Introduction

> You who are indicted, I counsel you, come to me,
> To the green forest of Belregard, where there is no lawsuit,
> Nothing but the savage beast and the pleasant shade;
> For too uncertain is the common law.
>
> "The Outlaw's Song of Traillebaston"[1]

For one accused of felony in medieval England, like this poem's outlaw, the common law was indeed uncertain. If a trial followed, a defendant's fate—a walk to the gallows or a walk home—rested in the twenty-four hands of twelve local men sworn to speak the truth, *verum dicere*, about the alleged crime. Had the mathematicians and logicians of medieval England examined the parchment plea rolls of the king's courts and tabulated verdicts, they might have reassured our alleged felon that his chances were actually quite good. Most juries acquitted, and many other defendants secured pardons. This would have been small comfort to the outlaw who had witnessed a gallows scene in his lifetime or who had known a family left homeless and impoverished after a parent's felonious error led to forfeiture of their worldly possessions. "The one who can save me is the son of Mary," reflected our poetic outlaw, writing in the early fourteenth century, "for I was not culpable, but was indicted through envy." The outlaw added: "He

[1] "The Outlaw's Song of Traillebaston," in *The Political Songs of England, from the Reign of John to that of Edward II*, ed. Thomas Wright (London: Camden Society, 1839), 234: "Vus qy estes endité, je lou, venez à moy, / Al vert bois de Belregard, là n'y a nul ploy, / Forque beste savage e jolyf umbroy; / Car trop est dotouse la commune loy." In Anglo-Norman French, "ploy" can refer to an action at law, a pleading, or a dispute or battle more generally. See *Anglo-Norman Dictionary* online edition, www.anglo-norman.net (accessed 15 February 2019) (hereafter "*AND*"), *s.v.* "plai." The adjective "dotouse" can also mean fearful or dangerous. See *AND*, *s. v.* "dutus." See also *Dictionnaire du Moyen Français* (1330–1500), version 2015, http://atilf.fr/dmf (accessed 15 February 2019), *s.v.* "douteux."

who put me in this place, may God curse him! The world is so changeable, he who trusts in it is a fool."[2]

Though tempted to tarry in the shady woods of Belregard, this book instead meanders through scenes of highway robbery, domestic arson, and violent homicide—oh, so many homicides!—to make certain medieval England's uncertain common law of crime. Rambling through records, writs, and religious writings, the book peels open the black box of jury verdicts, exposing the reasons why so many defendants walked free while others walked to their deaths by hanging. Not having the luxury of jury interviews or even, in most instances, a second-hand account of what transpired in the courtroom, this book relies on narratives of crime preserved in coroners' records and trial accounts, including, where available, the jury's reasons for recommending a particular verdict. This evidence, in combination with insights into medieval English culture gleaned from imaginative literature and religious texts, undergirds this book's central claim that the medieval English system of felony adjudication, though characterized by perfunctory trials with few procedural protections for hapless defendants, had at its core an understanding of culpability situated in the heart and mind, as opposed to merely the hands, of the person who committed an allegedly criminal act. Mens rea, or guilty mind, constituted the foundation of medieval English criminal liability.

Other factors mattered, too. Repeat actors came in for greater condemnation, as did people generally of ill repute in the countryside or known locally to be of dubious character. Yet even these factors, viewed from the perspective of measuring culpability, tend to circle back to the issue of heart and mind. Nothing speaks better to a person's ill intent than repeated recourse to criminal acts, and a person's acts, ambiguous in isolation, can appear to be permeated by wickedness when viewed in the light of known bad character. To say that juries considered reputation and character, therefore, does not negate the principle that what most interested them was the question of the intentionality brought to bear upon an allegedly criminal act.

Why did mind matter? Mind, inseparable from heart in the medieval Western European worldview, mattered because the culture of the period was steeped in an understanding of guilt based on intentionality, on a person's interior orientation toward the actions he or she undertook in the world. Medieval English felony law took root during an age of penitential literature, which encouraged deep reflection on the nature of sin and the manifold factors that intensified or diminished a person's culpability. Jury trial for felony arose at a time of heightened attention to the importance of confession and examination of conscience, both by penitents and by confessors. The inquisitorial procedures

[2] "Outlaw's Song," in *Political Songs*, ed. Wright, 235–36: "Cely me pust salver que est le fitz Marie; / Car je ne su coupable, endité su par envye; / Qy en cesti lu me mist, Dieu lur maldie! / Le siècle est si variant, fous est qe s'affye."

of the king's coroners demonstrate a cultural connection between church and crown, both of which adapted a rhetorical tradition of circumstantial inquiry for the purpose of ascertaining intentionality, in the one instance to save some from eternal damnation, and in the other to send some to death by hanging. Also during this formative period of English felony law, tales of the misjudging of Jesus, and of judicial actors both exemplary and condemnable, assisted justices and jurors in developing a sophisticated approach to the process of judging, one that recognized that the mind of justice and juror mattered when contemplating the culpability of a defendant's mind.

In the chapters to come, this book traverses questions of etymology, including the meaning of the word "felony" and of the various words connoting hatred and anger in Middle English, Anglo-Norman French, and Latin. It describes medieval England as a confessing society, in which the discipline of confession and examination of conscience influenced how jurors understood sin and crime, and how coroners and justices interrogated suspects and juries alike. It studies literary tales of judges good and bad to understand the perils involved in the act of judging, perils shared by justices and jurors in the English system of felony adjudication after 1215. And it posits that just as a defendant's guilt or innocence turned on the state of her heart and mind, so too did the interior disposition of justices and jurors determine whether the act of judging brought them a step closer to heaven or to hell. Although felony adjudication took place in the king's courts, not the ecclesiastical courts of bishops and archdeacons, it nevertheless transpired in the shadow of the Last Judgment, when Jesus would set mercy aside and sternly separate the sheep from the goats, the redeemed from the damned. Only then, after all, would hearts and minds be fully revealed.

THE HISTORY OF MENS REA

"*Reum non facit nisi mens rea.*"[3] Appearing in an early twelfth-century English legal compilation, but traceable to Augustine perhaps by way of Ivo of Chartres, this maxim rings familiar to modern lawyers as a principle fundamental to the Anglo-American common law tradition: culpability depends upon the presence of mens rea, or guilty mind. This book explores the understanding of mens rea prevalent in English culture at the time of the adoption of the criminal trial jury and in the first two centuries of its existence. Just as the jury has survived to this day, albeit as more of a vestige than a robust part of the now plea-bargain-

[3] L. J. Downer, ed. and trans., *Leges Henrici Primi* (Oxford: Clarendon, 1972), 94–95, §5.28b: "A person is not to be considered guilty unless he has a guilty intention." Regarding potentially contradictory passages, see *ibid.*, 11. The author of the *Leges* might have borrowed this from Ivo, *Panormia*, Book VIII, 111 and 116, although Downer has traced the statement to Augustine, *Sermones* 180.2. The maxim might have been intended to apply only to perjury. *Ibid.*, 311–12.

centric process in the United States, issues of mind continue to lie at the core of our modern understanding of criminal responsibility.

In referring to mens rea, this book employs an expansive reading of the concept, broader indeed than our current understanding of the phrase. Criminal law theorists typically identify two uses of mens rea. First, according to an older, broader definition, it "means 'guilty mind,' 'vicious will,' 'immorality of motive,' or, simply, 'morally culpable state of mind.'"[4] Joshua Dressler refers to this as "the 'culpability' meaning" of mens rea. Second, mens rea has a modern, narrower meaning, referring to "the mental state the defendant must have had with regard to the 'social harm' elements set out in the definition of the offense."[5] For example, if a statute defined a crime as the intentional undertaking of a particular action, then recklessness would not suffice for a conviction despite the morally problematic nature of recklessness. The book uses mens rea throughout to capture the first of these two meanings, which more closely approximates the medieval English conception of guilty heart and mind.[6] Taking its cue from the medieval sources, the book understands mens rea to encompass what we today might separate into distinct categories, including excuses and justifications. Where we, for example, view the emotion of anger as a possible basis for mitigation, analyzing it separately from the bare intent to commit a felony, medieval English sources tend to treat such matters as all bearing directly upon the question of whether or not a person had acted feloniously, or with the intent sufficiently grave to give rise to felony, thereby meriting conviction. Moreover, this medieval understanding of intentionality did not merely consider the individual's state of mind at the moment an offense was allegedly committed, but rather took a longer-term view of a person's capacity for, inclination toward, and free choice of culpable intentionality.

Although fundamental to the common law tradition, the notion of mens rea is not unique to it.[7] In that sense, there appears to be something almost natural

[4] Joshua Dressler and Stephen P. Garvey, *Criminal Law Cases and Materials*, 7th ed. (St. Paul, MN: West, 2016), 158. See also Sanford H. Kadish, Stephen J. Schulhofer, and Carol S. Steiker, *Criminal Law and Its Processes* (New York: Aspen, 2007), 213 (equating the broad conception of mens rea with "moral fault").

[5] Dressler and Garvey, *Criminal Law Cases and Materials*, 158. See also Kadish, Schulhofer, and Steiker, *Criminal Law and Its Processes*, 213 (referring to the narrow concept of *mens rea* as "the kind of awareness or intention that must accompany the prohibited act, under the terms of the statute defining the offense").

[6] This is due in part to the fact that the narrower concept of *mens rea* presumes a statutory basis for crime, whereas medieval England did not typically have explicit statutory descriptions of particular crimes.

[7] For Jewish scriptural references to willful homicide, sanctuary for unpremeditated killers, and refuge cities for those who killed against their will, see, e.g., Exodus 21:12–14, Numbers 35:11–12, 20–25. On the distinction between willful and accidental homicide in classical Roman law, namely the *Institutes* of Gaius, see Bruce W. Frier, *A Casebook on the Roman Law of Delict* (Atlanta: Scholars Press, 1999), 42 (*Institutiones* 3.211). On intent in Islamic

law-like about mens rea: *of course* culpability must be rooted in the human mind. Yet mens rea came to play its starring role in the common law tradition due to cultural confluences that were at play when England abandoned trial by ordeal in the early thirteenth century. In 1215, the English system of felony adjudication experienced an exogenous jolt with the Catholic Church's withdrawal of priests from the administration of trial by ordeal. The jury system that soon replaced the ordeal developed within a culture already heavily attuned to issues of mind. This book tells the story of that foundational moment and the formative first two centuries of the English felony trial jury.[8]

The chapters to follow hold lessons for historians and modern lawyers alike. The seismic shift in criminal procedure engendered by the Fourth Lateran Council's effective abolition of trial by ordeal was as monumental as the abandonment of plea bargaining in the U.S. criminal justice system would be today. But in a sense, we are at a potential turning point in the history of the Anglo-American criminal law, insofar as the American system of felony adjudication faces a crisis of confidence in this early twenty-first-century moment. Given the dramatic scaling back of jury trial in favor of plea bargaining in the latter half of the twentieth century, U.S. prosecutors and defense attorneys seldom have to grapple head-on with issues of mind. At the same time, incremental changes in charging and sentencing have produced monumental shifts in the practice of incarceration. How we address this complex prisoners' dilemma in future decades will depend in part upon our understanding of the purposes of our criminal justice system, which is itself embedded in a broader culture that influences public policy and popular attitudes toward crime and criminality. Would a renewed focus on mind help to right the wrongs in our system as presently constituted?

This book will not answer that question directly, but will rather provide the historical perspective to inform responses to our present crisis. It will pursue the Holmesian approach to legal history, looking to the common law past as a source of "enlightened skepticism" about the state of the common law present. "When you get the dragon out of his cave on to the plain and in the daylight," observed Oliver Wendell Holmes, "you can count his teeth and

jurisprudence, see Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (New York: Cambridge University Press, 2015), 137–44, 164–65, 177–80.

[8] I end my analysis in the fourteenth century, before the posthumous condemnation of John Wycliffe at the Council of Constance (1415), the age of Reginald Pecock (c. 1395–1461), and the strong reaction against such vernacularizing and anticlerical tendencies in England. Another justification for this endpoint could be the 1390 statute restricting the king's pardon to certain kinds of homicide, although the long-term impact of this statute is doubtful. See J. M. Kaye, "The Early History of Murder and Manslaughter, Part I," *The Law Quarterly Review* 83 (1967), 369–77, 391–95.

claws, and see just what is his strength."[9] A dragon metaphor, of course, seems particularly apt in light of the medieval roots of our jury system and of the general part of the criminal law. Holmes suggested that the next step should be either to kill the dragon or to tame him, putting him to good use. I might suggest a third option, in some instances, of apologizing and returning the dragon to his hidden slumber after satisfying one's curiosity. Holmes argued that it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," and even more so if the grounds upon which the rule was founded have since disappeared into the mists of time, thereby obscuring the dragon's lineage. Holmes alluded to Henry IV, and this book will explore dragons of the Henry II and Henry III eras as well, but his lesson applies to rules laid down at the time of the U.S. Constitution's drafting or any other point of time in legal history. In other words, "blind imitation of the past" is always a risky proposition. Knowing imitation—or rejection—of the past is another matter entirely.

This book is inspired, in part, by earlier work on the English criminal trial jury, particularly that of Thomas A. Green.[10] His scholarship highlights the ways in which medieval English juries tempered the harsh formal law of felony—which mandated the death penalty for homicide and for thefts over a certain value—by acquitting defendants who for one reason or another struck them as undeserving of capital punishment.[11] As Green's work illustrates, we can never know exactly why a jury acquitted in a particular case: perhaps they felt that the defendant was indeed guilty, but that the penalty was too harsh; perhaps the defendant was a sympathetic figure due to his or her role within the local community; maybe too little was known about the circumstances of the crime to give the jurors confidence to convict; alternatively, maybe the suspect was manifestly guilty, but the jurors feared the vengeance of friends or kin should they issue a guilty verdict; maybe it was all about what the jurors had for breakfast; or perhaps the defendant did not seem to have the requisite state of mind in committing the alleged crime. On this last point, Green unearths compelling evidence of juries crafting an informal distinction between murder and manslaughter long before the law

[9] Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10:8 (1897), 469. For a recent use of this metaphor by a modern legal historian, see Robert W. Gordon, *Taming the Past: Essays on Law in History and History in Law* (Cambridge University Press, 2017), 4–5.

[10] See especially Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (University of Chicago Press, 1985); "The Jury and the English Law of Homicide, 1200–1600," *Michigan Law Review* 74:3 (1976), 413–99; "Societal Concepts of Criminal Liability for Homicide in Medieval England," *Speculum* 47:4 (1972), 669–94. For scholarship inspired by Green's book, see J. S. Cockburn and Thomas A. Green, eds., *Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* (Princeton University Press, 1988).

[11] Green, *Verdict According to Conscience*, 28–64.

made such a distinction officially, and hypothesizes a similar intent-based distinction between opportunistic versus planned forms of theft.

It is this issue of guilty mind or mens rea that drives my analysis in the pages to follow. How important was mens rea among the various factors juries considered in assessing a defendant's culpability? And what exactly constituted a sufficiently guilty state of mind to merit a felony conviction? Was intent to carry out a wrongful act sufficient? Or did one need to exhibit something more damnable, such as malice, hatred, envy, or even pure evil? Religious texts are clear on this point, speaking directly to issues of consent and intentionality and suggesting that guilt was almost entirely dependent upon states of mind. The contemporary criminal law could have veered far from the church's insistence on the essentially mental aspect of culpability,[12] but then the contemporary criminal law was administered by justices assisted by local jurors who were themselves steeped in the religious traditions of the Catholic faith. Perhaps this is self-evident: jurors *must* have considered whether a defendant intended to undertake a wrongful act, whether he or she consented to participating in a crime, whether he or she bore ill will toward the crime victim or, alternatively, expressed no concern about the ramifications of his or her self-interested actions. Historians have not, however, taken this as a given, nor should they, particularly in light of the danger of anachronistically transferring our current priorities onto a distant and alien legal system, a danger all the greater in the history of the common law, where the slow pace of explicit doctrinal change and the conservative nature of legal vocabulary can mask great shifts in understanding over centuries. Even if we were to assume that mens rea was a factor in jury decision-making, the further question remains about how mens rea came to be part of the common law tradition, and how the average medieval English juror came by his understanding of the nature of guilty mind.

This is the first monograph devoted to exploring the meaning of felony and the centrality of mens rea in medieval English felony adjudication. Some of the questions I ask here resist resolution and, in some instances, I can do little more than open up a dialogue on what might have been. No medieval English juror ever wrote a tell-all memoir of his experiences judging felons. No statutes laid out the balancing between the general part of the criminal law, as we term it today—issues of mind, act, and excuse—and the special part, the specific varieties of crimes. No comprehensive manuals for judges or jurors survive to tell us how people understood these issues either. What does survive, in great abundance, are records of coroners' inquests and trials, as well as a smattering of legal treatises and case reports in the early Year Books. Reading these legal sources alongside non-legal texts—sermons, poems, theological tracts, romances—allows the legal historian to piece together an understanding of

[12] See Judith Shaw, "Corporeal and Spiritual Homicide, the Sin of Wrath, and the Parson's Tale," *Traditio* 38 (1982), 285–86.

ideas in wide circulation in England during these centuries. It is an imperfect methodology, relying on informed hypotheses and sometimes on less-tethered speculation. Yet I believe that this approach—the wide-angle-lens view of medieval felony adjudication—promises to open a broader conversation about the medieval origins of modern ideas of criminal responsibility within the common law tradition.

It also offers a rejoinder to criminal law scholars who posit a major transformation in criminal responsibility in later centuries and who suggest that the medieval approach to adjudicating criminal cases, by comparison, was rudimentary and focused on manifest criminality rather than human interiority and subjectivity.[13] Scholars writing about the seventeenth and eighteenth centuries, for example, have described a shift over the last 250 years from theories of criminal responsibility based on character and disposition toward theories based on capacity and human agency.[14] Nicola Lacey has posited three distinct stages in the history of criminality: (1) a period of manifest criminality, when a self-informing jury witnessed to immediately visible danger, a model obsolete by the eighteenth century; (2) an intermediate stage, during which judgments about an individual's character supplemented the increasingly indirect information a jury had about the facts of a crime; and (3) by the eighteenth century, a model of "subjective criminality" in which a defendant's responsibility was the subject of proof at trial.[15] Relatedly, while acknowledging what he terms "an early wave of

[13] See, e.g., George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), 115–18; Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016), 37–39; Lindsay Farmer, "Bringing Cinderella to the Ball: Teaching Criminal Law in Context," Review of Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Weidenfeld & Nicolson, 1993), *Modern Law Review* 58:5 (1995), 762. See also the critique of this thread of scholarship in Elizabeth Papp Kamali and Thomas A. Green, "A Crossroads in Criminal Procedure: Assumptions Underlying England's Adoption of Trial by Jury for Crime," in *Law and Society in Later Medieval England and Ireland: Essays in Honour of Paul Brand*, ed. Travis Baker (London: Routledge, 2018), 55–58.

[14] See, e.g., Nicola Lacey, "Character, Capacity, Outcome: Toward a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law," in *Modern Histories of Crime and Punishment*, ed. Markus D. Dubber and Lindsay Farmer (Stanford University Press, 2007), 17; Nicola Lacey, "Responsibility and Modernity in Criminal Law," *Journal of Political Philosophy* 9:3 (2001), 250. See also Nicola Lacey, "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law," *Modern Law Review* 64:3 (2001), 357 (arguing that the "idea of subjective, capacity responsibility" only came to the forefront of English legal thinking by the early nineteenth century).

[15] Lacey, "In Search of the Responsible Subject," 361. For a similar argument, albeit with a different time frame, see Eugene J. Chesney, "The Concept of Mens Rea in the Criminal Law," *Journal of Criminal Law and Criminology* 29:5 (1939), 632. John Langbein relies upon a notion of manifest criminality in arguing that medieval trials were largely for "clandestine crime," while someone caught red-handed or in flight would be summarily executed. John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003), 65. This overstates the frequency of summary execution in medieval England. See, e.g., John Parker, ed., *A Calendar of the Lancashire Assize Rolls*, vol. 1 (London: Record Society, 1904), 64 (two

moralization-individualization" in twelfth-century Europe, Pieter Spierenburg cautions against overestimating this development and insists that the repression of crime was "not primarily individualized" until the nineteenth century, when it finally turned from a focus on crimes and their impact toward an interest in a particular criminal's guilt.[16] In some instances, the history of criminal intent in England has been informed by models of human psychology that present the Middle Ages as a time of unfettered emotionality and legal obtuseness toward such nuanced subjects as intentionality and motive. Johann Huizinga's theory of the Middle Ages as the "childhood of man" and Norbert Elias's theory of the civilizing process at work in medieval society have both contributed, even if indirectly, to scholarship on criminal intent and, indeed, to scholarship on violence more broadly.[17] Their teleological theories, seductive in their deductive logic about the Middle Ages, have inspired scholarship based on historical inaccuracies, positing a brutal and simple medieval period giving way to the Renaissance, the Enlightenment, and modern subjectivity and civilization.

In fact, medieval English literary and religious evidence points firmly in the direction of jurors concerning themselves with issues of mind in reaching felony verdicts. The centrality of mind to weighing guilt arises in the theological texts that informed the sermons jurors heard at church and the advice they received during confession. This theme appears repeatedly in a diverse range of registers, from the most elite and Latinate to the more humble and vernacular, as well as

cattle thieves beheaded, but only after a jury determined that they had been caught in the act); Harold N. Schneebeck, Jr., *The Law of Felony in Medieval England from the Accession of Edward I until the Mid-Fourteenth Century*, vol. 1 (PhD diss., University of Iowa, 1973), 195–204 (describing the necessity of securing a confession before summarily executing a freshly captured killer). But see Margaret E. Lynch, ed. and trans., *Crown Pleas of the Lancashire Eyre, 1292*, vol. 3 (Chester: Record Society of Lancashire and Cheshire, 2015), 518–19, no. 886, describing a clothes thief chased at Lancaster's fair and immediately arrested and beheaded. See also *ibid.*, 546–47, no. 958.

[16] Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience* (Cambridge University Press, 1984), 5.

[17] See generally Johann Huizinga, *The Autumn of the Middle Ages*, trans. Rodney J. Payton and Ulrich Mammitzsch (University of Chicago Press, 1996); Norbert Elias, *The Civilizing Process*, trans. Edmund Jephcott (Oxford: Blackwell, 1994); Charles M. Radding, "Evolution of Medieval Mentalities: A Cognitive-Structural Approach," *The American Historical Review* 83:3 (1978), 583. For Elias-inspired work on the historic decline of violence, attributing this decline to a process of civilization, see Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking, 2011), esp. 59–128; Pieter Spierenburg, *Violence and Punishment: Civilizing the Body through Time* (Cambridge: Polity, 2013). For critical engagement of Elias's ideas by a medievalist, see Richard W. Kaeuper, "Chivalry and the 'Civilizing Process'," in *Violence in Medieval Society*, ed. Richard W. Kaeuper (Woodbridge: Boydell, 2000), 21–23, 33–35. And for a medievalist's response to Pinker's *Better Angels*, see Sara M. Butler, "Getting Medieval on Steven Pinker: Violence and Medieval England," *Historical Reflections* 44:1 (2018), 29–40.

the elite vernacular of higher society and the humble Latin of parish priests. Indeed, thirteenth- and fourteenth-century religious texts betray a near obsession with mind, which in turn reflects a long-standing tradition in Judeo-Christian thought that was sharpened in the twelfth and thirteenth centuries by top-down interventions by the papacy and influential theologians and bishops in Paris and elsewhere and by bottom-up responses from the clergy and laity. The church increasingly emphasized matters of conscience as it strove to reform the Christian clergy; the clergy, in turn, labored to reform the laity through preaching and confession, and the laity brought these ideas to bear on daily life. Such ideas did not leave off at the church door: popular literary works drove home the theme of intentionality as central to matters of culpability and innocence, thereby reinforcing messages preached from the pulpit.

Related to this emphasis on mind was a commitment to the principle of mercy, another theme prevalent in contemporary religious and secular literature. Most notably, if one had doubts as to a person's state of mind, judging could be fraught with difficulty and danger, the latter insofar as a wrongful judgment would have repercussions not only for the defendant but also for the person issuing the judgment. In some instances, jurors could be more confident of a defendant's guilty state of mind, which might lead them toward a tough-on-crime stance, particularly during periods when gang violence and civil disorder reached distressing heights. These worries were amplified when jurors were faced with alleged criminals who were strangers, and therefore presumptively dangers, to the local community. Texts offering guidance to rulers and royal justices emphasized that it was in the king's interest that crimes be dealt with swiftly and severely.

While the church promoted the virtues of mercy and forgiveness, it also shared and in fact broadcast concerns with collective responsibility for the extirpation of crime. A decretal of Pope Innocent III popularized the maxim, "*rei publica interest ne crimina remaneant impunita*," or "it is in the public interest that no crimes remain unpunished."[18] While this maxim targeted criminal clerics, it resonated in the broader culture in changing attitudes toward crime. Trisha Olson points out the seeming incompatibility of such concepts when she asks, "what was the mode of thought that allowed medieval Western Europe to simultaneously embrace and practice mercy as an attribute of justice proper, and to nevertheless resort, however infrequently, to the wreaking of fantastic suffering upon the body of a felon?"[19] Olson's words remind us that the problems I explore in the pages that follow were issues

[18] See Finbarr McAuley, "Canon Law and the End of the Ordeal," *Oxford Journal of Legal Studies* 26:3 (2006), 494; Richard M. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages: 'Rei publicae interest, ne crimina remaneant impunita'," *University of Illinois Law Review* 1984:3 (1984), 577–95.

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