Introduction

> [S]he turned all things to her good, and sucked honey out of the cruelty of her enemies. They persecuted, and she thereby learned patience; they shut her up into close prison, and she learned thereby to forget and despise the world; they separated her from house, children, and husband, and she thereby became familiar with God; they sought to terrify her, and she thereby increased in most glorious constancy and fortitude, insomuch that her greatest joy was to be assaulted by them.
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> John Mush, "A True Report of the Life and Martyrdom of Mrs. Clitherow."[1]

In 1586, after prolonged deliberation and with great reluctance, Justices Clench and Rhodes, sitting in judgment at the Castle of the Common Hall in York, ordered the execution of the recusant, Margaret Clitheroe (also, Clitherow). Her offense was a distinctly post-Reformation one: she was charged with harboring Catholic priests, a crime for which she was most surely guilty, having constructed a hidden room in her neighbor's home where multiple well-known Catholic dissenters had taken refuge. Harboring of this kind was also a newly legislated felony, having been enacted at parliament a year prior. The evidence poised against her was slim,

[1] John Mush, "A True Report of the Life and Martyrdom of Mrs. Clitherow," in John Morris, ed., *The Troubles of Our Catholic Forefathers Related by Themselves*, 3rd ser. (London: Burns and Oats, 1877), 371–2.

resting principally on the confession of a young Flemish boy schooled in her home, whom city authorities had browbeaten and manhandled until he agreed to guide them to the concealed room. The presence of chalices and vestments there hinted at the enormity of Margaret's wrongdoing. Yet, not having encountered an actual priest in residence, authorities had only the boy's testimony to substantiate that Margaret had in fact sheltered priests there in the past. If she had been tried, in all likelihood, as the justices continually assured her, she would have been acquitted. The evidence left far too much room for doubt. Even if the jury did somehow find against her, once again the queen's justices pledged her mercy.

Nonetheless, her trial never quite got off the ground. At her arraignment, when Judge Clench asked Margaret how she wished to plead, she refused to tender an answer. Common law labeled this behavior as "standing mute," although as the hagiography admiringly penned by her private confessor and spiritual guide, John Mush, makes amply clear, she was anything but silent. When asked "how will you be tried?" her response was

> 'Having made no offence, I need no trial.' They said: 'You have offended the statutes, and therefore you must be tried;' and often asked her how she would be tried. The martyr [Margaret] answered: 'If you say I have offended, and that I must be tried, I will be tried by none but by God and your own consciences.' The judge said, 'No, you cannot so do, for we sit here,' quoth he, 'to see justice and law, and therefore you must be tried [by the country, i.e. a jury trial].' The martyr still appealed to God, and their consciences.[2]

Fervent attempts to extract some sort of plea continued all that day and the next. The justices extended every sensible opportunity to Margaret to cease her perilous resistance and accept a jury trial, at which they were certain she would be acquitted. They tried to reason with her by outlining in gory detail the penalty for her failure to cooperate. Those who refused to plead were habitually sentenced to peine forte et dure ("strong and hard punishment"). As one of the judges explained it,

> If you do not put yourself to the country, this must be your judgment: You must return from whence you came, and there in the lowest part of the prison, be stripped naked, laid down, your back upon the ground, and as much weight

[2] Mush, "A True Report," 413.

laid upon you as you are able to bear, and so to continue three days without meat or drink, except a little barley bread and puddle water, and the third day to be pressed to death, your hands and feed tied to posts, and a sharp stone under your back.[3]

Still, she refused to concede defeat. Her bold impertinence in the face of death strikes just the right note for a saint's life. According to Mush, she declared, somewhat deliriously, "God be thanked all that He shall send me shall be welcome; I am not worthy of so good a death as this is."[4]

Weary and exasperated, the king's justices sent for the sheriff to escort her back to prison. Over the course of the following week, the city's authorities, loath to assist in Margaret's rise to martyrdom for the Catholic faith simply by following the dictates of the law, made several last-ditch attempts to coax her into a plea. Meeting failure at every turn, finally authorities had no choice but to make an example of her. Margaret, wife of a well-respected butcher, daughter of a former sheriff of York, stepdaughter of a man who ultimately rose to prominence as the city's mayor, mother of three who professed that she was likely pregnant again, was sentenced to death by the peine. Mush's description of her execution on Good Friday of that year underscores the city's efforts to make a public example of her. Rather than a solitary death in the deepest, darkest part of the prison, as described above by Judge Clench, she was brought out to the toll bridge on the River Ouse, not seven yards from where she had been imprisoned in the Tollbooth. Before a crowd of onlookers, in what Peter Lake and Michael Questier in their recent biography of Margaret Clitheroe have described as an "obscene, virtually pornographic, shaming ritual," she was stripped naked, stretched by the limbs with inkle strings "so that her body and her arms made a perfect cross." Under her back, "a sharp stone as much as a man's fist" was placed, while a door balanced on her chest.[5] Her spine instantly snapped when the four beggars assigned to the task began piling irons and stones on the door, "seven or eight hundred-weight . . . breaking her ribs" and

[3] Mush, "A True Report," 417. [4] Mush, "A True Report," 417.
[5] Peter Lake and Michael Questier, *The Trials of Margaret Clitherow: Persecution, Martyrdom and the Politics of Sanctity in Elizabethan England* (London: Continuum, 2011), 4; Mush, "A True Report," 432.

causing them to "burst forth of the skin."[6] The whole grisly ordeal took less than fifteen minutes. The inhumanity of her death and her venerable resistance to what her Catholic supporters saw as an unjust authority led to instant martyrdom and eventual canonization.

Any internet search for the phrase peine forte et dure will lead you straight to the story of Margaret Clitheroe. For many, her gruesome death is the archetype of the practice. However, as this book will argue, Margaret's experience of the peine very much represents the exception, not the rule. In Margaret's case, the peine functioned as a form of capital punishment, reprimanding her for rejecting the queen's law by witholding consent to be tried; although, as Mush reports, the sheriff of York, who was present at the end, tried in vain to persuade her that it was in fact her treasonous activities that prompted the execution.[7] Despite the celebrity of this example, Margaret's death was not a typical example of peine forte et dure in the medieval context, or afterwards, for that matter. Since its emergence in the early thirteenth century, the peine, or some variant of it, existed chiefly as an inducement to compel reluctant defendants to submit to jury trial. Time in prison under harsh conditions was hoped to incite a speedy change of heart, propelling the defendant back into the courtroom ready to plead. The coercive nature of the practice intimates that its usual application was much less rigorous in format than what we saw above with Margaret Clitheroe. Further, medieval defendants subjected to peine forte et dure sometimes languished for days and weeks at a time; thus, the form and nature of the punishments endured by Margaret could not have been conventional.

Given the horror and revulsion that Margaret's execution inspired in the English public, it should come as no surprise that peine forte et dure was never a popular option for defendants. Those who stood mute were in a distinct minority. For the medieval era, James Masschaele describes it best when he observes that silent defendants "were not common, but neither were they entirely rare."[8] For the fourteenth century, Barbara Hanawalt offers us a more precise assessment. In her *Crime and Conflict in England Communities,*

[6] Mush, "A True Report," 432. [7] Mush, "A True Report," 431.
[8] James Masschaele, *Jury, State, and Society in Medieval England* (New York: Palgrave Macmillan, 2008), 82.

1300–1348, she includes an extensive statistical breakdown of indictments drawn from the jail delivery and coroners' rolls for eight counties.[9] In her analysis, she discovered that 0.8 percent of accused felons stood mute, leading her to describe it as a "very uncommon" practice.[10] Yet, it persisted as the legal punishment for those who stood mute on a felony indictment until the prison-reform movement of the eighteenth century took hold in Britain, leading to an urgently required overhaul of England's prisons and punishment procedures. The Felony and Piracy Act of 1772 declared that, in the future, refusal to plead would be treated as a guilty verdict: silence, then, left a defendant undefended and bound for the gallows.[11] After 500 years of coercion, peine forte et dure as a practice became obsolete overnight, jubilantly discarded by a humanitarian movement that considered physical coercion barbaric. Of course, the 1772 Act was not the end of the story. The Act of 1827 overturned the 1772 decision. The success of a burgeoning psychiatric movement in Britain brought new thinking to the subject of criminal behavior. The Act concluded that the courts would henceforth consider a failure to plead instead as a plea of not guilty, thus necessitating holding a trial with evidence and a jury verdict before deciding the defendant's guilt. This reversal is how we get to where we are today.

Despite the rarity of the practice and its long history, peine forte et dure has cast a dark shadow on medieval history. As recently as 2011, Lake and Questier referred to the peine as a "sickeningly barbaric medieval punishment."[12] Their statement is not a novel interpretation, nor is it inspired purely by the histrionic tone of Mush's overblown *vita*. For centuries, legal scholars and historians alike have roundly described peine forte et dure as a lingering manifestation of medieval barbarity. William Blackstone (d.1780) infamously dubbed it a "monument of the savage rapacity" of feudalism.[13] Frederick Pollock and Frederic Maitland, England's

[9] Essex, Herefordshire, Huntingdonshire, Norfolk, Northamptonshire, Somerset, Surrey, and Yorkshire.

[10] Barbara Hanawalt, *Crime and Conflict in English Communities, 1300–1348* (Cambridge, MA: Harvard University Press, 1979), 42.

[11] 12 Geo. III, c. 20 (1772), as cited in Andrea McKenzie, "'This Death Some Strong and Stout Hearted Man Doth Choose': The Practice of *Peine Forte et Dure* in Seventeenth- and Eighteenth-Century England," *L&HR* 23.2 (2005): 282.

[12] Lake and Questier, *Trials of Margaret Clitherow*, 4. [13] *Blackstone*, vol. IV, ch. 25.

legal history giants, were somewhat more restrained in their derision, depicting it as "barbarous enough and clumsy enough."[14] Luke Pike decried the peine as both a "perpetuation of barbarism" and a "hideous cruelty."[15] Vic Gatrell called it "a relic of torture."[16] Historians' condemnations decrying peine forte et dure as a vestige of medieval barbarity are intended as a criticism not only of the practice, but also of the era. In this discourse, barbarity and civilization are binaries, sitting at opposite ends of a spectrum, intrinsically tied to the premodern–modern divide in a history that is linear and progressive. As Stuart Caroll opines, medieval man has become "the barbarian 'other' to our civilized 'self.'"[17] This critique is especially damning, given that what Margaret endured was not, in fact, typical of medieval practices. One of the goals of this book is to suggest that this discourse of medieval barbarity must be eradicated in order to better understand the "medievalness" of the peine.

Here, it is important to note that although peine forte et dure looks as if it was a method of torture, and is sometimes referred to as such by historians, technically it was not. Judicial torture in the context of medieval Europe was a fact-finding tool, devoted expressly to wringing a confession from an averse defendant. This was not the purpose of peine forte et dure, in which coercion was intended to extract consent to a trial, not a confession. The method of coercion differed also dramatically. Judicial torture relied on the application of short bursts of severe pain through stretching or searing the body, serious enough in nature that custom regulated the duration of its use to the length of time it takes to say a prayer, and required the presence of a physician in case things did not go as planned. The brutality was intended to produce immediate results. Peine forte et dure, however, was entirely different in nature and did not require any extraneous safety measures. Despite what we saw above with Margaret Clitheroe, more generally, peine forte et dure was a slow process, involving mostly deprivation and discomfort. It usually took days or weeks

[14] P&M, vol. II, 660.
[15] Luke Pike, *A History of Crime in England: Illustrating the Changes of the Laws in the Progress of Civilisation*, 2 vols. (London: Smith, Elder, and Co., 1876), vol. I, 211.
[16] Vic Gatrell, *The Hanging Tree: Execution and the English People* (Oxford University Press, 1994), 15.
[17] Stuart Carroll, "Thinking with Violence," *History and Theory* 55 (2017): 25.

before a defendant agreed to jury trial. More important still, the peine existed outside the trial altogether. As we discovered with Saint Margaret, a jury of her peers had not found her guilty of a felony. Instead, because she declined jury trial, the court deemed Margaret to have refused the common law. In consequence, her case never proceeded to trial; technically, she died unconvicted.

Law and Rationality

"Medieval barbarity" points to a primitiveness that has been especially problematic for legal historians, whose focus rests on the timing of the practice's appearance. Peine forte et dure emerged as a practice alongside the trial jury, the very symbol of modernity. Thus, with Frederic Maitland at the helm the more pressing concern has been to comprehend how peine forte et dure fits into the larger historical narrative which presents the development of the common law as a progression from unreason to reason, impelled by the rediscovery of Justinian's *Corpus Juris Civilis* in the eleventh century. While the English spurned the wholesale adoption of Roman law, the absorption of Romanism into the English legal system, particularly under the aegis of the great jurist Henry Bracton, led to the emergence of English "Rationalism," the ingenuity of this new phase signaled by Maitland's bold capitalization of the term.[18] Shedding the "archaisms" of the early medieval period – typically represented by the *wergeld* (which Maitland described as a remnant of "Welsh barbarism"), the ordeal, judicial combat, and compurgation – by 1272 English law could be described as "modern" and "enlightened," a "law for all men."[19]

The effective abolition of the ordeal by the Fourth Lateran Council (1215) and the subsequent emergence of jury trial stand as the apex of this transition from irrational to rational. Often referred to as the "palladium of justice," or the "palladium of our liberties," the trial jury is emblematic of the rationality and modernity of thirteenth-century common law. The English people no longer turned to God for a verdict, as they had done with the ordeal. Instead, in jury trial,

[18] Frederic Maitland, ed., *Bracton's Note Book: A Collection of Cases Decided in the King's Courts during the Reign of Henry the Third* (London: C. J. Clay and Sons, 1887), 9.
[19] P&M, vol. 1, 224.

the torch of justice passed into the hands of men, who reviewed the evidence and drew a reasonable conclusion. For legal historians of yore, then, the emergence of the jury trial heralded the death of the age of superstition. Common law arose from the ashes of the early Middle Ages, unconnected entirely with the law codes of the Anglo-Saxon kings that bear a striking resemblance to penitentials. In this version of history, the legal revolution of the long twelfth century (1085–1215), so heavily mired in the study and adaptation of Roman law, persuaded the English to strip God from their laws, amending them in accordance with the rationality of Roman precedent, and wisely to relegate churchmen to courts of their own. God's mystery overthrown (or perhaps, outgrown?), common law took on a new sense of authority and certainty. It is no surprise, then, that for this period historians begin to speak of the advent of the "science of law."[20]

Charles Radding's comments on Lombard law underscore just how deeply historians have associated Christianity with superstition and irrationality. He writes that Lombard law stands out from other barbarian law codes primarily because of its secular nature. The "virtual absence from the surviving *placita* of cases decided by judgments of God in any of its forms – compurgation, duel, or ordeal – has led some scholars to refer to the 'rationality' of Lombard procedures."[21] In this narrative, Christianity is not simply tied to irrationality; it is the *cause* of irrationality. One senses this also in Maitland's eagerness to weed out religion from law, seeing them as distinct realms of influence. One is highly irrational, relying on supernatural intervention as evidence; the other is comfortably, familiarly rational, manned by England's trustworthy elites. His perspective also reflects post-Enlightenment sensibilities that only when church and state are separate can modernity prevail. Recently, Christina Caldwell Ames has questioned whether we have achieved any progress in this respect, observing just how much trouble historians have with the idea that the medieval world was "governed

[20] Stephan Kuttner, "The Revival of Jurisprudence," in Robert Benson, Giles Constable, and Carol Lanham, eds., *Renaissance and Renewal in the Twelfth Century* (University of Toronto Press, 1982), 299.

[21] Charles Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna 850–1150* (New Haven: Yale University Press, 1988).

by a god who watches, torments, burns, and persecutes."[22] To Maitland, and to many other legal historians, severing the link between law and religion is a necessary precursor to understanding how the medieval world might have laid a solid foundation for modern legal practice. As a sign of this modernity, the character of the trial jury is inviolable; even though, as Rebecca Colman has complained cynically, "[t]he modern verdict of the jury in perplexing cases often has all of the inscrutability of a judgment of God," a sentiment with which I suspect most Anglo-Americans today would agree.[23]

For the purposes of this study, this surprisingly enduring narrative prompts an imperative question: how is it possible that the thirteenth century gave birth to the jury trial, a purported harbinger of modernity and enlightenment, at the same time as peine forte et dure, a practice regularly described as barbaric? While one speaks to progress, the other, by all appearances, is a step backwards. If this was a work of fiction, one suspects that my editor would gently remind me that the peine should be more appropriately situated in the irrational early Middle Ages. No wonder Maitland tried his best to steer clear of this question. In Pollock and Maitland's two-volume history of English law comprising 1,379 pages, only a page and a half is dedicated to peine forte et dure. The authors present it as an "expedient," borrowed from the Normans when justices could think of no better way to coerce defendants into submitting to jury trial.[24] Following Maitland's lead, most legal scholars have chosen simply to ignore peine forte et dure altogether; this is why so little has been written on the subject for the medieval period, with historians preferring to turn to Margaret Clitheroe or Blackstone for information about the medieval practice. Unfortunately, neglect is not going to get us any closer to answering this difficult question.

One of the overarching goals of this book is to establish that peine forte et dure is, in fact, not aberrant; it is not a hideous blight on England's march towards legal progress; it is not a resort to a primitive mentality when rationality fails. Rather, it was every bit

[22] Christine Caldwell Ames, "Does Inquisition belong to Religious History?," *AHR* 110.1 (2005): 37.
[23] Rebecca Colman, "Reason and Unreason in Early Medieval Law," *Journal of Interdisciplinary History* 4.4 (1974): 591.
[24] P&M, vol. II, 651.

as much a product of the evolution in common-law ideology as was the jury trial. In order to make sense of this development, peine forte et dure must be considered from the vantage point of the world that produced it. This book sides with Mirjan Damaška when he writes, "To be rational is to try to bring about the best result possible under the circumstances."[25] For that reason, this book first examines it with respect to contemporary legal process and jurisprudence. English justices imposed peine forte et dure upon individuals who refused to plead to a felony indictment. The severity of the court's reaction implies a need for a clearer understanding of conceptions of standing mute from both sides of the bar. What prompted an accused felon to choose silence? Was this a curial strategy exerted as a last-ditch effort to save one's neck from the gallows? Or, did the defendant exploit silence as a tool of resistance against what was perceived to be an unjust judicial process? What were the implications for English justices? Why did it matter so deeply whether the defendant pled to the accusations? Why didn't they simply proceed to trial without a plea? All of these questions are critical to our understanding of the function of peine forte et dure in the legal context. The premise of this book is that we cannot study the consequence without also studying the cause; that is, peine forte et dure cannot be properly understood until we peel back the various layers of meaning to the act of silence in the context of the medieval courtroom. It was not a one-way process in which the Crown held all the power. It is critical to recognize also the agency of the victims of peine forte et dure, and appreciate that silence might be a powerful weapon in which they attempted to bend the courts to their will.

Second, peine forte et dure must be interrogated in light of contemporary religious practices. The thirteenth century was not a watershed moment in the separation of church and state, as the traditional legal historiography implies. In fact, even with the influence and incorporation of Roman law in various manifestations across Europe, the era represents a deeper Christianizing of an already-entrenched religious judicial system. English justices wore multiple hats; or, at the very least, in the thirteenth century many of them also

[25] Mirjan Damaška, "Rational and Irrational Proof Revisited," *Cardozo Journal of International and Comparative Law* 5.25 (1997): 32.