

1972

# Societal Concepts of Criminal Liability for Homicide in Medieval England

Thomas A. Green

*University of Michigan Law School*, [tagreen@umich.edu](mailto:tagreen@umich.edu)

Available at: <https://repository.law.umich.edu/articles/849>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Comparative and Foreign Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Legal History Commons](#)

---

## Recommended Citation

Green, Thomas A. "Societal Concepts of Criminal Liability for Homicide in Medieval England." *Speculum* 47, no. 4 (1972): 669-95.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# SOCIETAL CONCEPTS OF CRIMINAL LIABILITY FOR HOMICIDE IN MEDIAEVAL ENGLAND

BY THOMAS A. GREEN

## INTRODUCTION

THE early history of English criminal law lies hidden behind the laconic formulas of the rolls and law books. The rules of the law, as expounded by the judges, have been the subject of many studies; but their practical application in the courts, where the jury of the community was the final and unbridled arbiter, remains a mystery: in short, we know little of the social mores regarding crime and criminals.

This study represents an attempt to delineate one major aspect of these societal attitudes. Its thesis is that from late Anglo-Saxon times to the end of the middle ages, there existed a widespread societal distinction between 'murder,' i.e., homicide perpetrated through stealth, and simple homicide, roughly what a later legal age termed manslaughter. This distinction, which was imposed upon the courts through the instrument of the trial jury, was fundamentally at odds with the letter of the law. It is therefore necessary to state, if only briefly, what the rules of law were.

In the early twelfth century, the Crown took exclusive jurisdiction over all homicides and defined them as 1) culpable and thereby capital, 2) excusable and thereby pardonable, 3) justifiable and thereby deserving of acquittal.<sup>1</sup> The last class at first incorporated the slaying of handhaving thieves and outlaws who resisted capture. By the middle of the fourteenth century, it came to include the killing of housebreakers and robbers caught in the act, though it was not until the sixteenth century that a statute made this policy into firm law.<sup>2</sup> Pardonable homicides were those committed by the insane, unintentional homicides and homicides committed in self-defence. The rules of self-defence were rigorous throughout the entire mediaeval period. The slayer had to have made every possible attempt to escape his attacker, must have reached a point beyond which he could not retreat and must have retaliated out of literally vital necessity.<sup>3</sup> All other homicides, those deliberate but of a sudden as well as those planned and stealthily perpetrated fell into the large category of culpable homicide; according to the rules of the law, there were to be no distinctions made among them. This remained true until the late sixteenth century when the judicial distinction between murder and manslaughter finally emerged.<sup>4</sup>

<sup>1</sup> Naomi D. Hurnard, *The King's Pardon for Homicide before A.D. 1307* (London, 1969), p. 1 ff. Hereafter cited as Hurnard. I am grateful for the assistance of Professor S. E. Thorne of Harvard University, Alfred Konefsky of the Harvard Law School and Ruth Brownell Green.

<sup>2</sup> 24 Hen. VIII, c. 15, *Statutes of the Realm, 1235-1713*, ed. G. Luders, T. E. Tomlins, et al (London, 1810-28), III, 442.

<sup>3</sup> *Infra*, p. 675.

<sup>4</sup> J. M. Kaye, "The Early History of Murder and Manslaughter," *Law Quarterly Review*, LXXXIII (July and Oct., 1967) 365-395, 569-601.

To be sure, the king might as a special favor grant a pardon to a felonious slayer, usually for a considerable fee, or as a reward for service abroad in the royal army. These pardons 'of grace' were emanations of the royal prerogative. Pardons for self-defence, accident and insanity were, by the late thirteenth century, pardons of course; all who deserved them according to the rules of the law were to receive them. After 1294, due mainly to the needs of military recruitment, pardons of grace issued in far greater numbers than ever before to perpetrators of felonious slayings of all sorts.

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

Because coroners' rolls are too sparse in the pre-1300 period, there exists no definitive method of proving that the societal attitudes traced here precede the fourteenth century. In fact, a recent study of pardonable homicide in the thirteenth century, by Naomi Hurnard, argues that jurors were fairly scrupulous in giving evidence and that their determinations did not vary substantially from at least the spirit of the law. In Part III I shall contend that Miss Hurnard's analysis does not conclusively prove the argument she sets forth and that, while her thesis cannot be disproved, there is much about it which remains doubtful. Moreover, I shall argue that the early history of criminal liability, especially that for the period just preceding the imposition of royal jurisdiction in all homicides, suggests that the official rules from their very inception ran counter to and never really became a part of social practice. This argument, admittedly speculative, takes the following form. During the Anglo-Saxon period only those who committed homicide through secrecy or stealth — murder — had to pay for their act with their life. The new, twelfth-century practice subjected to the death penalty not only 'murderers' but the large class of open slayers formerly allowed to compensate for their act by payment of the *wergeld*. The community resisted this harsh extension of capital punishment and subsequently found means — acquittals and verdicts of self-defence — to impose upon the courts their long-held

notions of justice, a process which becomes visible to us only as of the fourteenth century. The societal distinction between murder and simple homicide thus had its source deep in the English past. The introduction of novel and strict official rules of liability meant the destruction of the traditional means of dispute settlement in simple homicide, but it did not obliterate traditional societal attitudes of liability. Nor did the imposition of a new scheme of criminal administration prevent society from acting, within the context of that scheme, in accordance with its traditional attitudes.

Finally, in Part IV, I shall elaborate upon the nature of the mediaeval societal concept of 'murder' and the place of that concept within the process of dispute settlement.

### I

Throughout the entire mediaeval period for which written records are extant, the great majority of defendants who stood trial were acquitted. While many are acquitted today, one must take into account the fact that most suspects do not now stand trial; the vast majority of them plead guilty. In the middle ages few pled guilty to any felony, as the penalty was invariably capital.<sup>5</sup>

Doubtless, many defendants deserved acquittal. Many charges were poorly supported. The coroner's report might reflect the testimony of only a few neighbors and might represent only the most serious charges which circulated in the wake of a homicide. Although coroners were required to list all those present at a homicide,<sup>6</sup> they often failed to do so. In many cases, they recorded the details of a slaying, maintaining at the same time that no one had been present except the slain man, who had died immediately, and the slayer, who had thereupon fled.<sup>7</sup> What, then, was the source of those details? There had probably been witnesses who were not anxious to become involved, to risk coming under suspicion themselves. To come forward later was to risk a fine for not having raised the hue.<sup>8</sup> On the other hand, what they had seen must soon have become the common knowledge of the countryside, and, allowing for the usual exaggerations or alterations of the true story, may have appeared in the coroner's enrollment as a fairly accurate account of the event. But it is difficult to separate the accurate descrip-

<sup>5</sup> Convictions were particularly rare at the eyre, for few would appear who had neither a pardon nor assurance of acquittal by the country. See *Eyre of Kent, 6 and 7 Edward II, 1313-1314*, ed. F. W. Maitland, *et al* (London, 1903-14), I, xlii. At gaol delivery, where nearly all the defendants had been arrested against their will, the record of conviction was not much better. The roll of Thomas Ingelby and his associates, for example, compiled at deliveries of Derbyshire, Leicestershire, Lincolnshire, Northamptonshire, Nottinghamshire, and Warwickshire, 40-45 Edward III, contains the trials of 160 individuals accused of homicide (twenty-four were cited as accessories or receivers). Only fifteen were found guilty; seventy-four were acquitted, fifty-nine were given special verdicts as self-defenders. The remainder came with pardons or were released for other reasons. Of the principals who denied the charges against them eighty per cent were acquitted outright. P.R.O., J.I. 3. 142, mm. 3 ff.

<sup>6</sup> R. F. Hunnisett, *The Medieval Coroner* (Cambridge, 1961), p. 24.

<sup>7</sup> E.g., *Calendar of Coroners Rolls of the City of London, A.D. 1300-1378*, ed. R. R. Sharpe (London, 1913) Roll B, 36; Roll D, 5.

<sup>8</sup> Hunnisett, *op. cit.*, pp. 10, 25.

tions from the cases of mere guesswork. The trial jurors probably took a more reasonable view, rejecting unsubstantiated testimony.<sup>9</sup>

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

The clearest evidence of juries discriminating on the basis of the nature of the slaying dates from the end of the fourteenth century and the first decades of the fifteenth. In 1390, century long protests against the royal pardoning policy culminated in a statute which restricted the power which the king had to grant to those who had committed murder pardons of grace.<sup>10</sup> 'Murder,' as a term of art, referred to the most heinous forms of homicide, those perpetrated through stealth, at night or by ambush. It appears to have been directed especially at murderous assaults committed by professional highwaymen and burglars for monetary gain. The King agreed not to pardon murderers lightly; moreover, no pardon for murder would be valid unless it made specific mention of 'murder.' It is extremely important to note that culpable homicide continued to include both murder and simple homicide. Both were capital; no judicial distinction was made between them. The term 'murder' was employed, where relevant, solely for the purpose of administering the Statute of 1390. Though the statute's effectiveness was short-lived, for several decades 'murder' found its way into some homicide indictments.

Analysis of several trial rolls which include indictments by coroners and justices of the peace who, despite the courts' failure to apply the 1390 statute, bothered to discriminate between murder and simple homicide reveals that juries acquitted the great majority of non-murderers and sent murderers to the gallows about fifty percent of the time.<sup>11</sup>

A gaol delivery roll covering the first eight years of the reign of Henry VI demonstrates the point quite clearly.<sup>12</sup> The roll was compiled for James Strangways and his fellows, who visited the gaols of Lincoln, Nottingham, Northampton, Warwick and Leicester. A total of 114 defendants came before them to

<sup>9</sup> See Hurnard, pp. 361 ff., for an analysis of inquisitions, held on a writ *de odio et atia*, to ascertain the veracity of appeals and indictments.

<sup>10</sup> The background to the statute of 1390 is given in Kaye, "Early History," Part I. My interpretation of the statute itself differs from that of Kaye, who argued that it limited pardons in all types of felonious homicides. I plan to publish an article dealing with the statute and with the early history of the official distinction between murder and manslaughter.

<sup>11</sup> I have chosen those rolls, or sections of rolls, which contain a substantial number of indictments for homicide and where it seems clear that coroners and justices of the peace inserted, when relevant, *murdravit* or its statutory equivalent: *insidiavit*. On many other rolls, of course, where no distinction was made, indictments not including these terms of art often ended in convictions. A fuller analysis of the post-1390 gaol delivery rolls will appear in the study referred to, *supra* n.10.

<sup>12</sup> J.I. 3. 203.

answer indictments for homicide, in seventy-seven different cases. Of these, excluding those excused for faulty indictments and those for whom the jury returned special verdicts, eighty-four men were acquitted and twenty were condemned to death. The latter group, with one exception, had been indicted for murder. Acquittals, on the other hand, were registered for thirty-seven indicted for simple homicide and for forty-seven held for murder. Taking only principals into account, eighteen of the nineteen hanged had been charged with murder and of the forty-five acquitted, only seventeen were murder suspects. Thus, while an indictment for simple homicide practically assured the principal defendant of exculpation (one of twenty-nine was hanged), an allegation of murder put his chances at about fifty-fifty (eighteen of thirty-five were hanged).<sup>13</sup>

Similarly, John Cokayn's roll, compiled over the years of Henry V's reign from deliveries of the gaols in Derbyshire, Leicestershire, Lincolnshire, Northamptonshire, Nottinghamshire, Rutland and Warwickshire, records fifteen convictions based on murder indictments and only four based on simple homicide, despite the fact that there are substantially more simple homicides on the roll.<sup>14</sup> The enrollments for Leicester gaol, based on several deliveries during the reign of Henry IV, show only four convictions, all based on murder allegations. Of the thirteen acquittals, seven of the original indictments were for murder, six for simple homicide.<sup>15</sup> John Martyn's roll for the far western circuit, 1424-1430, presents ten simple homicides, nine of which ended in acquittal and five murders, four of which led to convictions.<sup>16</sup>

There is no evidence that the judges pushed juries to convict in murder indictments. Certainly, the judges did not encourage juries to acquit those indicted for simple homicide. Only the grounds of self-defence justified the deliberate slaying of a person who was neither a convicted nor a manifest felon, and the test for self-defence remained quite rigorous. As Prisot, J., stated as late as 1454:

. . . if a man assaults you in order to beat you it is not lawful for you to say you want to kill him and to endanger his life and limb: but if the case is such that he has you at such advantage that he intends to kill you as you seek to flee and he is swifter than you and pursues you so that you are unable to escape; or if you are on the ground under him; or if he chases you to a wall or hedge or dike, so that you cannot escape, then it is lawful for you to say that if he won't desist, you want to slay him to save your own life, and thus you may menace him for such special cause. . . .<sup>17</sup>

<sup>13</sup> Two of the seventeen had been indicted for murder by one inquest and for simple homicide by the other: coroners' indictments often differed from those of the justices of the peace.

<sup>14</sup> J.I. 3. 195.

<sup>15</sup> J.I. 3. 188.

<sup>16</sup> J.I. 3. 205. The 'simple homicide' resulting in conviction was the slaying of a man by his wife, an act which the community usually construed as murder. *Infra*, p. 693.

<sup>17</sup> *Year Books, 1422-1461* (Henry VI) (London, 1556-74), 33 Hen. VI, Easter, pl. 10: ". . . *quar si un home vous assaute de vou battre n'e loial ꝑ vous adire que vous voiles luy tuer, et de luy menasser de vie et de membre: mes si l'cas soit tiel, q'il ad vous a tiel advantage ꝑ par entend il voilloit vous tuer come si voiles fuir, et il est plus courrant que vous estes, et alla apres vous, issint que ne vous poies luy escaper; ou autrement que vous estes desouh luy al'terre; ou s'il ad enchace vous a un mure ou un hedge ou dike, issint q' vous ne poies luy escaper, donq's est loial ꝑ vous adire ꝑ s'il ne veut departir de vous, q'vous en salvatio de vostre vie luy voiles tuer, et issint vous poies luy menasser pour tiel special cause . . .*"

The judges at gaol delivery could invoke these standards but they could not impose them upon the jury. They could relieve their frustration only by getting on to the next case, the next county-town. Evidence of false testimony lay all about them, but pursuing it would have been very time consuming. Testimony given at coroners' inquests could not have been so systematically wrong as the verdicts of petty juries made it appear, yet if questioned, the jurors would simply have continued to swear on their oaths that the defendant was not guilty. The court could have done little short of undertaking a fullscale investigation of the homicide, and lacking a police force and any sophisticated evidence-gathering techniques, even that would seldom have made the matter any clearer.<sup>18</sup>

## II

Our demonstration that juries acted upon their own extra-legal theory of culpable homicide — based, broadly speaking, on the distinction between serious and simple homicides — is limited thus far to the post-1390 period. It is likely that society made this distinction earlier, but it is not easy to prove. Before 1390 gaol delivery enrollments, in recording the indictment made before the coroner or justice of the peace, almost invariably used only the unenlightening phrase *felonice interfecit*. Thus it is impossible to show from them that juries distinguished between types of felonious homicides. If we work backwards from the trial roll to the indictment as it appeared on the original coroner's roll, two nearly insuperable problems are presented: the greater part of the original inquests are no longer extant; those that do survive generally contain only the operative phrase, *felonice interfecit*, with few details from which the nature of the act can be deduced. One of the few coroners' rolls that does supply such details is the roll of Edmund de Ovyng.<sup>19</sup> It is also the longest of the extant coroners' rolls. Of the twenty-five cases on Ovyng's sixty-nine membrane roll that present homicides identifiable on the trial rolls, only two ended in convictions.<sup>20</sup> Both show the characteristics of murder, but in one the defendant confessed and turned approver.<sup>21</sup> This sort of piecemeal evidence, drawn from isolated cases on many different rolls over a century or more, does not afford convincing proof.

<sup>18</sup> The procedure of attain of the jury "was never extended to the criminal jury which had been 'chosen' by the defendant." S. F. C. Milsom, *Historical Foundations of the Common Law* (London, 1969), p. 366.

<sup>19</sup> J.I. 2. 18 (Cambridgeshire, 14-39 Edw. III).

<sup>20</sup> Nine ended in acquittals, eleven in findings of self-defence, one defendant came forward with a pardon, one died in gaol and one was remanded.

<sup>21</sup> J.I. 2. 18, m. 21/4 (1349): "... *noctanter felonice interfecit R. B. et M. uxorem eius . . .*" The gaol delivery roll (J.I. 3. 134, m.38/5) used the form, "*felonice et sediciose interfecit . . . noctanter.*" In the second case, testimony was recorded at the coroner's inquest [J.I. 2. 18, m.5d/4 (1346)] that, "... *post horam cubitus [A] surexit extra cubitum suum . . . insultum fecit eidem W. . . . W. surexit a lecto suo*" and raised the hue, at which point the defendant stabbed him to death. The accused turned approver. For the gaol delivery enrollment, see J.I. 3. 134, m.34/4 (1346). Although little can be made of such rare cases, they deserve some comment. They are the only cases which led to conviction. Both have elements of "murder." The first was secretly done, at night; the second was an attack on a man in his own bed. Though the defendant confessed, it is unlikely he would have done so had the jury not been about to declare him guilty. This is precisely what we would expect to find if a more extensive comparison were possible.

The only feasible approach to our problem is to compare the coroner's indictment with the trial enrollment in cases ending in a verdict of self-defence. As we have seen, the law of self-defence was very strict. The slayer had to have acted as a last resort which meant, in effect, that the jury had to detail the defendant's attempts to escape his assailant. Verdicts of self-defence appear on the trial rolls as a series of formulas which put the defendant's actions in the best possible light. The slain man was usually said to have provoked the fight and dealt the first blow; the defendant then had attempted to escape, only to find himself cornered or thrown down and held to the ground; gravely wounded, the defendant as a last resort drew a weapon and saved his life in the only way possible. Often, it was specified that the defendant had retaliated with a single blow.<sup>22</sup> Doubtless, some of these details represented embellishments of the truth. Some of them even went beyond the rigorous requirements of the law. It would have been sufficient, for purposes of eligibility for royal pardon, to allege that the defendant had retreated as far as possible and had struck back as a last resort; had he not yet been wounded or had he needed to retaliate with multiple blows, he would still have been eligible.

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

Admittedly, several methodological difficulties arise in employing the coroners' rolls. In the first place, the coroner's inquest was held very soon after the homicide occurred, and in some cases additional evidence must have come to light after the inquest had been held. Moreover, the coroners' enrollments nearly always name one suspect and set forth one set of facts as to the circumstances of the homicide. We know nothing of the process by which these seemingly unanimous inquest verdicts were reached. They probably represented the belief of the majority of the jurors. Many inquest votes may have been close and their outcome may have resulted from the prestige or power of one or two persons. Many coroners (or their clerks) were erratic in the enrollment of details; the fact that only a few facts were set down in a given case does not mean that others were not stated at the inquest. Finally, some enrollments were malicious indictments. This is more likely to have been the case where there had been only one witness or where there had not been a witness, but merely a "first finder." The witness or finder would have been in a strong position to place the blame where he pleased.

<sup>22</sup> E.g., J.I. 3. 142, m.6d/2 (1367); J.I. 3. 142, m.10d/2 (1371).



Several steps have been taken in order to mitigate the above problem. Coroners' inquest juries often stated that a homicide had been committed in self-defence although the evidence they presented did not meet the legal requirements for a pardon. These cases are the best source of evidence of community attitudes and I have relied heavily upon them. I have excluded from my study coroners' rolls which include very few details. It is clear that the clerks compiling these rolls did not bother to enroll evidence of self-defence, but merely characterized all homicides as felonious. Therefore, it is unsafe to assume that any corresponding trial verdict of self-defence represented an alteration of the facts. I have instead relied upon rolls which include a great deal of detail in most cases. This allowed the assumption that where the coroner's inquest did produce testimony of self-defence it was duly enrolled.

In order to kill in self-defence, it was necessary for the man attacked to retreat until retreat was no longer possible. At the trial the jurors always alleged the presence of such an impasse, and though that was sometimes true,<sup>23</sup> a comparison of the coroners' rolls and the trial rolls reveals that it often was not and that a petty jury had so altered the facts as to make pardonable what the law considered nonpardonable. From the community's point of view, a violent attack could be met by a violent response. A man whose life was threatened did not have to seek some means of escape; indeed, he need not do so though he was not in danger of losing his life. The court's concern with last resort indicates a concept of criminal liability fundamentally at odds with prevailing social notions.

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

William put his hand to his knife in order to draw it and strike Robert. Robert, fearing that William wanted to kill him, in self-defence struck William on the head with a hatchet.<sup>24</sup>

Edmund de Ovyng, the Cambridge coroner, was usually very careful to report inquest findings in detail.<sup>25</sup> He recorded a case of homicide *se defendendo* in which the assailant had seized the defendant's beard. Walter Clerk and Thomas Clerk argued until Thomas, threatening to kill Walter,

<sup>23</sup> For various examples on coroners' rolls of clearly stated last resort, see, J.I. 2. 102, m.9d/2: "*fugit usque ad quoddam angulum domus*" (1363); J.I. 2. 18, m.5/4: "*iacuit super ipsum*" (1345); J.I. 2. 102, m.11d/2 (1364); J.I. 2. 67, m.5/3: "*quandam ripam ubi voluit transisse et non potuit pro profunditate et largitudine dicte aque.*" (1354); J.I. 2. 18, m.52d/2: "*cessidit ad terram . . . A. fuit in proposito interfecisse . . . B.*" (1361); J.I. 2. 18, m.61/1: "*supersit predictum J. in ulnas suas*" (1364); J.I. 2. 23, m.2/2: "*non potuit evadere propter multitudinem inimicorum suorum*" (1373). The fact that the coroner's inquest produced such testimony does not mean that the facts were true; they might have been altered at this early stage. But in such cases the trial jury was not adducing facts contrary to those of the indictment.

<sup>24</sup> J.I. 2. 102, m.9/2: "*Willelmus misit manum suam ad cultellum suum abtrahendum et ad percucendum dictum Robertum. Idemque Robertus timens quod idem W. voluit occidisse eum in defensione vite sue percussit eundem W. in capite super cervicem eiusdem cum quadam hachia*" (1363). The trial record (Oyer and Terminer) has not been located, but the slayer was pardoned for self-defence: *Calendar of the Patent Rolls, 1232-1422* (London, 1906), May 6, 1367, p. 395. Hereafter cited as *C.P.R.* See also J.I. 2. 58, m.2/2 (1379).

<sup>25</sup> J.I. 2. 18 (14-39 Edw. III); J.I. 2. 256, mm. 1-4 (44-48 Edw. III).

suddenly jumped from the cart and took up an iron fork, intending to run at Walter, but Walter immediately grabbed the fork in his own hand and threw it from Thomas lest he do further damage with it; for which Thomas took Walter by the beard; Walter, because of this, drew his knife and in self-defence struck Thomas in the left arm so that he died.<sup>26</sup>

Thomas' attack and intentions, rather than the imminence of danger to Walter's life, were the basis for the finding of self-defence. In a similar instance, Hugh Harpou, chaplain, took John atte Lane, also a chaplain, in his hands and

threw him down feloniously at his feet and wanted to kill him . . . because of this, John, fearing death and getting up, drew his knife and stabbed Hugh in the chest.<sup>27</sup>

Hugh seems to have been weaponless, so that John was not in imminent danger of death. Nevertheless, he was repelling an attack, and thus in a sense, defending himself. The resistance was excessive, but the community did not scruple as to the nature of the retaliation. The trial jury provided an elaborate story of self-defence.<sup>28</sup>

Jurors at a Leicestershire coroner's inquest in 1365 told a complicated story with respect to the death of Richard de Sydenfen.<sup>29</sup> Richard Ruskin and his son William came to the door of William de Assheby's house in Melton and the elder Ruskin brought Assheby outside with sword drawn by calling him a liar. After a struggle, Assheby chased his enemies to the door of their house where Ruskin senior's servant, Sydenfen, seeing that his master was in grave danger, felled Assheby with the blow of a club. The latter revived, and drawing a small knife, slew the servant "in self-defence." Assheby did not retreat once he had risen to his feet, but that was of no consequence. Nor did it matter that he had entered the fray of his own choosing. When he killed Sydenfen he was acting in "self-defence."<sup>30</sup>

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

<sup>26</sup> J.I. 2. 18, m.45d/5: "*W.C. et T.C. . . . simul cum una caretta pro garbis querendo . . . et contencio mota inter ipsos T. . . . stetit super caretam querendam et minavit ipsum Walterum de vita et membra et festinans descendens de caretta cepit unum furcum ferratum et voluit concurrere super dictum W. et incontinenti dictus W. cepit furcum in manu sua et illud iactavit ab ipso ne dampnum ulterius cum illo faceret quo facto dictus T. cepit ipsum W. per barbam suam quo facto dictus W. traxit cultellum suum et in defensione sua percussit predictum T. in brachio sinistro . . .*" (1357). The trial enrollment has not been located.

<sup>27</sup> J.I. 2. 18, m.47d/4: "*. . . cepit in manibus suis et iactavit ipsum feloniter humo sub pedibus suis et ipsum voluit interfecisse . . . quo facto predictus Johannes atte Lane timens mortem suam et in resurgendo de pedibus ipsius Hugonis traxit cultellum suum . . . et percussit predictum Hugonem in pectore . . .*" (1358). The trial enrollment (P.R.O., C. 47, Cambridge, File 6/87) is partly blind, but the legible parts indicate a classic form of self-defence. See also, J.I. 2. 58, m.4/2 (1380), where the accused had been thrown to the ground before slaying his assailant. There is no mention of any weapon used by the assailant, but the inquest jury maintained the homicide was committed in self-defence. No trial enrollment located.

<sup>28</sup> In some cases, the self-defender seems to have stood his ground and waited for his assailant to reach him despite the fact that there was no apparent obstacle to retreat. E.g., J.I. 2. 18, m.16/3 (1351); trial enrollment at J.I. 3. 134, m.41/1; J.I. 2. 58, m.3d/1 (1379); trial enrollment not located.

<sup>29</sup> J.I. 2. 53, m.3d/4.

<sup>30</sup> When Assheby came to trial he already had a pardon. J.I. 3 142, m.18/1; *C.P.R.*, Dec. 6, 1366, p. 345.

John le Marche, 'pottere,' and Agnes de Wycoumbe after the hour of curfew, were quarreling in the High Street opposite the house of John . . . when the said Agnes taking a staff . . . out of the hand of John . . . therewith struck the said John on the back and sides; that thereupon came Geoffrey de Caxtone . . . and Andrew de Wynton, 'pottere,' with staves in their hands to assist the said Agnes and struck the said John on the head and body, so that he died a week later.<sup>31</sup>

A trial enrollment is extant only in the case of Andrew.<sup>32</sup> The petty jurors testified that John met Andrew some distance from the place of the slaying and struck him on the head with a staff.<sup>33</sup> Andrew fled until he was up against a wall and forced to retaliate.<sup>34</sup> There was no mention of any other principals to the homicide.

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

John Pentyn would have hanged himself in his solar, and on that account his wife Clemencia raised the cry so that the said John de Chiggewell, John atte Mersshe, Adam de Wykham and other neighbors, names unknown, came to her assistance, and that when the said John de Chiggewell would have entered the solar before the others, . . . Pentyn feloniously struck him on the head . . . inflicting a mortal wound. . . .<sup>35</sup>

At Pentyn's trial, the petty jury alleged that he had argued with his wife and, after she had left the house, had locked the door and gone up to his bed in the solar. Clemencia returned in the evening and finding herself locked out, raised the hue, at which point Chiggewell arrived, ascended the stairs to the solar and tried to kill Pentyn with a hatchet. Pentyn, unable to escape, grabbed an iron window bar and in self-defence gave his assailant one blow from which he died fifteen days later.<sup>36</sup>

Finally, a simple homicide led to a special verdict of self-defence in the case of John Counte, who, after quarreling with Robert Paunchard in Bishopsgate Ward, London, drew a knife and stabbed Paunchard to death.<sup>37</sup> The trial jury maintained that Paunchard had thrown rocks at Counte and driven him to a wall.<sup>38</sup>

By the middle of the fourteenth century, a defendant who had slain a house-breaker might be acquitted by judgment of the court.<sup>39</sup> The same applied where he had slain someone who came to rob him. The courts were not consistent in

<sup>31</sup> *London Coroners' Rolls*, Roll E, 35, pp. 162-3.

<sup>32</sup> According to the coroner's roll, Andrew and a certain Robert le Raykere, who had "aided and abetted" the felony, were immediately captured; Agnes and Geoffrey fled.

<sup>33</sup> C. 260/37 no. 7. (1326). See also, J.I. 3. 43/3, m.2/1 (1326) for the original trial enrollment.

<sup>34</sup> Pardon: *C.P.R.*, Feb. 22, 1327, p. 24.

<sup>35</sup> *London Coroners' Rolls*, Roll B, 42, pp. 65-6.

<sup>36</sup> C. 260/32 no. 15. (1322). Order to bail Pentyn: *Calendar of the Close Rolls, 1272-1447* (London, 1900-37), April 13, 1323, p. 636.

<sup>37</sup> *London Coroners' Rolls*, Roll H, 9, pp. 242-3.

<sup>38</sup> C. 260/50 no. 61. (1339). It is possible that the jury was influenced by the location of the slaying. The fight had taken place in the close of the Earl of Warren where Robert Artoys, by whom Counte was employed as a cook, resided.

<sup>39</sup> *Supra*, p. 669.

their treatment of such cases, and it appears that at least until late into the century, acquittal might depend upon clear evidence of self-defence. In this area, the community was ahead of the courts. Trial juries supplied evidence of self-defence where, on the basis of coroner's inquest testimony there had been neither true self defence nor even clear evidence of housebreaking or attempted theft.

In one instance, where self-defence may in fact have been involved, though the jurors at the inquest made no mention of last resort, the deceased had entered the close of William Childerle

at the hour of Prime without the license of William and against the latter's will. . . .<sup>40</sup>

William returned home from the fields and met Richard on the stairs of his solar where a struggle ensued and the intruder was slain. At the trial, the petty jury assured the court that William had fled to a wall near the door of the house where he was finally cornered and forced to strike back in self-defence.<sup>41</sup> Thomas Randolph of Braunston, Leicestershire, saw someone standing outside his window at night and demanded to know who it was.<sup>42</sup> Receiving no answer, he took up a club and went outside where the trespasser, John Sherman, attacked him. Standing his ground, Thomas dealt Sherman a fatal blow, which the inquest jurors said was done in self-defence.<sup>43</sup> Similarly, Henry Priour, attacked by William, son of John Paryn, who came one evening to the door of Henry's house, retaliated immediately with a club.<sup>44</sup> At Priour's trial, the petty jury asserted that William attacked Henry "*ad domum ipsius Henrici*" and drove him to a wall where he, Henry, happened to find the club he used; he thus had slain in self-defence.<sup>45</sup>

In a more extreme case, it was considered self-defence where the defendant on his master's property slew a man who had hurled insults at him.<sup>46</sup> William de Walynford, 'brewere,' quarreled with Simon de Parys in Cheap and the latter followed William home, threatening him as they went. The coroner recorded that William forbade Simon to insult him in his master's house and then immediately William fetched a knife and plunged it into Simon's chest. In the petty jury's account, however, the facts were altered to show that Simon had attacked William with a knife as they stood in the king's highway: William fled to his master's house, where, being cornered by his assailant, he had slain him as a last resort.<sup>47</sup>

One related and extraordinary case, for which coroner's indictment and trial enrollment are both extant, shows how the community sanctioned the slaying of an adulterer. An aggrieved husband was not permitted to take the adulterer's

<sup>40</sup> J.I. 2. 18, m.41d/2: "*circa horam prima sine licencia ipsius Willelmi et contra voluntate ipsius Willelmi*" (1356).

<sup>41</sup> C. 260/68 no. 20. (1357); Pardon: *C.P.R.*, May 3, 1357, p. 530.

<sup>42</sup> J.I. 2. 58, m.1/1 (1379).

<sup>43</sup> No trial enrollment has been located for this case. Possibly, the defendant was acquitted as a slayer of a thief.

<sup>44</sup> J.I. 2. 18, m.44d/3 (1354).

<sup>45</sup> J.I. 3. 139, m.13d/1 (1356). The defendant was remanded to await a pardon.

<sup>46</sup> *London Coroners' Rolls*, Roll C, 13, p. 80.

<sup>47</sup> J.I. 3. 43/1, m.21/1 (1324).

life,<sup>48</sup> but as in the case of a trespasser upon his land, he would have been able to drive him away. Robert Bousserman returned home at mid-day, an inquest jury testified, to find John Doughty having sexual intercourse with his wife (“*ad fornicandum cum illa*”).<sup>49</sup> Bousserman forthwith despatched Doughty with a blow of his hatchet. The petty jury altered the facts to make Robert a self-defender who could not escape and to emphasize the aspect of trespass:

John Doughty came at night to the house of Robert in the village of Laghscale as Robert and his wife lay asleep in bed in the peace of the King, and he entered Robert's house; seeing this, Robert's wife secretly rose from her husband and went to John and John went to bed with Robert's wife; in the meantime Robert was awake and hearing noise in his house and seeing that his wife had left his bed rose and sought her in his house and found her with John; immediately John attacked Robert with a knife . . . and wounded him and stood between him and the door of Robert's house continually stabbing and wounding him and Robert seeing that his life was in danger and that he could in no way flee further, in order to save his life took up a hatchet and gave John one blow in the head. . . .<sup>50</sup>

The allegation that the slain man had secretly entered a house at night while the master of the house slept was one of the common elements of later indictments for ‘murder.’<sup>51</sup> In this case it was unnecessary; the jurors needed to do no more than provide the usual allegations of homicide *se defendendo*. Possibly, the elaborations by the trial jury indicate an especially strong sense of outrage.

The community was also ready to excuse homicide which occurred in defence of a kinsman though the slayer was not himself in mortal danger. The petty jury had to alter the true facts by asserting that the accused himself had come under attack and had slain his assailant as a last resort.<sup>52</sup> This may be seen in a number of cases.

A Buckinghamshire coroner, John atte Broke, recorded that John Colles,

<sup>48</sup> Cf., Sir F. Pollock and F. W. Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. (London, 1898), II, 484–5: “There are signs that the outraged husband who found his wife in the act of adultery might no longer slay the guilty pair or either of them, but might emasculate the adulterer.” It seems doubtful that this practice survived into the fourteenth century.

<sup>49</sup> J.I. 2. 211, m.1d/1 (1341).

<sup>50</sup> J.I. 3. 78, m.2d/1: “. . . *infra nocte predictus Johannes Doughty venit ad domum ipsius Roberti in predicta villa de Laghscales prefato R. cum uxore sua in lecto suo in pace Regis iacente et sompniante et domum ipsius R. intravit quod percipiens uxor ipsius R. secreta a viro suo surexit et ad ipsum J. iuit et predictus J. uxorem ipsius R. ibidem concubiit . . . medio tempore predictus R. vigilavit et audiens tumultum in domo sua et percipiens uxorem suam a lecto suo abesse surexit et querendo eam in domo sua invenit eam cum predicto J. et statim predictus J. in ipsum R. cum quodam cultello vocato [tear in membrane] ibidem insultum fecit et ipsum verberavit vulneravit et inter ipsum et hostium eiusdem domus stetit semper cum cultello predicto ipsum percuciendo et vulnerando ipsum ibidem ad interficiendum et predictus R. videns periculum mortis sibi imminere et se ulterius nullo modo posse diffugere causa mortem suam propriam evitandi sumpsit quoddam polhachet et inde percussit predictum J. solo ictu in capite usque cerebrum unde statim obiit . . .” (1342).*

<sup>51</sup> *Supra*, p. 672.

<sup>52</sup> Miss Hurnard states the common law rule as restricting self-defence to defence of one's own life. She appears to have found no cases where defence of one's kin was alleged.

senior, and his son John stood talking to William Shepherde when an argument broke out. Shepherde struck Colles senior with a staff.

Seeing this, John Colles junior drew his knife and struck Shepherde in the right part of the neck wounding him mortally.<sup>53</sup>

Broke concluded his enrollment with the phrase, "and thus he slew him feloniously," and indeed the younger Colles had clearly not been attacked. At the trial, however, the petty jury asserted that after Shepherde had begun the quarrel, and had struck Colles senior, Colles junior intervened to part them. Shepherde then turned on Colles junior, who fled as far as a wall between two houses where he was forced to slay his attacker in self-defence.<sup>54</sup>

According to a London coroner's roll, Simon Chaucer and Robert de Uptone quarreled on the street in Cordwainer Street Ward; Simon struck Robert, wounding him on the upper lip (there is no mention of a weapon). John, Robert's son, who was present and saw the incident, seized a "dorbarre" with which he beat Simon on the hands, side and head, killing him.<sup>55</sup> The petty jury told an elaborate story, which made John eligible for a royal pardon:

A quarrel broke out between Simon and Robert over certain pennies which Simon owed the latter. Simon took up a staff and wanted to strike Robert, but Robert grasped it firmly in his hands . . . Simon drew a knife and stabbed Robert in the mouth so that blood flowed. John, sitting in a shop (*shopa*), saw the fight and rising and taking up a dorbarre ran to the fight to pacify the two if he could. When Simon saw John coming he left Robert and went after John with the knife . . . he chased John as far as a wall in *Aldermannescherche* and held him tightly against the wall so that John could not escape. . . .<sup>56</sup>

Similarly, Alice, the wife of James Almand, 'Pipere,' who slew John Langetolft in London, was said at her trial to have entered a fray to save James, only to end by slaying in self-defence. The petty jury added, however, that she slew John in order to save not only her own life but that of her husband.<sup>57</sup> The coroner's indict-

<sup>53</sup> C. 260/105 no. 13: ". . . hoc videns extraxit cultellum suum . . . et percussit prefatum Willelmum in dextera parte colli faciens ei plagam mortalem et sic ipsum felonice interfecit . . ." (1393). The coroner's indictment is enrolled on the King's Bench transcript of the trial proceedings.

<sup>54</sup> *Ibid.* Colles junior was released, pending his pardon, in the hands of four men, one of whom was his father.

<sup>55</sup> *London Coroners' Rolls*, Roll F, 4, pp. 175-6.

<sup>56</sup> C. 260/50 no. 60: ". . . contencio oriebatur inter Simonem et Robertum de Uptone patrem predicti Johannis pro certis denariis eidem Roberto per prefatum Simonem debitis. Ita quod predictus Simon cepit in manu sua quendam baculum . . . et inde percussisse voluit predictum Robertum quem baculum predictus Robertus in manibus suis ita firmiter tenuit . . . Simon . . . extraxit quendam cultellum suum qui vocatur Bideu et inde percussit predictum Robertum in ore ita quod sanguis inde exiit. Predictus Johannes sedens ibidem in quadam shopa et videns dictum patrem suum et prefatum Simonem sic fore in contumelia surrexit et cepit quendam Dorebarre in manu sua et cucurrit eis ad contumeliam illam pacificandam si potuisset. Et cum predictus Simon vidit ipsum Johannem sic venientem reliquit predictum Robertum et se dedit eidem Johanni cum prefato Bideu in manu sua extracto et ipsum inde fugavit ad quandam parietem de Aldermannescherche contra quem parietem predictus Simon ipsum Johannem cum manu sua sinistra ita strite tenuit quod ex nulla parte evadere potuit . . ." (1340). Despite his immediate capture, John did not appear at gaol delivery until 1339, some three years thereafter. John was pardoned in Jan., 1340 (*C.P.R.*, p. 351).

<sup>57</sup> C. 260/72 no. 15. (1361).

ment copied onto the gaol delivery roll states that she slew John feloniously, no mention being made of self-defence.

A Cambridge jury converted a more serious manslaughter into pardonable homicide when it altered the facts of Richard Godmancester's slaying at the hands of William Holdy. Edmund de Ovyng's coroner's roll states that William came upon his brother Thomas and Richard as they quarreled. William drew his knife and stabbed Richard in the back.<sup>58</sup> Ovyng termed the homicide a felony. The trial jury's reworking of the facts provided ample evidence of last resort and asserted that Godmancester had died of a wound in the stomach, a rather more reasonable place for a self-defender to stab his adversary.<sup>59</sup>

In none of the above cases had the defendant in fact acted out of true premeditation. Where the defendant had supplied the initial provocation, it appears to have been a less than homicidal attack, which then escalated with fatal results. Certainly, these slayings were not 'murders' in the sense that term was used by the late fourteenth century. The defendant had not ambushed the deceased or employed other means of stealth. But in none of them would the defendant have merited a royal pardon under the terms of the law. Had the true story come out in court, as the statement of Prisot indicates, the defendant would have been sentenced to death.<sup>60</sup>

One final and difficult question: are we dealing here with an expanded notion of self-defence or with a broader attitude that only murderers ought to be hanged? The answer must be that there is evidence of both. Surely, in many, perhaps most of the above cases the community believed the slaying was justified even though the official rules of self-defence had not been met. But in others there had been little or no element of self-defence and the trial verdict appears to be an entire fiction devised for purposes of saving the defendant's neck.

Perhaps all that can be said is that given the nature of mediaeval social life, the rules of both self-defence and felonious homicide were unrealistically strict. If firmly applied, they would have meant the condemnation of men of pride who, when under attack, did not turn tail and flee until cornered beyond all hope of

<sup>58</sup> J.I. 2. 18, m.15d/3 (1351).

<sup>59</sup> J.I. 3. 134, m.41/4 (1348). The accused was thrown to the ground and lay "*subtus quandam parietem . . . insurgendo versus dictum parietem se defendendo percussit predictum Willelmum [sic] in ventre.*" For a case in which self-defence involved striking a man in the back, see *Calendar of Inquisitions Miscellaneous (Chancery), 1219-1377* (London, 1916-1937), #2126.

<sup>60</sup> This study remains somewhat tentative. The great majority of cases for which I located both an indictment and a trial enrollment could not be used. In hundreds of cases, indictments for felonious homicide led to trial verdicts of self-defence, but it is unclear that the coroner bothered to record details of self-defence. In many others where both indictment and verdict agreed on self-defence, the former was so formulaistic as to raise suspicion that fact alteration had already taken place. Another possible approach to the problem of demonstrating fact alteration is to analyze the formulaistic verdicts of self-defence. Miss Hurnard's suspicions about the post-1294 period appear to have been raised by the frequent use of a limited number of excuses. My approach in fact makes this very point while going a step further and showing that the formulas were not merely convenient summaries for what were in fact instances of pardonable homicide.

further escape. They would also have meant the hanging of men who, in sudden anger, struck a blow which, due to infection, resulted in death. These are different cases, occasioning different motives for leniency. Many homicides must have combined elements of both these cases. It is, however, impossible to determine where society drew the line between homicides it viewed as justifiable self-defence and homicides it viewed as unjustifiable but, nevertheless, not deserving capital punishment. Nor, for that matter, is it possible to determine which slayings in the latter class were considered as so impetuous as to be akin to accidental homicides. It is likely that some simple homicides were recast by trial jurors as misadventures, and hence made pardonable, but there are too few such special verdicts on the fourteenth century rolls to make comparison with the coroner's enrollment profitable. The sub-groups within the area of simple homicide must have shaded into one another and distinctions among them probably differed over time and distance. Moreover, as I shall suggest in Part IV, many social and psychological factors must have played a role in the formation of the community's attitude toward individual defendants and its perception of their deeds.

### III

The foregoing study suggests that, in the fourteenth century, trial jurors were not above characterizing as pardonable 'simple' homicide, roughly what we would call manslaughter. The present section of this study seeks to assess the argument recently put forth by Naomi D. Hurnard that in the thirteenth century trial jurors' verdicts closely represented the truth. Miss Hurnard concluded her analysis of royal pardons for homicide with the end of the reign of Edward I, but she hinted that jury behavior might have changed in the ensuing period. She pointed out that the sudden increase of pardons *de gratia* after 1294 caused a fundamental break with earlier practice. The implication of her remarks is that conclusions arrived at on the basis of fourteenth century evidence cannot be carried back into the earlier period. The specific argument here would be that, after 1294, jurors, with knowledge of the indiscriminate dispensing of pardons to slayers, altered their outlook toward homicide defendants — especially toward those who had committed a simple homicide — and found pardonable circumstances where there had been none. The jury would have reasoned, in effect, that a man who by acting with more despatch might have made himself invulnerable to prosecution should not be hanged unless he was of the most disreputable sort. In my view, while the new pardoning policy might have increased the jury's willingness to alter the facts in favor of the defendant, that policy was not the real source of jury attitudes. Jury behavior did not change radically after 1294: from very outset of the common law period, juries were inclined to structure the evidence in such a way as to save the life of the manslaughterer.

#### a.

In her chapter on 'The Verdicts,' Miss Hurnard examined the extent to which juries fabricated facts in order to ensure that the defendant would receive a pardon for excusable homicide. Her analysis is based upon comparison of the allega-



tions made by jurors at special inquisitions held for the purpose of deciding whether bail ought to be granted with those set forth at the actual trial before justices in eyre. Her findings support her conclusion that:

. . . on the whole, discrepancies between two or more verdicts were over details of location and the sequence of events, the sort of thing on which independent witnesses could easily differ . . . The impression which these comparisons give is of pretty general agreement on the issue of self-defence or accident. . . .<sup>61</sup>

In one case of "serious discrepancy," the eyre jury suppressed the fact that the defendant had retaliated against blows of a staff with a small axe, alleging instead that he had used a staff in self-defence. The inquisition had alleged that the defendant had been struck on the head, cornered and had employed his axe because he could not otherwise have escaped death.<sup>62</sup> The alteration "may have been literally vital" to the defendant, as Miss Hurnard argues, but this would be true only because of the overly strict rules of self-defence, not because the trial jurors were coming to the aid of a person who had not in fact slain in self-defence.

How much weight ought we accord to the "pretty general agreement" between special inquisitions and trial enrollments? The former were indeed less formal than the latter; they were not necessarily final and sometimes less attention was paid to the stringent rules of pardonable self-defence. But they were directed to the issue of excusable circumstances and were held at the "request of the accused or his friends, who probably had some reason for confidence in their outcome."<sup>63</sup> They represented a point in the procedure at which community views as to the circumstances of the homicide had become known, and they probably were held only when it was fairly clear that community sympathy lay with the suspect. This may help to explain the fact that Miss Hurnard was able to find only one such commission which determined that the defendant had slain feloniously.<sup>64</sup> In fact, the partiality of jurors at special inquisitions sometimes resulted in favorable verdicts which trial jurors later overturned.<sup>65</sup> Miss Hurnard's comparison, therefore, is of limited usefulness. Having set along side the trial verdicts a body of evidence overwhelmingly favorable to the defendants, i.e., special inquisitions, she concluded that the trial verdicts were relatively scrupulous; where they disagreed with the special inquisitions, they took a more critical, and probably a more objective, view of the circumstances. But Miss Hurnard was unable to establish the relationship between a random selection of indictments and the trial verdicts. That relationship can be established, if at all, only by comparing the coroners' enrollments with the verdicts given at trial. Miss Hurnard recognized the potential value of such a correlation, but rightly concluded that too few thirteenth century coroners' rolls exist to carry it out.

Miss Hurnard had before her, but did not cite, one important piece of evidence

<sup>61</sup> Hurnard, p. 265.

<sup>62</sup> *Ibid.*, p. 261.

<sup>63</sup> *Ibid.*, p. 110.

<sup>64</sup> *Ibid.*, p. 254.

<sup>65</sup> *Ibid.*, p. 110.

which raises some doubts about her thesis. A thirteenth century precedent book, *Placita Corone*, describes the case of a man indicted for homicide. The defendant, a certain Thomas, came before the court and told his story as follows:

And because I refused him (the deceased) the loan of my horse he ran at me in my own house with a Welsh knife, horn handled, in his right hand and inflicted several wounds on my head, shoulders, feet, and elsewhere on my body wherever he could reach. I did not at first return his blows; but when I realized that he was set on killing me I started to defend myself: that is to say I wounded him in the right arm with a little pointed knife which I carried, making no further onslaught and acting in this way to save my own life.<sup>66</sup>

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

Thomas, you have greatly embroidered your tale and coloured your defence: for you are telling us only what you think will be to your advantage, and suppressing whatever you think may damage you, and I do not believe you have told the whole truth.<sup>67</sup>

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

Thomas' case is perhaps an exaggerated example, but it is not very different from a great many thirteenth century enrollments. Moreover, it demonstrates that the justices were aware of fact coloration in cases of self-defence but that juries were not intimidated even when doubts had been expressed from the Bench. Miss Hurnard recognized that formulistic descriptions of self-defence raise "suspicion that some of these circumstances were borrowed from other cases." She admitted that:

It may be judged that too many slayers in self-defence pulled stakes from fences and poles from carts, bolted into culs-de-sac or tried and failed to climb walls, were brought up against dykes or rivers, found swords unexpectedly but conveniently to hand or made random knife thrusts that just happened to hit vital spots.<sup>68</sup>

Nevertheless, Miss Hurnard concluded that victims of assault "naturally reacted in a similar manner;" that the "paucity of many of the clerks' Latin vocabulary" led them to fall back on the same terminology. Before 1307, she maintained, the verdicts do not

tend to become divorced from the realities<sup>69</sup> . . . the jurors were not yet falling back on one or other set of prefabricated tales which could be borrowed, disguised only with minor variants, to substantiate their declaration that slayings had been in self-defence.<sup>70</sup>

Perhaps she is correct, but there appears to be little evidence to support her

<sup>66</sup> *Placita Corone*, ed. J. M. Kaye (London, 1966), pp. 19–20.

<sup>67</sup> "Thomas, vous avez mult enbeli vostre parole et vostre defens enflori: kar vous pronunciez quant ke vous quidez ke vous poet valer et conceler ce ke grever vos poet, kar je ne quid pas ke vos eiez tote la verite conte."

<sup>68</sup> Hurnard, p. 267.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, p. 268.

view.<sup>71</sup> One has the impression Miss Hurnard has resolutely taken her stand in the face of nearly irresistible conclusions of common sense.

Miss Hurnard never attempted to explain the high number of acquittals on the medieval rolls. She viewed the area of pardonable homicide largely in isolation from other elements of the administration of criminal law. This is an important point, for the possibility that the acquittals resulted from jurors' failure to tell the truth threatens to undermine the notion that jurors were particularly scrupulous in cases of excusable homicide.

While Miss Hurnard's thesis cannot be conclusively disproved, there are good reasons to believe that fourteenth century societal attitudes were not radically different from those of the preceding period. To explore these reasons, we must turn from the narrow confines of pardonable homicide to the general contours of the early history of liability for homicide.

b.

In the Anglo-Saxon period, and for perhaps a century after the Norman Conquest, some homicides were unemendable, leading to punishment — usually capital — at the hands of the Crown.<sup>72</sup> These homicides, secret homicides known as 'murders,' were considered particularly heinous and, as outrages against society as a whole, were exclusively royal pleas. It cannot be determined how closely the Anglo-Saxon 'murder' corresponded to the 'murder' of the late fourteenth century.<sup>73</sup> Probably the term always had connoted stealth; the slayer acted when his victim was off guard. But it appears that any homicide committed in the absence of a witness was presumed to have been committed through stealth. It was in secret, and, hence, a murder. Open homicide, on the other hand, remained until the outset of the twelfth century an emendable act.<sup>74</sup> The guilty party or his kin paid *wer*, *bot* and *wite*. Failure to pay the *wer* could result in liability to the feud;

<sup>71</sup> In her analysis of the king's role in the pardoning process, Miss Hurnard argues that "in a sample of well over 500 cases identified on the plea rolls pardon is very unlikely to have been granted to felonious killers in more than twenty percent, and even ten percent may be considerably above the mark" (p. 245). This assumes, of course, that the evidence on the plea rolls is trustworthy. What the author has proved is that the king did not often grant pardons to persons for whom there was not some favorable testimony, not that those who in fact slew feloniously were seldom able to obtain pardons. Miss Hurnard also shows that presenting juries often used the phrase *mota contencions* to describe "fatal free fights"; they did not adduce testimony of pardonable circumstances in all such free fights. This does not prove the trial jury would not have done so had the suspect appeared and put his life in their hands.

<sup>72</sup> Hurnard, p. 1.

<sup>73</sup> See Pollock and Maitland, *History of English Law*, II, 486; Kaye, "Early History," Part I, 366 ff. Kaye argues that 'murder' retained its ancient meaning of "secret or stealthy killing" during the twelfth through fourteenth centuries, despite the fact that it was also used as a synonym for the general term 'kill' and a fine for an unexplained homicide. Kaye failed to show that the concept was deeply embedded in societal attitudes during the entire period. Possibly, the social view of 'murder' changed, due to the growth of professional crime, from certain specific acts, e.g., poisoning, to all planned homicides.

<sup>74</sup> Hurnard, p. 8. Miss Hurnard ventures the judgment that "the process may have been completed by the end of the reign of Henry I." But she cautions: "The date when this occurs is not known."

after the tenth century, only the slayer could be subjected to the vengeance of the slain man's kin.<sup>75</sup> Although there is no evidence as to the frequency of such feuds, it is likely that settlement in money or in kind was the normal result of sudden and open acts of homicide. If the slaying resulted from a mutual quarrel and involved fighting on both sides, some elements of self-defence probably lay side by side with elements of excessive retaliation. Settlements probably took these elements into account, though in an impressionistic way.

The extension of royal jurisdiction in the twelfth century to encompass the entire area of homicide had two revolutionary effects: many homicides which formerly had not resulted in capital punishment were now made capital under the law; strict and largely unenforceable requirements were introduced into a law of self-defence. Miss Hurnard, in an ingenious opening chapter, explained why the Crown took jurisdiction over excusable homicide at the time it made open homicide a royal plea.<sup>76</sup> She also discussed at length the residual attempts of the kin to obtain compensation;<sup>77</sup> and, in this context, she suggested that the kin could, without dishonor, accept money in lieu of appealing an open slayer. But she did not argue that society balked at the novelty of hanging those who had committed open homicide, particularly those who had slain in situations involving some measure of provocation. By implication, at least, it is Miss Hurnard's view that society at large had no objection to presentment of the open slayer; if the kin had an objection, it was chiefly because presentment greatly reduced their chances to obtain monetary compensation.

The evidence as to jury attitudes in the fourteenth century may aid in understanding societal attitudes toward criminal liability in the entire period from late Anglo Saxon times to the end of the middle ages. If so, the argument would run as follows. Originally, the Anglo-Saxons practiced the feud in homicide cases. The kin of the slain took vengeance upon the slayer or one of his kin, who were jointly liable for their kinsman's act.<sup>78</sup> Whether the mental element was taken into account is unknown. Secret homicide was a matter for the king, but all other homicides were emendable; failure to pay the *wergeld* rendered the slayer and his kin liable to vendetta, though reduction of the amount of compensation by agreement was probably common. By the tenth century, the laws restricted liability to vendetta to the actual slayer. They also mandated that the court reduce compensation where there had been mitigating circumstances.<sup>79</sup> In such cases, where the slayer had acted in self-defence or through accident, the king relinquished the

<sup>75</sup> II Edmund 1, in *The Laws of the Kings of England from Edmund to Henry I*, ed. A. J. Robertson (Cambridge, 1925).

<sup>76</sup> Hurnard, 25 ff. In brief, Hurnard argues that the King took jurisdiction over self-defence and accident because otherwise the kin of the victim might attempt to pass off more serious homicides as excusable ones in order to avoid having to bring an appeal and thereby lose an opportunity to make a private settlement.

<sup>77</sup> Hurnard, chs. VII and VIII.

<sup>78</sup> D. Whitelock, *The Beginnings of English Society* (Harmondsworth, 1952), p. 39.

<sup>79</sup> III Edgar, 1, 2: "there is to be such remission in the compensation as is justifiable before God and supportable in the State." Quoted by Hurnard, p. 5; VI Ethelred, 52, 1: "he who is an involuntary agent in his misdeeds should always be entitled to clemency and to better terms." *Ibid.*

*wite*.<sup>80</sup> While the kin of the slain may have taken a narrow view of such mitigating circumstances, society at large, having nothing to gain from feud or compensation, and in a day when fights began easily and led often to death — due to sepsis or other results of poor medical techniques — took a broader view of the matter. In its eyes, secret homicide or especially malicious attacks justified punishment by death. Simple homicides were seen as requiring compensation, with mitigation if the act was unintentional or to some extent provoked. When all homicides were drawn within the sphere of royal jurisdiction and made, unless excusable, punishable by death, the community was forced to choose between presentment of the slayer and payment of the *murdrum*, a fine imposed for an unexplained homicide.<sup>81</sup> Before 1215, persons presented for homicide were forced to undergo the ordeal, so that if the community desired to absolve a slayer it had to fail to present him in the first place. The records do not permit us to observe the resulting tension between the bonds of friendship and the demands of the pocketbook. By the third decade of the thirteenth century, however, this tension had been relieved: once the slayer had been presented, it was left to the trial jury to state whether he was guilty or not.<sup>82</sup> This provided them with an opportunity to acquit or to adduce circumstances of pardonable homicide. The compromise which resulted is illustrated in *Placita Corone*, where a defendant who successfully pled self-defence was asked who put him in prison. He replied:

Sire, my neighbors: for they were afraid of being involved in the affair and suffering loss thereby.<sup>83</sup>

Thus, from the outset of the common law period, trial juries reflected a sense of justice fundamentally at odds with the letter of the law. They persisted throughout the thirteenth and fourteenth centuries in using their role as submitters of evidence to condemn murderers and to acquit or render pardonable those whom a later legal age would term ‘manslaughterers.’ Trial juries remained free to reject the conclusions of juries of presentment and of coroners’ inquest juries, to say the truth as they knew it. Of course, the process of fact alteration, in many cases, began before the trial jury gave its verdict: it was not uncommon for a coroner’s jury to use elaborate formulas to describe a case of self-defence.<sup>84</sup> The trial jurors, drawn from the hundred where the homicide was committed, but not necessarily from the immediate vicinage, probably reflected already settled attitudes of the

<sup>80</sup> F. Sayre, “Mens Rea,” *Harvard Law Review*, XLV (May, 1932) 982.

<sup>81</sup> Hurnard has traced the use of presentment from the late tenth century to the Assize of Clarendon. “The Jury of Presentment and the Assize of Clarendon,” *English Historical Review*, LVI (1941) 374–410. On the *murdrum* fine, see *ibid.*, pp. 385 ff.; H. G. Richardson and G. O. Sayles, *The Governance of Mediaeval England from the Conquest to Magna Carta* (Edinburgh, 1969), pp. 195–6. Pollock and Maitland, *History of English Law*, II, 487.

<sup>82</sup> *Rolls of the Justices in Eyre, Being the Rolls of Pleas and Assizes for Lincolnshire, 1218–1219, and Worcestershire, 1221*, ed. D. M. Stenton (London, 1934), pp. lxviii–lxxi. As Lady Stenton points out, judges had never been partial to the ordeal and had, before 1215, tried to persuade defendants to put themselves upon the country.

<sup>83</sup> *Placita Corone*, p. 19.

<sup>84</sup> E.g., J.I. 2. 58, m.4/2 (1380).

countryside toward individual defendants.<sup>85</sup> It remains to suggest, by way of conclusion, what were the significant determinants of these societal attitudes.

#### IV

We have seen that in the Anglo-Saxon period murder meant homicide through secrecy or stealth. Originally, murder was 'secret' in the narrow sense that the slayer hid his victim's body to conceal the deed,<sup>86</sup> but it probably was soon used more broadly to refer to any homicide whose perpetrator was unknown. It is with this aspect of murder that the *murdrum* fine was associated, for the hundred was amerced in all cases of unexplained homicide.<sup>87</sup> It is likely, however, that murder already in Anglo-Saxon times might have referred to the fact that the slayer's identity was concealed from his victim, so that the latter was taken offguard.<sup>88</sup> Both Glanvill<sup>89</sup> and Bracton<sup>90</sup> refer to murder as homicide wherein the concealment was relative to third parties, but this may be due to the fact that by the time they wrote, the sole function of the allegation of murder was to relieve the appellor from the requirement that he claim to have seen the deed with his own eyes. For our purposes, of course, the important question is, not which acts the official concept of murder encompassed, but which acts were considered so heinous by society that they believed the perpetrator deserved to be hanged. The answer to this question as of the twelfth century will probably never be known.

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

A. M. was staying at the house of S. . . . and R., knowing M. was staying there, through murder and malice aforethought came to the house of S. and sought M. in order to kill him . . . R. immediately broke the door of the room and entered it and ferociously attacked. . . .<sup>91</sup>

<sup>85</sup> From the 1280's at least, the sheriff, in preparing for a gaol delivery, ordered the hundred bailiffs of his county to supply a panel of sixteen or twenty knights and freeholders for use as jurors. See c. 260/4 no. 19 (1288); c. 260/5 no. 14 (1289). Trial juries at the eyre were not always drawn from the hundred of the homicide. *Crown Pleas of the Wiltshire Eyre, 1249*, ed. C. A. F. Meekings (Devizes, 1961), p. 52.

<sup>86</sup> Pollock and Maitland, *History of English Law*, II, 485.

<sup>87</sup> *Supra*, n. 81.

<sup>88</sup> Miss Hurnard assumes too much when she defines murder as "secret and so presumably premeditated killing," p. 1.

<sup>89</sup> Glanvill, ed. G. D. G. Hall (London, 1965), p. 174.

<sup>90</sup> Bracton, *De Legibus et Consuetudinibus Angliae*, ed. G. E. Woodbine (New Haven, 1915-42), II, pp. 378-79 (fo. 134b).

<sup>91</sup> C. 260/15 no. 38. (1305): "*M. hospitatus ad domum cuiusdam Sarre F. . . . et R. sciens predictum M. ibidem hospitatum esse per murdrum et malitiam precogitatum venit ad domum predictae Sarre et quesivit predictum M. ad ipsam interficiendum . . . R. ostium eiusdem camere statim fregit et cameram intravit et . . . ferociter insultavit . . .*"

- B. M. . . . about noon of that day maliciously entered and afterward, maliciously abusing the said W. and committing *hamsoken* against him, of his malice aforethought, attacked him there in the house [and] threw him to the ground. . . .<sup>92</sup>
- C. R. left the aforesaid house and stood outside the door of the house, of the aforesaid W. beneath the wall of that house lying in wait for A. in order to slay him because of an old quarrel between them, A. knowing nothing at all about R.'s lying in wait. . . .<sup>93</sup>
- D. W. was in his house and W.B. knew this. W.B. entered the close of W. at night and hid there during the night through malice aforethought, and maliciously lay in wait for the said W. in order to kill him, W. being ignorant of this; and when W. arose at dawn and left his house closing the door behind him thinking no evil, W.B. with malice aforethought suddenly and feloniously. . . .<sup>94</sup>
- E. H. and S. fought together in a mill . . . and S. attacked H. with a hatchet and wanted to strike him, but they were separated from one another by certain bystanders and S. was expelled from the mill. . . . S., nevertheless his furious intention continuing, maliciously devised deceitful plans against H., hiding himself outside of the mill and [when] H., believing that the argument between them had been settled, left a little later thinking he was leaving safely and in peace. . . .<sup>95</sup>
- F. J. [was] lying hidden in ambush with two strangers in the house of H. They saw H. coming along the way and immediately, feloniously and in a deliberate assault, they attacked H. from all sides. . . .<sup>96</sup>

The chief purpose of the testimony in the above cases was to support a verdict of self-defence. Housebreaking immediately puts those residing within on the defensive. Stealth on the part of the assailant, whose presence was until the last moment unknown to the eventual slayer, is strong evidence that the latter lacked malice (cases C, D, E). It might be argued that the second part of the testimony, the formal allegation of last resort (which I have omitted from all the above excerpts), was alone insufficient in proving that the defendant had not provoked the fight. But it should have been enough merely to assert, as most juries did, that A attacked B, wounded B and drove B to the wall. Whatever additional strength the above details lent to a special verdict, whether they represented the truth or

<sup>92</sup> C. 262/1/1 no. 6. (1318): "*M. . . . circa horam nonam eius diei maliciose intravit ac postmodum maliciose ipsum W. insultando et hamsoken super ipsum faciendo ex malicia sua precogitata . . . ipsum W. ibidem in domum ad terram prostravit . . .*"

<sup>93</sup> C. 260/20 no. 26. (1310): "*R. exivit domum predictam et stetit extra ostium domus predicti W. subtus murum dicte domus insidiando predictum A. ad ipsum interficiendum ratione antiqui odii inter eos perhabiti et ipso A. insidiationem illam omnino nesciente . . .*"

<sup>94</sup> C. 47, Bedfordshire, File 4/86 (1314): "*W. in domo sua propria exitisset et predictus W.B. hoc scivisset. W.B. clausum ipsius W. noctanter intravit et ibidem pernoctavit latitando (sic) per maliciam excogitatum et predicto W. maliciose insidiabatur ad ipsum W. interficiendum ipso W. hoc omnino ignorante et cum W. in aurora diei surrexisset et domum suam exivisset et hostium post se clausisset nulli malum cogitans predictus W.B. malicia precogitata in ipsum W. subito felonice prosiliit et cum quodam baculo ipsum insultavit . . .*"

<sup>95</sup> C. 260/15 no. 9. (1304): "*H. et S. contenderunt adinvicem infra molendinum . . . et idem S. cum quadam hachia que vocatur hache a Pyke ipsum H. insultavit et ipsum H. percussisse voluit set per quosdam circumstantes seperati fuerunt abinvicem et predictus S. a molendino illo fuit expulsus . . . set tamen idem S. animo furioso et perseveranti insidias excogitatas adversus ipsum H. maliciose machinabatur abscondendo se extra molendinum predictum. Et predictus H. credens contentionem illam inter eos pacificari post pauca exivit a molendino illo credens secure et pacifice recessisse . . .*"

<sup>96</sup> C. 260/54 no. 40. (1343): "*J. cum duobus hominibus extraneis latitanter insidiando . . . in domo cuiusdam H. predictum H. transeuntem per viam videbant et statim felonice et insultru premeditato ipsum H. . . . incircuiter insultaverunt . . .*"

were mere fabrications, the jury was describing what society took to be the most repugnant form of attack.

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

The use of *per murdrum* in case A, which was recorded in 1305, is extremely rare.<sup>97</sup> *Murdrum* at this time was used almost exclusively with reference to the fine for an unexplained homicide, almost never to describe the slayer’s act.<sup>98</sup> It would appear, then, that the phrase meant ‘through stealth,’ in the sense that the slayer acted in such a way as to conceal his identity from third parties. But stealth in C, D, E and F appears to refer to the fact that the intended victims were explicitly said to have known nothing of the presence of their ambusher. Murder was no longer conceived, if indeed it ever had been, solely as the concealment of the slayer’s identity from third parties.

The only case which does not involve stealth is B. Here the jurors alleged that the would be slayer committed housebreaking, presumably with intent to kill, an act which in Anglo-Saxon times had been regarded by the law as particularly heinous.<sup>99</sup> It may well be that this had always been an element of the social view of murder.

The phrase *malicia precogitata*, and its variants, — which I have translated as ‘malice aforethought’ — was used commonly in indictments of homicide throughout the middle ages to denote the threshold degree of *mens rea* for felonious homicide: mere deliberateness.<sup>100</sup> As I shall demonstrate elsewhere,<sup>101</sup> the phrase could also be used, in the fourteenth century, to refer to true premeditation. Everything depended upon the context. In case A, the assailant came to the defendant’s house with malice aforethought, not mere deliberateness; ‘*ex malicia sua precogitata*,’ in case B, seems contextually to represent more than the formulistic ‘*malicia precogitata*,’ the ambusher in D, who lay in wait throughout the night ‘*per maliciam excogitatum*,’ exhibited more than mere deliberateness.<sup>102</sup> In case C, the assailant carried an old grudge; like the assailants in E and F, he lay in wait for the defendant. Only the assailant in E appears to have acted in hot blood.

Clearly, the jurors were attentive to the mental state of the assailant. It might

<sup>97</sup> Kaye found a “Latinised form of the English ‘to murder,’ synonymous with ‘to kill’ ” in a 1281 eyre roll (J.I. 1. 147, m. 13a). “Early History,” Part I, p. 371.

<sup>98</sup> The murdrum fine was effectively abolished in 1340. 14 Edw. III, stat. 1, c. 4.

<sup>99</sup> Pollock and Maitland, *History of English Law*, II, 457.

<sup>100</sup> Kaye, “Early History,” Part I, pp. 371 ff.

<sup>101</sup> *Supra*, n. 10.

<sup>102</sup> Later on in the indictment, *malicia precogitata* is used in its formulistic sense.



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

The Statute of 1390 equated murder with ambush and malice aforethought.<sup>103</sup> Its drafters were undoubtedly concerned mainly with highwaymen and housebreakers who robbed and slew their victims.<sup>104</sup> The official term, 'murder,' operative only in the administration of pardons, now clearly embraced homicide perpetrated through stealth with respect to the victim. Moreover, true premeditation had come to be conceived officially as at least a common incident of murderous intent. Most murder indictments contain only the operative phrase '*murdravit*' or '*insidiavit*' (ambushed); frequently, '*noctanter*' (by night) appeared. But few indictments are richly detailed and fewer still provide insight into a societal, as opposed to an official, concept of murder.

There is nevertheless some indication that the short lived statute cast murder in terms which were too narrow for the community. If murder was, *stricto sensu*, homicide through stealth, where the victim was taken off guard, it was in its broadest societal use a particularly repugnant homicide. A case from the roll of John Fovyll, coroner in Leicester, and one of the first to employ the word 'murder' systematically in his indictments, lays to rest the notion that the societal concept of a murderous act was dependent upon secrecy or stealth. John Howetson came upon two boys, Roger and Richard Malynson, working near the road and wanted to strike them because of a long-held grudge. Seeing this, a certain Robert Malesherbe interceded, saying he would take whatever punishment was coming to the boys. Their sister Maud arrived at this point and similarly offered to make amends, but Howetson, calling her a whore, tried to strike her with a hatchet, pursuing her as she fled to her house. Malesherbe followed, imploring Howetson not to strike the woman, at which point Howetson turned upon him, swinging his hatchet 'with great force.' Malesherbe,

thinking no evil, neither having a knife with him nor seeing any other weapon, to prevent a blow upon his head, sprang from him and ran into Maud's house to get some weapon for defending himself. . . .

Malesherbe grabbed a stake, but Howetson broke this and then, aided it seems by his son and another relative, proceeded to finish the job. While two held Malesherbe down, the other struck him, and when the victim could no longer struggle, all dealt mortal blows so that 'they slew and murdered Robert without any cause.'<sup>105</sup>

<sup>103</sup> "*Murdre, Mort d'ome occis par agait, assault, ou malice purpense.*" 13 Richard II, stat. 2, c.1.

<sup>104</sup> *Supra*, p. 672.

<sup>105</sup> J. I. 2. 61, m. 12/1 (1409): ". . . *nullum malum cogitans nec super se habens cultellum nec aliqua alia arma videns ictum illum supra caput suum eminere saltavit ab eo et cucurrit in domum ipsius Matil-*

In another case, admittedly a rare one, there was stealth but not premeditation. It was alleged that after a vigorous argument, one of the disputants, B,

turned his back to [A] in the field and A ran to B and suddenly drew the dagger of B and feloniously stabbed him twice in the side. . . . The jurors say he slew him feloniously and murdered him.<sup>106</sup>

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

There is one final point to be made about the late fourteenth and early fifteenth century murder indictments. The slaying of master by servant and of husband by wife, two forms of statutory petty treason,<sup>107</sup> had for centuries been counted among the most reprehensible of homicides. Such slayings figured prominently in the indictments for murder, and all too frequently the jurors alleged that the victim had been slain while he slept in his bed or taken at night by ambush.<sup>108</sup> And, what is more revealing, occasionally it was said in such cases that the slayer had attempted to hide the deceased to conceal the act.<sup>109</sup> Murder, thus, had not entirely lost its most ancient meaning, and, one suspects, its stigma could be attached to any homicide which society found particularly repugnant.

The process by which the community determined that a given slayer was a murderer was undoubtedly very complex and not solely a function of the slayer's immediate act. Coroners' juries and trial jurors were probably swayed in many cases by the reputations of the combatants and by what was known about past relations between them. Such considerations may have been critical to the determination that the defendant had acted through stealth, that he had caught his victim off guard. Conversely, these factors must sometimes have contributed to

---

*lidis ad aliqua arma sibi assumenda pro defensione et salvacione vite sue . . . absque aliqua causa dictum R. M. interfecerunt et murdraverunt. . . .*" See also, J. I. 2. 61, m.9 2/2 (1406), where the slayer's dog attacked the victim, bringing him to the ground, whereupon the slayer 'murdered' him.

<sup>106</sup> J. I. 2. 63, m.3/2 (1400): ". . . *vertebat dorsum suum ad eundem in campum, predictus A. cucurrit ad predictum B., subito extraxit daggarium ipsius B. et felonice percussit . . . bis in latere . . . jurati dicunt felonice interfecit et murdravit. . . .*"

<sup>107</sup> 25 Edw. III, stat. 5, c.2 (1352).

<sup>108</sup> E.g., J.I. 3. 180, 23d/6 (Gloucester, 1393); J.I. 3. 180, 31/1 (Hereford, 1390); J.I. 3. 203, 11d/3 (Lincoln, 1429). J.I. 2. 190, m.4/3 (Warwickshire, ca. 1390); J.I. 2. 242, m. 5d/6 (Yorkshire, 1388). This last case, recorded by a coroner before the Statute of 1390, was one of many indictments reflecting the use of 'murder' in a commission to justices of the peace in 1380. *Rotuli Parliamentorum*, III, 84b. For discussion of justice of the peace indictments based on the commission of 1380, see Kaye, "Early History," Part I, 379 ff. The Statute of 1390, with slight modification, repeated the categories represented in the commission. I have based my discussion upon the Statute to avoid confusion, but it should be noted that indictments began to employ the term 'murder' a decade before the Statute and at a time when that term had no operative effect whatsoever. I shall address myself to the commission, as well as to the Statute, in a separate article dealing with the official meaning of 'murder' in the fourteenth century.

<sup>109</sup> J.I. 2. 163, m.1/6 (1389) and m.2/11 (1393).

the conclusion that the parties had fought together on equal terms, out of sudden and mutual anger. There is, in fact, evidence that in some cases jurors perceived simple homicides as 'accidental' ones because the parties were known to have been 'friends.'<sup>110</sup> It may be, too, that an informal, extra-judicial system of monetary compensation long outlived the demise of formal *wergeld* settlement.<sup>111</sup> If so, the relations between the slayer and his victim's kin may have determined the community's perception of the homicide or, at least, of the slayer's just deserts.

One of the most important weaknesses in Miss Hurnard's analysis is that it assumes too much precision in evidence gathering techniques. The coroners' rolls leave the impression one would expect: in many cases, the inquest jurors were imprecise, confessed lack of knowledge or made little effort to assess blame for a fight ending in homicide. Many homicides had been viewed from a distance or not at all. At least to the extent that facts were unknown, or poorly documented or in conflict with other testimony, there must have been an input of facts unrelated to the fact situation of a homicide, but related instead to its social and psychological setting. It may be true that, in the fourteenth century, trial jurors were more lenient in some cases than they had been before the change in the Crown's pardoning policy. But it is also possible that, with the increase in social mobility and the rise of professional crime, trial jurors were called upon more frequently to pass judgment on strangers to the neighborhood and dealt with them more harshly. In any case, these would merely be two more examples of foreign elements creeping into the verdict process. The essential nature of that process had not suddenly changed. Due to the nature of the extant evidence, it suddenly becomes visible to us, but common sense suggests that it had for centuries been integral to the phenomenon of dispute settlement.

THE UNIVERSITY OF MICHIGAN

<sup>110</sup> E.g., J.I. 1/1185, m.3; C. 145, File 59/46.

<sup>111</sup> Miss Hurnard stated that out of court settlement was common during the twelfth century, but it is unclear how long this continued. Hurnard, p. 9.