Nevertheless, that the court in the end granted an acquittal in Neel's Case suggests that, whether or not self-defense remained a necessary element, this expansion had been accomplished. Moreover, by the last third of the fourteenth century slayers of nocturnal housebreakers no longer appear among those pardoned for homicide se defendendo, though earlier such cases had been abundant.58

Thorpe's 1349 ruling had pertained not only to housebreaking but also to attempted robbery.59 This position, or something very close to it, was adopted by the whole court when Thorpe put the following case four years later: "A man was indicted for homicide; it was found that the deceased was a thief who assailed the defendant and pursued him closely so that the defendant slew him.... [All] say that he will go quit."60 Here, too, it appears that some element of self-defense remained crucial to the finding of justifiable homicide. The effect of this ruling is more difficult to ascertain from the rolls than is the effect of the ruling concerning the slaying of burglars. Again, the records of acquittals provide very few details about the cases. Moreover, the absence of victims of attempted robbery among those pardoned for self-defense is not helpful here. An attack in the open had always been described as an assault with intent to

57. JUST 3.142, m.17d/1 (1366).
58. See above, n. 51.
59. See above, n. 54 and accompanying text.
60. Livre des Assises, 26 Edw. 3, pl. 32 (1353).
slay, since this was a necessary allegation in self-defense. Other motives, such as robbery, had rarely been mentioned.

This part of Thorpe’s ruling was nevertheless of considerable significance because, at least in theory, it broadened the scope of justifiable homicide to include slaying to prevent felony. The new rule concerning the slayers of housebreakers was perhaps less novel; the wrongdoer had already committed the ancient but nonfelonious breach of the peace known as *hamsocn.*

The extension of justifiable homicide to include slayers of would-be burglars and robbers was very possibly a response to what was thought to be—and may in fact have been—an unprecedented contemporary rise in professional crime. Thorpe’s ruling was not expanded, however, to include slayers of criminals who assaulted with intent to kill rather than to rob, not even to include slayers of would-be “murderers,” as those who committed homicide through stealth were coming once again to be known. The failure to treat the slaying of a would-be murderer as justifiable homicide is particularly puzzling since by the end of the fourteenth century murderous assault was considered especially heinous. This is shown, as we have seen, by the 1390 statute greatly restricting the grant of pardons “of grace” to perpetrators of stealthy homicide.

The courts may have drawn this line between professional robbers and stealthy killers because the former were considered to be a threat to the entire community, while the latter were deemed a threat only to their intended victims. But it seems more likely that the judges were responding to the juries’ practice of finding self-defense in many less serious, yet felonious and undesirable homicides. The bench must have realized that many homicides described as *se defendendo* had in fact been committed in the course of drunken brawls and similar rows. Against these, too, the law had to provide deterrence, and the procedure of pardon and forfeiture, which was a quasi-sanction, may have seemed an appropriate deterrent. The true self-defender, however, especially the one who had repulsed a murderous assault, might have deserved better; moreover, in his case even the logic of deterrence mandated acquittal. But how were the judges to identify the true self-defender? Jury testimony and the defendant’s own story were so formulistic that discrimination among alleged self-defenders was an impossible task. Evidence as to the exact nature of the victim’s alleged assault would have been difficult to obtain,

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as would have been the truth regarding the defendant’s efforts to escape without dealing a mortal blow.

The theory of royal mercy that underlay the granting of pardons may also have had something to do with the retention of pardons in self-defense cases. Although by the fourteenth century pardons for self-defense and accidental homicide were granted *de cursu*, the vestiges of the earlier idea of special consideration survived at least in the formulae that were inscribed on charters of pardon.62 Nevertheless, pardons for excusable homicide were retained as a matter of policy as well as of tradition. For, as we shall now see, while self-defenders required pardons in virtually every case, those who slew by accident did not. “Mercy” was required, it seems, only where suspicion of wrongdoing remained.

3

Throughout the thirteenth century the prevailing rule in cases of accidental homicide was that the slayer was required to obtain a royal pardon. The pardon issued as a matter of course upon a finding of unintentional homicide (misadventure). Even grossly negligent slayers were included within this class of excusable homicide.63 By the late fourteenth century, however, the courts frequently granted an immediate acquittal for accidental homicide, no longer insisting that the slayer forfeit his chattels and secure a royal pardon. Though there is no clear evidence as to when and how the new policy was formulated, its widespread application is clear from the rolls.64

62. See e.g. C 66/230, m.21 [“Moved by mercy, we have pardoned...” (“Nos pietate moti perdonavimus...”)]. The pardon still carried the proviso that the defendant “stand to right” (“ita tamen quod stet recto in curia nostra”) should the kin of the slain wish to bring an appeal (literally, “should anyone wish to speak against him”). By the late thirteenth century, if not long before, the kin’s right to appeal a pardoned slayer had lapsed. It is unlikely that it remained even in theory, though the form of the pardon was unchanged. Green, “Jury and the Law of Homicide,” pp. 419–20, n. 22. Nevertheless, it is still barely possible that this ancient claim to private compensation against an excusable slayer accounted in part for the retention of the pardon requirement. One would still have to explain why a pardon was required rather than acquittal with an obligation to stand to right. The rule of automatic forfeiture suggests that pardoned slayers were disadvantaged for reasons other than the kin’s right to appeal. Moreover, the expansion of the class of justifiable homicide was accomplished without concern for the rights of the deceased’s kin. It led to acquittal of some who formerly required a pardon for self-defense. As we shall see, judicial policy changed with regard to accidental homicide with the same potential effect on the theoretical right of the kin to bring an appeal.

63. See generally Hurnard, *King’s Pardon for Homicide*, pp. 98–108.

64. But see *Year Book* (Edward III), Hil., 44 Edw. 3, pl. 44 (1371); Fitzherbert, *Graunde Abridgement*, “Corone,” pl. 94 (1371) (judicial statements that acquittal is appropriate in accidental homicide cases). For a discussion of an unsuccessful attempt during the reign of
The majority of all homicide defendants delivered before the justices were acquitted outright. In most of these cases the clerk recorded on the trial roll only the homicide for which the defendant had been indicted, the date and place of the act, the jury's verdict of "not guilty" ("non est culpabilis"), and the court's judgment of acquittal. The evidence does not permit us even to estimate how many such cases were acquittals on verdicts amounting to misadventure. Occasionally, however, the clerk did record the facts of the case in more detail, and from this small body of hard evidence it is possible to discern a new departure in the courts' handling of accidental homicide. Judges now acquitted many defendants who had received a jury verdict of accidental homicide. There is additional support for this conclusion: late-fourteenth-century trial rolls contain few pardons for misadventures, and coroners frequently neglected to record an indictment where the inquest jury found misadventure, as though they believed that the courts were not concerned with such cases.

The gradual disappearance in the fourteenth century of the pardon requirement for accidental homicide may have been the natural outgrowth of an older distinction between homicides resulting from the slayer's act alone and homicides produced by intervening circumstances over which the slayer had no control. Thirteenth-century courts had already more or less systematically acquitted in some accidental homicide cases, for instance those involving carts and ploughs. From one perspective, acquittals in these cases may be taken as a "rough-and-ready" approach to the problem of negligence. More often than not the victim, rather than the driver, had failed to use care. In shooting accidents and other cases where the slayer was more likely to have been the negligent party, the pardon requirement was maintained. A second plausible explanation of the early resort to acquittals in driving cases is that, by and large, the slaying could be attributed to a nonhuman agent. The cart, plough, horses, or oxen, rather than the driver, might be perceived as the

Edward I (1272–1307) to reform the law in this direction, see Hurnard, King's Pardon for Homicide, p. 279.

65. E.g., the four rolls discussed in Green, "Jury and the Law of Homicide," p. 430, dating from the period 1351–85, contain many cases of self-defense but none ending in the defendant's remand to prison to await a pardon for accidental homicide.

66. See below, n. 96.


68. Ibid., p. 102. See, however, George P. Fletcher, Rethinking Criminal Law (Boston, 1978), p. 359. Fletcher stresses "the important conceptual distinction between acquittal for no homicide and a judgment or pardon for an excused homicide." I agree that this was an important distinction, but I believe that in some cases the facts supporting a conclusion of "no homicide" were false and that the bench therefore sometimes required a pardon. See below, text at nn. 91–95.
responsible agent. There is an evident confusion between an embryonic concept of fault and the ancient theory governing homicide committed by a nonhuman agent, for which payment of a "deodand" was required.69 The courts' stress on the driver's absence of intent, rather than upon his lack of negligence, is therefore revealing. Frequently, when a court had determined that the driver had not "intended" to strike the victim, it concluded that his horse or cart was to blame. The horse might as well have been riderless or the cart empty, for the courts treated such a case as no different from that of a death caused by a tree that had been blown down in a windstorm.70

Most of the late-fourteenth-century accidental homicide cases in which the defendant was acquitted involved situations where it was perceived that either the slain person himself or an intervening object had been the real cause of death. In this sense, these cases represented a logical extension of the earlier pattern of acquittals for accidental homicide. Archery accidents were among the most common causes of unintentional slaying throughout the Middle Ages.71 Target shooting, a favorite sport, continued to take its toll despite attempts to require strict safeguards.72 Arrows went off course in several recorded instances, one, e.g., after striking a tree branch73 and another after glancing off the ground.74 The defendant in each of these cases was acquitted, though in the second only after the court took the matter under advisement.75 Of the shooting-accident cases, these two are the closest in nature to the thirteenth-century acquittals. The defendant had set in motion the agent of death, but circumstances perceived to be beyond his control had

69. The deodand (literally, "to be given to God," but in fact given to the Crown) represented the value of the agent that caused the death. See Hunnisett, _Medieval Coroner_, pp. 32-34; Pollock and Maitland, _History of English Law_, 2:473-74.

70. See e.g. G. Fowler, trans., "Roll of the Justices in Eyre at Bedford, 1227," in _The Publications of the Bedfordshire Historical Record Society_ (hereafter cited as _Bedford Eyre_), vol. 3 (Aspley Guise, 1916), p. 153 (cart); JUST 1/280, m.18d (1286) (cart); _London Coroners' Rolls_, Roll A, no. 30 (1301) (horse ran over deceased "against [the rider's] will").


72. Jurors at a coroner's inquest, JUST 2/207, m.2d/1 (1397), described an accident resulting from the slain man's negligence in the course of an event subject to specific regulations at a well-marked area: 

"It happened that . . . William Swayne negligently ["necligenter"] and in a disorderly way stood beyond the marker within the limits and bounds set up for the shooting match so that while William Swayne stood negligently in the said manner, William Stonehale shot him with one of his arrows." Cf. JUST 2/59, m.18/3 (1387), where the defendant had yelled a warning to someone who was crossing the shooting area.

73. JUST 3/167, m.72/1 (1384).

74. JUST 3/177, m.47d/2 (1391).

75. In this case, the court also ordered forfeiture of chattels. JUST 3/177, m.47d/2 (1391).
Judge, Jury, and the Evolution of the Criminal Law

determined the outcome; on the other hand, in no way could it be said that the deceased had been responsible for his demise. 76

Cases in which the deceased was said to have been at fault were not uncommon, 77 however, and in the late fourteenth century they began to play a significant role. A few shooting cases suggest that the deceased’s behavior—contributory negligence, as it were—had become a matter of great concern. Indeed, it is in the context of the victim’s action in these cases that the term negligence first gained prominence on the medieval criminal trial rolls. Only on the rarest occasion was that term associated with the slayer; his negligence was almost never at issue. 78 To the modern mind, it might seem strange that the law was more lenient toward those who had used lethal weapons in a negligent or even reckless manner than toward those who had retaliated against murderous assaults. 79 But the paradox is easily explained. The court looked solely to the slayer’s intent, and slaying without malice was not felonious. Thus, if it could be shown that the deceased had caused his own death in a manner the slayer could not have predicted, there was a strong presumption of nonmalicious

76. For an early example of acquittal in a shooting case, see JUST 1/1060, m.13d (1279), and the discussion in Hurnard, King’s Pardon for Homicide, p. 279.

77. See above, text at n. 68.

78. In a 1416 case, JUST 2/170, m.1/2, a coroner recorded the following: “Geoffrey Angulluskey drove a cart . . . [and] through his negligence and inebriation the nearside wheel of the cart ran across the head of Julia who lay at the foot of the wall of her mother, Lucy, without any unusual motion of the cart or horses. . . . The value of the wheel is twelve pence; the said wheel killed Julia . . . and Geoffrey fled and he has no goods.” The coroner assigned the negligence to the driver, the only such case I have found on any of the extant coroners’ rolls, but he then treated the death as a misadventure due to other than a human agent. He blamed the death on the wheel, and assessed its value for purposes of the deodand. See above, n. 69. Geoffrey’s goods were assessed presumably because he fled rather than remained and gave evidence. The coroner was subsequently amerced; an assize clerk later added: “The coroner is at fault for failing to mention who ought to respond.” Most likely the assize clerk, like the coroner, treated the case as a misadventure due to other than a human agent, and the amercement was for failure to note who ought to respond for payment of the deodand. It is possible, although I believe very unlikely, that the clerk, noting the coroner’s reference to the driver’s “negligence,” believed an indictment was merited and was assessing the coroner for failure to frame one.

79. See e.g. C 145/11/30 (1261) (defendant threw a knife at a cat but hit and killed his wife instead); C 145/85/18 (1320) (defendant threw a knife at a wall but hit and killed his wife instead).

80. Maitland remarks: “That a man who kills another in self-defence should require a pardon will seem to us even more monstrous than that pardons should be needed where there has been misadventure, for the ‘misadventure’ of this age covers many a blameworthy act.” Pollock and Maitland, History of English Law, 2:483. In my view, however, the formal rules of self-defense took account of the fact that jury verdicts of self-defense concealed many blameworthy acts. While this does not account for the leniency toward negligence, it does help explain the relative severity of the self-defense rules.
homicide. It was to that end that the allegations in shooting cases leading
to acquittals recited that the deceased had gotten in the way and been
slain "by his own fault" ("in defectu suo proprio"),\textsuperscript{81} or that the deceased
had run into the target area through his own foolishness or negligence.\textsuperscript{82}

The allegation that the deceased had been foolish, reckless, or at fault
runs through the largest and, for legal theory, the most important class of
cases identifiable as resulting in acquittal for misadventure. These are
cases in which the defendant had the weapon causing death more or less
under his control, but the deceased, it was said, ran or fell upon it. What
came to be of critical importance were the attendant circumstances.
Acquittals were gained easily in homicides caused by accidental contact
with sheathed knives in games of football and wrestling.\textsuperscript{83} More problem-
atic were cases that fell between self-defense and accident, in which the
deceased allegedly launched a deadly attack upon the defendant only to
die "through his own fault," unintentionally plunging upon his intended
victim's weapon.\textsuperscript{84} In essence, these were cases in which self-defense had
been transformed into accidental homicide.

Accidental death in the course of deadly assault, which appears
occasionally on the early trial rolls,\textsuperscript{85} became very common in the late
fourteenth century.\textsuperscript{86} By then, of course, a great deal more was at stake
and much depended upon the characterization of the defendant’s act.
According to the policy initiated in the 1340s, the excusable slayer not
only was required to obtain a pardon but lost his chattels whether or not
he had fled.\textsuperscript{87} By the later fourteenth century, however, if the excusable

\textsuperscript{81} See e.g. JUST 3/180, m.24d/8 (1393).
\textsuperscript{82} See e.g. JUST 2/207, m.2d/l (1397). But see JUST 3/185, m.8d/3 (1398), where similar
allegations as to the deceased's behavior led to defendant's remand and pardon.
\textsuperscript{83} See e.g. JUST 1/1194, m.l/1 (1272) (football); C 145/38/20 (1280) (football); JUST
3/167, m.30/l (1381) (football); \textit{Bedford Eyre}, p. 1 (wrestling). Cf. C 144/27/31 (1287)
(dancing).
\textsuperscript{84} Compare JUST 3/176, m.6/2 (1390); JUST 3/181, m.7d/l (1390); JUST 3/179, m.6/2
(1391); JUST 3/183, m.2/l (1395); JUST 3/179, m.49/l (1397); JUST 3/205, m.11d/7 (1427)
cases ending in acquittals); with JUST 3/179, m.31 (1387); JUST 3/179, m.28d/6 (1393);
JUST 3/179, m.38d/3 (1394); JUST 3/180, m.46d/3 (1395); JUST 3/180, m.14/8 (1397)
defendants ordered to obtain pardons).
\textsuperscript{85} See e.g. C 260/2, no. 47 (1280); C 144/31/12 (1292); C 260/20, no. 16 (1309). See also
\textit{Hurnard, King's Pardon for Homicide}, pp. 95-96.
\textsuperscript{86} See above, n. 84 and cases cited therein.
\textsuperscript{87} See Hurnard, \textit{King's Pardon for Homicide}, p. 147. See generally Pollock and
Maitland, \textit{History of English Law}, 2:481. It is not possible to determine the exact moment
this new policy came into being. The first Year Book reference to a general rule of forfeiture
is \textit{Year Book} (Edward III), Hil., 21 Edw. 3, pl. 23 (1347). See also \textit{Year Book} (Edward III),
Mich., 44 Edw. 3, pl. 55 (1370); \textit{Year Book} (Henry IV), Easter, 2 Hen. 4, pl. 6 (1400).
Examination of the gaol delivery rolls yields very uncertain information. Clerks did not
always record forfeitures, and, even before 1340, they often failed to note flight. Recording
slaying were accidental, the slayer stood an excellent chance of acquittal and retention of goods. The court therefore was careful in these cases to determine—or at least to elicit a sworn assertion—that the defendant had drawn the knife or sword solely for the purpose of self-defense, that he had held it steady as a bar to further assault, and that the deceased had of his own motion plunged onto the defendant’s weapon. The defendant, it was sometimes said, had not supplied any motion or force at all. The tenor and form of the testimony bears a greater resemblance to that produced in the late-fourteenth-century shooting accidents than to that set forth in the thirteenth-century cases of deaths suffered by negligent assailants.

Even with explicit, sworn statements from the jurors, the bench appears to have been cautious with allegations of death resulting from negligent assault. The acquittal rate when the jury brought back a finding of this kind seems to have lagged behind that for misadventures surrounded by other less suspicious circumstances. Indeed, the fact that very few of these latter cases, such as deaths resulting from target shooting, appear on the rolls suggests that they led automatically to acquittal with relatively little testing of the evidence.

flight was unnecessary before forfeiture became general: where forfeiture was indicated there must have been flight. Afterward, since flight was no longer a prerequisite for seizure of goods, it was an equally purposeless point for the busy clerks to make. Hence, neither the failure to indicate forfeiture nor the indication of forfeiture without mention of flight necessarily indicates whether the automatic forfeiture rule was in effect. For gaol delivery rolls evidencing the haphazard application of the new rule, see JUST 3/129 (1336–46); JUST 3/131 (1337–55); JUST 3/134 (1341–51), passim. See below, n. 105 and accompanying text. 88. But see JUST 3/177, m.47d/2 (1391), where the defendant was acquitted but forfeited his chattels.

89. See e.g. JUST 3/17A, m.8/4 (1351) (after the deceased had struck the defendant and gravely wounded him, he ran after the defendant, who held a pitchfork between himself and his attacker; the deceased then “stupidly ran upon the pitchfork”); JUST 3/176, m.6/2 (1390) [the deceased had thrown the defendant into a ditch and had fallen accidentally on the latter’s knife; the court asked whether the defendant had, out of any malice, held his knife upward toward the deceased (“ex aliqua malicia sursum potuit cultellum suum versus . . .”)]; JUST 3/179, m.6d/2 (1391); JUST 2/60, m.13/2 (1394) (the defendant held a sword between himself and his assailant without moving it); JUST 3/179, m.3/1 (1389) (the jurors stated that the defendant had not moved his weapon but held it still; he nevertheless had to obtain a pardon for self-defense).

90. See above, n. 85.

91. Cf. cases cited above in n. 84 with cases cited above in n. 83. It is interesting to note that Thomas Cauteshangre, one of the coroners who responded to the new judicial policy of acquitting in accidental homicide cases by not framing indictments in many such cases, did continue to frame indictments in cases where the deceased was said to have run against a knife held up in self-defense. See e.g. JUST 2/155, m.9/3 (1382); JUST 2/155, m.10/3 (1383); JUST 2/155, m.11/5 (1385); JUST 2/155, m.16/1 (1389); JUST 2/155, m.21/3 (1392).
The more frequent enrollment of details in cases where "accidents" stemmed from fights suggests that the courts had some difficulty in determining liability in such cases. Perhaps the judges suspected that jurors had now found a convenient way to obtain acquittals for those who had perpetrated simple homicide: rather than portray them as self-defenders who struck the fatal blow, jurors could go one step further and turn them either into "accidental" slayers on whose weapons murderous assailants had, through their own fault, flung their bodies or into "nonslayers," the deceased having "slain himself." Evidence of the bench's suspicion regarding such verdicts can be gleaned from the fact that many of these defendants who were not acquitted, but who were instead required to obtain a pardon, were pardoned for self-defense rather than for accident. Judicial caution in the face of the new formula is understandable, yet at times appears extreme. One court, e.g., went so far as to discuss whether a pardon was required for a defendant who allegedly ran from his assailant and was spared when the latter slipped and fell upon his own knife. Perhaps the cases involving assailants said to have fallen upon their own weapons had multiplied beyond all belief.

92. For cases in which the formula "the defendant slew himself" ("se ipsum interfecit") appears, see e.g. JUST 3/179, m.4d/2 (1390); JUST 3/179, m.6/2 (1391). In a yearbook case [Year Book (Edward III), Mich., 44 Edw. 3, pl. 55 (1371)], Knivet, J., stated that had the defendant slain in self-defense, pardon and forfeiture would have been required; here they were not required because the deceased, in attacking the defendant, had fallen upon the defendant's knife and had thereby killed himself.

A sixteenth-century treatise groups this genre of case with suicide ("felo de se"). William Staunford, Pleas of the Crown (London, 1557), p. 20 (1557). At another point, however, Staunford treats such cases as though they turned upon the question whether the defendant had any recourse other than to draw his knife. Ibid., p. 16a. The implication is that such homicides were perceived as accidents for which no blame attached to the defendant rather than as true suicides. Staunford distinguishes two fourteenth-century cases in an effort to explain why one required pardon and forfeiture while the other did not. A defendant who had held his knife in his hand as he lay on the ground had been acquitted while a defendant who had remained on his feet and held a pitchfork against his assailant's charge was pardoned. In both cases the deceased had plunged onto the weapon, but in the latter, Staunford asserts, the defendant had other means of escape. While fourteenth-century courts did not in fact adhere consistently to a distinction between defendants lying upon the ground and those on their feet, it is possible that in an attempt to weigh the credibility of the jury's testimony, the bench found the former cases more persuasive than the latter. It is also possible that the former cases more often led to acquittals because they were easier to assimilate to accidental homicides where parties engaged in sporting events had fallen upon one another.

93. See e.g. JUST 3/179, m.3/1 (1389); JUST 3/179, m.28d/6 (1393).
94. JUST 3/182, m.18/6 (1395). The defendant was eventually acquitted.
95. See e.g. JUST 3/179, m.27/2 (1388); JUST 3/179, m.27/3 (1388); JUST 3/179, m.4d/2 (1390).
This convergence of the self-defense and accident formulae came at a moment when the law of misadventure was in flux\textsuperscript{96} and the complaints about professional crime were intense. The convergence offered an opportunity for carving out a species of justifiable self-defense leading to acquittal: only those who truly repulsed murderers would fit within the class; less worthy "self-defenders" would continue to move through the pardoning process, suffering forfeiture of goods and chattels. But the new category was based upon a fiction of accidental homicide that itself depended upon a tenuous distinction. It is impossible to determine how well it worked in relieving true self-defenders of the strictures of the law of excusable homicide, or even how long it persisted. The fifteenth-century rolls are too incomplete for us to judge.

It appears that within two centuries of its inception this trend toward acquittals in cases of misadventure was reversed. In the sixteenth and seventeenth centuries the rolls once again reflect a need for pardons in cases of accidental homicide. It is possible that one of the underlying reasons for judicial insistence upon pardons in misadventure was the invention and widespread distribution of firearms.\textsuperscript{97} Whether the courts were seeking to deter negligence or to punish suspected malice is impossible to determine, but it appears that they returned to pre-fourteenth-century practice and refused to acquit defendants, whether or not the jury stated that the deceased had "slain himself."

The foregoing study of the late medieval law of nonfelonious homicide has centered on the effects of jury behavior on the development of the

\textsuperscript{96} The new judicial approach to accidental homicide also caused some coroners to be in doubt as to whether indictment was appropriate in cases of accidental homicide. The nature and extent of the confusion, however, are difficult to trace. When a human agent was involved, the coroner was supposed to record the suspect's name, the value of his goods, and, if he had not taken flight, in whose custody the suspect had been placed. Unfortunately, the extant coroners' rolls reveal very sloppy recording of the essential details so that it is often difficult to determine whether or not the coroner recorded an indictment. Failure to assess the suspect's goods and to note his present whereabouts does not necessarily mean there was no indictment. Each individual enrollment must be interpreted in the light of the entire roll. Some coroners marginated "felonia" beside their indictments, and omission of "felonia" only in cases of misadventure almost certainly indicates failure to indict. Failure to assess goods only in misadventures indicates that no human agent was being held responsible. On the basis of a thorough study of the extant rolls dating from 1350 to 1422, it is clear that treatment of misadventures was highly erratic, depending only in part on who was coroner; some coroners followed contradictory policies in identical cases. For a review of the extant evidence on this matter see Green, "Jury and the Law of Homicide," pp. 450-51, n. 149.

\textsuperscript{97} Ibid., p. 495, n. 299.
substantive law. I have suggested that jury behavior in cases of simple homicide to some extent stifled legal development. Specifically, I have suggested that had there been a free flow of fact situations, judicial discussion of "close cases" might have resulted in the elaboration of the rules of self-defense and felony, singling out true self-defenders for better treatment (acquittal without forfeiture) and producing a class of felonious but noncapital homicide. But lacking direct evidence, it is difficult to prove that judges were in fact influenced by jury behavior. It is always possible, for instance, that judges were mechanically applying the rules of self-defense and that they would have continued to do so even if juries had acted in accordance with the formal rules of liability for homicide.

While there can be no empirical evidence about how courts would have structured the law had juries behaved differently, there are developments in the law of nonfelonious homicide that suggest some legal fluidity and a judicial capacity—perhaps after consultation with the Crown—to modify the traditional common-law rules. The courts singled out slayers of burglars and thieves as justifiable slayers, thus eliminating for them the requirements of pardon and forfeiture. And the courts developed the theory by which some accidental slayers were acquitted on the ground that they were not true slayers but merely instruments by which the victims, through negligence, caused their own deaths.

However, in related areas the courts demonstrated considerable reluctance to modify the substantive rules. The slaying of a would-be murderer was not included within the class of justifiable homicide, and, although acquittals were freely allowed in accidents resulting from target shooting, courts were cautious in acquitting for accidental homicides stemming from fights. The pattern of relative nondevelopment in areas where the courts were faced with facts that might suggest the appropriateness of acquittal is as important as the pattern of fluidity and growth. On the one hand, the law remained static just where one might expect it to: where the defendant had been involved in a fight for which he might have been at least in part responsible. On the other hand, the defendant in some of these cases was under unprovoked and deadly attack. He was resisting behavior that the law sought specifically to deter in much the same way as were those who slew robbers and burglars. Yet only the latter were deemed worthy of acquittal. One is driven to ask why self-defense, especially in cases of defense against murderous assault, resulted in the application of the full rigor of the law of excusable homicide. The answer, at least for the fourteenth century, cannot lie solely in the mechanical nature of judicial application of the law. By then some self-defenders and some perpetrators of accidental
homicide were being acquitted; others were not.98

A second possible explanation for the courts' behavior might have been the Crown's need for additional revenue. As long as true self-defenders required pardons, they suffered forfeiture as well. But considering their likely numbers, acquittal of all true self-defenders would have cost the Crown a relatively small sum, and acquittal only of those true self-defenders who had slain would-be murderers would have involved a still smaller cost.99 If the Crown could afford to acquit many of those who had slain accidentally and most of those who had slain robbers and burglars, it could have afforded to acquitted those who had slain murderers.

The most plausible explanation for the retention of the strict rules of self-defense was the difficulty, given the pattern of jury verdicts, of identifying true self-defenders. But if jury findings that the defendant had slain an attempted murderer were suspect, why were findings that he had slain a burglar or robber not equally open to doubt? Why did the courts treat with caution verdicts to the effect that the defendant had slain accidentally in the course of a fight (i.e., where the defendant had stood motionless and his assailant had hurled himself upon the defendant's knife), while apparently giving credence to verdicts of mischance at target shootings?

98. For a recent, useful comment on this problem see Thomas Glyn Watkin, "Hamlet and the Law of Homicide," *Law Quarterly Review*, vol. 100 (1984), pp. 286-87. Watkin, who deals with this matter only in passing, suggests that the "mere attacker, who is not a robber, has not at the time of his demise yet committed a felony so as to place himself outside the law." The "medieval approach was from the standpoint of the victim not the killer." This is an important point and may speak to the early development of the law. By the fourteenth century its claim on the juristic mind was probably much attenuated. I am not convinced that, by that late date, those who prowled the highways waiting to ambush and slay their victims were thought of as truly different from those who came to rob someone in his home. Moreover, Watkin's suggestion does not seem to explain the difference between the treatment of accidental slayers and slayers in self-defense.

99. It is impossible to determine either the number of true self-defenders or the percentage of them who slew would-be murderers. Of the 10 to 40 percent of defendants who received verdicts of self-defense, many, perhaps most, had failed to comply with the strict letter of the law. Of those who had complied, many had retreated from an attack launched by a friend or neighbor after a heated argument and probably only a few from a truly murderous assault. In any case, many defendants had no goods; others had goods but disposed of them before trial. Moreover, the Crown could not depend on juries to assess the full value of the defendant's goods in cases of true self-defense.

The Crown did stand to gain from forfeiture as it applied to all cases in which juries rendered verdicts of self-defense. See Green, "Pardonable Homicide," pp. 189-90. Moreover, since most of those cases were in fact instances of felonious homicide, the rule of forfeiture served important deterrent and punitive purposes. See below, text at n. 105. The true self-defenders were, of course, victimized by this interaction of jury behavior and judicial response (unless juries refused to state that the true self-defenders had goods).
The suggestion here is that juries did not—or that judges supposed juries did not—engage in total fabrication of the facts but built upon or modified some core of reality. To emphasize the defendant's absence of malice, juries were not beyond construing common fights as one-sided attacks. They assigned to the deceased responsibility for commencing the struggle, often alleging that he had harbored a grudge against the defendant or had taken him by surprise. Such descriptions may have been ritualistic assertions extended by the jury in its desire to promote the defendant's case. Similarly, the assertion that the defendant held his knife motionless against his attacker’s reckless charge stretches the truth but a little further than the clearly acceptable assertion that the defendant actively fought back by striking one blow as he stood, gravely wounded, with his back to the wall.

But it would have been quite another thing for the jury to invent a shooting match or to place the parties in a field where they labored side by side with sharp-edged tools that might go astray. Converting slaying during a fight into slaying to prevent a burglary may have demanded more distortion than the jury was prepared to countenance. After all, in many cases the true facts would have been known to many individuals not sitting on the jury. Reducing complicated facts to particular forms that did "justice" might not have engendered popular disapproval; complete transformation of the facts might have. Moreover, although we cannot be certain about the nature of medieval trials, it is possible that in many cases the defendant told his story first and that the jury repeated, or built upon, his statement. While the defendant doubtless sought to put the best possible face upon the basic fact that he had slain in the course of a fight, he may out of prudence have stopped short of attempting to achieve acquittal through a total invention.

The fact that the bench countenanced some change within the area of nonfelonious homicide, and that rational explanations are available for areas in which the court was reluctant to mandate change, does not, however, prove the proposition that, other things being equal, the bench would have been willing either to modify the outer limits of nonfelonious self-defense or to create an intermediate category of noncapital felonious homicide. Either of those changes would have meant shifting the line between life and death rather than between acquittal and pardon. It is at least possible that even had juries behaved differently, the legal definition of capital homicide would have remained unchanged—that if all perpetrators of felonious homicide had been convicted of that crime, they would all have been hanged.

100. See ibid., p. 433 text at nn. 76–77.
Moreover, even if it is assumed arguendo that judicial confrontation of close cases might have resulted in the elaboration of the law of felonious homicide and self-defense, it must be conceded that such a development could have occurred without a body of close cases. Judges must have been aware that many homicides resulted from brawls that defendants had freely joined and that juries systematically concealed this aspect of the defendant’s behavior. The judges could have redefined felonious homicide to secure justice, to induce different jury behavior, or both. Yet they did not do so. Systematic nullification of the formal rules of felonious homicide continued for perhaps two centuries or more. Why did the Crown not seek to end such nullification by changing the formal rules? To answer this question we must consider once again the development of the administration of the criminal law.

IV

By way of conclusion to Part I, we should attempt to bring together the main themes of these first chapters, to put the problem of the law-finding jury in perspective, and to speculate on the role that rule and sanction nullification played in the larger world of criminal justice. In doing so, however, we must not exaggerate the degree to which any single aspect of the administration of the criminal law was shaped by conscious choice.

The history of the English criminal trial jury has its origins in the twelfth-century transformation of the criminal law. This transformation, which represented an evolutionary development about which we know very little, involved a shift from a more or less private to a more or less public criminal law and a shift from monetary composition between private parties to capital punishment at the hands of the Crown. In theory, neither development required the use of juries, grand or petty. In practice, Henry II, either through improvisation or through elaboration of an existing institution, resorted to presentment by a jury of laymen. It was a short step to the employment of the trial or petty jury, though had the church not opposed the use of the ordeal, that step might not have been taken. The Crown’s recourse to the trial jury suggests an acceptance of deep-seated social attitudes, an awareness of profound administrative weakness, and a sure instinct about how to make things work. It is impossible to say how these elements were related causally, if indeed they

101. There is strong evidence of jury manipulation of facts for the period 1250–1430. The rolls for the period 1430–1550 are too sparse for analysis; thereafter, it appears that juries infrequently returned verdicts of self-defense. See ibid., p. 493. While there is reason to believe the new pattern of jury verdicts began before 1550, the date of the change cannot be determined. See below, Chapter 4, text at n. 69.

102. See above, Chapter I, section I.
were distinct. Probably we ought to understand them as different aspects of the same relationship between ideas and institutions.

The juries, both grand and petty, were bound to play a crucial role. They made possible the implementation (though only on a selective basis) of a royal and capital law of felony precisely because they were of the community rather than of officialdom. From the very outset there must have been a great deal of discretion in the functioning of presentment juries; certainly the trial jury, which reached decisions concerning life and death, made broad-based assessments of just deserts.

Unfortunately we know very little about the administration of the criminal law in the pre-trial-jury period. Specifically we do not know whether the jury behavior that we can ascertain was anticipated in earlier procedures. Until we know a great deal more about the assumptions the Crown and royal officials made concerning lay participation, we cannot really address the problem of the purpose of the jury. As a result, we can only describe how the system of criminal justice functioned and assess official response in the period for which we do have evidence, reconciling ourselves to the fact that for the most interesting questions we do not yet have answers.

Our primary observation has been that the trial jury mitigated much of the harshness of the new system of criminal justice. Given its institutional setting and powers, the trial jury was able to impose upon the new, formal royal process the traditional attitudes that had predominated in the criminal law during its earlier, private phase. This phenomenon is traceable in homicide, where one would expect it to occur with greatest frequency, but it doubtless affected all areas of crime to greater or lesser degree. The substantive law was harsher than social conditions and attitudes would allow. Moreover, juries were forced to make decisions about individuals partially on the basis of the reputation of those individuals in the community. Fact-finding involved an assessment of personal worth: Was the suspect the sort of person likely to have committed a certain act with malice? And almost inevitably trial jury verdicts came to be judgments about who ought to live and who ought to die, not merely determinations regarding who did what to whom and with what intent. 103

The official response to jury law-finding is very difficult to reconstruct. We have seen that officials were likely to be most concerned with the bribing of juries, with extortionate practices, with intimidation by suspects and their associates. Moreover, the attention of officials was drawn to the most serious cases. Jury behavior in simple homicide and casual

103. See Pugh's remarks on this subject in "Reflections of a Medieval Criminologist," p. 98.
theft was to some extent concealed from view. Presentment of the innocent and lack of substantial evidence were all too common for judges to be certain that a given acquittal was not, strictly speaking, merited by the rules of the law. Finally, the bench must have been aware that juries were toughest on the worst offenders, that they made distinctions—both when they convicted and when they nullified either the rule or the sanction in the less serious cases—that corresponded to widely held attitudes.

Jury law-finding, then, was only one aspect of jury deviation from legal rules. It reflected disagreement with those rules but not necessarily a corruption of legitimate legal process. Although it also reflected the Crown’s incapacity to achieve enforcement of the law, other aspects of jury behavior did so much more dramatically. Moreover, it was an aspect of jury behavior that the bench and Crown could accommodate, for it could be understood as an appropriate extension of mercy in individual cases.104

At the same time, jury nullification, particularly in homicide, involved some costs, for it slowed development of the law and induced the bench to deal too circumspectly with some cases meritng generous treatment. The true self-defender suffered most. Those true self-defenders who had slain in the course of resisting burglary or robbery were assured of full acquittal without the pardon requirement only after the middle of the fourteenth century. This seems especially ironic given the bench’s concern with professional crime. Even in the very late fourteenth century, when officialdom was attempting to deal with those who committed homicide through ambush by removing eligibility for pardons of grace, slayers of such offenders still required pardons. Thus jury resistance to the full reach of the capital law of felony interfered, albeit indirectly, with the judicial attack on the truly pressing problems of the criminal law.

The law of sanctions and the criminal trial jury interacted to produce a substantial distortion in the legal process. In the law of homicide, a large and mainly false category of self-defense was employed as a catchall for less serious forms of homicide. Pretrial incarceration, the strains of standing trial, remand to await pardon, and the forfeiture of goods became the de facto sanctions for what a later age called “manslaughter.” Acquittal was probably accorded some true self-defenders, though probably not most. The Crown maintained the substantive legal rules and the institutional structure despite this quite obvious distortion. It did so at the

104. See ibid., p. 9, for the suggestion that in the late thirteenth century the bench showed compassion toward some “imprisoned or fined for appeals which failed,” releasing them “for their poverty.” This “compassion may have infected jurors.”
risk of increasing difficulties in confronting serious crime. Why, we must ask, should this have been so? Why did the Crown not introduce a lesser offense corresponding to simple homicide, or casual theft, for which imprisonment and/or a fine would be the penalty, thereby singling out the worst offenders for capital punishment and the true self-defenders for pardon without forfeiture, and removing the aura of suspicion that attended slayers in self-defense against thieves and ambushers?

In one sense, of course, perpetrators of simple homicides who were alleged to be self-defenders were fined. At least after 1343, all of them were supposed to suffer forfeiture even though they received pardons. Indeed, the rule of automatic forfeiture, which penalized the true self-defenders as well, may have been a belated response to juries' handling of simple homicide. In another sense, some thieves and some felonious

105. Maitland ascribes the new rule to royal desire for revenue generally:

So far as we can see, the homicide who obtained a pardon on the score of misadventure or self-defence (unless he had fled on account of his deed), did not in Henry III.'s time incur that forfeiture of his chattels which was inflicted upon him in after days. But very often he had fled, and this, so it seems to us, may have enabled our ever needy kings to establish forfeiture as a general accompaniment of the "pardon of course." [History of English Law, 2:481].

I suspect, but cannot prove, that the bench was influenced by the frequent recourse of juries to a verdict of self-defense. The new rule of forfeiture also affected misadventure, but, as we have seen, judges began to acquit accidental slayers, except where they suspected misadventure verdicts concealed simple homicides.

There is, however, another explanation, which the bench itself gave as early as 1347. A Year Book entry of that year noted that the Statute of Gloucester, Stat. 6 Edw. I, c. 9 (1278), authorized a pardon for cases of accident and self-defense but said nothing about saving the defendant his goods. Year Book (Edward III) Hil., 21 Edw. 3, fol. 17, pl. 23 (1347). In fact, the Statute of Gloucester dealt with procedures for the granting of writs of inquest into cases of homicide. See Hurnard, King's Pardon for Homicide, p. 281; Pollock and Maitland, History of English Law, 2:481. It therefore provided no occasion for dealing with the matter of forfeiture.

The same Year Book entry reveals an important misconception of the Statute of Marlborough, Stat. 52 Hen. 3, c. 26 (1267). That statute decreed that the murdrum fine (the fine imposed upon a hundred for an unexplained homicide) was not to be levied in cases of misadventure. The murdrum fine was abolished altogether in 1340, perhaps some decades after it had fallen into disuse. The bench in 1347 read the Statute of Marlborough to say that misadventure was no longer to be treated as "murder," in the substantive sense of felonious homicide. Due to this misreading, the judges concluded that pardons de cursu in accident and presumably self-defense cases were of relatively recent vintage (1267), and that the procedure in such cases had been developed soon after by the Statute of Gloucester (1278). Since neither statute dispensed with the rule of forfeiture, which applied in all cases of felonious homicide, the judges' conclusion that forfeiture applied to all of the "new" excusable homicides is understandable. For a discussion of these erroneous statutory constructions and subsequent commentary upon them, see Pollock and Maitland, History of English Law, 2:481–82.
slayers could avoid prosecution by paying a "fine"—the cost of a pardon of grace: money in normal times, forty days of service in time of war. Between these two provisions, many thieves and felonious slayers suffered a penalty even if they were not prosecuted or, in the case of the former, were prosecuted but avoided conviction through securing a verdict of self-defense.

There were advantages to the system as it worked in practice. The retention of a general capital sanction in felony meant that many slayers and thieves sought a pardon of grace from the Crown. Even those who had committed the less serious forms of these offenses may not have trusted their lives to juries and, instead, immunized themselves from prosecution. They turned themselves in, relieving central and local officials of some of the overwhelming burden under which they worked. Fewer suspects had to be taken, incarcerated, and tried. The threat of execution, in short, automatically acted as a dragnet.

Moreover, the pardon power gave the Crown considerable control over the destiny of many subjects. Recipients of pardons of grace were direct beneficiaries of royal largesse. Whether the Crown exacted military service or money, or nothing at all, the pardoned offender owed his life to the king.106 This was also true, though in an attenuated form, if the offender stood trial. If he was acquitted or was granted a verdict of excusable homicide and a pardon _de cursu_, he stood as the beneficiary both of his peers and of the Crown. Of course, the open availability of pardons of grace may have increased jury leniency, and judicial toleration of jury leniency may have increased the number of offenders who put their lives on the country. This, in turn, must have diminished the numbers who sought refuge in the Crown. Indeed, as it operated in practice, the system probably tended to drive into Chancery seeking pardons of grace a disproportionately large number of the most serious offenders, i.e., those whom juries were far more likely to convict, and tended instead to encourage lesser offenders to stand trial. If so, this unintended result must have made enforcement of the statutes limiting the royal power to pardon all the more imperative. The advantages of the system were intimately connected with its disadvantages. If the pardon

While the judicial misreadings of earlier statutes are understandable, there remains the question of what occasioned judicial inquiry into the problem of forfeiture in excusable homicide. Maitland's suggestion regarding the need for revenue and my own related suggestion regarding jury behavior in cases that otherwise would clearly have led to forfeiture must remain tentative. In any case, my analysis of the effect of the rule once it had been propounded does not depend upon my suggestion regarding the motivation of the bench in 1347.

106. For discussion of this theme as it relates to the use of pardons and other forms of mitigation in the eighteenth century see below, Chapter 7.
power was a source of strength—and certainly it was—it was also productive of substantial weakness.

In any case, casual theft and everyday brawling (with the inevitable ensuing deaths) could not be ended altogether by formal legal rules. Indeed, from the perspective of the Crown and bench, a moderation of the law might only have made matters worse. The adoption of a lesser sanction for simple homicide and lesser forms of theft might have seemed to condone jury attitudes and thereby resulted in their amplification. Or it might have produced more convictions only at the expense of encouraging already endemic physical violence. In short, by adhering at least in theory to the strictest rules of criminal liability—by posing what might have been thought to be the greatest threat to the greatest number—the Crown might well have believed that its approach to homicide and theft represented at least a modest deterrent, one that also produced an important source of deference, money, and military service.

On balance, then, it is not surprising that the Crown and bench accommodated themselves to jury leniency. Serious offenders were the real enemy, and so long as juries were relatively harsh in dealing with them the Crown’s incapacity to enforce the legal rules against less serious offenders was not fatal to the administration of the criminal law. The bribing and intimidation of jurors by professional criminals posed a far greater threat to the system. Moreover, although jury-based nullification in casual theft and simple homicide both slowed the development of substantive rules designed to deal with serious offenders and established a tradition of community participation that would sometime be difficult to control, it also served dramatically to advertise the merciful quality of royal justice.