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JUSTICE, MERCY, AND LATE MEDIEVAL GOVERNANCE

*Pat McCune**

KINGSHIP, LAW, AND SOCIETY: CRIMINAL JUSTICE IN THE REIGN OF HENRY V. By *Edward Powell*. Oxford: Clarendon Press. 1989. Pp. xi, 319. \$59.

There is a central paradox in medieval English history evident in the contradictory conclusions drawn by historians of legal institutions and by historians of crime. While the sophistication of the common law administered through the royal courts is undeniable, the records those institutions produced show a society of violent disorder. Why was this centralized legal system, one based on the Crown's authority and operated by the governing estates, unable to maintain the peace? Legal treatises speak of the king's obligation to ensure justice for his subjects, and of the necessary participation of those subjects in the machinery of the law. Other literature, however, tells of corruption and practices at odds with the expressed belief that royal courts dispensed equitable law unsullied by favor. English law and government became increasingly complex beginning in the late twelfth century and continuing through the fifteenth century, assuming a more dominant and articulate role in English life. Yet from the end of the thirteenth century, English social and political order seemed to be unraveling.

No such glaring disparities appeared in the history of medieval England when legal and constitutional historians held the field. They focused their efforts on the authority of Crown and Parliament and on the institutional development revealed in administrative records, laws, and treatises. The perspective of social historians has prevailed since mid-century, however, coloring our view of medieval England with studies of crime and of lordship. For the past two decades the historiography of late medieval England has been dominated by efforts to describe the role of the magnates and gentry in English polity, and to place the role in its wider social context. The lens has been withdrawn from central royal authority and focused instead on the structures and exercise of power among the governing estates on a local and county level. These historians have emphasized patronage and affinities, the social and economic manifestations of lordship. At the same time, many legal and social historians have turned to examine the practical

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realities of how the governing estates used the law. As a result of the ascendance of social history we now see legal practices greatly at odds with legal theory, and we are faced with three especially puzzling phenomena: high acquittal and low conviction rates, widespread mitigation of the law (through, for example, benefit of clergy), and extensive use of the royal pardon. Many historians have concluded that corruption was the order of the day, and that this legal system simply did not work. Most historians now see late medieval England as characterized by violent disorder.

In *Kingship, Law, and Society: Criminal Justice in the Reign of Henry V*, Edward Powell attempts to resolve the paradox. Powell employs a detailed examination of the administration of royal justice during the reign of one king in an effort to provide a fuller understanding of the place of law in late medieval English society. He demonstrates that a knowledge of royal policy and legal administration is fundamental to our understanding of political society in England during the period. For Powell, the kingship of Henry V is medieval political management at its best. The maintenance of order among the governing estates was crucial to establishing peace at all levels of society (pp. 19-20). Powell believes that Henry had a conscious program for government that was realized effectively through the royal courts (pp. 8-9). He reinforces his argument by considering contemporary theories about law and governance. He finds that the king's obligation to provide justice was the primary feature of kingship (pp. 30, 36). This idea of justice was one that equated law with reason, and saw justice as consisting of the intent to do right (p. 28). Henry drew on these ideas and used the legal machinery to discipline magnates and gentry. He forced them to recognize the authority of the Crown, threatened local factions into conciliation, and, perhaps most importantly, used royal justice to recruit for the military. This understanding of Henry's reign is one way to make sense of the use of royal pardons and some forms of mitigation of the law. England was not ungovernable, but it did need a king who could operate within the constraints on royal authority and make the most of existing means for exercising power. Henry V used the theory and practice of justice to ensure the cooperation of the governing estates in maintaining the peace.

The strength of Powell's book lies in its lucid description of the machinery of royal justice, and its careful consideration of legal administration — from Henry's personal involvement to the level of local politics in early fifteenth-century England. That this is the best and most satisfying aspect of the book will not surprise those familiar with Powell's earlier work.¹ Powell provides a vivid portrait of the

1. For example, see Powell, *Arbitration and the Law in England in the Later Middle Ages*, 33 *TRANSACTIONS OF THE ROYAL HIST. SOC. SER. NO. 5*, 49 (1983); Powell, *Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400-1429*, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800*, at 78 (J. Cockburn & T.

ways in which one king used the law. He shows us the nature and exercise of political power in late medieval England in a wonderfully thorough description of that king's rule. He reveals the administration that sometimes constrained and sometimes enabled the king in exercising royal authority, and he successfully places the network of patronage among the governing estates within its institutional context. *Kingship, Law, and Society* is a valuable contribution to the new constitutional history that Powell describes in his introductory chapter (pp. 2-7).

However, Powell's effort to show the relationship between contemporary concepts of law and kingship, on the one hand, and actual legal practice, on the other, is less successful. The value of his conclusions concerning the ideological basis of late medieval English governance is diminished by his limited understanding of contemporary attitudes about justice and its uses in society. Powell defines justice narrowly, and because of this he unnecessarily limits his speculation concerning the connection between attitudes about the law and some of the most puzzling elements in medieval English legal practice. In the first half of the book he introduces such problematic features of practice as the mitigation and pardon of offenses, arbitration, corruption, and the importance of the community on which the administration of the royal courts heavily relied. Yet instead of pursuing these significant issues, Powell attributes the successful maintenance of order through royal courts to the force of Henry's personality. Moreover, his desire to explain apparent contradictions in late medieval law and governance through a neat and coherent analysis results in the simplification of complex behavior. Instead of winnowing the complications we encounter in our search for causation, the real problem for historians is to devise a reconstruction that takes into account all the possibilities concerning why people behaved as they did.

Powell takes care at the outset to describe the institutional framework into which he will place his discussion of the late medieval idea of justice. He outlines the growth of royal criminal jurisdiction that had transformed English governance by the early fifteenth century. The first phase occurred during the reign of Henry II and involved the development of standardized returnable writs for land actions and regularized procedure for the presentment of felonies. The second phase occurred during the latter half of the thirteenth century, when there was a rapid extension of royal jurisdiction over personal actions and increased use of procedure by plaint and bill. The third phase began in the last years of the reign of Edward II with the breakdown of the

Green eds. 1988); Powell, *Settlement of Disputes by Arbitration in Fifteenth-Century England*, 2 *LAW & HIST. REV.* 21 (1984); Powell, *Social Research and the Use of Medieval Criminal Records* (Book Review), 79 *MICH. L. REV.* 967 (1981).

general eyre.² In the first half of the thirteenth century the eyre had been concerned with feudal and proprietary rights of the Crown, royal prerogatives, and presentments of homicide. But in the second half of the century the extension of the eyre's jurisdiction greatly increased the number of complaints to be heard, especially those about official abuses and those concerning offenses against person and property (pp. 9-11). In the first decade of the fourteenth century, there was a marked rise in violent disorder — at least in part the result of the wars with France, Wales, and Scotland — and the Crown used a variety of judicial commissions in the effort to replace the eyre, which gradually ceased its functions over the next few decades. They included commissions that went on circuit in the counties to deliver the gaols and hear assizes, as well as special commissions of oyer and terminer. Some became known as trailbaston commissions, after the word used to describe the violent gangs disrupting the peace.³ In addition, king's bench was active as an itinerant criminal court. But the problems engendered by the loss of the general eyre and the expansion of the Crown's jurisdiction were not met in any effective way until the second half of the fourteenth century, when the powers of the justices of the peace were increased and regularized. They became the most significant judicial officers at the local level after a long struggle over the extent of their powers between the interests of the Crown and magnates on one side, and the Commons on the other. The former wanted authority exercised by itinerant professional justices; the latter wanted a greater share in that authority. The use of peace commissions as well as itinerant justices at assizes and gaol delivery accommodated the interests of both (pp. 12-17). A new polity had been formed by 1400 that managed to establish a parity between local and central interests.

Powell believes that the great dissatisfaction with the legal system voiced in the fourteenth century was due to the disparity between theory and practice. Since the late twelfth century the Crown had promoted the notion that the king's courts offered a higher caliber of justice than that available in other courts. This was the justification for the king's coopting what had been an important source of power for the ruling estates at the local level — that is, the power to adjudicate disputes. Many of the men who served in royal courts then exploited the opportunities available through their positions of influence. The crisis in public order, therefore, resulted not from degeneration in legal administration but rather from innovation in the royal courts.

2. The general eyre was a branch of the king's court composed of royal justices sent to the counties to hear and determine criminal and civil pleas, and to investigate local officials. See J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 19-20 (3d ed. 1990).

3. These powerful commissions of oyer and terminer were first issued in 1305 to deal with the armed gangsters known as trailbastons. P. 13. For a discussion, see A. HARDING, *THE LAW COURTS OF MEDIEVAL ENGLAND* 88 (1973).

Moreover, developments in legal administration did not keep pace with the expansion of royal jurisdiction. The problem was that it took time to curb the corrupt practices of individuals who were involved in the administration of the courts, and for the norms of acceptable behavior to coincide with the theoretical standards of justice. Powell thinks that the complaints about abuses by the legal profession and the landed estates' resentment of government control in the localities were resolved by 1400 as the central government accommodated the interests of the magnates and gentry. Although the Crown relied upon these ruling estates for law enforcement, its authority was not undermined. On the contrary, the central government had been strengthened by augmenting the responsibility of magnates and gentry to maintain public order (pp. 18-20).

Kingship, Law, and Society is divided into three sections, each intended as a separate level of inquiry. Part I, which contains only one chapter, is on legal theory; Part II deals with legal institutions in three chapters; and Part III devotes six chapters to legal policy and administration. The assumption that in the end limits the force of Powell's argument in *Kingship, Law, and Society* emerges in the first chapter, "Concepts of Law, Justice, and Kingship in the Age of Henry V" (pp. 23-44). This chapter treats the impact that the expansion of royal jurisdiction had on theories of law and justice and assesses contemporary opinion about the powers and responsibilities of kings. The elite sources Powell uses are familiar: Aquinas, Fortescue, and the coronation oath. Powell emphasizes that the English believed the king's primary duties were defense and justice and that the English public equated law with reason. By 1200 the new common law of the royal courts allowed the king a virtual monopoly, for though the common law grew out of custom and used the collective judgment of juries, it was administered by legal experts answering only to the king (p. 31). The political struggles between the magnates and the Crown over the next two hundred years turned largely on the efforts of the magnates to limit the king's power by subjecting royal authority to the rule of law. Powell's view of the kingship that emerged from this struggle reveals the influence of Kantorowicz: the political strife was resolved when the Crown became separate from the king's person and therefore it was possible to depose the king.⁴ By the second half of the fifteenth century, when Fortescue was writing, the monarchy was limited by law, Parliament, and the coronation oath.

Powell provides less discussion of popular attitudes to law and justice because he feels that they already have received much scholarly attention. He cites a few often-used works such as *Vox Clamantis*, *Tale of Gamelyn*, and *London Lickpenny* to identify the feelings of "consumers" toward the law. Powell concludes that the English peo-

4. See generally E. KANTOROWICZ, *THE KING'S TWO BODIES* (1957).

ple did not question the ideas of Aquinas; that is, they believed in the divine origin of law, equated law with reason, and understood justice as the intent to do right. Powell finds that in the popular literature people condemned the workings of the legal system, not the system itself.⁵ The new procedures available in the royal courts found favor with the governing estates, yet these courts threatened their local autonomy. During the thirteenth and fourteenth centuries the Crown raised expectations it could not meet. The landowning classes gradually adapted these legal institutions to their own advantage by the beginning of the fifteenth century. In the end, the traumatic effects of the growth of the common law were felt in lesser communities — the villages, manors, and seigniorial towns. The Peasants' Revolt demonstrated their expectations concerning the justice system.

Those unfamiliar with the mechanics of medieval legal administration will find Part II most useful. These chapters successfully establish the connection between the schematic framework of legal administration and the ways in which communities from the national to the local level employed and manipulated it. Chapter Two, an admirably concise and well-organized outline of the courts and personnel involved in royal jurisdiction over crime, begins with the king and continues through the ranks to local officials. The next chapter concerns the character of proceedings in criminal courts. Though Powell introduces here some of the most significant issues that emerge in the work of legal historians and social historians of crime, he does not connect Part I's discussion of legal theory with Part II's focus on institutions. He does not speculate on what the concepts of law, justice, and kingship, which he discussed in Part I, might indicate about such problematic topics as the nature of the jury, the development of royal prosecution, the role of mitigation in general and royal pardons in particular. The only exception to this failure to connect theory and practice occurs in Chapter Four, which places late medieval law in the wider social context of dispute settlement. In the course of his description of the forms and functions of arbitration in late medieval England, Powell considers again the central assumption that dominates current writing about the history of late medieval England: that

5. His discussion of popular attitudes toward law and justice is on pp. 38-42; see the references he provides in note 76. The outlaw ballads of Robin Hood certainly have received attention, but unfortunately most historians continue to use contemporary literature as decorative embellishment. An outstanding exception to this approach is N. DAVIS, *FICTION IN THE ARCHIVES: PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE* (1987). On the English side, one of the best examples is Ives, *The Reputation of the Common Lawyers in English Society, 1450-1550*, 7 U. BIRMINGHAM HIST. J. 130-61 (1960). Nuanced studies with an awareness of historical context are often from the literary side; for example, see J. COLEMAN, *ENGLISH LITERATURE AND HISTORY, 1350-1400: MEDIEVAL READERS AND WRITERS* (1981); V. SCATTERGOOD, *POLITICS AND POETRY IN THE FIFTEENTH CENTURY* (1971); M. STOKES, *JUSTICE AND MERCY IN PIERS PLOWMAN: A READING OF THE B TEXT VISIO* (1984); Barron, *The Penalties for Treason in Medieval Life and Literature*, 7 J. MEDIEVAL HIST. 187-202 (1981).

the ties of lordship and clientage caused widespread corruption and social disorder. Powell convincingly argues that extrajudicial forms of dispute settlement and the ways in which the courts were used to secure an agreement acceptable to all parties were not corrupt but part of the legal system as a whole. In his view, the landed estates manipulated the personnel and procedures of the royal courts to preserve their own dominance in the local community. They succeeded mainly because they were the king's natural partners in government. This interpretation relies on the scheme of legal development Powell sets out in his introductory chapter. The rapidly expanding royal jurisdiction had been assimilated by the governing estates so that by the early fifteenth century it was institutionalized as part of the local power structure. Powell concludes that the 1380s were in fact a significant watershed; by 1400 the unitary concept of royal sovereignty prevailed over the traditional practices of private association (pp. 112-14).

In Part III, Powell moves from the theoretical and general to a detailed look at the reign of Henry V, particularly the first three years. In Chapter Five, the first chapter of Part III, Powell contrasts Henry V to his father, describes his exalted sense of royal authority, and characterizes Henry's sense of kingship as one rooted in the king's promise in the coronation oath to ensure justice for his people. The next two chapters depict the nature of Henry's rule. Powell concludes that the distinctive features of the reign were established by Henry's use of the royal courts in response to the Lollard Revolt in 1414, and by his general campaign against disorder at home in 1414-1415. Powell believes the superior eyre of king's bench in 1414 reveals the administration of criminal justice at its most dynamic (p. 185). He notes the extraordinary lack of convictions and the widespread granting of royal pardons, and resolves the paradox to which others have pointed by claiming that Henry's real goal was political management. Henry's intention was to discipline landed offenders without losing support. The king's aim was to threaten and then reconcile local factions, forcing them to acknowledge the authority of the king (pp. 192-94).

"The Settlement of the Realm, 1413-1415," the eighth chapter (pp. 195-228), entails a meticulous examination of local circumstances in regional disorder — in Wales, Devon, and the Midlands — and an assessment of the effects of royal judicial intervention. Powell's purpose in this chapter is to show the able manipulations of Henry V as he threatened his subjects with the law, encouraged arbitration and settlement, granted pardons, and collected fines, so demonstrating to his subjects the power of his royal authority. Powell describes a policy of conciliation, one intended both to restore public order and to recruit for the military. The worst disorders were caused by the magnates and gentry, and Henry needed them in France. Unlike Edward I, he did not have to rely on convict armies, but instead used indictments as leverage to enlist an officer class. Powell sees the realization of

Henry's program for law enforcement in the lack of serious disorder in the period 1415-1422. This success was a triumph of personal authority; Henry's achievement was to fulfill contemporary expectations of justice through effective use of existing machinery, which he ably adapted to his military goals (pp. 266-70). Powell uses the reign of Henry V to demonstrate that England was not ungovernable in the fifteenth century.

Yet, despite the absorbing analysis of Henry's achievement, Powell's book is not a success as a whole. The organization of the chapters into three unequally weighted parts indicates the strengths and weaknesses of the book. Theory, presented in broad strokes and commonplaces, gets short shrift. Powell devotes painstaking attention to the first few years of Henry's reign. Parts I and II draw attention to significant questions, but Powell's description of legal practice in Part III, satisfying as it is, does not return to those questions; nor does it reflect the complexity of the issues. Powell ends with a conclusion that also fails to address the problems raised in the early chapters; instead he makes claims about Henry V that are not clearly rooted in the minutiae of detail provided. His narrow focus on a few years of one king's rule cannot bear the freight assigned to it.

Although much of the book is devoted to demonstrating that Henry V carefully employed a conscious program of judicial administration to secure political stability, Powell often returns to the point that "public order rested not on institutions but on the character and the personal authority of the king" (p. 246). His conclusions about the successful use of the legal system are based essentially on the events of the years 1413-1415. Though Powell states that the attainment of the goals of law enforcement is evident in England's lack of serious disorder during the remainder of the reign, he also admits that records are scant for the period after 1415 (pp. 264-65). In what substantial way were the policy and achievements of Henry V really distinct from those of other English kings in the thirteenth through fifteenth centuries? Surely there were other three-year success stories. Henry V was an impressive and able monarch. But it is hard to see how his use of the traditional apparatus of kingship differed fundamentally from that of his predecessors or successors. Pivotal to Powell's thesis is the belief that Henry's promise in the coronation oath to uphold the laws, "to do right and equal justice to all," was for this king "almost as a manifesto, a programme for government" (p. 130).

Yet the description of how Henry settled the realm in the first three years of his reign actually shows us business as usual. How fine a sense of justice — of the justice described at the outset of the book — do we see in the treatment of criminals detailed here? Powell presents the corruption and career of Thomas Barnby as just one example of Henry's successful law enforcement program. Indicted in 1414 on a

variety of charges from extortion to treason, Barnby owned up to all but the latter and sought the king's mercy. Two years later Henry chose him to be treasurer of Harfleur, and Barnby continued to hold a variety of royal appointments in France until his death in 1429 (pp. 199, 239). Powell provides other examples of offenders who received little if any punishment and returned in short order to the king's service. Powell's fluent representation of Henry's efforts to restore order in the realm is fascinating, but the methods employed by the king are familiar. The Welsh paid very heavily to be reconciled with the king, and in fact disorder there continued throughout the reign. As for Devon, Powell concludes that the king's assertion of authority had a limited effect at best. Disorder in the Midlands is attributed to the struggle for local power; this was not mindless violence or anarchy but local efforts to gain patronage and advancement otherwise denied by Henry IV. The leading offenders became Henry V's trusted servants in war and local government (pp. 197-216). Aside from the parties and political particulars involved, this struggle for local power and its resolution did not differ notably from any that had taken place since the time of Edward II.⁶

How is Henry V's management of violent and corrupt subjects distinguished from the rule of other English kings who threatened with law, encouraged arbitration and settlement, granted pardons, and exacted fines? Powell's answer turns largely on the goal of military recruitment and the use of the king's pardon. Much is made of Henry's politically astute use of royal courts to leverage recruits. The most significant disturbers of the peace were magnates and gentry; by recruiting them for the military the king provided a "constructive outlet for their energies" (p. 240). This is how he staffed the ranks of the officer class — which Powell indicates Henry needed to fill and had no trouble replenishing (pp. 233, 236). We must question whether contemporaries would have distinguished between the large-scale granting of pardons to common criminals who would fight in the army, as was Edward I's practice, and to upper-estate criminals who would lead the army, as was Henry's. Historians may draw distinctions between the ways in which Edward I and Henry V used royal pardons to recruit military forces; the repetitive complaints in Parliament about the abuse of royal pardons do not indicate that one was thought less odious than the other.

The royal pardon clearly has a significant role in Powell's reading of the effective employment of the legal system to maintain the peace. He is critical, however, of the use other kings made of the pardon, claiming for example that the "large scale use of pardons undermined

6. See, e.g., C. GIVEN-WILSON, *THE ENGLISH NOBILITY IN THE LATER MIDDLE AGES* (1987); N. SAUL, *KNIGHTS AND ESQUIRES: THE GLOUCESTERSHIRE GENTRY IN THE FOURTEENTH CENTURY* (1981).

the initiative and authority of the local judicial agencies by reducing the informal social pressures towards compensation or reform which a community could exert upon offenders under the threat of the death penalty" (p. 85). Powell does not explain why we know that the many general pardons granted by Henry IV simply were motivated by financial need, while "those of Henry V formed part of a wider strategy in which domestic peace, dynastic stability, and foreign war were closely linked" (p. 232). Nor does Powell state whether all the pardons given under Henry V were granted on condition of military service. It is difficult to see how Henry's use of the royal pardon did much to establish law and order. For example, his second general pardon, granted in 1414, dropped the clause excluding treason, murder, and rape, and there was no set time during which the pardon must be sued. In addition, over 4,800 were granted in the next three years, and Powell notes this is much higher than those under the general pardons of Henry VI's reign (p. 188). Despite the aggressive use of royal courts during Henry's reign to root out criminals, the conviction rate was strikingly low and general pardons indiscriminately used. Powell explains this as an efficient and convenient way to deal with the huge number of cases in the courts in the early years of the reign (pp. 231-32). What was for Henry V a clever way to clear the docket was evidence of corruption under other kings.

Powell cogently explains the place of arbitration in late medieval English law. The relationship of arbitration to law enforcement under Henry V is more evident than is that of the pardon. Yet the connection Powell seeks to establish between Henry's conscious program and the use of arbitration in the early fifteenth century is not as persuasive as one would like. Powell's description of the process of dispute resolution makes clear that the prevalence of extracurial settlements was not due to the failure of the law (pp. 97-107). But the relationship between royal justice and local dispute resolution is not manifest. Powell describes the judicial visitations early in Henry's reign as a catalyst for restoring local order (p. 246). Through the courts, the king threatened disputants and urged reconciliation. Again we come back to the personal authority of the king. Although Powell claims that mediation and arbitration procedures were unsuccessful prior to 1414, and that subsequently they only succeeded through Henry's intervention, he provides only one example of the king's active involvement. Further, he offers no comparison with other kings, so we get no sense of whether or not Henry really was more adept than were other kings at pressuring his subjects to reconcile (pp. 240-46).

* * *

These may be minor problems in Powell's account of how successful kingship illuminates the way law was meant to be used. The major problem is that good kingship alone cannot make sense of how law

operated in society, nor explain the paradoxes in legal theory and practice in medieval England. In placing so much emphasis on the force of the king's presence and the effect of royal law on the community, Powell slights the importance of the other side of the equation — the effect of the community on the royal courts. And this neglect comes sharply into view in light of the other vitally important issues Powell introduces but never adequately accounts for in his theory of forceful royal justice: corruption, mitigation, and the extent to which the administration of royal courts depended on the lay population. There is a striking gap between the description of active kingship in the third part of the book, which is so vivid and convincing in terms of the abilities of Henry V, and the theoretical and social context of the law in the first two parts. Powell frequently refers to the importance of the community in the system of royal justice, and he describes the involvement of the lay community, but he neglects the influence the English people had on the law. The book is flawed by this failure to consider seriously the dialogue between central government and local communities. For in that dialogue it is possible to find the goals and values of those who used the law to secure personal objectives and establish order whether on a local or national level. Without this dialogue we cannot fully understand contemporary ideas about a king's obligation to maintain the peace and how he was to fulfill that obligation.

For medieval English people, judgment — the establishment of social order through justice — always involved mercy. Justice was joined in the minds of people involved in the courts not with an abstract notion of reason, but with the practical values of forgiveness and restoration of the balance of relationships in the community. In his limited definition of justice, Powell overlooks the integral presence and importance of mercy in the medieval sense of justice and the meaning of peace.⁷ Powell mentions reconciliation and concord again and again in the book, but does not acknowledge why they were so crucial. He begins with a narrow conception about what justice meant to medieval English men and women, and so overlooks the place of mercy in the medieval concept of law and in the medieval understanding of the way order ought to be maintained in society. Mercy is linked with justice even in the narrow range of works, elite and popular, that he selects as paradigms of the contemporary understanding of law and society. Although Powell recognizes the modern equation of reason

7. The allegory of the Four Daughters of God is a striking embodiment of the medieval sense of the relationships among mercy, justice, peace, and truth. For an introduction to the history of this allegory and its popularity in medieval literature, see K. SAJAVAARA, *THE MIDDLE ENGLISH TRANSLATIONS OF ROBERT GROSSETESTE'S "CHATEAU D'AMOUR"* 62-90 (1967); Traver, *The Four Daughters of God: A Changing Mirror of Doctrine*, 40 *PUBLICATIONS OF THE MODERN LANGUAGE A.* 44 (1925); T. Janecek, *The Literary History of the Parliament of Heaven Allegory* (1975) (Ph.D. Dissertation, University of Illinois at Urbana-Champaign).

with law in some elite medieval treatises, he does not acknowledge that the literature emphasizes the importance of a moral response that would restore balance in society, not the value of reason in the application of the law. Reconciliation and forgiveness, not retribution, were for centuries the ideal means to maintain peace.

Without doubt, the task of describing how justice was understood in medieval England presents formidable methodological problems. Perhaps most intractable is the question of the relationship between expressed ideals and actual legal practice. But before we can address that question we need to grasp fully what those ideals were. This can be achieved through an awareness of the connections between elite and popular works, and a sensitivity to change over time. We need to eliminate the artificial boundary between religious and secular ideas of justice and judgment. Rather than focus on a definition of popular literature, or worry over which works are most representative, we can look instead at the question of audience, and read across categories of literature for common modes of expression and recurring themes, tracing their transformations over time.⁸

There is, however, no need to look beyond Powell's sources to see the important role of mercy. Let us begin with the work of Thomas Aquinas, the authority on whom Powell relies most. Aquinas repeatedly equates reason with justice, and he thought justice was one of the primary duties of kings. But Aquinas' conception of royal justice was more complex than Powell indicates. In Aquinas' treatise *On Kingship*, we find an emphasis on the role of clemency and forgiveness in the office of kingship, as well as on the correspondences between divine and secular kingship. For example, Aquinas reminds the king that he is to be in the kingdom what the soul is in the body, and what God is in the world. If he reflect seriously upon this, a zeal for justice will be enkindled in him when he contemplates that he has been appointed to this position in place of God, to exercise judgment in his kingdom; further, he will acquire the gentleness of clemency and mildness when he considers as his own members those individuals who are subject to his rule.⁹

Aquinas indicates the parallel between God's treatment of humankind and the king's treatment of his people earlier in this treatise when he states that weak rulers can more easily secure divine forgiveness if they "do not neglect to offer up to their true God the sacrifice of humility, mercy, and prayer for their sins."¹⁰

8. The popularity of compositions during the medieval period may be inferred to some extent from the number of manuscripts of particular works that survive today. See C. BROWN & R. ROBBINS, *THE INDEX OF MIDDLE ENGLISH VERSE 737-39* (1943). Though it concerns a later period, H. BENNETT, *ENGLISH BOOKS & READERS 1475 TO 1557* (1952), provides a sense of the literature that was popular in late medieval England. Also very useful are studies of literacy, such as J. MORAN, *THE GROWTH OF ENGLISH SCHOOLING 1340-1548* (1985).

9. T. AQUINAS, *ON KINGSHIP TO THE KING OF CYPRUS* 54 (G. Phelan ed. 1949).

10. *Id.* at 42.

The relationship of mercy to justice is treated in great detail in the *Summa Theologica*. This relationship becomes manifest when we look at the entire context of the treatment of justice in the *Secunda Secundae*. Justice, there, is equated with reason, but it is more than the will to render to each his or her due. Rather justice is a cardinal virtue, and as such has secondary virtues such as mercy and liberality hinging on it.¹¹ Consider *quaestio* 60, which concerns the act of passing judgment.

And so we ought to be inclined to judge them good rather than evil, unless there be manifest evidence to the contrary. We may be mistaken, but that spells no evil to our intellect . . . but rather it shows kindly feeling Then in judging of things we should make efforts to read them just as they really are; in judging persons, however, we should adopt the more favorable construction, as we have maintained.¹²

Justice in the human community is treated in Questions 101-22. It is worth listing the associated virtues and vices that come under discussion because they reflect the human realities of medieval legal practice: piety, respect, respectful service, obedience and disobedience, gratitude and ingratitude, vengeance, truth, lying, deception and hypocrisy, false modesty, friendliness, flattery, quarrelling, liberality, avarice, prodigality, and equity.¹³ In some of these, piety, gratitude, and liberality, for example, we have facets of what medieval men and women would have recognized as mercy. And this list clearly describes a range of human behavior in which we find the nexus of problems associated with arbitration, jury verdicts, pardons, mitigation, the affinities of lordship, corruption — in short, the paradoxical problems that continue to puzzle historians of late medieval England. The medieval idea of justice was considerably more complex than the use of right reason and rendering to each his or her due according to the letter of the law. The goal of justice was peace, but it was enmeshed in the complexities of human emotion, in the strategies of reciprocal generosity and obligation, and it was overshadowed by the importance in Christianity of God's mercy and justice.¹⁴ Medieval English governance will continue to present paradoxes until we widen our perspective on the use of justice to maintain peace, which was in theory at least the primary goal of the royal judicial system. Aquinas thought that there is no real

11. T. AQUINAS, *SUMMA THEOLOGIAE* II-II, Question 58, Article 11, Reply (T. Gilby ed. 1975).

12. *Id.* at II-II, Question 60, Article 4, Reply.

13. This is Aquinas' definition of equity (*epieikeia*) in *id.* at II-II, Question 120: *Epieikeia* does not put aside what is just absolutely, but what is just under the determination of the law. Neither is it against the virtue of severity, for this follows the exactness of law when it is proper to do so; but to obey the letter of a law when we should not is wicked. Equity is a word not often used in Middle English literature until the fifteenth century. For indications of its range of meaning and chronology of use, see definitions of *equite*, *evenhede*, and *evenness*, in *MIDDLE ENGLISH DICTIONARY* (H. Kurath & S. Kuhn eds. 1952).

14. *See, e.g.*, T. AQUINAS, *supra* note 11, I, Question 21; *id.* at II-II, Question 30.

peace when one is forced into an agreement by fear; in this case the proper order of things is not kept because fear is used. The dissension between man and man is opposed to concord. "Peace is only indirectly the work of justice, in that justice removes the obstacles to it. On the other hand it is directly the achievement of charity, which of its very nature is the cause of peace."¹⁵ Peace was the result of mercy as much as it was of justice.

No other source proves so rich in its theoretical treatment of the relationship between justice and mercy as the *Summa Theologica*. Yet such elite sources bear a problematic relationship to the widely shared notions of English people about the role of justice in governing the realm. In the effort to discern secular attitudes, and perhaps to distinguish them from the theological, Powell emphasizes the significance of the coronation oath because it reflected the belief that justice was a virtue integral to good kingship and crucial to the governance of the English realm. Surprisingly, however, he does not provide the wording of this undertaking to do justice. One of the clauses requires the king to affirm that he would according to his power cause fair and right justice and discretion in mercy and in truth to be done in all his judgments.¹⁶ That the king's mercy was a powerful element in kingship also is obvious in many practices associated with the ceremonies of medieval coronation. Just one example is the use of the Curtana, a broad and pointless sword known as the sword of mercy. From the late twelfth century the Curtana was an important item in the regalia. At least two fourteenth-century kings, Edward II and Richard II, were girded with the Curtana as the sword of state.¹⁷

It is no simple task, however, to find any detailed treatment of justice — or mercy, or other aspects of its administration in society — in medieval English legal treatises. These treatises were on the whole practical, and not theoretical works. Nevertheless, it is possible to glean some sense of attitudes about justice and mercy from Glanvill, *Dialogus de Scaccario*, and *Placita Corone*; still more may be learned in Bracton and Fleta.¹⁸ One of the clearest statements about the relationship of justice and mercy is Fortescue's often cited explanation of the value of the jury.

Who, then, in England can die unjustly for a crime, when he can have so

15. T. AQUINAS, *supra* note 11, at II-II, Question 29, Article 3, Reply.

16. "*Facies fieri in omnibus iudiciis tuis equam et rectam iusticiam et discrecionem in misericordia et ueritate secundum uires tuas.*" See ENGLISH CORONATION RECORDS xxxi (L. Legg ed. 1901) and Richardson, *The Coronation in Medieval England*, 16 TRADITIO 111-202 (1960).

17. THE CORONATION OF RICHARD III, 236-38 (A. Sutton & P. Hammond eds. 1983).

18. See, e.g., 2 H. DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 23-24, 304 (S. Thorne ed. & trans. 1968); II FLETA 1-2 (Selden Socy.) (H. Richardson & G. Sayles eds. & trans. 1955); R. NIGEL, DIALOGUS DE SCACCARIO: THE COURSE OF THE EXCHEQUER 48 (C. Johnson ed. & trans. 1983); PLACITA CORONE 17, 21-22 (Selden Socy. Supp. Series 4) (J. Kaye ed. & trans. 1966); THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 1-2 (G. Hall ed. 1965).

many aids in favour of his life, and none save his neighbours, good and faithful men, against whom he has no manner of exception, can condemn him? I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly. Nevertheless, it cannot be supposed that a suspect accused in this form can escape punishment, when his life and habits would thereafter be a terror to them who acquitted him of his crime.¹⁹

Here we see what was in fact a fairly typical desire to balance the demands and uses of justice and mercy, to reconcile the often conflicting ideals that dominated the administration of English law.

Powell ignores the presence of mercy in the literature he uses to depict popular attitudes to the law and kingship, and, more importantly, he misapprehends the character of the genre he relies upon to give testimony to these contemporary ideas. Although he considers these sources indicative of popular attitudes, the ideas they express are generally atypical of the ideas expressed in medieval literature about justice, judgment, and maintaining the peace. It is no wonder, given his sources, that Powell characterizes the equation between law and reason seen in Aquinas as "virtually unquestioned" by the English people (p. 39). Though the works he cites, such as the *Gest of Robyn Hode* and the *Tale of Gamelyn*, do preserve a telling voice in their expression of love of the king and hatred of corrupt officials, their attitudes and concerns are not those that dominate popular literature from the thirteenth through fifteenth centuries. Far more representative are other works Powell mentions, such as the poems in Digby 102 and Gower's *Vox Clamantis*, but he apparently overlooks the essential feature of this genre. Complaint literature was intended to generate the moral response necessary for reforming a disordered society. These works were not concerned primarily with politics and law, let alone the place of reason.²⁰ This religious idealism shaped the expression of behavioral norms, and hence shaped the understanding of law's place in society. We can see the distinctively medieval sense of the role of mercy in a vast range of genres — chronicles, allegories, mystery and morality plays, exempla collections, sermons, devotional guides, and belletristic literature.

The Christian duty to forgive and the reciprocal obligations engendered by that mercy and generosity were an integral part of medieval justice. When we understand this, a more nuanced picture of the use of justice in governance takes shape. Look, for example, at Hoccleve's

19. J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 65 (S. Chrimes ed. & trans. 1942).

20. Though Powell refers to J. COLEMAN, *supra* note 5, at 98-109, he does not discuss her views but instead claims that the equation of law and reason is seen in the poems of MS Digby 102. P. 39. An excellent starting point for becoming familiar with this genre is Robbins, *Poems Dealing with Contemporary Conditions*, in *5 A MANUAL OF THE WRITINGS IN MIDDLE ENGLISH, 1050-1500* (A. Hartung ed. 1975). For a revealing discussion of the nature of this literature that is very sensitive to the historical context, see Middleton, *The Idea of Public Poetry in the Reign of Richard II*, *53 SPECULUM* 94-114 (1978).

Regement of Princes.²¹ Quite rightly, Powell cites it as indicative of Henry's concerns and priorities as king (pp. 126-29). But it reveals more. When we look at the context in which justice is described, it helps to explain such occurrences as the low conviction rate and great number of pardons. Hoccleve does define justice in the first stanza of this section in terms of giving each his due. But the next stanza emphasizes mercy:

For your equal, reconciliation; for your enemy,
 Allowance of wrong-doing; and for yourself, virtue;
 For those in trouble, oppressed with wretched woe,
 Mercy in deed, and pity his hardship
 As far as you are able, and alleviate his misfortune;
 And have compassion for him, so that if your power fails
 Intention shall compensate for your action.²²

The section on justice continues by describing the king's obligations to listen to his people, redress wrongs, and correct his ministers. The next section, on observing the law, includes the usual exemplum about corrupt judges, and reminds the prince that great men must help the poor and the Church and shun flatterers.²³ But these sections on justice and law cover only a fraction of the necessary princely virtues. The remaining sections of this mirror echo the topics in the *Summa Theologica*: they treat pity, mercy, patience, chastity, courage, liberality and prodigality, avarice, prudence, and peace.²⁴ The relationship of mercy and justice in royal governance is a recurring concern. For example, in the section on pity, Hoccleve condemns the practice of pardoning murders, but lauds forgiveness for those indicted by the malice of foes; mercy shown to the conquered enemy earns great renown. In the section on mercy, Hoccleve reminds Henry of the merciful behavior of his father and grandfather, and their rejection of vengeance. He is most like God who is merciful; kings should avoid cruelty and rule with pity.²⁵

Powell's limited view of medieval justice, its components and its uses, mars an engrossing and valuable work. Just as our understanding of medieval English constitutional and political history benefited by a shift in focus from jurisprudence to the social realities of legal practice, we have much to gain by widening our perspective on the meaning of justice. Powell rightly claims that knowledge of royal judi-

21. T. HOCCLEVE, *THE REGEMENT OF PRINCES* (Early English Text Socy. Extra Series, 72) (F. Furnivall ed. 1897; reprint 1978).

22. "To thyne egall, concorde; vnto thy foo, / Suffrauncē; & to thy self, holynesse; / To the nedy, greved with wrecched wo, / Mercy in dede, & rewē his distresse / After thy power, & releve in heuynesse; / And reve vpon hym, yf that thy myght faile / For that will shall thy ded[ue] countervayle." *Id.* at 90.

23. *Id.* at 100-08.

24. *Id.* at 108-96; T. AQUINAS, *supra* note 11, at II-II, Questions 101-22.

25. T. HOCCLEVE, *supra* note 21, at 120-24.

cial policy and administration are crucial to understanding English political life in the late middle ages (pp. 7-8). But so, too, are the beliefs and objectives of the community which administered the law. We must be able to discern how their beliefs and objectives were congruent with or diverged from those of the Crown. It is true that people were dissatisfied with the legal system because of disparity between theory and practice, and that the new royal courts were popular but threatened local autonomy. It is also true that between the thirteenth and fifteenth centuries ideas about justice, and about its place in English governance, changed fundamentally. Undeniably, there was a failure of justice in the late middle ages, yet in our determination to find its etiology we have overlooked the concomitant failure of mercy. The historiographical emphasis on lordship has brought to our attention the importance of the "web of social and political obligations" which Powell so ably describes (pp. 3-7). At least some of the paradoxes which appear in the legal and social history of the period are less intractable when considered in the context of a more complete apprehension of medieval idea of justice. The appearance of corruption, widespread mitigation, arbitration, and royal pardons takes on a different cast when seen in the light of the social requirements of reconciliation, the reciprocal obligations engendered by generosity and forgiveness. The medieval sense of justice will elude us if we look only at legal, political, and philosophical treatises. We also must seek it in the obligations of lordship and religion, and in the literature that expressed those values.

A continuing dialogue on medieval English polity can be found in the literature that was popular among those who used and served in the courts. And the metamorphosis in that polity can be seen in the changing ways in which those ideas were expressed. The understanding of justice in English governance was not the same in 1300 as it was in 1500. For St. German and Fortescue, law and reason may have been synonymous, but we cannot assume that this was true for jurors. Nor can we assume that justices under Edward I had the same sense of the function and objectives of justice as did justices under Henry VII. Works such as Hoccleve's *Regement of Princes* have particular value because they are among the earliest to reflect rising tensions in society that centered on the obligations of lordship and religion. Through most of the fourteenth century the traditional view of the relationship of mercy and justice prevailed: mercy in its myriad forms was preferred in society because of the obligations it spawned and the reconciliation it made possible. But in the decades around 1400 there appeared expressions of the sense that English society was experiencing a failure of mercy as well as a failure of justice. Forgiveness and generosity no longer seemed so likely to maintain the peace. Allegations of the misuse of mercy vie with those of overzealous enforcement of the law.

Powell's description of the formation of a new polity in the decades around 1400 is perceptive but one-sided. The dialogue between community and Crown reveals a society angry and confused about the passing of an old order based on the reciprocal bonds of obligation. Men such as Hoccleve and Gower — men from the governing estates — were among the first to voice a new concept of justice in governance, justice based on the threat of retribution exercised by those gentry and nobility who had joined the Crown in government.