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Introduction

In the Middle Ages both sides of human consciousness - that which was turned within as that which was turned without - lay dreaming or half awake beneath a common veil. The veil was woven of faith, illusion, and childish prepossession, through which the world and history were seen clad in strange hues. n1

Once our world was enchanted. n2 In this place arose an understanding of criminal procedure which permitted proofs such as throwing an accused into a pool of blessed water or having him pluck an object from a boiling cauldron. n3 Clergy read the signs. n4 The man whose body was received by the water or whose wound healed within a specified period of time was [*111] proved innocent. n5 In 1215, the Fourth Lateran Council forbade clergy from performing the sacred acts that attended the ordeals. n6 In time, this form of proof died. n7 In its place the judicially centered inquisitorial system arose in Germany, Italy, France, and the lay-centered jury system in England. n8 A vast majority of
historians assume that, like modern systems of proof, the ordeals were a means to ascertain fact. Thus the thematic thrust of the ordeal is not considered to be an historically interesting question. Instead, historians focus upon the reason for Lateran IV's ban. They trace the decision to: theological doubts about the ordeals' legitimacy, \(^{n9}\) a popular decision about their lack of usefulness which the Church then endorsed, \(^{n10}\) and the reform campaign of a papacy intending to root out heretics and bring misbehaving clergy in line. \(^{n11}\) The seeming arbitrary nature of the ordeal may also keep legal historians from studying the proof's theoretical details. A few note the hubris in thinking there exists but one form of rationality and that it is ours. \(^{n12}\) Still no one mourns for the ordeals. The [*112] history of legal proof is thought to begin where the ordeals end.

This article questions the received understanding, suggesting that the ordeals' demise is indeed a bittersweet story. Moreover, it is a story relevant to any inquiry into the significance of the criminal jury trial. This article builds the case that the ordeals reflected something other than an appeal to the Deity as a supra-fact finder. In practice, if not in theory, the ordeal provided a guilty man with a way to purge his wrong and therefore to be adjudged innocent. The subsequent system of roman-canonical proof constituted an evidentiary revolution, shifting the focus of evidencing to accurate fact finding. The same, however, cannot be said of the jury trial. Unlike the roman-canonical proofs, the jury trial, like the ordeal, aimed primarily at resolve. Moreover, it was a resolve that carried sacerdotal meaning.

To uncover this understanding, one must grapple with the ordeals' status as a sacrament. \(^{n13}\) The popular idea of what may be called "sacramental" cut deeper and wider than the seven sacraments instituted by the Church in the eleventh and twelfth centuries. The sacramental vision reflected faith in a celestial luminosity that shone forth when men and women made sacrificial offerings to a Father who, in the grace of His fidelity, stretched out His hand in return. \(^{n14}\) Implicit in this belief is that, just as the divine redeemed the profane, the apparent, mundane world participated in the deeper and higher reality which it reflected. \(^{n15}\) In the [*113] judicial setting of the central Middle Ages, the ordeal was the way the divine manifested itself as men and women suffered into resolve. \(^{n16}\) The final result revealed the Divine's judgment about the proband's willingness to throw himself at the mercy of his god by submitting to a test of character. The criminal jury trial, unlike the roman-canonical proofs, carried on the same sacramental tradition. Thirteenth and early fourteenth century England kept faith with the idea that the Divine manifested when an accused, in humility and contrition, perfected his bond with his country and his god by throwing himself upon the community's judgment of his character.

Why has this story of the ordeal and, to a lesser extent, the jury trial not yet been told? A partial answer lies in the sources legal historians consider. This era was essentially pre-literate, largely warrior, and strongly monastic. \(^{n17}\) (It was also increasingly urban, learned, and evangelical). Thus it is not merely sensible, but imperative, that legal historians search out this era's tradition of thought in places that may seem unusual. Ancient sagas, miracle tales, iconography, and architecture express the law as much, perhaps more, than codes or treatises. \(^{n18}\) It is only when the scholar [*114] considers these unconventional sources that an alternative story of the ancient proof begins to emerge. So too, legal historians often forget that medieval men were the bearers of ideas. \(^{n19}\) Hence, the ordeals are not considered upon their own terms. On one side are the functionalists, who presume that popular needs drive historical change. \(^{n20}\) On the other sits the traditionalists, who tend to view ideas as ideology, which in turn, grows out of the power of a given ruling class. \(^{n21}\) Both groups tend to look behind what men and women said about the ordeals to see what they "really" thought. They thereby deny the period the relevancy of its speech. \(^{n22}\)

[*115] The aim of this article then is twofold. In one respect, it simply observes an historical curiosity: on the continent, the church withdrew its support from a proof that embodied its own conciliatory teaching. In its place it instituted a system of proof aimed at accurate fact finding. England, in contrast, replaced the ordeals with a proof richly and fully reflective of the sacramental faith. At a deeper level, this article invites the reader to recall a past usually thought to be outside the reader's ancestral memory. Though historians long ago abandoned as quaint the idea of a medieval mind, scholarly skepticism borders upon the extreme. To understand the ordeals and the rise of the jury trial is to grapple with conditions of intelligibility - conditions that once held great force and informed evidentiary practice. This task alone seems a worthy endeavor.
Part One looks at the conventional accounts of the ordeal. Part Two suggests an alternative telling. Part Three turns to the medieval English criminal jury trial exploring its kinship with the ordeals.

I. The Received Wisdom

Legal historians differ about what medieval proofs may properly be called an ordeal; their relationship, if any, to Christianity in western Europe; and their essential character. Possible answers to the first two questions shed light upon the third.

A. The Ordeal

The ordeal, iudicium Dei, was the common method of adjudication for criminal pleas in the eleventh and twelfth centuries. There was no “trial” as we know that term. Rather a person or an inquest, (somewhat akin to the grand jury) made an accusation, and the accused swore an oath denying it. Methods of accusation differed depending on the place and kind of court in question. In the ecclesiastical courts there existed an accusatorial plea whereby a private person brought an accusation. There was also accusation by denunciation. Bishops gathered synodal witnesses asking them to swear an oath denouncing persons guilty of crimes, which would then be investigated. Similarly, in the feudal assemblies accusation was by private appeal and later by communal presentment before a meeting of suitors. In England, Henry II introduced the inquest jury for criminal pleas of the crown. In 1166, the Assize of Clarendon mandated that twelve law-worthy men from each of the hundred and four vill should report those they suspected of a crime to the visiting royal justices who handled breaches of the King’s peace. In all of these courts, once a man was accused and had made his denial, rather than receiving or hearing evidence, the court adjudged what proof would be offered. Until 1215, some form of purgatio, the ordeal, was the method of proof and judgment for criminal pleas in the lay and ecclesiastical courts on both the continent and in England.

Arguments abound about whether medieval appeals to the Deity are properly called a judicial ordeal. The debate is strained, however, for scholars wrestle with categories unknown to the period. In so doing, they inadvertently wash away the ordeals’ salient characteristics. Nevertheless, historians agree that those proofs (to employ the word for now) involving a single person, the accused or the accuser, in a spiritual test involving some degree of interference with nature’s elements may be called a judicial ordeal.

The proofs cited most routinely are the ordeal of the iron, which consisted of a proband carrying a red-hot iron for a specified distance, and the ordeal of the cauldron, which required him to pluck an object from boiling water. An affirmative judgment required that the wound heal cleanly within three days time. The ordeal of cold water, in which a bound person was immersed into a pool of blessed water and sank if innocent, was also widespread. In England, this ordeal was used in cases presented before the king’s traveling justices from 1166 onward. The ordeal of walking on hot ploughshares was employed less frequently but was still prevalent in eleventh century Italy and England. The list should also include the ordeal of the cursed morsel whereby an accused received a piece of bread or cheese and judgment depended upon his ability to swallow nearly an ounce of food.

Some historians include trial by battle under the definition of ordeal (the proof for private accusation), concluding that the number of participants was irrelevant. Closely akin to trial by battle was the ordeal of the cross, whereby a plaintiff and defendant stood with uplifted arms before the crucifix, the one able to maintain his position longest being adjudged victor. Because most ordeals involved the immediate judgment of the Deity (a failing to sink for example), many scholars do not include trial by oath (whereby by an accused or accuser swore to the truth of his story alone or with oath-helpers who swore to his reputation for veracity), assuming a false oath led to no apparent and immediate sign.

The medieval, however, had a much broader understanding of “an ordeal.” For purposes of this article, “ordeal” is best defined as a test of deed or word, fraught with moral danger that yielded the Deity’s judgment mediated through man’s practical wisdom. To begin with, there was nothing distinctly juridical about the ordeal. An ordeal was called
only iudicium or iudicium Dei. And what bound various ordeals together was that a iudicium Dei occurred when the Deity was asked to sanction or deny the formal oath made by a party to a dispute. Whether the ordeal was an oath simple, an oath followed by battle, or some other form of test, it was assumed, as we assume the laws of gravity, that when entered into properly and seriously, a judgment would irradiate. Humans participated in that irradiation. All forms of the medieval proofs involved a spiritual act and/or took place within a holy place, the proof by hot iron often reserved for the cathedral. Most were preceded by three days of fasting, after which the proband took his communion. As retold in Chretien's Lancelot of 1160c (and some forty years later in La Mort Artu of the vulgate cycle), a combatant fasted to expel sin prior to battle. The elements exercised in trials by fire or water were blessed and clergy supervised the ordeal itself. In trial by battle, the combatants swore their oath in church, often over relics, after preparing themselves by receiving communion and attending Mass.

Moreover, I include trial by oath because I find the stress many place on the immediacy of divine judgment to be misplaced. Abundant tales exist of perjurious oath takers being struck dumb prior to, or collapsing immediately after, their oath. The medieval mind assumed that the false oath eventually would be revealed. And like the more severe ordeals, the oath had its own risk, for the ritual was extremely complex with many formalities. If bungled, adverse judgment resulted. I also include trial by battle for though it involved brute strength and immense skill, this human element was present in all the other ordeals. Each could be affected by a person's weight, calluses upon his skin, bad memory, or his capacity to endure. Conversely, however, and just as with the other ordeals, the contemporary literature impressed upon men's hearts and memories, that no biological factor or skill was sufficient to overcome judgments of God. A warrior estate looked naturally to battle as the way to obtain a iudicium Dei, as witnessed by Emperor Henry III's 1044 Hungarian campaign and also William the Conquer's view of his victory at Hastings.

On the other side of the coin, the type of proof employed in each case was extremely particularized, making it artificial to say "this" kind of case involved an ordeal, but "that" kind did not. The proof used often depended upon the status (and choices) of the parties. For example, women, the aged, or crippled could not engage in trial by battle. And, in Norman England, the feudal hierarchy did not compel Saxons to proof by battle. Another form of proof was substituted. So too, strangers or known perjurers could not swear an oath. Jews, who were in some instances subject to ecclesiastical jurisdiction, were not subject to the severe ordeals. In manorial courts, peasants (and serfs) could (and did) resort to oath swearing, while in local and royal courts they were subject to a more severe ordeal. Although the scholarship conflicts about what proofs constituted an ordeal, it is nearly uniform when it turns to the question of what the proof ascertained.

B. The Ordeal As a Supra-Fact-Finder and Instrument

A large group of scholars see the ordeals as a means to ascertain the factual truth in difficult cases. In addition, a majority of scholars tacitly agree that the ordeals were instrumental in effecting other, broader purposes, such as maintaining group cohesion or preserving the political power structure. Something is amiss. Historians' insistence that the medieval Deity was a fact-finder leaves unfathomable a host of literature, which speaks of the Divine protecting the guilty proband by cloaking evidence or ensuring that he succeeded at his ordeal. So too, the assumption that the ordeals' legitimacy depended upon some external institutional or social need denies the possibility that the proof was meaningful in and of itself. One is sidetracked from being attentive to the literature that says how and why this was so.

1. The Ordeal as Fact-Finder

It cannot be denied that many in the age spoke of the severe ordeals as a tool for establishing the truth in uncertain cases. A Carolingian capitulary mandated, "let doubtful cases be determined by the judgment of God." and Ivo of Chartres conceded, "we do not deny that sometimes it is necessary to resort to divine testimony when, after an ordinary accusation, human testimony is wholly lacking." Peter the Chanter, twelfth century theologian and avid ordeal critic, saw the proof similarly, though he considered it to be flawed. And the ordeal often was used in hard cases such as heresy and self-defense where the "mens rea" was at issue. Historians also think it critical that in
many cases an accused faced a possible blood sanction. Hence, it is assumed the age would be loath to condemn a man to die without certain proof. Still, the historical judgment that the ordeals ascertained the irrefutable truth is problematic.

a. Moral Character v. Factual Truth

Most generally, up until the mid-fourteenth century, the medieval did not conceive of spoken "truth" in the way a lawyer would reference the word today. To characterize legal disputes as involving "the determination of facts with the view to applying legal norms... to a found fact is to project our analytical apparatus" into a time where it was yet unknown. The final question of the priest to the ordeal participant is telling: "Frater, es justus ab hoc crimine de quo accusaris? Iustus sum. Mundus? Mundus sum." The proband swears to his justification and to his state of cleanliness. Thus, though he may mean to say "I didn't do it," his oath also signifies a statement of "rightness," as in "I was justified in doing it" or "I did nothing wrong." Similarly, in England, the Assize of Clarendon required the accused to swear that "so far as he knows, he has not been a robber or murderer or thief, or a receiver of them, since the lord king has been king." This question asked the accused to speak a normative truth. Indeed, in both the Old and Middle English, truth (trowthe me, treuth) denoted a man's rectitude and integrity. Hence a "true" oath partook of a man's normative evaluation and not simply his belief in the oath's correspondence to an empirical reality.

Analogously, what often was uncertain at the ordeal was a question of ethical rather than empirical dimension. Henry I, before meeting Robert Curthose at Tincenbray, is said to have entreated his god to "grant victory to whomever he elects to procure peace and to protect his people." Harold declared before the battle of Hastings, "Today God will decide what is just between William and myself," and in Roland, Thierry calls out to Pinnacle, "May God do Justice this day betwixt me and thee!" Literary and historical figures exemplify the medieval knowledge that "God alone judges the petty quarrels of men and that his judgment often surpasses their understanding.

Indeed, it appears the courts often awarded an ordeal in cases where the facts were known or strongly suspected. Consider England. The presentment jury was an investigative body, assembled from the village hundred, and assumed to have made inquiry of witnesses before declaring whom it accused to the visiting justice of the eyre on his periodic visit. This alone established what we may call probable cause to proceed. Yet, it was only when the jury added that the accused was also "suspected" that he underwent an ordeal. Along with that addition was a requirement of supporting evidence, or of four vills joining in the suspicion. As, Professor Roger Groot points out, the judgment of guilt had, in some way, been made when the presentment jury added the label of suspicion to its accusation. Consider too that a severe ordeal was awarded when an accused could not find the requisite number of oath Helpers. Since all freemen were enrolled in a pledge group responsible for their well-being, and vassals and serfs were dependent upon their lord, a proband's failure to obtain oath helpers stood as a pretty good indicator that a community knew him, or believed him, to be guilty.

In answer, it may be said that participants considered the presentment accusation or the accused's failure to find oath-swearers as only circumstantial evidence. Historians judge that this age was loath to hang a wrongdoer without something more. Divine judgment provided it.

b. The Argument of the Severe Sanction

At the outset, one crucial fact undermines the thesis that the ordeal was a means to ensure accuracy when the blood sanction loomed on the horizon: Recall that some form of ordeal settled most disputes in this period, many of which did not involve a blood sanction. So too, though the learned were exposed to the teaching of Roman law that clear proof was needed when a man may be condemned, it is doubtful that those who participated in the ordeals thought the specter of the gallows should induce extra evidentiary caution. In the twelfth century and later, men and women simply did not abhor death the way we do today. Subsequent to England's ban of the ordeal, defendants, at times, engaged in overt acts of self-immolation, confessing their felony and being forthwith hung.
Celts, the death of those who "surrendered themselves voluntarily was considered sacrificial, inasmuch as they did thereby all in their power to compensate for their crimes." n93 The point is not that the medieval temperament was caviler. Rather, the phrase "Necesse est ut eam, non ut vivam" n94 captured the idea that death itself could provide the condition of a truly human life. This heroic, rather than stoic, attitude toward death is a centerpiece of the epic literature. From the ninth century Anglo-Saxon tale of Beowulf n95 until the more starkly Christian feudal epics such as The Song of Roland the audience is taught the ideal of a valorous death. n96 In both England and France the ideals of genuine feudality, influenced by the substratum of an older pagan faith that lay underneath the Christian surface, flourished until the early fourteenth century. n97 By [*126] "genuine feudality," I refer not to political theory, to the complexities of property law, nor to class structure, though each topic may inform the phrase. n98 For purposes of this article, the word "feudal" is broadly descriptive of a way of life that was status-based, bound by various relationships of inter-dependence that were nevertheless hierarchical, and shaped by the tenets of a warrior culture. n99 The mid-twelfth century emphasis was upon honorable death, unswerving fidelity, courageous deeds, and loving acceptance of fate, which mingled together wedding pagan custom with Christian teaching in such a way as to form a mentality. An aspect of this mentality was a staunch indifference to death. It seems that something beyond discomfort with the blood sanction prompted men to so steadily turn to their god.

c. The Divine Protecting the Guilty

A hint of what medieval men and women sought from the ordeal, whether it be by fire, water, battle, or simple oath, begins to surface when one pauses upon the strongest evidence against seeing the ordeals as a means to ascertain empirical truth. The sermon literature of the twelfth and thirteenth century overflows with stories of a Deity who cloaks evidence [*127] against the contrite wrongdoer. n100 It would seem the age depended upon its god to see beyond facts and even legal rights, and to judge according to some other, perhaps incomprehensible, measure.

A representative example comes from Caeser of Heisterbach, a twelfth century master of novices whose Dialogue was a common source for sermon-stories. n101 He told of a soldier who suspected that his wife had committed adultery with a certain priest. n102 The soldier wished to "learn the truth more fully" before making accusation and asked the priest to accompany him to a nearby village where there lived "a possessed person, in whom there was such a wicked demon that in the presence of bystanders she revealed sins which were not cloaked by a true confession." n103 Fearing for his life, the priest "entered a stable and throwing himself at the feet of a servant of the soldier" he confessed, asking for a penance to be imposed. n104 Subsequently, when the priest and soldier met the demon, the soldier asked the demon if she knew anything about the priest. She replied in German that she knew nothing about the priest, and she added quickly in Latin, "he was justified in the stable." n105 The monk explained the moral of the tale to the novice: the Deity did not allow the demon to speak German to the soldier "lest the knight should understand what be said and learn the truth; and she was not permitted to be silent, in order that she might show the priest the virtue of confession." n106 The belief that genuine grieving about one's sin (even if silently expressed) could wipe out evidence of a crime at the moment of proof permeates the exempla, and sermon pamphlet literature of the twelfth and mid-thirteenth centuries. n107

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2. Searching for Legitimacy

Recognizing the conceptual difficulties, historians from all schools of thought tend to the language of instrumentalism to locate and explain the ordeals' legitimacy. A small but intense battle exists in the scholarship between the functionalists, who see the ordeal as a flexible instrument for generating consensus and ensuring stability in small face to face medieval communities, and those more class-conscious historians, who see the ordeal as an intrusive and coercive tool of royal power. n108 The latter group suggests that the ordeal was "enforced in an exercise of power, yet [it] represented submission to that power as submission to the deity." n109 By relying upon the language of instrumentalism, however, both schools of thought bleach out features of medieval life critical to discerning why the period believed the Deity would aid a suffering wrongdoer, or why the ordeal would be employed even when the facts
of a case were fairly well established.

a. The Class-Conscious Historian

It is not atypical for historians to tacitly assume a rigorous class structure with the ordeals being one way for priests, judges, and lords, to keep serfs, peasants and strangers in their place. It was the rulers who held the power of the Divine in their hand and it was used against those who needed to be controlled. This view, however, fails to take account of widespread practice. The sources are replete with Saxon monks accused of heresy, concubines desiring to establish paternity, warring monarchs at an impasse, and queens suspected of infidelity offering to undergo, and undergoing, trial by fire or water.

Moreover, modern ideas of the disempowered mass and coercive elites, do not suit an age where surrender, obedience, and service were not only ideals, but the ontological description of the human condition at its most flourishing. Simply put, it is too easy to explain the ordeals' legitimacy in terms of coercive political power. In twelfth century vocabulary, "no combination of words was more widely used or more comprehensive" than the phrase "to be the "man' of another man." In this period man, homo was conceived of in a position of primordial and spiritual subordination. The specialized sense of a vassal's homage was on one end of a single continuum with the services, servus, of the serf sitting at the other.

In the central Middle Ages, vassalage (a word extended to describe serfs in some parts of England and France) was a cherished condition. Not only did affection flow upwards to the lord, but the lord's friendship flowed downward to the vassal. Formal language contained within legal documents attest that the "tie was one of affection, the true union of hearts in which life is inconceivable without the other." The bond was one of absolute devotion and willingness to die for the lord or disregard the most terrible of sins.

All belonged to someone. The prelate pledged fealty to his bishop and undertook service to his god and secular rulers, such as King John, acknowledged the Church's spiritual dominion over England, pledging himself as spiritual vassal of Pope Innocent III. And, so too, the pope was but a "steward" and "dispensator" understood in the medieval sense of a servant who performed his officium at the pleasure of his lord. In short, conceptually there existed no oppressed disempowered mass, which a sovereign elite then coerced. Submissive bondage, the plighting of one's troth, represented the first virtue.

The point bears stress. The ordeal cannot be understood without grappling with the medieval view of the import in abandoning and surrendering to a power higher than one's self. The more Marxist flavored historians impede such effort by imposing very modern ideas upon those who dwelled within the world of the ordeals. The functionalists go further. They obscure the ordeals' situating backdrop completely.

b. The Functionalists

Rather than looking from the top down as the traditionalists do, the functionalists look at the ordeal from the bottom up seeking "rational" explanations for the ancient proof. In modern evidence law, rational proof refers to methods of ensuring accurate fact-finding by seeking empirical, logical, verifiable, and/or scientific grounds. In this regard, the ordeals were irrational. The judgment was unverifiable and it was not subject to the law of probability as it applies to questions of guilt. Yet, today the word "irrational," and through it "religious" (or mystical), connotes more than non-empirical, non-propositional forms of reasoning. Irrational is used pejoratively to imply incoherence, or affective emotions devoid of thought. Thus, functionalists attempt to rescue the ordeal from the pale of irrationality by looking at the proof's latent social ends. It is said that the ordeals were resorted to in cases that needed to be resolved to maintain the group's internal cohesion. This, in turn, was a defensive mechanism that ensured the safety and security of those who dwelled in a dangerous and hostile world.
The twelfth century was varied in its forms of piety. In daily life, a cohesive, acute, and popular piety bound twelfth century Western Christendom together. Loosely stated, the spiritual route of the twelfth century was one of purification, illumination, and union. In England, France, and Italy mysticism, more worldly communal forms of veneration, and pagan beliefs co-mingled in a non-systematic way, birthing a piety of worldly redemption. The somber world, awaiting Judgment Day in the tenth century, had, by the mid-twelfth, given way to light. The earthbound dark Romanesque style of the eleventh century, which underscored the distance of man's travels, yielded to the...
up-reaching light- [*134] filled Gothic; images of Christ sitting in judgment were supplanted by those of a crucified Jesus; and Virgin Mary took her place as the compassionate intercessor who "cheated Hell of its most promising candidates." It was a redemptive age, which saw found hope in man's own suffering (the ordeal being a paradigmatic example). It was, to state the case differently, an age that saw its world sacramentally.

Sacrament had three interrelated meanings. Sacramentum, from the Greek mysterion, referred to the presence of the Deity. Sacramentalis spoke to those acts and words that transfigured, consecrated, and ennobled, an event, person, or thing. Those customs, which spoke to holy matters, though not within the core church traditions, persisted as "sacred" acts of popular piety. These conceptual lines were just beginning to be clarified in the Middle Ages. Until the late twelfth century, the Church accepted that sacramentum held no uniform meaning within Scripture. In the Vulgate Bible, it is written, "manifestly the sacrament of piety (pietatis sacramentum) is great, that which was manifest in the flesh." The phrase "the sacrament of the incarnation" established itself. From these words, the belief evolved that "sacrament" referred to the nativity, the passion, the resurrection, and the ascension of Christ; the atonement. Others spoke of sacramentum as illumination, perfecting, and as the sign (i.e. presence) of this reality. Translated from the Latin as "oath," the sacramentum was the visible sign of the invisible grace as it worked its way through men's covenantal acts. Nowhere was an oath more tied to a manifestation of the Sacred (sacre) than at the ordeal. According to the Charlemagne of Huon de Bordeaux, the ordeal constituted a "miracle made visible." [*135]

[*135] The question predominating this age was what attributes belong to divinity and hence to its presence, its embodiment? In the mid-eleventh century, beauty ascended as the Divine's most venerated attribute. The scriptures, extended and amplified by the church fathers and confirmed by the classical heritage, produced a vision of the cosmos as an inexhaustible irradiation of loveliness - "a dazzling cascades of splendors." Bernard of Clairvaux, twelfth century mystic, taught:

When the brightness of beauty has replenished to overflowing the recesses of the heart, it is necessary that it should emerge into the open, just like a light hidden under a bushel: a light shining in the dark is not trying to conceal itself. The body is an image of the mind, which like an effulgent light scattering forth its rays, is diffused through its limbs and senses, shining through in action, discourse, appearance, movement - even in laughter, if it is completely sincere and tinged with gravity.

It may be said then that His presence was Beauty incarnate. Words and deeds were of the sacramentum when they yielded a visible form to the invisible activity of grace; a shining out, through an act of embodiment, the resplendent accord that hitherto remained hidden.

The above hints at the most splendid aspect of the medieval sacramental life, and hence of the ordeals, but it is the most elusive of thoughts. Beauty consisted of the harmonious yoking together of the discordant. The paradigm was the Trinity, whereby the Divine was understood as "neither solitary nor singular;" His very existence as three in one was an existence in communion. This knowledge of the sacramentum as radiant accord tightly wove heaven and earth together. In the twelfth century, intangible interlaced with the perceivable. "In stormy skies people saw phantom armies passing by," and a unicorn could be captured if it rested its head upon a virgin's lap. "Even at its most dreadful, nature" was an "alphabet through which God spoke to man ... the world was [His] discourse" to us. The world then was seen as the Deity's gift. According to the pseudo-Dionysus, it was right that the things of the Deity should appear in dissimilar entities because "it was precisely the incongruity of a symbol that made it palpable and stimulating." The subtle, but crucial, thought here is not that the divine mixed with and redeemed the profane, but that Nature itself was Divinity revealed.

Accordingly, as a creature of nature, man participated in Divinity's unveiling. It has been said that in the eleventh and twelfth century, the split between sacramentalias and sacramentum was slight. It could be no other way. That which ennobled, enlightened. And enlightening, the bearing of light, was the presence of His divinity. In daily life, each
act of enhancing, transfiguring, and perfecting a deed, word, or oath contained a liturgical element for beautifying rendered the divine possibility concrete. n155 In turn, perfecting required the harnessing of polarities. The hard thought is that the divine essence must transcend all opposition, "not [*137] only those of intelligence and intelligibles, of being and non-being, but also of "yes' and "no."

Reconciliation, as both divinity's core attribute and beauty's definition, was not an idea that easily translated into the practical arrangements of worldly life. n156 Nevertheless, it was an idea that permeated the age. As with all earthly things, the ordeal too held the capacity to transcend opposition - conflict - and to provide the efflorescent Beauty forma. But the question is, how are we to understand a legal proof as the coming into accord of the discordant.

B. Concordia and Penance

The answer to this question requires grappling with this age's understanding of what law, and hence its breach, signified. Even a brief consideration of the subject indicates that men and women resolved disputes and dealt with breaches in a way imitative of their knowledge of the sacramentum. They strove for concord. n157 The bridge to be crossed from that aim to the ordeal proof is the emergent, twelfth century teachings on penance. It is these teachings that make sense of the ordeals, bringing clarity to the otherwise muddy waters of judgments of innocence in cases of false oaths and declarations of guilt when it seemed no wrong had been done.

1. The Breaking of Faith and Concordia

Sharp division among what we call religious, ethical, or legal norms was nonexistent in the Middle Ages of Europe. n158 Law was rooted in the [*138] soil of ancient custom, riht, and practices. n159 Custom, in turn, defined peoples, manifesting itself in "personality of law" whereby persons carried their law as a birthright wherever they might travel. n160 Neither the coming of the Italian communes, nor feudal land tenure, altered the essential place of law in medieval life. It granted and shaped one's identity, delimiting a myriad of relational statuses, which resided in the collective memory of serf n161 and lord, woman n162 and man, warrior and ploughman, cleric and lay, n163 who all held the duty to recall and preserve the law. n164

[*139] The medieval knowledge of wrongdoing then was more than the infliction of harm upon another. Wrong's darkness inhered in its quality of a breaking of faith, fidelitas. The outlaw, qua law-breaker, not only declared war upon his community, but also upon himself. By his deed, he broke those bonds that granted him identity. In eleventh and early twelfth century England "[it was] the right and duty of every man to pursue him," ravage his lands, burn his house, and hunt him as prey for he [was] caput gerat lupinum - a friendless man - a wolf. n165 The rigor of this stance bespoke the deadly seriousness of breaking bond. Those of a particularly heinous nature were "unemendable." In Saxon law, these were the botless crimes. n166 In Norman England, they became the felonies. In the context of feudal law, a felony tattered the bond between a man and his lord, leading to forfeiture of the man's lands. n167 When given its Latin form, fallere, felony connotes failure, weakness, lack, and death, as in the judicial duel, where the morally weak were sure to lack the strength to prevail. n168 A thought is contained within this stern view of wrong relevant to the ordeal.

While to exist "out-lawed" was to lose one's privileges as a dweller within a community, on the other side of the coin was the belief that one may return, as in a home-coming, if he made proper sacrifice. n169 [*140] Accordingly, in all disputes, criminal or otherwise, the medieval sensibility aimed at concord, derived from cor, and signified an agreement of the hearts. n170 In its technical sense, concord may be roughly equated with settlement. In this period, Professor Van Caenegem remarks that the court records in England leave "an impression of basic weakness... We hear more of concords... than of downright judgments of right and wrong." n171 Yet, in the central Middle Ages, concord was the aspirational ideal for all forums that rendered judgment. n172 The medieval "loveday," from the seventh century onward until the late Middle Ages, aimed to save the face of adversaries and yet to bring them to amity. Pledges to "henceforth be good and loyal friends" were frequently part of agreements. n173 Although a "loveday" was not a "lawday," both shared a common aim.
There is a relationship between concord and the ordeal, the seat of which is purgation. To be purged is to be restored to purity (purus), meaning, in its fundamental sense, to be freed of discordant qualities. Cast affirmatively, the medieval sensibility saw purity as a condition of fittenedness - of concordia. In that the ordeal was purgatoria, it either cleared one of a factual accusation, or revealed one's inner corruption. This explains, for example, the import of whether a burned hand healed [*141] clearly or showed decay. Critically, expulsion (expurgare) referenced not a proving of factual innocence, but rather cleanliness, and, hence, in the early twelfth century, the scholastic Alger of Liege clarified that confession and penitential works could also "prove" lack of corruption. n174 So too, at either a loveday or lawday, purgation involved a suffering. It bears repeating that in this world the natural was always a metaphor for deeper intangible realities. The pain of the hot iron, for example, spoke to a deeper truth about the suffering one endures in surrendering or submitting to something other than oneself. Similarly, concordia demanded a kind of violence upon oneself. Even in an arbitrated concord, participants overcame their ego, enduring the irritation that attends one's release of a claim of unconditional right. In charters recording formal concords, the images of men denying a wrong, such as homicide, but, nevertheless, undertaking the holding of mass and pledging homage to a deceased's kinsman, permeate the records. n175 The final resolve in the charters was to cease a feud and to become "concordes et amici in perpetuity."

2. The Explicit Tie with Penance

The idea of suffering into accord, the sacramentum insofar as the appearance of beauty partakes of the yoking together of opposites, found expression in the teachings of penance. These teachings tether formal concords and legal judgment, making it difficult indeed to see any conceptual distinction between the two. n176 During the eleventh and twelfth century, the kinship between earthly purgation and the ordeal was explicit. It was said that those known to be guilty, but adjudged innocent at the proof, were absolved due to their repentance. n177 Those judged guilty, but known to be innocent of the instance, had engaged in some other unpardonable wrong. n178 Without a doubt, many tales seem to be tortuous attempts to explain away "inaccurate" judgments. There is the story of the man accused of stealing horses, who failed at the ordeal, notwithstanding [*142] that he was innocent. n179 Witnesses to the giving of the proof surmised that he failed because he had wrongly shaved like a cleric. So too, in the twelfth century, it was not atypical for events to be understood in terms of a god who took vengeance upon wrongdoers. n180 This understanding of what has come to be called "immanent justice" parallels the understanding of the deity as a supra-fact-finder at the ordeal.

Yet, again, the turn in the twelfth century was to a benevolent god who responded to man's suffering. The chronicles, exemplar, epics, and romances frequently speak of an ordeal as an instance of the Deity bestowing the gift of grace upon a proband. n181 Now, it is difficult to know how to fit these stories of grace within a judicial context, for conceptually undeserved mercy stands in tension with justice and no ready answers exist to the puzzle. n182 Accordingly, scholars frequently dismiss this literature and focus upon the ordeal's efficacy only in terms of a God who "punished the wicked and rewarded the good." n183 Yet, when the ordeals are forced into this paradigm without accommodation for repentance and grace, the sources reflect a hodge-podge of seemingly incoherent beliefs. If, however, one situates the judicial ordeal within the wider penitential [*143] culture, one will find that the sources reflect a consistent, cogent, and rather noble understanding of what is to be "evidenced" in a dispute. n184

Next to the Eucharist, penance is the doctrine with which twelfth century theologians most occupied themselves. Penance was practiced throughout the Middle Ages on both the continent and in Great Britain, though its dogmatic content remained unformulated until the late twelfth century. n185 As the church began to focus upon the hope of a redeemed earthly life, the tenor of penitential teaching also mutated. Strongly retributive in the early period, it elevated to a teaching of restoration. n186 In the eleventh century, Saint Anselm of Canterbury set himself to the task of inquiring into why God became man. n187 He posed two questions: first, how is God's infinite justice to be reconciled with his infinite mercy; and second, how can a human ever render satisfaction to God? Anselm observed that God could not justly forgive man's wrongs for then He seems to violate the order of the universe that He must uphold to remain consonant with Himself. "Injustice" pervades if wrong "is canceled by compassion alone, [for it] is more free than justice, which seems inconsistent." n188 Yet, God does not require (i.e. need) man to make amends. He is impervious: "nothing can be taken or added from His honor." n189 In other words, He requires no retribution for Himself. n190
Anselm found, in the idea of satisfaction, a way to transverse the chasm between grace and justice. In modern parlance, we think of satisfaction as payment or fulfillment. We "satisfy" a debt, a need, a requirement. Instead, Anselm spoke of satisfaction as negating the need to fill a lack or pay a debt. He conceived of satisfaction, not as a payment, but as an offering. Whereas punishment is a thing "exacted," leading to the torment of separation, satisfaction is a thing "freely given" which restores man's relationship to God, much as a remorseful beloved bringing flowers to his offended lover reaffirms the beloved's pledge. n191 The reason, [*144] Anselm said, is that pricelessness inheres only in gifts: what is unconditioned. In payment, there exist a contingency in value depending on the debt. n192 Therefore, "when anyone pays what he has unjustly taken away, he ought to give something which could not have been demanded of him... this is the satisfaction which every sinner owes to God... for you restore nothing unless you restore something greater than the amount of the obligation." n193 Gifts do not impose an obligation upon a receiver, so man cannot be reconciled unto God unless the gift is accepted. Hence, there came about the doctrine of absolution. Anselm provided the dogma of penance consisting of the four interwoven steps of contrition of heart, confession of mouth, satisfaction of deeds, and the infusion of grace. Though spoken of in steps, it is significant that in the hagiography, annals, and other literary sources, grace is not portrayed as that which follows proper contrition. Rather, grace also allows for contrition, the stinging of the purple pain of remorse. n194

While the laity was both uneducated and illiterate, the spirit which opened this discourse to Anselm predominated medieval life in all its facets. For example, the complicated system of bot, "betterment," among the Germanic peoples, which designated compensations to be paid for various wrongs, was inextricably tied to the penitential system. The bot constituted a dramatized apology, which was said to be "amende honorable." n195 The overlap between the penitential manuals and, for [*145] example, the Anglo-Saxon law codes of the tenth century, whereby the latter often mandated the former, represented the import of a wrongdoer reconciling himself both to his community and to his god. Both the penitential and "legal" literature of the Anglo Saxons spoke of expiation rather than punishment and numerous passages in the Anglo-Saxon laws required confession. n196 The medieval emphasis was not so much upon the victim as upon the spiritual needs of the wrongdoer. Thus, in the Leges Henrik Primi, it was stated that one who unwittingly caused a harm should "consciously make amends," a tenet also characteristic of the penitential literature which the Henrik Primi incorporated. n197 The object was to allay the penitent's grief at contributing, in anyway, to a fellow's harm. n198 Similarly, by Bracton's day, it was said that a man who caused harm, even when justified or by accident, still needed to offer penance ad cautela, (i.e. as a matter of prudence). n199 The legal literature captured in rule, albeit perhaps unwittingly, the import of accord so pivotal to the sacramentum's realization. Typical of the early twelfth century miracle tales is the story of Pope Gregory VII, who interceded on the behalf of a man struck with grief [*146] at the accidental killing of his brother's son who could not bring the grieving father to accept his "offerings of full retribution." n200 The Pope witnessed the devil "clinging" to the father "riding his shoulders" and upon telling him what he saw, the father immediately "accepted satisfaction for the death of his son, and promptly offered the whole sum for the redemption of his soul." n201 We are told of the necessity of an offering for an accidental killing without comment. The account's focus is upon the necessity of both men expiating their grief at the calamity without interference from the devil who would seek to obstruct such accord. In short, what Anselm explained in the scholastic spirit of the period was a practice embedded in the Germanic memory and part of the religious teachings of the earlier period. Both practice and teaching colored the ordeal proof.

3. The Affinity between the Judicial and Spiritual Realms

Notwithstanding the central place of penance in twelfth-century Europe, it seems far removed from the ordeal. During penance, a wrongdoer seeks to expunge his inner corruption, thereby reuniting himself with those he has offended. At the judicial ordeal, however, one sought to clear oneself of a charge by proving the truth of his oath. Indeed, historians perceive a struggle between political forces, which were represented by the monarchy and interested in uncovering crime, and religious forces, which were represented by the Church and interested in the wellbeing of its flock. n202 While a few see a link between the emergent penitential culture of the twelfth century and the ordeal, they perceive a tension. n203
From the spiritual standpoint, Professor Robert Palmer asks that if one confesses to his priest with genuine contrition, how could he then go to the ordeal and "fail," perhaps losing a finger or suffering decapitation? Potentially an adverse judgment stood as a contradiction to the teachings on grace. On the other side, Professor Robert Bartlett suggests an inaccurate judgment of innocence that was justified by the accused's contrition "watered down the [ordeal's] judicial function" which was to ascertain who was and was not guilty. And if the proband was guilty, swore a false or equivocal oath, and was cleared, the tie between penance and the proof appears even more fanciful. At this point, a conflict between the spiritual and judicial realm is assumed, inquiry stops.

Yet, it is problematic and perhaps anachronistic to conceptually divide the judicial and spiritual realms during the twelfth century. In the twelfth and early thirteenth century, there was too much overlap to speak of a distinctly judicial or penitential mindset. Clerics dominated the judicial benches of local and royal courts until the late thirteenth century. For the most part, they were men steeped in their religious tradition. Analogously, there were temporal causes of action, but in the late twelfth century, no boundary was perceived between sins and wrongs. And if the proband was guilty, swore a false or equivocal oath, and was cleared, the tie between penance and the proof appears even more fanciful. At this point, a conflict between the spiritual and judicial realm is assumed, inquiry stops.

But prior to the late twelfth century, the priest, whether judge or confessor, held essentially the same role. Thus, it was sensible to say that an accused could expurgare either by proof or by confessione et penitentia.

C. The Penitential Ordeal

In granting the above, critical questions arise. Since the judicial and spiritual realm partook of each other, it is hard to fathom why a penitent, who was accused of a crime and had privately confessed, would still be required to undergo an ordeal. Second, it is unclear why an accused that had privately confessed could go to the ordeal, swear his innocence, and still be considered a genuine penitent. And third, the equivocal or false oath would seem to deny the proband any claim to his god's mercy. In attempting to solve these puzzles, what appears is the enormous import of the accuser's stance at the ordeal as well as the accused's. So too, what surfaces more generally are beliefs about evidencing that even the most neutrally-situated legal historian must bow to in admiration.

1. Doctor and Patient

A possible answer to why the confessed penitent underwent his ordeal lies in how the period conceived the role of the confessor. In the twelfth century, theologians struggled with the doctrine of the keys, whereby all priests, through Peter, had "the authority to "bind and loosen' sins on earth. Theologians of this period emphasized that the priest's principle role was to advise a penitent about the satisfaction required to expiate his wrong. Until the late twelfth century, the priest did not stand in the role as an earthly absolver. Rather, he was an intercessor, who told a penitent about what acts he should take to be absolved by the Deity. Notwithstanding that an accused made a private confession, it was up to the Deity, not the confessor, to absolve. And, in criminal matters, that possibility rested with the accused undergoing an ordeal.
Turning to the second question, it still seems odd that prior to 1215, "prudent and pious priests" counseled the guilty to licitly swear that he was not guilty of the crime charged if his heart was penitent and he had confessed. n218 This was true even in the serious crime of heresy. n219 It would [*150] seem that priests counseled perjury. Several things can be said. To begin with, in the twelfth century, medieval Europe did not generally think public confession was necessary to penance. n220 So too, a constant theme, in medieval chronicles and miracle stories, is that a proband may swear to his innocence if he has properly purged, through the pain of contrition, his previous wrong. n221 The justification for this belief rests with the period's conception of wrong.

The medieval's definitional emphasis when considering wrong was not upon a man's past act but upon the corrupting aspect of wrongdoing. Wrong was conceived of as an "ulcer," which once shown to a "doctor, who... healed" and bestowed medicines, "easily quit" a man. n222 Genuine contrition and confession cleansed souls. Thus, a man could in good conscience undergo the ordeal swearing to his "innocence." The nub of the teaching was not simply that private confession freed a proband. Recall the proband's rite of purification before undergoing an ordeal. It was through his suffering in genuine contrition that the stain of wrong was washed away. Representative is an account from 1215. Several heretics, who had been convicted by the hot iron, marched with a priest to the stake. The priest persuaded one heretic to repent and the heretic confessed, "I certainly think that I have been mistaken, but I fear repentance in so great straits will be by no means acceptable to God." n223 His wounded hand healed, being "perfected" by the time he reached the site of execution. n224 The priest exclaimed to the judge, "it is not just that an innocent man should be condemned unjustly.' Since no trace of a burn was found in his hand, he was dismissed." n225 Innocent, here, referred to the heretic's state of cleanliness subsequent to confession.

Indeed, what the scholarship invariably overlooks is that, for a time, endurance of pain lived compatibly with grace understood not as remission from suffering, but as the promise not to abandon those who willingly suffered. n226 Some historians acknowledge that the witnessing community [*151] may confirm a finding of cleanliness upon its response to an accused's "pathetic agony, [and] noble stoicism." n227 But the reading of the Divine sign is implied to be a kind of ruse, which allows the group to proceed as it sees fit. The idea is far deeper. The ordeal was predicated on the faith that the Deity responded and renewed a bond when one inwardly suffered for want of His presence. Physical suffering stood as a metaphor. And the communal response reflected not a clever manipulation, but a genuine act of inferencing which, as with all inferencing, depended upon normative assumptions.

Tales abound in the sources, without a distinction being drawn between a judicial or a penitential ordeal, of the freeing quality of suffering. Professor Lea observes the frequent early medieval practice of fastening bands of iron around the neck or arm of a murderer, who was banished, "until by pilgrimage and prayer his reconciliation and pardon should be manifested by the miraculous loosening of the fetter, showing that the soul [through the body was]... released from [its] bond." n228 Saint Emerie of Hungary's release from his irons led to his immediate canonization in 1073. n229 Although Saint Emerie's ordeal was his sanction, what ties it to the judicial proof is that it was the uncorrupt condition of his soul, brought to wholeness through its own contrition, which released him.

Though heresy or the tales of saints' lives may comprise a special category, the same focus upon the cleansing nature of suffering in remorse appears in the stories of the most ordinary crimes of the most common folk. Scholars of the ordeal point to the story of a fisherman (1220c) who had long lived incontinently with a certain woman:

His sin was too notorious, fearing one day to be accused at the synod then impending, he said within himself: "what will you do, poor wretch? If you are accused of incontinence ... and must confess, you will forthwith be compelled to take her to wife; or if you deny it you will be convicted by the ordeal of white-hot iron and be still more confounded. n230

[*152] He went to his priest, confessed, and was advised "if you have a firm purpose never to sin again with her, then you may carry the white-hot iron without further care and deny your sin; for I hope the virtue of confession will free
you." n231 He was adjudged innocent. n232 Rather than signifying approval of perjury, the priest's advice to guilty probands reflected a faith in the Deity's willingness to cloak from men's eyes evidence of crimes that a proband, unabashedly and without rationalization, had regretted at private confession. Typical in the sermon literature are tales of the Devil attempting to unveil a wrongdoer's crimes to others and of the deity, erasing, taking, or cloaking the evidence when the proband had offered genuine contrition. n233

2. False and Equivocal Oaths Without Outward Confession

The above does not address those ordeals, where a proband swore a false or equivocal oath without previously confessing and nevertheless succeeded at the proof-taking. Form the standpoint of the twelfth century, this result was not difficult to comprehend. Vigorous debate ensued in the period about the relative import of outward penance, i.e. confession and satisfaction, in relation to the inward elements of contrition and the infusion of grace. n234 Contritionalism dominated this period with confessional literature stressing the sufficiency of inner shame that comes with self-reflection, a teaching vigorously put forth by Abelard and Peter Lombard. n235 From 1110 onward, entire cycles of miracle stories [*153] "dwelled on the hiatus between outer appearance and inner disposition." n236 A fornicating monk may be buried "in unhallowed ground but a lily growing from the mouth of his corpse showed that, on his way to his inamorata," he offered his Ave Marie before dying. n237

It is within this context that accounts of false or equivocal oaths should be placed. Contritionalism opened the possibility of a proband swearing falsely and receiving, for reasons beyond man's understanding, the Deity's forgiveness. n238 Of note is Lambert's trial. A vassal of Charles the Good, Lambert was implicated in his lord's murder in 1127. n239 He succeeded at the ordeal despite his guilt. Subsequently, he and his men "arrogantly, without any sense of mercy, used a force of 3,000 men to besiege a handful" in a battle. n240 He was slain. n241 Galbert of Bruges recounted that "as long as [Lambert] acted humbly towards God, God forgave him," but He withdrew when Lambert became arrogant and merciless. n242 Scholars tend to cite Lambert's case as an example of the belief that the Deity rewarded the deserving and harmed the undeserving. n243 Yet, the issue in Galbert's journal was not just desserts. Galbert instead interpreted the ordeal and its aftermath penitentially. The Deity judged that, although Lambert was guilty of a crime, he had approached his ordeal with humility and remorse. Therefore, he was released. When he resorted to his supercilious ways, however, Lambert banished his god from his life. Put differently, his avowal of no quarter for his enemy was a disavowal of His presence. What saved him was his state of purity at the ordeal; and concomitantly, what destroyed him was its lack at battle.

Close in theme to the above are the tales of equivocal oaths. Representative is the legend of Tristan and Isolde. n244 As Huizinga [*154] remarked, moderns find medieval "noble love... intolerably stale and ridiculous." n245 This is the "fate of any romantic form that has lost its power as instrument of passion." n246 Hence, Tristan's genuine courage escapes us. Isolde was a queen, wedded to King Mark, and rightly accused of adultery with Tristan. She swore a literal truth that misled others and she was absolved at the ordeal. Historians see her ordeal as one example of "the cunning by which medieval men [and women]... faced and manipulated the supernatural in their affairs," n247 The epic is misread.

The origins of the Tristan legend are unknown. n248 Given the fullness of the ordeal's rendering, Gottfried von Strassburg's (1200) courtly poem is accepted as the most relevant to inquiry into the proof. n249 Prior to her ordeal, Isolde:

remained alone with her fears and her sorrows - fears and sorrows that gave her little peace. She feared for her honour and she was harassed by the secret anxiety that she would have to whitewash her falseness. With these two cares she did not know what to do: she confided them to Christ, the Merciful who is helpful when one is in trouble. With prayer and fasting she commended all her anguish most urgently to Him. Meanwhile she had propounded to her secret self a ruse which presumed very far upon her Maker's courtesy. n250
Isolde must presume upon her Maker's courtesy, for the medieval Christian god was not a divinity that could be forced to anything, including to confirm literal but misleading statements of truth. And of course, this god did not commit error. Indeed, it was Isolde's telling a literal but misleading truth that placed her at the Deity's mercy. Isolde did not swear in perjury, thereby committing a further wrong, but instead hid from men her confession to her god. Prior to her ordeal, she gave away all her worldly possessions as an offering to her god, undergoing an informal kind of penance. The tale teaches the nobility of her stance in facing her ordeal rather than her cleverness in attempting to fool her god. Gottfried writes:

Thus it was made manifest and confirmed to all the world that Christ in His great virtue is pliant as a windblown sleeve. He falls into place and clings, whichever way you try Him, closely and smoothly, as He is bound to do. Gottfried is read sardonically. Yet in this age of courtly love, it was no more startling to see Christ cast as a courteous knight than it was in the eighth century to see him cast, in stone relief, as a fierce Germanic warrior. Courtesy was to be found in the armor of the king's virtues; it was thought to bespeak an attitude of compassion and was heralded as a species of mercy. Langdell and Julian of Norwich venerated the Father as sovereign Courtesy understood as an aspect of His perfection, beauty, and charity. It is in a sympathetic context for boundless ardor that Isolde's god judged her after seeing her "surrender life and honor utterly to [His] mercy" so that "He may judge her "true guilt.'"

As Tristan and Lambert suggest, one could undergo an ordeal remorsefully and, yet, stand silent, failing to confess to his fellows. Perjury remained a grave sin and it may be recalled that those known to have engaged in it were not considered oath-worthy. And, so too, the tales are plenty of false oath swearers being revealed by the Deity. If one asks whether tales of the ordeals as a penitential act of purgation irrefutably establish the routine common understanding, no true answer can be given scant sources. Yet, if "culture" is taken in its narrow sense of the highest forms of thought within a period that saturate the age, spreading (at times in reduced and thin form) into the crooks and crannies of daily life, then the ordeals penitential character is beyond dispute. More than obscure tales, these legends comprised the Middle Ages' moral bank. Historians must pluck out their skeptical eye when viewing the sources. In the Middle Ages, the redemptive vision, amplified by the tenets of courtly love, directed the ordeals to a higher justice.

3. Suffering of the "Victim"
Concord is movement between two. From the standpoint of the wronged person (or god), what must be overcome is vengeance. The accuser's refusal to sit upon his rage and seek just resolution of a conflict crops up in the sources as being keenly relevant to the Deity's judgment at the ordeal. Vengeance's most salient characteristic is rage, which taunts the soul, telling it that it can never reach back and undo what has been done. In this age "every passion was violent," the belle vendetta was admired, and commitment to honor ran wide and strong enough to mark a class. Nevertheless, an accuser's refusal to sit upon his rage, when an accused sought resolution, crops up in the sources as being keenly relevant to the Deity's judgment at the ordeal.

The inter-relation between proper vengeance and its restraint is best seen in the blood feud. Occasionally dismissed as subculture violence, which the ordeal constrained, the blood feud had its law. It embraced those tenets, albeit darker in form, that made up the penitential melody of the late twelfth and thirteenth centuries. In its raw expression, to demand and/or exact satisfaction is to take vengeance. At its core, however, is an embryonic nobility. "The irksome sort of disquietude and feverish heat" that arises when one is affronted reflects a consciousness of oneself as a personality. Hence, the feud commanded respect. It said that one was not "timid" and would take action to restore his reputation (fama being the touchstone of whether one dwelled in a state of honor or shame). The same theme resonates at trial by battle. Yet, there was a caveat. In King Alfred's day (c. 900), it was unlawful to begin a feud without asking for a dead man's wergild, a set sum meant to "atone" for his death. The scholarship tends to
treat the complicated systems of payment in modern terms, thus speaking of the move from vengeance to tort-like compensation, or from compensation to state inflicted penalty. n268 But the wergild represented something altogether more profound. It aimed not only to compensate, but also to restore amity. n269 Wrongful deeds were made "better" by the giving of a bot. n270 Most important, as early as Beowulf and constant up to the Norman-Saxon law, the wronged man was obligated to respond when a wrongdoer offered honorable repair. n271 In the Leges Henric (c.1140): "If anyone made amends to another for his misdeed" and offered something beyond what was owed "along with an oath of reconciliation," it was commendable of the wronged man to "give[] back the whole thing." n272 He continues, "it ought to be sufficient" that the accused has "in some measure offered himself to his accuser."

n273 The ability to pay, and by implication to refuse payment, was part of honorific conduct; it implied one's greatness of soul. n274 One who demanded compensation easily appeared grasping. And vengeance contained its own pettiness for it was cowardly to fail to accept life's viscidities. n275

Similarly, at the ordeal, whether by battle or in some other form, the proof not only spoke to the proband's moral stance, but also to the accuser's. n276 A few historians allot attention to an English ordeal from the last decade of the tenth century. A slave was arrested for an unspecified crime and was brought to trial before the village reeve. n277 His master cared for him and went to the reeve offering him a pound of silver and the services of his man if the reeve would spare the slave his ordeal. n278 The reeve refused. n279 It is recorded that, pompous in his role, he banked the fire higher than usual, and the slave was given an iron heavier than was typical. n280 The accused lifted the iron, his severely wounded hand was bandaged, and it was examined three days later. n281 When the bandages were unwrapped, "the astounded reeve and his cronies had to admit: this man [was] not guilty, there [was] no blame, no crime in him!" n282 The hand was clean. n283 Oddly, the rest of the on-lookers could see the pus and decay on the hand, but not the Reeve. n284 Arguably the Reeve's own baseness led to his blinding, which itself stood as the Deity's judgment.

And in La Mort le Roi Artu c. 1230, an accuser's pride is his downfall. n285 We are told of Lancelot's killing of Sir Gawain's kin and of Gawain's rightful claim to vengeance through trial by battle. n286 Lancelot abased himself, offering to give Gawain homage and to undertake a pilgrimage showing a proud knight's contrition and willingness to suffer in satisfaction. n287 Gawain desired no concord between them. He insisted upon trial by battle. Gawain's man asked him "why have you undertaken this battle, and wrongly too, because he will defend himself with justice on his side? You have certainly never done anything so foolhardy." n288 After a long-fought battle, Lancelot's "innocence" was proven. n289 While "legally" guilty of a wrongdoing, Lancelot went to combat with grave remorse. n290 The proof was his purgation, which referenced not only him, but also his accuser's pride. n291 The medieval man admired the vendetta. n292 To have one's peace broken was to have one's honor "desecrated" and, thus, to leave the indignity unavenged was to choose to dwell befouled. n293 Yet, if a wrongdoer took a vulnerable position and offered contrition to the one offended, the proper response was for the injured man to sacrifice his vengeance as a both a gift and a sign of strength. If instead he insisted upon proof, his failure to accept an offer of concord entered into the Deity's judgment.

4. Bowing to the Unknowable

The import of surrender and forbearance shows up not only in the way participants conducted themselves at the ordeal, but also was inherent to the proof. The willingness to appeal to the Deity bespoke a juridical modesty alien to the modern taste. n294 At the most general level, the age's faith that the Deity would show himself grew out of the Middle Age's understanding of its god's love for his creatures rather than from a belief in man's capacity to strip divinity of its mystery. n295 It was out of the medieval's abiding humility which counseled her to view the world as a mysterious place that an ideal of procedural forbearance grew.

Nowhere was this humility more apparent than on the question of mens rea. In the twelfth century, theologians gave new and prolonged thought to man's inward life. n296 But, concomitantly, the folklaw remained resistant to the idea that one's inward life could be guessed at by an observer. n297 In England, neither prosecution for felony nor writs of trespass allowed the pleading of special defenses that would open up an accused's inward thoughts for inspection. n298 This age took it for granted that states of mens rea were beyond human ken. n299 Despite its desire to ferret out crime, a long Church tradition existed that envisaged a party's interior life as an improper avenue of inquiry.
Pope Stephen V, in his letter of Consuluisti in 886-9, condemned two ordeals writing, "the holy canons do not consider that a confession should be forced from anyone by the examination of hot iron or hot water... Public crimes are to be judged by spontaneous confession or by the proof of witnesses; hidden and unknown things are to be left to the judgment of Him who alone knows the hearts of the sons of men." Pope Stephen V's letter implies that circumstantial inferencing (which would require the undermining of an accused's credibility) was not appropriate. Instead, in the criminal context, when an accused had not confessed but instead stood his ground, his credibility may be supported by oath-helpers, he could be outsworn, or he may fail or succeed at trial by battle, water, or fire. Other avenues of impeachment, which often involved ugly tactics, were closed off. The argument from seemliness carried weight. Theological arguments abounded in the twelfth century about the impropriety of searching out the interior life of one who had not invited others in to take the view (so to speak).

So too, until the mid-twelfth century, the literary style of the songs of deeds was not to ignore the question of a man's virtues. But rather, insofar as human judgment was concerned, character remained that which was to be conveyed by the person's choice of conduct. Similarly, in the legal context, if an accused chose not to confess, rummaging in his head to establish the truth was not proper. Instead, the court waited for an outward sign.

The medieval's very willingness to employ the proof manifested an inclination to surrender to, and concede, the extraordinary. The ordeals invited participants, at times, to make a leap of faith about a proband's credibility against probabilities. This is hard for us to understand as a good. We live in an age that finds comfort and security in believing that truth is subject to estimates of probability. Nonetheless, the medieval acceptance of the improbable judgment bespoke a rather laudable humility. It was far removed from a later age's confidence in man's role as a master of his world, who could devise measurements to predict and manage it.

In the twelfth and early thirteenth century, even if an accused held a status that impinged upon his credibility or made it difficult for him to find the required number of oath-helpers, he had a way to support his oath through the ordeal. It seems reasonable to view the later roman-canonical proofs as a search for consistency and certainty in proof-taking. The canonists set out, as a matter of law, the percentage of credibility judges who were assigned to women, nobility, serfs, etc. Contrary to the received wisdom, the ordeals suggest an opposite attitude. They exhibited the medieval's ability to live with the uncertain, the inexplicable, and the unmanageable, thereby opening a way of acceding to those kinds of reasons that cannot be quantified or logically articulated.

All sorts of modern assumptions about the purpose of proof and the evil of suffering make the penitential ordeal hard to accept. The proof appears to have been hellishly cruel. And even if suffering into accord was part and parcel of undergoing the ordeal, it seems too much to say that an adverse judgment manifested the inextricable knot of suffering and grace. Yet, violence that ensued from an adverse judgment need not, in and of itself, evince a decision about whether one remained cleaved unto, or culled from, his fellows or his god. The eyes of the Middle Ages did not focus upon the fact of death but upon the way a man killed or died. What an adverse judgment ultimately signified was determined by an accused's willingness, or lack thereof, to courageously suffer what was adjudged, wrong or not, and by others' willingness to accept and absolve. Contrary to Professor Brown's conviction that the ordeal allowed one to "step out of the human community," thereby making amends while saving face, it was a decidedly human act that gave persons a way to respond to the angels of their better nature and in so doing, render their god concrete.

Well after 1215, "[a] proud manly bearing before and at execution excited such admiration that the narrator often" forgot to tell his audience for what offense the criminal was put to death.

D. Chewed by the Tooth of Disputation

With this account of the ordeal, Lateran IV's ban of clerical participation in the administration of the proof becomes exceedingly difficult to understand. Precisely at the moment when the redemptive age is blossoming, the Church disapproves of the evidentiary practice that embodies the sacrament's teachings. When Pope Innocent III came to the papal throne in 1198, a general council had not been held for two decades. On November 11, 1215, the Lateran IV Council met. It was a self-conscious council of reform with seventy-one canons being formulated. Among them: the roman-canonical proof was adopted: clergy was forbidden from performing the sacred acts that
accompanied the ordeals; the doctrine of transubstantiation was received; and confession was ruled an annual requirement.  

By the end of the eleventh century, theology and philosophy were taught at Paris, medicine at Salerno, and law at the university of Bologna. The legists concentrated upon the recovered Corpus Juris, centrally the Digest, compiled under Justinian about 534 A.D. By the twelfth century, canon law was added to the curriculum and two law faculties taught, one the Roman law and the other the canonical. The canonists worked at elaborating and reconciling the decrees of the church councils, texts of papal bulls, scripture, and the work of the church fathers. In 1140, the first major canonical work, A Concordance of Discordant Canons, was written by Gratian, a Bolognese monk who is thought to have taught at the university. In 1150, Peter of Lombard wrote the Sentences. Between 1209-1215, the proceduralist Tancred composed his Ordo iudiciarius. The ferment, leading to the clerical ban of the ordeals, began in these intellectual circles. The question is why did these thinkers' work unravel the integrity of the ancient proof?

[*166] John Baldwin persuasively makes the case that Lateran IV's ban upon clerical participation was the outcome of theological debate that occurred in the wake of scholasticism's rise. Yet, as Richard Fraher's later research establishes, the Church also had pragmatic concerns such as its desire to impose hierarchical control over criminal procedure through appellate review as well as its commitment to uncovering crime at a time when heresy and clerical misconduct were rampant. The ordeals disallowed both. The Divine's judgment was naturally final and His reason inscrutable. One did not ask the Divine for written reasons or to parse fact from law. So too, the ordeal often cleared those participants that were strongly suspected. The two scholars' accounts are not incompatible. Without a doubt, Pope Innocent III, as did others in his age, began to place stress upon the discovery of crime and the necessity of a centralized authority. What made these goals appropriate, however, was that the cosmology, which sustained a penitential proof, had begun to unravel. When canonists, civilians, and theologians attempted to order and systematize practices and procedures, they necessarily pulled at strands in a sacerdotal web too delicate to withstand analytical fingering. When logic displaced rhetoric as the queen of arts, justification became more critical than practice, and the art of distinction divided all, including the natural from the intangible, the ordeal became insensible.

1. From Allegory to Authority

In the period from 1050-1215 arguments were advanced that the ordeals lacked authority, were internally inconsistent, and that the Deity's judgment was inaccessible. In the late twelfth century, the church began to listen attentively. Peter the Chanter of Notre Dame (1147c - 1197) led a scorched earth attack against the ordeals, going so far as to argue his case before the cardinals. What made these arguments possible, however, was not a sudden discovery of new prohibitions, but rather a new interpretative approach to the reading of texts.

With the rise of the universities came logic's displacement of rhetoric as the primary method for studying, thinking, and pondering about all weighty subjects including theology and law. In an age of an experiential sacramental faith, the ordeals retained a home for the world and were seen through the veil of metaphor, allegory, and myth. For example, trial by battle found its legitimacy in the combat between David and Goliath. The instance, as were all instances, was to be understood metaphorically in order to discern its larger truth. The canonists and theologians, however, came to distrust allegorical reasoning. Central to a belief in a mediating hermeneutics is the implicit assumption that man came into the world already in possession of the knowledge necessary to discern, understand, and interpret. Peter the Chanter saw an inescapable distance between man and his god; hence he placed new emphasis upon the distinction between subjective and objective writing against those whom he judged engaged excessively in the allegorical sense of scripture, arguing for a plain letter interpretation.

The legists' and theologians' aim to develop a corpus of law and theology reinforced the above with both disciplines, giving logic new primacy. The canonists' treatment of legal texts was similar to, and likely taken from, Peter Abelard's treatment of patristic texts. Abelard's first rule for contradiction was to decide whether a textual corruption existed. If none was found, texts were examined to find if a later statement retracted or modified
the earlier one. In canonical study, as in theological, it was taught that a comparison of laws was imperative for one "often elucidates" the other. When diverse things were said on a same issue, Abelard continued, "one must investigate what was intended... so that we may find a solution of the difficulty on the basis of diversity of intention." Finally, when various methods could not resolve a contradiction "the authorities were to be compared and that which had the strongest witness and the greater support should be given preference." As Professor Pelikan observes, this solution "moved the entire process back to where it had begun, for the issue of choice among authorities had been the fundamental problem all along."

The learneds' method was the ordeals' malediction.

There was little authority for the ordeals. The Roman law was silent, the older canonical law ambivalent, and scriptural support scant. The Decretum set one kind of law off from another, arranging its discussion of "types" into an hierarchal order where each held relative authority to another. Gratian placed "natural law," defined as God's will revealed in human reason and conscience, above both ecclesiastical laws and the law of princes. Law, whose only authority was that it was practiced, was placed at the bottom. Still, in their quest for order and fit, the learned took a positivist turn. The Bolognese master, Huguccio, asserted that the specific prohibitions found in Gratian should apply to the ordeals generally. His reason was interpretive. In line with an emergent codifying spirit, he concluded "that all is prohibited which is not explicitly commanded or permitted."

2. From Redemption to Deterrence

The most damning argument against the ordeals, however, came from Peter the Chanter. He wrote, "in an age where sin is so prevalent, miracles are not to be found." His remark carried an assumption: grace, the miraculous, comes to those who deserve it, while wrongdoers, the undeserving, are to be punished. By the early thirteenth century, the Church's focus had shifted from a wrongdoer's ability to perfect himself with his god through purgation, to the fallen state, which made such perfecting necessary in the first place. Put differently, "natural" man was now an animal who "would do good only out of terror" rather than a being who was himself "a revelation from God." With this shift in emphasis came an understanding of suffering as exacting payment or deterring conduct as a kind of relentless reminder of man's essentially corrupt and fallen state.

In 1203, Pope Innocent III responded to the Bishop of London's inquiry about the propriety of laity using force upon rogue clergy and prelated incarcerating wayward clerics. The pope replied that both acts were justified, for "the wicked respond to impunity by becoming yet more wicked, and as a matter of public utility crimes should not remain unpunished." The tenet that wrongdoers should be punished and that remission would serve to increase wickedness held sway with many thirteenth century canonists. The Justinian Digest and Code expressly disapproved of the remission of punishment, and spoke of crime as a public wrong that required a strong preventive arm. The proceduralist Tancred (1210) treated the link between punishment and deterrence as a self-evident truth. And by 1250, the maxim quoniam rei publice interest, ut crimina non remaneant impunita was common place in both canonical and civilian procedural handbooks.

A, perhaps unintended, revolution had taken place. In the Church's effort to institutionalize Latin Christianity, and to proclaim the unique and superior character of the sacred, which until the mid-twelfth century was "inextricably mingled with the profane," the Gregorian reformers, and subsequently Pope Innocent III, extricated the divine from earth. As a result, two antithetical understandings of wrong now co-existed. A chasm exists between purgation, which gives back to a wrongdoer the character he lost, and retribution, which takes back what was wrongfully gained. The former understanding saw wrong as an impurity that resulted from a past act. Thus, a proof whereby an accused (or accuser) purged, purified, himself was acceptable. In contrast, the latter understanding focused upon the fact of the past act, and the likelihood of its being repeated in the future. The maxim that remission of punishment allowed the wicked to escape with impunity stressed the necessity of exacting revenge for the past or of providing an incentive to control the future.

Peter the Chanter and his peers noted the difference and drew a line. It was now said that a priest imposed satisfaction upon a wrongdoer to reconcile him with God, and an ecclesiastical judge imposed damages to punish the
wrongdoer in the public sphere. The learned broke the judicial and penitential apart. New evidentiary procedures were needed to facilitate the now asserted aims of the judicial realm. In evidence law, the conventional judgment of canonists that witnesses should not be coerced to testify in criminal cases was rejected. Notwithstanding those [*172] like Pope Innocent IV, who insisted that it was wrong to force a witness to testify since refusing to bring light to another's crime was meritorious, canonists held to the view that the witness was necessary to prevent the guilty from being "absolved." Similarly, the proceduralist Albertus Gandinus (c. 1290) held that a judge could compel an accuser to bring charges against a suspected wrongdoer because it was "expeditious for the state, that crimes not remain unpunished." Bartolus held that when a private accuser had abandoned his cause, the judge was not only allowed to continue, but also was obligated to do so. By the fifteenth century, private settlement between accuser and accused was not thought to end a criminal matter judicially. On the continent, concord became collusion. The enchanted world had vanished and with it the ordeals. The age of proof as a tool for fact-finding arrived.

III. Traces: The Rise of the Jury Trial in England

Something different occurred in England. After the Fourth Lateran Council banned clergy from participating in the ordeals, the English crown did not institute a new form of proof. Instead, in 1219, the crown instructed the eyre justices to imprison those suspected of serious crimes, to abjure those suspected of less serious crimes, and to take security for those accused of small wrongs. In the decades that followed, the justices adapted the already familiar presentment jury to the new situation. By 1229, the jury trial was the normal mode of proof in all criminal proceedings. It has been written that the history of criminal procedure in England tracks the stages which all civilized communities appeared to have gone through. "First, revenge approved as no more than adequate, or disapproved as excessive... finally the staying of the private avenger's hand, and the repression of crime by the direct application of the power at the disposal of the crown." The jury proof, like the roman-canonical, seems to have been a rational means to the crown's goal.

Yet, in practice, the English jury criminal trial did not serve the widespread progression toward the modern state associated with the continental revolution in proof. From the beginning of the jury trial, the acquittal rate was overwhelmingly high, the justices accepted these verdicts, and their accuracy was often doubtful. Historians put forth various explanations for the high acquittal rate, which, of course, is a crinkle in the jury's story.

Some suggest the likelihood of over-presentment. The justices held coroner reports that listed homicides, which they could compare with the jury's accusations fining those juries that concealed facts. In other cases, it seems likely that there was insufficient evidence. While the early jury was self-informed, recent historical work suggests that it was not always in a position to know the facts that had occurred. A blunt criminal law that, by the thirteenth century, had made all felonies capital is also offered as an explanation for the medieval jury's conduct. In the thirteenth century, the populace accepted open man-slaying as way to resolve disputes or as a less grievous wrong than murder by stealth; yet, by 1215, officialdom had negated the distinction between open man-slaying and secrete murder, making both subject to the penalty of death. So too, other felonies, such as larceny, that had previously been emendable were now also subject to the blood sanction. Historians surmise that the jury judged hanging to be too severe a penalty for crimes like simple theft. In short, the jury is said to have engaged in either rule or sanction nullification. Without doubt, this is true.

The sources, however, suggest a third ground for the acquittals that, if accurately perceived, shows a tight kinship between the ordeal and jury trial. A strong case can be made that often the jury acted not to express disapproval of a law or of a sanction but to bestow mercy (i.e. undeserved grace) upon a defendant. It is within the details of this act that one may find the jury's affinity with the ordeal as a penitential act of purgation. Initially, however, some comment needs to be made about the theoretical backdrop against which the jury acted. At the last, a speculative narrative is offered about how the criminal jury trial intersected with ideals prevalent in an Anglo-Saxon past. Within that relationship is a clue as to how a penitential proof could live on in the English jury trial, while at the same time, being abolished by the Church and canonists on the continent.
A. Role of Mercy in English Jurisprudence

Prominent historians of the medieval jury trial recognize that mercy played a large role in the jury verdicts. The English phenomena is striking when compared to the thirteenth century continental reforming spirit, which aimed at ensuring that wrongdoers did not escape punishment by acts of heavenly remission. Notwithstanding, in 1275 the complaint was voiced in England that "the peace is less kept, and the laws less used, and offenders less punished than they ought to be;" the English steadfastly committed themselves to a system of proof, which kept the possibility of wide discretion and, therefore, merciful verdicts open. Though attaint formally existed as a punishment for a jury declaring a false verdict in a criminal case, it was little, if ever, used. And even Bracton, friendly to the continental learning, wrote that "punishments are rather to be mitigated than increased, [though] mercy is indeed unjust when it is extended to the incorrigible." Still, the role of simple mercy is apt to get lost in discussions of the medieval criminal jury, for, as Professor Thomas Green observes, "our study of that language of humanity [i.e. grace] is primitive; [thus] its inaccessibility to us may lead us to underestimate its pervasiveness and importance" and, I would add, its very nature. Nearly without fail, legal scholars build into the concept of nullification an equation between a jury's decision to acquit (or to mitigate) and its judgment of a defendant's culpability. It is presumed that, in cases of proper nullification, the jury judged a defendant either to have acted rightly (despite the law) or to not deserve the punishment that attached to a crime. From the philosophical standpoint, what happens is a recasting of mercy into equity. When a historian notices that a particular verdict (or pardon) does not square with some notion of dessert, he is inclined to explain it as an act of political expediency, personal favor, or arbitrary whim. There was in this age, however, an alternative story of the merciful verdict.

Equity is distinct from grace. Equity allows a jury's to take account of particular circumstances which the law, by virtue of its generality, does not. It thereby ensures the proper portioning of just desserts. Grace it may be recalled is different. It was the Deity's bestowing of the undeserved gift of reconciliation upon the wrongdoer: a wrongdoer who had incurred a debt beyond his capacity to ever pay. Grace was not owed or deserved. Rather the Deity was evoked by His boundless love for a suffering wrongdoer.

Throughout the high Middle Ages of Western Europe, one can find enjoinders to rulers to extend judgment with the hand of mercy. Representative in England is Hoccleve's The Regiment of Princes which instructed rulers:

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

England is distinct in that it instituted an evidentiary proof, which gave substance to what could easily have remained empty maxims.

Others note some similarity between the jury and the ordeal. The jury, like the ordeal, gave a "blank result," and no division between fact and law was imposed upon the jury's judgment. nor was the final judgment subject to appeal. But, as I attempt to show, the tie between ordeal and jury proof goes deeper than (what may be called) the operational mechanics.

B. Kinship between Jury and Ordeal

Some hint has been made about how penance could be undertaken at the ordeal. The question remains about how it could occur in its aftermath and within the context of a human form of proof. Little is known about the early English criminal trial. It is known that the jury was self-informed, meaning that it came to trial with knowledge of the facts, and
Significantly, while the accused did not swear an oath, the jurors did. In the thirteenth and fourteenth century, the twelve jurymen were drawn from the site of the crime and the defendant's township. Until the seventeenth century, lawyers were not part of the criminal trial, nor could witnesses be compelled to testify. The defendant stood in view of the bar and the jury as the sheriff or another official repeated the charge against him. The accused stood alone, and "only two voices could be heard; the justice questioned, the defendant answered." Despite scant sources, some educated guesses can be made about how the medieval jury saw its task.

1. Placing Oneself upon the Country for Good and Ill

The place to begin is with the requirement that an accused consent to jury trial. If an accused did not consent, the trial could not go forward. The Mirror of Justice, written during the reign of Edward I (1272-1307), stated the complaint that, "it is an abuse that proofs and purgations be not by the miracle of God where other proofs faileth." It is with an eye toward such disapproving language that historians consider the consent requirement. If the defendant consented to the jury, it is said, an air of legitimacy was given to the proof. The accused could not complain of that which he requested. In an effort to compel assent, in 1275, the rule of prisone forte et dure was established by statute. One who refused jury trial was imprisoned and tortured until such time as he accepted to place himself upon the country. It well may be that the crown felt some need to legitimate the jury trial; yet if the jury proof existed merely as a means to more efficiently uncover malefactors, an accused's consent was unnecessary. The crown could have imposed the teeth of its will upon an accused without going through the time consuming ritual of seeming to obtain consent through torture.

Another possible answer to the whyfore of the consent requirement (at least from the standpoint of the juror and judge if not the crown) suggests itself if one looks at it against the backdrop of the ordeal. When pleading not guilty, the accused was to place himself in the hands of "God and country." He did not "ask" for a jury trial but put himself upon his neighbors. And he did so for de bono et malo (good and ill). If the accused stood "mute," the court determined whether he was "mute by visitation of God" or "mute of malice." The converse implication is then that if an accused placed him/herself upon the country, he professed his devotion to that community he was accused of affronting. The speculation is that an accused's implicit avowal of membership counted heavily with his jury, notwithstanding his denial of a charge. Teasing such a claim out from the sources requires keeping the jury's cultural domicile within view. In early Fourteenth century England, rescue miracle tales abound, whereby convicted thieves, forgers, and the likes escape death at the pillory after vowing to a saint and promising a penitential act. In the exempla verse, such as Robert Greatham's Miroir (c1250) and Robert Mannyng's Handlygn Synng (c 1320), the laity was consistently exposed to the idea that when a wrongdoer willingly traveled through the fires of Hell or abandoned himself to suffering, he would find redemption and grace. Recall that in accord with the doctrine of contritionalism, confession was not as necessary as was the pledge to do right in the future in light of one's inward suffering.

That the jury, like the saint, could place weight upon an implicit pledge of attachment, though an accused's denial of a charge gains support when the juror's role as the judgement-finder, rather than witness, is emphasized. As Professor Damaska notes in speaking of the continent, "the ascertainment of truth was of the essence of the officium judicis," whose nearest analog was the judex of the canonical system. The English judge's function at the early criminal trial was that of an enforcer and perhaps a co-judgment-finder insofar as he questioned the jury verdict. But it was the jury that rendered judgment. The jury's deliberative role was not so different than say the reeve's at the ordeal when he interpreted the divine sign. As at the ordeal, the judgement-finder still relied upon his good sense in deciphering the signs given to him. And, as at the ordeal, he conveyed that truth to the participants.

In attempting to glean what "signs" were critical to that judgment, one finds a clue in the meaning of felony. The traizoun, which in Law French and Middle English denoted a betrayal of good faith, a breaking of the Old Germanic comitatus, remained (at least in the early fourteenth century popular imagination) synonymous with felony plain. Accordingly, it would seem critical to the jury's judgment that an accused renounce his alleged betrayal by surrendering
himself to his fate at trial. Indeed, in consenting to his jury, an accused did little different than what he had done when he threw himself upon his god's more direct judgment during battle, compurgation, or test by fire or water. n427 As was seen at the [*181] ordeal, a proband could be adjudged innocent when he inwardly confessed, irrespective of whether he had sworn a false denial. n428 What counted was his inward suffering and his willingness to undergo his ordeal in a posture of devotion to the judgment-finder. Analogously, at the jury trial, the accused must surrender to, and strike a bearing of respect for, his peers as represented by the jury. n429

2. The Jury's Response

Rather simple evidence supports the idea that once an accused had consented, the jury saw itself as being charged to respond from a penitential posture. The juror swore to tell the truth (verum dicere - verdict). n430 Now, the juror also held the role of a quasi-witnesses as well as an arbitrator of right. Hence, he would commit perjury, a grievous sin, which put his soul at grave risk if he were to bring in a false verdict. n431 Yet, at the same time, medieval English legal historians consider it common knowledge that the jury, under valued goods, contrived stories of self-defense, found misadventure when culpable conduct had occurred, and generally acquitted freely. n432 Until the mid-fourteenth century, the jury could have as many as ten members from the original presenting jury, who were assumed to have some knowledge of the fact. n433 In this age of faith, it [*182] is doubtful that jurors held little regard for their oath. n434 Rather, it seems the nature of the juror's oath, insofar as it reflected a pledge to truthfully witness, must be reconsidered.

Leftover bits and pieces of information fortify the speculation that the juror's understanding of his oath was akin to what was asked of the Deity at the ordeal. The juror sat in judgment of the accused's character at the time of trial rather than strictly as a fact-finder. n435 English criminal procedure's continued conflating of fact and law, which on the continent had been soundly divided, allowed the early jury to proceed in this fashion. n436 Central to its evaluation of an accused's character was his effort at concord. It was not atypical for men to be acquitted on an appeal of homicide when it was shown they had offered and made satisfaction to a victim's kin. n437 At times, acquittal could be part of an outside agreement formed at a "loveday." n438 The name signified the "Quiet and Tranquility that should follow the ending of controversie," and early fourteenth century disputants often employed such mediation, leading to a trothplight, even after an appeal had been brought. n439 So too, the medieval jury [*183] expressed acute sensitivity to an accused's reputation understood not in the sense of popular rumor about past events but in the different ethical sense of a man's touthe. The question was whether he was fidas, a good son? n440 In short, for a jury to acquit an accused did not so much represent its finding of fact, but rather its willingness to offer compurgation to the accused by implicitly attesting to his worthiness. It is not surprising then that in fourteenth-century Linconsire, for example, acquittals in homicide cases frequently appeared to have turned upon whether an accused could find pledges to ensure his future good conduct. n443 And some evidence exists of jurors acting as pledges for acquitted defendants. n444 Reputation cut both ways. At the same sessions, manifold presentments directed themselves at an accused's general refusal to live rightly with his neighbors rather than at any particular wrong he had done. n445 It was not unusual for an accused to be convicted on the ground that he was "more thief than lawful" instead of upon a clear statement of factual guilt. n446

In answer, it may be said that it is just as likely that the jury disapproved of the blood sanction and hence engaged in the more familiar [*184] practice of sanction nullification. For example, in the thirteenth century, grand larceny was punishable by death, whereas petty larceny, a trespass, was punishable by a whipping or fine. Numerous thefts were prosecuted (both privately and by inquest) as a trespass, though the amount involved raised the theft to a felony. n449 Or, even if a crime was prosecuted as a felony, the petty jury would say an accused was guilty, but openly undervalue the goods stolen. n450 Similar practices took place in homicide cases. n451 The categories of excusable and justifiable homicide were narrow. n452 Outlaws caught in the act were rightly killed. n453 Excusable homicides were those committed by the insane, in self-defense, or by accident, and required a pardon from the king after the jury made its judgment. n454 The rules for self-defense were strict. The killing must have occurred as a last resort. n455 By the fourteenth century (if not earlier), the [*185] jury rendered verdicts of self-defense in cases of plain simple homicide (open man-slaying) thereby transforming a capital felony into a pardonable offense. n456 As
Professor Green has traced, while the juries' assertion that an accused had no other recourse was open to exacting questioning by the justice, they tenaciously held to their verdict that "ditches, walls, and hedges had constrained fleeing defendants at every turn." n459 It seems evident that often the jury engaged in some form of rule or sanction nullification.

Yet, again the beliefs and tenets that shaped the age must be kept in mind. The thirteenth and early fourteenth centuries were worlds that held courtesy, understood properly as both a kind of compassion and the exemplar of the Sublime grace, as the Queen of virtues. n460 It was not precisely distinct from other virtues, but rather a quality that informed each revealing a posture of mercy to the miserrum cor (misery of the heart) in the other. n461 Courtesy clothed Chaucer's knight, was said in Pearl to be synonymous with sanctifying grace, n462 and in Piers Plowman, the holding of "Courtesy as a waster" marked the Anti-Christ. n463 Indeed, it would be baffling if, in this still largely allegorical world, the medieval juror did not attempt to mimic "the Courtesy of Our Lady. n464

There exists another parallel between the jury trial and the ordeal that highlights what is, perhaps, the most historically over-looked aspect of penance: the moral necessity of the victim, however figuratively represented, overcoming his desire for vengeance. Accordingly, in Bracton, it was said that when an official executed a condemned man, even this killing may be a sin if either judge or executioner "acted out of malice or from pleasure in the shedding of human blood." n465 A similar tenet pervaded appeals of felony. An appeal could be challenged as being made out of "hate or spite" (de odio et atia), or upon the ground that the alleged victim had failed to display a wound to the coroner. n466 The accused would purchase an inquest jury by writ to decide the issue. n467 As Professor Groot researched, it seems the case that a jury's finding that an appeal had been brought out of hate often reflected its judgment about the falseness of an allegation. n468 Yet, it is not unlikely that an appellor's refusal of settlement (or squabbling about the amount) loomed behind many jury verdicts that an appeal had been brought maliciously.

Injured parties were not left to decide upon their own whether they would make peace or bring an appeal. Lords, abbots, relatives, and sheriffs all intervened, at times against the desires of the potential appellor, to make a concord. n469 A not atypical example can be found in 1219 in an advowson dispute where, though a duel was in progress, the combatants were brought into concordia by their friends. n470 This period placed such weight upon resolve that even when a court appeared to produce a result, there was pressure placed upon a victor to be generous to the losing party. n471 Hence, it seems quite likely that an inquest jury would also take into consideration an appellor's refusal to settle in finding that an appeal had been brought by hate and malice.

Though historians today generally acknowledge the import of resolve over right in the middle ages, n472 the argument that this mindset was also pivotal to a jury's decision about whether an appeal had been brought with spite may seem too much. Given that trial by battle was the proof awarded in an appeal, appeal of felony would seem to be essentially an action of spite or institutionalized vengeance. n473 Yet, in this age, seeking to redress the dishonor of being wronged constituted the most noble of acts for it indicated one's sense of himself as a dignified being. n474 Vengeance only transformed into an act of spite when one struck in the face of a wrongdoer's offer of satisfaction. Well into Ricardian England, the prevalent stance toward trial by battle is that while "ye, who is trewe, who is fals, him-selfe knowlegeth tho things," yet a man will enter battle may at least with "wordes saye his quarel is trewe" and expiate in his willingness to fight rather than to "crepe away." n475 Though an emergent state now executed the loser, trial by battle, remained in the popular mind a way to transform raw vengeance into honorable resolve.

3. The Counter

Counter examples should not be ignored that suggest England, like the continent, was wedded to modern ideas of retribution and deterrence rather than to the ideal of penance. Bracton shared the continental urge to prosecute, frowning upon appellors abandoning their appeals. n476 And though Bracton's Romanism was not necessarily representative of his age, n477 the canonists and civilians worked closely with royal officials acting as advisors to the English crown. n478 That reconciliation was not always the crown's paramount concern is evidenced by the thirteenth century crime of theftbote, whereby a victim who agreed to be quiet about a larceny (though an accused had been presented and indicted)
would himself be punished by a fine. So too, legal historians often view the move in England from an accusatorial to an inquisitorial procedure of accusation to be evidence of the state's interest in uncovering and deterring crime. And it is typical for legal historians to explain the English arrangement of a severe criminal law, and the crown's abundant granting of pardons upon a theory of deterrence and political expediency.

Yet, historians assume the existence of the concepts they extrapolate from the sources. The bench had more pragmatic reasons to disapprove of appeals by felons than its tie with compensation. Appeals were a cumbersome and time-consuming process. So too, as Susan Reynolds has found, the employment of a panel of locals to resolve disputes was common and existent in England long before a learned theory can be said to have been received. And in thirteenth century England, there was scant mention of grand theories of the purpose of criminal law such as deterrence or retribution. Conversely, practices in both the Church courts (which appears to frequently have taken jurisdiction over "secular" crimes) and the common law courts attest to the deep commitment to repair the peace rather than to uncover the wrongdoer. That a firm, though perhaps tacit theology, underlay varied practices finds support in the crown's pardon power, a power often assumed to be evidence of more modern concerns.

Verdicts of self-defense required a subsequent pardon from the crown. It is an odd kind of deterrence when an impassioned man-slayer nevertheless wins a verdict of self-defense and then is assured a pardon. And the concept of deterrence also does not explain pardons of grace, which issued in large numbers in 1290 and during the fourteenth century. These pardons granted immunity from prosecution when one (likely to be accused of a crime) pledged to serve in one of many foreign wars. It is easy to ascribe motives for these practices other than deterrence. The literature has done so. The crown's motive for pardons of grace, for example, is said to be its need to gather fighting forces at a time when knightly service was no longer tied to military performance, and wars were aplenty. What is forgotten, however, is that the existence of a motive is never sufficient unto itself. It may be quite beneficial to take an action, but a further question always remains about whether that action is appropriate. Beliefs, tenets, and a heritage formed a mentality accepting of pardons. Today, while in time of war, the necessity of raising an army may provide a motive to pardon all convicted felons (legal issues aside), the modern mentality would find the act of the executive incomprehensible.

In sum, the pardon system was appropriate because penance pervaded English culture. And substantial teaching existed that penance was no less necessary when self-defense had occurred than when a wrong had been done. Recall that one was to do penance when he caused a harm even when he was blameless. Accordingly, we find the rule in Leges Henrik Primi that once proof be had the accused "committed the deed in self-defense," he should then be allowed to "make amends." The aim was twofold. First, one should reach out to one he has harmed, even if accidentally. The tenet was tethered to the wider ethical mandate, found in the Anglo-Saxon sources onward, that the man who bore the true cause should nevertheless be generous to his adversary (particularly if he lost) perhaps giving him a gift of horses or a drinking horn. Second, it was presumed, said Bracton, that it was exactly one's "sorrow," in conjunction with necessity, that distinguished self-defense from other killings. Some form of satisfaction enabled the actor to expunge his remorse. Similarly, the older Saxon practice of demanding a wer from the self-defender offered a justified man-slayer a way to express his remorse for his deed. The pardon requirement, in cases of self-defense, neatly fits with the same penitential-centered ideas. Accordingly, it was natural to attach conditions of satisfaction, qua sacrifice, to pardons. In the early thirteenth century, King John often insisted upon the "supplicant" abjuring the realm, entering a monastery, or taking a pilgrimage. At times, the king imposed a condition, but then remitted it analogous to the Saxon practice of exchanging gifts. The crown's conditions, whether "religious" as in a pilgrimage, "secular" as in serving in the king's war, or small, as in offering a few marks, did not qualify the gift, but were part of it. They gave a wrongdoer a way to purge himself.

C. The Worshipful Warrior

When the ordeal is cast as a proof that sought factual accuracy in difficult cases, the roman-canonical proofs that replaced it in Italy and France seem closer to the ancient proof than the jury proof in England. At every turn, the roman-canonical proofs sought to ensure accurate fact-finding. Circumstantial evidence was not allowed in cases
that carried a severe sanction. \textsuperscript{n496} So too, in the case of credibility conflicts, the proceduralist Tancred gave detailed instructions for the weighing of evidence, which rested upon perceived truths about a witness's probable veracity in terms of fixed criteria such as gender, status, or class. \textsuperscript{n497} Finally, in the roman-canonical system, the judge was to judge things, and not according to his conscience. \textsuperscript{n498} In contrast, the jury proof allowed what the other two modes of proof protected against: mistakes. The English jury trial courted the fallibility of human judgment by permitting hunches, biases, considerations of equity, rumor, and circumstantial inferencing to inform judgments. \textsuperscript{n499} So too, it was a system of free proof with no \textsuperscript{[*191]} objective weight being attached to kinds of evidence. \textsuperscript{n499} Finally, the English jury was instructed to do what the continental judge was forbidden to do. It was to "do that which God shall put in your hearts." \textsuperscript{n500} Nevertheless, I have argued that when one drapes the jury trial with its penitential cloth, a different set of kinship relations appear. It is the lay-jury trial in England, which was akin to the ordeal, whereas the roman-canonical system was only barely related. A question arises: why did thirteenth century England remain fertile ground for a penitential form of procedure when the continent shifted and embraced a proof that served the ends of a retributive or preventive theory of criminal law?

A partial answer may lie in no more than the irrational conditions of time and place. As Professor Van Caenegem observed, "England [in the twelfth century] became an island in the Romanist sea. Her semi-feudal, semi-modern Common Law, the most Germanic of Europe, was an anomaly, a freak in the history of western civilization, less modern because it was modernized earlier." \textsuperscript{n501} Before Roman-canonical law, with its more individual-centered notion of identity, was in a "position to exert any profound influence" upon England. \textsuperscript{n502} This was a feature of Anglo-Saxon companionship with Norman feudalism. \textsuperscript{n503} The spirit of that union was caught - and woven into the English legal fabric. At the core of Anglo and Norman-Saxon law was the law-worthy man. He was Germanic, finding his selfhood within relationships, \textsuperscript{n504} committed to the virtue of honor, and \textsuperscript{[*192]} nurtured by an heroic ideal "celebrated in song and story and... presented again [and again] to the people so that they could participate in [the hero's] magic." \textsuperscript{n505} The ideals of valor, deference, belonging, and courage in the face of "threat or peril \textsuperscript{n506} were embedded in the Anglo-Saxon past. In this respect, the Norman invaders introduced no novelty into England. \textsuperscript{n507} When Henry II entered into a partnership with the feudal hierarchy, whereby judicial business became the task of the latter, that fabric was strengthened. \textsuperscript{n508} At the day to day level of criminal disputes, what occurred was the on-going cultivation of what was no less than the heroic ideal, which had been refined by an age that held courtesy (generosity of heart) as the highest of ideals.

Thus, though it is a speculation for future study, the argument is worth making that the jury trial's penitential kinship with the ordeal was not fertilized by Church dogmatics, but by the ideal of pride, inherited from the distant past of ancestral invaders. \textsuperscript{n509} From this "sinful origin" came the Anglo-Saxon law of honorable concordia, which the penitential spirit of the eleventh and twelfth centuries then elevated and stylized. \textsuperscript{n510} English \textsuperscript{[*193]} criminal procedure preserved that spirit, albeit perhaps unconsciously, but nonetheless securely. The dramatic argument that the continent succumbed to Roman law, which destroyed the traditional, tribal, ways of Germanic people, is rarely expressed today. \textsuperscript{n511} In large part, it seems its association with the Germany of 1938 makes the idea distasteful. Yet, in the context of criminal proof the story of what occurred in England, as compared with the continent, suggests that there is something to the romantic historian's claim that where juristenrecht (jurist's law) dominated a rationalizing force also came that promoted a concept of law and conflict resolution more arid, less human than where the Volksrecht prevailed. \textsuperscript{n512} In contrast to the strictures of roman-canonical procedure that demanded the detached and distanced calculation of probabilities, trial by jury involved the kind of concrete, particularized, resolution-centered judgment that attends a penitential setting. And unlike the continent, English criminal law remained local and non-professional, with proof remaining tied to community knowledge and interpretation. \textsuperscript{n513} Participants were not paid officials who worked within a \textsuperscript{[*194]} complex magisterial culture such as was evolving in France and Italy. \textsuperscript{n514} Rather, the commissioned judges were knights of the shire, elders, and standard bearers of their communities. \textsuperscript{n515} On the civil side as well as in the royal courts, England increasingly saw the professionalization of law. \textsuperscript{n516} But in the context of criminal law, the groundwork was laid to ensure that the trial kept its character as a moral dialogue between accused and the judgment-finder. The use of lay judges - bench and jury - implicitly assumed that wrongdoing remained not a specialized science, but rather that of which all had a living and practical knowledge. And that knowledge continued to
be shaped by a relational motif. As late as Malory's Tristan, King Mark is portrayed as a "fals traitour" to his vassal [*195] Sir Tristran. n517 The English remained wedded to the idea that each, including a King, was defined and constrained by his trothplight to others. n518 In this setting, the interwoven practices of the chivalric ethic, the Anglo-Saxon ideal of companionship, and popular religious beliefs, could not help but carve the character of the jury trial into a penitential form. In a world wrapped about the feudal and Saxon heritage, the English retained a living iconography that allowed them to keep a "tremendous sense of intimacy and adjacency of the holy" that characterized western Europe generally at an earlier time. n519 Thus while "sacramentum" had taken on a crisp and technical meaning within Church teaching that disallowed an older understanding of the world as a place of unceasing miracles, the popular English mind, impelled by its inclination to see all in terms of relationship and inter-dependence, continued to comport itself to a belief that proofing was an act of mutual surrender. It was a yielding that, in yoking polarities together, ignited a flash of divinity.

Conclusion

This Article visited the question of whether the ordeal sought to illuminate fact, or the realization of concordia (the Divine presence) by viewing the proof through the wide lens of the theological, religious, literary, and custom-based traditions that encased it. What one finds sustaining the proof are beliefs both complex and cogent that go far beyond the simple notion that medieval men and women saw their god as a tool in their fact-finding endeavor or as an instrument of social control and cohesion. An implicit imperative shaped this discussion. Legal historians [*196] investigating the ordeals must begin where medieval men and women tell them to begin. Their Deity spoke. Rather than skipping over this, the historian should pause and say "alright then - how, why, and in what way, on your terms, do we resolve seeming inconsistencies?" In doing this, I argued that an entire new vista opens to the early criminal jury trial. Obvious parallels begin to peek out between it and the ordeals. Moreover, these parallels were born not from Church dogma but from a warrior culture the scholastics repudiated. In England, a feudal mentality, draped in the cloth of a warrior ethic, securely preserved the sacramental faith whereby the Deity remained present in that world.

Should we care? If the main work of "a legal system is deciding matters of past fact," n520 and/or if the criminal law is founded upon policy justifications that transcend moral intuitions, n521 this story is but a curiosity. Yet, in a day much different than now, penance, in its earlier, practical form, opened a way for sanctioning (i.e., suffering for wrong) and forgiveness (i.e., reconciliation) to exist symbiotically. The sacramental practice supposed that at his loftiest, medieval man held the capacity to bind and loosen his sins by achieving accord with those whom he stood in breach. This suggests that there is more to the criminal trial than proving or disproving propositions. It seems a thought worthy of consideration.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral OverviewCriminal Law & ProcedureScintorGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

FOOTNOTES:

n1. Jacob Burckhardt, The Civilization of the Renaissance in Italy 100 (First Modern Library ed., Random House, Inc. 1954) (1860). Though often read as a disparagement upon the Middle Ages, this judgment has more to do with the modern evaluation of the qualities that Burckhardt names than with any ridicule on his part. Indeed Burckhardt is close to Nietzsche's thinking that the greatest moment of human victory is the capacity to play in blissful blindness "between the fences of the past and the future, moving as though it were a lost paradise," Friedrich Nietzsche, On the Utility and Liability of History for Life, in 2 Unfashionable Observations 83, 88 (Richard Gray trans. 1995).
n2. "Our" refers to our joint status as jurisprudential heirs to the bulwark of Roman law, Germanic custom, canon law, feudal law that constitute the "Western European legal tradition." Alan Watson, The Making of the Civil Law 1 (1981). Within the tradition of legal scholarship, "Western" is separate from Arab and Byzantine. See Harold Berman, Law and Revolution 2 (1983).


n4. Id. at 115. 2 Frederick Pollock and Frederick W. Maitland, History of English Law 599 n. 2 (2nd ed. 1968 2 vols.).

n5. 2 Pollock and Maitland, supra note 4, at 599.


n7. See Robert Bartlett, Trial by Fire and Water 100 (1986) (trial by fire or water). Trial by battle (which I include under the definition of an ordeal) was not outlawed in England until 1819 though it seems to have been nearly obsolete by 1300. See Anthony Musson, Public Order and Law Enforcement: The Local Administration of Criminal Justice 1294-1350, at 169 n.4 (1996).


n13. Historians accept that the ordeals were tied to beliefs about man's relationship to his god. Yet, with few exceptions, those beliefs are deemed mildly relevant to understanding the adjudicative temperament of the period. See Robert C. Palmer, Trial by Fire and Water, 87 Mich. L. Rev. 1547, 1547 (1986) (reviewing Robert Bartlett, Trial by Fire and Water (1986)). Most recently Professor George Fisher forges a link between the ordeal and the jury trial by focusing upon the increasing historical importance of the sworn oath in the jury trial, an oath that continued to have sacerdotal significance. See George Fisher, supra note 8, at 583. Yet, he also thinks it is not necessary to discern the exact nature of the divine judgment at the ordeal in order to see a parallel between it and the jury trial. See also R.C. Van Caenegem, The Law of Evidence in the Twelfth Century: European Perspectives and Intellectual Background, in Proc. of the Second Int'l Congress of Medieval Canon Law 297 (1963) [hereinafter The Law of Evidence in the Twelfth Century]. Professor Van Caenegem is the only legal historian that I have found so far who has used the technical term sacramentalis to describe the ordeal.


n15. See, e.g., Johan Huizinga, The Autumn of the Middle Ages 234-36 (R.J. Payton & U. Mammitzsch trans. 1996). As Huizinga writes, "As soon as the idea of God was conceptualized... thus comes into being that noble and lofty idea of the world as a great symbolic nexus - a cathedral of ideas, the highest rhythmic and polyphonic expression of all that can be thought." As a caveat, although Huizinga has received enormous criticism for not adhering to proper historical method, see R.L. Colie, Johan Huizinga and the Task of Cultural History, LXIX, 3 Am. Hist. Rev. 607, 614-23 (1964), I rely upon him precisely because of his methodological commitment to ignore political and economic exegesis, scoff at progressive or Marxist theories of history, and insist upon the interrelatedness of various forms within a specific and confusedly detailed context. His, perhaps eccentric, manner of doing history is what enables us to glimpse the medieval sacramental vision, for his method is, in many ways, medieval. See also Brown, supra note 10, at 135; Marc Bloch, Feudal Society 83-84 (L.A. Manyon trans., 1961).

n16. A few historians intuit something of this. They speak of the ordeal as a way to "make the balance," exercise mercy, or punish. Hyams, supra note 10, at 97, 100. See Palmer, supra note 13, at 1550.

n17. As Professor Damaska observes, "while the twelfth and thirteenth centuries saw a small avalanche of law books... abundance does not necessarily indicate that these books were of the same significance and impact everywhere." Mirjan Damaska, How Did it Begin?, 94 Yale L. J. 1807, 1820-21 (1985) (reviewing Harold Berman, On Law and Revolution (1983)). By the thirteenth century, an ecclesiastical judge is likely to turn to authority, but less so is the "secular courts dominated by the lay social elite." Id. The growth of the city, or burg, in the twelfth century is an historical commonplace with the cathedral and university being the two monuments of this age. But, feudalism also spread during the eleventh and twelfth centuries to England, Germany and the Crusader states. C. Warren Hollister, Medieval Europe: A Short History 143 (1968). For the growth of the Borough in England from the thirteenth century on, see 1 Pollock and Maitland, supra note 4, at 63.
n18. What legal historians typically count as "legal subject" matter is too cryptic (if it exists) to rely upon exclusively. Those sources "presume the existence of the very knowledge of which we are in search." 1 Sir James F. Stephen, A History of Criminal Law in England 51 (1883). There are few surviving archival records of the criminal courts (i.e. assemblies) in the 1200s. Historians rely upon the Hungarian Register from the town of Varard in the late twelfth century for statistical information. Registrum Varadiense: Az idorenebe szedatt Varadi Fuzesvasproba Lajstrom (Budapest 1903) [hereinafter Reg. Vard.]. There is a profusion of scholastic jurisprudence from the continent though much is not translated. See S. Balanshei, Criminal Justice in Medieval Perugia and Bologna, 1 Law & Hist. Rev. 251, 251-75 (1983). There are, however, supplemental materials such as royal legal codes (less in France and Germany) literary accounts, liturgical writings, and the comments of ecclesiastics and canons. See Bartlett, supra note 7 for collected sources passim.

n19. There is a stir in legal history about methodology. See, e.g., William Fisher, Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History, 49 Stan. L. Rev. 1065 (1997); Randall McGowen, New Directions and Old Debates in the History of the English Criminal Law, 43 Stan. L. Rev. 799 (1991) (comparing semi-Marxist flavor of social historians with the less thematic legal text based approach). Sharp argument occurs about how material should be handled and what is reasonable to infer from it. See Robert Gordon, Foreward: The Arrival of Critical Historicism 49 Stan. L. Rev. 1023 (1997). And history also has seen the rise of functionalist scholars who look to the relation between "law" and "society" from, in practitioner's terms, the "bottom up." This author assumes that good legal history cannot ignore the relation between law (institutionally understood) and those it governs. That relationship informs how one interprets both doctrine and practice. On the other hand, the uniqueness of the Middle Ages was its internal consistency. In short, Professor R.G. Collingwood seems correct in observing "for history, the object to be discovered is not the mere event, but the thought expressed in it. To discover that thought [however] is to already understand it." R.G. Collingwood, The Idea of History 214 (1946). One may ask "whose thoughts?" My quite old-fashioned answer is (without discounting the relevancy of "marginalized" groups to varying types of history) that what matters in inquiry into the ordeals and jury trial are the shared meanings of a culture strong and wide enough to sustain a form of proof.

n20. See Gordon, supra note 19, at 63-64 (explicating general tenets of functional methodology and offering some criticism).

n21. See McGowen, supra note 19, at 799.

n22. See, e.g., Rebecca V. Colman, Reason and Unreason in the Early Medieval Law, 4 J. of Interdisciplinary Hist. 571, 577 (1975). Professor Colman chides those who would call the medieval mind irrational insofar as that word is used pejoratively. She suggests that the early medieval law did not emphasize "the primitive or irrational or mystical" but took rational measure to ensure stability and social control. Id. at 577-78. As Professor Radding remarks, the problem with the "functionalists" in general is that they justify, in the end, by saying "they" were just like "us." Charles M. Radding, Superstition to Science: Nature, Fortune, and the Passing of the Medieval Ordeal, 84 Am. Historical Rev. 944, 949 (1979). The notion that law cannot be disentangled from the culture that situates it has been elegantly expressed by others. See Robert Cover, Forward: Nomos and Narrative, 97 Harv. L. Rev. 42 (1983). In comparative law, the point has been recently made that methods of social science, which, in all their variety, tend to an external observation of other's law will always fail in their project. See William Ewald, Comparative Jurisprudence I: What Was it Like to Try a Rat? 143 U. Pa. L. Rev. 1889, 1947 (1995). Rather one must engage with the "cognitive structure" within which law forms only a part of an intricate web of beliefs, reasons, choices, ideals, principles and assumptions. Id. 1947-48.

n23. Argument abounds about whether these ordeals were of strictly pagan origin or the church law of post Roman-Gaul. Bartlett, supra note 7, at 1-25, 153.

n24. English royal law established its use through the Assize of Clarendon. An English translation appears in 1 Carl Stephenson & Frederick
George Marcham, Sources of English Constitutional History 76-80 (1972). For Germany and France see Bartlett, supra note 7, at 25. Throughout Europe, the ordeals were used in the courts of the feudal lords. See Bloch, supra note 15, at 360.

n25. Stephenson & Marcham, supra note 24, at 77-78.

n26. Id. at 74.

n27. Initially aimed at discovering clerical misconduct and heresy, this mode of accusation was later extended to a large group of spiritual crimes. See IV Lateran's Revolution in Criminal Procedure, supra note 11, at 101-02.

n28. Evidence exists in the twelfth century of bishops proceeding ex officio mero to investigate, discover, and judge conduct based upon a strict requirement of public fame. It was often established by secret inquest. See R.H. Helmholz, The Early History of the Grand Jury and the Canon Law, 50 U. Chi. L. Rev. 613, 620 (1983). Ecclesiastical judges did not possess unfettered discretion. The want of public fame, untainted by spite, was a real one, and accused persons could and did demand inquests to establish it. Id. Conviction According to Conscience, supra note 11, at 40.

n29. In 1180, Glanvill speaks most frequently of this form of accusation. G.D.G. Hall, The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill XIV, 1, 173 (G.D.G. Hall trans. & ed. 1993) [hereinafter Glanvill]. Glanvill's author is unknown though it is assumed to have been written by a man closely connected to the work of the royal court at the end of Henry II's reign.


n31. Stephenson & Marcham, supra note 24, at 77-78.

n32. Id. at 76-80. See Helmholz, supra note 28, at 613. The Assize of Clarendon is nearly universally held to be a statement of skepticism about the ordeal. Aside from codifying the presentment jury, the edict also provided that those who passed the ordeals but were of ill repute must nevertheless abjure the realm. See e.g. A. L. Poole, From Domesday Book to the Magna Carta 402 (2nd. Ed. 1955). During this time felony prosecution was largely a matter for the crown and handled by the eyre, a periodic visitation of each county by royal justices. See Frederick W. Maitland, Pleas of the Crown for the County of Glouster vii-viii (1884).

n33. Stephenson & Marcham, supra note 24, at 78.
n34. See, e.g., Charles Donahue, Proof by Witness in the Church Courts, in On the Laws and Customs of England 128 [hereinafter Proof by Witness]; Procedural Innovation and Institutional Change in Medieval English Manorial Courts, supra note 30, at 202-203 (noting that at the beginning of the thirteenth century the ordeals of fire and water were routinely used in manorial courts with high criminal franchises); Glanvill, supra note 29, at 171, 173, 175-176. Note that the ancient canons and Roman procedure adapted contained a strict two witness rule which Richard Fraher persuasively argues the Church circumvented by employing the ordeals in an effort to prosecute misconduct by prelates more successfully. See VI Lateran Revolution in Criminal Procedure, supra note 11, at 104.

n35. See Bartlett, supra note 7, at 162; Hyams, supra note 10, at 92 (a little more inclusive); Palmer, supra note 13, at 1547.

n36. See Bartlett, supra note 7, at 13-22.


n38. See Bartlett, supra note 7, at 11 (tracing to Rome in 800's).

n39. See Roger D. Groot, The Early Thirteenth Century Criminal Jury, in Twelve Good Men and True 3, 7 (J.S. Cockburn & T. Green eds., 1988) [hereinafter The Early Thirteenth Century Criminal Jury]. In cases reported to the crown, there are unbroken, though incomplete judicial records from 1194 onward. Id.

n40. Intellectual Preparation, supra note 9, at 613-14.

n41. See id. at 613. A similar ordeal was of the "Eucharist" traced back to the close of the Sixth century and use primarily in clerical disputes. See Henry C. Lea, Superstition and Force 269 (1866). In England, a feather was concealed in food swallowed by an accused. His innocence depended upon his failure to choke. Plucknett, supra note 3, at 114.

n42. Intellectual Preparation, supra note 9, at 622-23.

n43. Professor Bartlett notes that in ecclesiastical cases, it was an alternative to trial by battle. Bartlett, supra note 7, at 9. Charlemagne
strongly approved this method of resolve, ordering all territorial disputes between his sons to be so settled.

n44. See, e.g., Hyams, supra note 10, at 92 (though he does not draw a bright line between kinds of ordeals). The church employed trial by oath most commonly. In most instances, the judge, often a bishop, subjected an accused to this canonical purgation. In other cases, there was a choice of proof (as in cases of adultery or other crimes of sexual misconduct). The ordeal of the red hot iron was used often in cases of disputed paternity. 1 Orderic Vitalis, Ecclesiastical History 282 (1969). The Church also employed charters and instrumental witnesses in what we would call civil cases and some criminal cases. See Bartlett, supra note 7, at 9.

n45. Professor Helmholz also considers the oath to be a form of ordeal writing that “it was a severer form [than by water] but not different in kind.” Helmholz, supra note 28, at 620.

n46. See Colin Morris, Judicium Dei: The Social and Political Significance of the Ordeal in the Eleventh Century, 12 Stud. in Church Hist. 95, 96 (1975). The Latin echoed the vernacular. Prior to 1100, we find simply the Bavarian urteil, (judgment) with an exception existing in the Anglo-Saxon, where we find the word ordal indicating a specialized kind of judgment. In French, there was iuise. Id. at n.2. In the canonical literature, one finds the phrases purgatio vulgaris and purgatio canonical to distinguish between those proofs rooted in custom and those stemming from canonical law.

n47. See, e.g., Ralph J. Hexter, Equivocal Oaths and Ordeals in Medieval Literature 2 (1975); Hyams, supra note 10, at 92.

n48. See Morris, supra note 46, at 100.

n49. See Brown, supra note 10, at 313.

n50. De Troyes Chretien, Lancelot of the Laik (Margaret Muriel Grey ed. 1912). The twelfth century French epic consists of Chretien's five tales of The Knight of the Cart, Erec et Enide, The Knight with the Lion and Perceval. Though the Arthur legend's telling pre-dates these works, it is here that conflict between obligations, expiation and penance, become central themes in the context of Lancelot's and Queen Guinevere's forty year liaison. H. Oskar Sommer, Lancelot Prose Cycle (1908). The ordeal plays a central role in the working out of these themes. The Vulgate Cycle of 1215c, sometimes called the Prose Lancelot, consists of: Estoire de Saint, Merlin, Lancelot, The Quest, and La Mort Artu. The literature was widely known and lauded as history rather than considered mere entertainment.

n51. See Morris, supra note 46, at 100.

n52. Id.
n53. See, e.g., Lea, supra note 41, at 270-73 (recounting the lore of Kings who lied when taking the sacramental oath and later succumbing to death or plague); Morris, supra note 46, at 104 (retelling how the Bishop of Nizo, exasperated by Pope Leo's position in a dispute between Rome and Ravenna, declared "may this throat be cut by a sword if I do not get you disposed from the papal dignity." He died in three days); A. Stacpole, Huge of Cluny and the Hildebrandine Miracle Tradition, 77 Revue Benedictine 341, 356-58 (1967) (tale of simoniac bishop, who, when challenged in 1050, was unable to state simple oath Gloria filio et patri et spiritui sancto); Hyams, supra note 10, at 93.

n54. See Morris, supra note 46, at 103. For example, at the council of Mainz, a bishop's failure to defend himself against a charge of simony manifested at the communion-ordeal when his jaw suddenly became paralyzed and remained so for the rest of his life. Id. The moral of the tale was simple as stated in The Vita Leonis: "it is a fearful thing to fall into the hands of the living God." Id.


n56. R. Bloch, supra note 55, at 47.

n57. A representative example comes from The Song of Roland, perhaps the best known old French epics of the late eleventh century belonging to Chansons de Geste ("songs of deeds"). Though the heros are physically weaker than their opponents, success at the ordeal is theirs. "The Franks all cry: "God's might is manifest!" and thus the opponent Ganelon is justly quartered. Dorothy L. Sayers, The Song of Roland 200-02 (1957). These epics were particularly popular during the late eleventh century and recited along the pilgrim routes that dotted western Europe retelling a history that assumed the audience's knowledge. Id. at 9-10. As Professor Linda Meyer pointed out to me, we still have vestiges of this in popular culture. Action films always have a final scene in which the "good guy" fights the "bad guy" - one-on-one - and, of course, the good guy wins.

n58. See Morris, supra note 46, at 109; R. Bloch, supra note 55, at 20 nn.13-18 (failed crusades or the Pope's defeat against the Normans in 1054 as well as assorted victories or recovery from captivity were unceasingly attributed to the Deity's judgment about the justness or injustice of the cause). While the Church disapproved of trial by battle, evidence exists, particularly in France, of monasteries defending their privileges by engaging champions to do battle. See Id. at 98.


n62. See Bartlett, supra note 7, at 37.

n63. Id. at 54.

n64. See Procedural Innovation and Institutional Change in Medieval Manorial Courts, supra note 30, at 205. Some say they detect the smell of serfdom upon the severe ordeals. Yet, in twelfth century England and France, serfs held full legal status in regard to all freemen excepting their lord. See id. at 203; 1 Pollock & Maitland, supra note 4, at 415. And, in Glanvill's England, one finds trial by water being reserved for the unfree and trial by iron for the freeman. See, e.g., Glanvill, supra note 29, at 173. It would seem the latter, not the former, would be considered the most severe.

n65. See, e.g., Bartlett, supra note 7, at 100 (the most insisting upon the point). Others such as Colin Morris and Richard Fraher seem to agree implicitly. Richard Fraher argues that the Church employed the ordeals as part of its campaign to more effectively uncover clerical misconduct such as simony, heresy, and concubinage. IV Lateran Revolution in Criminal Procedure, supra note 11, at 104. See also Morris, supra note 46, at 104 (making similar point in regard to Pope Leo IX's efforts). But cf., Palmer, supra note 13, at 1548-50 (comparing Professor Bartlett's insistence upon the judicial function of fact-finding with other historians who see the ordeal as a means of resolve). See generally, Colman, supra note 22 (concurring with Professor Palmer).

n66. Colman, supra note 22, at 573-74.

n67. See infra notes 110-17 & accompanying text.


n69. See masters, princes and merchants, supra note 9, at 327.

n70. Peter the Chanter's polemics against the ordeals gave many examples where innocent men were wrongly convicted. See id.
n71. See Moore, supra note 11, at 124-25. An analogy would be the difference between telling a lie and making a mistake. One cannot be said to "lie" unless knowledge exists of refusing the truth. Therefore crimes such as fraud are dependent upon intent. In heresy, one may make an error and be corrected or one may consciously go against dogma, which requires, of course, knowledge of the dogma. See Hyams, supra note 10, at 90, 98-100.

n72. See Fisher, supra note 8, at 597; 2 POLLOCK AND MAITLAND, supra note 4, at 65.

n73. Rational and Irrational Proof Revisited, supra note 12, at 25; Hyams supra note 10, at 100-01 (concurrs though it is unclear whether he thinks the distinction is made by the Deity, or whether it is not a sensible distinction given this age's vision of the cosmos). Moderns are familiar with the question of whether the line between law and fact is artificial. Notwithstanding a concession to what is termed "brute facts," the most mainstream evidence theory recognizes that behind all fact-finding is an inferential chain linked by "background generalizations" which are norm laded. See William Twining, Civilians Don't Try: A Comment on Mirjan Damaska's "Rational and Irrational Proof Revisited, 5 Cardozo J. Int'l & Comp. L. 69, 71-73 (1997).

n74. Reg. Vard., supra note 18, at 151. The translation is roughly, "Brother, are you justus of the crime of which you are accused? Are you mundus? I am mundus." Mundus denotes clean or pure. I am indebted to Richard M. Fraher for translating as well as clarifying the sense of the question. He explains, "the rhetorical weight of the colloquy turns on the words justus and mundus. Justus denotes just, justified, having the right. In a moral sense, it can denote "justified" or "innocent." In a criminal procedure, these words convey a legal denotation resonating with a moral connotation. Letter from Richard M. Fraher to Trisha Olson (March 30, 2000) (on file with author).

n75. 1 Carl Stephenson & Frederick George Marcham, supra note 24, at 77. Professor Palmer thinks this indicates an interest in the purely factual question. See Palmer, supra note 13, at 1549-50. Yet, the question was couched in moral language that required a judgment beyond the brute facts of the case.

n76. This idea is explored with rigor and detail in Richard F. Green, Literature and Law in Richardian England: A Crisis in Truth 9-15 (1999). Professor Hyams agrees that the question was holistic, however, he surmises that the lack of distinction between fact and ethical is tied to the idea of a deity making judgment. Hyams, supra note 10, at 100. See also Brown, supra note 10, at 311 (deity was judging the status of a person and the justness of the claim).


n78. P. Rousset, La Croyance en la justice immanente a l'epoque feodale, 54 Le Moyen Age 225, 234 (1948).

n79. Sayers, supra note 57, at 199.


n82. Id. at 5.

n83. Recently Michael Macnair has argued for a strong overlap between the roman-canonical use of fama as grounds for proceeding against an accused though a specific accuser was lacking and the institution of the presentment jury as finding probable cause to present based upon local reputation. See Michael Macnair, Vicinage and the Antecedents of the Jury, 17 Law & Hist. Rev. 537, 583 (1999).

n84. The Jury of Presentment Before 1215, supra note 81, at 7.

n85. Id. Those who passed the ordeal were made to abjure the realm and those who did not were mutilated. The evidence, however, suggests that even this decision was discretionary. Id.

n86. See id. at 6.

n87. See Colman, supra note 22, at 576.

n88. Id.

n89. See Fisher, supra note 8, at 597; See also 2 Pollock and Maitland, supra note 4, at 65.

n90. See Dorothy Whitelock, The Beginning of English Society 145-46 (1952) (it was frequent under Anglo-Saxon law for compensation or forfeiture of property to serve as an adequate punishment). In Norman-Saxon England, mutilation rather than death typically followed a failed ordeal. See The Jury of Presentment Before 1215, supra note 81, at 6.
n91. See Philippe Aries, L’Homme Devant La Mort 291 (1977) (speaking to medieval understanding of death as a moment of clarification rather than as dissipation, a moment of the soul’s awakening rather than of its end); Desmond Manderson, Et. Lex Perpetua: Dying Declarations and Mozart's Requiem, 20 Cardozo L. Rev. 1621, 1631 (1999) (speaking of historical transition in context of justification for the dying declaration exception in evidence law).


n94. "It is necessary to go, not to live.”

n95. See Beowulf 22:1534 (Joseph. F. Tuso ed., E. Talbot Donaldson trans., 1975) ("So shall a man when he aims to earn lasting praise in battle - he does not worry about his death."). The deeply rooted and long life of the heroic ideal for England is apt to be overlooked if one yeilds to an interpretation of that age as one of “hopeless courage.” As Kenneth Sisam observes, it is hard to think of Beowulf as hopeless for never does he brood on death and always does the poet show him as fearless. Kenneth Sisam, The Structure of Beowulf, in id. at 116-17.

n96. Sayers, supra note 57, at line 2355-63. In an epic, overwhelming in its detail to battle and boasts of brave men, Roland speaks for his feudal (and not yet romantic) age when as “he feels death press upon him hard, its creeping down from his head to his heart,” he stretches himself ritualistically under a pine tree and begins his last breaths “for the French and Charles, Since fain is he that they should say, brave heart, That he has died a conqueror at the last.” Id. (emphasis added).

n97. The received wisdom is that the eleventh and twelfth century witnessed the rise of the town, the coming of a waged-based society, and the demise of the warrior-feudal way of life. See, e.g., Hollister, supra note 17, at 138-39. This is particularly true in Northern Italy and Flanders. The merchant class was born. Three points, however, are worth noting. A way of life may die, and yet not its ideals, which will inform and shape a whole host of jurisprudential concepts. This was certainly true in the eleventh and twelfth century where the virtues and vices of the noble estate continued to shape ethical perceptions. See Huizinga, supra note 15, at 73-85. Second, though the rise of the tenet farmer and a new peasant class emerged in England, there was a counter-trend whereby many nobles reclaimed and enlarged their demesne. See Hollister, supra note 17, at 144. Third, unlike the continent, England did not turn to a professional legal class but instead to the aristocratic and villein estates which retained ways founded upon the bedrock of status-based relationships.

n98. Most recently, Susan Reynolds has suggested that the historical account of vassalage and fief may be lacking in that historians looked at sources with a structure already in mind and into which they then force a fluid language. See Susan Reynolds, Fiefs and Vassals: The Medieval Evidence Reinterpreted 22-26 (1994).
As Susan Reynolds notes, we owe much to the German historians of the nineteenth century when approaching this subject. Susan Reynolds, Kingdoms and Communities 900-1300, at 22-35 (Oxford 1984) [hereinafter Kingdoms and Communities]. For purposes of understanding the ordeal and jury proof, however, I argue throughout (perhaps arrogantly going against convention) that in the narrow context of criminal procedure the status-based feudal relation is best understood as simultaneously hierarchal and communal. Contra id. at 28-29 (speaking to Gierke's well accepted contrast between the Herrschaft (vertical relations) and Genossenschaft (horizontal relations of unity and freedom)).

See, e.g., Frederick Crane, The Exempla of Jacques de Vitry (1890) (Tales of the Virgin who saves thieves from discovery); D'Etienne de Bourbon, Anecodotes Historiques 155-77 (Paris 1877) (through confession the devil's evidence of a clerk's misdoing are blotted out and robber saved from the gallows by his plea to Mary that he not die stained). The image of the trickster Christ was not accepted by many of the learned in the twelfth century. It was disapproved by both Anselm and Peter Lombard. See R. Green, supra note 76, at 345. On the other hand, the concept had strong support from Gregory the Great and Saint Augustine.


Id. at 112.

Id. at 112-13.

Id.

Id.

Id. at 113.

On the exempla as a genre of medieval literature that offers testimony to the everyday mindset of the later Middle Ages see C. Bremond, et al., L'exemplum, in 40 Typologie des Sources de Moyen Age Occidental (Turnhout 1982).

See, e.g., Brown, supra note 10, at 30-308; Colman, supra note 22, at 576-78.
n109. See Bartlett, supra note 7, at 36, 39-41. Frequently John Baldwin's work is thought to be the precursor to Bartlett's in that both given keen attention to the debate over the ordeals' authority. See, e.g., IV Lateran's Revolution in Criminal Procedure, supra note 11, at 98. For purposes of discussing the "why" and "how" of the ordeal, however, it seems best to group Bartlett and Hyams together as instrumentalists. I leave John Baldwin's work for another section as well as the work of Richard Fraher, for both, in this author's judgment, are similar in methodology in that each pay keen attention to what contemporaries said about the ordeals, refraining from inferring hidden motives or unconscious incentives that tell the "true" story of the ordeals.

n110. See Bartlett, supra note 7, at 36-37.

n111. See id. at 20-21. Not uncommon is the example of the champion of the Holy Lance who, after the first crusade, undertook to prove the lance's authenticity by passing through fire. Professor Bartlett dismisses this phenomena as posturing for effect, however, the ordeals are a dangerous form of posturing when one considers, for example, the triple ordeal of the boiling cauldron. Henry I's wife Matilda offered to undergo an ordeal before her marriage to prove that she had taken the veil to protect herself from Norman lust and not as a nun which would have halted her marriage to Henry. See Colman, supra note 22, at 585.


n114. See, e.g., Jacques Le Goff, The Symbolic Ritual of Vassalage in Time, Work, & Culture in the Middle Ages 251-52 (Goldhammer trans., 1980). Le Goff details the ritual of homage to show that contrary to the idea of the relationship between vassal and lord as a long arm contract for mutual benefit, the ceremony was one of submitting in faith and trust to the power of a lord, who in turn embodied concretely the divine power of lordship. The exchange of a kiss exchanged breath as in the marriage ceremony indicating that the lord had cleaved a man unto himself as his own - himself - therefore taking on duties of care, protection, and bond. Contra Reynolds, supra note 98, at 19-20. As Miss Reynolds points out, the word vassal is modern in that in the eleventh and twelfth centuries the words most frequently employed were miles (soldier), fidelis (faithful or law-worthy man), or homo (man). Id. But see Fred Cheyette, Fiefs and Vassals: The Medieval Evidence Reinterpreted, 71 Speculum 998, 1004 (1996) (reviewing Susan Reynolds' work noting that historians should not lose sight of the big picture: the astounding fact that emotions like love and faith were constantly a part of legal documents such as charters).


n116. See Reynolds, supra note 98, at 390 (citing Innocent III, Selected Letters, nos. 53-55, 60, 67, 80, 82).


n119. The functionalists are concerned with rescuing the ordeals from judgments that their demise is "one feature of the emergence of western civilization from the tunnel of the Germanic dark ages and of the progress of rationality." Brown, supra note 10, at 309.

n120. See id. at 307-11, 313.

n121. The modern inclination (for it seems to have become that) is to begin, albeit implicitly, from Hart's distinctions between "primitive custom" and law, whereby the latter cures the problems of uncertainty, staticness, and instability. H.L.A. Hart, The Concept of the Law 91 (1994). As others point out, the defects pointed out already assume an understanding of law as something, which is posited by an empowered sovereign. See, e.g., Marianne Constable, The Law of the Other 89-93 (1994).

n122. See Colman, supra note 22, at 578-79.

n123. Linda R. Meyer, Is Practical Reason Mindless?, 86 Geo. L. J. 647, 674 (1998) [hereinafter Is Practical Reason Mindless?]. The functionalists reflect a more pervasive understanding of law as technology that "turns us from responsible moral actors into objects to be predicted and controlled." Id. at 673. In the historical context, we look to the past with an assumption that each public lawful way was an attempt to render one's surroundings and fellows more secure, safe, and predictable. We are foreclosed from recalling that once we "believed self-control came from a 'willing' that could conform itself to reason and law... Now we just take serotonin reuptake inhibitors." Id. at 667 n.97 (citations omitted). It is in this way, for example, that we should hear Henry V's call his men at Agincourt "for he today that sheds his blood with me, shall be my brother; be he ne'er so vile, this day shall gentle his condition." William Shakespeare, Henry V, Act V, Scen. III, L. 60-63.

n124. The insufficiency of essentially pragmatic-based explanations for the history of proof is also alluded to by R. van Caenegem. See The Law of Evidence in the Twelfth Century, supra note 13 at 306 ("It is clear that the history of evidence... is linked with the ways of thinking, the mentality of a people. If there is one field which shows that even institutions cannot be properly studied without an eye on psychological history, it is the history of evidence.").

n125. R.C. Van Caenegem, Birth of the English Common Law 68 (1973) (emphasis in original); Lea, supra note 41, at 214 (suggesting a decision was made by the church that it was "impolitic" to attempt to eradicate the ordeals).

n126. Professor Harold Berman suggests, for example, that the ordeals were essentially "tribal and feudal in nature," tied to the folk law, and directed at controlling the blood feud which, in turn, was secured upon the twin pillars of honor and fate. He contrasts this with the
Christian law of penance, which was redemptive, directed at preserving the spiritual well-being of the community, and secured by "repentance and forgiveness." Berman, supra note 2, at 72-73. See also, Alan Harding, The Law Courts of Medieval England 27 (1973).

n127. A few note this. See, e.g., Hyams, supra note 10, at 125. The two, which come closest, however, are Professors Baldwin and Bartlett. The former extensively traces the debate among theologians. See Masters, Princes and Merchants, supra note 9, at 324-25; Bartlett, supra note 7, at 32-36. Most historians, however, tend to move briskly through the concepts of superstition, magic, and sacrament, blending and conflating where they should not. See, e.g., Lea, supra note 41, at 590 (equating rejection of ordeals with victory of reason over "cruel and arbitrary domination of superstition and force."). See Palmer, supra note 13, at 1548.

n128. In 1130, the monastic Benedictines participated in worldly affairs in a spirit of religious moderation accepting the expansion of custom's role in monastic law, whereas the ascetic monks mortified their flesh, abased their body, and dwelled as hermits exemplifying the teaching that holiness partook of the solitary. See Georges Duby, The Age of Cathedrals: Art and Society 980-1420, at 63-65 (Eleanor Levieux & Barbara Thompson trans., 1981). Professor Duby surmises that the hermit's life calls many in the eleventh century given its close tie with the feudal norms of physical heroism and self-control. Id. at 67. See James L. J. Nuzzo, The Rule of Saint Benedict: The Debates Over The Interpretation of an Ancient Legal and Spiritual Document, 20 Harv. J.L. & Pub. Pol'y 867, 880 (1997). In 1115, the mystical Cistercians gained ground responding to the perceived laxity of the Benedictines. Duby, supra note 128. In Southern France, the heretical dualism of the Cathari arose; and in 1139, three crusading orders were established, blending the ideal of knighthood with monastic austerity. The Templars, the Knights of St. John the Baptist, and the Teutonic knights "were among the First of the Knightly Orders." Huizinga, supra note 15, at 408. By the 1200s, the Dominican and Franciscan orders emerged. Rejecting the cloistered life, they devoted themselves to working in the thriving urban towns that had begun to grow alongside the older feudal fortresses, and stressed a spirituality associated with the individual and the shedding of the material. Hollister, supra note 17, at 262.

n129. See Evelyn Underhill, Mysticism 168-70 (12 ed. 1930); Southern, supra note 112, at 224-27; Duby, supra note 128, at 100 (speaking to a theology of light that through a scale of "analogies and concordances, the created existed in union with the noncreated").

n130. See Hollister, supra note 17, at 164; Duby, supra note 128, at 57-76. See Umberto Eco, Art and Beauty in the Middle Ages 44-45 (Hugh Bredin trans. 1986). Art historians are familiar with this move. But a link is not seen between a theology of light, based upon sensual experience and earthly perceptions, and the "sensuous" aspect of law in the Middle Ages. This sensuous element was disapproved when the new scientific study of theology and law arose. See Berman, supra note 2, at 59.

n131. See Hollister, supra note 17, at 249.

n132. See Duby, supra note 128, at 107-08 (speaking to the change in iconography from a focus on God's transcendence to His incarnation).

n133. See id. at 164. Marian iconography appeared in the middle twelfth century. At Chartres, center of Beauce, the first stone statue of the Virgin Mary appears seated in the throne of Solomon. The cathedral at Senlis was the first whose porch was devoted to Mary, showing her together with Jesus on the same royal seat. See id. at 158-59.


n136. See 1 Pelikan, supra note 14, at 206; Brown, supra note 10, at 326.

n137. 1 Timothy 3:16 (vulgate).

n138. 1 Pelikan, supra note 14, at 207.

n139. Id. at 208. On the sacrament, see Ganoczy, supra note 134, at 4-5; Bernard Cooke, Sacraments and Sacramentality 6-10 (1983).


n141. See generally, Eco, supra note 130, at 21-22. Professor Pelikan notes that mysticism became a strong force ca. 500 with the composition of a body of works under the pseudonym of Dionysius the Areopagite. 1 Pelikan, supra note 14, at 344. These works, such as Dionysus the Areopagite, The Divine Nature 95-96 (C.E. Holt trans., 1920), shaped the mystical thought of twelfth century monks as well as the later thinking of Thomas Aquinas. 1 Pelikan, supra note 14, at 344

n142. Id. at 17-18.

n143. St. Bernard of Clairvaux, Sermons in Cantica, IXXV, II (PL 183, col. 1193).

n144. While there are several definitions, Augustine’s is relied upon heavily by theologians. As Pelikan points out, Augustine is often wrongly translated as speaking of a “sign” of the invisible mystery or grace. Form better captures the thought for the sacramental faith assumes the enfleshing of the divine which therefore is a living sacredness by virtue of the communion of spirit and flesh. (Invisibilis gratiae visibilis forma).

n146. See 1 Pelikan, supra note 14, at 175.

n147. See Bloch, supra note 15, at 107; Brown, supra note 10, at 305. Professor Brown sees the late eleventh and twelfth century as a period where the profane and sacred are disengaged from each other. One example is the investiture contest where clergy are given a new and specialized role. Id. In the legal context, however, the clergy continue to sit as judges in all courts during this period.

n148. See Bloch, supra note 15, at 82.

n149. See Eco, supra note 145, at 55.

n150. Id. at 54; Karen Jolly, Popular Religion in Late Saxon England 72-73 (1996).

n151. See, e.g., Dionysus the Areopagite, supra 141, at 94-96. See Peter Brown, Cult of the Saints, 102 (1981) (the late Roman period whereby saints intervened again and again in men's lives to reconcile him with his god). Along with the medieval mystic's kinship with Dionysus was a renewed emphasis upon the beauty and goodness of the earth. Against the heresy of the world as the epitome of evil came the Franciscan order in 1209, praising the physical universe as a holy gift. See Hollister, supra note 17, at 179.

n152. See Eco, supra note 145, at 55. Representative are the twelfth century writings of Hugh of St. Victor. The earth, he wrote, was "like a book written by the finger of God" (quasi quidam liber scriptus digito Dei). Hugh of St. Victor, De Tribus Diebus, in Bk IV Didascalicon ch. 4, PL 276 col. 814.

n153. A point so often missed and which shakes up the traditional notion of Christianity as a metaphysic. Karen Jolly attributes this mindset to the comfortable relationship that developed between Germanic and early Christian belief. See Jolly, supra note 150, at 73.

n154. See id. at 162; Huizinga, supra note 15, at 175 (what hope had theologians from keeping a clear distinction when the "masses clamored" to the "gaudy and magical").
n155. See id. at 44.

n156. The Church understood the difficulty of bringing into actuality its spiritual existence. For example, consent to baptism was part of the ecclesiology of the twelfth century, yet posed problems for the church as an earthly community. See Stanley Chodorow, Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum 65-67, 76-94 (1972). If only adults were true members the church was reduced to merely a congregation not on equal footing to other earthly communities. Id. at 81-82.

n157. The term finslis concordia does not appear in legal documents from England until soon after the Norman Conquest, the Anglo-Saxon agreements were akin in substance and spirit. See Valerie A. Sanchez, Towards a History of ADR: The Dispute Processing Continuum in Anglo Saxon England and Today, 11 Ohio St. J. Disp. Resol. 1, 32 (1996). In Leges Henrik Primi 164, 176 (L.J. Dower trans., 1972), one finds the statement, disputants are "brought together by love or seperated by judgment." And, in the time of Henry II, Glanvill asserted that "it is generally true that agreement prevails over law." Glanvill, supra note 29, at 129. David Bates suggests that William the Conqueror also preferred compromise to clear cut judgments of rights in various property disputes. David Bates, William the Conqueror 98 (1989).

n158. See Henry Maine, The Ancient Law 230 (1917) ("the distinctions of the later jurists are appropriate only to the later jurisprudence"); S.F.C. Milsom, Historical Foundations of the Common Law 11 (1981). Professor Milsom writes of England, "laws as well as institutions were local, and the differences between one district and another sometimes reflected not different answers to a problem but different ways of life." Id.

n159. In some contexts, the words translate to "justice" or "right" with the reference most often being to custom. See Laws of the Kings of England from Edmund to Henry I at Indexes (A.J. Robertson ed., and trans. 1925); Milsom, supra note 158, at 12. Kingdoms and Communities, supra note 99, at 16-17 (arguing that before the twelfth century conditions, did not exist that would allow for the conceptual distinctions between law, right, and custom).

n160. Such a conception lead to a jealous regard for the birthright to one's law. Hence a theory of personal law is most prominent where there can be potential conflict of law in a dispute. See Simeon L. Guterman, The Principle of Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas, 21 Univ. Miami L. Rev. 259, 261 (1966); Hessel E. Yntema, The Historic Bases of Private International Law, 21 Am. J. Comp. L. 297 (1952); Constable, supra note 121, at 7 (considering the mixed jury in England during the Middle Ages). The phrase "personality of law" is used here in a slightly unorthodox way. Typically it is spoken of in the context of private international law and contrasted with "territoriality," whereby the law of a place governs all that reside there rather than the "personal" (national) law of a person. See id. It is said that feudalism and the Italian communes eventually replaced personal law with territorial. See General Survey of Continental Legal History 60-68, 80 (1968). The contrast is drawn too firmly. The idea of law as personifying and reflecting one's ties to others is at the crux of personality of law and of feudalism. Feudalism is a long distance from modern territorialism, which sees law as the officially enacted rules of a sovereign with the power to enforce his laws against an array of individuals who happen to gather in a place. See Constable, supra note 121, at 7 (making a somewhat analogous point).

n161. Serfdom is a difficult concept. By the twelfth century, it denoted "relational" slavery rather than one's legal personality. A serf was "rightless" only in relation to his lord; however, in all other matters, he was, as the freeman, capable of owning property, making contract, and bringing suit. See 1 Pollock & Maitland, supra note 4, at 428. In the manorial and local courts, the serf sat as presenter. Id. at 421. So too the serf was expected, if rich enough, to hold arms. Id. at 421-22 n.4.
n162. In public law, a woman could never be outlawed, for she was never "in law" or law-worthy in what we would call the public domain. She could be declared a "waif" no longer in the "mainpast" of a man. 2 Bracton, supra note 60, 414; 1 Pollock & Maitland, supra note 4, at 482. In private law, she was fully "in law" and women are found as jurors when, as frequently happened, "some expectant heir alleged that there was a plot to supplant him by the production of a suppositious child." Id. at 485. In this case, Maitland has found evidence of a jury of matrons. Id.

n163. Synods involved the laity since the beginning of the Church's life. Lateran IV included 400 bishops as well as envoys of many European kings and the personal representative of Frederick II. These ecumenical councils were, in many respects, congresses. IV Lateran's Revolution in Criminal Procedure, supra note 11, at 97.

n164. See Kingdoms and Communities, supra note 99, at 52-55 (noting that where Roman law was felt, collective judgment slowly eroded. Susan Reynolds observes, however, that throughout Europe, and particularly in England, some form of collective law-remembering remains); Beckerman, supra note 30, at 201 ("Suit of court, the obligation to attend and participate in its proceedings" was the burden of customary service in manorial court with suitors in the emergent court Leet acting as the "guardians of custom").

n165. 2 Pollock & Maitland, supra note 4, at 449. See 2 Bracton, supra note 60, at 362 ("An outlaw also forfeits everything connected with the peace, for from the time he is outlawed he bears the wolf's head, so that he may be slain by anyone with impunity, especially if he resists or takes flight so that his arrest is difficult."). By the thirteenth century, generally men were no longer allowed to execute captured outlaws and manifest bandits without trial. Thomas Green, The Jury and the English Law of Homicide 1200-1600, 74 Mich. L. Rev. 416, 438 (1972) [hereinafter The Jury and the English Law of Homicide].

n166. Plucknett, supra note 3, at 251.

n167. Glanvill, supra note 29, at vii.17; Magna Carta 1215, cl. 32 (1225, c.22). Historians frequently speak of felony in terms of its consequence, defining it as the kind of offense, which allowed a lord to take back his tenants' land. The confiscation of land, however, was the result of breaking bond. The jurist, Sir Edward Coke, located "felony" in the Celtic fel: "The gall of a living creature." 3 Edward Coke, Institutes 149.

n168. See Frederick W. Maitland, Constitutional History of England 110 (1961). Maitland notes that the origin of the word is disputed but thinks Coke was right to locate it in the Celtic. One of the first usages of "failure" is "to prove deficient upon trial by battle." The Compact Edition of the Oxford English Dictionary.

n169. See generally Maurice Keen, English Society in the Later Middle Ages 285-89 (speaking to cults of relics, import of penance, indulgences, and appeals to saints); see Michael E. Smith, Punishment in the Divine Comedy, 25 Cumb. L. Rev. 533, 561 (1995) (speaking to Dante's poetic expression of pain in purgatory as a way home).
n170. See Leges Henrik Primi, supra note 157, at c.3, I.; Brown, supra note 10, at 311 (though he sees concord as a peace that ensures safety and security rather than as an imitative tenet); Hyams, supra note 10, at 98 (speaking of concords occurring immediately before ordeal). On the pervasiveness and import of the medieval loveday see J.W Bennett, The Medieval Loveday, 33 Speculum 351 (1958); Michael Clanchy, Law and Love in the Middle Ages, in Disputes and Settlements: Law and Human Relations in the West 47-67 (John Blossy ed., 1983).

n171. See Van Caenegem, supra note 125, at 16; Colman, supra note 22, at 68.

n172. Edward Powell makes the argument that concords should not be viewed as an aberration from the norm of litigation. Instead, they were an integral part of the wider medieval legal system, serving a complementary role. Edward Powell, Settlement of Disputes by Arbitration in Fifteenth Century England, 2 Law & Hist. Rev. 21, 29 (1984) [hereinafter Settlement of Disputes by Arbitration on Fifteenth Century England] (speaking to concord and selection of lovedays). See also E.W. Ives, The Common Lawyers of Pre-Reformation England 126-30 (1983). Kingdoms and Communities, supra note 99, at 26 (noting that modern distinctions between settling and disputing do not fit the age). See also, Richard M. Fraher, Preventing Crime in the Middle Ages: The Medieval Lawyers' Search for Deterrence, in Popes, Teachers, and Canon Law in the High Middle Ages 215 (1989) [hereinafter Preventing Crime in the High Middle Ages] (speaking to the patristic ideal to follow the example of Christ's toleration of Judas and therefore for the rightness in not accusing one's brother). This is to be contrasted with the Gregorian's sense of urgency to purify the Church by uncovering misbehaving clerics.


n176. Although she does not deal in depth with the theology, Susan Reynolds also argues that in this time period, the distinction between settlement and dispute resolution waits to be born). Kingdoms and Communities, supra note 99, at 26.

n177. See Bartlett, supra note 7, at 80 (discussion the confessional work of Thomas of Choham).

n178. See id. at 78.
n179. See id.

n180. See, e.g., C. Oulmont, Les Debats du Clerc et du Chevalier dans la Litterature Poetique du Moyen Age 57 (Paris 1911) (Eugene III, in writing to the archbishops of Cologne and Treve, blamed a fire at the monastery of Remiremont upon the relaxed morals of the inhabitants); Bloch, supra note 15, at 20 (speaking to the retributive understanding of the Deity's judgment in this period).


n182. See Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy 169 (1988) ("If we simply use the term mercy to refer to certain of the demands of justice...then mercy ceases to be an autonomous virtue and instead becomes a part of (is reducible to a part of) justice... If on the other hand, mercy is totally different from justice...it then counsels injustice."). Very few today try to think through the puzzle of justice and grace in a way that preserves each and yet fits the two together. One beautiful working out of this problem is Linda (Helyar) Meyer, Justice and Grace (PH.D. dissertation University of California at Berkeley, J.S.P. 1991). I am greatly in debt to Professor Meyer for her insight and guidance on this ever-taunting conundrum.

n183. See Radding, supra note 12, at 951. This is not to discount the idea of judgment upon wickedness. For example, as Professor Radding points out, the triumph of the Normans in Italy, the drought dissipated by Saint Benedict's miracles, and the constant famines in this period were often spoken of as punishments for sin. Id. What seems overlooked, however, is that such punishment reflected one's own choice in that it personified his separation from his god. See Smith, supra note 169, at 558 ("The punishments of Hell are not retributive, at least in the usual way. The damned are there altogether by their own resolve to persist in sin rather than to repent of it. The pains they suffer are not a sentence inflicted... but are inherent in their sinfulness. The painfulness of sin is part of the very nature of human beings" when separated from the divine).

n184. The classical Latin, evidentia, originally spoke to clarity or distinctiveness to that which rendered a matter evident, rather than to its more generalized sense of information proving the truth of a claim. See Green, supra note 76, at 37.

n185. See, e.g., Thomas P. Oakley, English Penitential Discipline and Anglo Saxon Law in Their Joint Influence, in Studies in History Economic and Dubul Law 20-22 (1923); McNeill, supra note 93, at 84-85.

n186. The motif of divine retribution appears in earlier hagiography reflecting it seems the apocryphal stance of the earlier age. See, e.g., Colman, supra note 22, at 586.

n188. Id. at 204.

n189. Id. at 208.

n190. Id.

n191. Id. at 209.

n192. Id. at 216.

n193. Anselm, supra note 187, at 241-44. It is in light of the above that Anselm answered the question of why God became man. Anselm stated that man cannot offer up satisfaction for "if in justice I owe God myself and all my powers, even when I do not sin, I have nothing left to render him [as a gift] for my sin." Id. at 241. Thus, because only man suffers to make satisfaction to restore himself and since no one could transform an act of supplication into a gift except God who owes nothing, God became man: "it is necessary that the same being should be perfect God and perfect man to make this atonement." Id. at 246.

n194. Not atypical is the story of Thomas of Elderfield, who engaged in a wrong. "Eventually God's grace intervened and remorse stung him; so he presented himself to a priest and took his healthy advice to do proper penance for his offense." R.R. Darlington, The Vita Wulfstani of William Malmesbury cap. 16 (1928). His suffering was itself a gift, which eventually released him from pains and trials endured over a long period, including being convicted at trial by battle for a wrong which he had not done.

n195. See, e.g., Oakley, supra note 185, at 136-51 (discussing the Anglo-Saxon laws that provided for penance and the penitentials inclusiveness as to the importance of mund (i.e. peace, protection); 2 Holdsworth, supra note 61, at 48. Legal historians infrequently discuss the penitential character of the Anglo-Saxon system of payments and instead focus upon the question of whether it reflected an essentially private or public conception of wrongdoing, what Patrick Wormald calls the move from "amendment to penalty." See Patrick Wormald, Frederic William Maitland and the Earliest English Law, 16 Law & Hist. Rev. 1, 16 (1998). Professor Wormald argues the sources reveal that a concern for public order, and a understanding of wrong as damaging the community as a whole existed much earlier than Maitland and others have judged. Id. at 17.

n196. See Oakley, supra note 185, at 144; William Ian Miller, Choosing the Avenger: Some Aspects of the Blood Feud in Medieval Iceland and England, 1 Law & Hist. Rev. 159, 202 (1983) (speaking to duty of forgýf when a wrongdoer hands himself over to a wronged kin group
...member).


n198. See The King's Pardon for Homicide before A.D. 1307, supra note 197, at 164.

n199. Some see in this rule a system strict liability that was related to the older notion of wrong being a matter of private law. See, e.g., John S. Beckerman, Adding Insult to Injurin: Affronts to Honor and the Origins of Trespass, in On the Laws and Customs of England 163 (1981) [hereinafter Adding Insult to Iniuria]. Yet, strict liability is too blunt a idea to overlay on this age. According to the Leges Henrik, "mercy" was to be extended to an actor when he caused unintended harm and the appropriate compensation was to be determined "according to the facts of the case." See Leges Henrik Primi, supra note 157, at C.90, 11a-d. In other instances an act spoke for itself so what one sees is not indifference to intent, but an understanding of it through the action. See Julian Pitt-River, Honour and Social Status, in Honour and Shame 27-28 (J.G. Peristiany ed., 1966) (speaking to tie between conduct and intent in matters of honor). What framed the discussion of damages in this age was status. Status is a relational concept: within a relationship, one does not consider himself to be subject to strict liability when he takes responsibility for harming one who stands with him in intimate relation. This holds though the harm occurred through no fault of one's own. Within the context of a relationship, it would not be surprising to hear an actor speak in the language of remorse, unfounded feelings of guilt, or concern, notwithstanding that no wrong has been done.

n200. Stacpole, supra note 53, at 360.

n201. Id.


n203. See Bartlett, supra note 7, at 68-69; Palmer, supra note 13 at 1552. See, e.g., Hyams, supra note 10, at 100; Thomas Green, Verdict According to Conscience: Perspectives on the English Criminal Trial 1200-1800 (1985) [hereinafter Verdict According to Conscience].

n204. See Palmer, supra note 13, at 1552, 1556.
n205. Bartlett, supra note 7, at 80.

n206. For example, Professor Palmer considers the last chapter of Professor Bartlett's work, which deals with some of the theological debates and questions surrounding the ordeal to be rather picky and not central enough to true legal history thus concluding such a chapter is "strange to find... in a book by a professional historian." Palmer, supra note 13, at 1555. While historians glean that "if ever there was an area where the sacred penetrated into the chinks of the profane and vice versa, it was the ordeal," it is seen as a problematic relationship at best. See Brown, supra note 10, at 307. For example, in the baptismry of Canterbury cathedral, it was possible to be both baptized and to undergo an ordeal in the same blessed pool of water. Historians see the "judicial" and "sacramental" function as distinct, and hence such dual usage of the water as a "confusion." R. W. Southern, Saint Anselm and His Biographer 263 (xerographic reprint 1990) (1963).

n207. In 1272, the English bench was nearly entirely clerical. By 1307, the balance shifted to a little less than half. Plucknett, supra note 3, at 236; 1 Pollock & Maitland, supra note 4, at 204-05; F.W. Maitland, 1 Bracton Notebook 5, 14, 60 (F. Maitland ed. 1887) (speaking of Royal English judges William Raleigh and Martin Pateshull).

n208. The penitential literature distinguished between capitalia crimina and peccata minora. See Oakley, supra note 185, at 64; McNeill, supra note 93, at 111-13, 121-28 (importance of confessor for any offense). The Latin peccata is a "fault," failing," "transgression," "sin" from the noun pecco.

n209. The early penitentials directed the judge to "correct the faults" of the wrongdoer. See McNeill, supra note 93, at 221 (quoting penitential ascribed to Bede cc 730); Masters, Princes and Merchants, supra note 9, at 49-51 (speaking to the emergence of a division between the "celestial faith" and "celestial morality" which comes to be seen as two necessary conditions of a proper spiritual life. Previously, one's faith was one's morality, broadly understood, and wrong did not "count one out" except for a time of penance. Even then, one was not "out" precisely but in a condition of return).

n210. See IV Lateran's Revolution in Criminal Procedure, supra note 11, at 108-09; The Law of Evidence in the Twelfth Century, supra note 13, at 301 (speaking to rise of centralization of both church and state as one important factor in revolution of proofs).


n212. The patristic teaching was of the virtue in tolerating wrong as well as of the priestly role in leading a wrongdoer to the medicinal through penance. By Lateran IV, this older ideal was coming into conflict with a notion of a church, both internal and external, that, in its latter role, punished transgression. See Preventing Crime in the High Middle Ages, supra note 172, at 215-19; Helmholtz, supra note 211, at 5 (speaking to judge's role as argument for church jurisdiction over "secular" crimes).

n213. Masters, Princes and Merchants, supra note 9, at 51.
As other historians have noted, though the public character of penance was manifest in the patristic literature, under Celtic influence it became increasingly private in the later central Middle Ages. See Masters, Princes and Merchants, supra note 9, at 50. On the Celtic revitalization of penance, see Oakley, supra note 185, at 19. Historians tend to view questions about medieval confession in terms of a dichotomy between the judicial and the penitential. Hence, the maxim that "no one is bound to reveal his own shame" is often seen as being applicable to the public forum such as a trial, but not to the private realm, where one tended one's spiritual life. See, e.g., Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2639-40 (1996).

Le Goff, supra note 174, at 212-13.

See Masters, Princes and Merchants, supra note 9, at 51-52.

See McNeill, supra note 93, at 183 ("the priest did not grant absolution; he supplicated God for it."). By Lateran IV, however, new emphasis was placed upon the import of confession to penance and hence to the necessity of a confessor. Accordingly, the priest's role gained in importance and his supplication for the penitent evolved by the thirteenth century into his pronouncement of absolution. Id. at 185. Still, there was not complete agreement, and whereas many canonists insisted upon the priests' power to reconcile, many theologians kept with the older view of the intercessory role of the priest. Masters, Princes and Merchants, supra note 9, at 50-51.

See Bartlett, supra note 7, at 76-80 (recounting Thomas of Chobham, author of an early thirteenth century Summa Confessorum).

See Van Caenegem, supra note 125, at 69.

Le Goff, supra note 174, at 215-17.

See, e.g., Thomas of Chobham, Summa Confessorum, 429-30 (F. Broomfield ed. 1968).

See Alschuler, supra note 214, at 2539 n.57 (quoting Chrysostom, whose maxim was repeated from the fifth century onward).

Caesar of Heisterbach, A Heretic Healed by Confession Relapses and is Burnt, in 2 Translations and Reprints from the Original
Sources of European History 17 (Dana C. Munro ed., Dep't of History of U. Penn. 1895).

n224. Id.

n225. Id. See also Hexter, supra note 47, at 45. See, e.g., Lea, supra note 41, at 261.

n226. Again, Dante stands as teacher par excellance. See Smith, supra note 169, at 561 (purgation, or suffering, is the way by which "the capacity for the beatitude is regained" and thus, it is a gift). A few legal and intellectual historians pause upon the idea that the ordeal was predicated upon "the assumption that a willingness to suffer pain would demonstrate the ethical truth of an accused." Green, supra note 76, at 111; see also William Ian Miller, Ordeal in Iceland, 60 Scandinavian Stud. 189, 210 (1988). Le Goff traces the idea of purgatorial fire back to Augustine and the idea of a locus for purgatory to the twelfth century. Le Goff, supra note 174, at 73, 216-17.

n227. Green, supra note 76, at 111.

n228. Lea, supra note 41, at 285.

n229. Id. at 286.

n230. Caesar of Heisterbach, supra note 223, at 14-17.

n231. Id.

n232. Id. The rest of the tale explains the homely, (printed five times between 1475 and 1605) in Caesarius of Heisterbach's Dialouge. It was written that many days after the man was "absolved," he rowed with another fisherman on the river:

The house of the aforesaid woman came in sight, then the other said unto him: "I marvel greatly...why the iron did not burn you at the synod though thy sin was notorious." He boasting unworthily of the grace that had been conferred on him (for he had already conceived the purpose of sinning again) smote the river water with his hand and said: "The fire hurt me no more than this water!" Mark the marvelous justice of God! Who had guarded the penitent in his mercy, punished now the same man when he relapsed. For no sooner had he touched the water that it was to him as white hot-iron. He drew back his hand suddenly cried aloud; but he left his skin in the water. Caesar of Heisterbach, supra note 223, at 17.
n233. Id.

n234. See Masters, Princes and Merchants, supra note 9, at 50-51.

n235. See Brown, supra note 10, at 327. Professor Brown views this development as one that undermined the ordeals, allowing for private regret in contrast to the public display of the ancient proof. Yet, it seems the advent of Contritionalism literature would encourage appeals to the Deity. The ordeals arguably protected the private nature of contrition that Professor Brown notes. On Abelard and Peter the Lombard, see Masters, Princes and Merchants, supra note 9, at 50-51. The subject of the ordeals and penance were inextricable. Confession raised many questions in this period. Should it be required or not? Should it be private or made publicly? Was contrition sufficient to reconcile a wrongdoer to the Deity, and if so to the church too? See Oakley, supra note 185, at 60-61, 77-85, 155 (speaking to controversy over compelled or voluntary confession in ninth and tenth century).

n236. See Brown, supra note 10, at 331.

n237. Id.

n238. See Le Goff, supra note 174, at 156 (in late twelfth century, theologians such as Peter Comestor glossed Peter Lombard’s penitential work as teaching that contrition of the heart may be so deep as to allow one to pass through the purgatorial fire after death without undergoing additional acts of satisfaction).


n240. Id. at 284.

n241. Id.

n242. Id.
n243. Bartlett, supra note 7, at 78.

n244. See Helaine Newstead, The Equivocal Oath in the Tristan Legend, in 2 Melanges offerts a Rita Lejeune 1077-85 (Gembloux 1969); Hexter, supra note 47, at 16.

n245. Huizinga, supra note 15, at 86.

n246. Id.

n247. See, e.g., Brown, supra note 10. This legend, in its courtly version combines two literary traditions, the chanson de geste epic centered on loyalty to one's lord and the Romance emphasized loyalty to one's beloved. The courtly arose in the twelfth century. See Hollister, supra note 17, at 244 (-speaking to legend and emergent literary styles of the twelfth century).

n248. Hexter, supra note 47, at 18; Urban T. Holmes, A History of Old French Literature from the Origins to 1300 (1962). Students of medieval literature traditionally assign the many versions of the legend to one of two genres, known as the courtly and the primitive. See Norris J. Lacy & Geoffrey Ashe, The Arthurian Handbook 88 (2d ed. 1997). Courtly versions written by Thomas d'Angleterre (c.1165) descended to us through the poem of Gottfried von Strassburg (c. 1200), the Norse Tristrem Saga by Brother Robert (c.1250), and the English Sir Tristrem (c.1300). Hexter, supra note 47, at 18.


n250. See Hexter, supra note 47, at 20-21 (translating from original).

n251. Id. at 3.

n252. Id. at 21.

n253. See, e.g., Bartlett, supra note 7, at 19.
n254. As Huizinga writes, "Ever since the German minnesingers and Provencal troubadours of the twelfth and thirteenth century first gave voice to the melody of unsatisfied desire, the violins of love had sung ever higher until only Dante could play the instrument purely." Huizinga, supra note 15, at 126. More than a cultural curiosity, courtly love expressed and concentrated the sacramental struggle to beautify life within the framework of forms of love which was placed all Christian, civic, and social virtues. Id. at 127. Often associated with the rise of individualism, courtly love was molded on the devotion of the vassal to his lord where identity remained starkly relational. See Bloch, supra note 15, at 233. As Professor Berman notes, the jurisprudential vision in eleventh and twelfth century western Europe cannot be gleaned without noting the tie between the rise of courtly love, and "the cult of the Virgin Mary... In law itself, mercy asserted itself as a principle under the Greco-Roman name aequalitas ('equity')." Berman, supra note 2, at 196.

n255. As Southern remarks, it was the quality that had vice as its counter pole represented by the words courtois (which we water down to gentleman) and vilain (lout). Southern, supra note 112, at 244. In sixteenth century England, Spenser's Faire Queen is written devoting Book Six to the subject of courtesy, which continues to be understood from within the chivalric tradition and is heralded as the apex of all virtues that particularly governs the relationship of those in need. See Dorothy W. Culp, Courtesy and Fortune's Chance in Book 6 of the Faire Queen, Modern Philology 254-55 (1976).


n258. See Bartlett, supra note 7, at 32.

n259. There are very few records of cases that can be compared against fuller accounts of a trial shedding light upon the ordeal. That being said, some exist. For example, is the plea roll record of Thomas of Elderfield, who was appealed by George of Nitheweie for assault and "his wife similarly." Frederick Maitland, Pleas of the Crown in the County of Glouster 21 (London, MacMillan 1884). What was allegedly done to the wife is unclear. However, in recounting the miracles of Saint Wulfstan, a fuller account is given by William of Malmesbury. The Vita Wulfstani of William Malmesbury 168-75 (Camden Society 1928). Both sources say that trial by battle was adjudged, Thomas was defeated, and subsequently castrated and blinded by the appellant. Of note to the ordeal is that Thomas was indeed guilty of adultery with George of Nitheweie's wife, though not of assault upon either. Prior and during his ordeal, proof, Thomas entrusted himself to "the Lord, devotedly to his aid Mary ... and the blessed Wulfstan." Id. at 174. Nonetheless, he was defeated. Yet, he did not yield faith and nine days after his trial his manhood and sight were miraculously restored not out of his claim of right, but for moving the saint "to compassion with tearful prayerd and noisy groans and deep sighs of devotion." Id at 175.

n260. As Hexter remarks, "one might very well justify a study of equivocal oaths and ordeals by citing either the wide dispersion of the motif or the mere fact of its appearance in three important Medieval story cycles" of the Arthur Legends, Tristan, and Amis and Amiloun. Hexter, supra note 47 at 1. In the Knight and the Cart, (Chretien de Troyes, le Chevalier de la Charrette, of about 1170), Guinevere is
unjustly accused by Meleagant of laying with Sir Kay. Id. at 37-38. Wounded, he had slept beside her with a sword between them. Id. Lancelot, however, had laid with her, sneaking in through a window and leaving a drop of blood upon the sheet from his own wound. Id. After accusation was made, Lancelot defeated Melagant in judicial combat but spared his life. Id. He seemingly tricked by his oath that Guinevere was not an adulteress since she had not slept with Sir Kay. Id. On the import of the old French epic, or chanson de geste, see Holmes, supra note 248, at 66.

n261. See Philippe Nonet, What is Positive law?, 100 Yale L.J. 667, 693-94 (1990) ("What makes longing impossible to fulfill? The answer is: time.").

n262. Burkhardt, supra note 1, at 273-77.

n263. See Berman, supra note 2, at 72-73. Professor Berman argues that the ordeal was directed at controlling the blood feud and he contrasts it with the Christian law of penance.

n264. See, e.g., William Ian Miller, Choosing the Avenger: Some Aspects of the Blood Feud in Medieval Iceland and England, 1 Law & Hist. Rev. 159, 160, 202 (1983) (speaking to the law of feuding as opposed to the existence of war or anarchy as well as the place of forgiveness in the blood feud's ritual); Whitelock, supra note 90, at 39-45. See Adding Insult to Iniuria, supra note 199, at 168.


n266. See Pitt-River, supra note 199, at 27. Roman law and other European legal systems, such as the French, Italian, and Spanish, recognized in the action, actio iniuriarum, liability for insult that affronted honor. See Adding Insult to Iniuria, supra note 199, at 160.


n268. See Wormald, supra note 195, at 10 (1998) (Wormald detects a changing meaning to bot by the early tenth century with the act beginning to reflect making payment to the king or community at large); Katherine F. Drew, Public vs. Private Enforcement in the Early Middle Ages: Fifth to Twelfth Centuries, 70 Chi.-Kent L. Rev. 1583, 1585 (1995) (characterizing compensation as a form of tort payment).

n269. See Whitman, supra note 267, at 69 (speaking to Kentish Laws of 602 which spoken to friends aiding in settlement).
n270. See Beowulf, supra note 95, at 100 (speaking to the Germanic way of vassalage based upon trust, and the giving of wealth as signification of one making honorable homage or amends depending upon the context). There were crimes of which no bot could be had and instead a solemn death was suffered. This was particularly true in cases of cowardice and treason. Pollock & Maitland, supra note 4, at 452. Nevertheless, this does not evidence a switch from a penitential vision to a retributive one. Most difficult to accept is that once penance is tied to offerings rather than payment, no rule of proportionality exists. One may be "restored" and yet die. And indeed, as Maitland remarks, these solemn deaths were performed as sacrifices to the gods. The giving and transfer of wealth constituted "visible proof that all parties [were] realizing themselves to the full in a spiritual sense." See id. at 454.


n272. Leges Henrik Primi, supra note 157, at 143 c36, 2, 2a.

n273. Id.

n274. See Pitt-River, supra note 199, at 59. Of significance here is Aristotle's teachings on the great-souled man. "He is fond of conferring benefits, but ashamed to receive them, because the former is a mark of superiority and the latter of inferiority... He must be open in both love and hate since concealment shows timidity... He does not bear a grudge, for it is not a mark of greatness of soul to recall things against people, especially the wrongs they have done you." Aristotle, Nichomenhen Ethics IV:3 (Rackham trans. 1947). The same virtues are celebrated in the Song of Roland where Charlemagne is depicted as "just, prudent, magnanimous, and devout" calling his "young bachelors his sons." Sayers, supra note 57, at 14-15.

n275. Professor Brown suggests that the ordeal allowed participants to distance themselves from the concrete conflict and thereby avoid losing face. Brown, supra note 10, at 313. In this way he sees the ordeal as allowing a resolution to be "devoid of much of the odium of human responsibility." The opposite seems true. A necessary condition of responsibility is judgment, i.e. thoughtful action as opposed to reaction. Whereas vengeance is highly reactive, it is in the decision to choose to forego vengeance that responsibility is introduced into a situation. This took place at the ordeal by all deciding to undergo it rather than to feud. Moreover, responsibility connotes a "response," which asks one to see, hear, and taste "not I," to put aside one's ego, a difficult act for, say, a knight, where honor is tied to continual self-presenting. Thus, insofar as men did step outside a situation to take distance, enormous responsibility showed itself.

n276. See Hyams, supra note 10, at 92.

n277. Id. at 94 (recounting tale). Professor Hyams sees the story as a window into the political nature of the ordeal with the village Reeve being viewed by the populace as part of a despised ruling elite.
n280. See Hyams, supra note 10, at 93-94.

n285. The Death of King Arthur 9-21 (J. Cable, trans. 1971). The tale forms the last part of three romances called the Vulgate Cycle, the first two being Lancelot and the Quest for the Holy Grail. Scholars conclude that all are the work of different authors. There are few mentions of the Arthur legend before The History of the Kings of Britain (c. 1135) by Geoffrey of Monmouth, who wrote in a somber Latin prose. The French "romance" translations and expansions appear in (c.1160-90) in the work of Chretien de Troyes where Lancelot appears.
n289. Id. at 179-85.

n290. Id. at 177.

n291. Similarly, the chansons de geste (song of deeds) of the twelfth and thirteenth centuries, as for example in Raoul de Cambrai, are vast frescos of wrongs done, unquenchable wraths, vengeances that transform persons into the monsters they fought, further wrongs, until a hero halted all by beseeching forgiveness for a sin See Jean-charles Payen, Le Motif du Repentir Dans la Litterature Francaise Medievale 199-200 (Geneva, 1967).

n292. At the time of the Norman Conquest, one could not take vengeance without first seeking legal redress. See Beckerman, supra note 199, at 166-67. After the Norman Conquest, there is some indication that some private feuding was condoned. Id. at 167. Whether or not approved, it continued well into the Fifteenth century with arbitrators often being hired to mediate difficult and complex feuds between lords. See generally, Powell, supra note 172, at 27-29.

n293. See Pitt-River, supra note 199, at 26. See, e.g., Holmes, supra note 248, at 98 (speaking to the tale of Raoul de Cambrai from the end of the twelfth century). Medieval literature is best designated by type rather than by languages (all work was in Latin with some being translated into vernacular). The link is between tales of kinds of life that crossed national boundaries such as the feudal code detailed in Raoul.

n294. Richard Fraher suggests that the vulgar ordeals were heavily used in large part due to the aggressive campaign of the Church which found the traditional roman-canonical procedure too cumbersome. Preventing Crime in the High Middle Ages, supra note 172, at 216-17. This desire however is not incompatible with the above when one takes the long view comparing resort to the ordeal with the modern confidence in man's reasoning powers. See, e.g., Mirjan Damaska, Free Proof and its Detractors, 43 Am. J. Comp. L. 343, 353 (1995) [hereinafter Free Proof and its Detractors].

n295. Indeed, the notion would not be conceivable for the twelfth century was still a time that saw nature as the Divine's revelation rather than as a barrier to bearing witness. See Eco, supra note 145, at 24 (1988) (speaking to John Scottus Eriugena who tracked Dionysius and who Eco postulates was representative. "For him, the relations between God and things were not solely causal, but were also like the relations between sign and signified. The created world is a revelation. Nature is a theophany.").

n296. See Le Goff, supra note 174, at 213 (recounting the late twelfth century focus upon the works of Anselm of Laon and Yves of Chartres teachings on the connection between sin and intention).

n297. See Green, supra note 76, at 119.
n298. See 3 Holdsworth, supra note 61, at 373-74 (noting judges refusal to "try a man's thoughts."). The English common law was stubborn on this point and did not recognize intention defenses until long after the ordeal had ceased. Verdict According to Conscience, supra note 203, at 86-93, 98-100.

n299. As Professor McGovern puts it, "today we are bold enough to try to determine not merely a man's intent, but his motive. Medieval law was less sure of its powers." William McGovern, Contracts in Medieval England: Wager of Law and Effect of Death, 54 Iowa L. Rev. 19, 61 (1968). Recently Richard Green has argued that arguably the medieval reluctance to probe intention was tied to the older notion of the impropriety of searching "out the mysteries of the offender's personal deity," i.e., fate. See Green, supra note 76, at 303.

n300. Reprinted in Bartlett, supra note 7, at 74-75 (emphasis added).

n301. Id. at 75

n302. See Oakley, supra note 185, at 136-37.

n303. Traditionally, there is said to be a movement from epic to romance, whereby in the former, the tale focuses upon men's deeds whereas in the latter it shifts to the internal and private quest of individuals. See, e.g., Southern, supra note 112, at 243-44 (comparing The Song of Roland with Chretien's tales of King Arthur). Nonetheless, in the work of the Richardian poets, Richard Green points out that intention and motive remain obscure with outer action continuing to remain to be what the reader should judge. Green, supra note 76, at 326.

n304. See 3 Holdsworth, supra note 61, at 373-74 (the search for intention, or a level of intention was considered akin to trying a man's thoughts); Green, supra note 76, at 111-19.

n305. See supra notes 84-86 & accompanying text.

n306. See Free Proof and its Detractors, supra note 294, at 343-44 ("If it were possible to devise a reliable scheme for the measurement of probative value - as early Enlightenment philosophers believed to be the case - powerful arguments would have had" to be made). See Meyer, supra note 123, at 659 ("The world is not a creation of our consciousness or our experience, but, as our surroundings, it gives itself to us to think. We need to focus on that giving.").

n307. This "giving a chance" to the accused is also noticed by Colin Morris. Morris, supra note 46, at 96.
n308. On the canon law of procedure and evidence in the twelfth and thirteenth century, see Allessandro Giuliani, The Influence of Rhetoric on the Law of Evidence and Pleading, 62 Jurid. Rev. 231-51 (1969). Along with the canonical development of probable truth and principles of relevancy and materiality came elaborate rules for evaluating evidence: testimony of a woman counted only one half and had to be supplemented by testimony of at least one man; the testimony of a nobleman counted more than that of a commoner; and that of a priest more than of a layman. Mauro Cappelletti and Joseph M. Perillo, Civil Procedure in Italy 35-36 (The Hague, 1965); A. Esmein, A History of Continental Criminal Procedure 10-11, 78-79 (J. Simpson trans. 1913).

n309. As Professor Damaska points out, there continues to exist a conflict in evidence law about how a fact-finder engages in enquiry and discovers. Against the school of thought that insists reason is a faculty of experience and logic are those who insist upon "intuitive components which cannot fully be expressed in propositional form." Free Proof and its Detractors, supra note 294, at 346.

n310. See Brown, supra note 10, at 309.

n311. See Theodore Meron, War and Chivalry in Shakespeare ch. 5 (1998) (speaking of shift in early middle ages from culture of shame built on code of chivalry and the concern to die honorably to a culture of guilt whereby the cultural focus was upon a war's ultimate justness).

n312. See, Brown, supra note 10, at 310.

n313. Id. at 319-21.

n314. See Burkhardt, supra note 1, at 284 (speaking to strength of redemptive theology from Middle Ages in the more humanist secular environment of Renaissance Italy).

n315. See Masters, Princes and Merchants, supra note 9, at 316.

n316. Id. at 317.

n317. Id.
n318. Id.

n319. See Masters, Princes and Merchants, supra note 9, at 317.


n321. See Masters, Princes and Merchants, supra note 9, at 83-87.

n322. See Watson, supra note 2, at 20-30 (discussing relevancy of each section in medieval legal education). See Berman, supra note 2, at 122-23.

n323. See, e.g., Cappelletti et al., supra note 308, at 13-18.

n324. The procedural and substantive Roman law studied in the university was not the prevailing law of either the ecclesiastical or secular courts which adhered to local customs and practices. Most notable are the works of the great canon lawyer Ivo of Chartres (1040-1116). See Intellectual Preparation, supra note 9, at 617-18. Although little of the work of the early Bolognese jurists, civilian or canonist, was aimed at suggesting alternative procedures to the courts, their work affected the church courts particularly the papal court under Pope Alexander III (1159 -1181). See Proof by Witness, supra note 34, at 128.

n325. Gratian, Decretum, 1 Corpus Juris Canonici (E. Friedberg ed., 1879, reprint 1959) [hereinafter Decretum]. For a discussion of the import of the Decretum, see Chodorow, supra note 156, at 1-4. Gratian's Decretum was adopted by the law teachers as the standard introductory text for the study of canon law. See Kenneth Pennington, The Spirit of Legal History, 64 U. Chi. L. Rev. 1097, 1103 (1997). Gratian pulled from many sources including Roman and Germanic law, the later works of Bede, papal letters, canons from both provincial and ecumenical councils, writings of the Church Fathers and scripture. See Chodorow, supra note 156, at 3-4.


n327. Intellectual Preparation, supra note 9, at 617.
n328. Id.

n329. IV Lateran's Revolution in Criminal Procedure, supra note 11, at 99.

n330. Representative are Professor Helmholz's findings in regard to canonical purgation administered by the Church courts in a variety of criminal cases. He found that a vast majority of cases, the accused was cleared. See Crime, Compurgation, and the Courts of the Medieval Church, supra note 211, at 5-10.

n331. See Southern, supra note 112, at 172.


n333. See id.

n334. See Masters, Princes and Merchants, supra note 9, at 326.

n335. Id. at 326-27. He made six related, but independent, arguments: 1) the ordeals tempted God; 2) the proof was without scriptural support; 3) miracles by definition were not necessary; 4) the ordeals reflected mere superstition; 5) the New Testament had outlawed such rituals which were concession to the "malice" of the Jews; and 6) "God's promise of intervention applied only to the righteous, and our present sins hinder modern miracles."

n336. See Southern, supra note 112, at 172-77; Masters, Princes and Merchants, supra note 9, at 77-80.

n337. Southern, supra note 112, at 172-73.
n338. See Masters, Princes and Merchants, supra note 9, at 325.

n339. On the place of allegory and tropologies in scriptural exegesis and its attack in Reformation England, see Thomas Luxon, Not I, But Christ: Allegory and the Puritan Self 915-16 (1996). Many of the reformer arguments seem to simply track the earlier arguments of Peter the Chanter and his group.

n340. Masters, Princes and Merchants, supra note 9, at 94.

n341. The canonists and theologians faced a variety of sources in a less than uniform tradition. While canonists treated scripture as paramount, the church fathers were assumed to have also been divinely inspired. Hence, their words needed to be given all weight. See Peter G. Stein, Judge and Jurist in the Civil Law: A Historical Interpretation, 46 La. L. Rev. 241, 243 (1985). The legists faced similar problems. Justinian's texts were perplexing, at times contradictory, and bulky. Id. at 243; Watson, supra note 2, at 144-46; Brian Stock, The Implications of Literacy: Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries 523 (Princeton 1983).

n342. Chodorow, supra note 156, at 2-3 (scholars have struggled over the question of Gratian's source of method though many conclude that he took his method from Aberlard).


n344. Id.

n345. Id.

n346. Id.

n347. Abelard, supra note 343, at 63-65.

n348. See 3 Pelikan, supra note 14, at 228.
n349. See Masters, Princes and Merchants, supra note 9, at 323. The civilians ignored the ordeals when considering judicial proof for they were non-Roman in origin. They made some room for presumptions and the oath. By and large, however, the emphasis was upon witnesses and written instruments. See Bartlett, supra note 7, at 83-85. The theologians, on the other hand, had begun to draw divisions between the Old and New Testament holding that the latter altered many laws of the former. See Masters, Princes, and Merchants, supra note 9, at 325-326. For example, judicial battle was justified by reference to David and Goliath, and the ordeal of water by the Mosaic test of bitterwaters. Peter the Chanter saw both as stories of divine interventions for only those specific situations. Id. at 326. Finally, Pope Gregory IX mandated that the authority of ancient custom was not slight, but it could only prevail against positive law if it had legal prescription. Peter the Chanter concurred, writing in his Verbum Abbreviatum that even "honest" traditions impeded the law of God (scripture) because of their great number. Id. at 324.


n351. Id.

n352. See Berman, supra note 2, at 45. Many of the canonists were not sure about the ordeals and Gratian left the question of their legitimacy open. See Van Caenegem, supra note 125, at 69; Proof by Witness, supra note 34, at 129. The Decretum assembled both the authorities, opposing the ordeals as well as those sanctioning them such as the ordeal of the Eucharist, which allowed bishops and priests to clear themselves of false accusations. Later commentary was added to the Decretum that generally supported the ordeals, which included two council canons from the ninth century. Gratian's indecision as well as the ambivalence of previous popes and councils engendered a certain reluctance on the part of canonists to disapprove the proof. Professor Baldwin suggests that Pope Innocent III was unsure up to the eve of Lateran IV. Masters, Princes and Merchants, supra note 9, at 325.

n353. See, Masters, Princes and Merchants, supra note 9, at 325.

n354. See Intellectual Preparation, supra note 9, at 624 (setting forth Huguccio's Summa).

n355. Masters, Princes and Merchants, supra note 9, at 326.

n356. Id.

n357. Richard Fraher locates the nascent theory of deterrence in the mid-twelfth century though he too thinks it awaited full development until the early thirteenth. So too, he sees this development as displacing an older penitential notion of uncovering and curing wrong. See Preventing Crime in the High Middle Ages, supra note 172, at 215. He tends to view the theory as a secondary thought to justify the
pre-existing aims of a reforming church. Yet it seems that to understand why this specific theory was now acceptable, as against the older idea of tolerating wrong, one must push at its foundational presuppositions. What one uncovers is a very non-sacramental vision of mankind notwithstanding that this was the age that institutionalized the sacraments. It is seemingly related that it is also the twelfth century which finds an other worldly locus for purgatory whereas in prior centuries the idea hovered of the possibility of beginning one's ultimate penances during one's lifetime. See Le Goff, supra note 174, at 136-38.

n358. Not atypical is emphasis placed on Roman Law that it was against the "public interest to grant remission of punishments 'least people be encouraged to dare to commit crimes.'" Preventing Crime in the High Middle Ages, supra note 172, at 220 (also see collected sources therein).

n359. Id. at 231 (quoting Durandus of Pourcain who appears to have spoken majority view of high middle ages).

n360. Jolly, supra note 150, at 73, 82 (speaking to shift the definition of a miracle which in Saxon period potentially referenced all hidden meaning in nature and in the twelfth became that which interfered with nature).

n361. See Theoretical Justification, supra note 202, at 577.

n362. Id. at 578.

n363. Id.; Preventing Crime in the High Middle Ages, supra note 172, at 212; Walter Ullmann, Some Medieval Principles of Criminal Procedure, 59 Juridical Rev. 1, 13-14 (1947) (writing of early to middle fourteenth century).


n365. E.g., Richard Fraher, Tancred's Summula de criminibus: A New Text and Key to the Ordo iudiciarius, 9 Bull. Medieval Canon L. 23-36 (1979). The most popular textbook on procedure, Durantis' Speculum iudiciale, published around 1272, took up a similar call. Professor Fraher sees the emphasis upon discovering and punishing crime as the explanation for chipping away at 'defendants' rights ... fixtures of the Romane-canonical tradition." Theoretical Justification, supra note 202, at 584.

n366. The maxim translates to mean "as a matter of public utility, crimes should not remain unpunished." Theoretical Justification, supra note 202, at 578. During the thirteenth and fourteenth century, a proliferation of monographs were written on criminal law and procedure. Ullmann, supra note 363, at n. 1. By the first half the fourteenth century, Bartolus, whose commentaries on Roman laws contemporary jurists looked upon as definitive, took up the same banner. Id. at 8-9.

n368. The highest expression of this faith is in Dante's Purgatory. See Smith, supra note 169.


n370. See Theoretical Justification, supra note 202, at 593. Professor Fraher suggests that in regard to the principles underlying canonical criminal procedure, the civilians borrowed from the canonists rather than the other way around. Id. at 594-95. Professor Smith observes that aspects of the retributive and preventive stance can also be seen in Dante's work and the former in Aquinas's. See Smith, supra note 169, at 539 & n. 9.

n371. See Preventing Crime in the High Middle Ages, supra note 172, at 219 (point of contention between canonists and legists); Masters, Princes and Merchants, supra note 9, at 51 ( tension between spiritual and secular estates). See also Chodorow, supra note 156, at 113-14 (Gratian left the question of confession open. On one hand, the teaching that private contrition was sufficient left canon lawyers without a justification for the ecclesiastical authority's judicial power for the Church was conceived of as one sphere. Yet, insisting upon regular confession would split the earthly from the heavenly insofar as Church governance of its flock and spiritual redemption became distinct. Not good, for the essential unity of the two was a basic principle of Christian ecclesiology).

n372. Since the seventh century, divide existed over the necessity of confession, the sufficiency of contrition, the import of formal reconciliation, and the requirement of public as opposed to private penance. See, e.g., Oakley, supra note 185, at 25.

n373. See Theoretical Justification, supra note 202, at 582.

n374. Id. (quoting the thirteenth century canonist Hostiensis).

n375. Id. at 585.
n376. See Ullmann, supra note 363, at 8.

n377. Id.

n378. Id. at 26.

n379. See Plucknett, supra note 3, at 119.

n380. Id.

n381. There is evidence of juries being occasionally used since 1195. See Verdict according to Conscience, supra note 203, at 3.


n383. Frederick Pocock, The King’s Peace in the Middle Ages, 13 Harv. L. Rev. 177 (1900); J.H. Baker, An Introduction to English Legal History 571 (3d ed. 1990). See also Whitman, supra note 267, at 52-59. Patrick Wormald has argued that this movement occurred earlier than Henry II’s reforms, where most historians place it. Wormald, supra note 195, at 20. He argues that in late Anglo-Saxon law there was already a move from compensation to penalty by the King’s hand. Id.

n384. See, e.g., Verdict According to Conscience, supra note 203, at 22. In the mid-fourteenth century, for example, the conviction rate for homicide was about 15% and about 32% for theft; see J.G. Bellamy, Crime and Public Order in England in the Later Middle Ages 124 (1973). See also Pugh, supra note 92, at 83-88. Both pulpit and Crown grumbled that “compassion” rendered justice void with the juries acquitting far too many wrongdoers. Bernard W. McLane, Juror Attitudes Towards Local Disorder: The Evidence of the 1328 Trailbaston Proceeding, in Twelve Men Good and True 36 (J.S. Cockburn & T. Green eds. 1988). The bench accepted verdicts of self-defense notwithstanding that coroner indictments show a number of cases were sudden arguments that resulted in death.

n385. See Irwin Langbein, The Jury of Presentment and the Coroner, 33 Colum. L. Rev. 1329, 1331 (1933). The coroner held an inquest in a village where a death occurred. The presentment jury could be amerced, heavily fined, for concealing facts or for false presentment. The coroner was a “keeper of the peace,” usually a knight. The office was thought to have begun around 1194. Id. at 1340.
n386. See McLane, supra note 384, at 65.

n387. With the institution of presentment, whereby the crown commissioned justices to hear the hundred-jury presentments, the crown took control over the law of felony, whereby offenses became pleas of the crown and hence subject to the death penalty. Verdict according to Conscience, supra note 203, at 9, 30. Blinding and/or castration remained a punishment for rape in some places during the thirteenth century. In addition, in some places, the custom was death by decapitation rather than hanging. See, e.g., Seipp, supra note 60, at 61.


n389. During the Anglo-Saxon period, only those who committed murder by stealth were subject to a blood sanction, whereby open man-slaying could be resolved by the payment of a victim's wergeld. Verdict According to Conscience, supra note 203, at 31. James Givens stresses the medieval acceptance of violence as an appropriate means for resolving dispute; Givens, supra note 388, at 213. So too, as G.G. Coulton has observed, the privilege to resort to feud was claimed by the peasant class as well as the knightly. G.G. Coulton, The Medieval Village 188 (1989).


n391. Id. at 46-70; Milsom, supra note 158, at 422-23; McLane, supra note 384, at 58; Pugh, supra note 92, at 89.

n392. See Verdict According to Conscience, supra note 203, at 28-64; Robert C. Palmer, Conscience and the Law: the English Criminal Jury, 84 Mich. L. Rev. 787, 792-94 (1986) (Professor Palmer focuses upon the issue of a defendant's present moral standing as being pivotal both at the ordeal and at jury trial); Thayer, The Jury and its Development, 5 Harv. L. Rev. 244, 378 (1892) ("always scope was allowed to the sentiment that there should be mercy and caution in cases."). For a little later period see Pat M. McCue, Justice, Mercy and Late Medieval Governance, 89 Mich. L. Rev. 1661, 1671 (1991). P.G. Lawson thinks that (at least in the context of sixteenth century jury verdicts) the historian should not too readily assume mercy as a basis for verdicts. He argues that instead more modern attitudes about the need for exemplary punishment may have informed "selective" verdicts. P.G. Lawson, Lawless Juries? The Composition and Behavior of Hertfordshire Juries 1573 - 1624, in Twelve Good Men and True 156 (1988). Yet, in the thirteenth century, these attitudes and concepts simply were not prevalent in England's cultural vocabulary.

n393. As Professor Damaska notes, the continental response to the ordeal ban was truly "revolutionary" whereas the English response was "evolutionary" in that the jury trial grew out of the prior ordeal. Free Proof and its Detractors, supra note 294, at 357 n.41. On the strength of the preventive theory in the Italian City-states, see Preventing Crime in the High Middle Ages, supra note 172, at 229.
n394. Statute of Westminster, reprinted in McLane, supra note 384, at 36.

n395. See Thayer, supra note 392, at 377-78.

n396. 2 Bracton, supra note 60, at 306.

n397. Thomas Green, A Retrospective of the Jury Trial, in Twelve Men Good and True 386-87 (J.S. Cockburn & T. Green eds. 1988) [hereinafter A Retrospective of the Jury Trial].

n398. See, e.g., John H. Langbein, Albion's Fatal Flaws, in 98 Past & Present 96, 119 (1983); Douglas Hay, Property, Authority and the Criminal Law, in Albion's Fatal Tree: Crime and Society in Eighteenth Century England 17-63 (1975). Though Professors Langbein and Hay are concerned with a later period, their argument is representative of the problem with conflating equity and grace. In response to Professor Hay's argument that the pardon power was used by the ruling elite to "demonstrate their influence," exact deference, and "enhance... their reputation... [and] authority," Professor Langbein argues for the pardon power as an equitable adjustment for an overly harsh criminal code. Hay, at 41-42; Langbein, at 102-06. What is discounted, implicitly, is the language of repentance (which is tied to neither equity nor class warfare but to a deeply embedded and complex spiritual knowledge) that permeates the judges notes on why a particular pardon should be granted. See Verdict According to Conscience, supra note 203, at 283 n.53 (noting penitential language in pardon recommendations in later eighteenth century).

n399. See, e.g., The King's Pardon for Homicide Before A.D. 1307, supra note 197, at 1. Miss Hurnard writes that the pardon power was "grossly over-employed. Criminals were pardoned before trial from motives, which were unrelated to circumstances of their crime, with no suggestion of extenuation, and in complete disregard for the deterrent force of prospective punishment." Id.

n400. See Peter Landau, Aequitas in the Corpus Iuris Canonici, 20 Syracuse J. Int'l L. 95, 96 (1994). As Doctor Landau points out, in the Middle Ages, "equity was identified with justice in its meaning and seen in opposition to all sorts of moderation, indulgence, and commiseration as a singular deviations from justice." Id. By justice, Isidor of Sevilla taught, one corrects by equity but forbears with commiseration. Id.

n401. See supra notes 187-93 & accompanying text.

n402. A point emphasized in the fourteenth century poem, Pearl, with the allegory of a penny to all in common. See Pearl, xxii (E.V. Gordon ed. 1990).
n403. T. Hoccleve, The Regiment of Princes 90 (Early English Text Soc'y, Extra Series 72) (F. Furnivall ed. 1978) (1897). See, e.g., McCue, supra note 392, at 1670 ("reconciliation and forgiveness, not retribution, were for centuries the ideal means to maintain peace") (reviewing Edward Powell, Kingship, Law and Society (1989)).

n404. Milsom, supra note 158, at 5; Free Proof and its Detractors, supra note 294, at 357 n.41 (England substituted the "inscrutable vox dei expressed in trial by ordeal with the inscrutable vox populi expressed in jury verdicts.").

n405. Plucknett, supra note 3, at 137; 1 Holdsworth, supra note 61, at 317.

n406. How the jury informed itself is unclear. Circulated suspicions, the accused's reputation, his bearing in his community after presentment and prior to trial at the eyre, and information provided to local officials must, taken together, have generated a loose communal knowledge of the facts. Verdict According to Conscience, supra note 203, at 17. It is not clear when the jury stopped being self-informed. Some historians conclude that it was as early as 1290, given that at times a jury conceded that it acquitted because it was ignorant of the facts. See McLane, supra note 384, at 56. In McLane's research, some jurors came from as far away as five miles of the scene of a crime. Id. What is certain is that towards the end of the Middle Ages, the trial jury underwent a change from active witnesses and sayers of the law to passive receivers of information. John H. Langbein, Historical Foundations of the Law of Evidence: A View From the Miles Sources, 96 Colum. L. Rev. 1168, 1170-71 (1996) [hereinafter Historical Foundations of the Law of Evidence]. As Professor Langbein points out, it is the instructional jury that opens the possibility to a law of evidence. Id.


n408. Pugh, supra note 92, at 95.

n409. See J.M. Kaye, Placita Corone 30 (1966) (one of few thirteenth century legal treatise in England); Milsom, supra note 158, at 412.

n410. See Verdict According to Conscience, supra note 203, at 16.

n411. Id.

n412. See 2 Pollock and Maitland, supra note 4, at 623 ("the summoning of a jury is always... in theory the outcome of consent and submission").
n413. See John H. Langbein, Torture and Proof 75 (1977) (remaining true until 1772).

n414. See 1 Stephen, supra note 18, at 253. (quoting article 127 of the Mirror). See id. at 6 ("It is almost impossible for us to imagine how difficult it must have been for the ordinary people of that age to accept that substitution.);
Fisher, supra note 8, at 574-75.

n415. 2 Pollock & Maitland, supra note 4, at 650; Plucknett, supra note 3, at 126.

n416. Fisher, supra note 8, at 574-75; Langbein, supra note 413, at 6 ("It is almost impossible for us to imagine how difficult it must have been for ordinary people of that age to accept the substitution").

n417. If the accused refused the jury, statute provided that he was to be placed in prison with the word "prison" eventually read as "peine," torture. Milsom, supra note 158, at 411; Roger Groot, The Jury in Private Criminal Accusations Before 1215, 27 Am. J. Legal. Hist. 113, 118 (1983) [hereinafter The Jury in Private Criminal Accusation]; Holdsworth, supra note 61, at 310. Previously, if one refused to go to the severe ordeal, he could be put to death.

n418. See, e.g., Baker, supra note 383, at 580.

n419. See, e.g., The Early Thirteenth Century Criminal Jury, supra note 39, at 18. The first consistent use of the phrase is in 1220. Id.

n420. If it was determined that he willfully refused to place himself upon the country, it was said "let him be put to [his] penance, until [he] prays to go it; and let [his] penance be this, that [he] be barefooted, ungirt and bareheaded, in the worst place of the prison, upon the bare ground...and that [he] be put in irons." Britton, An English Translation and Notes 21-22 (Francis Morgan Nichols ed. 1901). (This thirteenth century treatise is attributed to Britton, though authorship is uncertain).

n421. See Michael E. Goodich, Violence and Miracle in the Fourteenth Century 52-53 (1995). Of interest in England is St. Thomas of Hereford, who is said to have rescued a man accused of murdering thirteen persons in 1291 and of a thief accused of stealing oxen who was hung three times before the sentence was put aside.
n422. See Kemmier, supra note 197, at 140-41; Goodich, supra note 421, at 48. In the Fourteenth century there is some concept of contractual duty between Deity and devotee; however as Professor Green points out there is also the counter notion in Langdell whereby it is stressed that works cannot evoke grace. GREEN, supra note 76, at 367-68. The import of submitting to the judgment of the jury suggests itself in a sample of three counties from 1400-1429 looked at by Edward Powell. He notes the astounding fact that in 280 indicted offenses for rape, not a single man was convicted for the offense. Id. at 102. Some of these men were cleric living with concubines and hence, Powell concludes, the indictment signified the judgment and represented sufficient punishment.

n423. See supra notes 235-37 & accompanying text.

n424. Macnair's recent work stresses the witness function of the early jury; yet he relies heavily upon the availability of attaint for perjury to support this proposition. Macnair, supra note 83, at 547. The sanction is mentioned by Glanvill in passing, Glanvill, supra note 29, at ii, 12, p. 32, though Bracton appears to consider the possibility of a sanction for false judgment. 2 Bracton, supra note 60, at 3:71. Attaint does not support seeing the jury as traditional witnesses in the criminal context, however, given that it was not employed in the non-civil proceeding.

n425. Damaska, supra note 17, at 1820. Professor Damaska draws the other connection pointing out that oath-helpers most likely also held a quasi-witness function in that it was likely that they knew something about the case in question. Rational and Irrational Proof Revisited, supra note 12, at 29.

n426. See Green, supra note 76, at 209.

n427. In argument, it may be said the above is all well and fine, but the accused likely sensed or knew his fate prior to placing himself on the jury given that this system was dependent upon the tight knit relations of small communities. Perhaps, but this leaves unexplained those cases, where an accused confessed to a crime, throwing himself upon his god and country in another way and was forthwith hung. See, e.g., The Early Thirteenth Century Criminal Jury, supra note 39, at 15 n.50. So too, most persons accused of trespasses confessed their guilt and asked to pay a fine. See McLane, supra note 384, at 54. In addition, there is the English oddity of benefit of clergy whereby a cleric accused of a felony could be tried in a lay court but then was surrendered to the bishop's proctor for punishment in the courts Christian. Pugh, supra note 92, at 89-90. The requirements were not strict. One must be literate, tonsure, not dressed as laymen, and not twice married or married to a widow. Id. Hanging was avoided, and in some instances, any punishment at all was avoided. Many, who apparently qualified for benefit of clergy, did not make the claim. And those who could easily deceive the court by obtaining clothes, shaving their head, and reading (the few requirements) refrained.

n428. Bartlett, supra note 7, at 80-81.

n429. A point also implicitly suggested by Professor Thomas Green who writes that often common malefactors were sometimes acquitted "for agreeing to appear and put their lives on the country - and, I would say, for thus implicitly reuniting themselves with the local community." A Retrospective of the Jury Trial, supra note 397, at 366.
n430. Green, supra note 76, at 105.

n431. Macnair's recent work stresses the witness function of the early jury. Macnair, supra note 83, at 547.

n432. See, e.g., A Retrospective of the Jury Trial, supra note 397, at 360-61; Crime, Compurgation, and the Courts of the Medieval Church, supra note 211, at 19-20, 25 (noting the exceedingly low conviction rate at jury trial as well as in the spiritual forum where trial was by compurgation).

n433. See Jury Trial at Gaol Delivery in the Late Middle Ages, supra note 388, at 91. Until 1375, it was not unlikely that a number of the original presenters now swore the verdict. See Verdict According to Conscience, supra note 203, at 15; The Jury of Presentment Before 1215, supra note 81, at 24.

n434. In the mid-fourteenth century, as in prior ages, the pervasiveness of saint cults in England as well as charitable activity, funerary rites, the prevalence of anchorites and anchoresses, and tales of miracles that allow guilty men to escape the gallows all attest to the firm, though varied, religiosity of the English medieval in the later age. See Keen, supra note 169, at 271-72. See Anthony Musson, Twelve Good Men and True? The Character of Early Fourteenth Century Juries, 15 Law & Hist. Rev. 115, 131 (1997). Professor Musson stresses that the value one placed upon one's oath as well as the gift culture, where presents were both normal and expected, should measure any inferences about the frequency of bribery. Id.

n435. See Robert Palmer, The Whilton Dispute, 1264-1380: A Social-Legal Study of Dispute Settlements in Medieval England 211 (1984) (in the context of the civil jury, Professor Palmer makes a like point suggesting that "when [jurors] swore to tell the truth they perhaps felt their oath had more to do with justice than an historian's conception of truth").

n436. See Rational and Irrational Proof Revisited, supra note 12, at 25 (making the same point and suggesting that the divide between fact and law was, in part, prompted by the arrival of appellate review on the Roman-canonical model). On the tradition of fusing fact and law in the English law, see, e.g., Paul Vinogradoff, Villainage in England 337 (Oxford 1892).


n438. Green, supra note 76, at 40.

n439. Quoted in Yarn, supra note 173, at 68 (from Arbitirim Redivium or The Laws of Arbitration (London 1694)); Barbara A. Hanawalt, Community Conflict and Social Control: Crime and Justice in Ramsey Abbey Villages, in xxxix Mediaeval Studies 402 (1977); Crime,

n440. Here, I depart from Macnair who sees in the jurors as “witnesses to local reputation” understood in the canonical sense of fama, whereby in Gratian it was said strong public suspicion of a crime would in some cases be sufficient to put a person to an ordeal, notwithstanding that there was no accuser or witness. Macnair, supra note 83, at 537. In the context of jury proof, it seems only sensible to see the juror's witness role as closer to compurgation. Focused attention to the language both Latin and Middle English suggests that after fama (rumor) was established, what was "tried" was not the accused's innocence, but rather his character as evidenced by what the oath-helper was to attest. Moreover, in the context of the presentment jury, it retained an evaluative function in that while fama sufficed to bring a man to his trial, the presentment jury held wide discretion about whether he would be put to his proof. See Jury of Presentment Before 1215, supra note 81, at 7-10.

n441. See Green, supra note 76, at 20 (speaking to Richard Rolle's use of trouth to render the Latin fidelity).

n442. Id. at 17-23 (speaking to Middle English usage transcending simply loyalty to equate trouthe with highest moral goodness).

n443. See Pugh, supra note 92, at 98. Similarly, acquittals obtained in homicide prosecutions at times appeared to have turned upon whether an accused could find pledges to ensure his future good conduct. See McLane, supra note 384, at 59, 61.

n444. See Musson, supra note 434, at 138.

n445. See McLane, supra note 384, at 49 ("presentment jurors in most such cases were probably much more concerned with establishing the notoriety of these habitual petty offenders than with prosecuting specific offenses they had committed").

n446. Groot, supra note 39, at 33. See McLane, supra note 384, at 52. Another representative example is the case of Peter Swine. With his accomplices, he was charged with breaking into a building at night with force of arms and stealing goods worth 10 pounds. He was prosecuted for trespass, notwithstanding that on the same roll there was a like case with identical facts, which was prosecuted as a felony. The records reveal that the only distinction was that the latter case involved professional thieves.

n447. See Barbara Hanawalt, Community Conflict and Social Disorder, 28 Medieval Studies 402-03 (1976); Verdict According to Conscience, supra note 203, at 59. In general, all species of theft, such as robbery, burglary (housebreaking at night) or larceny (taking and carrying off such as pick pocketing), were a capital crime excepting those involving less than 12 pence.
n448. Plucknett, supra note 3, at 448, 446-47. See 2 Pollock & Maitland, supra note 4, at 495; Milsom, supra note 158, at 425.

n449. Id. See McLane, supra note 384, at 50-51. Professor McLane extrapolates from his gathering of statistics a 1328 trailbaston that most thefts must have been dealt with informally, pointing out that prosecutions for theft can be found in village records. Also, the amount at issue during the 1328 session he researched did not necessarily reflect the true value of the goods stolen.

n450. Evidence comes from comparing jury verdicts to indictments recorded by clerks, sheriffs or justice of the peace. Not much detail is contained in these records. See Verdict According to Conscience, supra note 203, at 61.

n451. See id. at 416. In the thirteenth century, when a death occurred, the county coroner (typically a knight) was required to hold an inquest within a day or two after discovery of the body. A jury was assembled from the vill and its neighbors, and suspects were often named and arrested. At the gaol delivery, the suspect was brought forward, the charge was read, the defendant pled, usually not guilty, and a jury was sworn. Id at 30.

n452. While the terms "justifiable" or "excusable" were not employed in this period, they are helpful to ordering the law of homicide.


n454. Id. at 420. Self defense was an extremely narrow category. The slayer had to have been under mortal attack, his back against the wall, with killing as a last resort.

n455. Id. Accidental homicide was unintentional. Thus, in modern terminology, it may include those killings, which were reckless or negligent but not with malice aforethought.

n456. Id. at 419; 3 Holdsworth, supra note 61, at 312. In the statute of Glouster (1278), one who killed se defendeno or without felony was to plead as such and "in case it be found by the country that he did it in his defence or by misfortune [accident], then by report of the justices to the king, the king shall take him to his grace if it please him." 6 Edw. 1, ch. 9 (1278) (quoted in Holdsworth).

n457. Green, supra note 76, at 428.
n458. Verdict According to Conscience, supra note 203, at 31. Professor Green's analysis of the trial rolls, which include the coroner's
indictment distinguished between simple homicide and murder (i.e. killing by secrete), shows that juries acquitted in the majority of
instances of simple homicide and convicted in the majority of murder cases.

n459. See Jury and English Law of Homicide, supra note 165, at 429.

n460. See Pearl, supra note 402, at xx (In Pearl, Mary is Queen cortayse, though it is a quality possessed by all memers of that "royal
society."); Bloch, supra note 15, at 305 (describing courtesy as the sum total of noble qualities from 1100 onward. The word was for a time
analogous to prudhomme, a word that St. Louis said "filled the mouth" merely to pronounce it denoting the virtues of a monk, and
comporting the perfect knight).

n461. See Culp, supra note 255, at 255.

n462. See Pearl, supra note 402, at xx.

n463. See Saward, supra note 256, at 24-25.

n464. Pearl, supra note 402, at xx-xxi.

n465. 2 BRACTON, supra note 60, at 340; The Kings Pardon for Homicide Before A.D. 1307, supra note 197, at 70.


n467. The King's Pardon for Homicide Before A.D. 1307, supra note 197, at 117. The accused was then entitled to an inquest of local
people to say whether the appeal was so motivated or whether the wound had been shown. Id. at 339 & nn. 2, 3 (looking to pipe roll entries).
Professor Groot suggests that this winnowing out of malicious appeals shows a lack of confidence in the ordeal along with the fact that those
who successfully purged must still abjure the realm. The Jury in Private Criminal Accusations, supra note 417, at 118. Yet, in this age human
responsibility for the state of one's own soul was stressed. The belief in the Deity's presence is compatible with a belief that one has a duty to
seek out the particulars of a situation. Put differently, a belief in divine manifestation did not necessarily entail a belief in passiveness.
n468. The Jury in Private Criminal Accusations, supra note 417, at 119.

n469. See The King's Pardon for Homicide Before A.D. 1307, supra note 197, at 199-200.

n470. Green, supra note 76, at 84.

n471. Id. at 84-85.

n472. See Crime, Compurgation, and the Courts of the Medieval Church, supra note 211, at 20-26; A Retrospective of the Jury Trial, supra note 397, at 380-82.

n473. See Seipp, supra note 60, at 61 (noting the denotation in Britton).


n475. See Green, supra note 76, at 111 (quoting Thomas Usk).

n476. 2 Bracton, supra note 60, at 402.

n477. See Van Caenegem, supra note 125, at 91.


n479. See Seipp, supra note 60, at 74 & accompanying notes.
n480. See Crime, Compurgation, and the Courts of the Medieval Church, supra note 211, at 7, 25 (speaking to traditional view as put forth by Maitland, though Professor Helmolz notes that an informal extrajudicial system of compensation long outlived its official demise).

n481. The King's Pardon for Homicide Before A.D. 1307, supra note 197, at 1-15. On the history of the pardon power during the early fifteenth century, see Edward Powell, Kingship, Law and Society, 233-40 (1989). Other historians, such as Professor Green, are less inclined to grand jurisprudential theories of crime and sanction. He stresses that the reasons for the stringent criminal code in this early era are not easily gleaned and remain ambiguous. Verdict According to Conscience, supra note 203, at 10.

n482. See Placita Corone, supra note 409, at xxiv-xxv.

n483. See Kingdoms and Communities, supra note 99, at 23-34.

n484. See Seipp, supra note 60, at 65.

n485. See generally Crime, Compurgation, and the Courts of the Medieval Church, supra note 211, at 19-25 (speaking to practice in English church courts similar to what is discussed here regarding the jury trial).

n486. This was used particularly in Edward I's reign. H. Hewitt, The Organization of War Under Edward III 29-31 (1966). See King's Pardon for Homicide before A.D. 1307, supra note 197, at 311-23.

n487. Some historians argue that the act of pardoning was a means by which the "propertied elite" demonstrated their power and influence, thereby enhancing their reputation and authority. See Hay, supra note 398, at 17-63. Yet, this thesis ignores that those in power to forgive or absolve a wrongdoer, such as the victim, the justice of the peace, and the jury, were the wrongdoer's own. Accord Langbein, supra note 398, at 96. The desire to fill the king's coffers is often put forth to explain the integrity of the pardon system away. As Ms. Hurnard points out, the amounts of supplication are usually small. The King's Pardon for Homicide Before A.D. 1307, supra note 197, at 5. Moreover, the offering of money must be seen in light of composition with its ancient roots in the penitential system of the Celts, which was pervasive in England. See, e.g., McNeill, supra note 93, at 120-21.

n488. Leges Henrik Primi, supra note 157, at 251, 80, 7b, c. 87, 6. There is some evidence that as early as the reign of Henry I, self-defense did not require the payment of compensation, the wergild. The defendant still had to, however, "make honorable amends" ("dignis satisfactionbus hoc monstrare liceat").
n490. 2 BRACTON, supra note 60, at 340-41.

n491. A point often overlooked but made long ago by Maitland. See 2 Pollock & Maitland, supra note 4, at 483.

n492. The King's Pardon for Homicide Before A.D. 1307, supra note 197, at 35-37. Ms. Hurnard suggests that in some cases, "punishment" attached to pardons. This seems right as long as punishment here is understood as "satisfaction" qua offering. Yet, Ms. Hurnard appears to distinguish between "religious" and "secular" punishment by the type of conditions imposed rather than by the conceptual meaning of "sanction" in this period. Repeatedly, the motif appears of punishment as the passage back to one's home, a sacred act.

n493. Id. (citing several pipe rolls entries).

n494. See Oakley, supra note 185, at 49.

n495. See Torture and Proof, supra note 413, at 6.

n496. See Mirjan Damaska, Evidence Law Adrift 19 (1997) [hereinafter Evidence Law Adrift] (Professor Damaska points out that the application of rules of weight were less mechanical then extreme views propose). Professor Langbein argues that the two-witness rule for serious crime responded to the question of substituting the voice of the judge for the sign of the Deity. Langbein, supra note 413, at 4. As Richard Fraher has argued, however, the thesis may not be air-tight given that much academic debate took place over the propriety of circumstantial evidence and many Italian statutes granted the commune magistrates wide discretion to draw inferences. Conviction According to Conscience, supra note 11, at 29.


n498. Michael Macnair places strong emphasis upon the role of a defendant's reputation to the jury's decision. Macnair, supra note 83, at 538. Professor Langbein, however, thinks that in tight-knit communities of the early medieval period, the jurors likely had more evidence of the facts than some modern historians conclude. Historical Foundations of the Law of Evidence, supra note 406, at 1202 n.6.
n499. Free Proof and Its Detractors, supra note 294, at 346.


n501. Van Caenegem, supra note 125, at 105, 103-105; Bloch, supra note 15, at 430.

n502. Van Caenegem, supra note 125, at 105. Most recently, Professor R.H. Helmholz has suggested that the English Magna Carta of 1215 may have been more heavily influenced by the amalgam of Roman and canon law that dominated the continent. See Magna Carta and The Ius Commune, 66 U. Chi. L. Rev. 297 (1999). Yet he does not propose that the charter should be read as a futuristic non-feudal one. Id.

n503. See Bloch, supra note 15, at 442; Whitelock, supra note 90, at 31. The Anglo-Saxon companion's giving of arms to his liege and the Norman vassal's giving of coin to his lord was more than an economic arrangement - it perfected the bond between men. See id. (on Anglo-Saxon England); James Q. Whitman, The Seigneurs Descend to the Rank of Creditor: The Abolition of Respect 1790, 6 Yale J. L. & Human. 249, 251 (1994) [hereinafter The Seigneurs Descend to the Rank of Creditor] (on feudalism's focus upon paying of respects in French "tax"). Though in 1066 one finds in England two nations living in the unease of a conquered land, by 1215 the amalgamation of Franci and Angeli was nearly complete. See Van Caenegem, supra note 125, at 5.

n504. Loyalty was, as Matthew Gervase's writes, "of couer loiall," a quality of the soul. Matthew Gervase, Ideals of Knighthood in Late Fourteenth Century England, in Twentieth Century Interpretations of Sir Gawain and the Green Knight (1968); The Seigenurs Descend to the Rank of Creditor, supra note 503, at 252 ("Roman law broke all legal relations down into either personal or real rights - something utterly foreign to the feudal world, which linked real and personal right inextricably in a system founded on the concepts of loyalty and trust").


n507. See, e.g., G.O. Sayles, The Medieval Foundations of England 199-205, 210-11, 218-220 (1961) (drawing connection between "feudalism" and Anglo Saxon thegns and the Danish housearls); Whitelock, supra note 90, at 28-35 (speaking to early Anglo-Saxon devotion to the ideals of loyalty, courage, and proper death). Southern suggests that by the twelfth century, the "heroic" ideal had given way to the romantic as was seen in literature. Southern, supra note 112, at 224.
In landholding, Henry II established the royal, as opposed to feudal, court as the freeman's court of first instance. Some see this as laying the ground for the realization of a centralized national nation-state, and hence of the casting off of the feudal way. See Van Caenegem, supra note 125, at 19. Others such as Milsom, however, disagree. He argues that Henry rather sought to ensure lord's carrying out of their feudal obligations and that the new legal procedures were but experiments suited to the moment. See S.F.C. Milsom, The Legal Framework of English Feudalism, 36, 65-66, 105-06 (1976) [hereinafter The Legal Framework English Feudalism].

By Grendel flatly refusing to offer wergeld to Hrothgar for his killings, he shows the depth of his vileness.

In the tenth century, the eight capital sins were, pride, envy, unchastity, anger, bitterness, sadness of the world (melancholy) gluttony and avarice. See Oakley, supra note 185, at 64. All translate easily into the nomenclature of a warrior culture, whereby the three primary virtues were courage, loyalty, and magnanimity. See, Huizinga, supra note 15, at 73 (challenging Burkhardt's thesis that the transfiguration of pride into the virtue of honor separates the Renaissance from the medieval character).


The argument is made that while there may have been a strong communal understanding of right and wrong, it stood in tension with that of officialdom's. Hence, rather than the criminal trial reflecting a unified act on the part of the jury and the bench to resolve a breach with the accused, the jury acted to protect the accused from the ever increasing reach of "the state." Yet, the mosaic of early medieval English criminal procedure does not fit well with stratified theories of legal history. In 1250, the group of professional lawyers, and the king's permanent justices, was small. By 1220, the crown was issuing specialized commissions known as oyer, terminer and gaol delivery for the hearing of criminal pleas from county to county. Visitorial eyers are not systematic until the rule of Henry II. 1 Holdsworth, supra note 61, at 275. There are also the central courts. One sat at Westminster and the other traveled with the king on his visits around England. The court coram rege heard pleas without a jury. See The Jury in Private Criminal Accusations Before 1215, supra note 81, at 118. Until 1215, the sheriff handled criminal pleas in the local shire and hundreds court. Verdict According to Conscience, supra note 203, at 6; Hyams, supra note 10, at 93. See John P. Dawson, a History of Lay Judges 178 (Cambridge 1960). The county court was usually held once a month. Id. The county court spoke not as individual elites, but "as a body, for the county as a whole... It was the county, personified. Id. (emphasis in original). Presentment was made before the local sheriff, the coroner, bailiffs of townships, and commissioned justices presided over the trials. Musson, supra note 434, at 116. In the mid-fourteenth century, criminal adjudication became even more localized when gentry began to be placed as justices of the peace with the power to hear both felonies and trespasses. 1 Holdsworth, supra note 61, at 289 (It was enacted in 1389 that the justices should be "the most sufficient knights, esquires and gentlemen of the land").
n514. See 1 Pollock & Maitland, supra note 4, at 220; Plucknett, supra note 3, at 429; Milsom, supra note 158, at 414. In the thirteenth century, France, under Louis IX, structured a system of royal justice that depended upon a professional class with the lay judges of old partly being driven out by the adoption of the Roman-canonical proof. See Langbein, supra note 500, at 22, 213-14 (1974); Dawson, supra note 513, at 48 ("the canonists method of proof were soon to require a vast increase in the royal bureaucracy"). Also contributing to professionalization was the growing dependency on the continent upon a written record, in contrast to England where criminal procedure remained largely oral.

n515. See John P. Dawson, The Oracles of the Law 4-5, 136 (1994) [hereinafter The Oracles of the Law]; John H. Langbein, The Origins of Public Prosecution at Common Law, 17 A. J. L. Hist. 317-19 (1973). There is evidence of some form of wage but in time it became obsolete. 1 Holdsworth, supra note 61, at 289. The crown took advice from Parliament rather than from the royal judges about whom should be appointed. Id. at 291. In the middle of the fourteenth century, a lawyerly class was introduced at the trial for quarter sessions, standing commisions whereby the justices sat, with "three or four of the most worthy of the land with some learned in law" hearing criminal pleas. See 1 Pollock & Maitland, supra note 4, at 220; 1 Holdsworth, supra note 61, at 288. The noble class resisted the increasing upward mobility of wealthy English peasants merchants in the thirteenth century, for it saw position as a birth right tied to the ancient feudal ways. Thus, the rural, local, and non-professional color predominated with the lay justices holding much power and continuing to be drawn from the landed estate.


n518. This point has been made in a slightly different way by Walter Ullmann in his distinction between kingship as theocratic and feudal. Walter Ullmann, The Individual and Society in the Middle Ages 66-67 (1966). One may recast the idea slightly, noting that in a largely oral culture the oath in England continued to bind crown to man as well as man to crown. This concept rested upon the idea of persons fitting themselves to another in pledges of faith becoming the keeper or man of another. Hence, treason remained well into the fourteenth century essentially a betrayal of trust. Green, supra note 76, at 231. In contrast, "injured majesty was the central all encompassing aspect of treason in later medieval France, and betrayal, though primordial, was but a subordinate one." S. H. Cuttler, The Law of Treason and Treason Trials in Later Medieval France 238 (1981).
