Non est misericordia vera nisi sit ordinata: Pastoral Theology and The Practice of English Justice, c. 1100 – c. 1250

Philippa Byrne
Wadham College

Doctor of Philosophy
Michaelmas Term, 2013

Ignominy in ransom and free pardon
Are of two houses: lawful mercy
Is nothing kin to foul redemption.

Measure for Measure, Act 2, Scene 4.

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Short abstract

This thesis examines the relationship, in theory and in practice, between the concepts of justice (*iustitia*) and mercy (*misericordia*) in English courts between c. 1100 and c. 1250. During this period English judges (in courts of both common and canon law) were faced with a serious dilemma. The emergence of systematic law had fundamentally altered the pastoral foundations of the act of judgement. On the one hand, judges were incorporated into a system of law in which justice was expected to be routine and regular. They were bound by procedure, and 'justice' was considered to lie in the return of due punishment for injury. On the other, this notion of strict justice coexisted with an alternative way of conceiving of judicial responsibilities, which emphasised that justice was incomplete unless it incorporated within it the principle of mercy. This tradition argued that, both for the benefit of the offender and the judge's own soul, it was safer and more virtuous to mitigate the punishments prescribed by law. English judges were caught in a dilemma, and were, in effect, obliged to choose between two fundamentally opposed ideas of justice, and two starkly contrasting approaches to sentencing.

This thesis argues that such a choice was a problem which concerned the schools of theology as much as it did the courts of law. It examines the attempts of theologians and lawyers to resolve the dilemma and provide practical counsel to judges. Scripture, classical philosophy and patristic texts were the key sources in a discussion of how judicial discretion should be exercised in choosing between punitive and merciful courses of action. Rather than conceiving of justice as a purely procedural exercise, English law,

and English judges, appreciated that the act of giving judgement was a complex pastoral challenge.

Long abstract

This thesis aims to reassess the moral foundations of legal judgement in England between c. 1100 and c. 1250. It considers the pastoral theory and practice of justice, both in common law, as applied by royal judges, and in canon law, as applied by English prelates. The thesis discusses how judges perceived their role in relation to both the dictates of the law and the political conditions of English society. At its heart is an examination of three relationships – that between justice and mercy, that between the schools of theology and the schools of law, and that between the theory and practice of judgement.

The first and most basic objective of this thesis is to explain how medieval authors constructed the relationship between the concept of justice and the concept of mercy. It argues that twelfth-century authors in both theological and legal traditions perceived justice and mercy as two opposed virtues. The term justice (*iustitia*) could either be separated from that of mercy (*misericordia*), or elided with it. Surveying a conflicting tradition of scriptural, patristic and classical writing, twelfth- and thirteenth-century authors recognised that *iustitia* could denote two distinct courses of judicial action. On the one hand, the term could be interpreted as the notion of the strict return of due punishment in line with the gravity of an offence. On the other, the idea of *iustitia* could be understood to encompass the principle of mercy. On this reading, true justice lay in the decision to punish an offender less than their crimes warranted. Because, however, both of these courses of action (giving sentence in line with strict justice and mitigating punishment through merciful compassion) could be considered acts of virtue, and because both courses of action were approved of by scriptural and philosophical authorities, twelfth-century judges faced a considerable problem. How were they to determine which

judicial stance was most appropriate to the particular case before them? This was a difficulty not resolved by the proliferation of legal procedural manuals between c. 1100 and c. 1250. These texts specified how adherence to the correct procedural forms could avoid abuses of justice. What these works could not do, however, was to excise, altogether, the space for the exercise of judicial discretion from these legal systems. As that scope for discretion was maintained, so the opportunity for, and necessity of, judicial choice between strictly just and leniently merciful courses of action remained.

The second aim of this thesis is to define the relationship between theology and law, by considering whether medieval theologians and lawyers had distinctively different approaches to justice. This has been the traditional contention of legal history, which has depicted the common law reforms of the twelfth century as a supremely practical achievement. This thesis challenges the prevailing characterisation of medieval lawyers and judges as driven by purely pragmatic concerns and seeks to demonstrate how supposedly speculative theological ideas pervaded English legal education and discussion. It traces how, in one direction, scriptural exegesis and scholastic argument shaped the practices of English law courts, and, from another perspective, how the structure of human legal systems made theologians rethink the way in which they constructed questions of soteriological justice.

The connection between theory and praxis – the way in which justice was theorised and the way in which justice was performed in the law courts – provides a third line of enquiry. The thesis argues that the reason why the conflict between justice and mercy did not remain a purely speculative discussion, but instead was transferred to the realms of judicial practice, was due to the dramatic changes in twelfth-century legal systems. Both common and canon law were undergoing rapid systematisation during this period, at the hands of increasingly assertive centralised judicial authorities – crown and

papacy. But as these two legal systems were standardised and giving judgement became a matter of routine process, rather than a personal transaction between lord and vassal, the place of mercy within those legal systems was problematised. Mercy, which had, before legal systematisation, been understood as a personal act of compassion granted by a superior towards an inferior, now resembled the abuse of judicial partiality. This change meant that there was a pressing need to define the relationship between the two concepts, *iustitia* and *misericordia*, and to define how *misericordia* fitted within those newly-established legal systems.

There is, however, neither a straightforward body of evidence for examining the moral foundations of medieval judgement, nor a smoking gun which defines the relationship between theologians and lawyers. Explicit judicial rationales for judgements (in both common and canon law sources) are extremely unusual. Official records for grants of royal pardon, for example, are almost non-existent before the 1190s, and rare still for some time after. Thus this thesis turns to alternative, extra-legal, sources to consider how the debate between justice and mercy was framed. Histories and chronicles, a number of them composed by former members of the English judiciary, provide a demonstration of how the conflict between two virtuous ideas was transposed into political debate. Similarly, evidence from popular sermons and vernacular verse illustrates how the relationship between justice and mercy was considered a vital topic for the instruction of the laity. The way in which the relationship between the two concepts was resolved was a matter which concerned both the fortune of the political community and humankind's soteriological destiny. Simply put, the question of how to 'do justice' was at issue at almost every level of English society during this period – a theme for 'popular' and 'official' debate and a major topic of argument in both the schools of theology and the courts of law.

Ultimately, the thesis seeks to reconsider how historians have understood the moral foundations of judgement in England between c. 1100 and c. 1250, and it invites a reassessment of established historiographical narratives concerning medieval justice. First, it argues that any account of the development of medieval English law is incomplete without a consideration of concepts of justice drawn from theology. Pastoral demands were just as important as procedural considerations in doing justice. Secondly, it seeks to establish that theological thought on the meaning of *iustitia* was far more complex, and far richer, than has previously been appreciated, a point embodied in the relationship of *iustitia* to the idea of *misericordia*. Finally, it contends that, even in an age of standardisation and regularisation of legal forms, both theologians and lawyers appreciated the importance of judicial discretion as an essential part of the operation of justice, precisely because the purpose of that discretion was to choose between strictly just and merciful strategies of punishment.

The introduction and first two chapters of the thesis discuss how the theoretical conflict between opposed ideas of justice was constructed and understood by medieval theologians. The subsequent three chapters consider the impact of the tensions between justice and mercy on the practice of judgement.

The introduction provides the context for this study. It sets out the typical narratives drawn by both intellectual historians and legal historians concerning the meaning and importance of justice in this period. The two have taken fundamentally different approaches, sharply separating the approaches and attitudes of theologians and lawyers to justice: on the one hand, medieval theologians have been depicted as totally disconnected from political realities, whilst on the other, medieval judges have been characterised as mere administrators, concerned with nothing but pleasing their royal

employers. The introduction considers in greater detail the multiple different definitions of justice available between c. 1100 and c. 1250 and their sources. It lays out the two most influential interpretations of *iustitia* operative in this period: justice as the act of 'suum cuique tribuere' (the act of giving to each their due), a definition derived from Roman law, and justice as 'subveniendo miseris' (the relief of the wretched), a definition provided by Augustine. It explains why medieval thinkers considered these two definitions to be opposed, and why that opposition entailed such profound intellectual and political problems, and generated such a volume of commentary and discussion.

Chapter 1 examines in detail the ideas which informed twelfth- and thirteenth-century judicial models – scriptural and classical *exempla* – and discusses how these traditions were adapted by contemporaries to fit English realities during the Angevin revolution in law. In response to the conventional modern historiographical contention that little in the way of moral guidance was ever provided for judges, it considers how much judicial advice was in fact extracted from scripture, patristic literature and Roman histories. It suggests that rather than a straightforward conflict between 'Christian' and 'classical' approaches to justice, there were internal debates over the value, purpose and place of mercy within both traditions. Twelfth-century authors could utilise either tradition to argue in favour of either judicial severity or judicial mercy. According to the approach of scholastic authors, there was little significant difference between the Roman principle of *clementia* and the Christian concept of *misericordia*.

Chapter 2 discusses how scholastic authors perceived the conflict between *iustitia* and *misericordia* to be at work in the world around them, a conflict present from the moment of Creation to the Last Judgment. Theologians understood essentially the same problem to face both the divine judge and the human judge. Divine justice, too, after all, had to keep punitive and merciful principles in balance. It was this belief which prompted

theologians to scrutinise, at length, the rationale behind soteriological ideas of punishment and redemption at the Last Judgement. Scholastic authors were concerned to understand the underlying logic of divine punishment, not least for what it could teach the human judge about problems of partiality and forgiveness of offences. This chapter further considers how the soteriological conflict between strict and merciful justice was conveyed to non-academic audiences –through architecture, sermonising and vernacular poetry. It argues that the conflict was widely understood and appreciated, and that the complex relationship between 'justice and mercy' provided a conceptual tool for understanding the soteriological order of the universe. There was no split between 'elite' and 'popular' understandings, only a difference in the depth of those understandings.

Chapter 3 addresses how the judicial precepts of scripture were translated into instructions for practical action by twelfth-century commentators. It considers the foundational difference between acts of justice commanded by precept (that is, acts of justice which could not be contravened without risking damnation) and acts of justice urged by counsel (that is, acts which were virtuous but not necessary to the salvation of the individual). Given this distinction, it examines whether acts of mercy and merciful forgiveness of offenders were considered to be necessary for salvation, i.e. whether all Christians were bound to demonstrate forgiveness. Scholastic authors were particularly interested in the ways in which the words of the Sermon on the Mount – Christ's exhortations to mercy – were interpreted. Whom did Christ's words bind, and how were Christians obliged to follow them? Did these instructions constitute a compulsory precept or simply a voluntary counsel? By considering the evidence of sermons and *summae*, this chapter examines how theologians constructed each individual Christian's duty to be merciful, and exactly how those merciful duties were transmitted to lay audiences.

Chapter 4 expands upon the previous consideration of whether different judicial duties were placed on different groups, examining the differences – supposed and real – between the expectations on royal and on ecclesiastical judges. Was there a significant difference in the way in which their respective relationships to mercy were conceived? What should we make of the oft-repeated contention in modern historiography that (at least in England) the role of the Church was to mollify the severe justice of the secular power? This chapter argues that, rather than any contrast between royal and ecclesiastical justice, the courts of both crown and Church were faced with the same dilemma – the impossibility of setting down legal rules and procedures to provide for every conceivable judicial scenario. Instead of a single conflict between *regnum* and *sacerdotium* there were in fact two internal conflicts within those bodies, as different courtiers and churchmen proffered different solutions to judicial dilemmas. The final part of the chapter reassesses some of the correspondence from the Becket conflict to further draw out these internal institutional arguments.

Chapter 5 turns to the question of why the choice between strict justice and mercy was such a difficult problem in practice. It locates the dilemma in conflicting opinions about the purpose of judgement, perspectives which can be traced to classical rhetorical debates. English authors were profoundly concerned by the contradictory ends that 'justice' was intended to achieve – both in securing the safety of the community and in safeguarding the soul of the judge and the offender. Rhetorical argument, this chapter argues, not only polarised the choice between justice and mercy, but made resolution more difficult to achieve, because the same rhetorical tools allowed the debate to be prolonged and expanded. Applying rhetorical techniques to arguments about justice made it possible to persuade well-intentioned but simple judges away from the truly righteous course of action. This chapter draws on English chronicles and histories to demonstrate

just how difficult – and contested – the choice between different judicial strategies might be, and how the decision to free a single prisoner might be praised from one side as an act of virtuous mercy, whilst being condemned on the other as a reckless act endangering the safety of the political community.

The conclusion to the thesis provides an overview of the problems created by the fact that justice had both private and public aspects: private in that justice could be understood as an issue of personal virtue, public in that acts of judgement inevitably impinged on the political community. In Anglo-Norman and Angevin England there was an evident struggle, both in theory and practice, to impose order on the various categories of justice and mercy, and to reconcile principles of law and licit retribution with the ideal of love for one's neighbours. The conclusion reflects on how the arguments made in this thesis modify the recent (and not-so-recent) historiography of justice and common law. It suggests that the role of justice in both intellectual and legal history is more complicated than has sometimes been suggested. It argues that increasing legal systematisation compounded, rather than resolved, the contested relationship between justice and mercy. The intellectual history of justice did not begin, as has sometimes been claimed, c. 1250, with the rediscovery of the Aristotelian categories of 'general' and 'particular' justice. Rather, attention should be paid to the complex and multifaceted twelfth-century debate concerning the interaction between justice and mercy. As regards legal history, this thesis challenges the argument that twelfth- and early thirteenth-century lawyers were interested only in procedure, not virtue. 'Doing justice' was not a simple matter of following the law, but a complex pastoral calculation with profound moral and political implications.

Acknowledgements

> Forgive us our debts. Debts: and what debts are these? [...] It would take a long time to set forth our debts, which it was easier to incur than it is to discharge, and so we are going to postpone this task to another day.
>
> Gervase of Tilbury, *Commentary on the Lord's Prayer*, ed. and trans. S.E. Banks and J.W. Binns, in *Otia imperialia. Recreation for an Emperor* (Oxford, 2002), appendix 3, pp. 922-3.

At the present political moment, and in higher education in particular, debt is a tediously all-consuming preoccupation, an idea both familiar and frightening. But it is something I am obliged to discuss a little further. In the years it has taken to write this thesis, I have run up more debts than can hope to be serviced, let alone repaid. Here I can only give to each an acknowledgement, not their due.

This thesis, and the master's dissertation which preceded it, was only made possible through the generous funding of the Arts and Humanities Research Council. A grant from the Oxford History Faculty paid for a visit to the *Bibliothèque nationale*, without the benefit of which my arguments would have been all the poorer, and this thesis considerably shorter. I am grateful too, to the Vice-Chancellor and Librarian of Lincoln Cathedral, Dr. Nicholas Bennett, for his generous assistance with the works (and rather unwieldy manuscripts) of Ralph Niger.

I am proud to say that this thesis is a Wadham College production through and through. Undoubtedly there is no better place in Oxford to be a historian. A number of college grants and a graduate scholarship have made it possible for me to present various drafts of various chapters at various conferences, and have also funded a trip to Germany. I am most grateful for it. This was a project conceived of, begun, and finished in the college library, and the librarians of Wadham – Sandra, Francesca and Tim – have kindly provided, twenty four hours a day, an atmosphere conducive to study. To two Wadham historians I am particularly indebted. Jane Garnett has been characteristically generous with her time, expertise and encouragement, and charitably indulgent of my laxity. My supervisor, Matthew Kempshall, has expended seven years (and great pains) in bringing me up to scratch as a medieval historian. He has shown me that if intellectual history is worth doing (and, of course, it is), it is worth doing well.

I thank Corinna Matlis for sitting through some truly terrible papers on medieval justice and always having the good grace to ask intelligent and thoughtful questions. Gina, *vox clamantis in deserto*, has frequently reminded me that there are more important things in life than medieval justice. She is probably right; I am grateful. Finally, the greatest debt of all is due to my parents and my grandmother, who roundly failed to follow all Solomonic injunctions about the raising of children, and who have always wielded the *baculum*, never the *virga*. As any one of the Anglo-Norman or Angevin judges discussed herein might have observed, to them, I cannot do justice.

TABLE OF CONTENTS

Abbreviations 4

Prologue: The Vanishing Adulteress 6

Introduction 11

- Justice in Intellectual History 12
- Justice in Legal History 18
- Defining *Iustitia* 30
- Justice and Mercy in Written Law 47
- Justice and Mercy in English Law: Standardisation and Discretion 50
- Justice and Mercy in English Law: *Vis et voluntas* 63

Chapter 1. Justice in Classical, Biblical and Patristic Thought 71

- Justice in Scripture 73
- Heli and Phinehas 80
- Samuel 83
- Susannah and the Woman Caught in Adultery 85
- Moses's Intercession 88
- Classical *Exempla* 92

Chapter 2. Divine and Human Justice 103

- The Connection between Divine and Human Justice 107
- God's Justice and Mercy as a Semantic Problem 113
- God's Justice and Mercy as a Theological Problem 116
- Conflicting Scriptural Arguments 118
- Punishments and Deserts 120
- The Pastoral Relevance of Divine Judgement 128

Chapter 3. Precept and Counsel 141

The Twelfth-Century Debate 142
Precept and Mosaic Law 147
Caritas and *Obedientia* 151
The Implications of *Caritas* for Secular Judges 157
Mercy as Counsel 160
Mercy as Precept 169
Turning the Other Cheek 172
Dissolving the Difference between Precept and Counsel 177

Chapter 4. The Varieties of Royal and Ecclesiastical Judgement 184
The Historiographical Problem 186
Royal Mercy 195
Ecclesiastical Mercy and Other Strategies 202

Chapter 5. Histories of Justice 236
Justice as a Rhetorical Choice 236
Writing the History of Justice 254
Orderic Vitalis and the Judicial Failings of Norman Kings 258
Debating the Judicial Virtues of King Stephen 265
Walter Map and the Justice of the Simple Ruler 271
Richard of Devizes and Matthew Paris: Due Process and Rhetoric 276
Norman Sicily: A Comparative Study in Justice and Mercy 281

Conclusion 294

Appendix 308

Bibliography 311

Abbreviations

Ad Herennium	(pseudo-)Cicero, *Ad C. Herennium: De ratione dicendi (Rhetorica ad Herennium)*, ed. and trans. H. Caplan (London, 1954)
Becket Correspondence	Thomas Becket, *The Correspondence of Thomas Becket, Archbishop of Canterbury, 1162-70*, ed. and trans. A. Duggan (2 vols., Oxford, 2000)
BnF	*Bibliothèque nationale de France*
CCSL	Corpus Christianorum, Series Latina
CCCM	Corpus Christianorum, Continuatio Mediaevalis
CSEL	Corpus Scriptorum Ecclesiasticorum Latinorum
Codex	*Codex Iustinianus*, in *Corpus iuris civilis*, vol. 2, ed. Paul Krueger (Berlin, 1887)
Decretum	*Decretum Magistri Gratiani*, in *Corpus iuris canonici*, ed. E. Friedberg, (2 vols., Leipzig, 1879-81)
De inventione	Cicero, *De inventione*, ed. and trans. H.M. Hubbell (London, 1949).
Dicta/dictum	Robert Grosseteste, 'Dicta', from Oxford, Bodleian Library, MS Bodley 798
Digest	*Digesta Iustiniani* in *Corpus iuris civilis*, vol. 1, ed. Paul Krueger and Theodor Mommsen (Berlin, 1909)
DNC	Walter Map, *De nugis curialium*, trans. M.R. James, revised by C.N.L. Brooke and R.A.B. Mynors (Oxford, 1983)
EH	Orderic Vitalis, *The Ecclesiastical History*, ed. and trans. M. Chibnall (6 vols., Oxford, 1969-80)
GO	*Glossa Ordinaria*, PL.113-4 (Paris, 1852)
GFL	Gilbert Foliot, *The Letters and Charters of Gilbert Foliot, Abbot of Gloucester (1139–48), Bishop of Hereford (1148–63), and London (1163–87)*, ed. Z.N. Brooke, A. Morey and C.N.L. Brooke (London, 1967)
Institutes	*Institutiones Iustiniani* in *Corpus Iuris Civilis*, vol. 1, ed. Theodor Mommsen (Berlin, 1872)
MGH	Monumenta Germaniae Historica
MTB	*Materials for the History of Thomas Becket*, ed. J.C. Robertson and J.B. Shepherd, RS 67 (7 vols., London, 1875-85)
PL	*Patrologiae Cursus Completus, series latina*, ed. J-P. Migne, 221 volumes (Paris, 1841-62)

Policraticus	John of Salisbury, *Policraticus, sive de nugis curialivm et vestigiis philosophorum*, ed. C.C.J. Webb (2 vols., Oxford, 1909)
QDP	Robert of Melun, *Questiones de divina pagina* in *Oeuvres de Robert de Melun*, ed. R.M. Martin, vol. 1 (Louvain, 1932)
QEP	Robert of Melun, *Questiones de epistolis Pauli*, in *Ouevres de Robert de Melun*, ed. R.M. Martin, vol. 2 (Louvain, 1938)
RS	*The Chronicles and Memorials of Great Britain and Ireland during the Middle Ages* = 'Rolls Series'
RTAM	*Recherches de théologie ancienne et médiévale*
SAP	Thomas of Chobham, *Summa de arte praedicandi*, ed. F. Morenzoni, CCCM 82 (Turnhout, 1988)
SC	Thomas of Chobham, *Summa confessorum*, ed. F. Broomfield (Louvain, 1968)
SCV	Thomas of Chobham, *Summa de commendatione virtutum et extirpatione vitorum*, ed. F. Morenzoni, CCCM 82B (Turnhout, 1997)
Sentences	*Magistri Petri Lombardi Parisiensis episcopi Sententiae in IV libris distinctae*, ed. I. Brady (2 vols., Rome, 1971-81)
SS	Alexander Nequam, *Speculum speculationum*, ed. Rodney M. Thompson (Oxford, 1988)
ST	Thomas Aquinas, *Summa theologica*, in *Doctoris angelici divi Thomae Aquinatis Opera omnia*, ed. Stanislas Eduard Fretté and Paul Maré (34 vols., Paris, 1871-80)
VA	Peter the Chanter, *Verbum adbreviatum: textus conflatus*, ed. Monique Boutry (Turnhout, 2004)

Unless otherwise noted, all translations are my own.

Prologue. The Vanishing Adulteress

De principis instructione, a moral treatise on the cultivation of virtue, composed by the Angevin courtier, scholar and litterateur, Gerald of Wales (c. 1146 - c. 1223), exists today in only a single copy, a mid-fourteenth-century manuscript of unknown provenance.[1] There are no indications that the text was widely circulated, much less that it ever reached the eyes of rulers. Written and revised at intervals between 1190 and 1217, *De principis instructione* consists of three books (*distinctiones*), intended to instruct both princes and prelates.[2] The first *distinctio* looks very much like a traditional *speculum principis*, praising virtues such as modesty (*modestia*), chastity (*pudicitia*) and prudence (*prudentia*), and explaining the difference, in behavioural terms, between a king and a tyrant. The two subsequent books provide a narrative of how those virtues had, or had not, been practised by princes, in the form of a contemporary history of the Angevin and Capetian dynasties. As Gerald himself explained, the first book instructs through the precepts of theology and ethics, the second and third teach rulership through *exempla*.[3]

Along with much of Gerald's voluminous and varied oeuvre, *De principis instructione* was edited and printed in the late nineteenth century as part of the Rolls Series, filling seven substantial volumes.[4] The Victorian editors, however, found very little worthy of remark in the first book of *De principis instructione*, and, when preparing the text for publication, they excised many of the quotations and *exempla* which Gerald had so carefully worked into a coherent whole. Recent scholars have agreed with that nineteenth-century judgement, regarding the first book of *De principis instructione* as little more than a collection of trite commonplaces culled from *florilegia* collections,

[1] 'De principis instructione', British Library, MS Cotton Julius B.XIII, ff.48r-173r.
[2] *DPI, praefatio prima*, pp. 5-6.
[3] Ibid, p. 6.
[4] For the history of the series see David Knowles, *Great Historical Enterprises; Problems in Monastic History* (London, 1963), pp. 99-134.

which reveals little about the political, intellectual or cultural life of late twelfth- or early thirteenth-century England. Robert Bartlett, Gerald's modern biographer, dismissed the first book as 'neither original nor very illuminating', labelling it a 'derivative' compilation of quotations intended to reinforce 'moral platitudes', and quite separate from the more valuable 'historical' information contained in the second and third *distinctiones*.[5] There the 'meat' of Gerald's text is to be found – in a critical history of twelfth-century rulership, its personnel and its failings. As a result of this modern editorial judgement, therefore, *De principis instructione* can only be read as Gerald intended it when consulted in the manuscript. Only there may Gerald's careful selection of scriptural and classical quotations – and his own commentary upon them – be read and appreciated in full.

Contained within the forlorn, forgotten and apparently formulaic first *distinctio* is a chapter on clemency (*de principis clementia*). The focus of the discussion is the judicial role of the prince, and Gerald urges those who have the power to punish to control their anger, to remit offences and to mitigate due punishment.[6] To this end he quotes from a variety of authorities: from classical poets, moralists and historians (including Lucan, Ovid, Sallust and Cicero); from scripture (the psalms, gospels and prophets); from the exemplary history of the 'protomartyr' Stephen, who prayed for those who stoned him to death; and from Ambrose of Milan's treatise on Christian duties, *De officiis*. Amongst these, Gerald takes, as an example of clemency and forgiveness, a case from the gospel of John, the story of the woman caught in adultery (John viii.1-11). The guilty woman had been presented to Jesus by the Pharisees, who demanded that he pass sentence upon her. The law required her to be stoned to death, but Christ refused, arguing that only a sinless

[5] R. Bartlett, *Gerald of Wales: A Voice of the Middle Ages* (2nd edition, Stroud, 2006), p. 63. The one significant exception to this modern neglect of *De principis* is Bejczy, 'Gerald of Wales on the Cardinal Virtues: A Reappraisal of *De principis instructione*', *Medium Aevum* 75 (2006), pp. 191-201.
[6] *DPI*, 1.7, pp. 21-7.

man could justly execute the woman. That this pericope has been cut out of all modern printed editions of Gerald's text in many ways typifies the more widespread neglect of the practical influence and significance of moral theology by medieval historians. For Gerald to cite the example of Christ forgiving a sinful woman may have seemed to its modern readers simply to represent a repetitious, formulaic argument for clemency. In fact, this passage has hugely important ramifications for the way in which twelfth- and early thirteenth-century authors sought to bring to bear the moral guidance of scripture on their interpretation of the law.

The episode of the woman caught in adultery was interpreted by medieval readers according to two distinct strategies.[7] It had a central place in legal discussions about interpretation of law and dispensation from written law. John viii formed the basis for a legal stipulation in canon and civil law concerning the procedural requirement for witnesses. Canonists and civilians specified the legal implications of the gospel passage: Christ had refused to condemn the adulteress because no witness to her crime could be produced: without a witness or witnesses to attest to the proof of the charges, judgement was manifestly unsound. The pericope said nothing about morality, but a great deal about procedure. By contrast, the interpretation presented by Gerald in *De principis instructione* takes Christ's treatment of the adulteress as a plea for mercy in judicial sentencing. As they were glossed in scriptural commentaries and invoked in sermons, Christ's words ('let he who is without sin throw the first stone'), were treated as an admonition to the judge. Those appointed to sentence must be ever mindful of divine judgement on their own sins, and their own desperate need for mercy from the divine judge, lest they act too hastily or too severely towards the earthly sinners brought before them. In *De principis instructione*, Gerald places the example of the adulteress next to the injunction 'love your

[7] Below, pp. 85-8.

enemies and pray for those who persecute you' (Matthew v.44), and the example of Christ's forgiveness for his own persecutors at the moment of his crucifixion (Luke xxiii.34).[8] Deployed in this context, then, Gerald clearly intended the woman caught in adultery to stand as an example of how the judge should temper the harshness of punishment. Far from adding to a list of moral platitudes, Gerald was weighing in on a debate concerning how love for one's fellow man or woman might override the strict punishment pronounced by law.

The *exemplum* of the woman caught in adultery has obvious intellectual and cultural significance, and Gerald's selection of this case connects him to a long-running tradition of moral debate. The implications of the second, 'legal' interpretation of John viii – the doctrine of witnesses – has been discussed quite extensively, and the importance of this scriptural story in the development of *ius commune* legislation has been examined at length in modern historiography. Yet the interpretation of John viii according to moral theology – the interpretation of Christ's refusal to judge a sinner as an exhortation to clemency, the interpretation here provided by Gerald – has received almost no attention whatsoever from medieval historians. The argument of this thesis is that the role of moral theology of the interpretation of law – exemplified here in the ramifications of the story of the adulteress – repays careful historical attention. Readings of moral theology and theological traditions shaped medieval responses to law, and, more particularly, how law should be implemented. Medieval theologians used scripture to argue that moral considerations, not the dictates of written law, should claim primacy in sentencing. Theology engaged with practice and, just as importantly, lawyers took notice. Most significantly of all, passages such as John viii were deployed to suggest that sometimes 'true justice' lay in the mitigation of punishment and in the exercise of mercy. The

[8] 'De principis instructione', 1.7, f.55r.

definition of justice was, in short, just as much a matter for the schools of theology as it was for the schools of law. Examining medieval readings of John viii, as well as other scriptural, patristic and classical *exempla*, illuminates what may conveniently be termed the 'moral tradition' of justice. This tradition should not be dismissed as platitudinous, trivial or trite – theologians wielded real influence in shaping the ways in which the relationship between judgement, justice and the law was understood by contemporaries, and their discussions informed contemporary legal practice. Simply put, the adulteress, in her dual symbolism – bestriding the domains of theology and law – must be restored to the argument.

Introduction

The subject matter of this thesis is the relationship between three seemingly binary categories: law and theology, theory and praxis, justice and mercy. At its heart is the question of whether justice (*iustitia*) was a meaningful term in twelfth- and thirteenth-century England. Those first two opposed categories – law and theology, theory and practice – concern historiographical debates as much as historical argument. The greatest challenge in writing the history of justice in a 'long twelfth century' (c. 1100 - c. 1250) is that of historiographical definition, and the seemingly strict separation between the disciplines of intellectual and legal history. Both fields have conventionally claimed to have the measure of the meaning of medieval justice, each regarding the subject matter and method of the other as inconsequential. Ruling between the two approaches – let alone reconciling them – represents a scholarly labour akin to the judgement of Solomon. On the one hand, the history of medieval justice can be considered as a purely intellectual pursuit, lying in the examination of competing sets of concepts and definitions. This strand of historiography has attempted to expound the medieval meaning of *iustitia* by considering the descent of various definitions, the formal exchanges and borrowings between authors.[9] These definitions are primarily moral and ethical, biblical and philosophical. On the other hand, *iustitia* in the minds of legal historians is a none-too-specific term which encompasses both the devising of laws and their pragmatic application in the 'real' world. For legal historians, 'justice' has the imprecise meaning of an act endorsed by law, regardless of its ethical or moral status. Justice, then, tends to be presented by modern commentators as either an ideal or an action. Yet this strict division between theory and praxis, between intellectual and legal history, and the implicit

[9] Cf. István Bejczy, *The Cardinal Virtues in the Middle Ages: A Study in Moral Thought from the Fourth to the Fourteenth Century* (Leiden, 2011), pp. 100-9.

(sometimes explicit) assumption that moral virtue has no connection to legal practice, is not a polarisation which reflects thinking about justice in the period from 1100 to 1250.

Justice in Intellectual History

The place of medieval justice in modern intellectual history has been, and remains, determined by conceptual frameworks devised in the first half of the twentieth century. Modern understanding of the theoretical aspects of medieval justice, particularly as it figures in early scholastic thought (in particular that before 1250), is still largely dependent on the work of a much earlier generation of scholars. All modern studies take their cue from the work of Odon Lottin and the insights presented in his magisterial *Psychologie et morale aux XIIe et XIIIe siècles*, an exploration of scholastic moral philosophy, which was published in six volumes between 1942 and 1960.[10] Lottin's account was characterised by a clear teleology, valorising the achievements of the thirteenth century ('scholasticism proper') at the expense of the twelfth.[11] For Lottin, whose most expansive treatment of the scholastic understanding of justice is found in an article of the 1930s, medieval theories of justice should be fitted into a grander narrative of the development of systematic scholasticism. According to this narrative, the scholastic analysis of justice only became fully lucid, penetrating and politicised with the rediscovery and employment of Aristotle in the thirteenth-century schools. Lottin accordingly anticipates the triumph of Aristotelian categories of 'general' and 'particular' justice in the thirteenth century, a solution which allowed authors to think clearly about the relationship between a just (virtuous) life and specific (judicial) acts of justice. This view of the twelfth century as mere preparation for the real breakthroughs of the

[10] O. Lottin, *Psychologie et morale aux XIIe et XIIIe siècles* (6 vols., Abbaye du Mont-Cesar, 1942-60).
[11] For the repetition of a similar teleology in recent work see C.J. Nederman, 'Aristotelianism and the Origins of "Political Science" in the Twelfth Century', *Journal of the History of Ideas* 52 (1991), pp. 179-94.

thirteenth is evident even in the proleptic title of his original article – 'justice...avant l'introduction d'Aristote'.[12] As Lottin argued, and subsequent historians have reiterated, before the mid-thirteenth century discussions of justice were to be described as, at best, idiosyncratic, at worst chaotic and disorganised, a mishmash of borrowings from classical texts, lacking any compelling structural principle.[13] Whilst there may have been flashes of brilliance – most notably Abelard's penetrating ethic of intention (with all their consequent implications for the courtroom) – these ideas were never taken up by the main body of scholastic thought and, it is argued, left little legacy.[14] As a result, in the history of justice, the twelfth and early thirteenth centuries is conventionally characterised as a period of frenzied discussion without any lasting influence.

Recent scholarly analyses have only served to reinforce Lottin's perspective. Intellectual history has typically concerned itself with the status, role and classification of *iustitia* as a virtue, by following the approaches of scholastic *summae*, *quaestiones* and works of the *de virtutibus et de vitiis* genre. Justice is considered in relation to its fellow cardinal virtues, namely prudence (*prudentia*), temperance (*temperantia*) and fortitude (*fortitudo*).[15] Modern, 'virtue-centric' research has also supported Lottin's argument for a fundamental thirteenth-century change: István Bejczy, for example, has argued that the thirteenth century heralded a profound shift in the way in which the cardinal virtues of justice, prudence, fortitude and temperance were conceptualised.[16] The view that virtue was a mental habit came to supplant the opinion that virtue resided in the will. Whilst

[12] O. Lottin, 'Le concept de justice chez les théologiens du moyen âge avant l'introduction d'Aristote', *Revue thomiste* 44 (1938), pp. 511–21. The article is reproduced, with minor modifications, in *Psychologie et morale,* iii, pp. 283-99.
[13] e.g. M. Lutz-Bachmann, 'The Discovery of a Normative Theory of Justice in Medieval Philosophy', *Medieval Philosophy and Theology* 9 (2001), pp. 1-14; I.P. Bejczy, 'The Cardinal Virtues in Medieval Commentaries on the Nicomachean Ethics, 1250-1350', in I.P. Bejczy (ed.), *Virtue Ethics in the Middle Ages: Commentaries on Aristotle's Nicomachean Ethics, 1200-1500* (Leiden, 2008), pp. 199-221.
[14] Bejczy, *Cardinal Virtues*, pp. 87-8.
[15] e.g. I.P. Bejczy, 'Gerald of Wales on the Cardinal Virtues'; Riccardo Quinto, 'The *Conflictus vitiorum et virtutum* attributed to Stephen Langton', in István P. Bejczy and Richard Newhauser (eds.), *Virtue and Ethics in the Twelfth Century* (Leiden, 2005), pp. 197-267.
[16] Bejczy, *Cardinal Virtues*, p. 159.

twelfth-century authors believed that justice served to regulate the will and thereby allotted it an important role,[17] in thirteenth-century thought, there were only three faculties of the mind: reason, which was controlled by prudence; the irascible appetite, under the power of fortitude, and the concupiscent appetite, moderated by temperance. As such, justice did not have control of its own 'mental' power.[18] With this shift in understanding, earlier theorisations of the role and place of justice were eclipsed, if not condemned to irrelevance.

The apparent 'chaos', disorganisation, and irrelevance of scholastic thought on justice before the introduction of Aristotle is further reinforced by modern perspectives on the development and organisation of scholasticism itself. In purely formal terms, for example, the twelfth and early thirteenth centuries mark a period in which scholasticism was in something of a state of flux.[19] Different organising principles led to still greater variety in the expression and setting of arguments about justice. Modern perspectives on justice have accordingly remained a depiction of intellectual disorder. As a result, the focus of historians has tended to be limited to salvaging the reputation and thought of certain individual authors.[20] Yet these singular studies are of limited use in an attempt to establish the theoretical meaning (or meanings) of justice during this period. The true importance of scholastic arguments about justice can only be understood by situating each individual in their intellectual milieux. The most interesting elements in an author's discussion of justice will be revealed only when their definitions are set alongside those of their contemporaries, and, indeed, related to the broader contours of scholastic thought on the subject. For this reason, then, any attempt to discuss justice in the twelfth and

[17] Ibid, pp. 73-133.
[18] e.g. William of Auxerre, *Summa aurea*, ed. Jean Ribaillier (5 vols., Paris, 1980-7), 11.3.3, iv, pp. 190-1.
[19] Marcia L. Colish, 'From the Sentence Collection to the Sentence Commentary and the *Summa*: Parisian Scholastic Theology, 1130-1215', in eadem, *Studies in Scholasticism* (Aldershot, 2006), XII, pp. 9-29.
[20] e.g. R.H. Rouse and M.A. Rouse, 'John of Salisbury's Doctrine of Tyrannicide', *Speculum* 42 (1967), pp. 697-709; P. Delahaye, 'La vertu et les vertus dans les oeuvres d'Alain de Lille', *Cahiers de civilisation médiévale* 6 (1963), pp. 13-25.

earlier thirteenth century through the thought of one individual alone can be fundamentally misleading, because such an approach fails to demonstrate just how fissiparous and contentious the definition of justice actually was. Disagreement was the order of the day. Contributions to an often fractious debate on the meaning of *iustitia* might, for example, be hidden amongst otherwise more uncontroversial assertions in *speculum principis* literature or sermons. As a result, in order to appreciate the intricacies of twelfth- and thirteenth-century debates about justice, the broader outlines of medieval thought on *iustitia* must be sketched out.

When considering the historiography of medieval theories of justice, in sum, modern historiography still today lacks any chronology more sophisticated than Lottin's original schema of diversity of outlook in the twelfth century followed by Aristotelian systematisation in the thirteenth. This thesis attempts to construct a more sensitive and nuanced chronology by considering how various views of justice developed over time, and as a result of influences and interactions in the period before c. 1250, when the reception of Aristotle fundamentally altered the terms of the debate. However, a demonstration that this is a picture of 'complexity' rather than 'chaos' is only the first step. The second is to contextualise these various forms of justice and suggest that whilst there may indeed have been no single answer to the question of what 'justice' meant in the twelfth century, this diversity did not render justice a meaningless concept, as has sometimes been implied.[21]

There is, moreover, a still greater historiographical problem to address – that of attempting to connect medieval theory to medieval practice. Over the past half century, the perspective of revisionist cultural history has supported a strict separation between *iustitia* as an idea and the 'justice' of medieval political action. Such an approach has

[21] See, for example, the discussion in T.N. Bisson, *The Crisis of the Twelfth Century: Power, Lordship, and the Origins of European Government* (Princeton, NJ, 2009), and below, pp. 16-8.

argued that in the world of medieval politics, 'justice' was a matter of might, not right: any action performed by the powerful or victorious could be retrospectively rationalised as an act of justice.[22] Such an approach assumes that the term 'justice' had no particular meaning, no special resonance, and simply describes politically-expedient practice rather than politically-charged theory. Historians who take such an approach also accordingly usually suppress the theological connotations of the idea, simply arguing that 'justice' was a term used by politically astute medieval authors as a way of flattering a power which changed its forms according to circumstances. Thus, for example, a king might viciously punish one enemy, yet forgive another, and both actions could be written up as the performance of justice, not because of any underlying logic or justification to such actions, but because 'justice' lay in the actions of whichever king a court encomiast wished to flatter. Where modern historians have pursued the historiographical hare of 'power', and focussed on the idea of representations of that power, there has therefore been little room for a study of the complexities of justice, particularly when those complexities had their roots in scripture.[23]

The most recent consideration of justice along these lines has also been the most extreme, concentrating on the modern category of power at the expense of any more complex medieval notion of justice. T.N. Bisson's *The Crisis of the Twelfth Century* argues that kings and lords exercised a power which was essentially untrammelled and unchecked for much of the twelfth century. Bisson argues that the texts which provide an argument for the sophistication of medieval government (such as John of Salisbury's *Policraticus*), are fundamentally divorced from social reality, misrepresenting the realities

[22] Frederick L. Cheyette, 'Custom, Case Law and Medieval "Constitutionalism": A Re-Examination', *Political Science Quarterly* 78:3 (1963) pp. 362-90, esp. 366-7; cf. W. Davies, 'Judges and Judging: Truth and Justice in Northern Iberia on the Eve of the Millennium', *Journal of Medieval History* 36 (2010), pp. 193-203.
[23] Cf. G. Koziol, 'England, France and the Problem of Sacrality in Twelfth-Century Ritual', in T.N. Bisson (ed.), *Cultures of Power: Lordship, Status, and Process in Twelfth-Century Europe* (Philadelphia, 1995), pp. 124-48.

of royal and lordly power. Instead, Bisson argues, 'power was felt more than it was analyzed'.[24] Moral discourses drawn from the Bible and classical philosophy, when they are mentioned, are accordingly described as being filled with 'platitudinous allusions' about public power and lawful rule, and their sophisticated and consciously-classicising vocabulary is considered to have borne no relation to the way in which twelfth-century society actually worked.[25] In Bisson's account of twelfth- and thirteenth-century European politics, 'justice' becomes an almost meaningless concept, denoting an ethical standard of behaviour and set of rules which did not really govern the operation of political life. As such, the writings of 'theorists' in the schools, or counsellors at court, had no tangible impact – or at least, no impact which it is worthwhile measuring, given 'the disparity between moral imperative and arbitrary actuality', and in which biblical precepts were 'beyond hope of realization'.[26] For Bisson, in short, 'justice' belonged only in the minds of theologians and philosophers, whilst the reality of power was *dominatio* – force used to accomplish political ends. On this reading, justice – in the sense of lords bound by rules based on moral precepts – once again, does not arrive until the later thirteenth century.

Bisson puts the point more bluntly than others, yet his comments serve to highlight a seemingly widely shared assumption.[27] Whilst Lottin found twelfth-century thought on justice to be fragmentary, a mere prelude to the intellectual insights of the thirteenth, more recent revisionist accounts have gone still further, dismissing scholastic thought on the subject as irrelevant to the major political debates of the age. One object of this thesis will accordingly be to examine these verdicts more carefully, and to ascertain whether twelfth- and early thirteenth-century thinking on justice is accurately represented

[24] Bisson, *Crisis*, p. 3.
[25] Ibid, p. 10.
[26] Ibid, p. 17.
[27] See, for example, Alexader Murray's review of *Crisis*, 'Protection Rackets', *London Review of Books* 31:8 (April, 2009), pp. 25-6.

when characterised as chaotic and inconsequential. The assertion will be that, rather than chaos, there was complexity. As for the 'inconsequential' nature of scholastic thought on justice in this period, this is a point which must be addressed with reference not only to intellectual, but legal history.

Justice in Legal History

English legal history, as it goes back to Maitland (and beyond him, to Selden and sixteenth-century antiquarians), has traditionally been characterised as insular and distinctive.[28] The common law has 'a life and logic of its own'.[29] This historiographical tradition provides serious conceptual obstacles which impede the drawing of any connections between twelfth-century intellectual developments in the schools of northern Europe and contemporaneous technical developments in the English legal system. Indeed, this tradition may ultimately account for why the interpretation of *iustitia* across the two disciplines appears so starkly opposed in modern scholarship.

The first of these obstacles is the long-held and seemingly ingrained assumption concerning the explicitly practical and procedural nature of common law and the pragmatic orientation of its earliest practitioners. The history of common law has been written as a history of professionalisation.[30] Before the emergence of the Inns of Court, English legal history lacks a clear focus – or at least a focus beyond that provided by the

[28] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2 vols., Cambridge, 1895) i, p. 135; on the early modern connection between the distinctiveness of common law and English character, Brian Lockley, *Law and Empire in English Renaissance Literature* (Cambridge, 2006), esp. pp. 113-41.
[29] David J. Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law', *Law and History Review* 7 (1989), pp. 175-217, esp. p. 175.
[30] See Susan Reynolds, 'The Emergence of Professional Law in the Long Twelfth Century', and the response of Paul Brand, 'The English Difference: The Application of Bureaucratic Norms within a Legal System', both in *Law and History Review* 21 (2003), pp. 347-66 and 383-7.

persons of its practitioners.[31] The modern historiography of the first century of common law has accordingly focussed on accumulating data on the social class and background of judges and advocates, in addition to identifying the authors of the most famous legal tracts.[32] English lawyers and administrators have been characterised largely as self-interested landholders, 'new men' concerned only to secure title and position. They understood 'justice' to be the task of carrying out the wishes of the crown, and 'a great gap separated the ideal expressed in the decrees of councils, complaints of moralists, and commentaries of canonists and theologians from the practice of the Angevin kings'.[33] What drove the development of justice was the need to work around practical problems in administering the law, whether this was simply the requirement to uphold order or to generate financial revenue for the crown. These political realities drove the development of law.[34] This characterisation highlights the pragmatism and practicality of the legal profession but explicitly at the expense of any moral and social obligations and considerations which may have guided the enforcement of that law. Still more striking, perhaps perverse, is the way in which this type of legal history has sought to deal with the potential problem that ecclesiastical officers sometimes served as royal justices. Such a coincidence might, on first principles, suggest that some non-practical, theological, ideas would have necessarily been introduced into the administration of English law. Legal historians have had to contort their arguments in order to argue otherwise. John Hudson,

[31] Cf. Donald W. Sutherland, 'Legal Reasoning in the Fourteenth Century: The Invention of "Color" in Pleading', in Morris S. Arnold, Sally A. Scully and Stephen S. White (eds.), *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* (Chapel Hill, NC, 1981), p. 182.
[32] See Sarah Tullis, 'Glanvill after Glanvill' (University of Oxford D.Phil. thesis, 2008), pp. 16-7. Tullis argues that authorial issues have become a distraction in the study of legal history. Cf. R.V. Turner, 'Who was the Author of Glanvill? Reflections on the Education of Henry II's Common Lawyers', *Law and History Review* 8 (1990), pp. 97-127. See also Paul Brand, 'Chief Justice and Felon: The Career of Thomas Weyland', in Richard Eales and David Sullivan (eds.), *The Political Context of Law* (London, 1987), pp. 27-8.
[33] R.V. Turner, 'Clerical Judges in English Secular Courts: The Ideal versus the Reality', in idem, *Judges, Administrators and the Common Law in Angevin England* (London, 1994), p. 178.
[34] R.V. Turner, 'The Reputation of Royal Judges under the Angevin Kings', *Judges, Administrators and the Common Law*, pp. 112-5.

for example, attempting to maintain the entirely 'pragmatic' character of English law, puts forward the hypothesis that acts of mental compartmentalisation must have taken place on the part of these judges: 'an essential explanation seems to be the capacity of such administrators consciously to operate in two separate legal spheres'.[35] Yet such a position is difficult to sustain when considering individuals such as Richard FitzNigel, the son of Henry I's treasurer, Nigel, Bishop of Ely. FitzNigel was a man promoted through both royal administrative and church hierarchies, who served as a royal justice, and who was ultimately appointed Bishop of London. FitzNigel's *Dialogue of the Exchequer* (c. 1180) explained the performance and routine of royal justice at the exchequer with explicit reference to the scriptural precepts which informed it.[36] Whilst much of the nature and purpose of the *Dialogue* remains open to question, what is clear is that, in its author's eyes, royal justice was understood to stand on firm theological and moral foundations. Other individuals also clearly bridged any putative divide between royal administrative and ecclesiastical roles: Eustace of Fauconberg (1170-1228), for example, was active as a judge both at Westminster and on eyre, followed a similar path to Fitznigel, serving as both treasurer of the Exchequer and bishop of London. Eustace had received a university education (though whether at Paris or Bologna is unclear).[37] The same is true of Godfrey de Lucy (d. 1204), bishop of Winchester, chief justiciar of England, a *magister* who had studied both in the schools of London and abroad, and who is one possible candidate for authorship of the legal treatise *Glanvill*.[38] Richard Barre, who studied law in Bologna with the celebrated canonist Stephen of Tournai, subsequently worked as a preacher,

[35] John Hudson, 'Magna Carta, the *Ius Commune* and English Common Law', in J.S. Loengard (ed.), *Magna Carta and the England of King John* (Woodbridge, 2010), pp. 116-7.
[36] See John Hudson, 'Administration, Family and Perceptions of the Past in Late Twelfth-Century England: Richard FitzNigel and the "Dialogue of the Exchequer"', in Paul Magdalino (ed.), *Perceptions of the Past in Twelfth-Century Europe* (London, 1992), pp. 75-98.
[37] N. Vincent, 'Master Eustace de Fauconberg', in N. Vincent (ed.), *English Episcopal Acta IX: Winchester, 1205–1238* (Oxford, 1994), Appendix 4, no. 30, pp. 193-5.
[38] Turner, 'Who was the author of *Glanvill*?', pp. 116-20.

served Henry II as a justice 'in curia domini Regis' in 1172, and later held the position of chancellor for the Young King Henry.[39] Richard Barre had also made a study of the Bible, dedicating a compendium of biblical excerpts to William Longchamp, Chancellor of England.[40] As these biographies demonstrate, all four of these men had the education and experience which would have forced them to confront the *ethical* implications of acting as judges, of 'doing' justice. It is the contention of this thesis that the historian should not, in fact, assume that such individuals neglected their moral responsibilities as churchmen, or divorced their ecclesiastical and temporal identities, or simply acted merely as royal yes-men. This thesis argues that it is a more plausible and probable assumption that theological precepts impinged on the behaviour of such men as judges.

In addition to the biographies of its practitioners, the historiography of the common law in England is a history, first and foremost, of the development of procedural forms and procedural innovations. English law is a history of writs, not ethical dilemmas,[41] or, as Patrick Wormald phrased it, 'law as System' rather than 'law as experienced'.[42] The ultimate consequence of this approach is that an exclusive focus on procedure implies that there was no room for judicial discretion in common law. As the application of the law was supposedly a matter of following instructions and formulae, the 'ethical' qualities of a judge were, by definition, unimportant.[43] A focus on procedure has accordingly allowed historians of the English common law to bypass the question of moral theology and moral responsibility. James Whitman, for example, has argued that the concept of reasonable doubt was first developed c. 1219 in England, after the

[39] Richard Sharpe, 'Richard Barre's *Compendium Veteris et Novi Testamenti*', *Journal of Medieval Latin* 14 (2004), p. 128; see also R.V. Turner, 'Richard Barre and Michael Belet: Two Angevin Civil Servants', *Judges, Administrators and the Common Law*, pp. 181-98.
[40] Sharpe, 'Richard Barre's *Compendium*', p. 135.
[41] Cf. R.V.Turner, 'Henry II's Aims in Reforming England's Land Law: Feudal or Royalist?', *Judges, Administrators and the Common Law*, pp. 1-16.
[42] Patrick Wormald, *Lawyers and the State: The Varieties of Legal History* (London, 2006), p. 19.
[43] T.F.T. Plucknett, *Early English Legal Literature* (Cambridge, 1958), pp. 102-3; see also H. D. Hazeltine, preface to *Radulphi de Hengham Summae*, ed. William Huse Dunham Jr. (Cambridge, 1932).

abolition of the ordeal, in order to excuse jurors from the moral responsibility of potentially condemning an innocent person.[44] It was, in other words, a procedural innovation that circumvented the ethical problems raised by human fallibility. In a similar vein, Paul Brand, who has made a study of the ethical responsibilities of the judge in medieval common law, has argued that the question of judicial morals was, for this period, moot. Until the final decade of the thirteenth century, when the impetus of scandal made this a pressing consideration, English legal practitioners largely ignored the question of judicial morality. Although the selection of jurors (and the removal of unsuitable jurors) is a concern evident from legal texts, Brand concludes that there was no similar concern for enforcing codes of judicial ethics:

> The English common law, in the earliest phase of its history, does not manifest any great concern with the need to develop and enforce a strong code of judicial ethics to guide and control the behaviour of royal justices or to guarantee to individuals with business before the king's courts an unbiased treatment by a neutral judge.[45]

This thesis challenges that position, not least by suggesting that, rather than expecting to find ethical standards for English judges set down in 'legal' texts, it might be more fruitful to cast the net more widely and examine didactic works of moral theology.

Prosopography and procedure have obscured the analysis of the ethical dilemmas of medieval English law, but there is one context in which the intellectual and abstract influences on English law have been considered, albeit after a fashion. This is found in the long-running debate concerning exactly how far common law was influenced by, or isolated from, contemporary European developments in the *ius commune*, the 'learned' Roman law and canon law which comprised the basic elements of contemporary

[44] James Q. Whitman, *The Origins of Reasonable Doubt: The Theological Roots of The Criminal Trial* (London, 2008).
[45] P. Brand, 'Ethical Standards for Royal Justices in England *c.* 1175-1307', *University of Chicago Law School Roundtable* 239 (2001), p. 278.

European legal systems.[46] To consider these arguments is, to some extent, to consider the case for the role of intellectual, scholastic ideas in shaping common law, especially given the theological content of canon law. The question of how far this 'learned law' influenced common law has certainly given rise to contentious debates. There has been argument over specific points of contact between laws – the question, for example, of whether common law practices such as 'wager of law' (i.e. compurgation) or 'proof by charter' were derived from canon law.[47] Yet there has also been a further, ideologically-charged, argument about the more intangible aspects of *ius commune* influence. To what extent were the practitioners of common law – the pleaders in court – aware of Roman methods and Roman ideas? To what extent did they employ a shared vocabulary; and how far was the *ius commune* of use to them? Not the least of the problems with this line of discussion is the rather monolithic view it takes of the *ius commune* as a fixed set of theoretical ideas, when, of course, the civil law varied greatly as it was applied and theorised across Europe. Moreover, the majority of the participants in this modern debate have tended to assume hostility towards the *ius commune* in the minds of English lawyers, a point which cannot be definitively established or disproved.

In modern terms, the debate has been framed between 'maximalists' (such as R.M. Helmholz) who emphasise the possible extent and influence of the *ius commune* on English developments, and 'minimalists', who deny almost any possibility of meaningful contact between the two (or indeed, three) laws. And it is the maximalists who are very much in the minority on this topic. The widely-accepted argument against any real, measurable or meaningful Roman or canonical influence on common law rests on a

[46] See K. Pennington, 'Learned Law, *Droit savant, Gelehrtes Recht*: The Tyranny of a Concept', *Syracuse Journal of International Law and Commerce* 20 (1994), pp. 205-15.
[47] e.g. Charles Donahue, Jr., 'Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law', *On the Laws and Customs of England*, pp. 127-58.

number of pillars.[48] First is the argument that the foundational developments of the common law were laid down during the mid-twelfth century. The path that common law would take was largely determined by the decisions taken in the reign of Henry II. Ultimately, so the arguement goes, by the time that Roman law was in a position to provide a systematic approach to legal problems, there was no need for that system to be borrowed in England. Van Caenegem summarises: 'the pure native nature of the common law is due to the very fact of its being so firmly established and so admirably exposed at such an early date, at a date indeed when Romano-canonical learning was still in its infancy'.[49] By the time that Roman law scholars could offer a full and workable model of jurisprudence, English law was too far divergent to be able to, or want to, make use of it.

The second barrier to contact between the laws is that of geographical separation: whilst canon and Roman law were studied at Oxford in the twelfth century,[50] the development of common law took place far away from the schools, both geographically and temperamentally. Common law was developed and practised primarily in London – first focussed around the royal court, then later at the Inns of Court. It was not only taught in a different location, but practised an in entirely a different style. Whereas the schools of the *ius commune* studied a highly-structured system of speculative jurisprudence, students of common law learned by studying the actual decisions handed down from the bench – a practical exercise in procedure and pleading. Geographical separation bred distinctive pedagogies. As Paul Brand puts it: 'one consequence of this was to make

[48] For the arguments which follow see P. Brand, 'Legal Education in England before the Inns of Court', in Jonathan A. Bush and Alain Wijffels (eds.), *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900* (London, 1999), pp. 51-84.
[49] R.C. van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (London, 1959), p. 379.
[50] The question of when instruction in Roman law began at Oxford has been the subject of a great deal of debate. The present consensus is that whilst the teaching of Roman law may not have been 'institutionalised' before the 1190s, it was certainly being studied in Oxford (and possibly at other locations) by the 1180s. See R.W. Southern, 'Master Vacarius and the Beginnings of an English Academic Tradition', in J.J.G. Alexander and M.T. Gibson (eds.), *Medieval Learning and Literature: Essays Presented to Richard William Hunt* (Oxford, 1976), pp. 257-86; Peter Stein, *The Teaching of Roman Law in England around 1200* (London, 1990), introduction; Rodney M. Thomson, 'Serlo of Wilton and the School of Oxford', *Medium Aevum* 68 (1999), pp. 1-12.

English judges and lawyers resistant to abstract thought and theoretical speculation: they had not been trained to think about law in that kind of way and saw no need to do so'.[51]

The clinching argument against *ius commune* influence on English law, finally, is one of language: instruction in common law took place in French; the *ius commune* in Latin. Two legal cultures, it is argued, are symbolised by two different languages. This linguistic separation, it is claimed, is both a manifestation and cause of the isolation of English law. In the common law (aside from the anomalous latinate flourishes of *Bracton*) instruction, lectures, and pleading took place in French. Plucknett, for example, saw the rise of French as the language of law in the thirteenth century as the single most important reason for of the 'insularity' of English law. English pleaders, unable to access the Roman system, were thus locked into their own law, unable to access civilian and canonist insights, even should they have wished to. This difference became decisive from about 1250 onwards.[52] More recently, however, there has been some reassessment of the role of Latin in the common law, and a defence of the Latin abilities of English pleaders. Sarah Tullis, for example, has noted that, although French was the dominant language of legal argument, it should not be inferred from this that French was the *only* language in which pleaders were literate.[53] The number of common law procedural manuals and 'notebooks' that were written in Latin suggest the continuing importance of the language in law, even after the supposed 'peak' of Roman law influence.[54] Modern legal historiography may thus have done a disservice to English lawyers and their linguistic abilities. An English legal community that was literate and able to take instruction in Latin would at least make the reception of *ius commune* ideas in the courts a distinct

[51] Brand, 'Legal Education', p. 84.
[52] Plucknett, *Early English Legal Literature*, esp. p. 85, 96.
[53] Tullis, 'Glanvill after Glanvill', p. 51.
[54] Patrick F. Philbin, 'The *Exceptiones Contra Brevia*: A Late Thirteenth-Century Teaching Tool', in Jonathan A. Bush and Alan Wijffels (eds.), *Learning the Law: Teaching and the Transmission of Law in England* (London, 1999), pp. 133-56.

possibility. Yet lately, even Helmholz, the staunchest defender of an appreciable *ius commune* influence on common law, has sensed an impasse and abandoned an increasingly sterile debate.[55] The present balance of opinion, in short, argues that Roman law had, at best an indirect influence on English developments – in shared problems, rather than in any shared procedures.[56]

The historiographical debate within English common law needs to be separated from the aims of this thesis. Whilst the issue of contact between the *ius commune* and common law cannot be ignored, it will not be addressed directly. Rather than seeking out the specific borrowings between one law and another, this thesis is interested in addressing a broader question which is, in many ways, still more basic: the relationship of theology to law, and, specifically, the relationship of theological developments in the schools to the development and application of law at the English court. Whilst much of the most cutting-edge training in scholastic theology took place in the schools of Paris, those techniques were then carried back to England by students and masters. Those individuals with intellectual formation in theology did not lose the habit of thinking in a dialectical or 'theological' mould if they subsequently departed the schools (whether those of Paris or Oxford) in order to take up places in Angevin administration. Moreover, the chronology of the development of scholastic theology and the emergence of systematic law in England are broadly in accordance: dialectical techniques were being applied to theological questions about 'justice' early enough in Paris – from the first decades of the twelfth century – to exert an impact on the judicial practices of Angevin England. Nonetheless, in many ways, the approach of this thesis will seem, to the legal historian at least, deliberately perverse: searching for a link between law and theology in English common law, which is, according to its modern experts, the least 'learned', and

[55] R.M. Helmholz, *The Ius Commune in England: Four Studies* (Oxford, 2001), pp. 3-15.
[56] Hudson, '*Ius Commune*', p. 116.

most assuredly 'practical', of all medieval laws. The aim is to challenge the latter assumption, or at least reassess the historical basis for this claim.

Legal historians are not, of course, unique in their myopia. Intellectual historians too, have also been guilty of the same sin of 'insularity'. It is all too easy to distance medieval theology from law. Just as legal historians have been keen to trace the emergence of professional law, so intellectual history has focussed on the development of medieval theology as a discipline, as a discrete and dominant faculty within the emerging medieval university. As G.R. Evans asserted, to trace the academic history of twelfth-century *theologia* is to trace the history of the highest form of *sapientia*, separate in aim from the 'lower wisdom' of the secular study of the natural world, and an endeavour served by these lesser disciplines.[57] Yet too narrow a focus on the disciplinary disctinctiveness of theology risks overshadowing what the schools of law and theology held in common, both in terms of dialectical techniques and shared moral principles. Evans' work on the late eleventh-century emergence of schools of theology, for example, offers a narrative of how academic techniques, and the study of logic and philosophy, formed the academic study of theology.[58] What is still lacking, however, is an adequate history of how the emerging schools of theology related to the emerging schools of law.[59] The significant overlap, however, between theologians and lawyers, in terms of shared academic techniques, methodology, and moral philosophy still remains to be definitively discussed.

The apparent demarcation between theology and law as educational discipline is plain to see in the laments of medieval students of the schools, who drew a sharp contrast

[57] G.R. Evans, *Old Arts and New Theology*: *The Beginnings of Theology as an Academic Discipline* (Oxford, 1980), p. 34.
[58] Ibid, pp. 57-119.
[59] This is a point subsequently, if briefly, addressed by Evans in *Law and Theology in the Middle Ages* (London, 2001), pp. 8-10; 69-75; cf. Anders Winroth, *The Making of Gratian's Decretum* (Cambridge, 2000), esp. pp. 146-74.

between those worldly and avaricious individuals who chose to study law, aiming at wealth and success, and the impoverished students of theology, who studied the 'Queen of the Sciences' with slim hopes of preferment or career advancement.[60] A neat example of this disciplinary separation is furnished in Herbert of Bosham's *Vita Sancti Thomae*, when Herbert, who had been a distinguished master of theology in Paris, described the dining arrangements in the household of Thomas Becket.[61] There he recounts how lawyers were made to sit at a lower table than the theologians, a lesser place suitable for those who concerned themselves only with worldly matters.[62] Herbert describes a *cordon sanitaire* between the disciplines of law and theology, a line in the sand between the world of the theological 'abstraction' and the pragmatic domain of law. Yet this contrast is overplayed. There is, admittedly, a considerable scholarly challenge in connecting *iustitia* as a virtue to 'justice' in practice, moving from speculative commentaries to concrete legal change, as well as in the methodology employed in trying to 'detect' practical judicial thought in speculative texts.[63] Yet the intellectual foundations do exist for a potentially fruitful study of the interplay between theology and law. R.W. Southern's definition of scholastic thought, after all, emphasised the practical dimensions of medieval learning, which sought as its aim 'a unity of life and ideals'.[64] By clarifying and systematising the knowledge they had inherited from the ancient world, scholastic authors sought to impose order (*ordo*) on both human knowledge and action, 'to give the truths thus clarified practical application by deducing from them appropriate rules of conduct'.[65] Education in the schools prepared men for future careers in royal and

[60] Stephen C. Ferruolo, '"Quid dant artes nisi luctum?" Learning, Ambition, and Careers in the Medieval University', *History of Education Quarterly* 28 (1988), p. 2.
[61] For Herbert see Deborah L. Goodwin, 'Herbert of Bosham and the Horizons of Twelfth-Century Exegesis', *Traditio* 58 (2003), pp. 133-73.
[62] *Vita Sancti Thomae*, 3.12, *MTB*, iii, p. 207.
[63] Cf. Alan Harding, 'The Reflection of Thirteenth-Century Legal Growth in Saint Thomas's Writings', in G. Verbeke and D. Verhelst (eds.), *Aquinas and Problems of His Time* (Louvain, 1976), pp. 18-37.
[64] R.W. Southern, *Scholastic Humanism and the Unification of Europe* (2 vols., Oxford, 1995), i, p. 3.
[65] Ibid, i, p. 5.

ecclesiastical administration; scholasticism furnished the conceptual tools and systematic approach which produced a new type of European governance.[66] More recently, Philippe Buc's work on biblical exegesis in the late twelfth century has further emphasised the explicitly political application of scholastic learning, examining the scriptural bases for twelfth- and thirteenth-century schemes of social organisation.[67]

In seeking to reconcile the two disciplines here, this thesis follows the approach pioneered by John Baldwin in his magisterial work, *Masters, Princes and Merchants*. Baldwin took as his starting point the work of the Peter the Chanter, master of theology in Paris in the late twelfth century, and the students who studied under him.[68] Baldwin demonstrated how the group of theologians associated with the Chanter addressed the most pressing practical questions of the age, ranging from economics to politics and ethics, taking in the problem of usury, standards of conduct for administrators and royal officials, and the behaviour of advocates and judges. Baldwin further argued (a position which has not subsequently gone unchallenged) that the practical legal impact of scholastic thought could be seen in the 1215 papal ban on ordeals: because scholastic theologians had discredited the suitability of such a method of proof and the biblical texts on which it was founded, the ordeal fell out of favour.[69] Baldwin depicted his theologians as social commentators, considering a group of masters with a distinctly practical orientation. This thesis extends Baldwin's argument further, contending that even the seemingly most 'impractical' and abstract of theological topics – for example, the nature of divine justice – impinged in discernible ways on debates about the practice and

[66] Ibid, i, pp. 145-62.
[67] P. Buc, *L'Ambiguïté du livre: prince, pouvoir, et peuple dans les commentaires de la Bible au moyen âge* (Paris, 1994).
[68] John W. Baldwin, *Masters, Princes and Merchants: The Social Views of Peter the Chanter and his Circle* (2 vols., Princeton, NJ, 1970).
[69] John W. Baldwin, 'The Intellectual Preparation for the Canon of 1215 against Ordeals', *Speculum* 36 (1961), pp. 613-36; cf. Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford, 1990). See also Baldwin's 'Master Stephen Langton, Future Archbishop of Canterbury: The Paris Schools and Magna Carta', *English Historical Review* 123 (2008), pp. 811-46.

performance of human justice. Further, whilst the fundamental aim of this thesis is to vindicate the relevance of intellectual history to the history of medieval law, it will, nonetheless, approach the problem from both 'sides' – by considering what perspective law could give to theology, as much as how theology formed law. The starting point for any historiographical argument, however, must be the medieval meaning of justice itself.

Defining *Iustitia*

The most common and most basic definition of justice utilised in this period was one drawn from Roman law and repeated in late antique and early medieval texts. The Roman jurist Ulpian had defined *iustitia* as the constant and perpetual desire to give to each person their due (*iustitia est constans et perpetua voluntas ius suum cuique tribuens*), a definition repeated at the beginning of both the *Digest* and the *Institutes*.[70] This was a definition which medieval scholastic authors readily assented to, glossing justice as the act of 'giving to each their due'. Moreover, as justice was a form of due, the imposition of appropriate punishment could be described by the term 'debitum', a debt to be repaid. This term could be applied both in a secular judicial context, as 'pena debita',[71] and in a penitential or religious setting, given the words of the Lord's Prayer, 'dimitte nobis debita nostra'.

It is hard to overemphasise the significance of the definition of justice as a due between 1100 and 1250. It is repeated across a century and a half – in biblical glosses, in theological *summae* and *sententiae*, in monastic writing and in works of pastoral instruction. It is evident in the anonymous early twelfth-century gospel commentary,

[70] *Digest*, 1.1.1, 1:29; *Institutes*, 1.1.1, 1:1.
[71] e.g. Peter the Chanter, *VA*, 2.9, pp. 648-9; on *debita* as both a financial and soteriological concept see R.W. Shaffern, 'Images, Jurisdiction and the Treasury of Merit', *Journal of Medieval History* 22 (1996), pp. 237-47.

Enarrationes in Matthaeum,[72] and the treatise *Ysagoge in theologiam*.[73] It is repeated by by Peter the Chanter,[74] Thomas of Chobham,[75] Stephen Langton,[76] and Robert Grosseteste,[77] to name only a few. Almost all earthly actions could be fitted into this mould: it is just when an individual gives to God the praise and worship which is his 'due', an individual acts rightly in society by giving what is 'due' to their neighbours; when the individual condemns wickedness they give the 'due' of hatred to sin; when an individual resists evil, they pay the appropriate 'due' to the devil.[78] To give each their due is the duty of all – including both the secular judge and the priest.[79] Within this definition, some significant minor distinctions could also be drawn. Theological commentaries, for example, when discussing justice as a virtue, removed the phrase 'ius' from Ulpian's definition (as Cicero had done before them): justice was then simply defined as *suum cuique tribuens*.[80] There was also some consideration given to whether justice was better described as the will (*voluntas*) or intent (*intentio*) to give to each their due, rather than the virtue (*virtus*) which actually does so, for although an individual may have the desire to act justly, the action of giving to each their due may not always be in his or her power.[81] Some discussion was also generated by the signification of the term 'suum' in the phrase 'suum cuique tribuere' – was it to be understood as the 'due' owed by the giver, or the 'due' earned by s/he who would receive it? The problem was typically dealt with briefly: Alan of Lille's *De virtutibus et de vitiis et de donis spiritus sancti*, and

[72] *Enarrationes in Matthaeum*, PL.162.1286D, 'iustitia est reddere unicuique quod suum est, id est, Deo, et sibi, et proximo'.
[73] *Ysagoge in theologiam*, ed. Artur Landgraf, *Écrits théologiques de l'école d'Abelard* (Louvain, 1934), p. 75, 'virtus communi utilitate servata ius suum cuique conferens'.
[74] Peter the Chanter, *VA*, 2.28, pp. 707-10, 'que cuique reddit quod suum est'.
[75] Thomas of Chobham, *SCV*, 4.2.2. p. 143, 'iustitia sit virtus unicuique reddens quod suum est'.
[76] Stephen Langton, Paris, BnF Lat 16385, f.42v, 'iustitie est unicuique suum reddere et non solum homini, sed etiam unicuique rei'. Cf. Lottin, 'Le concept', p. 513.
[77] Grosseteste, *Dictum* 56, f.45v, 'amat igitur reddere unicuique quod suum est, atque iste amor iusticia est', and *Dictum* 70, ibid, f.51v, 'iusticia reddit unicuique quod suum est'.
[78] Thomas of Chobham, *SCV*, 4.2.2, pp. 144-5.
[79] e.g. Gervase of Tilbury, *Otia imperialia. Recreation for an Emperor*, ed. and trans. S.E. Banks and J.W. Binns (Oxford, 2002), preface, p. 2.
[80] Cicero, *De inventione*, 2.161, p. 328.
[81] e.g. Grosseteste, *Dictum* 3, ff.3v-4r, cf. *Dictum* 70, f.51v, *Dictum* 103, f.106v.

Alexander Nequam's *Speculum speculationum*, amongst others, determine that the 'due' refers to the recipient of an act of justice.[82] These discussions, however, did not prevent medieval authors from repeating Ulpian's definition and appropriating it as their own.

There were, of course, other ways of defining justice. Anselm of Canterbury, considering justice in a more general and more spiritual sense, had glossed *iustitia* as rectitude in his *De veritate*: *iustitia est rectitudo voluntatis servata propter se*.[83] This is an idea repeated by Peter the Chanter, as well as by Robert Grosseteste.[84] The Chanter also defined justice in a more general sense as the just life, that is, living in accordance with the laws of God.[85] None of these other definitions, however, generated as much intellectual commentary and questioning over the relationship between *iustitia* and *misericordia* as the definition of justice provided by Augustine, which appeared completely to contradict the premise Ulpian's notion of justice as due. It was, most influentially, repeated by Peter Lombard in his *Sentences*, c. 1150. The *Sentences* deal only briefly with justice – in fact they afford all the cardinal virtues only limited attention. The Lombard does not provide any 'classical' (pre-Christian or 'philosophical') definitions of justice or indeed of any of the cardinal virtues.[86] Instead, he defines justice as 'in subveniendo miseris', the relief of the wretched or the suffering, a definition which he took directly from Augustine's *De trinitate*.[87] Such a definition omitted any notion of due and, in its stead, placed, at the very heart of justice, the concept of *misericordia* (the act of showing mercy to the *miseris*).[88] Indeed, Augustine's definition blurred the

[82] Nequam, *SS*, 4.21, p. 450.
[83] Anselm, *De veritate*, 12, in *S. Anselmi Cantuarensis archiepiscopi Opera omnia*, ed. F.S. Schmitt (6 vols., Edinburgh, 1946-61) i, pp. 191-6.
[84] Grosseteste, *Dictum* 3, f.4r.
[85] *VA*, 2.28, pp. 708-9.
[86] Marcia L. Colish, *Peter Lombard* (2 vols., Leiden, 1994), ii, p. 504-7.
[87] Peter Lombard, *Sentences*, 3.33.1, ii, p. 188, quoting Augustine, *De trinitate*, ed. W.J. Mountain and F. Glorie, CCSL 50 (2 vols., Turnhout, 1968), 14.9, ii, p. 439.
[88] e.g. Grosseteste defines mercy as 'amor sive voluntas relevandi miserum a sua miseria', *Dictum* 2, f.1v. For a discussion of the etymological connection see Edith Scholl, 'Mercy within Mercy: *Misericordia* and *Miseria*', *Cistercian Studies Quarterly* 42 (2007), pp. 63-82.

distinction between *iustitia* and *misericordia* as discrete concepts. This then, was an explicitly 'Christian' definition of mercy. It was also an influential one, given the status which Peter Lombard's *Sentences* rapidly attained as a basic textbook in the curriculum of the schools in the second half of the twelfth century.[89]

The dilemma here, presented by the authorities of Ulpian and Augustine, was that the latter's definition of justice as mercy seemed to fundamentally contradict the principle of justice as strictly calculated due (*suum cuique tribuens*), particularly when it came to the question of punishment. Justice as due pays back precisely and exactly: it weighs the measure of a crime and repays it with an appropriate measure of punishment. The idea of *misericordia* contradicts that principle, for it suggested that justice lies in going beyond due. The judge who shows *misericordia* in mitigating the punishment of a criminal, or perhaps even in pardoning him for his crime, adheres to the definition of justice as mercy, but totally discards the idea of justice as due. This is the problem recognised, for example, by Stephen Langton in his *Summa* when he considers how justice and mercy can be related at all, given that they seem to have such opposite effects: the purpose of justice being to inflict punishment, the purpose of mercy to relax punishment. The relationship between the two seemed inversely proportional: as the justice of a sentence grew, the proportion of mercy decreased.[90]

What, then, did it mean to 'do' justice? And how did justice relate to mercy? The *Glossa ordinaria*, the great commentary on scripture compiled at the school of Laon in the early twelfth century, for example, strongly implied that the two virtues were complementary, averring that 'mercy is the light of justice, and justice is the virtue of

[89] For example, it is repeated by William of Auxerre in his *Summa aurea* (c.1215-20), 3.42.4: 'et dicit Augustinus quod: iusticia est subvenire miseris', iv, p. 819.
[90] Sten Ebbesen and Lars Boje Mortensen, 'A Partial Edition of Stephen Langton's *Summa* and *Quaestiones* with parallels from Andrew Sunesen's Hexaemeron', *Cahiers de l'institut du moyen-âge grec et latin* 49 (1984), pp. 146-7.

mercy'.[91] In this sense, the ideal judgement seemed to be one which combines both justice and mercy, finding a mid-point between them. However, another early twelfth-century gloss on the gospel of Matthew, usually attributed to Geoffrey Babion, Archbishop of Bayeux, explains that these are two separate principles: some judgements show justice, whilst others show mercy.[92] The challenge for scholastic authors was to reconcile these two definitions, or at least to demonstrate that one had priority over the other, and explain by which standard the virtue of justice ought to be measured.

There was, however, one further alternative definition of justice which was available to twelfth- and thirteenth-century theologians. Aristotle's *Topics*, had been circulating in Latin in the translation of Boethius since the early middle ages, but were given a new lease of life in the early twelfth century as part of the fresh translation of the *logica nova* undertaken by James of Venice.[93] The *Topics* provided a definition of virtue as the midpoint between excess and deficiency, the 'golden mean'. A similar definition could also be found in Cicero's *De inventione*.[94] The reasons why some definitions were *not* taken up by medieval theologians can prove just as revealing as understanding why others were. In general, the Aristotelian idea of a mean (*medium*) did not form the basis for any substantive definition of justice in twelfth- and thirteenth-century theology. Certainly there was a general appreciation of the idea of prudential moderation in all behaviours.[95] Peter the Chanter, for example, recognised the importance of *moderatio* in influencing the exercise of justice, and recognised that it is always better – whether as preacher, judge, or confessor – to hold the middle way (*medium tenuere*). This, however,

[91] *GO*, Matthew v.6, PL.114.90; for the authorship and origins see Lesley Smith, *The Glossa Ordinaria: The Making of a Medieval Bible Commentary* (Leiden, 2009), pp. 1-33.
[92] *Ennarationes in Matthaeum*, PL.162.1287.
[93] L. Minio-Paluello, 'Iacobus Veneticus Grecus: Canonist and Translator of Aristotle', *Traditio* 8 (1952), pp. 265-304.
[94] e.g. C.J. Nederman, 'The Aristotelian Doctrine of the Mean and John of Salisbury's Concept of Liberty', *Vivarium* 24 (1986), pp. 130-3.
[95] e.g. *Policraticus*, 3.3, 1:480; 8 (prologue), 2:711.

was fairly general praise of the avoidance of excess, and Peter does not recognise anything specifically 'Aristotelian' about it, instead citing warnings from Cicero and scripture against the excesses of justice.[96] The *Glossa ordinaria* made the same point. [97] In the more sophisticated and lengthy discussions of *iustitia* found in scholastic *summae*, however, theologians reject the premise that justice can be described as a mean. On close inspection, justice did not seem to be an action with a single, virtuous, middle point.[98]

A model of an Aristotelian mean implied that true justice existed as a midpoint on a scale between two extremes: absence of justice on one hand, and excess of justice on the other. The most instructive and detailed discussion of the issues this raised is found in Stephen Langton's *Summa* (probably dating to the first years of the thirteenth century).[99] Langton begins his discussion by reiterating Ulpian's definition of justice as the act of giving to each their due (*reddit alicui quod suum est*). If due justice is the virtuous midpoint, then, Langton explains, it is possible to conceive of two vices opposed to it. The vice of giving more than is due, i.e. excess of justice, is called prodigality (*prodigalitas*), and the vice of giving to no-one their due, i.e. deficiency of justice, is avarice (*avaritia*). However, Langton explains, the problem is that, rather than there being a single virtue of justice located at a midpoint between prodigality and avarice, there are in fact two virtues: largesse (*largitas*) and frugality (*parcitas*). Largesse is the action of giving to another slightly more than they deserve, but it is still a virtue, because it retains what is necessary for the support of the individual giver. Frugality, by contrast, is the action of retaining things for one's own use, yet it is still a virtue because this does not prevent it from giving to others what they deserve. In sum, then, both *largitas* and *parcitas* are virtues of justice because they both give to each their due. On this basis,

[96] *VA*, 1.66, pp. 437-8, quoting Cicero, *De officiis*, ed. and trans. Walter Miller (London, 1956), 1.10.33, pp. 34-5.
[97] *GO*, Numbers xx.17, PL.113.450.
[98] Below, pp. 250-1.
[99] Ebbesen and Mortensen, 'A Partial Edition of Stephen Langton's *Summa*', pp. 146-8.

Langton asserts, justice cannot be accurately described as a single virtue located between two vices. If this were to be the case, largesse and frugality would have to be considered the same action, an action which goes by different names on different occasions. But, as Langton has just established, they operate quite differently in relation to due. Conceiving of justice as a mean does not fully capture the complexity of its effects. The theologian William of Auvergne, teaching in the schools of Paris approximately two decades after Langton, considered the same set of arguments.[100] Justice, he concludes, is too complex an idea to be a midpoint between excess and deficiency. William cites the same case of *largitas* and *parcitas* to demonstrate the point, and further discusses the idea with relationship to *misericordia*. The problem with conceiving of justice as a mid-point between giving too little, and giving too much, he explains, is how such a position is to be reconciled with the knowledge that *misericordia* is both a part of justice and a virtue which always advises a Christian to give to another *more* than is their due. Mercy and justice are both opposed to the vice of *iniustitia*, William concludes, and they are both, clearly, virtues. But – like *largitas* and *parcitas* – *misericordia* and *iustitia* cannot easily be fitted into a model of virtue as a mean. Twelfth- and thirteenth-century theological debate, in short, was driven by attempts to address the apparent incompatibility of *iustitia* and *misericordia*. That debate ruled out the relevanceof the Aristotelian idea of the mean to resolving this pastoral problem.

It would have been relatively simple for theologians to resolve the dilemma of whether justice should be understood as 'due' or 'compassion' by distinguishing the two different definitions of Ulpian and Augustine as two distinct types of justice. Thus they might have argued that the justice defined as 'due' according to Roman law traditions applied to judicial justice, the justice of the law courts, whilst the definition of justice as

[100] William of Auvergne, *De virtutibus*, 18, in *Opera Omnia* (2 vols., reprint, Frankfurt, 1963), i, p. 178.

'mercy' provided by Augustine expressed justice in the sense of charitable acts or alms-giving. Yet however neat and tempting this resolution may have seemed, it did not reflect the response of twelfth-century writers. Mercy was explicitly regarded by scriptural and patristic authorities as a judicial duty. This principle was stated at several occasions in the Bible, but most notably at James ii.13, 'judgement without mercy will be shown to anyone who has not been merciful', and Matthew vi.14, 'if you forgive others their sins, so will your heavenly father forgive you'. These passages were interpreted by twelfth-century commentators to mean that the human judge who fails to show mercy to an offender will not receive merciful treatment from the Lord on the Day of Judgement.[101] This principle (which will henceforth be referred to as 'reciprocal mercy'), was not brushed aside as an empty threat, but instead understood by twelfth- and thirteenth-century authors as integral to their conception of judicial duty. The unmerciful judge endangers his own soul. This understanding was reinforced by glosses on the Solomonic injunction of Ecclesiastes vii.17, 'noli esse iustus multum', an idea typically explained as 'be not too just', namely as a check to avoid excessive severity in passing judicial sentence.[102]

A secondary point of reference here was the biblical pericope known as the parable of the unforgiving servant (Matthew xvii.21-35). The parable describes a servant brought before his master, who owed a debt of ten thousand talents. The master, on the pleading of the servant, shows compassion and forgives the huge debt. The servant, leaving the court, then encounters another servant, who owes him a much smaller amount, and, for his failure to repay the sum, has his fellow-servant cast into prison. When their master hears of this, he condemns the first servant's unmerciful actions, and sends him to be tortured. Christ had concluded the parable with the words: 'this is how my heavenly

[101] See, for example, the gloss on James ii.13 attributed to Stephen Langton in BnF MS Latin 338, f.7v.
[102] See Alan of Lille, *Distictiones theologicae*, PL.210.825A; *Policraticus* 4.9, 1:266-7.

Father will treat each of you unless you forgive your brother or sister from your heart'. For medieval commentators, this parable confirmed the vital importance of judicial mercy: as all humans seek mercy from God, so all have a duty to show mercy towards those over whom they are placed to judge. The parable was interpreted in both a literal way, as referring to simple debts, but also, as Peter the Chanter explained, in a spiritual sense, referring to sins or crimes.[103] A further problem which medieval authors recognised was that this principle of reciprocal mercy had the potential to place the personal justice of the judge in conflict with public requirements of justice. If it was deleterious to one's own soul to condemn a man to death without mercy, but beneficial for the public peace – which course was a judge to follow?[104]

The most complicating factor in any discussion of justice and mercy, however, was the structural relationship of the virtues themselves, and, in particular, the role of *caritas*. As a theological virtue, *caritas* could naturally claim priority over the cardinal virtue of justice. Indeed, it has been argued that the importance of *caritas* as the principal virtue in Christian theological schema was growing during the twelfth century (overtaking a 'monastic' framework, in which *humilitas* was considered the root of the virtues).[105] One significant line of thought argued that the measure of the 'righteousness' of any action lay in its agreement with *caritas*. This was embodied in an oft-quoted Augustinian principle, 'habe caritatem et fac quidquid vis' (love and do what you will).[106] The fundamental intellectual problem here, however, was that such a principle could be

[103] Peter the Chanter, *Summa de sacramentis et animae consiliis*, ed. Jean-Albert Dugauquier (Louvain, 1954), 75-6, pp. 12-5.
[104] Below, pp. 241-8, for the conflict between personal virtue and public peace.
[105] Bejczy, *Cardinal Virtues*, pp. 100-1.
[106] The original citation (Augustine, *Tractatus in Epistolam Iohannis ad Parthos*, 7.8, PL.35.2033) is 'dilige et quod vis fac', but 'habe caritatem, et fac quicquid vis' is more commonly given by scholastic authors. See Giles Constable, *"Love and Do What You Will": The Medieval History of an Augustinian Precept* (Kalamazoo, MI, 1999).

used to dispense from the law altogether.[107] The Cistercian Aelred of Rievaulx even noted that *caritas* might permit divergence from the path of reason, for an act such as loving one's enemies was not reasonable, prima facie.[108] So long as a Christian acted in accordance with the dictates of *caritas*, they no longer needed to observe a strict definition of justice as the 'paying back' of dues. The specifically judicial dilemmas caused by giving *caritas* power over *iustitia* are apparent from a number of twelfth- and thirteenth-century treatises on the virtues which argue that *misericordia* is not a part of the cardinal virtue of justice, but instead belongs to the theological virtue of love. As a constituent part of *caritas*, *misericordia* can actually claim priority over justice. This is the case, for example, in *De fructibus carnis et spiritus*, composed in the second quarter of the twelfth century by the Benedictine Conrad of Hirsau.[109]

Conrad's work places mercy as one of the *comites* of *caritas*, that is alongside the virtues of *gratia*, *pax*, *pietas*, *mansuetudo*, *liberalitas*, *indulgentia*, *compassio*, *benignitas* and *concordia*.[110] *Misericordia* is defined as showing kindness and equal treatment towards all ranks, and inclining towards co-suffering (i.e. compassion) with the afflicted. The relationship between *misericordia* and *iustitia* is not explicitly spelled out by Conrad, but it seems that, in his opinion at least, *misericordia*, as a part of *caritas*, possesses the power to override or abrogate, and not simply to moderate, justice. For the moderation of justice, *De fructibus* offers another principle, *aequitas*, which it numbers amongst the *comites* of *iustitia*. *Aequitas*, the treatise explains, functions as the scales of justice, weighing the appropriate return of merits.[111] It is vital to note, however, that the principle

[107] Bruce C. Brasington, 'Lessons of Love: Bishop Ivo of Chartres as Teacher' in Sally N. Vaughn and Jay Rubenstein (eds.), *Teaching and Learning in Northern Europe 1000-1200* (Turnhout, 2006), pp. 129-47.
[108] Aelred of Rievaulx, *Speculum caritatis*, 3.17, in A. Hoste and C.H. Talbot (eds.), *Aelredi Rievallensis Opera Omnia*, CCCM 53 (Turnhout, 1971), p. 124.
[109] *De fructibus carnis et spiritus*, 13, PL.176.997-1006; for the attribution see R. Bultot, 'L'Auteur et la fonction littéraire du "De fructibus carnis et spiritus"', *RTAM* 30 (1963), pp. 148-54.
[110] *De fructibus*, 18, PL.176.1004-5B.
[111] Ibid, 18, 1003A-B.

of *caritas* alone does not necessarily condone unusually lenient judicial behaviour (although this is most typically the case). The invocation of *caritas* as a judicial principle could equally license more severe treatment of an offender, if a judge was motivated by love to impose severe discipline on an offender who is in dire need of correction. *Caritas* thus had a more austere side: it was accordingly sometimes understood as being divided into *caritas aspera* and *caritas suavia*: both of these are to be identified with mercy, but only the second is to be identified with the mercy which remits punishment.[112] Scholastic authors observe that sometimes it is more 'merciful' to discipline a sinner than to let him continue in his offence and endanger his immortal soul.

Ambiguity over the definition and meaning of justice was something more significant than a simple squabble over semantics. The period c. 1100 to c. 1250 is characterised by neither disorder nor simple disregard for the structure of justice. Instead, it is marked by the serious and careful confrontation of an intellectual dilemma. The problem, if anything, was not that scholastic theologians lacked an organising principle with which to frame their analysis of justice, but quite the converse: theologians had to cope with a surfeit of competing organising principles. In this sense *iustitia* might be thought of as undergoing a crisis of meaning during the twelfth and thirteenth centuries, where the central problem stemmed from how one defined the relationship between justice (*iustitia*) and mercy (*misericordia*): two concepts which could either be harmonised as complementary virtues or contrasted as opposites. It is the potential for conflict, and the practical implications of that conflict, which have not been sufficiently appreciated in modern scholarly analyses of medieval justice. Indeed, a closer analysis of the terms related to justice will reveal exactly how complex the relationship between *misericordia* and *iustitia* was considered to be.

[112] See Robert of Melun, *QEP*, 1 Corinthians iv.21, p. 187.

Scholastic theologians were broadly agreed on the constituent parts of justice, which were drawn, in particular, from Cicero's *De inventione*. Cicero had listed *religio, pietas, gratia, vindicatio, observantia* and *veritas* as the 'parts' of justice,[113] explaining that each of them involved the returning of due to some party: thus *religio* was to offer appropriate and fitting worship to the divine; *vindicatio* was the return of injury to one who had injured you; *observantia* was to offer honour to one's ancestors. The only significant adaptation made to this list by medieval authors was the addition of *misericordia* – although this was not always placed as part of justice. For Cicero, *misericordia* was never a part of justice, and he refers to it in *De inventione* only as a strategy which the accused may employ in pleading.[114] *Severitas* too, might be added to this list of the parts of justice, or substituted for *vindicatio*: it had the general sense of the part of justice which returns due punishment for injury.[115] The anonymous twelfth-century treatise, *Moralium dogma philosophorum*, sometimes attributed to William of Conches, and a work which drew heavily on the writings of Cicero and Seneca, defines *severitas* as the part of justice which returns due punishment for injury. The *Moralium* considered *severitas* to be one of the two major constituent parts of justice, alongside *liberalitas*. An extremely popular text, the work served to mediate classical philosophical definitions of justice to other twelfth-century authors.[116] Thus Alan of Lille's treatise *De virtutibus, de vitiis et de donis spiritus sancti* (c. 1170-80) extends Cicero's original list of six to a total of nine, listing *religio, pietas, innocentia, severitas, vindicta* [sic], *gratia, reverentia, concordia* and *misericordia*.[117] The inclusion of *innocentia* in this list points

[113] Cicero, *De inventione*, 2.161, p. 328.
[114] Ibid, 2.51, p. 212; 2.56, p. 218; 2.107-8, p. 275.
[115] *Das Moralium dogma philosophorum des Guillaume de Conches, lateinisch, altfranzösich und mittelniederfränkisch,* ed. John Holmberg (Uppsala, 1929), pp. 12-3.
[116] John R. Williams, 'The Authorship of the *Moralium dogma philosophorum*', *Speculum* 6 (1931), pp. 392-3.
[117] For a comparison with other works (the list is largely identical), see R. Baron, 'A propos des ramifications des vertus au XIIe siècle', *RTAM* 23 (1956), pp. 25-6.

to a secondary influence on Alan's scheme, namely the early fifth-century Christian author Macrobius, whose *Super somnium Scipionis* followed Plato and Plotinus in listing the constituent virtues of justice as *innocentia*, *amicitia*, *concordia*, *pietas*, *religio*, *affectus*, *humanitas*.[118] These two descriptions of the 'parts' of justice (that of Cicero and that of Macrobius) were not necessarily incompatible, particularly given the flexibility of individual terms used as synonyms for *iustitia*. Sometimes they were simply put side by side.[119]

Much of the complexity of defining the relationship between justice and mercy was bound up in issues of language and terminology. The semantic implications of a single word could be considerable, and, as such, the language of the debate must be approached with sensitivity. Whilst the component parts of justice were common to most authors, it is a far harder task to identify the synonyms of *misericordia*. There were a number of Latin cognates for the modern English terms 'mercy', as well as for the opposing idea of 'severity' (that is, justice as the strict return of due). In addition to *caritas*, for example, mercy might be expressed as *compassio*, *clementia*, *humanitas*, *indulgentia*, *lenitas*, *mansuetudo*, *misericordia*, *moderatio*, *mollitia* or *pietas*.[120] The rationale for the inclusion of *humanitas* as a synonym for mercy derived from Isidore of Seville's *Etymologiae*, which had defined *humanitas* as a feeling of love and pity towards one's fellows,[121] broadly equating it with the idea of *compassio*, or co-suffering. Sometimes these terms are clearly used interchangeably: for example, the terms *misericordia*, *mansuetudo* and *mollitia* were all applied to the same intercessory action of

[118] Macrobius, *Commentary on the Dream of Scipio*, ed. and trans. W.H. Stahl (New York, 1990), 1.8.7, p. 122.
[119] For example, both Cicero and Macrobius's lists of the parts of justice are given in a late twelfth-century *florilegium* from Worcester: C.H. Talbot and P. Delhaye, *Florilegium morale oxoniense: MS. Bodl. 633* (2 vols., Namur, 1955-6), i, p. 85, 88.
[120] The term *indulgentia* had not yet acquired the meaning of a remission for the punishment of sin. See R.W. Shaffern, 'Learned Discussions of Indulgences for the Dead in the Middle Ages', *Church History* 61 (1992), pp. 367-81.
[121] Isidore of Seville, *Etymologies*, 10.116, trans. Stephen A. Barney et al., *The Etymologies of Isidore of Seville* (Cambridge, 2006), p. 220.

Moses.[122] Occasionally, however, an author utilises these differences in terminology to make a particular point concerning the nature and meaning of justice. For example, in Peter Abelard's *Collationes* (probably composed between 1127 and 1132), a pagan philosopher, arguing against a representative of the Christian religion, complains that *misericordia* denotes indiscriminate and undeserved pity, and, as such, it is not an admirable quality. The philosopher instead praises *clementia* as a true virtue, because it is reasonable to pity only those who have been punished unjustly.[123] Abelard was probably here drawing on the Ciceronian idea that *clementia* regulated justice because it belonged to the prudential virtue of *temperantia* (under which heading *moderatio* was also classified).[124] Other authors, however, whilst arguing that *clementia* regulated the distribution of justice, performing a function similar to that of *prudentia*, still maintained that *clementia* was a part of *iustitia*.[125] For other scholastic theologians meanwhile, *clementia* and *misericordia* performed such similar roles that they could, for the most part, be considered to be synonymous.[126]

The antonym of *misericordia* – unyielding, punitive justice – also had a number of synonyms, in addition to *iustitia* itself, which, when paired with *misericordia*, typically indicates a strict return of due, a more stringent judicial sentence. These terms included *asperitas*, *austeritas*, *districtio*, *excessus*, *rigor* and *severitas*. Of these terms, only *excessus* had inevitably negative connotations – of exceeding the limits of righteous justice.[127] *Districtio* bore the meaning of applying the full force of the law, without

[122] Below, pp. 88-92.
[123] Abelard, *Collationes*, 128, ed. J. Marenbon and G. Orlandi (Oxford, 2001), pp. 140-3.
[124] *De inventione*, 2.163, p. 330: 'per quam animi temere in odium alicuius inferioris concitati comitate retinentur'.
[125] Raoul Ardens, 'Speculum universale', BnF, MS Latin 3240, x.64, f.49r; below, pp. 249-52.
[126] e.g. William of Auvergne, *De rhetorica divina*, 7, *Opera*, i, pp. 343-4.
[127] e.g. Gerald of Wales, *Vita Sancti Remigii*, ed. J.F. Dimock, RS 21 (London, 1877), 29, p. 68; see below, p. 273.

mitigation.[128] Some terms were more contentious than others. For example, Alan of Lille noted that some people did not consider *severitas* or *vindicta* to be virtues, because the desire to repel enemies derived not from nature (*natura*) but from human weakness (*ex infirmitate*).[129] Yet, as Alan observed, it was possible to construct a case for *severitas* as a necessary political action, even a praiseworthy virtue.[130]

Alongside the vocabulary which described judicial sentences, there was also a variety of terms which were used to refer to the judge's ability to permit exemptions from the written law. The most neutral of these is *discretio*, particularly important in a monastic context and the idea of dispensation from monastic rules.[131] *Discretio* is, however, is a term which requires careful elucidation when it occurs, since, whilst it may certainly carry a modern meaning of 'dispensation', it can also denote the process of discerning guilt or innocence, as its etymological root (*discernere*) implied.[132] Linked to the exercise of judicial discretion was the *voluntas* or *arbitrium* of the judge. These last two terms might simply convey the meaning of a judicial decision or judicial choice: alternatively, they might carry the association of a partial sentence, arrived at not through reason, but exercise of personal will.[133]

Beyond elucidating the different terms for *misericordia*, it should be noted that different 'types' or species of mercy were developed by scholastic authors, in part as an attempt to comprehend the acknowledged complexities of the virtue. Peter the Chanter, for instance, in his *Verbum abbreviatum* (c. 1187), a practical guide to moral theology, delineates five distinct varieties of mercy, each of which has its own particular function

[128] Cf. Innocent III's *Vergentis in senium* (1199), calling for the exercise of 'ecclesiastica districtione' against heretics, X.5.7.10 (*Corpus iuris canonici*, 2:782-3).
[129] Alan of Lille, *De virtutibus, de vitiis et de donis spiritus sancti*, ed. Odon Lottin, *Mediaeval Studies* 12 (1950), 1.2, p. 31.
[130] Below, p. 95, 242.
[131] e.g. Aelred of Rievaulx, *Speculum caritatis*, 3.32, pp. 141-3; *Benedicti regula*, ed. Rudolph Hanslik, CSEL 75 (Vienna, 1960), 70, pp. 160-1. See also below, pp. 154-7.
[132] See Edith Scholl, 'The Mother of All Virtues: *Discretio*', *Cistercian Studies Quarterly* 36 (2001) pp. 389-401.
[133] Below, pp. 65-6.

and inflections. This approach is representative of the precision and care which characterises scholastic discussions of justice in general. First, Peter lists *misericordia ignoscendi*, the mercy which forgives debts and injuries.[134] Second comes *misericordia iudicandi*, whose province is the 'sparing and relaxing' of punishments.[135] Third is *misericordia corripientis*, the mercy of censure and correction. It is under this heading that Peter discusses the relationship between mercy and discipline.[136] On this basis, any action which is intended to correct the soul – including physical punishment, if necessary – can be considered compassionate. This definition is followed by a fourth type, 'interceding mercy', and a discussion of intercession specifically directed towards one's enemies.[137] The most important scriptural demonstration of this form of mercy is the example of the crucified Christ praying for his executioners. This discussion of intercession is then followed by a fifth category, 'rescuing mercy' (*eripere*), which is closely aligned with the idea of charity.[138] Most significant of all for the discussion of the relationship between mercy and due justice is Peter's first category of 'pardoning mercy' – *misericordia ignoscendi*. Offering an *exemplum* of a rich man whose son was killed by a pauper, Peter describes how the murderer was brought before the father who, by law, had the right to execute his son's killer. The pauper begged him for mercy, saying:

> If you act mercifully towards me, I will never come to you again in my life, if you allow me to cross the sea and spend the rest of my life in pilgrimage and praying for the soul of your son. My Lord, if you wish, you may justly kill me, but I beg you for the sake of He who was crucified both for you and for me, and who redeemed us both on the cross... to spare my life and remit my deserved punishment of death**,** just as, on the day of judgement...you yourself will be rewarded by God above the measure of your deserts.[139]

[134] *VA*, 2.8, pp. 644-8.
[135] Ibid, 2.9, pp. 648-50.
[136] Ibid, 2.10, pp. 650-2.
[137] Ibid, 2.11, p. 652.
[138] Ibid, 2.12, pp. 653-4.
[139] Ibid, 2.8, p. 646.

On hearing this plea, the rich man, considering the reciprocal nature of mercy, was compelled to put away his sword. This *exemplum* demonstrates one very influential way of conceiving of the relationship between mercy and law, and the potential for mercy to override the commands of written law. For the murderer who seeks forgiveness for his crime, mercy means a stay of execution. *Misericordia*, as the offender admits, consists of the remission of due punishment. Mercy does not legitimise the crime but, through an appeal to the example of the crucified Christ, mercy remits the penalty of death which is due by law. It also replaces a negatively reciprocal relationship – that is, punishment returned for a crime committed – with a more positive one: forgiveness towards the offender is matched by the promised divine mercy towards the one who forgives.

Peter the Chanter, for one, clearly allows the possibility of mercy 'dispensing' from law, in much the same way as the idea that *caritas* allowed an individual to do what was right and even permitted that individual to disregard the written law.[140] Peter's *Verbum abbreviatum* was an immensely popular text, read and utilised by medieval students and masters alike.[141] As part and parcel of their education in the schools, medieval judges were made aware of the complexity of justice and mercy. Different definitions of justice were understood to license widely differing patterns of judicial behaviour. A definition which concentrates on what is 'due' allowed very little space for the exercise of judicial discretion, and, by extension, of judicial mercy. A definition of justice which emphasised the place of forgiveness and *misericordia*, on the other hand, accorded much better with a legal system in which pardon was a common practice.

Justice and Mercy in Written Law

[140] Above, pp. 38-9.
[141] In addition to Baldwin's *Masters, Princes and Merchants*, see Eva Matthews Sandford, 'The *Verbum Abbreviatum* of Petrus Cantor', *Transactions and Proceedings of the American Philological Association* 74 (1943), pp. 33-7.

One context in which the legal and practical ramifications of the potential intellectual conflict between justice and mercy have been acknowledged by historians is that of canon law. In a legal system which was undergoing the dramatic process of systematisation in the eleventh and twelfth centuries, canonists were forced to confront the question of judicial behaviour. As a law which drew more explicitly on theological and Roman traditions than English common law, it becomes instructive to consider the problems which twelfth-century canonists encountered in attempting to reconcile these two principles. The question of the development of justice and mercy in canon law was first addressed by Stephan Kuttner in his seminal essay, 'Urban II and the Doctrine of Interpretation: A Turning Point?'.[142] Kuttner argued that the conflict between *iustitia* and *misericordia* was a millennium-old theme in canonistic literature. The idea of tempering the canons, of mitigating the rigour of inviolable law with some concessions to human frailty, was, Kuttner argued, a very conventional concept, expressed through a profoundly traditional vocabulary. Twelfth-century popes and canonists, speaking of mitigation of the canons for reasons of 'temporis necessitas', 'necessitate cogente' or 'pro consideratione temporum', invoked terms used by popes Leo I, Innocent I, Alexander I and even Gregory VII himself.[143] Kuttner's fundamental point bears repeating: the conflict between justice and mercy in the canons dated back long before the advent of the twelfth, the 'legal', century: it was a constant in ecclesiastical law (and, indeed, in moral didactic literature) from almost the time of the early church. What was different in the twelfth century – and why the particular issue of *iustitia* and *misericordia* received such attention – was that increased scrutiny of the canons and the growing systematisation of church law forced canonists to confront the issue of exactly when, and why, a judge should be allowed to dispense from the law; in other words, how general rulings and principles

[142] Stephan Kuttner, 'Urban II and the Doctrine of Interpretation: A Turning Point?', *Studia Gratiana* 15 (1972), pp. 66-9.
[143] Ibid, p. 69.

should be applied in specific cases.[144] How did ideas of mercy and justice apply to the law as a whole, as a developing body of rules for governing Christendom?

Kuttner's challenge has been discussed at length in the modern historiography of canon law. The dilemma is neatly summarised by the preface to Alger of Liège's *De misericordia et iustitia*, a collection of canons composed at some point before 1121: 'for some canonical precepts concern mercy, others concern justice, and they are distinguished according to various orders, persons and times. Now mercy completely relaxes justice; now justice entirely overcomes mercy'.[145] Alger's preface emphasised the need to take account of the variety of circumstances and causes of offence, and to allow a flexible interpretation of the canons, so long as that interpretation was motivated by *intentio caritatis*, a righteous love which sought true justice.[146] Ivo of Chartres, writing in the final decade of the eleventh century, famously discussed the same question in the prologue to his *Decretum*: how ought two seemingly contradictory traditions within the canons to be reconciled?[147] Ivo, like Alger, argued that *caritas* ought to be the guiding principle for any judge who sought to interpret the provisions of the canons, as *caritas* gave licence to temper the severity of the law.[148] Within a generation, the insights of both Alger and Ivo had been incorporated into the fundamental text of canon law, Gratian's *Decretum* (c. 1140). This text included the crucial contention that application of the law ought to be determined by love, establishing the rule that 'ubi karitas non est, non potest esse iustitia'.[149] According to all three of these canonists, written law often had to be adapted in some way in order to fit the circumstances in which it was applied, for the

[144] Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury, 1198-1254: A Study in Ecclesiastical Jurisdiction and Administration* (London, 1971), pp. 100-1.
[145] Alger of Liège, *Liber de misericordia et iustitia*, ed. N. Kretzschmar (Sigmaringen, 1985), p. 187.
[146] Ibid, p. 187.
[147] For the date of Ivo's *Decretum* (the first stages date to the 1080s, the final form to c. 1094, but with continuous revisions), Rolker, *Canon Law*, pp. 160-161.
[148] Ivo of Chartres, *Prologue*, in Bruce C. Brasington, *Ways of Mercy: The Prologue of Ivo of Chartres* (Münster, 2004), pp. 115-42.
[149] *Decretum*, C.XXIV, q.1, c.29, 1:977; cf. Winroth, *The Making of Gratian's Decretum*, p. 20, for the relationship of that text to Ivo's writings.

good of the Church and for the good of the individual who had transgressed. Only with consideration of the circumstances of each case could a judgement be given and a rule adapted, and in doing so, *caritas* provided the key to the legitimate modification of legal commands.

Throughout the twelfth century, canon law sought to find a way of translating this moral dilemma into judicial guidance: needing both to observe the justice which rendered what was 'due' to God, but also mercifully to seek the reconciliation and salvation of sinners. A revealing development in this regard was some canonists' decision to abandon the use of the blanket term *misericordia*, and replace it with a more precise, technical, vocabulary to describe the action of mitigating punishment.[150] The substitute that canonists generally settled on was the phrase *aequitas canonica*: this described the considerations and motivations which encouraged a judge to temper the severity of the written canons. *Aequitas* is a term and a concept which canon law explicitly borrowed from civilians and Roman jurisprudence.[151] Gratian rarely uses the term *aequitas*, preferring to speak of *misericordia*,[152] yet by 1200, the latter term had almost been excised from the technical vocabulary of canonists.[153]

Canon law provides an instructive parallel for the study of English common law, for it demonstrates quite how much of a problem one law code could encounter when it tried to translate theological ideas into principles for actual legal argument and discussion. This was a law code which was undergoing rapid change in the course of the twelfth century, which was struggling to deal with the role of the judge and judicial

[150] Kenneth Pennington, 'The Practical Use of Roman Law in the Early Twelfth Century', in Matthias Lutz-Bachmann and Alexander Fidora (eds.), *Handlung und Wissenschaft: Die Epistemologie der Praktischen Wissenschaften im 12. und 13. Jahrhundert* (Berlin, 2008), p. 13.
[151] Above, p. 39.
[152] e.g. *Decretum*, C.II, q.7, c.36, 1:494; C.XII, q.2, c.39, 1:700; cf. D.XLV, c.10, 1:165.
[153] G. Conklin, 'Stephen of Tournai and the Development of *Aequitas canonica*: The Theory and Practice of Law after Gratian', in Stanley Chodorow (ed.), *Proceedings of the Eighth International Congress of Medieval Canon Law* (Rome, 1992), pp. 369-86.

discretion and, which, as a result, developed a language and a terminology with which it could be understood. This is a model which needs to be borne in mind when considering the way in which judges who had been trained in this ecclesiastical law, found themselves in England and being charged with the responsibility of applying common law. How did they seek to accommodate the idea of judicial mercy in *this* law and during a similar period of legal systematisation?

Justice and Mercy in English Law: Standardisation and Discretion

Prior to the twelfth century, the implicit intellectual contradiction between justice and mercy does not seem to have been considered as a particularly pressing political or legal problem. The term *misericordia* did not carry fixed legal implications, but fitted within a relatively informal and unwritten relationship between a vassal and his lord.[154] *Misericordia* was the process by which one made amends to a superior and sought forgiveness for wrongdoing: it relied upon personal and customary relationships; it was not subject to any 'exterior' measure of rectitude, such as law, nor was it measurable against an abstract standard of 'justice'.[155] However, the status (and legitimacy) of this type of *misericordia* was fundamentally challenged in the period after 1100, as, across northern Europe, the idea of ordered legal systems became the norm rather than the exception. Royal power asserted itself through legal means and through claiming legal powers previously held by lesser authorities. This process of royal assertion was accompanied by legal systematisation, and a growing desire to make law 'orderly', by

[154] Hincmar of Rheims, *De regis persona et regio ministerio*, PL.125.846.
[155] J. Goebel, Jr., *Felony and Misdemeanour: A Study in the History of Criminal Law* (1937), pp. 242-4; G. Koziol, *Begging Pardon and Favor: Ritual and Political Order in Early Medieval France* (London, 1992), pp. 215-6.

setting down the rules by which it operated.[156] This narrative of the standardisation of justice applies particularly to England during the reign of Henry II, marking the expansion of royal administration and legal powers associated with the 'Angevin leap forward' and the transformation of English law 'beyond recognition'.[157] Baronial power over the laws was curbed; itinerant justices (an innovation first seen under Henry's grandfather, Henry I) were rolled out across the land from 1163 onwards. Royal justice extended its reach, impinging on the lives of many more individuals than ever before. Alongside the expansion of royal judicial power came an emphasis on uniformity and regularity: royal justice was to be applied according to the same standards across the country.[158]

Implicit in the standard modern historical narratives of the development of the common law in twelfth-century England is the gradual, almost teleological, regularisation and routinisation of justice. As law was increasingly conceived of as a written body of rules, a judicial mentality developed which disapproved of the application of discretion or dispensation from the laws. Modern legal historians, considering the increasing uniformity of legal forms, pleading and procedure, have assumed that judicial centralisation and standardisation equated to the regularisation of justice.[159] The further the laws of England were fixed in written treatises, the better defined the role of the courts, and the more predictable the judicial process. The significance of the Henrician expansion of law, however, has lately come under increased scrutiny. Recent challenges to the traditional narrative of English legal history have, it is true, come, not from

[156] Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley, CA, 1993), p. 142; G.I. Langmuir, 'Community and Legal Change in Capetian France', *French Historical Studies* 6 (1970), pp. 276-82.
[157] See G.J. White, *Restoration and Reform, 1153-1165: Recovery from Civil War in England* (Cambridge, 2000), esp. pp. 211-2; for the quotation R.C. van Caenegem, *Royal Writs in England*, p. 204.
[158] John Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford, 1994), esp. pp. 270-5.
[159] On centralisation see Joseph Biancalana, 'For Want of Justice: The Legal Reforms of Henry II', *Columbia Law Review* 88 (1988), pp. 534-6.

intellectual history and its claims for the role of theology in law, but from cultural historians, who have begun to challenge the success and spread of standardised royal justice. The historiographical orthodoxy, established by Maitland and continued by his successors, emphasised the role of the twelfth century as a legal turning-point, as the inception of a specifically *rational* jurisprudence and learned argumentation as a means of resolving disputes. The challenge to this narrative has come from the rise of dispute literature (typified by Paul Hyams' *Rancor and Reconciliation*) which focuses its attention on clashes which were resolved, not through legal mechanisms, but through an appeal to older ideas such as vengeance and feud.[160] Despite the powers wielded by royal justices, most cases were settled not in the courts, but by threat of violence or self-help.[161] Hyams insists, for example, that, despite the rolling out of judicial mechanisms, thirteenth-century England still remained a 'vengeance culture'.[162] Later chapters of this thesis will address the particular arguments set down by Hyams, and the question of whether the English 'everyman' or 'everywoman' of the twelfth century was more interested in vengeance than in justice. But whilst revisionist narratives have complicated our understanding of the competing legal jurisdictions and means of dispute-resolution in England during the twelfth century, there would still seem to be broad agreement at least that, from c. 1160, royal legal power was asserted more forcefully and represented a significant change in the tenor of English government.

Even within the conventional narrative of the routinisation of English justice, however, there remained one legal concept which resisted standardisation: the exercise of mercy, particularly in the granting of pardon. For when law was systematised, pardon could not help but become problematised. Previously an informal agreement between a

[160] Paul R. Hyams, *Rancor and Reconciliation in Medieval England* (Ithaca, NY, 2003), pp. 155-86.
[161] Cf. John Hudson, 'Maitland and Anglo-Norman Law', in John Hudson (ed.), *The History of English Law: Centenary Essays on "Pollock and Maitland"* (Oxford, 1996), pp. 35-8.
[162] Hyams, *Rancor and Reconciliation*, pp. 132-4.

powerful superior and repentant inferior, pardon now had to be accommodated within a legal framework. Yet how could rules be created to govern exceptional situations? The point is expressed most clearly in what is, to date, the only dedicated study of the royal pardon in this period, Naomi Hurnard's 1956 work, *The King's Pardon for Homicide Before 1307 AD*. Hurnard identifies the crux of the problem: pardon, the judicial exercise of mercy, could never be wholly regularised, for the reason for pardon always depended on special circumstances. The act of pardon was the act of 'substituting administrative discretion for judicial decision, uncertainty for predictability of punishment'.[163] Pardon, it must be noted, did not necessarily mean the abrogation of all punishment, but the substitution of capital punishment for a lesser one, typically a fine. In Hurnard's view, it was not until the reign of Edward III that the place of pardon within the English legal system could be described with any precision or clarity.[164] For Hurnard, the phenomenon of royal pardon in the twelfth century was a deliberate anomaly within common law. The possibility of pardon served to mitigate the (ever-increasing) severity of the law: 'the intensification of public prosecution and punishment could be pressed to its limits only so long as the prerogative of mercy provided a safeguard against undue severity in particular cases'.[165] Pardon was necessary not least because the common law made no differentiation, for example, between manslaughter and deliberate killing: any proven act of homicide was a capital offence. Hurnard's study focussed on the problems which arose from this absence of legal distinction, and the granting of pardon in cases of what would now be call manslaughter: homicide performed by accident or in self-defence. The scope of this thesis will consider a broader topic, of which the pardon is but the most concrete example – judicial mercy towards those whose guilt had already been proven or admitted – but the issue is analogous.

[163] Naomi D. Hurnard, *The King's Pardon for Homicide Before 1307 A.D.* (Oxford, 1969), p. vii.
[164] Ibid, p. 223.
[165] Ibid, p. 21.

One problem with any study of pardon is, from a relatively limited body of evidence, understanding how the process itself worked. Under the common law system it was customary that those found guilty of a capital crime were executed immediately.[166] However, the act of suing for, and purchasing, royal pardon was a long and costly process which involved making representations to the royal court, or royal officials, in order to secure the appropriate documents. It seems likely that those who gained a pardon had begun the process of seeking it sometime before their case came to be presented before a court.[167] A further complicating factor is the difficulty of ascertaining the frequency of grants of pardon in the period 1100-1250. Pardons themselves (charters with immediate, not lasting relevance) do not survive. The pipe rolls record some pardons, but show only those which were not paid for immediately.[168] If pardon was, as Hurnard suggested, presented as the concomitant of a policy of deliberate severity in Angevin justice, there is little solid written legal evidence to reveal whether this promise was upheld, or how regularly it was granted. Historical analysis of the language of 'pardon', and of royal mercy more generally, is also fraught with difficulty. Pardon in itself describes the act of an offender putting his life at the mercy of a king, who may then impose a financial charge in exchange for the annulment of a capital sentence. In this sense it could apply to robbery, arson or other felonies in addition to homicide. The Anglo-Norman term 'amercier', describing the assessment of a fine (for any offence), is not attested before 1165-6, and only became common in the later twelfth century. A number of other terms could be used: *emendatio*, *redemptio*, *fortisfactura* or *misericordia*, or even the more

[166] H.R.T. Summerson, 'Attitudes to Capital Punishment in England, 1200-1350', in M. Prestwich, R. Britnell and R. Frame (eds.), *Thirteenth Century England* 8 (Oxford, 2001), pp. 123-33.
[167] e.g. F.W. Maitland (ed.), *Select Pleas of the Crown. Volume 1, A.D. 1200-1225* (London, 1888), case 171, p. 112.
[168] Hurnard, *King's Pardon*, p. 19.

general phrase *in beneplacito regis*.[169] The introduction of the term 'amercier' does, certainly, suggest the increasing routinisation of pardon in the later twelfth century. Before this period, however, there does not seem to be any clear distinction between the ways in which offenders debased themselves before Anglo-Saxon rulers, and the process by which pardon was sought from early Norman kings.[170]

Given these difficulties, rather than concentrating solely on pardon as it is defined in legal records, this thesis will approach the question of mercy more broadly, by examining the moral principles which informed the granting of pardon and guided contemporary discussions of mercy. In historiographical terms, studies of legal mercy have tended to focus their attention on the jury, rather than on the crown. 'Mercy' in English law has most frequently been addressed with reference to the idea of 'jury nullification', an idea most clearly elucidated by T.A.C. Green.[171] From 1166 (intermittently, as juries of presentment), and (regularly) from 1219 onwards, jurors held a powerful position within the justice system. 'Jury nullification' describes the process by which juries, though believing the suspect brought before them was guilty of the felony for which they were tried, would acquit him or her, because they believed that the statutory legal punishment was more severe than the crime merited. Acquittal was one possibility. More likely, however, was that a jury would demonstrate 'mercy' by re-classifying a felony, claiming the death brought before them to be an 'excusable' homicide, and thus recommending the killer to royal pardon (which then became almost, but not quite, a formality).[172] Common law juries were, it seems, very willing to extend

[169] J.P. Collas (ed.), *Year Books of Edward II, vol. 25: 12 Edward II: Parts of Easter and Trinity 1319* (London, 1964), pp. xiv, xxvi.
[170] Hyams, *Rancor and Reconciliation*, pp. 113-5.
[171] T.A. Green, 'Societal Concepts of Criminal Liability and Jury Nullification of the Law in the Thirteenth and Fourteenth Centuries', in idem, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago, 1985), pp. 28-64.
[172] Pardon was also made as a matter of course (*de cursu*) for those who killed an outlaw or an enemy of the king, Hurnard, *King's Pardon*, pp. 26-7.

this category: the excuse of self-defence could be made to cover a man who had pursued a thief; the excuse of insanity could be applied to cover a man temporarily enraged by the adulterous behaviour of his wife.[173] Juries might also recommend complex cases for special judicial discussion.

The 'mercy' of jurors in refusing to judge as the letter of the common law dictated has typically been interpreted as a demonstration of 'communal' standards of justice.[174] Those people who were acquitted of their crimes or had their felonies nullified were usually those known to the local jurors as individuals of good repute, whereas unpopular suspects or aliens usually felt the full force of the law, even in cases in which the circumstances could have conformed to a plausible *excusatio* of self-defence. Juries maintained a working distinction between murder and manslaughter, a division which the common law itself ignored, and in doing so, jurors demonstrated 'mercy', or, at least, showed their disagreement with the severity of punishments meted out by the crown. However, the methodological challenge in examining possible incidents of jury nullification as examples of medieval mercy is twofold. The first is evidential: with only the records of trial verdicts to exploit, it is impossible to tell precisely 'why' juries failed to present or convict suspects who look on paper to be certain felons. It may have been doubts over the evidence presented at trial which prevented conviction; it may have been notions of 'mercy', a genuine belief in the suspect's innocence, or a mixture of these motivations. It should not be assumed, however, as historians of 'power' have done, that nullifications represent only expected social customs and that there were no greater moral principles at stake. The only evidentiary pointer to the practice of jury nullification is a 'suspiciously' high level of acquittals.[175] It is difficult to see how, in the absence of other

[173] Ibid, p. 136.
[174] Green, Societal Concepts of Criminal Liability'.
[175] Green, 'The Criminal Trial Jury: Origins and Early Development – An Interpretive Overview', *Verdict According to Conscience*, p. 12.

records to supplement suspicions about juror motivations, this analysis can be developed further. The second problem is the historiographical paradigm which these studies have been used to support. Green, for example, notes that it is possible that the English crown never 'bothered' to create a category of manslaughter or excusable homicide, for it realised that the presenting jury would 'filter out' such cases, ensuring they were never brought to sentence.[176] The other, more common historiographical explanation, however, has been that jury nullification represents a clash of two opposing views of justice, two opposed mentalities, 'popular' and 'official, or 'bottom up' and 'top down'. An older, less punitive notion of community justice, represented by the jurors, subverted the unmerciful, punitive regime which a centralising royal power was attempting to impose on English society through legal reform.[177] The principle that there was any real horizontal distinction between 'elite' and 'popular' ideas of justice will be examined and challenged in this thesis.[178] The picture is never as simple as a local community which valued mercy subverting the severe edicts of unbending royal justice.

All studies of jury nullification typically depend on the argument that English common law had no time for mercy. Yet, on the contrary, *misericordia* was frequently held up as a royal duty and its importance is underlined in several manuals of common law.[179] Whilst legal textbooks themselves are far from specific on the subject of pardon, they do suggest that mercy, more generally, was also an essential principle for the common law judge. Legal records provide some brief glimpses of what they describe as 'mercy' (*misericordia*), moments at which the king, supposedly moved by 'mercy',

[176] Ibid, p. 10.
[177] Summerson, 'Attitudes to Capital Punishment', p. 3; Summerson, 'Suicide and the Fear of the Gallows', *Journal of Legal History* 21 (2000), p. 50.
[178] Below, pp. 177-82.
[179] Below, pp. 58-62.

decided to ameliorate the strictures of justice, most often by remitting fines.[180] After all, the promise to do both 'justice and mercy' was a basic element in the pre-conquest English coronation oath.[181] Likewise, the prologue to the treatise on English law known as *Glanvill* (c. 1188) averred that the role of the king was to 'temper justice for the humble and meek with the rod of equity... acting now with severity, now with leniency'.[182]

There is a strikingly lengthy discussion of mercy in common law legal texts compiled and produced across the period (c. 1100 – c. 1250) – running from the *Leges Henrici Primi* to *Bracton*.[183] All these works are markedly consistent, moreover, in the themes they allude to when discussing mercy. Although they do not explicitly spell out an opposition between justice and mercy, there are certainly places which strongly suggest a recognition of the latent tension between these two virtues and the problems of embodying them both in a single legal procedure. All of them note the importance of mercy; but all of them are revealingly vague when it comes to offering detailed instruction on when, and how, to apply that mercy. The *Leges Henrici Primi*, for example, composed c. 1116–18, but drawing on a long history of Anglo-Saxon law codes, asserts that mercy is an important part of the king's discretion when applying the law. Pleas 'concerning more serious charges and meriting greater punishments shall be assigned to the justice and mercy of the sovereign alone, so that more abundant pardon may be had for those seeking it, and more abundant retribution for those transgressing'.[184]

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[180] e.g. *Curia Regis Rolls of the Reign of Richard I and John, volume 1* (London, 1922), p. 382, '...et dominus rex [John] motus misericordia et per consilium recipit oblationem ipsius Hawisie'. See D.M. Stenton, *English Justice between the Norman Conquest and the Great Charter 1066-1215* (London, 1965), p. 93, 114, for a discussion of this record and John's acts of 'mercy'.
[181] P.L. Ward, 'The Coronation Ceremony in Medieval England', *Speculum* 14 (1939), pp. 160-78.
[182] *De legibus et consuetudinibus regni Angli* ('Glanvill'), ed. and trans. G.D.G. Hall (London, 1965), prologue, p. 8.
[183] For a comprehensive discussion of this theme see Patricia Helen McCune, 'The Ideology of Mercy in English Literature and Law, 1200-1600' (2 vols., University of Michigan Ph.D. thesis, 1989), i, pp. 1-74.
[184] L.J. Downer (ed.), *Leges Henrici Primi* (Oxford, 1972), 11.16a, p. 83.

But the author of *Leges*[185] goes beyond stating that mercy is simply a necessary attribute of the royal legislator – he also elaborates why such mercy should be necessary in the first place:

> Although the endless multitude of evil-doers may hinder a proper measure of mercy (*modum miserationis incommodet*), one phrase serves to restrain us: "Do not unto another what you do not wish to be done to yourself" [Luke vi.31]. The danger is so much the greater to the judge than to the person who is being judged, to the extent that we know, from the words of the Lord, that any judgement we pass on others is held in store for ourselves [Matthew vii.2].[186]

Although the *Leges* is often contrasted with Angevin law books because of its antiquated appearance, content and organisation,[187] this particular passage picks up themes in the discussion of mercy which will run and run throughout the common law. In the first instance, the doing of mercy is dependent on the virtue of the kingly judge rather than on the merits of the criminal who appears before him. In the second instance, the text utilises the words of the Sermon on the Mount as the basis for expounding a reciprocal concept of mercy, allowing the compassionate judge to store up mercy for himself (though whether in heaven or on earth is unclear in this context). Thirdly, mercy is given, not because it is due to the criminal, but because of explicitly Christian ethical imperatives of restraint.

The same argument for mercy as a reciprocal good, for example, is subsequently found in an Angevin text which deals not so much with the common law as with the administration of the royal household – Richard FitzNigel's *Dialogus de scaccario* (c. 1180). When the *Dialogus* discusses royal pardon (having in mind the sort of pardon

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[185] For whom see P. Wormald, 'Quadripartitus', in G. Garnett and J. Hudson (eds.), *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994), pp. 111-47.
[186] *Leges Henrici Primi*, 28.5-6, p. 131.
[187] See Paul Hyams, 'The Common Law and the French Connection', *Anglo-Norman Studies* 4 (1982), pp. 77-92. There is an additional problem in determining whether the *Leges* is a 'practical' text or merely an antiquarian exercise. For the former view, Wormald, 'Quadripartitus'; for the latter, Hudson, 'Administration, Family and Perceptions of the Past', pp. 76-7.

which excuses men from payment of taxes such as danegeld or scutage, rather than a pardon for criminal acts), in the case of those who are to be spared (*parcere*), FitzNigel exhorts all individuals to be mindful of the reciprocal basis of pardon:

> But the person who receives the prince's pardon (*cui dimittitur aliquid a principe*) for anything should be careful not to demand from those under him what was pardoned, but rather to remember the words "forgive and you will be forgiven" [Luke vi.37]. For when such an act is discovered, the prince, following the teaching of the Gospel, will not forgive him and will not forgive his debt, but may punish him a hundredfold, because he clearly abuses the grace he was granted when he shamelessly demands from others what was freely given to him.[188]

In the final part of this exhortation, FitzNigel is unmistakably alluding to the parable of the unforgiving servant (Matthew xviii.23-35), in which the servant whose lord frees him of his debt then fails to show the same pity (*miserere*) to his fellow debtor. It is clear from later passages in the *Dialogus* that FitzNigel's praise of generosity in sparing those who are at the royal mercy is not merely a rhetorical flourish but is, in fact, a vital attribute of good kingship. Thus, later in the work, he offers an encomium of Henry II, discussing the king's actions after the rebellion of his own children. Once again, willingness to pardon (this time the offence of rebellion, rather than writing off mere monetary penalties), is presented as highly commendable:

> So although the renowned King Henry had many examples and could have justly inflicted the most severe punishment on the rebels, he preferred to spare them, rather than to punish them, so that, though unwillingly, they would see his kingdom grow... may they learn from both their father's example and their own how glorious it is to spare the conquered and beat back rebels.[189]

Whilst victory over the rebellious is a sign of powerful kingship, it is pardon that makes that kingship glorious.

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[188] *Dialogus de Scaccario*, ed. and trans. E. Amt (Oxford, 2007), 1.8, p. 75.
[189] Ibid, 2.1, p. 117.

Fifty years after FitzNigel's *Dialogus*, the text *De legibus et consuetudinibus Angliae*, commonly known as *Bracton* (c. 1235), more fully expresses the potential clash between the strictures of written law and the ethical considerations of the human judge.[190] The lengthy consideration given to the relationship between written law and judicial discretion suggests just how necessary it had become to address this issue. Thus, in addition to setting out the forms of English law – of writs and pleading – *Bracton* offers insight into the common law's theoretical foundations. In particular, the text draws a distinction between 'equity' (*aequitas*) and 'justice' (*iustitia*). In simple terms, equity is that principle which awards to each their due, describing the uniform application of the law, regardless of the circumstances of offence. Equity describes a practice, whereas 'justice', so defined by Bracton, lies not in action but 'in the minds of the just'.[191] *Bracton*'s description of *iustitia* seems to encompass the idea of mercy, for justice is that which permits dispensation from the law in search of a virtuous resolution. Thus, *Bracton* affirms, justice is a virtue (*virtus*). The rules of law are arrived at through the study of *iuris prudentia*, the science which distinguishs the just from the unjust; but understanding and implementing those rules, discerning them (*agnoscere*) through the exercise of prudence (*prudentia*), is not the same as doing justice. The virtue of justice is to be preferred to the enforcement of equity as worked out through the science of *iuris prudentia*, for while 'justice is one of the highest goods (*summum bonum*) jurisprudence is a good of an intermediate character (*medium bonum*)'. *Bracton* counsels the judge that he ought generally 'to temper the law with a degree of benignity (*benignitatis*). Punishments are rather to be mitigated than increased'.[192] This mitigation of punishment is later qualified with reference to acceptable levels of mercy. A sharp distinction is

[190] For the problems of dating the text see Paul Brand, 'The Date and Authorship of Bracton: A Response', *Journal of Legal History* 31 (2010), pp. 217-44.
[191] *Bracton: On the Laws and Customs of England*, ed. and trans. G.E. Woodbine and Samuel Thorne (4 volumes, Cambridge, MA, 1968-77), ii, p. 25.
[192] Ibid, ii, p. 299.

drawn between the 'mercy of remission (*misericordia remissionis*)', the pity which may move a judge to abrogate a penalty altogether but which is legally unacceptable, and the 'mercy of compassion (*misericordia compassionis*)'. Compassionate mercy is indeed to be expected of the judge, although – as with the *Leges Henrici Primi* and the *Dialogus* – *Bracton* is vague on the circumstances of its application: 'to whom and in what fashion a judge should be merciful, the merits or demerits of persons shall instruct him'.[193] Yet the presumption clearly is that any man educated or trained to be a judge will clearly recognise the difference, in theory and practice, between 'remission' and 'compassion'.

Across these three legal texts, spanning over a century, there are some clear indications that the exercise of mercy may run counter to the expectations made of the judge. On the one hand, as the *Leges Henrici Primi* and the *Dialogus* note, a zealous desire to combat the great criminality of the world may make the judge forget the necessity of mercy. The danger of overlooking mercy is a danger to the judge himself – both to his immortal soul and to his relationships with the rest of human society. On the other hand, as *Bracton* counsels, whilst pity is to be valued in the judge, it exists only to mitigate punishments, not to excuse crimes improperly. At the very least, all three texts demonstrate that mercy is a constant and often problematic consideration over a century of developing common law, from the 1110s to the 1230s. The virtue of *misericordia* did have a place within that law, even if that place was imprecise and explained only as an acknowledgement of judicial discretion. Moreover, again at the very least, the discussions contained in the three texts all argue against the assumption that the creation of common law and the writing of legal textbooks constituted a purely 'secular' affair, and that self-denying compartmentalisation was ever practised by judges.[194]

[193] Ibid, ii, p. 306.
[194] Summerson, 'Fear of the Gallows', p. 50.

The importance of judicial discretion and of the scope for discretionary mercy which is highlighted in even this brief overview should go some way to challenging some of the central assumptions of the conventional 'legal history' of the twelfth and thirteenth centuries. The common law, it is often asserted, at least until the early fourteenth century, was always more interested in the jury and potential problems with the verdicts of jurors, than it was with the judge and his capacity to exercise discretion. It was the failings of jurors for which the crown offered redress, and the qualifications of a juror to pass a verdict, that most concerned the common law.[195] Conventional histories of twelfth-century England have assumed that, owing to the precocious successes of the Angevin legal system, there was little room for the exercise of discretionary mercy: Henry II replaced arbitrary action with sophisticated and impartial processes of judgement.[196] As is evident from the *Leges Henrici Primi*, the *Dialogus* and *Bracton*, however, this was clearly not the case. And yet it is clear that whilst royal justices, charged with implementing royal writs, may not have had the power to pardon, they had considerable discretionary powers. A royal justice could recommend a defendant considered worthy of mercy for pardon by the crown; he could reduce sentences such as outlawry; he could mitigate corporal punishment; he could diminish a prison sentence or reduce a fine. Such discretion – discretion which allowed the potential for mercy – was expected in every judge, whether that was the king sitting in *curia* or a provincial justice-in-eyre.[197]

Justice and Mercy in English Law: *Vis et voluntas*

[195] Brand, 'Ethical Standards', pp. 239-80.
[196] e.g. W.L. Warren, *Henry II* (London, 1973), p. 388.
[197] Cf. *Glanvill*, 7.1, p. 74.

Whilst the crown did consciously assert its supreme judicial rights and deliberately shape the law through the continued employment of its preferred justices,[198] this process did not necessarily herald an end to arbitrary decision-making. However, in trying to avoid the narrative of a twelfth-century invention of modern jurisprudence, one must not fall into the opposite trap of assuming that Angevin justice was rude, unsophisticated and wilful. There is an equally conventional narrative, after all, first voiced by J.E.A. Joliffe over fifty years ago, and more recently revived in the work of historians such as Paul Hyams, which argues that twelfth-century procedural changes made little impact on the English common law. Angevin government was still dominated by *vis et voluntas*, and justice hung on the will of the king.[199] In fact, the role of arbitrary will in justice, and attempts to mitigate its role in judgement, was a continuing concern throughout this period, something which is evident in contemporary criticisms of the common law. One critique is found in attacks on the relationship between money and pardon. Being 'in the king's mercy' had long involved the imposition of a financial penalty,[200] but twelfth-century accounts reveal an increased concern with the propriety of exchanging money for mercy. Whilst royal officials may have viewed the process of pardon as a financial transaction, others began to argue that it should be understood as an exercise in judicial virtue and, for this latter group, the involvement of money endangered that discretionary virtue. The Angevin courtier and archdeacon of Oxford, Walter Map, illustrates exactly this legal and moral dilemma. Map, writing in the 1180s, launches an excoriating attack on the rule of wealth in the law courts, whose interference transforms pardon into a financial transaction:

[198] Paul Brand, '*Multis vigiliis excogitatam et inventam*: Henry II and the Creation of the English Common Law', in idem, *The Making of the Common Law* (London, 1992), pp. 77-102.
[199] J.E.A. Joliffe, *Angevin Kingship* (London, 1953), p. 9, 88, pp. 96-7; for Hyams see below, pp. 81-2.
[200] Patrick Wormald, 'Giving God and the King Their Due: Conflict and its Regulation in the Early English State', in *La Guistizia Nell'alto Medioevo (secoli IX–XI)* (2 vols., Spoleto, 1997), i, pp. 549-92.

> None obtains pardon (*veniam*) save that for which Mother Purse pleads with her wrinkled mouth. She is that lady of all, who pardons crimes (*culpas ignoscit*), justifies the wicked (*iustificat impium*) and wills not the death of sinners.[201]

Financial considerations – the possibility that the judge may profit from his verdict – were thought to overturn the proper functioning of a legal system, and indeed, of morality. Part of this critique was conventional, but the concentration on pardon in particular is worth noting. The abuse of judicial discretion undermines the system and order which the judge himself represents. Questions of mercy, moreover, often run into the problem of the will of the judge. Because there was no clear or specific guidance, in legal terms, as to when pardon or mercy should be invoked, this turned on *voluntas regis* or *iudicis*. But the judge was not above being swayed by passions. This, of course, was the fundamental paradox of pardon: it depended on judicial *discretio* to mitigate a sentence and prevent injustice; but judicial partiality could equally be a source of injustice. The problem was recognised by civilian lawyers of the *ius commune* as well as by their English counterparts, who accordingly experimented with various legal means of restricting judicial discretion (and by extension judicial abuses).[202]

Concerns over financial impropriety and arbitrary will were, of course, nothing new. However, to appreciate that the judicial exercise of arbitrary will was not simply an abstract question in twelfth-century English political life, it is worth considering complaints made against the Forest Law. The law which governed actions performed in royal forests stood beyond the scope of common law, overrode benefit of clergy, and was enforced by a semi-separate judicial system. Forest Law was directly dependent on the king's will for its implementation, and, as such, it was frequently condemned as excessively severe. In the forest punishments were not legally stipulated, but left to the

[201] *DNC*, 5.7, pp. 508-9.
[202] See R.M. Fraher, 'Conviction According to Conscience: The Medieval Jurists' Debate concerning Judicial Discretion and the Law of Proof', *Law and History Review* 7 (1989), p. 28.

exercise of the king's representatives: as one contemporary lamented, 'violence took the place of law, extortion was praiseworthy, justice was an abomination and innocence a crime'.[203] From the perspective of Richard FitzNigel, in comparison with the well-regulated common law, Forest Law was worryingly arbitrary:

> The law of the forest, and the monetary or corporal punishment of those who transgress there, or their absolution, is separate from the rest of the kingdom's judicial system, and is subject to the sole judgement of the king (*solius regis arbitrio*) or his specially appointed deputy. For it has its own laws, which are said to be based on the will (*voluntaria*) of princes, not on the law of the whole kingdom, so that what is done under forest law is called just according to forest law, rather than absolutely just (*non iustum absolute set iustum secundum legem foreste dicatur*).[204]

FitzNigel implies that under common law, absolution is regulated by certain unstated but widely-respected rules, dependent on more than simply royal will. Moreover, where the forest was concerned, royal *voluntas* tended to punishment rather than absolution. This seems to be borne out by a case from 1175, when a number of men found guilty of the murder of a forester were imprisoned by Henry II. On learning that these men were considered to have 'ill public fame', the king changed his sentence and ordered them put to death, even though, under common law, the establishment of 'ill fame' was not a sufficient charge to merit a capital sentence.[205] That such action was considered excessive at the time is suggested by one of the concessions made in the Charter of the Forest of 1217: no man should be put to death or mutilated for forest offences.[206]

Criticism of forest law is a well-established and familiar feature of twelfth-century writing, but a focus on the 'arbitrary' laws of the forest should not mislead us into the

[203] Adam of Eynsham, *Magna vita sancti Hugonis*, ed. and trans. Decima L. Douie (2 vols., Oxford, 1985), 3.8, i, p. 114.
[204] FitzNigel, *Dialogus*, 1.11, pp. 90-1.
[205] C.R. Young, 'English Royal Forests under the Angevin Kings', *Journal of British Studies* 12 (1972), pp. 5-6; R.M. Helmholz, 'The Early History of the Grand Jury and the Canon Law', *University of Chicago Law Review* 50 (1989), pp. 619-20.
[206] The Charter of the Forest, in H. Rothwell (ed.), *English Historical Documents 3, 1179-1327* (London, 1975), No. 24[10], pp. 337-40.

assumption that common law was, by contrast, either believed to be entirely rational or entirely free of such abuses of judicial will. In the common law too, criticisms of *voluntas* and partiality were frequently raised.[207] What is evident in such criticisms, moreover, is a structural problem within English law, and a conflict between 'public' and 'personal' interests. The law (as has been argued) made space for judicial discretion, but still proclaimed that it judged with impartiality. Indeed, impartiality in judgement was pronounced to be a central principle of the common law. At the highest level, *Glanvill* opined that the king's court is 'so impartial that no judge there is so shameless or audacious to presume to turn aside at all from the path of justice'.[208] At the lowest level, the London Eyre of 1244 cites several provisions intended to ensure that judges did not profit from the verdicts they passed.[209] In theory, the 'higher' a court, the more authoritative and impartial the justice it should provide. Thus cases which had been improperly dealt with in lower courts could be passed upwards, and ultimate power of adjudication rested with the king.[210] This was a principle expressed in collections as early as the *Leges Henrici Primi*.[211] The king's judgement was a safeguard against the injustice which might be done in lower courts. It was on this basis that a number of writs were developed in order to transfer proceedings from lower to higher courts. The king's ability to intervene – to set right the mistakes of unsound judgements – ranged from the merely passive – the ability to dispatch observers to lesser courts – to the ability to call for a full-scale review of courts which were believed to be giving false judgements.[212]

[207] See below, pp. 263-4.
[208] *Glanvill*, p. 2.
[209] *The London Eyre of 1244*, ed. Helena M. Chew and Martin Weinbaum (London, 1970), 'de judiciis', (236), p. 96.
[210] Cf. Robert C. Palmer, *The County Courts of Medieval England, 1150-1350* (Princeton, 1982), p. 141.
[211] *Leges Henrici Primi*, 1.5, p. 4; 9.4a, p. 106; 9.10a, p. 108.
[212] J.V. Capua, 'Feudal and Royal Justice in Thirteenth-Century England: The Forms and the Impact of Royal Review', *American Journal of Legal History* 27 (1983), pp. 54-84.

The structure of the English judicial system, however, made it almost impossible to grant 'impartial' justice. At every level, there was space for judicial discretion, and as a result the possibility of judicial abuse. The system rested on public service.[213] Whilst judges received a stipend, the majority of their wealth was acquired through other means, partly from earnings as private pleaders, but also through extra-legal rewards for favourable judgement.[214] Judges may have been required to enforce the royal law, but the majority were also private landholders in their own right with private interests to protect.[215] Of course the greatest private landholder, the crown, was also expected to be the most impartial judge.[216] To commence major litigation, or to obtain certain writs 'de gratia', or even to speed along the process of justice, all required a level of political influence, and in some instances, royal blessing.[217] The role of royal favour should not be considered as part of a 'transitional' stage in the common law, moving from an entirely 'personal' kind of justice into 1100 to a wholly bureaucratic and impartial system by 1250.[218] Periodically, however, there were complaints about the excessively arbitrary and personal nature of royal justice. One such extreme occurred in 1209, when King John ordered all cases before the bench at Westminster and pleas from the eyres transferred to the court *coram rege*. Judgement was only given in the presence of the king. John's suspension of pleas at eyre meant that obtaining a favourable verdict was entirely dependent on gaining royal goodwill, and, indeed, access to the king.[219] Placing the crown as head of the judicial system meant, in theory, imposing a single arbitrating

[213] S.L. Waugh, 'Reluctant Knights and Jurors: Respites, Exemptions and Obligations in the Reign of Henry III', *Speculum* 50 (1983), pp. 937-86.
[214] Waugh, 'Reluctant Knights', p. 981.
[215] Cf. Anne L. Spitzer, 'The Legal Careers of Thomas of Weyland and Gilbert of Thorton', *Journal of Legal History* 6 (1985), pp. 62-83.
[216] On the royal role in 'safeguarding' justice, Capua, 'Feudal and Royal Justice'.
[217] S. Mooers Christelow, 'The Royal Love in Anglo-Norman England: Fiscal or Courtly Concept?', *Haskins Society Journal* 8 (1996), pp. 31-2.
[218] Cf. D.A. Carpenter, 'Justice and Jurisdiction under King John and King Henry III', in idem, *The Reign of Henry III* (London, 1996), pp. 24-5.
[219] M.T. Clanchy, 'Magna Carta and the Common Pleas', in Henry Mayr-Harting and R.I. Moore (eds.), *Studies in Medieval History Presented to R.H.C. Davis* (London, 1985), pp. 219-32.

authority in disputes; in practice, it could mean that justice depended on the arbitrary authority of royal will. The provisions of Magna Carta did not resolve this problem. Magna Carta curbed the worst excesses of arbitrary royal judgement, but it did not – it could not – remove the need to obtain royal goodwill in order to achieve anything at law.[220] Procedural innovations and the prescriptions of law books could not fully exclude the role of personal judgement and private virtue in the operation of English justice. Nor, necessarily, did law books wish to circumscribe the scope for private virtue, given that judicial discretion was one very important means of mitigating the excesses of written law. This is a consideration which has been insufficiently recognised in conventional narratives of the development of English law.

The argument of this thesis starts from the perspective of *longue durée* studies of the English crown and the English legal system. The historiography of the later thirteenth- and fourteenth-century has demonstrated that criticisms of 'arbitrary' justice continued to be raised but were never resolved. The nature of justice was, for example, a major complaint during the Second Barons' War (1264-7). Christine Carpenter has pointed to a systematic flaw in the English legal system, under which the men who most criticised arbitrary royal intervention in the judicial system were those who benefited most from the system of judicial patronage, describing a 'contradictory vision of the law, wanting it unbending but malleable'.[221] This was not a uniquely late medieval pardox: the same ambiguities are visible in the common law and from the twelfth century onwards where they crystallise in the form of a well-developed debate over the respective roles of justice and mercy. Strengthening royal judicial power in other words – if that is what happened under Henry II – only served to strengthen the contradictions within it. Between 1100 and

[220] Carpenter, 'Justice and Jurisdiction', p. 43.
[221] C. Carpenter, 'Law, Justice and Landowners in Late Medieval England', *Law and History Review* 1 (1983), p. 213.

1250, the complex relationship between justice and mercy, and the contested primacy of one principle over the other, was established as a central and recurring theme in English theological and legal argument.

Chapter 1. Justice in Classical, Biblical and Patristic Thought

Considered from the perspective of canon and Roman law, the contrast between 'Christian' and 'Roman' justice seems both stark and self-evident. Whilst the *Decretum* frequently invokes the principle of reciprocal mercy and the centrality of love to law,[1] the *Digest* advocates an altogether stricter definition of justice as the repayment of due. This contrast was evident to contemporaries and provided fertile ground for canonistic commentators working in England during this period. A copy of the *Decretum*, complete with an Anglo-Norman gloss and containing numerous *reportationes* from the schools of Oxford in the 1190s gives some indication of this.[2] The student who owned the copy recorded marginal arguments between canonists, including some discussion of whether it was the Roman law *leges* or the *canones* of the Church that could properly be said to be *clementiores* (more merciful).[3] One of these *reportationes* attributes disagreement on this point to John of Faenza, a Bolognese canonist,[4] and the Oxford scholar, John of Tynemouth. John of Faenza had maintained (pointing to *Digest* 48.19.5) that the Roman law was the more severe, for it allowed an offender to be condemned to penal servitude or even capital punishment. John of Tynemouth, on the other hand, argued that the Church held the greater punishments for the wicked, in that excommunication was the greatest punishment that any law could inflict, resulting in irreparable damnation.[5]

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[1] e.g. *Decretum*, C.XXIV, q.1 c.29, 1:977.
[2] For this manuscript see William W. Basset, 'Canon Law and the Common Law', *Hastings Law Journal* 29 (1977-8), pp. 1399-1400.
[3] Gonville and Caius College, MS 676, f.161v, on C.24 q.3. c.6; cf. f.69r. Stephan Kuttner and Eleanor Rathbone, 'Anglo-Norman Canonists of the Twelfth Century: An Introductory Study', *Traditio* 7 (1949-51), pp. 318-48.
[4] For John of Faenza see N. Höhl, 'Neue Erkentnisse zu Leben und Werk des Glossators Johannes Faventinus', and Karl Borchardt, 'Archbishop Gerard of Ravenna and Bishop John of Faenza', both in *Proceedings of the Eighth International Congress of Medieval Canon Law*, pp. 198-203 and pp. 574-92.
[5] This represents a broader debate in canon law – see C. Gallagher, *Canon Law and the Christian Community* (Rome, 1978), pp. 79-80.

A focus on the apparent legal opposition between canon law clemency and Roman law severity, however, cannot provide a complete picture of the interaction between ecclesiastical and secular perspectives, or 'Christian' and 'classical' traditions of justice. The legacy which classical thought bequeathed to the Middle Ages on the topic of justice and judgment ran much broader and deeper than the principles of Roman law alone. It was embodied in the way in which medieval authors and preachers thought and taught about the historical behaviour of Roman statesmen, philosophers and emperors. For example, the great exemplary representative of Roman concern for justice was held to be not Justinian, the legislator, but Trajan, the benevolent emperor. Legendary tradition, repeated by, amongst others, John of Salisbury, recounted how the emperor halted the progress of his entire army in order to hold an impromptu judicial hearing for a wronged widow who demanded justice.[6] From the seventh century onwards, histories, *vitae* and *florilegia* had all transmitted the story of Trajan's dedication to justice, a dedication so great that it had apparently prompted Gregory the Great to intercede for the emperor's soul in hell.[7] Equally, the judicial message of scripture was more extensive and multifaceted than the relatively straightforward principles of *caritas* and *misericordia* expressed in the Sermon on the Mount (Matthew v-vi). The Bible furnished its medieval readers with examples of extremely severe judicial discipline, particularly if they considered the histories of the Old Testament.

This chapter accordingly seeks to demonstrate that the biblical and classical heritage of judgement consisted of something more substantial than legalistic definitions alone, and something more complex than the sort of opposition pinpointed by John of Faenza and John of Tynemouth. The twelfth and thirteenth centuries were faced with a

[6] *Policraticus*, 5.8, 1:559-60.
[7] On the tradition, which dates back to the seventh-century *Life of Gregory* composed at Whitby, see Jeffrey A. Trumblower, *Rescue for the Dead: The Posthumous Salvation of Non-Christians in Early Christianity* (Oxford, 2001), pp. 141-53.

sophisticated tradition of judicial and moral thought, modified by patristic and earlier medieval authors, and one in which both 'Christian' and 'Roman' principles of justice were inextricably intertwined. For the sake of convenience, one may certainly speak in shorthand of a 'Christian' definition of justice – which demanded that mercy be included in any judicial calculation – and a 'classical' definition – which measured justice as due – but these categories did not denote two necessarily opposed traditions. Whilst there was a choice to be made between justice and mercy, this choice should not be aligned with an explicit division between 'merciful' Christian and 'strict' Roman forms of judgement. When an author or a preacher undertook to justify a sentence in accordance with a strict distribution of punishments, he could choose to support his case with any combination of classical philosophical, legal, scriptural or patristic citations and *exempla*. Both 'Christian' and 'classical' traditions, in short, offered a variety of perspectives on justice together with inherently contradictory formulae for the application of judgement.

Justice in Scripture

In the first instance, scripture itself supported an interpretation of justice as precisely calculated 'due'. Twelfth-century authors noted that the concept of *lex talionis*, injury inflicted as recompense for injury in kind, 'an eye for an eye' (Leviticus xxiv.20; Exodus xxi.24-5), carried, in effect, the same meaning as a 'Roman' definition of due justice. Like the principle of *suum cuique tribuere*, 'an eye for an eye' demanded the punishment of the wicked in accordance with the specifications of the written law.[8] Indeed, medieval readers noted that scripture contained a number of phrases which very closely paralleled the expression *suum cuique tribuere* and seemed to support what might otherwise be described as a 'classical' form of justice. Even the New Testament, with its

[8] Cf. *Les Disputationes de Simon de Tournai*, ed. J. Warichez (Louvain, 1932), *Disputatio* 29, pp. 88-9.

gospel message of clemency, provided definitions of justice which seemed implicitly to exclude or diminish the importance of mercy. The two passages which most frequently cited in support of a reading of scriptural justice as a form of due were taken from the Gospel of Matthew and Revelation. Matthew xvi.27 is the passage in which Jesus instructs his disciples on how to achieve the kingdom of heaven, telling them that, one day, 'the son of man will come in glory with his father's angels and he will reward each according to what they have done (*et tunc reddet unicuique secundum opera eius*)'. Robert of Melun, for example, considering this passage in the schools of Paris in the 1130s, used it to argue for the limitations of divine mercy. He noted the similarity between the words of the gospel and the argument made by Paul in his letter to the Romans, which had likewise defined divine justice with the words 'reddit unicuique secundum opera sua'.[9] For Robert, this idea of divine justice as strict due constituted a warning to the criminal: they ought not to believe that anything short of complete repentance and abasement would win mercy before God. Similarly, when the angel of Revelation had spoken to John the Evangelist, warning him of the final judgement (Revelation xxii.12), he expressed divine justice in terms which sounded distinctly 'classical': 'behold, I will come soon, and my reward is with me, and I will give to each person according to what they have done (*reddere unicuique secundum opera sua*)'. This was a warning which would not have been out of place in the mouth of the Roman lawgiver. Indeed, Gilbert Foliot's commentary on the Lord's Prayer, composed c. 1179-81, during his time as Bishop of London, envisions the kingdom of God as ruled with just such strict justice. For Gilbert, 'regnum tuum' is defined by its justice: a justice which operates in two movements, *distribuere* and *retribuere.*[10] Gilbert explains that God's royal power 'distributes goods to those who are good and are governed by the just laws of

[9] *QEP*, Romans xii.3, pp. 149-50.
[10] David N. Bell, 'The Commentary on the Lord's Prayer of Gilbert Foliot', *RTAM* 56 (1989), p. 94.

the kingdom; to those who are wicked and subvert the law, it gives retribution in evil and eternal punishment'.

The implications of divine justice as an act of 'suum cuique tribuere' were not lost on medieval theologians and prompted much commentary.[11] A more basic point, appreciated by twelfth- and thirteenth-century commentators, however, was that scripture itself did not ostensibly seem to be consistent on the relationship between justice and mercy. For those commentators, one fundamental problem lay in the relationship between the two testaments. The Old Testament, particularly in the numerous precepts of Deuteronomy and Leviticus, seemingly laid down a much harsher attitude to justice than the apparent 'freedom' contained of the message of Christ. The contrast occupied the minds of twelfth- and thirteenth-century commentators as they dwelt on the relationship between the testaments, and the apparently different 'temperaments' which informed them. On one hand, Christ had come to fulfil the Old Law, not abolish it (Matthew v.17: 'nolite putare quoniam veni solvere legem aut prophetas: non veni solvere, sed adimplere'); on the other, he had denounced the principle of *lex talionis* (Matthew v.38). Theologians went some way towards resolving the problem by examining the specific provisions of the Old Law – explaining, for example, how the various dietary prohibitions were appropriate to their time and context; the severe punishments for transgressors represented a necessary imposition given the moral infirmity of the Israelites of that period.[12] Theologians, however, were not willing to abandon the Old Law entirely – particularly as the historical books of scripture contained many salutatory examples of judgement. Looking beyond particular precepts, they sought to define more clearly the connection between the two laws. Such an approach is expressed in Stephen Langton's

[11] Below, p. 112.
[12] This is the explanation of Robert Pullen, *Sententiarum libri octo*, 3.8, PL.186.771C-2A. For further discussion see Beryl Smalley, 'William of Auvergne, John of La Rochelle and St. Thomas Aquinas on the Old Law' in *St. Thomas Aquinas 1274-1974: Commemorative Studies* (2 vols., Toronto, 1974), ii, pp. 11-74.

introduction to his gloss on Deuteronomy (c. 1187),[13] concerned with explaining how Mosaic law relates to the law of the gospels. Langton understands the two laws as both contrasting and complementary, explaining the apparently vast differences in legal practice by arguing that both were intended in the same spirit: the Old Law concerns itself with things *extrinseca*, the New with *intrinseca*; the Old with behaviour *in acte*, the New *in intentio*.[14] The Old Law is consummated in the gospel and any difference between the two is therefore apparent rather than substantive. Likewise, in another late twelfth-century commentary, possibly also attributable to Stephen Langton, the Sermon on the Mount is tied to the principle of *lex talionis*.[15] Rather than discount the idea, and argue that Christ abolished the practice of returning injury for injury, Langton chooses to emphasise the similarities between the two. *Lex talionis*, Langton explains, is entirely consonant with *lex evangelica*, because both laws impose a degree of restraint on humankind. The principle of 'an eye for an eye' allows the injured party to pay back only as much punishment as they have received: it does not permit actions which are motivated by revenge, but only permits the pursuit of justice (*non causa ultionis intuiti set solus intuitu iustitie*).[16]

Robert Grosseteste developed Langton's line of thought even further, by using his work on the Ten Commandments, *De decem mandatis* (composed in the late 1220s or early 1230s), to consider the pastoral relevance of Old Testament laws.[17] The utility of the commandments themselves, he argued, was enduring and fairly obvious, and those ten principles of behaviour were, in his opinion, entirely congruent with New Testament message of love towards God and one's neighbour. But Grosseteste also considers other

[13] For the dating of this commentary see Georges Lacombe and Beryl Smalley, *Studies on the Commentaries of Cardinal Stephen Langton* (reprinted from *Archives d'histoire doctrinale et littéraire du moyen âge*, 1931), esp. pp. 160-6.
[14] Stephen Langton, Commentary on Pentateuch, BnF, Latin 14415, f.243v.
[15] For the attribution, Lacombe and Smalley, *Studies on the Commentaries*, pp. 148-9.
[16] BnF Latin 14435, f.23r.
[17] See Lesley Smith, 'The *De decem mandatis* of Robert Grosseteste, in M. O'Caroll (ed.), *Robert Grosseteste and the Beginning of a British Theological Tradition* (Rome, 2003), pp. 265-88; J. McEvoy, 'Robert Grosseteste on the Ten Commandments', *RTAM* 58 (1991), pp. 167-205.

less sympathetic principles of Israelite law. He observes that the exegete will have problems in expounding the principle, given at Exodus xx.5, that the sins of parents will be visited upon their children ('I, the Lord your God, am a jealous God, punishing the children for the sin of the parents to the third and fourth generation of those who hate me').[18] For Grosseteste this is a difficult passage on a number of levels. He points out, for example, that it apparently contradicts the principle, stated elsewhere in the Old Testament (Ezekiel xviii.20), that 'the son will not share the guilt of his father, nor will the father share the guilt of his child'. Moreover, he continues, it seems downright unmerciful. Indeed, Grosseteste notes, how can one be comfortable with a divinely-given law which seems more punitive even than the laws of pagan Rome? Cicero had noted that the Roman state would never think of condemning a child for the transgressions of a father or grandfather.[19] Grosseteste accordingly posits two possible solutions for resolving the question of inter-generational punishment: either the exegete must accept that God's punishments are inflicted righteously, and sentences imposed upon children on behalf of their parents are in some way just, according to a divine plan which cannot be comprehended. Alternatively, the exegete must interpret the passage allegorically, understanding that the term 'sons' here does not refer to natural children of the flesh, but sons who imitate their 'fathers in sin'. In the case of the latter, Grosseteste explains, such punishment can hardly be said to be unjust: indeed, it is a merciful act as it aims to turn the souls of the wicked away from sin.

Langton and Grosseteste serve to demonstrate that theologians thought long and hard about how the concept of justice was shaped by the relationship between the testaments. They were not prepared to write off the justice of the Old Testament as an anachronism abrogated by the coming of Christ: quite the contrary – they argued that it

[18] Grosseteste, *De decem mandatis*, 1.24-33, pp. 18-22; cf. *Decretum*, C.I, q.4, c.9, 1:420; Robert Pullen, *Sententiarum*, 3.5, PL.186.769B-70D.
[19] Cicero, *De natura deorum*, ed. and trans. H. Rackham (London, 1979), 3.90, p. 376.

contained within it sound judicial principles and the kernel of the New Law. When it came to giving examples of judicial principles and judicial decision-making it was the Old Testament to which authors certainly turned. Other than, perhaps, the incident concerning Christ and the woman caught in adultery[20] – which was regarded as an example of a refusal to pass sentence – the New Testament contained very little in the way of judicial *exempla*. Indeed, it proffered rather more passages warning against judgement ('judge not lest you be judged', Matthew vii.1) which required careful glossing, lest they be interpreted as a general injunction against *all* forms of judgement in human courts.[21] The Old Testament, by contrast, particularly the books of Kings, presented many instances of royal and priestly judges, and instructive lessons which could be readily adapted for a *speculum principis* or for a sermon.

The value of the Old Testament for judicial guidance is demonstrated most clearly in Ralph Niger's commentary on Kings, *Moralia in libros Regum* (composed between 1179 and 1189).[22] The work exists in only a single copy, in two volumes, today held at Lincoln Cathedral library. Ralph has gained some small amount of historiographical fame for his complaints of the avarice and ambition of contemporary civil lawyers.[23] However, the manuscript of the *Moralia* reveals a more careful reading than such a potential characterisation might suggest; in particular it provides a sophisticated demonstration of how judicial principles could be extract from scriptural histories. Ralph Niger was well-placed and well-qualified to perform exactly this role: in Paris he had studied law under

[20] Below, pp. 85-8.
[21] See Robert of Melun, *QEP*, Hebrews x.30, pp. 309-10; Grosseteste, *Dictum* 24, ff.21r-22r, discusses the various biblical citations suggesting that only God, not earthly judges, has the power to punish.
[22] R.M. Thomson, *Catalogue of the Manuscripts of Lincoln Cathedral Chapter Library* (Woodbridge, 1989), pp. 19-20.
[23] G.B. Flahiff, 'Ralph Niger: An Introduction to his Life and Works', *Mediaeval Studies* 2 (1940), pp. 104-26; H. Kantorowicz and B. Smalley, 'An English Theologian's View of Roman Law: Pepo, Irnerius, Ralph Niger', *Mediaeval and Renaissance Studies* 1 (1941), pp. 237-52, esp. 244-52.

the distinguished canonist Gerard Pucelle,[24] as well as theology, most likely under the tutelage of John of Salisbury. The marriage of Ralph's theological and legal erudition is plainly apparent. The introduction to his moralising reading of Kings explicitly pins the changes in the ruling dynasties of Israel to the judicial failings of their leaders.[25] It was for judicial failures that the priest Heli was replaced by Samuel; it was for the same mistake that David was given Saul's throne. Ralph's commentary abounds with judicial advice which he drew from these histories, and on the basis of which he expresses warnings against those judges who, like Absalom, forget the value of discipline,[26] or who allow their justice to be corrupted,[27] as well as against the danger of excessive *indulgentia* and incautious dispensations from the law.

Ralph Niger's approach to the Book of Kings serves as a useful paradigm for understanding attitudes of twelfth- and thirteenth-century exegetes, whose perceptions of contemporary judicial politics and morality were shaped by *exempla* drawn from scriptural histories. These examples were much more than stock figures which could be invoked to embellish an argument: they warned medieval readers of timeless and unchanging obstacles which imperilled righteous judgement. These scriptural *exempla* provided a familiar frame around which contemporary narratives of praiseworthy or damnable acts of judgement might be constructed. They formed historical case-studies which supplied biblical precedents and typologies for the interpretation of more recent and contemporary history.[28] The invocation of such typologies of judges, of course, dates back much further than the twelfth century: such a tradition was old even by the time that

[24] Johannes Fried, 'Gerard Pucelle und Köln', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 99 (1982), pp. 125-35; Kuttner and Rathbone, 'Anglo-Norman Canonists', pp. 296-30.
[25] 'Moralia in libros Regum', Lincoln Cathedral Library, MS 25, f.5r.
[26] Ibid, X.3, f.156v.
[27] Ibid, X.4, f.157v.
[28] For *exempla* in structuring histories see Peter von Moos, 'The Use of *Exempla* in the *Policraticus* of John of Salisbury', *The World of John of Salisbury*, pp. 207-61.

the eighth-century Carolingian bishop, Theodulf of Orléans, composed his poetic satire, *Contra iudices*, inveighing against 'un-Christian' judicial corruption.[29] However, during the legal revolutions of the twelfth century, these *exempla* gained still greater relevance, as judicial authority became an increasingly important attribute of royal power. Scripture, as Ralph Niger noted, provided case studies of how single instances of bad judgement and lack of justice might imperil the stability of an entire kingdom. Scripture accordingly provided very practical advice for those judges who wanted to preserve their thrones or offices. It was a lesson not lost on contemporaries.

Heli and Phinehas: 1 Kings II (1 Samuel II) and Numbers xxv.1-9

The scriptural histories of the judgements of Heli and Phinehas were often treated as a complementary pair in moral treatises: Heli illustrated the dangers of excessive mercy, Phinehas the (occasional) necessity of severe judgement. Heli, the high priest of Israel, had forfeited his right, and the right of his descendents, to the hereditary priesthood, when he failed in his judicial office. Instead, that priesthood was subsequently transferred to the righteous judge Samuel. Heli offended by failing adequately to rebuke his sons who contemptuously stole the sacrifices offered to the Lord: Heli's correction was too feeble and lenient to compel a change in their behaviour.[30] Phinehas too, had been a high priest of Israel during the exile: the book of Numbers recounted how Phinehas had discovered that one of the Israelites had brought a Midianite woman into the camp in order to fornicate with her. On learning of this, Phinehas took immediate action, lancing the genitals of the man and the belly of the woman in order to prevent the spread of sinful and idolatrous Midianite practices amongst the Israelites. For this, the Lord bestowed an everlasting, hereditary priesthood on Phinehas and his descendents.

[29] Theodulf, *Carmina* 28 in *Carmina*, ed. Ernst Dümmler, MGH Poetae 1 (Berlin, 1881), pp. 493-517.
[30] e.g. Grosseteste, *Epistolae*, ed. H.R. Luard, RS 25 (London, 1861), Ep. 11, p. 53; Ep. 98, pp. 301-2.

The two stories represented the pairing of laxity and rigour; ineffective and praiseworthy correction.

The laudable nature of Phinehas's action had been discussed by Augustine in his vast work of commentary and reflection on the book of Psalms, *Enarrationes in Psalmos*, an extremely widely-disseminated work in twelfth-century England.[31] Here Augustine set out the argument which many later medieval interpreters faithfully followed: Phinehas's actions were praiseworthy because in striking one man, he had saved the souls of the whole people, prevented sin spreading amongst them, and avoiding much greater destruction.[32] Phinehas thus became a byword for judicial vigilance. Augustine had noted that, even if his judgement seemed severe, Phinehas's actions were not wrong because they had been motivated by the desire to avoid damnation. Nor, Augustine added, would such rectitude for justice be inappropriate even under the new dispensation. Peter the Chanter provided the same reading, and went on to approve of Phinehas as the model judge: his willingness to slay even a member of his own tribe demonstrated Phinehas's adherence to that most important of judicial principles – that a judge show no respect for persons.[33] Impartiality when it came to judging both the poor and the wealthy, the well-regarded and the suspect, was a fundamental standard of judicial conduct, drawn ultimately from Mosaic law, expressed in Deuteronomy i.17, 'neither shall you respect anyone's person'.[34] Robert Grosseteste gave further support to Phinehas as the model judge, explaining that Phinehas's anger at the sinful Israelites was that rare example of

[31] Richard Gameson, *The Manuscripts of Early Norman England (1066-1130)* (Oxford, 1999), finds 25 copies (19 of which are complete) of the *Enarrationes* in England in this period, making it by far the best attested work of Augustine, and more popular than *Confessiones*, *De trinitate* or Gregory's *Moralia in Iob*: appendix 1, p. 42.
[32] Augustine, *Enarrationes in Psalmos CI-CL*, CCCL 40 (Turnhout, 1956), on Psalm cv.26, p. 1563.
[33] Peter the Chanter, *VA*, 1.65, p. 434; Peter compares this with Moses's willingness to slay all those Israelites guilty of idolatry before the golden calf (Exodus xxxii.26-9), as Moses spared 'neither father nor son, neither brother nor friend'.
[34] The scriptural roots of this principle are explained by Robert Grosseteste, *Dictum* 103, f.85r; William of Auxerre, *Summa aurea*, 2.21, iii, pp. 671-8. Cf. Aquinas, *ST*, IIaIIae, q.67, ix, pp. 98-9, on why respect for persons is opposed to distributive justice.

anger motivated by love, virtuous anger: for by directing punishment at the sinning individual, Phinehas had turned away the anger of the Lord from all.[35] Phinehas, then, represented the scriptural demonstration of the judicial maxim that one should have no respect for persons but judge only according to the offence.

Twelfth-century authors wrought the history of Heli into an example to complement that of Phinehas. The moral of the biblical episode was provided in the interpretation of Rabanus Maurus in his *Commentary on Kings* (834), a text which itself drew on the *Jewish Antiquities* of Josephus. Heli had been damned because his *lenitas et mansuetudo* had prevented him from correcting sin.[36] Heli's behaviour in sparing his sons demonstrated the dangers of excessive leniency motivated by personal affection – that is, by excessive regard for persons. In turn, this touched upon questions about the role of the judge in the protection of the community. For Ralph Niger, Heli's actions were a demonstration of the failings of a judge who puts his personal reputation above the punishment of crime. Heli was motivated to avoid punishing his sons because he feared the shame it would bring him were he to acknowledge their wicked behaviour (*ac si potius vitanda esset fama quam peccatum*). As a result, Ralph explained, those who deserved to be whipped (*meruerant flagellari*) were merely lightly rebuked (*leviter castigari*).[37] The broader, practical, political dimensions of this scriptural *exemplum* became apparent when the tale was followed to its conclusion: Heli's failure to punish his sons had brought down divine punishment on Israel, causing the Israelites to be defeated in battle and to lose the Ark of the Covenant (1 Kings iv). Peter the Chanter observed that, by not punishing his sons, Heli had ensured that the *communitas*, the political

[35] Grosseteste, *Dictum* 75, ff.55v-r.
[36] Rabanus Maurus, *Commentaria in libros IV Regum*, PL.109.20-1 (quoting Josephus, *Jewish Antiquities*, 5.10-12); Rabanus Maurus and Josephus are the two authorities on this passage cited by the *Glossa ordinaria*, PL.113.544B-D.
[37] Lincoln Cathedral, MS 25, I.11, f.15r.

community, would suffer.[38] This was intended as a salutary reminder to the judge that the sentences he handed down had much wider political and social ramifications. John of Salisbury transformed this into a still more unambiguously political dictum in *Policraticus*, by drawing a comparison between Heli and the Roman republican consul Brutus. John recounted that Brutus, after the expulsion of the kings from Rome, had discovered that his sons were plotting a coup to reinstitute royal government. This was an offence against the state, and, in keeping with the law, Brutus commanded that they be beaten and subsequently decapitated. John explains that Brutus, unlike Heli, realised that, in this context, paternal mercy or leniency would be deleterious to the political community. John notes that, whilst this action may seem objectionable, Brutus's actions were in fact praiseworthy and to be approved of by Christian readers, for Brutus had chosen to put the welfare of the great mass of the people above that of his own children.[39] The cases of Heli and Phinehas underlined the links between right and proper judgement and the security of the realm itself. These *exempla* were proof of the practicality of scriptural instruction for judges. Not only do corrupt or partial judges fail: their nations fail around them too.

Samuel: 1 Kings vii (1 Samuel vii)

The scriptural history of the Israelite judge Samuel demonstrates, even more clearly than the cases of Heli and Phinehas, exactly how closely English authors understood their systems of justice to be informed by biblical histories. Samuel presented a straightforward story of justice done well and judgement given appropriately. Indeed, Samuel's good behaviour as a judge was precisely what distinguished him from his

[38] *VA*, 1.72, p. 474.
[39] *Policraticus*, 4.11, 1:535. For an alternative view from the late twelfth century see Simon of Tournai, *Disputatio* 29, pp. 89-90: to put one's own flesh to death offends against both the law of nature and positive law.

immediate predecessor as high priest and judge of Israel, Heli. The most revealing example of this particular connection of biblical history to contemporary reality is found in John of Salisbury's *Policraticus*. John takes the description of Samuel, touring the provinces of Israel for the purposes of administering justice (1 Kings vii.15-7), and equates this judicial activity with the work of itinerant English circuit judges at the time of writing (1159). These justices-in-eyre were a relatively new innovation in England: possibly introduced under Henry I, they had only been revived – and the institution revivified – under Henry II.[40] Samuel, like his Angevin counterparts, held an 'inquest' through which any failures of his judgement could be complained of and righted (1 Kings xii).[41] John fits Samuel into a model of Angevin judicial innovations: however, he laments that modern justices fail to emulate Samuel's lofty standards. John manipulates the biblical figure to provide both a model and a critique of contemporary legal standards. Strikingly, John's pupil (or possibly fellow-student) in Paris, Ralph Niger, also praised Samuel's peregrinations as the model of good judicial practice. Samuel's dedication to doing justice by moving around provinces of Israel could be read literally, as an example of good service, as John had done. When also read allegorically, however, Ralph explained that they also demonstrated Samuel's moral fitness for judicial service. Ralph's *Moralia in libros Regum* notes that Samuel's circuits of Israel as a judge prefigured his ascent to heaven.[42]

In Samuel then, theologians found an image of excellent human judgement, a judge who avoided corruption and kept himself open to the people. Moreover, Samuel's relevance as a judicial model applied across all types of law. Thus, whilst John of Salisbury hoped that Angevin princes would aspire to emulation of Samuel, Robert Grosseteste saw in him a model for *episcopal* justice, explaining that, just as Samuel had

[40] Judith A. Green, *The Government of England under Henry I* (Cambridge, 1986), pp. 107-8.
[41] *Policraticus*, 4.16, 1:581.
[42] Lincoln Cathedral, MS 25, II.14, f.29r.

toured Israel, so a bishop ought to inspect his diocese, making a circuit of it at least once a year.[43]

Susannah and the Woman Caught in Adultery: Daniel xiii and John viii

Whilst the *exempla* of Heli and Phinehas could be adduced to argue for strict punishment of sinners, a number of counter examples could be deployed when medieval authors wanted to argue in favour of mercy. These included further material from the books of Kings, such as, for example, David's choice to spare Saul (1 Kings xxiv) when he had his enemy at his mercy.[44] The most significant and popular *exempla* employed in praise of mercy, however, were Daniel's defence of Susannah and Christ's treatment of the woman caught in adultery. These two scriptural pericopes were often joined together to form a pair which emphasised the shared value of mercy, a value which transcended the apparent difference in spirit between the two testaments in which the *exempla* occured.

Daniel xiii describes how the virtuous Susannah is falsely accused of concupiscence by two wicked elders. Susannah is to be put to death on this charge until Daniel steps forward and proves that her accusers have borne false witness. This pericope was sometimes interpreted as providing a model of a bishop's duty to assist the falsely accused. Thomas of Chobham, for example, used it to demonstrate how 'truth' (*veritas*) was an integral part of justice: it was only by speaking the truth that Daniel had challenged the unjust proceedings of a corrupt judicial process.[45] The Angevin courtier and author Walter Map, meanwhile, illustrated how such an *exemplum* had contemporary relevance, by recounting the tale of how an untrue allegation of adultery at the contemporary Portuguese court had resulted in the execution of a knight and the beating

[43] Grosseteste, *Epistolae*, ed. Henry Richards Luard, RS 25 (London, 1861), Ep. 127, pp. 388-9.
[44] This *exemplum* is praised by Peter of Blois, *Sermo* 96, PL.207.698-700.
[45] *SAP*, p. 233. Peter the Chanter had given the same example, *VA*, 2.12, p. 654.

to death of the pregnant queen, a second Susannah. No just man, no new Daniel, Walter Map lamented, had stepped forward to challenge the wickedness of lying counsellors.[46] More generally, however, Susannah's fate was taken to denote judicial prudence: Walter Daniel describes the Cisterican abbot Aelred of Rievaulx as a 'second Daniel' (*alterius Danielis*), on the grounds that he was able to easily disentangle the truth in cases which others found hard and difficult.[47]

The most common twelfth-century approach to Daniel xiii, however, was to pair the text with John viii, in order to open up a discussion of the value of mercy. John viii.1-11 presents the pericope of the woman caught in adultery, whom the Pharisees presented to Jesus, demanding that he pass sentence upon her. The law required her to be stoned to death, but Christ refused, arguing that only a sinless individual was entitled to judge the woman. The crucial line here was Christ's comment to the woman that she should 'go and sin no more (*vade, et iam amplius noli peccare*)': rather than condemning her, Christ simply instructed the adulteress to alter her behaviour. This was the interpretation of Augustine, who had explained that rather than sentencing her to death, Christ granted the woman an opportunity to correct her sins in the present life.[48] Augustine's commentary, however, did not explicitly counsel the human judge to follow the precedent of Christ: it was rather more concerned with describing how the incident revealed the perfect balance of *mansuetudo* and *misericordia* with *iustitia* and *veritas* in the person of Christ.[49] It was only later medieval commentators who worked the passage into an admonition to earthly judges. The woman caught in adultery and Susannah had long been connected in theological thought, as both passages formed the readings in the Roman rite for the third

[46] *DNC*, 1.12, pp. 30-4.
[47] William of Rievaulx, *Vita Ailredi*, ed. and trans. F.M. Powicke (Oxford, 1978), 14, p. 23.
[48] *S. Aureli Augustini Hipponiensis episcopi Epistulae III*, ed. A. Goldbacher, CCSL 44 (Vienna, 1904), Ep. 153.9, pp. 405-6.
[49] Augustine, *Johannis Evangelium tractatus*, ed. D.R. Willems, CCSL 36 (Turnhout, 1954), 33, pp. 306-11.

Sunday before Lent.[50] Rupert of Deutz (writing c. 1112) explained the basis of the pairing: one represented a woman unjustly condemned for a crime she had not committed, the other a woman justly condemned, but both of them had been shown mercy.[51] As a result, the pericope was read by theologians and moralists as an admonition to clemency. For Thomas of Chobham in his guide for confessors and Gerald of Wales in his *speculum principis*, John viii argued the need for forgiveness, for mercy to dispense from the strictures of the rigid written law.[52]

John viii, however, was not solely a source of moral guidance for the judge. The passage was extensively scrutinised for the procedural guidance it could provide. Given the twelfth-century concern for stipulating the minutiae of legal procedure, it is not surprising that canon and roman lawyers turned to scripture as a basis for legal proofs. This borrowing, however, serves once again to underscore the concrete connection between exegesis and judicial reality. Civil lawyers following Martinus Gosia (d. c. 1166), one of the 'Four Doctors' of the Roman law schools at Bologna,[53] had used the pericope to illustrate the Roman principle of 'iudex secundum allegata, non secundum conscientiam iudicat' – that a judge could convict only according to the evidence presented to him by witnesses, not according to his private knowledge of the crime.[54] Rather than concentrating on Christ's injunction that the adulteress 'go and sin no more', this interpretation considered the questions which preceded Christ's 'judgement' of the woman: 'where are your accusers? Has no-one condemned you? (*ubi sunt qui te accusabant? Nemo te condemnavit?*)'. Christ's words here indicated the fundamental

[50] C. Brown Tkacz, 'Susanna Vitrix, Christus Victor: Lenten Sermons, Typology and the Lectionary', in C.J. Nederman and R. Utz (eds.), *Speculum Sermonis: Interdisciplinary Reflections on the Medieval Sermon* (Turnhout, 2004), pp. 58-62.
[51] Rupert of Deutz, *De divinis officiis*, ed. H. Haacke, CCCM 7 (Turnhout, 1967), 4.16, pp. 130-1.
[52] Thomas of Chobham, *SC*, 6.4.9a, p. 304; 7.2.8a, p. 362; Gerald of Wales, 'De principis instructione', British Library, MS Cotton Julius B.XIII, 1.7, f.55r; cf. *VA*, 2.55, p. 817; *GO*, PL.114.589-90.
[53] For the 'Four Doctors' see James Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (London, 2008), pp. 85-9.
[54] K.W. Norr, *Zur Stellung des Richters im gelehrten Prozeß der Frühzeit: Iudex secundum allegata non secundum conscientiam iudicat* (Munich, 1968), pp.16-8.

agreement between Roman legal and scriptural precedent: without an accuser, no crime could be prosecuted.[55] Civilians drew on John viii because it showed Christ refusing to judge without witnesses to the crime. The pericope was read as a comment on procedure: without witnesses, any judgement risked a false verdict, and this would endanger the soul of the judge.

Moses's Intercession: Exodus xxxii.31-2

The most complex of all scriptural judgements was, perhaps, that of Moses's intercession for the Israelites. This was a commonly-cited *exemplum* in the twelfth century, but its judicial message was far from clear. It could be invoked to present a very straightforward argument for merciful behaviour in a judge or ruler; on the other hand, those who had analysed the scriptural story very closely could argue that Moses's intercession, on the contrary, presented an example of mercy which should be avoided by all Christian rulers and at all costs. The different ways in which this *exemplum* was deployed reveals a great deal in fact about the moral constraints that were considered to act on merciful judicial behaviour. Exodus xxxii.32, the passage in question, describes how Moses sought mercy from God for the Israelites, who had constructed and idolatrously worshiped the golden calf. This incident is part of a complicated narrative framework: Moses, having discovered the idolatry of the people, first commands that 3,000 of them be slaughtered for this sin: it is only following this slaughter that he intercedes with God, asking for the forgiveness of the people. Moses pleads, 'either forgive them this sin or delete me from the book which you have written' (*aut dimitte eis hanc noxam, aut si non facis, dele me de libro tuo quem scripsisti*). Twelfth-century commentators understood this passage as meaning that Moses was willing to sacrifice his

[55] Cf. Fraher, 'Conviction According to Conscience', p. 24.

own salvation – his place 'in the book which you have written', namely, the 'Book of Life' – in order to secure the salvation of the Israelites.[56]

This willingness to sacrifice his own salvation was frequently cited in works praising Moses as the admirable embodiment of a merciful ruler.[57] Twelfth-century preachers utilised the figure of Moses to praise the value of gentleness.[58] Whilst the terms gentle (*manusetus*), mild (*mitis*), merciful (*misericors*) and clement (*clemens*) had subtly different semantic connotations, especially when being examined in very specific contexts (for example, scholastic *summae* on the virtues), they were, in sermons, very closely connected, if not interchangeable. Moses was described in the book of Numbers as 'mittissimus', the most merciful man on the earth: this mercy was also singled out for praise in the *Decretum*.[59] In the context of preaching, it followed that *mitis* Moses would very likely also be *misericors.* These were virtues, which, in a judicial or courtly context, led the judge to punish a defendant less than he deserved, an act which demonstrated judicial virtue. An example of how these themes could be joined together is given in Thomas of Chobham's *Summa de arte praedicandi* (c. 1216-22); a text compiled to aid parish priests in preparing sermons. Assembling a list of *exempla* a preacher might employ when exhorting an audience to the virtue of temperance, Thomas considers one embodiment of that virtue, he who is 'mansuetus' in punishment. Moses provides the biblical precedent for this behaviour. Thomas then argues that Moses's gentleness towards the Israelites (he does not tie this quality to any specific incident) embodies the same virtue which is so highly praised in Seneca's *De clementia*, namely clemency.

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[56] For the Book of Life as a record of salvation, see Hugh of St. Victor, *Explanatio in Canticum beatae Mariae*, PL.175.430C; cf. Psalm clviii.9; Daniel xii.1-2; Philippians iv.3; Revelation iii.5, xiii.8.
[57] For 'positive' readings of the intercession see Bernard of Clairvaux, *Sermones in cantica canticorum*, 30.4, PL.183.935C; Hugh of St. Victor, *De sacramentis*, 2.13.10, PL.176.538; Richard of St. Victor, *Les quatre degrés de la violente charité* (*Tractatus de quatuor gradibus violenae caritatis*), ed. Gervais Dumeige (Paris, 1955), 4.46, p. 175.
[58] e.g. *Sermo* 50 (a sermon wrongly attributed to Peter of Blois), PL.207.706-9; Grosseteste, Ep. 98, pp. 300-1.
[59] *Decretum*, C.II, q.7, c.27, 1:490.

Thomas of Chobham's point is a traditional one: there is no useful Roman knowledge which cannot also be found in the Bible. By presenting the example of Moses, Thomas strives to make the point that all that classical philosophy had said in praise of mercy was fundamentally in agreement with scripture.

John of Salisbury, in particular, was interested in what Exodus xxxii could reveal about the moral duties of rulership.[60] Throughout *Policraticus*, John emphasises that justice is the primary duty of a king.[61] He develops this point by arguing that justice has two essential aspects: to subject the people to law, and to subject oneself to divine law and the command of God. To demonstrate that this second command is just as vital as the first, John draws out the example of the notoriously wicked Old Testament ruler, Saul. Saul was admonished by God to destroy an enemy people, the Amalekites; but he spared Agag, their king (1 Kings xv). When the prophet Samuel rebuked Saul for failing to carry out the command of God, Saul defended himself by claiming that the people had forced him to spare Agag. It is in this last action, John asserts, that Saul's sin and the instructive message of scripture is really to be found: Saul was a prince who blamed his people for his own transgression, condemning them for his own failure to carry out God's command. It is as a positive counter-example to Saul that John discusses Moses, for it was Moses who, when God's wrath was kindled against the Israelites, pleaded that they be spared. Moses was an admirable leader because he did not seek glory for himself, but put Israelites first in everything, since 'even to his own cost he [Moses] preferred to serve the glory of God and the deliverance of the people whom he led'.[62]

Not all twelfth-century exegetes, however, were content to praise Moses's action. A number of theologians had serious concerns about the nature of the intercession. The

[60] *Policraticus*, 2.27, 1:463-4.
[61] e.g. *Policraticus*, 4.1, 1:513-4; Kate Langdon Forhan, 'Salisburian Stakes: The Uses of "Tyranny" in John of Salisbury's *Policraticus*', *History of Political Thought* 11 (1990), pp. 397-407.
[62] *Policraticus*, 2.27, 1:464; cf. 3.9, 1:493.

proposition was, from some perspectives, an awkward one: Moses was, in essence, bartering with his own soul in exchange for the forgiveness of the Israelites, and this, in itself, was unseemly. More worringly still, Moses had attempted to use his own predestined salvation as leverage to win mercy for the sinful Israelites, an action which looked like a challenge to the ordained soteriological order, an order which could not, according to the metaphysics of predestination, be overturned. Stephen Langton, for example, explained that the intercession could never have succeded, for predestination to salvation or damnation was the foundation of all divine justice.[63] Likewise, the most eminent masters of Parisian theology – including Hugh of St. Victor,[64] Robert of Melun,[65] and Peter Comestor[66] – considered the question of Moses's intercession. Their conclusion was that it had been no real intercession at all: Moses's words to God had been spoken rashly, out of concern and love for the Israelites, and as such it did not constitute a reasoned appeal to the divine judge.[67] In a society in the midst of defining rules for procedure and pleading, these theologians were at pains to emphasise that Moses's appeal was not strictly 'legal', according to the order of soteriological justice.

Strikingly, theological interest in Moses's intercession is a development particular to the twelfth century. This is true both in terms of the level of lavish praise heaped on Moses as an individual who demonstrated particular mercy through his intercession, and in terms of the scrutiny to which the legitimacy of the intercession itself was subjected. The intercession had never particularly troubled patristic or earlier medieval authors: whilst Isidore of Seville and Bede had discussed the incident of the golden calf, neither

[63] Langton, Commentary on the Pentateuch, BnF Latin 14415, ff.144v-5r.
[64] O. Lottin, 'Questions inédites de Hugues de Saint-Victor', *RTAM* 27 (1960), q. 50, pp. 54-6.
[65] *QDP*, q. 62, pp. 32-3.
[66] Peter Comestor, *Historia scholastica*, PL.196.1190-1.
[67] Cf. Peter of Blois, *De charitate Dei et proximi*, PL.207.340.

had mentioned the problems of the intercession.[68] Augustine had considered the intercession only briefly as one point amongst many his collection of questions on the problems of the first seven books of the Old Testament.[69] The sudden twelfth-century explosion of interest in the intercession (whether treated as a praiseworthy *exemplum* of mercy or as the subject of a difficult theological *quaestio*) is instructive for what it reveals about the broader social context of discussions of judicial mercy, and the political significance of acts of intervention in the legal process.

Classical *Exempla*

The 'Roman' contribution to twelfth-century debates on justice was more than purely legal. Whilst Roman law did furnish the influential definition of *iustitia* as a matter of the precise repayment of due, classical texts also offered a great deal of material which was harnessed to explore the morality of judgement. Indeed, how classical authors defined the philosophical idea of *clementia* mattered just as much as juridical definitions of *iustitia*. The twelfth century accordingly witnessed a renewed engagement with both the legal and the philosophical strands of Roman thought. Roman texts provided models for justice and virtuous judicial behaviour. The *Topographia Hibernica* of Gerald of Wales recorded that Henry II carried a copy of the Roman moralist Seneca's *De clementia* with him when travelling around his territories.[70] As such, the behaviour of Roman rulers was held up as a mirror to contemporary princes – and the examples of wicked or malicious Roman justice were powerful and compelling.[71] Orderic Vitalis, for example, noted that the cruelty which the malevolent Robert of Bellême inflicted on his

[68] Isidore of Seville, *Quaestiones in vetus testamentum*, PL.83.306B-7C. Bede's account follows that of Isidore, *In pentateuchum commentarii*, PL.91.330B-D.
[69] Augustine, *Quaestionum in Heptateuchum libri VIII*, ed. J. Fraipont and D. de Bruyne, CCSL 33 (Turnhout, 1958), 2.147, pp. 136-7.
[70] Gerald of Wales, *Topographia Hibernica*, ed. J.F. Dimock, RS 21 (London, 1867), 3.48, p. 191.
[71] See L. Boje Mortensen, 'The Texts and Contexts of Roman History in Twelfth-Century Western Scholarship', *The Perception of the Past in Twelfth-Century Europe*, pp. 99-116.

prisoners exceeded even that of the most notorious Roman persecutors of Christians – Nero, Decius and Domitian, men lacking all humanity and mercy (*humana ratione et clementia*).[72]

When one looks beyond the definitions of the jurists, it is apparent that classical thought on the relative advantages of justice and mercy as judicial strategies is as ambivalent as the 'Christian' tradition. Moreover, twelfth- and thirteenth-century authors were well aware of conflicting classical attitudes towards judicial punishment – and exploited them in the composition of histories and mirrors for princes. The set-piece passage which best sets out the ambiguities even in 'Roman' approaches to justice derives from the Roman author Sallust. Sallust experienced a renewed popularity in the eleventh and twelfth centuries, his literary style considered equal to that of Cicero.[73] The twelfth century represents the medieval high-water mark for the production and copying of Sallustian manuscripts.[74] Sallust's works formed the basis of the school curriculum in grammar and rhetoric, studied before one went on to any form of higher learning. As such, anyone who was literate (in the true Latinate sense of that term) would have known their Sallust.

Judicial and moralising attention focussed on parts of Sallust's *Bellum Catilinae*, the work which described the conspiracy, led by Catiline, to bring civil war to Rome. Narrating the conspiracy and its subsequent failure, Sallust had described a debate in the Roman senate, in which the leaders of Rome discussed how those citizens who had been exposed as partisans of Catiline ought to be punished and the degree of punishment that would be appropriate to their crimes. In Sallust's account, the debate is dominated by two

[72] *EH*, 8.15, v, pp. 225-7.
[73] L.D. Reynolds, 'Sallust', in L.D. Reynolds (ed.), *Texts and Transmission: A Survey of the Latin Classics in the Middle Ages* (Oxford, 1983), pp. 341-8; B. Smalley, 'Sallust in the Middle Ages', in R.R. Bolgar (ed.), *Classical Influences on European Culture* (Cambridge, 1971), pp. 165-75; B. Munk-Olsen, 'La diffusion et l'étude des historiens antiques au XIIe siècle', in Andries Welkenhuysen et al. (eds.), *Medieval Antiquity* (Leuven, 1995), pp. 22-5.
[74] Mortensen, 'Texts and Contexts', p. 104.

towering figures of Roman history – Julius Caesar and Marcus Porcius Cato – who, respectively, present the cases for leniency and severe treatment of the prisoners. It is Julius Caesar, Sallust's own patron, who is first to speak: he argues against imposing a penalty of death on the conspirators, urging that their goods be confiscated, their bodies imprisoned, but that their lives be spared. Caesar's argument does not turn on the worthiness of the prisoners to be pardoned, but instead makes the point that severe sentencing reflects badly on those who impose it. Although the Senate wields the authority to order executions, it is both more noble and more virtuous that it refrain from exercising that power:

> If the humble, who pass their lives in obscurity, commit any offence through anger, it is known to few; their fame and fortune are alike. But the actions of those who hold great power, and pass their lives in a lofty station, are known to all the world. So it comes to pass that in the highest position theirs is the least freedom of action. There neither partiality nor dislike is in place, and anger least of all; for what in others is called wrath, this in a ruler is term insolence and cruelty.[75]

This is a persuasive piece of deliberative oratory and makes at least implicit appeal to the conceptual foundation of *clementia* – the principle that the most powerful are most distinguished when they restrain themselves from making full use of their power.

In Sallust's account, Caesar's oration is followed and countered by the speech of Marcus Porcius Cato, also known as Cato the Younger, or Cato of Utica, the voice of senatorial Stoicism. Cato's speech presents a perspective entirely opposed to that of Caesar: he implores the Senate to put the conspirators to death. Any other course of action, Cato warns, would fatally weaken Rome: should the men be allowed to escape, they would only join the enemy forces. Indeed, in Cato's eyes, Caesar's merciful disposition and willingness to pardon the guilty – his horror of shedding blood – symbolises how decadent, effete and weak Rome has become, and he asserts that success

[75] Sallust, *The War with Catiline*, ed. J.C. Rolfe (London, 1928), 51, pp. 91-3. On the rhetorical power of an appeal to *clementia*, Cicero, *Ad Herennium*, 2.49, p. 153.

and security is obtained only through vigilance and action.[76] Cato rejects the possibility of exiling or imprisoning the conspirators and believes that nothing other than capital punishment will secure Rome against her enemies:

> Catiline with his army is at our throats; other foes are within our walls, aye, in the very heart of Rome...therefore the more need of haste... [They] have confessed that they have planned murder, arson, and other fearful and cruel crimes against their fellow citizens and their country, let those who have confessed be treated as though they had been caught red-handed in capital offences, and be punished after the manner of our forefathers.[77]

In Sallust's history, it is Cato who ultimately triumphs in debate: having heard and weighed both arguments, the conspirators are swiftly executed in order to ensure the safety of the *res publica*. The conclusion, however, is almost irrelevant to the later medieval history of this debate: what is significant is that Sallust had 'staged' such an argument, a set-piece conflict between principles of *clementia* and *misericordia* on one hand and *iustitia* and s*everitas* on the other, in which the strengths of both positions could be seen. The debate concluded with a paragraph which compared the conflicting temperaments of Julius Caesar and Cato, whilst making it clear that both were equal in virtue:

> In birth, then, in years and in eloquence, they were about equal; in greatness of soul they were evenly matched, and likewise in renown, although the renown of each was different. Caesar was held great because of his benefactions and lavish generosity, Cato for the uprightness of his life. The former became famous for his gentleness and compassion (*mansuetudine et misericordia*), the austerity (*severitas*) of the latter had brought him prestige. Caesar gained glory by giving, helping, and forgiving; Cato by never stooping to bribery. One was a refuge for the unfortunate, the other a scourge for the wicked. The good nature of the one was applauded, the steadfastness of the other. Finally, Caesar had schooled himself to work hard and sleep little, to devote himself to the welfare of his friends and neglect his own, to refuse nothing which was worth the giving. He longed for great power, an army, a new war to give scope for his brilliant merit. Cato, on the contrary, cultivated self-control, propriety, but above all austerity. He did not vie with the rich in riches nor in intrigue with the intriguer, but with the

[76] Sallust, *Catiline*, 52, p. 107.
[77] Ibid, 52, p. 109.

> active in good works, with the self-restrained in moderation, with the blameless in integrity.[78]

Sallust had thus never explicitly concluded either in favour of Caesar or Cato, but in praising both men's approaches to justice, he further polarised the conflict between their respective positions. This passage was well known to medieval authors, being reproduced in the *Florilegium Gallicum*, a mid-twelfth-century compilation of memorable and instructive extracts from classical authors, under the heading of 'De moribus Cesaris et Catonis mixtim'.[79] The *Florilegium* also provided long extracts from both the orations of Caesar and Cato, including those discussed here.[80] Twelfth-century authors capitalised on this Sallustian text, and it informed their readings of the conflict between mercy and justice. Caesar, embodying the virtue of *clementia*, had real courtly appeal in the twelfth century, in a nascent 'chivalric' culture.[81] *Clementia* should be understood as central to the 'chivalric' codes and mores emerging during this period, according to which a lord behaves 'honourably' on the battlefield by allowing high-status enemies to surrender without fear of execution.[82] *Clementia* was attendant on military prowess: only he who was victorious on the battlefield then had the ability to exhibit magnanimous mercy towards a conquered enemy, a feature typified in depictions of Julius Caesar. Thus the panegyrical work which praises William the Conqueror's victory in 1066, the *Gesta Guillelmi* of William of Poitiers, the Conqueror's chaplain, makes frequent comparison between the triumphant Norman duke and Julius Caesar, for the

[78] Ibid, 54, pp. 111-3.
[79] Johannes Hamacher, *Florilegium Gallicum: Prolegomena und Edition der Exzerpte von Petron bis Cicero, De oratore* (Frankfurt, 1975), pp. 190-1; R.H. Rouse, 'Florilegia and Latin Classical Authors in Twelfth- and Thirteenth-Century Orleans', *Viator* 10 (1979), pp. 135-8.
[80] Hamacher, *Florilegium Gallicum*, pp. 187-9.
[81] John Gillingham, '1066 and the Introduction of Chivalry into England', *Law and Government in England and Normandy*, pp. 31-55.
[82] See Matthew Strickland, *War and Chivalry: The Conduct and Perception of War in England and Normandy, 1066-1217* (Cambridge, 1996), esp. pp. 2-4.

reason that both showed extraordinary mercy towards their subject peoples.[83] The Conqueror, like Caesar, was a mighty warrior, but he was most distinguished by his refusal to use excessive force and his lenient punishment of his defeated enemies. *Clementia* was a virtue particularly associated with high office: it was only exercised by those who had the power of life or death over condemned men. Ralph Diceto reported that Caesar's goodness (*bonitas*) was so great that having defeated men by arms, he conquered them a second time with his clemency.[84]

Secondly, in *clementia* lay an element of civility and sophistication: self-restraint was a challenge which the prince or lord set for himself, and, if he could manage it, a further proof of personal virtue. For that connection between power, nobility and mercy, twelfth-century authors looked to the Roman moralist, Seneca. His treatise, *De clementia*, had been intended for the edification of the emperor Nero, and explained that clemency is the virtue which distinguishes the virtuous ruler from the tyrant.[85] This had also been the argument which Sallust placed in the mouth of Caesar: the *res publica* or ruler accustomed to delighting in harsh, punitive sentences may easily slip into lawlessness and tyranny.[86] *Clementia* is the most royal of virtues, because only he who has the power to inflict punishment also possesses the power to pardon.[87] Seneca's text draws on examples from Roman history and Stoic philosophy to present the case that clemency is both the mark of good rulership and a means of securing one's rule. Manuscript copies of *De clementia*, in addition to abbreviated versions and extracts, are well-attested in northern Europe from the late eleventh century onwards: by the end of the twelfth it was a familiar

[83] William of Poitiers, *The 'Gesta Guillelmi' of William of Poitiers*, ed. and trans. R.H.C. Davis and Majorie Chibnall (Oxford, 1998), p. xxii, xxv.
[84] Ralph Diceto, *De caesaribus*, *Opera historica*, ed. William Stubbs, RS 67 (2 vols., London, 1876), ii, p. 182; cf. *Abbreviationes chronicorum*, i, p. 52.
[85] Seneca, *On Mercy*, in John W. Basore (ed.), *Seneca: Moral Essays, Volume I* (London, 1928), 1.11, pp. 391-5; an idea repeated by Alan of Lille, *Summa de arte praedicatoria*, PL.210.141D.
[86] Sallust, *Catiline*, 51, pp. 95-7.
[87] Seneca, *On Mercy*, 1.5, p. 371.

text not only in France, but also England and Germany.[88] The classical formulation of *clementia* presented by Seneca could also be easily assimilated to the Christian virtue of mercy, *misericordia*.[89] Counsellors who saw it as their duty to reign in the violent power of kings appealed to both Caesar and Seneca to emphasise that mercy was an integral part of justice.

Sallust's juxtaposition of Caesar and Cato provided a means of conceptualising the conflict between justice and mercy, and formed the basis of several comparisons between the principles of merciful and strict justice. The chronicler Rahewin of Freising, in his continuation of the *Gesta Frederici* of Otto of Freising, c. 1158-60, exploited the comparison of one 'merciful', one 'severe' man, assigning the roles of Caesar and Cato to Duke Welf VI and Henry the Lion respectively. The two are described as *diversis moribus*, one clement, one severe, yet both are endowed with virtue, and Rahewin does not suggest whether one is to be preferred to the other. Clemency pursues fame, but severity and *constantia* are more likely to bring peace to the land.[90] Amongst English authors, the contrast between the two men and two virtues was readily exploited in order to explore the problems faced by judges during a century of legal revolution. It was used twice, to different effect, in the writings of Gerald of Wales. Gerald first employs the contrast in a martial setting, in which his modern-day 'Caesar' and 'Cato' debate the merits of executing a group of captured Irish prisoners during the Angevin campaigns in Ireland in the early 1170s. Gerald essentially rewrites Sallust's *Bellum Catilinae* in his *Expugnatio Hibernica*, imagining a rhetorical debate between two leaders in Ireland after the victory of Angevin and Marcher forces at the Battle of Waterford. One knight, Gerald's relative, Raymond FitzGerald (sometimes known as Raymond le Gros),

[88] H.M. Hine, 'The Younger Seneca', *Texts and Transmission*, pp. 364-5.
[89] e.g. *VA*, 2.9, pp. 648-50.
[90] Rahewin, *Gesta Frederici*, ed. G. Waitz, MGH, Scriptores rerum Germanicarum 46 (Hannover, 1912), 4.46, pp. 285-7.

reiterates the words of Caesar, arguing that as conquerors, the Angevin forces ought to exercise mercy, for it is more noble to spare a life than to take it. Invoking the familiar tropes of classical *clementia*, he argues that to kill unarmed men would represent only cruelty and savagery.

> I would not by any means insist that we should spare our enemies. However, these are not our enemies, but fellow human beings; they are not rebels, but beaten and vanquished opponents... They are now in such a position that in their case there is scope for showing mercy (*pietas*), to give them a good example, rather than for displaying cruelty to torture them.... So let that quality of compassion which is most deserving of praise (*dignissima laude clementia*) be seen in us, and enable us, who have conquered everything else, to conquer our own anger and violent passions. For self-restraint and moderation usually quieten the head-strong emotions... Although Julius Caesar, for whose victories the world was not wide enough, had such unbounded power, the only man he ordered to be killed was Domitius. But he had already once previously granted him his life. In any case, his mercy (*pietas*) increased his renown and did not stand in the way of his victories. What wicked, brutish barbarity when victory is not accompanied by compassion (*misericordia*)! [91]

Yet, in turn, this oration is challenged by another soldier, Hervey de Montmaurice, who counsels – following the logic of Cato's argument – that to spare the lives of the conquered Irish would be to endanger Angevin rule in Ireland. Conquest and mercy are, in his view, irreconcilable political choices:

> While peoples are still proud and rebellious they must be subdued by all possible means, and clemency (*mansuetudine*) must take a back seat. But when they have been subdued, when they are ready to be obedient, then and only then are they to be treated with all possible clemency.... But Raymond, showing truly amazing compassion (*misericordia*), is bent on increasing the number of our enemies by adding to it these men, as if this people were already conquered and the only quality we needed to display was mercy (*pietas*), or as if, because our enemies are very few in number, he cannot find any field wherein virtue may distinguish itself. But in fact the whole population of Ireland has joined in plotting our destruction, not without good reason... We must choose one of two policies. Either we must vigorously pursue that end for which we have come here, and with the aid of our armed might and our valour subdue with a strong arm this rebellious people, casting aside all pretence of clemency (*clementia*); or, if we consider it right to favour acts of mercy (*pietatis opera*) as Raymond counsels, then we should turn

[91] Gerald of Wales, *The Conquest of Ireland: A Translation of Expugnatio Hibernica*, ed. and trans. A.B. Scott and F.X. Martin (Dublin, 1978), 1.14, pp. 58-61.

> our ships round and leave this people which so deserves our pity (*miserabili plebi*) to enjoy their country and ancestral lands in peace.[92]

Enemies who are not totally subjugated will only rise again and seek to destroy their conquerors. Just as Cato had argued that the Roman senate should have no time for gentleness and compassion, Gerald's interlocutor, Hervey, speaks of the dangers of pity. As in the *Bellum Catilinae*, it is the arguments against mercy and in favour of 'national security' which win the day – and the conquered Irish are executed.[93] Gerald's sympathy here seems to lie with the argument for clemency, for he notes that it was 'shameful' that the Irish were executed in such a manner – shameful, no doubt, in part because the judicious counsel of his relative had been ignored. Underlining the classical dimensions of his account, Gerald later characterised Raymond in very similar terms to those associated with Julius Caesar – 'liberalis et lenis'.[94] But Gerald also slightly alters the terms of his classical model: he does not fit Hervey to the virtuously austere model of Cato, or seek to defend Hervey's position towards the Irish. Rather Gerald castigates him for his lack of principle and love of vice, his tendancy to malice rather than courage (*plus habens malicie quam militie, plus fraudis quam laudis*).[95] All in all, Gerald implies, Hervey's argument for slaughtering the captured Irish was not grounded in reasonable argument as Cato's position had been, and rather than arising from a genuine fear for the safety of the military and political position in Ireland, was the expression of vicious cruelty.

There is no evidence that such a battle, let alone such a debate, ever took place at Waterford, and it is likely that Gerald (perhaps having discussed the campaign with his relatives), imagined the argument for himself, in order to serve his own rhetorical ends. What is striking here, however, is how Gerald invokes a consciously classicising set-

[92] Ibid, 1.15, pp. 62-5.
[93] Ibid, 1.15, p. 65.
[94] Ibid, 2.8, p. 154-5.
[95] Ibid, 2.11, pp. 158-61.

piece (and one which would doubtless have been recognised by, and resonated with, his educated readers) to set out the possible and entirely opposed choices faced by a victorious ruler. Gerald of Wales also assigned the 'types' of Caesar and Cato to two other competing rulers, Henry II's sons, Henry the Younger and Richard respectively, directly quoting Sallust when he claims that: 'one was a refuge for the unfortunate (*miseris perfugium erat*), the other a scourge for the wicked (*malis pernicies*)'.[96] In this case, however, Gerald implies that the austerity of Cato is to be preferred in any ruler who exercises judicial functions, as Henry's clemency was akin to laxity, allowing the prince's court to become a safe haven for criminals.[97]

This chapter has set out the most important intellectual arguments and typologies for a judicial choice between *iustitia* and *misericordia*. These are the *exempla* which this thesis will return to numerous times in the following chapters, in order to understand how theologians, judges, and priests struggled to make sense of the practical challenges of justice, and resolve problems of judicial discretion. These discussions illustrate that twelfth- and thirteenth-century English authors understood that the relationship between justice and mercy was already contentious (and had been so for several millennia); those authors had before them the raw material to explore and refine that debate. The fundamental problems of that relationship had not been resolved simply by the *process* of codification and systematisation of law, nor had the *exempla* – scriptural, classical or historical – which could provide judicial guidance lost any of their relevance. There was a strong moral content to the classical tradition of thought on justice, provided largely by Sallust's historical and Seneca's moral writings. In turn, this only served to complicate the choice between judicial strategies. Indeed, this had been Augustine's point when, in a

[96] Cf. Sallust, *Catiline*, 54, p. 113.
[97] *DPI*, 2.9, p. 220; 3.8, p. 297, cf. *Topographia Hibernica*, 3.50, p. 196.

letter, he had cited Cicero's praise of merciful Caesar, and Cicero's explanation that the republic had become great because it preferred to pardon injury rather than avenge it.[98] Indeed, for Augustine, Caesar's conduct served precisely as a demonstration of the significant shared moral basis between Christian and Roman attitudes to mercy: even Roman authors endorsed the forgiveness of injuries. But Augustine's comment is worth dwelling upon for another reason: it was in the twelfth century, for the first time since Augustine's day, that these *exempla* once again had the relevance to create intellectual and practical judicial problems. For the first time since late antiquity, legal authority, and the way in which legal authority was constituted, was coming under sustained scrutiny. Moreover, that authority was once again, in theory and increasingly in practice, concentrated in a single governing authority which claimed control of the courts (whether that authority be a king or a pope). The situation was, in some ways, more comparable than ever before, to the judicial world which Augustine had known: a single authority aspiring to be the head of a comprehensive and systematic legal system.

[98] Augustine, Ep.138.9, CSEL 44, pp. 133-4.

Chapter 2. Divine and Human Justice

The central doorway of the north transept at Westminster Abbey, constructed c. 1246-59 as part of Henry III's monumental building programme, depicted the moment at which all would be judged.[1] It showed Christ seated in majesty, preparing to judge the damned and the saved. Christ, in turn, was probably flanked by painted figures of the Virgin Mary and St. John, intercessors before the divine judge, pleading that mercy might be shown towards human souls. The stone iconography of Westminster (at least as far as it can be recreated) set out the Last Judgement as it was described in Matthew xxv. It was an image which anyone entering the church could not miss; it was an iconography repeated across the churches of northern Europe, an image familiar on both Romanesque and Gothic portals.[2] Inspired by the iconography of Westminster (and, to some extent, built as a northern rival to that church), the same image of divine judgement appears in the Angel Choir at Lincoln, constructed approximately a decade later. Here the faithful entered the Church with a tableau of the 'wise and foolish virgins' (an image drawn from Matthew xv.1-13) at eye level: they were confronted with the unambiguous division of humankind between those 'wise' individuals who had adhered to divine teachings and earned heavenly reward, and those 'foolish' people who had wavered in their faith and would be damned.[3] The Last Judgement could be seen in England in glass as well as stone: in the late twelfth-century panels surviving in the stained glass of York Minster, and from thirteenth-century windows in Canterbury and Lincoln.[4] Such images were

[1] On the role of Henry III at Westminster see Suzanne Lewis, 'Henry III and the Gothic Rebuilding of Westminster Abbey: The Problematics of Context', *Traditio* 50 (1995), pp. 129-72.
[2] Williamson, for example, argues that Gothic representations of the Last Judgement emphasise the intercessory roles of the Virgin and John, whilst the Romanesque iconography makes fewer concessions to divine mercy, emphasising Christ's strict role as a judge, *Gothic Sculpture 1140-1300* (London, 1995), p. 2.
[3] Williamson, *Gothic Sculpture*, pp. 206-9.
[4] Richard Marks, *Stained Glass in England During the Middle Ages* (London, 1993), p. 81, pp. 113-7, p. 125.

intended to convey a didactic message to the faithful (and perhaps more importantly, the occasionally unfaithful), a message which hinged on the enormity and finality of divine judgement and the force of divine justice against the wicked.

The Last Judgement represents an essential starting-point in any consideration of the relationship between divine and human justice: it was, after all, the divine weighing of earthly sins. The Last Judgement was, moreover, represented in almost every medium: in iconography, in speculative scholastic *quaestiones* and in vernacular, pastoral texts. To understand the theological struggle to define and describe the justice of God, it must be appreciated that this was only one part – albeit a particularly sophisticated and highly-specialised part – of a broader social engagement with the idea of divine judgement. The period 1100-1250 produced an abundance of images and texts concerned with divine judgement. Yet this phenomenon has gone relatively unnoticed and unexplored. Jacques Le Goff, when writing his history of the 'birth of Purgatory' noted that the twelfth century witnessed a dramatic intensification in the level of scrutiny applied to divine punishment.[5] Le Goff traced those shifts in thought which led to the development of a doctrine of purgatory, and the punishment after death of sins in a place between heaven and hell. The development of the doctrine of the Last Judgement in the twelfth century is fundamentally similar to the birth of purgatory: theologians gathered together the various scriptural passages which provided information on this event, then sought to reconcile the apparent inconsistencies between their source texts.[6] Every aspect of divine judgement was brought under scrutiny.[7] Some theologians asked how exactly people would be divided on the day of judgement: how many groups would there be; how would one deal

[5] Jacques Le Goff, *The Birth of Purgatory*, trans. Arthur Goldhammer (London, 1984), pp. 135-42, 210-20.
[6] T.N. Hall, 'Medieval Traditions about the Site of Judgement', *Essays in Medieval Studies* 10 (1993), pp. 79-97, esp. p. 83.
[7] e.g. Honorius of Autun, *Sacramentarium*, PL.172.778; Robert Pullen, *Sententarium*, 8.20, PL.186.1000; Peter Lombard, *Sentences*, 4.48.4, ii, p. 545.

with the 'partly good' and the 'partly' wicked?[8] A further set of questions considered the variety of punishments that would await the damned in hell – how diverse would those torments be?[9] Whilst many of these questions had been considered by the Church Fathers, in the course of the twelfth century they were once again examined, now in much greater detail. Le Goff rightly characterised this as a period in which all material relating to divine judgement, punishment and reward – the weight of sins, the final days (*de novissimis*), the Last Judgement, along with the fate of the soul and the achievement of paradise – was scrutinised and arranged in order to create a coherent vision of the end of humankind and the end of days.[10] To what extent, theologians demanded, could God's plans for man after his death be discerned from scripture, and how might their implications be unfolded for the present?

Renewed scrutiny of divine judgement in the schools of northern France, moreover, had its analogue in iconography. It is only from the late eleventh century onwards that the representation of the Last Judgement in art really developed.[11] It was an idea which does not seem to have occupied a position of relative importance in the early Church,[12] but, from the twelfth century onwards, the Last Judgement was constantly before the eyes of Christians who attended Church, as it came to be represented in the elaborate iconography of tympana. The reasons for the relatively sudden development of

[8] On this see Richard of St-Victor, *De judicaria potesta in finali et universali judicio* (c. 1145-55), in ed. J. Riballier, *Opscules théologiques* (Paris, 1967), pp. 142-54.
[9] Cf. William of Auvergne, *De universo*, 1.65, *Opera*, i, p. 674; Peter the Chanter, *VA*, 2.58, pp. 837-48; cf. Alan E. Bernstein, 'Esoteric Theology: William of Auvergne on the Fires of Hell and Purgatory', *Speculum* 57 (1982), pp. 509-531.
[10] Le Goff, *Pugatory*, p. 135.
[11] For controversy of dating surrounding one such early depiction of the Last Judgement see D. Denny, 'The Date of the Conques Last Judgement and its Compositional Analogues', *Art Bulletin* 66 (1984), pp. 7-14; and J.C. Bonne, *L'Art roman de face et de profil. Le tympan de Conques* (Paris, 1984).
[12] J. Laffin, 'What Happened to the Last Judgement in the Early Church?' *Studies in Church History* 45 (2009), pp. 20-30.

this scene have still to be traced by art historians.[13] Indeed, as no single scholar has traced a grand narrative for the re-emergence of the theme of divine judgment in this period, there is no real or firm explanation on offer as to 'why' this subject emerged when it did. Certainly some of the drawing together and examination of texts relating to the Last Judgement can be explained as part of broader developments in schools, and the growth of a scrutinising and systematising scholastic culture conventionally denoted by the term the 'Twelfth-Century Renaissance'.[14] Some historians have suggested that the image of God-as-judge was developed by the Church for a particularly pastoral purpose, as bishops and priests, through the eleventh and twelfth centuries, came to be more concerned with notions of individual sin and personal reparation.[15] The images found in tympana certainly transmitted a didactic message to reinforce the words of the priest's sermons to the simple: encouraging parishioners to dwell on their present behaviour by keeping the certainty of future judgement always looming before their eyes.[16] Likewise, anyone entering the church at Lincoln or Westminster would have passed underneath this vision of judgement (at Lincoln, with the images of the 'wise and foolish virgins', i.e. the damned and the saved, at eye-level).[17] The image of the Last Judgement served as an invitation to contrition, a timely and repeated prompt to rectify one's own life. Divine justice then, did not belong to the realm of doctrinal abstraction, but was the subject of immediate concern – both in the pulpit and in the schoolroom.

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[13] Jerome Baschet, *Les justices de l'au-delà. Les représentations de l'enfer en France et en Italie (XIIe – XVe siècle)* (Rome, 1993). Baschet provides a useful survey, but his focus does not account for the reason for the emergence of these themes in iconography or theology.
[14] Cf. Southern, *Scholastic Humanism*, esp. i, pp. 4-5.
[15] For the relationship between confession and Last Judgement see N. Bériou, 'La confession dans les écrits théologiques et pastoraux du XIIIe siècle', in *L'Aveu. Antiquité et moyen âge* (Rome, 1986), pp. 261-82, esp. pp. 274-8.
[16] Pamela Sheingorn, '"For God is Such a Doomsman": Origins and Development of the Theme of Last Judgement', in D. Bevington (ed.), *Homo, memento finis: The Iconography of Just Judgement in Medieval Art and Drama*, pp. 15-58.
[17] Cf. the iconography of the wise and foolish virgins at St.Denis: Paula Lieber Gerson, 'Suger as Iconographer: The Central Portal of the West Facade at Saint-Denis', in Paula Lieber Gerson (ed.), *Abbot Suger and Saint Denis: A Symposium* (New York, 1986), pp. 187-91.

The Connection between Divine and Human Justice

The foremost example of the nature and meaning of *iustitia* in the minds of twelfth- and thirteenth-century theologians was the justice of the Lord, both as it was present in the created world, and as it would operate at the Last Judgement. Divine *iustitia* accordingly provided an axiomatic starting point for any broad definition of justice. Theologians looked to God, supreme in justice and supreme in mercy, in order to assist human judges in understanding what the doing of justice might mean. Yet precisely because God was the summit of justice, there was uncertainty as to how far humans could ever hope to comprehend, let alone imitate, that justice. As a result, the first question that theologians needed to answer was whether any meaningful connection *could* be drawn between the divine justice which governed salvation and the practice of justice in the compromised, post-lapsarian world. Consideration of this topic went well beyond superficial comparisons between the structure of human courts and medieval representations of the court of God (this was a familiar *topos* which dated back to the Church Fathers, when they had borrowed the language and procedure of the late Roman judicial system to describe the divine judgement of sinners).[18] Instead, the subject turned on an examination of the underlying principles of judgement – the nature and meaning of justice itself. In what sense could the familiar definition of due justice as the act of 'suum cuique tribuere' be applied to describe the actions of God in his judgement, his punishing and rewarding of man?

The starting-point for twelfth-century discussions of divine and human justice was the long and acrimonious debate between Augustine and Pelagius over the extent to which divine justice and human justice were in fact comparable. Augustine had attempted

[18] See Caroline Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford, 2007), esp. p. 78.

to make a clear distinction between the 'justice', minimal at best, of human figures like Noah, Daniel and Job, and the perfect justice of Christ, the only individual worthy of the title *iustus*. Pelagius, by contrast, had no problem in applying the term *iustus* both to worthy humans and to God.[19] This debate was repeated and reworked in the the twelfth and thirteenth centuries. What emerges as central to all these twelfth-century debates was the way in which scholastic authors conceptualised the relationship between divine justice and divine mercy.

Despite its soteriological importance, theological speculation over the nature of divine justice is a topic which has received remarkably little discussion in the historiography of the twelfth and thirteenth centuries. Whilst some attention has been paid to the arguments of individual authors on the justice and mercy of God,[20] a consideration of the broader scholastic or legal context of their arguments has been noticeably lacking. The most basic starting point must be to ask why it was that the nature of divine justice had become such a critical topic by the early twelfth century. One of the few scholars to have considered this question directly is Alistair McGrath in his study of the history of justification. McGrath provides one explanation as to why the need to examine and define divine justice was so pressing in this period:

> If human concepts of justice cannot be used to rationalise the divine dispensation towards mankind, in what sense can we speak of God being just? The problem, which is recognised by most theologians from the 11th century onwards, clearly brings into question the whole nature of the theologian's enterprise and the role of analogy in theological language is thereby threatened.[21]

[19] R. Dodaro, '"Christus Iustus" and Fear of Death in Augustine's Dispute with Pelagius', in C.P. Mayer and A. Zumkeller (eds.), *Signum Pietatis: Festgabe für Cornelius Petrus Mayer OSA zum 60. Geburtstag* (Würzburg, 1989), esp. pp. 341-3.
[20] Below, p. 110.
[21] Alistair McGrath, 'Justice and Justification: Semantic and Juristic Aspects of the Christian Doctrine of Justification', *Scottish Journal of Theology* 35 (1982), pp. 415-6; see also McGrath, *Iustita Dei: A History of the Christian Doctrine of Justification* (Cambridge, 1986), pp. 51-70.

McGrath, in sum, situates enquiries into divine justice as merely one amongst a series of problems concerning the application of human language to the qualities of divinity. This describes a common dilemma in scholastic thought when attempting to harness the imprecision of human language to the movements of God. The same point was made for almost every word in the theologian's vocabulary – the need to separate the 'everyday' meaning of terms such as *persona* from their meaning in a theological or academic context.[22] A critical gap in McGrath's argument in the context of justice, however, is that he conceives of this problem as operating only in a single direction, assuming that theologians began from a consideration of the vocabulary and procedures of human justice, and then moved on to examine how principles of human judgement might illuminate the actions of divine justice. In doing so, McGrath overlooks the possibility that such a dynamic might have operated in reverse, as assumptions which proceeded from theology might have influenced the way in which human judicial practice was perceived. Put crudely, this needs to be considered both as a 'top-down' as well as 'bottom-up' flow of ideas: if legal vocabulary might be appropriated to describe the divine court of justice, to what extent did the perceived operation of that divine court provide an model for human judges? This 'top-down' consideration, the movement from perfect divine, to imperfect human justice, could pack a potentially subversive punch. Augustine had already raised the idea which Abelard was to repeat in the twelfth century: if 'justice' is a quality which can belong only to Christ and God, and, by comparison, adheres only minimally in humans, what then are the implications for the value of human judicial systems? This, of course, is the rationale for the Augustinian maxim that 'all kingdoms without Christ are nothing more great bands of robbers (*remota itaque iustitia*

[22] G.R. Evans, *Alan of Lille: The Frontiers of Theology in the Later Twelfth Century* (Cambridge, 1983), pp. 33-53.

quid sunt regna nisi magna latrocinia)'.[23] The question posed by twelfth-century theologians was whether the less human justice resembled divine justice, the less legitimate its verdicts became.

The other significant exception to this modern scholarly neglect of the analogies between divine and human justice is commentary on the writings of Anselm of Canterbury. Some historians have argued that Anselm's concepts of due (*debitum*) and satisfaction (*satisfactio*) as used in the *Proslogion* (composed 1077-8), derived their meaning from a specifically 'feudal' context. In essence, these commentators contend, Anselm's understanding of divine justice was profoundly influenced by his society: he understood God on the model of a great landowner. In this, so runs the argument, historians can trace how late eleventh-century social realities, 'earth-bound' legalities, directly influenced and shaped one particular theologian's conception of divine justice.[24] This straightforward connection between human legal terminology and Anselm's soteriology, however, significantly misrepresents the complexity of Anselm's thought. It is something of a misstep to conclude that, because both eleventh-century legal documents and Anselm's theological writings use a concept of *debitum,* Anselm simply transferred this concept from the human to divine sphere. It ignores the complex metaphysical and soteriological dimensions to Anselm's thought, and their deep roots in patristic writings.[25] Indeed, more generally, one must exercise caution when considering the use of legal imagery in theological writings: apparent similarities in terminology may disguise great disparities in approach. It is a caution crystallised by the early thirteenth-century scholastic author William of Auvergne, when he meticulously set out the

[23] Augustine, *De civitate Dei,* ed. B. Dombart and A. Kalb, CCSL 47-8 (Turnhout, 1955), 4.4, pp. 101-2; cf. Abelard, *Ethica,* ed. D. Luscombe (Oxford, 1971), pp. 39-40.
[24] See G.R. Evans, *Anselm* (London, 1989), p. 76.
[25] Richard Campbell, 'The Conceptual Roots of Anselm's Soteriology', in D.E. Luscombe and G.R. Evans (eds.) *Anselm: Aosta, Bec and Canterbury* (Sheffield, 1996), pp. 256-63; see also Eugene R. Fairweather, 'Truth, Justice and Moral Responsibility in the Thought of Anselm', in *L'Homme et son destin d'après les penseurs du moyen âge* (Louvain, 1960), esp. p. 390.

differences between the process of 'judgement' (*iudicium*) in confession and the way it operated in human courts.[26]

That there is no such easily demonstrable 'simple' link between human and divine modes of justice, however, does not mean that the connections between the two were not explored in the twelfth and thirteenth centuries. Indeed, whilst it may not stand as a direct comparison between the human and divine judge, there is an inescapable connection between divine and human judgement, that was repeated across a range of twelfth-century sources: legal texts, theological *summae* and *quaestiones* and *speculum principis* literature. It is a connection built on the formula of 'reciprocal mercy', that is, the idea that when the soul is judged, only the individual who has been merciful in this life will receive mercy from the divine judge. The basic idea is presented in a number of scriptural injunctions, particularly from the gospels, for example, Matthew v.7: 'blessed are the merciful, for they shall receive mercy (*beati misericordes: quoniam ipsi misericordiam consequentur*)'; and, in a negative formulation, James ii.13: 'judgement without mercy will be shown to anyone who has not been merciful (*iudicium enim sine misericordia illi qui non fecit misericordiam*)'.[27] The cumulative effect of these injunctions, particularly as they were treated in scriptural commentaries, was to strengthen the link between the judgements of the human courtroom and the judgements of the Lord. All existing earthly judgements, even those made in royal courts, and not concerning cases of sin *per se*, would be considered by the Lord in weighing an individual's claims to salvation. This was most apparent in commentaries on the parable of the unforgiving or unmerciful servant, Matthew xviii.21-35.[28] The parable concludes with the words: 'this is how my heavenly Father will treat each of you unless you forgive your brother or sister from your

[26] Bériou, 'La confession', pp. 276-7.
[27] See also Luke vi.36, Matthew vii.2 and Ephesians iv.32.
[28] On this commentary tradition in the twelfth century see Beryl Smalley, 'Some Gospel Commentaries of the Early Twelfth Century', *RTAM* 45 (1978), pp. 147-80.

heart' (*sic et pater meus coelestis faciet vobis, si non remiseritis unusquisque fratri suo de cordibus vestris*). This scriptural passage made clear the reciprocal nature of mercy and it could be interpreted strictly (in terms of purely financial debts) or more broadly (in terms of the 'forgiveness' of sins involved in a royal pardon).[29]

Scholastic disputation on divine justice and mercy between c. 1100 and c. 1250 were focussed around three central issues: the question of the proportionality of divine punishments and rewards; the eternity or temporality of divine torments; and, crucially, the extent to which God's sentences are analogous to the sentences of a human court. Ultimately at issue was whether God's justice was measured by the same standards as human justice. More specifically, the question – sometimes implicit, sometimes explicit, and often incompletely resolved – that ran through many scholastic *summae* in this period was exactly how far 'suum cuique tribuere' could adequately describe the operation of divine justice. Or, to put it another way, to what extent did God fit the models of the human judge? These complex and explicitly 'scholastic' – that is, metaphysical and soteriological – aspects of justice must be understood before any more pastoral and practical discussions of justice can be considered. In order to understand what bishops and priests wanted to teach their congregations about justice therefore, it is necessary to appreciate what those bishops and priests had themselves been taught about justice. This necessarily involves consideration of works produced in the schools of Paris and northern France, since it is these theological commentaries which provide the most explicit and influential discussions of divine justice and its implications for humankind. To overlook these sources would be to overlook the most instructive scholastic debates on the nature of divine *iustitia*. Thus, whilst the focus will be on English authors such as Robert Pullen, Robert of Melun, Alexander Nequam and Robert Grosseteste, wherever possible, it is also

[29] Above, pp. 59-60.

necessary to look to the most influential and celebrated Parisian masters, such as Peter Lombard, Peter the Chanter, and Peter of Poitiers. In this context, no clear line of distinction can or should be drawn between 'English' theologians and their continental counterparts: all theologians considered the same fundamental problems, and their solutions do not divide along lines of nationality.

God's Justice and Mercy as a Semantic Problem

The relationship of God's justice to his mercy was often addressed in scholastic *summae* from two different perspectives. In addition to being a serious soteriological problem, the actual discussion of terms such as 'divine justice' and 'divine mercy' raised profound difficulties concerning the significatory powers of language. Thus those twelfth-century authors who have a particular interest in considering how language may either impair, or condition, human understanding are also the authors who frequently address the apparent conflict of divine justice and mercy in these terms. This semantic approach is partly a legacy of the sixth-century philosopher and logician Boethius, whose works provided the basic grounding for all twelfth-century logical studies.[30] In *De trinitate*, for example, Boethius had discussed the problem of the predication of divine attributes. Crucially, the example he had chosen to illustrate this problem was the phrase *Deus iustus*, deriving from Psalm cxiv, 'misericors Dominus et iustus et Deus noster miseretur'.[31] Boethius based much of his discussion of the difference between signification and consignification from a study of this particular example, and it was therefore this particular topic which provided a starting-point for twelfth-century theologians interested in the more general question of the application of grammar to the

[30] For the centrality of Boethius to twelfth-century logical studies see P. O. Lewry, 'Boethian Logic in the Medieval West', in M. Gibson (ed.), *Boethius: His Life, Thought and Influence* (Oxford, 1981), pp. 90-134; G.R. Evans, 'Thierry of Chartres and the Unity of Boethius' Thought', *Studia Patristica* 18 (1982), i, pp. 440-5.
[31] Boethius, *De trinitate*, 4, PL.64.1252-3.

divine.[32] Put simply, it could be argued that, in the phrase 'Deus iustus', the epithet 'iustus' *signifies* the divine essence. However, 'iustus' also *consignifies* that God recompenses and punishes men according to their merits, that is, that God acts justly.[33] Likewise, in the phrase 'Deus misericors', the epithet 'misericors' primarily signifies a part of the divine essence of God, but it also consignifies that God diminishes punishment, that is, he acts mercifully. In putting forward this argument, Boethius attempted to define the difference between 'ordinary' and 'theological' language, and in doing so, established the importance of differentiating between calling an individual human 'iustus' and describing God as 'iustus'.[34]

As a result of Boethius' discussion, a number of twelfth-century theologians found it necessary to discuss the question of justice and mercy as a linguistic problem before considering it as a theological dilemma.[35] This is evident in the work of Peter of Poitiers, who was particularly interested in considering how certain theological differences could be resolved by close attention to grammar.[36] It is in the first book of his *Sententiae*, for example, that Peter discusses the justice and mercy of God as a purely linguistic problem of predication – he considers the theological topic of the reconciliation of God's justice and mercy only in his third book. Peter begins his account accordingly by defining *iustitia* as principally signifying that which is pleasing to God – meaning that God is just, or justice is predicated of the divine essence. Yet, he points out, from the

[32] For twelfth-century commentaries on *De trinitate* see John Marenbon, 'Making Sense of the *De trinitate*: Boethius and Some of his Medieval Interpreters', *Studia Patristica* 18 (1982), i, pp. 446-52.
[33] L. Valente, '*Iustus et misericors*: L'Usage theologique des notions de consignificatio et connotation dans la seconde motie du XIIe siècle' in Constantino Marmo (ed.), *Vestigia, Imagines, Verba: Semiotics and Logic in Medieval Theological Texts (xiith-xivth century)* (Turnhout, 1997), pp. 207-36; G.R. Evans, *The Language and Logic of the Bible: The Earlier Middle Ages* (Cambridge, 1984), pp. 88-9.
[34] Robert of Melun follows Boethius in this: *Sententiae*, ed. R.M. Martin (2 vols., Louvain, 1947), 1.3, ii, pp. 43-6.
[35] Stephan Langton, in his *Questiones*, discusses the questions of 'utrum dues misericordia sit iustus', 'utrum dues ex misericordia puniat', 'an deus ex misericordia vel iusticia remuneret' under the heading of 'nomina Dei'; see Alys L. Gregory, 'Indices of the Rubrics and Incipits of the Principal Manuscripts of the *Questiones* of Stephen Langton', in Lacombe and Smalley, *Studies on the Commentaries*, pp. 221-44.
[36] For a general overview of this approach, M.D. Chenu, 'Grammaire et théologie aux XIIe et XIIIe siècles', *Archives d'histoire doctrinale et littéraire du moyen âge* 10 (1935), pp. 5-28; see also Evans, *Old Arts and New Theology*, pp. 107-18.

word *iustitia* humans also understand that God is the distributor and judge of merits. Similarly, *misericors* or *misericordia* is predicated of the divine essence, but humans understand it as the action of God as *miserator*.[37] Thus, as far as Peter is concerned, much depends on how humans actually describe God: in practice humans speak of *iustitia* when they envision God acting as a judge, and as *miserator et liberator* when they find him lessening punishments.[38] Like Boethius before him, Peter concludes that this is a question of the difference between signification and consignification: how language is used by humans to describe only what they perceive. The same point, employing the same example, is also made by the Parisian theologian Alan of Lille in his *Regulae theologicae* (composed between 1170 and 1185), when he sets down the conventions which govern how human language should be used to speak of God. Alan reiterates the same general premise: the actions of God should not strictly be called 'just', although it is right to call God 'divine justice'. Likewise, the preacher must understand that, when he speaks of 'Deus iustus et fortis', this may be understood in one way by the author of the sermon but in diverse other ways by his audience.[39]

God's Justice and Mercy as a Theological Problem

The conflict of mercy and justice could not be explained away simply with reference to the infelicities of human language. Even those authors who present the argument that these are simply two different terms used to describe aspects of single process still feel the need to address the potential for conflict between the two concepts. Scholastic attempts at reconciling justice and mercy can essentially be divided into three more-or-less distinct types of discussion: the reconciliation of conflicting scriptural

[37] Peter of Poitiers, *Sententiae*, 1.11, i, p. 102.
[38] Ibid, i, pp. 102-3.
[39] Alan of Lille, *Regulae theologicae*, 26, PL.210.633B-4B. Cf. Simon of Tournai, *Disputatio* 57.3, p. 164, quoting Boethius, *De trinitate*, 4, PL.64.1252.

passages concerning God's justice and mercy; the proportionality of God's punishment of sinners and his reward of the just; and the question of whether justice and mercy are to be found in all of God's works. The texts surveyed here range in date from c. 1077/8 (Anselm's *Proslogion*) to c. 1231-6 (William of Auvergne's *Summa*). This period, encompassing the development of systematic scholastic theology, witnessed some dramatic developments in form and organisation, particularly as *summae* become increasingly uniform in their structure.[40] Yet (with the obvious exception of Anselm), there is no significant difference between the questions posed by Robert Pullen in 1140-2, and those of William of Auvergne, ninety years later. Their answers may be different, and their discussions vary greatly in length, but they pose the same, or very similar, questions when seeking to reconcile the mercy and justice of God. These are questions largely founded on a body of conflicting scriptural citations and the logical problem of whether divine mercy necessarily abrogates divine justice.

Anselm is the first theologian to address the potential conflict between the justice and mercy of God in detail, and his response and the structure of his solution are revealingly idiosyncratic. Perhaps as a result, Anselm's solution was not particularly influential, and his works did not really provide the starting point for analysing the conflict in the schools (at least in the twelfth and early thirteenth centuries, although Anselm's argument would later become more popular).[41] His meditative theological works were not well suited for this end: although they were copied and circulated, they were too verbose and meandering to be the subject of lectures or *quaestiones*.[42] In his

[40]See Marcia L. Colish, 'Systematic Theology and Theological Renewal in the Twelfth Century', *Journal of Medieval and Renaissance Studies* 18 (1988), pp. 131-56.
[41] G.R. Evans, 'Anselm's Life, Works and Immediate Influence', in Brian Davies and Brian Leftow (eds.), *The Cambridge Companion to Anselm* (Cambridge, 2004), pp. 5-31. However, see below, p. 132, for the importance of Anselm's *Cur Deus homo* to the allegory of 'The Four Daughters of God'.
[42] One exception to this is Alexander Nequam's *Speculum speculationum*, which quotes the *Proslogion* extensively when discussing the mercy and justice of God. Nequam, *SS*, p. 237; quoting *Proslogion*, 9.1, pp. 106-7. Another exception is Grosseteste's use of the Anselmian concept of 'rectitude' as part of his own attempts to define justice (see above, p. 32).

Proslogion, Anselm considers a number of apparently contradictory pairs of divine attributes, but it is the combination of God's justice and his mercy which receives the most attention. Anselm spells out the basis of the problem: God is supremely just because he punishes the wicked and rewards the good; but he is supremely merciful because he spares at least some of the wicked. How is it, though, that God can mercifully spare the wicked, an action which would seem contrary to justice? Anselm's solution is to explain the apparent contradiction with reference to God's supreme goodness (*bonum*).

> For although it is difficult to understand how your mercy (*misericordia*) is not distinct from your justice, however, it is necessary to believe that it is not opposed to your justice at all, because it flows forth from your goodness, and goodness is nothing without justice. Indeed, it is in truly in harmony with justice. Of course, if you are merciful because you are supremely good, and you are not supremely good (*bonum*) unless you are supremely just, truly, therefore, you are merciful because you are supremely just.[43]

That God is perfectly good, in short, is the starting point for Anselm. Christians must acknowledge that it is a better 'good' to spare both the good and the wicked than it is to be good only towards the good. Hence God is merciful because he is the supreme good.[44]

Conflicting Scriptural Arguments

God's mercy is frequently referred to in scripture, especially in the Psalms – Psalm cxxxvi, for example, repeats the refrain 'his mercy endures forever' no fewer than twenty-six times.[45] A particularly important passage for scholastic commentators, however, was Psalm xxiv, 'all the ways of the Lord are mercy and truth (*universae viae Domini misericordia et veritas*)'. God then, was to be understood as the height of, or

[43] Anselm, *Proslogion*, 9, *Opera*, i, p. 108.
[44] Ibid, 9-11, i, pp. 107-10. On God's goodness in Anselm, see B. Leftow, 'Anselm's Perfect Being Theology', *Cambridge Companion to Anselm*, pp. 132-56.
[45] Psalm cxxxv, cf. Psalm li.1 and Exodus xxxiv.6.

highest, mercy.[46] But how was this basic premise of scripture, that God was most merciful, to be reconciled with James ii.13 ('judgement without mercy shall be given to those who show no mercy')?[47] James ii.13 appears to place a limit on the divine mercy: God will only act mercifully towards the deserving, that is, those who have earned mercy by themselves being merciful. Other passages reinforced this principle, including Matthew vii.2 and Luke vi.38, 'with what measure you mete, so shall it be measured to you'. Scripture did contain a number of passages which argued for an understanding of divine justice as retribution in accordance with due. Romans ii.6 argued that 'God will repay each person according to what they have done (*reddere secundum opera*)', a construction strikingly similar to classical, Roman law definitions of justice, as repayment according to deserts.[48] If God would return to each in accordance with their 'works', that is, their virtues, wherein did his mercy lie?

Two broad alternatives presented themselves by way of response. On the one hand, it was possible to construct a hierarchy on the basis of James ii.13, as the chapter went on to state that God's 'mercy is exalted above his judgement (*superexultat autem misericordia iudicio*)'. This posed its own further difficulties, however – how did this effect the way in which the relationship between justice and mercy should be conceived? On the other hand, however, theologians could focus on those citations which argued for a strict measure of justice, such as Revelation xviii.7: 'as much as they glory in their crimes, so great will be their torments'? When attempting to resolve these apparent contradictions, theologians warned of the dangers of privileging God's justice above his mercy: God cannot contradict himself, yet if he does not punish the wicked, he

[46] e.g. William of Auxerre, *Summa aurea*, 1.13.2, i, p. 248.
[47] This contrast is set out, for example, by Peter Lombard, *Sentences*, 4.46.1, ii, pp. 529-32, and Nequam, *SS*, 2.63.16, p. 242.
[48] Above, p. 30.

contradicts justice, which he himself is.[49] One typical discussion of this apparent contradiction can be found in Alexander Nequam's *Speculum speculationum*, composed in the first decade of the thirteenth century, when Nequam, who had previously taught in the schools of Paris and St. Albans, was a canon at Cirencester. Nequam highlights the familiar problem: if divine mercy is exalted above justice, must this abrogate divine justice entirely? He resolves the contradiction by appealing to a passage from Bede's commentary on the canonical epistles, which he probably knew through the *Glossa ordinaria*. Bede explained, and Nequam agreed, that to say God's mercy is exalted over his justice is not the same as to say that mercy entirely defeats or extinguishes justice.[50] This, however, is a relatively easy problem to resolve, when compared to the next objection which Nequam offers: if God shows mercy to all, how can it then be said that those who do not show mercy in their judgements will receive no mercy? Nequam's solution does not challenge the idea that God is always merciful. Instead he explains the distinction between the different types of divine mercy. The earthly judge who has not demonstrated *misericordia* in his sentencing does not qualify for *misericordia salvante* from the Lord, that is, the mercy which entitles him to salvation. Instead, he will receive a lesser type of mercy, *misericordia relaxante*, which will reduce his infernal punishments to an extent.[51] In this way, Nequam reconciles the contradictions: God does show mercy to all, but the unmerciful judge does not receive the most valuable kind of mercy.

Punishments and Deserts

Theologians sought to reconcile these apparently contradictory scriptural passages by considering how they might apply to certain hypothetical cases. Only from this extra-

[49] e.g. William of Auxerre, *Summa aurea*, 1.13.2, i, p. 248.
[50] Nequam, *SS*, 2.63.14, p. 242; quoting Bede, *In epistulas VII catholicas libros singulos* on James ii.13 (*GO*, PL.114.674C).
[51] Nequam, *SS*, 2.63.16, p. 242.

scriptural material would it be possible to discern, and thence describe, how the justice and mercy of God truly operated. The role of God's justice in relation to sinners was usually relatively clear: justice demanded that man be punished for his sins. The role of mercy was more ambiguous, because it could be interpreted in two ways: his mercy might consist in the lessening of due punishments, or it might lie in the reward granted to the good. In the latter case, God's actions towards the saved were 'merciful' in the sense that no-one marked with the stain of original sin could do enough on their own account to win the beatitude of heaven: it was thus an act of mercy that God granted eternal reward to those who were good, but not truly deserving of it.[52] If mercy simply rewarded the good, it was compatible with justice; if mercy lessened punishment, then further explanation was required. Indeed, if mercy was to be understood as the effect of lessening the punishment of the damned, then how that mercy operated also needed to be defined: did it take the form of the intermittent mitigation of the pains of the damned, or a more general lessening of the intensity of pains, with all punishments being somewhat lessened?

One particularly difficult topic in which the various competing claims of divine justice and mercy were rehearsed was why God should punish humans eternally for crimes which were only earthly. William of Auxerre expressed the common objection to this premise: 'how can it be that guilt committed in a momentary crime cannot be destroyed by punishment lasting for one hundred or one thousand years?'[53] Robert Pullen went as far as to say that if God were to inflict an eternal punishment for a momentary crime, this punishment could not have been earned and, hence, this was not justice according to the definition of 'quae cuique quod suum est reddit'; rather, if this punishment was unearned, then God's action was more like tyranny, his rule a violent

[52] e.g. Robert Pullen, *Sententiae*, 1.13, PL.186.701C.
[53] William of Auxerre, *Summa aurea*, 1.13.2, p. 249.

despotism.[54] Robert Pullen and William of Auxerre were then faced with the problem of demonstrating whether God's justice was explicable on the same basis as human justice, and, if not, why it was still just that this should be so.

William and Robert were addressing a problem which had first engaged patristic authors. Augustine had himself asked 'whether it is just that the punishment of sins last longer than the sins themselves lasted'.[55] Since it would appear unjust that a sin perpetrated in or over a brief period of time should be punished eternally, Augustine had also noted that this conclusion seemingly contradicted the notion of *lex talionis*, 'an eye for an eye', the apparent requirement for the proportionality of punishment to crime. Augustine's response had been to appeal, not to scripture, but rather to Roman legal practice, arguing that no Roman law had ever considered the need for the duration of the punishment to match the crime. Indeed, he concluded, Roman punishments, as described by Cicero, were often imposed without any possibility of pardon or relaxation. Thus, in this sense, they seemingly resembled 'eternal' punishments, in that, as long as life lasted, they punished, in a protracted way, crimes committed in an instant. Augustine concluded by defusing the potentially problematic citation of Matthew vii.2 and Luke vi.38 ('with what measure you mete, so shall it be measured to you'), by asserting that this refers not to the equal duration of crime and punishment, but to equal retribution for evil. Rather than cite Augustine, however, theologians in the schools of Paris preferred to turn to Gregory the Great for a resolution of this problem. When Gregory had considered the same question in his *Dialogues*, his answer had been that the damned were punished eternally because, had they not died, they would have continued to sin without end. Where there had been no earthly repentance, there was no end to punishment. [56] This was a conclusion which was explicitly endorsed, by, for example, the English scholar, Richard

[54] Robert Pullen, *Sententiae*, 1.13, PL.186.701B.
[55] Augustine, *De civitate Dei*, 21.11, pp. 777-8.
[56] Gregory, *Dialogi*, ed. Umberto Monicca (Rome, 1924), 4.46, pp. 303-4.

of St. Victor.[57] Others followed a similar line of argument: although death had put an end to a man's sinning, his desire to sin meant that, had he lived eternally, so he would have continued to sin eternally. In this sense, this 'eternal desire' to sin was rightly due a proportional, eternal punishment. This is the approach taken, for example, by Simon of Tournai.[58] Some temporal sins are given eternal punishment, but it is wrong to infer from this that eternal punishments are greater than they deserve, for believers know that God never punishes anyone more than they deserve, because 'all his ways are mercy and truth' (Psalm xxiv). There are, Simon states, two responses to sin: either one repents it, or one does not. If a sinner persists in repentance, they are never punished eternally, but if a sinner never repents, it is as if they have expressed a wish to sin for all eternity, and on this basis they deserve eternal punishment.

Having established, on the authority of Gregory the Great, that an 'eternal' sin deserved eternal punishment, a more difficult question was raised with the issue of whether God ever punished venial sins with eternal punishments.[59] Augustine had considered the question of whether venial sins might become mortal, and noted that venial sin might increase, dispositively, until it became worthy of eternal punishment, but he had never explicitly addressed the question of whether God might choose to punish venial sins eternally.[60] Scholastic *summae* expended much ink on this issue.[61] William of Auxerre, for example, shied away from giving a definitive answer, explaining that it was impossible for man to understand exactly how due punishments for sin were calculated.

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[57] Richard of St Victor, *De differentia peccati mortalis et venialis*, in J. Ribaillier (ed.), *Opuscules theologiques* (Paris, 1967), pp. 281-93. This text probably dates to the years of Richard's priorate (1162-73).
[58] Simon of Tournai, *Disputatio* 28, pp. 85-8.
[59] M. Huftier, 'Péché mortel et péché venial', in P. Delhaye (ed.) *Théologie du péché* (Tournai,1960), pp. 363-451.
[60] Augustine, *In Johannis Evangelium*, 12.14, p. 129.
[61] e.g. Simon of Tournai, *Disputatio* 61, pp.173-4: (1) whether eternal punishments will be imposed for venial sins; (2) whether God acts unjustly if he punishes venial sins eternally.

> For venial sin, however great it is, an individual does not merit a precise temporal punishment, nor a precise eternal punishment, but according to diverse courts of judgement, diverse punishments are due. So, many are due eternal punishments in the court of Hell; many in the present court are due great temporal punishment.[62]

William then offers an analogy to demonstrate why it should be so difficult to discuss the idea of definitive or set punishments for certain sins or types of sin. Offences are punished, not according to their gravity (alone, or even primarily), but according to the court in which they are judged: 'just as a minor theft is punished in Paris by mutilation of an ear, and in Chartres by the amputation of a foot'.[63] The idea that William is trying to illustrate here is one of variability of punishment. Human judgements may vary, but in one sense they are predictably variable, as positive law changes from country to country. In divine judgement, the crucial variable is the intent of the sinner. Because humans are able to appreciate the importance of intent in sin, in this sense, the variations in divine punishment can be understood. Because, however, the intent of an offender is impossible for humans to perceive, the human mind cannot fully comprehend how that variation in divine punishment works in individual cases.

Peter of Poitiers also addressed the complicated proposition of the relation of sins to divine punishment in his *Sententiae*. What happens, he asks, in the case of a man who dies with both mortal and venial sins – would it then be appropriate for that venial sin to be punished eternally, as mortal sins are? Peter sets out four possible answers to this proposition, each of them defending the conclusions that it would indeed be appropriate for venial sin to be punished as a mortal sin.[64] What is so striking here is that, in order to illustrate the operation of divine justice, Peter attempts to explain more precisely how that variation in judgement may work. Some people, Peter notes, argue that venial sin, if not repented of, and indeed, if it is deliberately persisted in, actually becomes a mortal sin:

[62] William of Auxerre, *Summa aurea*, 2.15.3, iii, p. 545.
[63] Ibid, 2.15.3, iii, p. 545.
[64] Peter of Poitiers, *Sententiae*, 3.10, PL.211.1062-4. Books I and II of Peter's *Sententiae* have been edited by Philip S. Moore and Marthe Dulong, *Sententiae Petri Pictaviensis* (2 vols., Notre Dame, IN, 1943-50).

and thus it is appropriate for it to receive eternal punishment. Others say that a man who is guilty of venial sins receives eternal punishment because he is being punished for both venial and mortal sins at once. A third group argue that, in this case, venial sin being added to mortal sin would augment the punishment of the mortal sin, in the same way that a king who is about to reward a servant with ten marks, on remembering the man's service, increases that reward to twelve. A fourth group, finally, argue that how a sin is punished depends on its place of punishment: venial sin is punished eternally when it is judged in the place of eternal punishment, on account of its relation to mortal sin (*propter consortium mortalis*). Here Peter employed the analogy of the Roman emperor who ruled the whole world, but whose judicial duties varied: when sentencing an adulterer in France, he punished with mild penalties, according to the customs of that land; but when in Rome, he punished the same crime much more severely, according to Roman practice. So it is with the punishments of God: the difficulty lies in comprehending how the forum of judgement is determined.

Scholastic authors were profoundly concerned with the question of whether one sin could be compared to another; whether God would punish similar sins to the same extent; and how much depended on the place of judgement (be it, for example, in this life, in purgatory, or at the Last Judgement).[65] This issue of different punishments in different 'courts' then led scholastic authors to enquire whether God's punishment of two identical sinners could be compared. Could any patterns at all be discerned, let alone explained, in the punishments of God? What would happen if he gave two equally sinful men different punishments? This was a question of consistency, and whether the interactions of divine justice and mercy were susceptible to rational analysis of any kind. In human courts, imposing the same sentence for the same crime, and the predictability of punishment, was

[65] See also Simon of Tournai, *Disputatio* 62.1, pp. 123-4; 49, pp. 142-3; Robert of Melun, *QDP*, q.40, pp. 23-4; q.41, p. 24.

one mark of 'justice' because, in following this principle, a judge showed himself to be 'no respecter of persons', i.e. that he was above special treatment, corruption or bribery.[66] But where divine judgement of sin was concerned, no two cases could ever be said to be the same, even if they seemed identical to human judges. One could not reconcile the punishments received with the offences which had incurred them.[67] Divine judgement operated according to a set of rules only partially revealed to humankind.

Beyond the questions raised by the Last Judgement, there was an additional, and not insignificant, dilemma relating to the mercy and justice of God. How was the oft-cited passage from Psalm xxiv, 'all the ways of the Lord are mercy and justice' (*universae viae Domini misericordia et veritas*), to be interpreted? What, in particular, was to be understood by the term *universae* in this context? Was it to be glossed as *simul*, suggesting that God's mercy and justice were simultaneously present in all his actions? Or was it rather less specific, simply denoting that God is sometimes just, sometimes merciful? Those theologians who preferred the latter explanation argued that there might be mercy in some works, justice in others and, in a third category of works, both mercy and justice might be present together. In this sense, the description of all the ways of the Lord as mercy and justice would describe only God's will, in which mercy and justice were ever present, but not the effect of his works. Amongst this group of theologians was Peter of Poitiers, who explained that, whilst justice and mercy belonged to the divine essence, they were not always both present in all of God's works.[68] Other theologians, however, chose to gloss *universae* as *simul*, finding justice and mercy present in every divine act and simultaneously. For this group it was simply that humans could not always see both in operation – God's justice might be visible, but his mercy hidden (as in the

[66] e.g. *VA*, 1.65, pp. 433-4; see below, pp. 232-3.
[67] William of Auxerre, *Summa aurea*, 1.15.4, i, p. 256. Cf. William of Auvergne, *De legibus*, *Opera*, i, p. 64: as one sin cannot be compared to another, so one cannot compare one punishment to another.
[68] Peter of Poitiers, *Sententiae*, 3.8, PL.211.1038.

case of the damnation of unbaptized infants, a popular example) or, conversely, his mercy might be revealed, but his justice hidden from human eyes. The question was never definitively settled between proponents of both solutions. Peter Lombard simply gave the two possible solutions without stating which he believed correct.[69] Robert Pullen went some way towards mediating between the two positions when he suggested that one could find justice and mercy in all of God's works, but, in the certain cases, for example in the punishment of the impious, such mercy is so tepid and small that it effectively amounts to almost nothing at all.[70] Other theologians who give an answer do not always explain their reasoning: Hugh of St. Victor, for example, simply states that Christians know that in all God's works there is both mercy and justice, and so must conclude that mercy is sometimes hidden.[71] Grosseteste, by contrast, explains his position with reference to God's *bonitas*, a response which may well have been influenced by his reading of Anselm. Both justice and mercy, he argues, are manifestations of this quality of *bonitas*. When a sinner is whipped, this is a manifestation of justice, *bonum debitum*. An act of mercy – of remitting such punishment – is equally a good, but this time a due which is *bonum indebitum*. Both aspects of this *bonitas* are present at once, in all of God's actions, because God is the greatest good: therefore none of his actions could be described comparatively, as *misericordius*, none of his actions *iustior*.[72]

Understanding divine justice as a question of 'due' had the benefit of making a seemingly incomprehensible topic accessible to scholastic inquiry. If divine justice, like human justice, could be understood with reference to the logic of deserts, then something could be said about it. On the other hand, from a penitential and personal point of view, man both desired and needed God to be merciful. William of Auvergne expressed this

[69] Peter Lombard, *Sentences*, 4.46.3-5, ii, pp. 532-7.
[70] Robert Pullen, *Sententiae*, 3.13, PL.186.700B-2C.
[71] Lottin, 'Questions inédites', p. 188.
[72] Grosseteste, *Dictum* 130, ff.106v-7r.

conflict nicely: 'we seek the help of God in this [question], which seems to be contrary to God's mercy and goodness: namely the multitude of the damned, the perpetuity of torments, the paucity of the elect and of the saved'.[73] The scholastic analysis of divine mercy and justice resulted in a level of what might be characterised as a kind of metaphysical schizophrenia. At one level, the judgements of God were always bound to remain impenetrable, at another, the reconciliation of mercy and justice was such a critical dialectical question that it invited explanation according to human reason. Yet the proffered solutions, where they could be arrived at, were limited. Characterising the explanation of divine justice and mercy in Anselm's *Proslogion*, Sandra Visser and Thomas Williams have described it as, at best, a partial resolution:

> We can, if only barely, comprehend the ways in which God is both just and merciful in his treatment of creatures. What we cannot comprehend is why God spares one wicked person and punishes another, even though they are alike in wickedness. [74]

Similarly, the final note in twelfth- and thirteenth-century scholastic attempts to comprehend the logic of God's justice and mercy were ultimately marked by the recognition of ignorance. Robert Pullen wrote that the most one could say was that, as present good accrued future goods, so present crimes accrued future tortures, and everything that God judges, he judges most justly (*iustissimo iudicante*).[75] Bartholomew, twelfth-century bishop of Exeter, put the problem even more succinctly, averring 'it must be understood that the sentence of God cannot be understood'.[76]

The Pastoral Relevance of Divine Judgement

[73] William of Auvergne, *De legibus*, i, p. 64.
[74] Sandra Visser and Thomas Williams, *Anselm* (Oxford, 2009), p. 108.
[75] Robert Pullen, *Sententiae*, 2.13, PL.186.700B-702C (quotation at 701D). For similar remarks see 2.14, 704A-B.
[76] Bartholomew of Exeter, *Contra fatalitatis errorem*, ed. David N. Bell, CCCM 157 (Turnhout, 1996), 125, pp. 121-2.

At first sight, divine justice might not be expected to prove a productive topic for pastoral theology. After all, the implicit conviction of Baldwin's *Masters, Princes and Merchants* was that there were some aspects of school theology which bore direct relevance to the lives of the laity – those *social* topics such as usury, warfare or trade – whilst there were other topics whose orientation was far more abstract, far less practical.[77] Divine justice seems to fall into this latter category: not only is the topic seemingly 'impractical', and imperfectly understood even by the most distinguished of specialists, but any topic which discussed the complexities of the divine plan of salvation before a general audience might all too easily slip into serious error when the precision of scholastic language was replaced by the rhetoric of the pulpit. Too incautious an emphasis on divine mercy might imply that all could be saved without repentence; to focus too closely on divine judgement might drive believers to despair of any hope of salvation. This was, after all, the judgement of theologians in the case of Moses's intercession (Exodus xxxii): whilst treatises produced in the schools carefully examined Moses's actions, drawing attention to a potential contradiction in the order of salvation set out in scripture, works written with a more didactic, less 'scholastic' purpose tended to omit altogether the idea that Moses's intercession might well have amounted to a breach of soteriological order.[78] Yet quite the opposite is true concerning the judgement of God: the Last Judgement and the nature of divine justice were standard topics for 'popular' sermons. Indeed, twelfth- and thirteenth-century sermons do not simply describe the judgements of God, but also discuss the heavenly conflict between his justice and his mercy. Divine justice was a topic too great for the preacher to ignore, encompassing, as it did, the crucial matter of human salvation. The justice and mercy of God – and the relationship between those two aspects of divinity – was a fixed doctrinal

[77] Above, p. 29.
[78] Above, pp. 88-92.

point, its comprehension theologically necessary. More pragmatically, as is evident from sermons which dwell on the theme of the Last Judgement, the looming threat of divine justice and the weighing of sins added a persuasive punch to preaching. Thus theologians preached about a topic which, as they themselves admitted, they could not fully comprehend.

The sermons of William of Auvergne (Bishop of Paris, 1228-9), illustrate how the themes which were discussed in an explicitly scholastic context could then be translated into sermons which conveyed something of the complexity of the nature of divine justice. Naturally, when considering sermons as evidence for pastoral theology, attention must be given to questions of audience. It is rarely apparent exactly where, when, and (crucially in this context) to whom sermons were preached (if, indeed, they were preached at all).[79] In the case of William of Auvergne, however, that at least some of his preaching was done to the 'unlearned' is suggested from a number of hints he provides to the reader – he notes, for example, the fact that his audience does not always understand the Latin words of church services**,** and there are indications that at least some of the sermons were originally preached in French.[80] Moreover, William was concerned, at several points in his career, with preaching directly to the laity for reasons of pastoral effectiveness – for example, in order to combat the heresy of Catharism. A correct theological exposition of doctrine could serve as a weapon to combat the spread of erroneous Cathar beliefs, and in particular, belief in the possibility of divine forgiveness for all, even the most wicked.[81] The topic of hell presented an evident challenge to the preacher: the orthodox theological position – there would be a great number of the damned and a relative paucity of the

[79] Cf. Mark A. Zier, 'Sermons of the Twelfth-Century Schoolmasters and Canons', in Beverley Mayne Kienzle (ed.), *The Sermon* (Turnhout, 2000), pp. 325-62.
[80] William of Auvergne, *Sermones de Tempore, vol. I: I-CXXXV*, ed. F. Morenzoni, CCCM 230 (Turnhout, 2010), pp. xxi-ii.
[81] Alan E. Bernstein, 'Theology between Heresy and Folklore: William of Auvergne on Punishment after Death', *Studies in Medieval and Renaissance History* 5 (1982), pp. 5-44.

saved – was not, as William himself noted, a particularly sympathetic message to present to an audience. Yet the ordinary sinner could profit by being reminded of the possibility – but also the limitations – of divine mercy.

In the middle of a sermon which examines the topics of sin, justice and judgement, William engages in a lengthy excursus to more fully express the relationship between God's mercy and his justice. In particular William emphasises that those sinners who place their hope in God's mercy to the exclusion of his justice are sorely mistaken:

> They lie who say of God's justice that indulgence is promised to all, and that he has no concern for eternal punishments. Likewise, [they lie] who extend the greatness of his mercy even to the annulment of God's justice, as if in the most just of courts there was no justice! The judgement of God is supported by both mercy and justice at once.[82]

William here emphasises a familiar point from more overtly scholastic debates – that although God's mercy might win some mitigation of punishment for sinners, it will not abrogate all, or even most of, their due punishments. Another short sermon is dedicated to explicating the true meaning of the phrase 'measure for measure' (Matthew vii.2; Luke vi.38), unpacking how this relates to the divine measurement of human sins.[83] Likewise, William expounds the complex idea of 'debitum', when preaching a sermon on Matthew xviii (xviii.28, 'redde quod debes'), explaining that individuals can make 'repayment' to the Lord in numerous ways.[84] And, in perhaps the most complex of his sermons on this theme, addressing the statement of 1 Corinthians iv.4, 'it is the Lord who judges me', William sets out the five meanings of 'iudicium Dei' in the temporal world. What one must first understand of *iudicium Dei*, he explains, is that God desires to pardon rather than punish. Second is the fact that Christ was sent to redeem sinful souls; the third

[82] William of Auvergne, *Sermones de Tempore, vol. II: CXXXVI-CCCXXIV*, ed. F. Morenzoni, CCCM 230A (Turnhout, 2011), *Sermo* 191, p. 224
[83] Ibid, *Sermo* 243, p. 406.
[84] Ibid, *Sermo* 314, p. 685.

element of *iudicium* is found in the intercession of Mary and other saints for the sinner; the fourth is in the action of those who endure unjust torments and persecution on earth. The fifth and final *iudicium* is found in the divine response to prayer.[85]

Beyond individual sermon collections, there is one theme which recurs consistently in preaching and pastoral theology, and demonstrates just how frequently theologians invoked the complicated, and sometimes conflicted, relationship between divine justice and divine mercy. This is the tradition known as the 'Four Daughters of God', an allegory derived from the text of Psalm lxxxv.10, 'mercy and truth have met each other, justice and peace have kissed (*misericordia et veritas obviaverunt sibi; iustitia et pax osculatae sunt*).[86] Earlier medieval traditions – both in Christian homilies and the Hebrew Midrash – had developed this text into an allegory in which Mercy, Truth, Justice and Peace (the 'daughters') plead before their father, God. Whilst Justice and Truth demand the condemnation of humankind according to it sins, Mercy and Peace seek divine forgiveness and reconciliation for the human race.[87] This interpretation was adapted and popularised in the twelfth century by both Hugh of St. Victor and Bernard of Clairvaux. In Hugh's allegory, found in his homilies on the Psalms (c. 1121), Justice lives in heaven with God, whilst Mercy is exiled to Earth with man. The two are only balanced when the two change places: *Misericordia* ascends to heaven to persuade God to forgive man, and *Veritas* descends to Earth in order to compel man to repentance, which permits a reconciliation with God.[88] In Bernard's version, part of a sermon on the Annunciation, the reconciliation between divine mercy and divine justice is achieved through the

[85] Ibid, *Sermo* 17, *Sermones de Tempore, vol. I*, CCCM 230, pp. 52-3.
[86] Hope Traver, 'The Four Daughters of God: A Study of the Versions of this Allegory with Especial Reference to those in Latin, French, and English' (Bryn Mawr College, Ph.D. thesis, 1907).
[87] The allegory is found in the Latin sermon known as the 'rex et famulus', found in Pseudo-Bede, *Homiliae*, 3, PL.94.505-7; For the Midrashic influence, see Rebecca Moore, 'Jewish Influence on Christian Biblical Interpretation: Hugh of St Victor and "The Four Daughters of God"', in Craig Evans (ed.), *Of Scribes and Sages: Early Jewish Interpretation and Transmission of Scripture* (Edinburgh, 2004), pp. 148-58.
[88] Hugh of St. Victor, *Homiliae*, PL.177.621-5; cf. Traver, 'The Four Daughters', p. 12.

Incarnation of Christ, in whom those merciful and punitive principles are combined and reconciled.[89]

The Four Daughters tradition drew on a popular understanding of the Incarnation as a divine act of mercy towards sinful mankind, who, without divine mercy, did not merit salvation. The topic was also linked to a more general understanding of divine justice as it was apparent in the scheme of salvation history: the Old Law had been a time of strict divine justice; the Incarnation had ushered in a new dispensation in which God acted mercifully towards humanity. [90] Yet at some point in the near future, it was argued, this merciful period would come to an end, and justice – expressed in the Last Judgment – would return again. The theme of the Four Daughters of God must be understood against this historical and temporal background – a chronological shift between periods of strict justice and periods of abundant mercy.[91]

After Hugh of St. Victor and Bernard of Clairvaux, the idea of the 'Four Daughters' was widely, and rapidly, popularised.[92] The story of the four daughters was also transformed into Latin verse (alongside various works of pastoral and moral instruction by Walter Map, pseudo-Cyprian, Augustine and Alcuin, including a versified description of the Ten Commandments and seven sacraments), in an early thirteenth-century manuscript from Corpus Christi College Cambridge.[93] There is some evidence that the Four Daughters was also adapted by Stephen Langton in a work entitled 'De

[89] Bernard of Clairvaux, *In festo annutiationis beati Mariae virginis, Sermo* 1, PL.183.383-90.
[90] Traver, 'The Four Daughters', p. 26, 63, 87, emphasises the importance of Anselm's *Cur Deus homo* in giving philosophical shape to this temporal scheme.
[91] For this scheme see B.E. Whalen, *Dominion of God: Christendom and Apocalypse in the Middle Ages* (Cambridge, 2009), esp. pp. 1-8 and 72-124.
[92] e.g. Peter Comestor's sermon, *De adventu domini*, PL.198.1736-7; a similar anonymous twelfth-century sermon is found in British Library MS Royal 6.A.XIII, ff. 173r-174r. For the later history of the legend in English, K. Sajavaara, *The Middle English Translations of Robert Grosseteste's Chateau d'Amour* (Helsinki, 1967).
[93] Corpus Christi College Cambridge, Parker Library, MS 481, ff.566-70; see M.R. James, *A Descriptive Catalogue of the Manuscripts in the Library of Corpus Christi College Cambridge* (2 vols., Cambridge, 1912), ii, pp. 424-32.

salvatione hominis dialogus'.[94] Whilst there were other vernacular versions of the legend circulating in England during the same period,[95] one particularly important and influential adaptation of the legend was Robert Grosseteste's *Le château d'amour*, for, in Grosseteste's retelling of the story, the pastoral implications of scholastic debates on divine mercy and justice are most explicit.

Le château d'amour is a vernacular work which ranges widely across Christian history: describing, in largely allegorical terms, the creation and fall of man, the Incarnation, the redemption of mankind and the Last Judgement.[96] The text is notoriously difficult to date and interpret, and various possible audiences have been suggested, ranging from the sons of Simon de Montfort to the first Franciscans in Oxford.[97] What is rather more certain is that *Le château* represents Grosseteste's attempt to present an outline of Christian theology to an audience without theological training.[98] Within *Le château*, Grosseteste's presentation of the argument surrounding the incarnation of Christ and redemption of man, and the story of the Four Daughters, appears to depend directly on Bernard of Clairvaux, rather than Hugh of St. Victor, but Grosseteste develops and expands the idea much further.

Grosseteste interprets Psalm lxxxxv as describing the household of a king (God), whose servant (humankind) has transgressed greatly and been condemned to severe punishment. The king's four daughters, namely Mercy, Justice, Truth and Peace, take it in

[94] Printed in Francis Michel, *Libri psalmorum versio antiqua gallica* (Oxford, 1860), pp. 364-8; Rivière, *Le dogme*, p. 339, notes that there are some reservations about this attribution.
[95] See the example from British Library MS Stowe 240 printed in Ferdinand Holthausen (ed.), *Vices and Virtues, being a soul's confession of its sins, with reason's description of the virtues: A Middle English Dialogue of about 1200 A.D.* (London, 1967), pp. 112-6.
[96] See E.A. Mackie, 'Robert Grosseteste's Anglo-Norman Treatise on the Loss and Restoration of Creation, Commonly known as *Le château d'amour*: An English Prose Translation', in Maura O'Caroll (ed.), *Robert Grosseteste and the Beginnings of a British Theological Tradition* (Rome, 2003), pp. 151-79.
[97] E.A. Mackie, 'Scribal Intervention and the Question of Audience: Editing *Le château d'amour*', in E.A. Mackie and J. Goering (eds.), *Editing Robert Grosseteste: Papers Given at the Thirty-Sixth Annual Conference on Editorial Problems* (Toronto, 2003), pp. 61-77.
[98] R.W. Southern, *Robert Grosseteste: The Growth of an English Mind in Medieval Europe* (Oxford, 1986), p. 225.

turns to come before their father to put the case for either his continued punishment or his reprieve. Composing the text in the Anglo-Norman vernacular and giving it a familiar setting – the king who must choose between punishment or remission – heightened its potential as a pastoral text. This is the first way in which Grosseteste attempts to makes the abstract, scholastic discussion of *Deus iustus et misericors* comprehensible. More striking still, however, is the extent to which Grosseteste employs the techniques of deliberative rhetoric to dramatise the conflict. For many years, he writes, the arguments of Justice and Truth have found favour with the king, and the servant has been condemned to punishment. The situation changes only when the king's son (that is, Christ), hears the plea of Peace, the youngest daughter, and is moved by it. Specifically, he is moved by her oratory:

> Peace has so moved me by the case she has presented that I have great pity (*grand pité*) for the servant. Mercy cries for mercy (*Misericorde merci crie*), and she will be heard first. I will do all she desires, and will reconcile her to Truth.[99]

It is Peace who persuades Christ to take human form and redeem the sinful servant. Moreover, Christ is moved more by persuasive rhetoric than by any concept of due. It is stated that the role of Justice and Truth is to 'give in wisdom to each whatever lawfully he ought to have' (*A chescun done par saveir/Kant ke il deit part dreit aveir*).[100] Peace, in her oration, cannot challenge the arguments in favour of continued punishment by appealing to the idea of mercy as a due. Instead she argues that Justice must always be subordinate to Mercy, asking:

> Why were Truth and Justice established if not to keep the peace? Justice has no other calling than to preserve peace (*Justise ne ad autre mestier/Mes ke la Pès seit sauvee*). Should I then be denied when all things were made for me and set down for my existence? Yet I am not preserved at all if Mercy is not heard.[101]

[99] *Le château*, trans. Mackie, p. 76.
[100] Ibid, p. 74.
[101] Ibid, p. 75.

Grosseteste's formulation here goes some way towards encapsulating a familiar theme in scholastic writings: why should it be that mercy is 'exalted' above justice?[102] Through allegory, Grosseteste's virtuous interlocutors answer the question simply: because the purpose of justice is to keep the peace. If justice attempts to preserve that peace through violent or excessively severe actions, then it endangers the thing it strives to preserve. Here *pax* is synonymous with *misericordia*.[103] Grosseteste offers his audience an extensive and careful look at divine justice: an excellent demonstration of quite how much of the complicated relationship between mercy and justice could be made accessible to 'lay' audiences. The second striking feature of his discussion is the idea that the conflict between justice and mercy can only be resolved through debate and persuasion: even the 'lord' himself has difficulty ruling between the equally persuasive counsels of justice and mercy.[104] If this conflict was apparent at the moment of the Incarnation, it is perhaps unsurprising that medieval theologians should have detected it at other moments of salvation history. Thus, whilst the Four Daughters of God sketch out an argument in heaven, a very similar device – this time concerning the 'four wills in Christ' – describes the struggle between 'merciful' and 'just' urges in the incarnate Christ.[105] The story of the 'four wills' of Christ in scholastic discourse typically focuses on two moments in scriptural history: Christ's reaction to the foreseen destruction of Jerusalem, and Christ's anticipation of his own suffering and death. At these two moments Christ had struggled to choose between what was strictly just and what was merciful.[106] The discussion of Christ's 'four wills' is best understood as an example of the interest in

[102] Above, p. 119.
[103] For the idea that peace depends on justice see below, pp. 266-71.
[104] Below, pp. 236-53.
[105] See Hugh of St. Victor, *De quatuor voluntatibus Christi*, PL.176.841-5.
[106] This is not to be confused with later scholastic discussions of the possible contrariety of Christ's 'two wills', i.e. human and divine. On this debate, see Corey Ladd Barnes, 'Christ's Two Wills in Scholastic Theology: Thirteenth-Century Debates and the Christology of Thomas Aquinas', (University of Notre Dame Ph.D. thesis, 2006).

christological affectivity which characterised the twelfth century: theologians sought to draw attention to the moments in scripture which demonstrated Christ's compassion.[107] The motif of the 'four wills in Christ' is strikingly similar to that of the Four Daughters of God, in that it defies the sharply drawn boundaries between 'scholastic' and 'pastoral' writing.

The problem of Christ's conflict between his compassion and his justice was expressed and explored by a number of scholastic authors. Robert Pullen enquires in his *Sentences* whether there was any conflict between Christ's future role as judge of the living and the dead and the charity he felt towards his persecutors during his lifetime.[108] Alan of Lille, in his commentary on the Lord's Prayer, unfolds the complexity of the division of wills in Christ.[109] Moreover, the debate did transfer to the realm of explicitly pastoral theology: William of Auvergne employed it in several sermons to explain why Christ had wept over the destruction of Jerusalem, an action which was just and inevitable, but which Christ's compassionate nature resisted.[110] The most comprehensive and revealing discussion of the conflict of Christ's wills, however, is found in a short (and rarely discussed) work by Hugh of St. Victor, *De quatuor voluntatibus Christi*, a treatise seemingly composed in response to a question from an unnamed correspondent, at some point between 1130 and 1141. Christ's four wills, Hugh explains, consist of one divine will and three 'human wills', where the latter consist of reason, humanity (or piety) and the flesh. For Hugh, the most interesting of these three is the second, namely the *voluntas*

[107] Cf. Caroline Walker Bynum, 'Jesus as Mother and Abbot as Mother: Some Themes in Twelfth-Century Cistercian Writing', in eadem, *Jesus as Mother: Studies in the Spirituality of the High Middle Ages* (Berkeley, CA, 1982), pp. 110-69.
[108] Robert Pullen, *Sententiarum*, 4.10, PL.186.817-18.
[109] Nikolaus Häring, 'A Commentary on the Our Father by Alan of Lille', *Annalecta Cisterciensia* 30 (1975), p. 166, glossing 'fiat voluntas tua sicut in cello et in terra'.
[110] William of Auvergne, *Sermones de Tempore, vol. II*, 270, pp. 485-95; 270(A), pp. 496-8; 271, pp. 499-501; 272, pp. 502-5.

pietatis, a will which explains Christ's compassion and *misericordia*.[111] It is with reference to all four wills that Hugh is accordingly able to explain how Christ could both pity those humans who were condemned to eternal punishment after the Last Judgement and condone their sufferings as just.

> For just as he desired, according to the will of the flesh, that the cup of the passion, which he knew would not be taken away, be taken away from him, so he prayed, from his pity, that the sentence of condemnation, which he immutably foresaw, be mitigated for others.[112]

Christ's divine and rational wills (the first and the second) understood that punishment was necessary: yet his (fourth) fleshly will (*voluntas carnis*) feared suffering, whilst his (third) *voluntas pietatis* allowed him to feel pity even for those justly condemned. Hugh explains that each of these wills sought an end which was appropriate according to its own ends: it was proper for the *voluntas rationis* to seek punishment, just as it was proper for the *voluntas pietas* to seek mitigation of that punishment. As in the tradition of the Four Daughters of God, there is a fundamental pairing of terms: two forces arguing for strict justice, two for compassionate tempering of that punishment.

Divine justice – the nature of salvation and redemption – had always been an immensely complicated proposition in Christian thought. Two developments, however, mark a distinctive twelfth-century contribution and change in a discussion which had been open since late antiquity. The first of these developments was the interest of theologians in venturing some suggestions as to how the punishments of human and divine justice might be related, at a moment when human legal systems were aiming at greater coherence and authority. Theological *summae* and *quaestiones* demonstrate the

[111] Boyd Taylor Coolman, 'Hugh of St. Victor on "Jesus Wept": Compassion as Ideal *Humanitas*', *Theological Studies* 69 (2008), pp. 528-55.
[112] Hugh of St. Victor, *De quatuor voluntatibus*, PL 176.845A.

conviction that divine justice was not a closed system, but did impinge on the workings of earthly justice. The relationship between the two was not definitively settled, as even a single theologian (Peter of Poitiers, for example) was able to construct multiple possible models for this relationship. The second significant twelfth-century change lay in theologians' attempts to measure how the scheme of divine mercy and punishment corresponded to the increasingly influential definition of justice as a repayment of 'due'. On the one hand, this was a definition of justice compatible with certain exegetical readings of scripture; on the other hand, it created fundamental problems when discussing the nature of divine mercy and redemption. It was precisely this question of due, and the relationship between divine justice and divine mercy, which fuelled interest, both speculative and pastoral, in the idea of Christ's Four Wills and the Four Daughters of God allegory. In each discussion Christ is presented as the individual who is able to properly reconcile the principles of justice and mercy. Theologians saw this fundamental conflict both as accounting for the Incarnation and an explanatory principle for comprehending Christ's actions on earth (Christ's pity and will to justice, for example, explaining his behaviour during the Passion). The fundamental conflicts between divine justice and divine mercy set out in popular sermons reflected, and were supported by, a vast hinterland of more abstract speculation on the subject. In this there is no rigid demarcation between the 'scholastic' and the 'pastoral'. In part, this was because some writers – like Robert Grosseteste – played a dual role as theologian and preacher; in part this was due to the centrality of the conflict between justice and mercy to a discussion of numerous topics in the scheme of salvation history. This theological complexity reinforces the idea that, as in the case of law, historians must be wary of arguing for sharp distinctions between 'official' and 'unlearned' ideas of justice and mercy; and likewise any division of 'top-down' or 'bottom-up' chains of belief. Here 'lay' cannot be a

synonym for ‘unlearned’, and the ‘popular’ is more explicitly theological than sometimes asserted.

One must still, however, place some limitations on the interaction between preaching and scholastic soteriology. It may be the case that the Four Daughters of God and Four Wills of Christ were ‘safe’ subjects for popular preaching precisely because they were *historical* examples of a conflict between divine justice and mercy, that is, because they had been resolved in the course of salvation history. The ‘solution’ was clear in both cases: mercy had triumphed over justice by winning redemption in the Incarnation of Christ; Christ had wept over Jerusalem and the souls of the wicked, but they had been destroyed anyway. These were not open-ended questions; they did not invite the same degree of speculation as one might find when speaking in more hypothetical terms (such as the question of whether one could expect equal punishments for two equally wicked sinners). Scholastic scrutiny of the workings of divine justice had tested and exposed the limitations of any definition as justice as a due, to a degree never considered by earlier medieval theologians. There was some measure of proportionality in God’s judgement, and certainly a combination of justice and mercy, but that judgement was not wholly governed ideas of due justice. Where the soteriological connection between justice and mercy was more comprehensible to human minds, however, was in the person of Christ, both in the Incarnation and in his ministry on Earth. It seemed, on the accounts of theologians as diverse as Hugh of St. Victor, Bernard of Clairvaux, and Robert Grosseteste, that the conflict of justice and mercy could only be truly and fully reconciled in the person of Christ and through divine actors. Yet if this was a conflict which could cause argument even in heaven, what sort of resolution could the human judge hope to achieve, faced with the same eternally-conflicting principles, but without the divine wisdom to rule between them?

Chapter 3. Precept and Counsel

> We wish we were not seeking revenge but could bear it all calmly to such an extent that when we were smitten on one cheek, we would immediately turn the other, not returning evil for evil, and endeavouring not to be overcome by evil, but rather to overcome evil by good. However, we have heard this teaching of the apostle [1 Peter iii.9] quite often, but we have not had the strength to reach this absolute perfection; for we cling to an old imperfection and anyone who has robbed us we consider an enemy. We still love our friends, and hate our enemies, especially when they have plundered us incessantly and irrevocably.
>
> Gerald of Wales, *Speculum duorum*.[1]

Understanding which actions and what behaviours were necessary to salvation was a central purpose of medieval exegesis. This was not a question limited to scholastic theologians, but an intellectual problem which lay beneath some of the most contentious dilemmas of medieval church politics. Twelfth- and thirteenth-century exegetes sought to distinguish the difference between those actions which scripture commanded – without which eternal life could not be achieved – and those actions which were merely regarded as admirable, virtuous and worthy of extra reward. This struggle to differentiate between 'necessary' and merely 'praiseworthy' actions is evident in two of the most controversial (and well-studied) questions for the institutional Church between the eleventh and the thirteenth centuries: poverty and virginity. A third and rather less well-known discussion should be added to this list: the distinction between acts of mercy or justice which needed to be performed in order to secure salvation (i.e. those commanded by precept) and those acts of mercy or justice which simply demonstrated great virtue (i.e. those advised by counsel).

[1] *Speculum duorum*, Ep.7, p. 261.

The Twelfth-Century Debate

Much debate over the type and level of poverty which ought to be practised by the Church (particularly, but not exclusively, in debates within the Franciscan order), focussed how one ought to interpret the various passages in the gospels in which Christ discussed questions of wealth. The gospels had condemned those who would accrue riches (e.g. Matthew vi.19-20), yet, at certain points, that teaching appeared to have been modified: Christ had, seemingly, permitted the apostles to carry a purse (Luke xxii.36).[2] How was such an injunction to be understood? It could be argued that Christ instructed his true disciples not to covet money, not to store up their wealth on earth; alternatively, it could be argued that the Lord himself had made concessions, accepting that, at times, his followers might require the use of wealth. The issue clearly could not be generalised and expanded into a command which bound all Christians.[3] Likewise, discussions surrounding the relative merits of virginity and celibacy hinged upon a scriptural citation, in this case from Matthew xix.12: 'there are also eunuchs who made themselves eunuchs for the sake of the kingdom of heaven. He who is able to receive it, let him receive it (*qui potest capere capiat*)'. Though virginity or celibacy was a demonstration of faith, a remedy against original sin, and an action which would earn great reward, not everyone was capable of it. For those people mired in concupiscence, marriage was granted as a *permissio*, a concession to weakness. This was a widely-accepted gloss on the passages of scripture which concerned marriage.[4] A far more problematic question then became to understand who was capable of celibacy, and indeed, who *should* be capable of adhering to this prototype. Those promoting the 'Gregorian' reforms of the eleventh and twelfth

[2] See Michael Lambert, *Franciscan Poverty: The Doctrine of Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210-1323* (revised edition, New York, 1998), pp. 33-72.
[3] The arguments over the relative wealth or poverty of the institutional Church were not limited to Franciscan critiques – see G. Leff, 'The Apostolic Ideal in Later Medieval Ecclesiology', *Journal of Theological Studies* 18 (1967), pp. 58-82.
[4] e.g. *GO* on Matthew xix.12, PL.114.148C; on 1 Corinthians vii.2, 114.529C; cf. *Decretum*, C.27, q.1, c.20, 1:1055.

centuries, for example, had included all priests, deacons, subdeacons, canons and monks within this category.[5] Both poverty and chastity, in sum, were essentially arguments about how broadly or narrowly the gospel message should be applied.

One way of considering these discussions was to approach them through the lens of precept (*praeceptum*) and counsel (*consilium*). The status of precept applied to all those scriptural statements without which salvation could not be achieved – the most basic of all being love of God and love of neighbour. Counsel, on the other hand, described those actions which were commended by scripture but were not incumbent upon all. Counsel typically signified an action that was more demanding or difficult to fulfil than a precept, something which only the 'perfect' attempted to observe – hence the importance of the phrase 'qui capere capiat', a phrase often invoked when explaining this distinction. Similarly, the injunction of Matthew xix.21, 'sell all you have and give it to the poor, and follow me' was prefaced with a clear conditional indication of its limited audience, beginning 'if you want to be perfect' (*si vis perfectus esse*).[6] The distinction between counsel and precept illuminates twelfth-century discussions of justice and mercy in two ways. First, debates concerning the status and fixity of precepts were closely connected to discussion of when rules – especially rules which concerned punishment – might be dispensed from. Secondly, at the heart of arguments about the status of biblical counsels and precepts was a practical question, concerning what types of merciful actions should be considered obligatory for Christians.

A useful, and indeed typical, working definition of the meaning of counsel is provided by the twelfth-century Benedictine Rupert of Deutz, when he defines *consilia* as actions which are done on behalf of God, but which go beyond those tasks which he

[5] On eleventh- and twelfth-century interpretations of 'qui potest capere capiat', L. Melve, 'The Public Debate on Clerical Marriage in the Late Eleventh Century', *Journal of Ecclesiastical History* 61 (2010), pp. 688-701.
[6] This preface is not included when the injunction is repeated at Mark x.21.

commands us to perform. Rupert glosses this with reference to Luke xvii.10: 'we are unworthy servants, we have done only our duty (*quod debuimus facere, fecimus*)'.[7] Christians follow counsels in order to earn extra merit in the eyes of God, in order to become *perfectionis amatores*. The problem highlighted by Rupert is that the individual who fulfils *only* that which is necessary to salvation, that is, who adheres only to precepts rather that attempting to follow divine counsels, cannot be judged a particularly good or worthy Christian. Rupert, writing in a monastic context, in which counsels were to be fulfilled, notes that those who follow precepts alone will never merit any great grace. Indeed, those who never attempt to implement scriptural counsels in their own lives are no more worthy of God's grace than the Israelites of the Old Testament, who simply and blindly followed the commands of Mosaic law: 'you are unworthy, who wish to add nothing in your due service (*debitum servitutis*) on account of the love or grace of God'.[8] Certainly in the cloister, where individuals aspired to serve God in all that they could, simply adhering to precepts did not by itself provide an adequate way of life for the monk, who had chosen by his vocation to follow both the 'counsels' of poverty and celibacy as if they were precepts.

The relationship between counsel and precept provides an essential (if hitherto neglected) context in which to read questions of judgement, justice and mercy. In addition to describing an advisory statement, *consilium* was both a virtue (categorised under the cardinal virtue of prudence), and one of the gifts of the Holy Spirit described in Isaiah xi.2-3. Placing *consilium* as part of prudence in catalogues or schemes of the virtues might, at first sight, seem to distance it from the cardinal virtue of justice and its associated virtue of *misericordia*, often considered a constituent part of *iustitia*. However, annexing *consilium* to *prudentia* also placed it in a more explicitly political context, as a

[7] Rupert of Deutz, *De sancta trinitate et operibus eius*, ed. H. Haacke, CCCM 21-24 (4 vols., Turnhout, 1971-2), 5.16, iv, p. 1996.
[8] Ibid, 5.16, iv, p. 1996.

virtue associated with governance.[9] Thus *consilium* did play a role in acts of judgement, even if it was not directly allied to justice. Conrad of Hirsau's *De fructibus carnis et spiritus*, for example, defined *consilium* as ordered to the careful mental examination and direction of cases (*causae*).[10] Certain theologians – including Robert Grosseteste – disagreed with this schematization, and placed *consilium* as a part of *iustitia*. For, Grosseteste argued, as the definition of *iustitia* was to 'give to each their due', *consilium* performed the same function: Christians owe the dues of help, instruction and counsel to their neighbours.[11]

The multiple possible points of contact between counsel and justice, counsel and mercy, are further demonstrated by Alan of Lille, who in his *Regulae theologicae* (composed at the end of the twelfth century) gave eight possible definitions of *consilium*:[12] the word could be glossed as a *suggestio*; as 'considered opinion' in a legal case –the product of consensus; as equivalent to the term *iudicium*, because judgement was only given after taking counsel; as describing the coming of Christ in humility; as a command which was binding only on the perfect – in the sense that virginity was a counsel to monks; as an alternate term for deliberation in decision-making; as a gift of the Holy Spirit;[13] and finally, *consilium* described not merely as counsels, but could encompass the actions which followed from acting on a counsel.[14] A number of themes emerge from Alan's definition of counsel – themes which embody many of the issues raised in subsequent discussions. From the perspective of the relationship between justice and mercy, three ideas are worth highlighting here. The first is Alan's definition of *consilium* as representing a considered judgement, from which a course of action would

[9] e.g. Thomas of Chobham, *SCV*, 4.2.1, pp. 141-2.
[10] *De fructibus carnis et spiritus*, 11, PL.176.1002C.
[11] Robert Grosseteste, *Templum Dei*, ed. J. Goering and F.A.C. Mantello (Toronto, 1984), 10.4, p. 50.
[12] Alan of Lille, *Regulae theologicae*, PL.210.750A-B.
[13] An idea which Alan explored in his treatise *De virtutibus* (below, p. 178).
[14] This latter from Psalm ix.23: 'they are caught in the counsels they devise'.

proceed – i.e. as an intellectual action which carried implications of implementation in practice.[15] Secondly, Alan recognised that *consilium* as an act of deliberation implies some level of difficulty in decision-making: not all *consilia* represented a straightforward choice between wicked and meritorious action – one might be required to choose between good and better actions, or two courses which seemed equally virtuous or advantageous.[16] Thirdly, *consilium* was specifically associated with the advent of Christ. This final connection could be constructed in two ways: Christ could be understood as representing a 'counsellor' in the sense that his Incarnation made the law of God known not only to the Jews, but to the Gentiles. His counsel, as provided in the gospels, was a guide to making virtuous moral choices. Alternatively, Christ's embodiment of *consilium* could be understood according to the way the Incarnation represented the mercy of God being extended towards humankind: Christ's reconciliation of man with God was a merciful act of *consilium* which challenged the previous strict precept of 'justice', as set out explicitly in the *Four Daughters of God*.

Just as the term *consilium* could be interpreted in a number of ways, the same was true of *praeceptum*. To describe a precept simply as a command necessary to salvation was not an adequate definition, a point which became increasingly clear with the advance of dialectical scholarship. Peter Abelard's *Sic et Non* (c. 1121), for example, makes this category central to the work of interpreting scripture. The prologue to the *Sic et Non* emphasises the need to distinguish not merely between precept and counsel, but between the many different kinds of precept. Some apparent precepts, Abelard argues, can be treated with 'indulgent remission' (*indulgentiae remissionem*), their commands modified or even let slip: some apparent precepts are not intended as commands at all, but should be read as exhortations to perfection. The only way of distinguishing between precepts

[15] *Consilium* could have a dual meaning as both a personal opinion and a judicial verdict. See *Enarrationes in Matthaeum*, PL.162.1294.
[16] For justice as the choice between two differently advantageous counsels, see below, pp. 241-2.

which bind all, and those which have a limited audience, is by identifying the context in which they were given, and the circumstances which gave rise to them.[17] Abelard thus formulates some general rules for dealing with scriptural precepts in his prologue. First the exegete must ask whether precept is a general or particular one – does it apply to all (*communiter*), or only to some (*specialiter*)? Very often this can only be inferred through close attention to context. Further, even amongst precepts given *communiter,* Abelard invites the student of theology to consider whether they were given for all time, or dispensed with after a certain period.

Precept and Mosaic Law

Dialectical reasoning, as Abelard had demonstrated, could resolve some problems associated with conflicting precepts: if two scriptural commands seemed to contradict one another, the fault lay in human reasoning, not divine law, and the exegete should therefore look for differences of audience, time, and circumstance in order to harmonise them. Yet a broader conceptual problem – one which could not be resolved simply by considering differences of audience – lay in the division between Old and New Testaments. How, precisely, did the many laws contained in the Old Testament relate to the precepts found in the gospels? There were many places in which Christ and his apostles seemed to argue that their message challenged, even disregarded that of the Old Law – for example, the words of Christ at Matthew vi.43, 'you have heard it was said: love your neighbour and hate your enemy, but I tell you: love your enemy, pray for those who persecute you'. Christ had clearly altered the more retributive aspects of the Old Law,[18] yet his modifications still had to be fitted within a scheme in which he had come to 'fulfil the law, not abolish it' (Matthew v.17). The specificities had to be pinned down,

[17] Blanche B. Boyer and Richard McKeon (eds.), *The Sic et Non: A Critical Edition* (Chicago, 1976-77), prologue, p. 96.
[18] Cf. *GO*, Leviticus xxiv.20, PL.113.367B.

and scholastic theologians were drawn to consider what remained of the Old Law that was still binding, and what exactly the New Law of Christ consisted of in practice. As an exegetical problem, this issue was raised anew in the twelfth century. Whereas the traditional patristic approach had been to approach Mosaic rules (other than the Ten Commandments) through a 'spiritualising' lens, arguing that the laws given to the Israelites should be read merely as foreshadowing the new law of Christ,[19] twelfth-century authors, especially Victorine exegetes, re-examined the value of Mosaic law when read 'literally' and situated in its proper historical context.[20] They considered the extent to which the precepts and commands given to the Israelites could be rationalised and considered according to their practical function in time and place. This interest in the literal and historical context of Mosaic law, however, was not limited to Victorine exegetes. Numerous scholars carefully outlined how the Decalogue stood both in relation to the other laws of the Old Testament and the evangelical precepts of the New. Anselm of Laon's *Sentences*, for example, established a distinction between 'natural commands' (*naturalia mandata*), those that were given in accordance with natural law – and those laws which were given according to the circumstances of the time (*tempus ordinata*).[21] The former were not to be considered simply as foreshadowing future truths, but as full and perfect precepts in their own right, with continuing validity. Anselm of Laon, like Abelard after him, accepted the idea of a division even within the category of precepts: some were not immutable, but susceptible to alteration in accordance with the time. Further, Anselm noted, in an argument which he drew from the seventh book of the

[19] See, for example, Augustine, *De spiritu et littera*, ed. Karl Franz Urba and Joseph Zycha (Vienna, 1913), CSEL 40, 17.29-30, pp. 182-4.
[20] See B. Smalley, 'An Early Twelfth-Century Commentary on the Literal Sense of Leviticus', *RTAM* 36 (1969), pp. 78-99; A.J. Minnis, 'Quadruplex Sensus, Multiplex Modus: Scriptural Sense and Mode in Medieval Scholastic Exegesis', in J. Whitman (ed.), *Interpretation and Allegory: Antiquity to the Modern Period* (Leiden, 2000), pp. 229-54.
[21] *Anselms von Laon Systematische Sentenzen*, ed. Franz Plazidius Bliemetzrieder (2 vols., Münster, 1919), i, p. 94.

Panormia attributed to Ivo of Chartres, there might even be certain 'exceptions' to the seemingly immutable Decalogue: thus the sixth commandment, 'non occides', would still allow for killing in defence of the Church (and possibly entertain further exemptions in cases of self-defence or specific divine command).[22]

This study of the particular circumstances which had given rise to the many laws contained within Deuteronomy and Leviticus reached its peak in the first half of the thirteenth century. Commentators devised a scheme by which those laws could be described according to three different categories according to the purpose they fulfilled in the lives of the Israelites: *moralia*, *iudicalia* and *caerimonalia*.[23] Further impetus to this study was provided by Moses Maimonides's detailed exploration of the value and logic of Mosaic law in his *Guide for the Perplexed*, translated into Latin as *Dux neutrorum seu dubiorum* in the 1220s. The insights of Maimonides were taken up, for example, in William of Auvergne's treatise *De legibus*, and soon thereafter by Alexander of Hales.[24] Thus, within the schools, from the twelfth century onwards, there was an increasing appreciation for and consideration of the laws of the Old Testament, and a conviction that the study of those laws could be fruitful to believers. Even if those exacting precepts no longer applied, they could not be ignored simply because they had been abrogated or fulfilled. English theologians represent no exception to these currents of study. A good example here is Robert Grosseteste, who, during the 1230s, composed two texts which considered the laws of the Old Testament and their relevance to priests and theologians. *De decem mandatis*, a study of the Ten Commandments, was a broadly pastoral work which demonstrated how pastors might use the Decalogue when instructing their flock –

[22] Ibid, i, p. 96-7.
[23] See L. Smith, 'William of Auvergne and the Law', in Thomas J. Heffernan and Thomas E. Burman (eds.), *Scripture and Pluralism*: *Reading the Bible in the Religiously Plural Worlds of the Middle Ages and Renaissance* (Leiden, 2005), pp. 123-42.
[24] Beryl Smalley, 'William of Auvergne, John of La Rochelle and St. Thomas Aquinas', pp. 12-3.

emphasising the continued relevance of this part of Mosaic law.[25] Grosseteste's second examination of the laws of Moses, *De cessatione legalium* (c. 1231-5), was rather more academic in its approach, and considered the opposite aspect of these laws. It sought to demonstrate why the specific laws and rites set out in Deuteronomy and Leviticus no longer applied to Christians living after the Incarnation. Grosseteste's premise was structured around four central arguments, but the theme which runs through the text is that Christ, the perfect sacrifice for sin, abrogated all the ritual, legal and ceremonial practices of the Mosaic law, rendering them heretical and blasphemous if observed by contemporaries under the new dispensation. The complex *legalia* and *caerimonalia* had been replaced with the sacraments of love, freedom and grace. The common bond between *De decem mandatis* and *De cessatione legalium* is that both texts consider how aspects of the Old Testament are to be read in relation to the message of the New. Grosseteste maintains some important distinctions here, noting, for example, that some precepts given in the Old Testament were just *essentialiter* and thus would always be binding on humankind – under this category fall, for example, the first and seventh commandments of the Decalogue – to love God, not to commit adultery. Yet there are also commandments of the Old Law which can be considered as *indifferentia* (a term which Christian theology had adapted from Stoic philosophy, denoting something which was neither virtuous nor vicious, but morally neutral).[26] The justice of the *indifferentia* derived only from their status as precepts given by divine authority, not from their content. Such precepts were capable of alteration or even abrogation by God.[27] Grosseteste demonstrated that the way in which one understood the meaning and status of a 'precept' was far from being an academic exercise, and was worth exploring for its

[25] *De decem mandatis*, introduction, pp. vii-viii.
[26] See Marcia L. Colish, *The Stoic Tradition from Late Antiquity to the Early Middle Ages* (2 vols., Leiden, 1990), ii, p. 270.
[27] *De cessatione legalium*, ed. Richard C. Dales and Edward B. King (London, 1986), 1.5.1-2, p. 21.

moral import. Once the *caeremonalia* and *legalia* were stripped away, Grosseteste argued, the unity of the two laws was demonstrated by their shared foundation in love – of God, of oneself and of one's neighbour. These were precepts under the Old Law, found in the Decalogue: these were precepts restated by Christ. Indeed, Grosseteste went so far as to argue that the whole of Mosaic law could be summarised in a single command, 'love!' (*hoc mandatum est etiam unicum verbum: ama!*).[28] As such, Grosseteste's praise of love invites a further consideration of one interpretative scheme which could be used to resolve conflicts between scriptural laws and human enforcement or adherence to those laws.

Caritas and *Obedientia*

Grosseteste used the concept of love to reconcile the differences between the specific commands of the Old Law and the instructions of Christ in the gospels: by considering the spirit in which all scriptural teachings were intended, conflicts of the letter could be put to one side. Grosseteste was not the first to argue that practical guidance could be found by considering the spirit with which laws or precepts were administered, but was in fact drawing on a long tradition of appeal to the interpretative principle of *caritas*.[29] The most influential consideration of how *caritas* impinged upon the interpretation of systematic law is found in Ivo of Chartres's late eleventh-century *Prologue* to his canonical collection.[30] Ivo, faced with his pastoral responsibilities as a bishop, considered how best to apply the disciplinary canons – the historical collections of rules established by church councils, synods and papal pronouncements – within his own church. His answer was to affirm the principle that so long as one acted in a spirit of love, it was possible to interpret canons with a degree of flexibility. Principally, Ivo

[28] Grosseteste, *De decem mandatis*, 1, p. 2.
[29] Above, pp. 38-40.
[30] See Brasington, 'Ways of Mercy', pp. 25-104.

considered the possibility of dispensing from, or mitigating, canonical punishments. Whilst there were general rules established for the maintenance of discipline within the Church, the canons allowed for certain exceptions. It was in this context that Ivo considered the varieties of precept and how they bound the officers of the Church. Whilst some had been given to stand for all time, others were more mutable – and these latter admitted a degree of modification in their application.[31] Ivo summarised his approach to the law by citing Augustine: 'love, and do what you will (*habe caritatem et fac quicquid vis*): if you correct, correct with love; if you pardon, pardon with love'.[32]

Ivo's teaching was enormously influential, and the *Prologue* circulated throughout northern France, Germany and England, even when the canonical work to which it was attached had been discarded in favour of newer collections.[33] Moreover, Ivo's decision to utilise *caritas* as a guiding principle of judgement coincided with increasing attention paid to *caritas* as virtue in the twelfth and thirteenth centuries.[34] *Caritas* was coming to hold a pre-eminent position amongst the virtues, and it soon came to eclipse the Gregorian idea of *humilitas* as the foundational virtue in many monastic accounts: the Cistercians Bernard of Clairvaux and William of St. Thierry made *caritas* the root of all other virtues.[35] Hugh of St. Victor gave voice to the common theme of many sermons, treatises and *specula* written on the topic, exclaiming, 'oh *caritas*, what can I say of you? How can I praise you?'[36] Hugh went on to answer his own question, explaining that 'you

[31] e.g. Ivo, *Prologue*, pp. 120-1.
[32] Ibid, pp. 116-7.
[33] For his influence, see Brasington, 'Studies in the "Nachleben" of Ivo of Chartres: The Influence of his Prologue on Several *Panormia*-Derivative Collections", in Peter Landau and Joers Muller (eds.), *Proceedings of the Ninth International Congress of Medieval Canon Law* (Rome, 1997), pp. 63-86.
[34] Above, pp. 38-40.
[35] Bejczy, *The Cardinal Virtues*, esp. pp. 100-1.
[36] Hugh of St. Victor, *De laude charitatis*, PL.176.969-74; 972C; cf. Aelred's *Speculum caritatis*, 1.31, pp. 51-2.

are the fullness of justice, the perfection of the law, the consummation of virtue, the perception of truth'.[37]

This description of *caritas* as the 'fullness of justice', however, had the potential to create difficulties when the principle of *caritas* was invoked or applied within a legal system, or even within a monastic rule. How, exactly, did *caritas* relate to *misericordia*?[38] Did acting in a spirit of *caritas* always oblige one to act with mercy? Ivo of Chartres's *Prologue*, placing *caritas* as the central mediator between law and practice, continued to be invoked by authors discussing this question. Yet, in many ways, Ivo's appeal to *caritas* posed more questions that it resolved. Ivo provided a means of harmonising the interpretation of potentially conflicting canons and arriving at a merciful judgement, but the terms of his solution left everything to be determined in practice. It was this fundamental problem which gave rise to various concerns surrounding the maxim '*habe caritatem et fac quicquid vis*' during the following century.[39] First, just who, for example, under Ivo's scheme, had the authority to determine what *caritas* meant when applied in practice – who would determine which precepts were fixed, which mutable? Secondly, giving place to *caritas* as a guiding principle of action had the potential to dissolve the bonds of obedience which held the institutional church together. The unruly monk might invoke the idea of *caritas* as means of challenging his superior. How could this instruction to act as *caritas* dictated be reconciled with the *obedientia* and *humilitas* expected particularly of a monk, but more generally demanded from all those placed under the authority of a superior? This problem was succinctly embodied by Robert Grosseteste's explanation of the difference between old and new dispensations. The

[37] Hugh of St. Victor, *De laude charitatis*, PL.176.974A.
[38] Above, pp. 38-40.
[39] Constable, 'Love and Do What You Will', p. 4.

message of the Old Law, Grosseteste observed, had been God's decree: 'do as I command'. The message of Christ was 'do as you command yourself'.[40]

This tension between *caritas* and *obedientia* was only imperfectly resolved. Safeguards had to be established to prevent *caritas* from becoming a licence for misrule. Bernard of Clairvaux's *De precepto et dispensatione* (c. 1132-6), a work indebted to Ivo's *Prologue,* dealt at length with this problem.[41] *De precepto,* a treatise addressed to two Benedictine monks, instructed them on how the *Rule of Benedict* was to be understood and followed, together with its implications for monastic conduct and discipline.[42] The key category in Bernard's explanation was that of *necessaria*: one might make exceptions to the *Rule* according to circumstances (time, place, person), so long as they were done with love (*caritas*). However, certain *necessaria* were never to be neglected – for example, dispensations were never to be granted if they might cause scandal or detracted from the standing of the Church; dispensation should never be based on *superbia,* but instead granted in a spirit of humility. Bernard's treatise distilled much of the argument that he had outlined as part of his earlier (c. 1127) dispute with Peter the Venerable, abbot of Cluny, over the question of which monastic order, the Cistercians or the Cluniacs, most closely adhered to the *Rule of Benedict*, and more specifically, whether that 'rule' was defined according to the spirit or the letter.[43] Bernard's *Apologia* had accused the Cluniacs of straying far from the strict precepts which constituted the Benedictine Rule, claiming that, in a Cluniac monastery,

[40] Robert Grosseteste, *De cessatione legalium*, 10.19, p. 190.
[41] Bernard of Clairvaux, *De precepto et dispensatione*, ed. J. Leclercq, H. Rochais and Ch. H. Talbot, *Le précepte et la dispense; La conversion* (Paris, 2000), 1.1-4, pp. 32-47.
[42] Cf. Lars-Arne Dannenberg, 'Charity and Law. The Juristic Implementation of a Core Monastic Principle', *Aspects of Charity*, pp. 11-28, for the relationship between monastic thought and canon law on this point.
[43] W.E. Goodrich, 'The Limits of Friendship: A Disagreement between Saint Bernard and Peter the Venerable on the Role of Charity in Dispensation from the Rule', *Cistercian Studies* 2 (1981), pp. 81-97.

> Laxity is called discretion (*discretio*), extravagance liberality, talkativeness sociability and laughter joy.... When we devote these things to another, we call it love (*caritas*). Such love destroys true love. Such discretion (*discretio*) ruins true discretion. This sort of mercy (*misericordia*) is full of cruelty, for as the body is served, so the soul is strangled.[44]

Peter's response was to argue that Cluniac practice only made appropriate concessions to necessity (*necessitas*) and utility (*utilitas*).[45] He repeatedly cited a statement from the Rule of Benedict (41.5):'let the abbot so temper and dispose all things so that souls may be saved'.[46] Peter explains that the abbot has the authority to temper monastic rules in order to make the distinction between *mandata mobilia* and *mandata immobilia*.[47] The abbot is able to recognise which precepts may or may not be dispensed from by following the guidance of *caritas* and good intention (*intentio bona*).[48] That Bernard fails to appreciate this important point, Peter implies, is a result of the failure of Bernard's own sense of *caritas*.

The exchange of letters between Bernard and Peter was a high-profile quarrel with significant ramifications for the way in which the relationship between *praeceptum*, *caritas* and *dispensatio* was understood in the twelfth century. Peter the Venerable insisted that even as Benedict had composed his rule, he had been mindful that it should be interpreted in a spirit of love and with flexibility.[49] The quarrel between Peter and Bernard demonstrates how important the abstract principle of *caritas* could become in an argument concerning practical actions and behaviours. How the gap between spirit and letter was to be bridged, and the dispensations which *caritas* may or may not admit was not a discussion limited to Benedictines and Cistericans. It was also a concern for the anonymous twelfth-century expositor of the Rule of Augustine (a work produced at St.

[44] Bernard, *Apologia S. Bernardi abbatis ad Guillelmum Theoderici abbatem*, 8.16, PL.182.908D.
[45] *The Letters of Peter the Venerable*, ed. Giles Constable (2 vols., Cambridge, 1967), Ep. 28, 1, i, pp. 61-2.
[46] Ibid, Ep.28, 1, i, p. 60; 7, i, p. 69; *Benedicti regula*, 41.5, p. 103.
[47] Ibid, Ep. 28, 20, i, p. 88.
[48] Ibid, Ep. 28, 7, i, p. 69; cf. 1, i, p. 60; 2, i, p. 64; 5, i, p. 68.
[49] Ibid, Ep. 28, 20, p. 97.

Victor in the mid-twelfth century and previously attributed to Hugh of St. Victor).[50] The Victorine author, like Bernard, also invokes and applies Ivo of Chartres's principles in order to provide a gloss on the rule.[51] He addresses the question of what is to be done when a Christian attempts to correct a neighbour who does not wish to be corrected. He explains that it is perfectly acceptable to importune an individual who does not want to listen, to correct someone against their will, so long as this is done from a spirit of love, not anger.[52] The commentator understands the principle of *caritas* to mean that the intent (*intentio*) of the corrector is as important as the action of correction:[53] that intent should accord with the spirit in which the rule was set down, even if the corrector's actions do not themselves completely adhere to the letter of the rule. The superior who corrects their subordinates, may sometimes, in their zeal for correction, overstep the bounds of moderation, and utter words which are not in keeping with the love (*caritas*) that ought to be in their heart, the commentator warns.[54] Sometimes, he observes, the vehemence of the superior's *locutio* may exceed their *intentio*. The Victorine commentator concludes by repeating the Augustinian principle utilised by both Abelard[55] and Ivo of Chartres: *habe caritatem et fac quicquid vis*. So long as a precept is interpreted with righteous and loving intention, it is not misinterpreted.

By c. 1135 (the date of Bernard's *De precepto*) the major issues at stake in a discussion of counsel and precept had been articulated. The scholastic study of grammar and dialectic had made it clear that the apparently fixed and unchanging 'commands' of scripture, church councils or monastic rules had to be read and applied with extreme care – for time or circumstance might have caused them to lapse. Moreover, the rapid

[50] B.T. Coolman, *The Theology of Hugh of St. Victor* (New York, NY, 2010), pp. 60-1.
[51] *Expositio in Regulam S. Augustini*, PL.176.822-924.
[52] Ibid, 7, 902D.
[53] Ibid, 10, 919A; cf. 7, 904A.
[54] Ibid, 10, 918A.
[55] Abelard, *Sic et Non*, p. 98.

circulation and widespread dissemination of Ivo of Chartres's *Prologue*, and the discussion of *caritas* contained therein had added a further dimension to this debate. Ivo had specifically invoked *caritas* in relation to the application of the disciplinary canons of the Church. The *Prologue* focussed attention on the modification of specifically punitive precepts.

The Implications of *Caritas* for Secular Judges

In the earlier part of the twelfth century, the discussion of *caritas* as a means of dispensing from law was ordered towards dispensation from ecclesiastical rules. This, after all, had been the original aim of Ivo of Chartres – to provide a principle for ruling between sometimes contradictory canons. But, later in the century, theologically-trained authors turned to consider how *caritas* – as a principle of legal dispensation and legal interpretation – might apply to the secular law. That such discussions were occurring in England, in relation to common law, is hardly surprising, given the overlap in personnel between the English church and the royal court.[56] The *De charitate Dei et proximi* of Peter of Blois, for example (a late work of Peter's career, written after c. 1195), attempts to set down a simplified version of Ivonian *caritas* for a lay, lordly, audience.[57] Peter had spent a decade close to the heart of Angevin government, and travelling with the court. His text emphasises that obedience to the law (any law, whether ecclesiastical or secular) means nothing unless that obedience proceeds from *caritas*.[58]

English authors also reflected more broadly on what gave common law its authority, and what permitted a king to dispense from law. English legal codes themselves stipulated that the law was not always to be applied as written.[59] Authors

[56] Above, pp. 20-1.
[57] Below, p. 171.
[58] Peter of Blois, *De charitate Dei et proximi*, 31, PL 210.929C-31B.
[59] Above, pp. 61-2.

trained in theology, familiar with canonists' struggles over questions of legal authority, attempted to provide guidelines for how the law might be appropriately moderated. The best demonstration of this is to be found in John of Salisbury's *Policraticus*, in which John dwells at some length on the question of dispensation from the secular law, and how dispensation may be done justly. John does not invoke the Ivonian idea of *caritas*. He does, however, borrow another concept from the schools of theology, framing the question of righteous dispensation from law as the ruler's duty to mediate between the 'spirit' and 'letter' of the law. The test for rightfully dispensing from the law, John explains, is that the specific dispensation should agree with the principles – the spirit – which informed the original written law.

> The first law could be written on stone tablets, but the second cannot be imprinted, other than on the purer intelligence of the mind. It is right that Deuteronomy be written in a book, in the sense that the prince turns over the meaning of the law, in order that the letter of it never pass out of his sight. And thus he pursues the letter, but it is never at variance with the purer, intellectual sense. For the letter kills, but the spirit gives life [2 Corinthians iii.6].[60]

In this instance, John is drawing on scholastic, monastic and canon law discussions on the relationship between law and dispensation, and framing them for his own *speculum principum*. Most striking of all, however, is John's explanation of the reasons for which the king may dispense from or modify the law:

> As long as the laws are flexible (*mobilia*), I grant dispensation from the letter; however the purpose of the law must be conserved, untouched, by weighing moral worth or utility (*compensatione honestatis aut utilitas*).[61]

John invokes two Ciceronian, rhetorical terms of reference here as categories which license dispensation from written law – *honestus*, a measure of moral worth, and *utile*, a

[60] John of Salisbury, *Policraticus*, 4.6, 1:522.
[61] Ibid, 4.7, 1:527.

measure of utility. One striking feature of John's argument was that it could be (and indeed, was), opened up to debate in terms of how, precisely, these categories of *honestus* and *utile* could be measured.[62] John's position here, however, should not simply be seen as a willingness to permit any and all deviations from written law simply in the service of the wishes of secular authority. John cautions, first, that not all laws can be dispensed from (not all are *mobilia*); and, moreover, that the justification for such dispensation must be worthy. In this sense, he reiterates the limitations placed on dispensation from monastic rules voiced decades earlier by Bernard of Clairvaux.

The question of dispensation from secular law was also considered, influentially, by Peter the Chanter, writing at the end of the twelfth century. Peter did not speak in terms of Ivonian *caritas*, or employ the Ciceronian rhetorical terminology favoured by John of Salisbury, but instead invoked the category of *necessaria*, as Bernard of Clairvaux had done. Actions prompted by *necessaria*, even if they ran contrary to secular or divine laws, are always to be considered just, a position justified by the canonical maxim 'necessitas non habet legem, set ipsa sibi facit legem'.[63] Peter offered a typical example drawn from canonists' discussions – the case of a poor man who stole from the wealthy in order to feed himself.[64] Because such a man acted out of necessity, in order to secure his own survival, Peter notes, in this case, the 'theft' is no theft at all.[65] There are a number of scriptural citations which endorse a similar message: Christ himself had condoned the action of David who had fed his men the consecrated host when they starved (Luke vi.3-5).[66] Likewise, Peter noted, when St. Laurence 'stole' the treasures of the church and sold them in order to raise money to distribute to the poor, this was no

[62] Below, pp. 241-2.
[63] *Decretum*, C.1. q.1. c.39, 1:374; the maxim, found in the Pseudo-Isidorean collection, originally derived from Roman law.
[64] Cf. Alan of Lille, *Liber poenitentialis*, ed. J. Longère (Louvain, 1965), 1.15, pp. 30-1.
[65] *VA*, 2.7, p. 642.
[66] Referring to David's actions at 1 Samuel xxvi.1; cf. Proverbs vi.30-1.

theft, as his actions were motivated by *misericordia*, here glossed in its Augustinian sense as the relief of the wretched, *in subveniendo miseris*.[67] In sum, by the end of the twelfth century, questions about legal dispensation, and the proper motivations for legal dispensation, were being discussed far more frequently and more generally than ever before. Ivo of Chartres's discussion had focussed on the question of internal church discipline, but the principles of his *Prologue* had now been integrated into 'secular' thought. The late twelfth-century historian, Ralph Diceto, for example, thought the *Prologue* important enough to be summarised to form part of the preface for his own world history. Ralph placed Ivo's discussion of the moderation of justice alongside the prologues of other works he considered fundamental to the understanding of Christian history, including Augustine's *De civitate Dei*, Eusebius's *Chronicon* and Bede's *Historia ecclesiastica*.[68] As John of Salisbury and Peter the Chanter made clear, concepts which licensed dispensation from ecclesiastical rules had also to be taken into account concerning the commands of secular authority. There was broad recognition of the idea that even commands which appeared to be firm and binding precepts might sometimes be subject to modification and moderation.

Mercy as Counsel

The relationship between precept and counsel within scholastic approaches to justice goes beyond the consideration of whether specific, individual scriptural statements were to be read as binding precepts or as mutable, adaptable counsels (or indeed, 'permissions' in the negative case, such as that allowing marriage). The virtue of *misericordia* itself was carefully examined in order to ascertain whether it belonged to the category of precept or counsel. The ensuing debate posed the question of whether the

[67] *VA*, 2.7, pp. 642-3.
[68] Diceto, *Abbreviationes chronicorum*, i, pp. 26-32.

duties of mercy (primarily understood in a judicial context, in a lenient and forgiving attitude towards offenders, but also in the form of alms-giving) constituted obligations for all, commanded by divine precept and without which salvation could not be achieved, or whether they were counsels directed only to the perfect, as an additional act of virtue. On the one hand, the biblical definition of reciprocal mercy (Matthew vi.12, *dimitte nobis debita nostra*)[69] seemed to imply that there could be no salvation for those who did not perform acts of mercy – a position which would seem to give it the status of a precept. On the other, it was possible to argue that more specific commands – such as *diligite inimicos vestros* (Matthew v.44) – demanded such a high degree of virtue that only the perfect would be able to achieve it – a position which would seem to make mercy a counsel rather than a precept.

The case for identifying mercy as counsel rather than a precept ultimately derived from a particular tradition of exegesis and commentary on the gospels, and, more specifically, Christ's words in the Sermon on the Mount. A distinctive twelfth-century development was the close attention which these commentaries paid to the language and context of the gospels.[70] The four evangelists were central to understanding the life, deeds and message of Christ, but they presented profound problems for their scholastic interpreters, not least the way in which some of their contents could or should be be accommodated with twelfth-century social structures. Thus those who glossed the text of Matthew v.25 had to deal with a passage which advised Christians to avoid resorting to the law to resolve their disputes, whilst Matthew v.34 exhorts Christians to make no oaths, an obvious problem given the increasing importance of oath swearing in court procedure.[71] This injunction could not be interpreted simply or literally. Another potential

[69] Above, p. 30.
[70] Smalley, 'Some Gospel Commentaries'; Damien Van den Eynde, 'Autour des "Enarrationes in Evangelium S. Matthaei" attribuées a Geoffroi Babion', *RTAM* 26 (1959), pp. 50-84.
[71] See Brundage, *Medieval Origins*, pp. 283-343; cf. *GO*, Matthew v.34, PL.114.95D-6B.

problem was observed by William of Auxerre, who pointed to the contradiction between the message of Matthew vi.12, 'do unto others as you would be done by' and the application of this command in a judicial context. No-one, William argued, who put themselves in the place of a condemned criminal, would want to be hanged: therefore, according to the logic of this passage, judges would be obliged not to put any criminals to death, as no one would wish such a fate for themselves. Yet if this policy were followed, he noted, and malefactors not punished, it could result in political disaster, and the *res publica* would be destroyed.[72]

Gospel passages which pertained to questions of judicial procedure and judicial action were thus subject to at least some form of moderation. In practice, Peter Comestor, for example, noted the need to consider the injunction 'love your enemies' and 'turn the other cheek' in light of the events of the crusades.[73] In order to do so, Peter first drew a distinction between those precepts which applied to those who sought to be perfect, and those which applied to the rest of society. But even the would-be perfect, he argued, fell into two classes: the perfect of the early church and those of today. It was appropriate for the perfect of the early church – the martyrs – to show patience and to turn the other cheek. Their demonstration of love towards their enemies had been a means of evangelising and making converts for the Church. However, this was no longer an appropriate way of acting in the twelfth century, even for the perfect. If that ban on taking vengeance were applied to the Holy Land, he points out, the heathen would abuse the patience of the Church, and Christians endangered. These precepts thus had to be understood as spoken 'pro tempore'.

For all these problems, the gospels – and particularly the Sermon on the Mount – became a central focus for scholastic exegesis and the subject of theological *quaestiones*.

[72] William of Auxerre, *Summa aurea*, 3.18.3, iv, pp. 378.
[73] Beryl Smalley, 'Peter Comestor on the Gospels and his Sources', *RTAM* 46 (1979), p. 125.

The Sermon on the Mount was so significant because it represented the moment at which Christ had set out his new law. The comparison between Moses ascending Mount Sinai to receive the Ten Commandments – the basis of the laws of the Old Testament – and Christ ascending the mountain to preach his own sermon on the law was a basic gloss on biblical history.[74] Seeking out the parallels and symmetries of scripture, scholastic commentators found in the Sermon on the Mount a complex relationship between the beatitudes, or blessings, of Christ, the petitions of the Lord's Prayer and the gifts of the Holy Spirit as set out in Isaiah. This not only provided a means of structuring the points of Christ's teaching; it also provided a link to the gifts foreseen by an Old Testament prophet. In this scheme, the beatitude of *misericordia* was usually linked to the petition 'dimitte nobis debita nostra' and the gift of *consilium*. The first modern historian to remark on this structure was Odon Lottin, who argued that it was first developed by Anselm of Laon in his commentaries.[75] Ultimately, however, the connection between the beatitudes, petitions, and gifts derived from Augustine's *Commentary on the Sermon on the Mount*. Glossing *beati misericordes*, discussing the gifts and their relation to the beatitudes, Augustine had written:

> Counsel is suited (*congruit*) to the merciful: for this is the one remedy by which great wickedness is avoided, in order that we forgive others as we wish to be forgiven, and we help others as much as we are able as much as we ourselves wish to be helped.[76]

Augustine, and Anselm of Laon following him, clearly implied that merciful action should be regarded as a response to counsel. The identification of mercy as a counsel was taken up and repeated in many twelfth-century commentaries on the Sermon on the

[74] e.g. *GO*, Matthew v.2, PL.114.89A-B.
[75] O. Lottin, 'La doctrine d'Anselme de Laon sur les dons du Saint-Esprit et son influence', *RTAM* 24 (1957), p. 268.
[76] Augustine, *De sermone Domini in monte*, ed. Almut Mutzenbecher, CCSL 35 (Turnhout, 1967), 1.4.11, p. 10.

Mount. The standard work of reference on scripture – the *Glossa ordinaria* – argues that mercy cannot be achieved without counsel: 'thus mercy needs the spirit of counsel, without which no-one is properly pitied'.[77] Hugh of St. Victor followed the scheme of pairing mercy, counsel and the petition to forgive, but developed the symmetry even further, arguing that each beatitude, gift and petition also corresponded to one of seven sins and one of seven virtues.[78] In the early thirteenth century, the subdeacon of Salisbury, Thomas of Chobham, writing for the instruction of would-be confessors, not only repeated the scheme, connecting the fifth petition, 'dimitte', to counsel and mercy, but even included two tables in his *Summa confessorum* to make the structural relationship clear to his readers.[79]

[77] *GO*, Matthew v.5-6, PL.1140.90A-B.
[78] Hugh of St. Victor, *De quinque septenis*, PL.175.405-14; see table 2.
[79] Thomas of Chobham, *SC*, 3.1.9a, p. 39; see tables 3 and 4.

Table 1. Reproduced from Lottin, 'La doctrine', based on Anselm of Laon's scheme.

Petition (Lord's Prayer)	Gift	Beatitude
Sanctificetur nomen tuum	Timor domini	Beati pauperes
Adveniat regnum tuum	Pietas	Beati mites
Fiat voluntas tua	Scientia	Beati qui lugent
Panem nostrum quotidianum	Fortitudo	Beati qui esuriunt
Dimitte nobis debita	Consilium	Beati misericordes
Et ne nos inducas	Intellectus	Beati mundo cordes
Sed libera nos a malo	Sapientia	Beati pacifici

Table 2. Representation of Hugh of St. Victor's scheme, *De quinque septenis*.

Vitia	Petitio	Donum	Virtus	Beatitudo
Superbia	Sanctificetur nomen tuum	Timor domini	Paupertas spiritus – humilitas	Regnum caelorum
Invidia	Adveniat regnum tuum	Pietas	Mansuetudo sive benignitas	Possessio terrae viventium
Ira	Fiat voluntas tua	Scientia	Compunctio, sive dolor	Consolatio
Tristitia	Panem nostrum quotidianum	Fortitudo	Esuries justitiae sive desiderium bonorum	Saturitas
Avaritia	Dimitte nobis debita	Consilium	Misericordia	Misericordia
Gula	Et ne nos inducas	Intellectus	Cordis munditia	Visio Dei
Luxuria	Sed libera nos a malo	Sapientia	Pax	Appellatio Filiorum Dei

Table 3. From Thomas of Chobham, *Summa confessorum*, 3.1, p. 37.

	VII petititones in oratione dominica	**Dona spiritus in Isaiah in primo ordine**
Ordo naturalis		
Ista ad futura	Nomen patris sanctificari	Spiritus timoris
	Adventum regni	Spiritus pietatis
	Voluntatem fiery	Spiritus scientie
Ista ad presens	Panem dari	Spiritus fortitudinis
	Peccata dimitti	Spiritus consilii
	Non induci in tentationem	Spiritus intellectus
	Liberari a malo	Spiritus sapientie

Table 4. Thomas of Chobham, *Summa confessorum*.
The seven beatitudes and their corresponding rewards.

[Beatitude]	**[Reward]**
Paupertas spiritus	Regnum dei
Mansuetudo	Possessio terrae
Luctus	Consolatio
Esuries	Saturitas
Exhibitio misericordiae	Adeptio misericordiae
Munditia cordis	Visio dei
Pax	Appellatio filiorum dei

By the later twelfth century, the connection between beatitude, gift and petition was a commonplace – it is found, for example, in the writings of Master Martinus, Alan of Lille, Stephen Langton, Geoffrey of Poitiers, William of Auxerre, Hugh of St. Cher and Philip the Chancellor.[80] All these authors tied *misericordia* (which was considered both a virtue and a beatitude) to the gift of *consilium*, implying not merely that the two were complementary, but that mercy was to some extent the product of counsel and deliberation. From this connection, it was possible to infer that *misericordia* was not a precept incumbent upon all, but a special act of virtue enabled by the grace granted by the Holy Spirit to a select number. Not all theologians, however, linked *misericordia* to the petition 'dimitte'. A significant minority preferred to associate mercy with the words 'fiat voluntas tua in nobis' ('let your will be done', Matthew vi.10). This is a construction employed by the *Enarrationes in Matthaeum*, and is also found in the *Glossa ordinaria*. The justification for this alternative pairing is just as striking for what it reveals about the conceptualisation of mercy. The *Enarrationes in Matthaeum* explains, for example, that by petitioning 'fiat voluntas tua', the Christian places themself at the disposal of God, and acts according to divine wishes, not their own. This divine will is unknowable to humans, and sometimes appears without explanation, even arbitrary. The same is true of acts of mercy, which sometimes appear inconsistent – God acts with strict justice towards some, with lenient mercy towards others. Because humans cannot explain the logic of these judgements, they cannot explain acts of *misericordia*, but are simply obliged to perform them according to God's will.[81] This reasoning was clearly thought to provide an adequate explanation when referring to the mercies of the Lord, the logic of which was

[80] Lottin, 'La doctrine', and for Stephen Langton, Riccardo Quinto, 'The *Conflictus vitiorum et virtutum*', p. 229. A significant exception is Peter Lombard's *Sentences*, which did not discuss the parallels between beatitudes, gifts, petitions, virtues and vices.
[81] *Enarrationes in Matthaeum*, PL.162.1287.

beyond the full comprehension of mankind.[82] That mercy should be a question of divine *voluntas* (which was of course always supremely good) was entirely acceptable. When applied to a temporal ruler, however, and to human *voluntas*, this assertion posed quite a different set of issues. In fact, linking mercy to the phrase 'fiat voluntas tua' had quite the opposite effect to associating it with the gift of *consilium*: for the gift of counsel made acts of mercy comprehensible, open to the scrutiny of the human mind.[83] To associate mercy with *consilium* was at least to imply that acts of *misericordia* were subject to deliberation, and, as such, were not binding on Christians in the same way as explicit precepts.

Beyond the beatitudes, other passages in scripture made the case for treating mercy as a counsel rather than a precept. Isaiah ix.6, foreseeing the coming of Christ, described him as King and God and had named him a 'counsellor' (*consiliarius*). When theologians sought to explain why Christ was given this latter title, they referred to his work of persuasion. Rupert of Deutz noted that 'counsellor' referred to Christ's mission to the gentiles, exhorting, encouraging and winning new souls for God. Persuasion was a term necessarily associated with counsel: Christ invited and encouraged people to follow him, but he did not command them with precepts.[84] English authors too, drew this connection – Thomas of Chobham explained in a sermon the 'conciliatory' role of Christ by setting his work of persuasion in a scheme of salvation history.[85] The post-lapsarian pride of humankind had been so great, Thomas explained, that humans were incapable of reconciling themselves with God: 'to find his redemption, however, man could not incline his soul to counsel'.[86] It was for this reason that Christ, the height of humility, was sent to

[82] Above, pp. 116-28.
[83] Cf. *GO*, Matthew v.48 and vi.10, PL.114.98C, 101C.
[84] Rupert of Deutz, *De sancta trinitate*, iii, p. 1509 (glossing Isaiah ii.3).
[85] Thomas of Chobham, *Sermones*, ed. Franco Morenzoni, CCCM 82A (Turnhout, 1993), *Sermo* 1, pp. 11-12.
[86] Ibid, *Sermo* 1, p. 12.

Earth, embodying the spirit of counsel, in order to counsel and plead with man to relinquish his *superbia* and be reconciled to God. Thomas's depiction of Christ as counsellor, the embodiment of *consilium*, bears striking resemblances to the numerous sermons and treatises composed on the theme of the Four Daughters of God. That allegory too makes the connection between *misericordia* and *consilium* (in the sense of deliberation), when each of the four 'daughters' of the Lord – Mercy, Truth, Justice and Peace – debate the issue of whether humankind deserves to receive eternal punishment.[87] Framing mercy in this way – as a counsel, a course determined by advice, the product of persuasion – had the effect of situating it as an action open to discussion, even criticism. In this sense it was not a precept – mercy was a consideration to be valued in judgement, but not necessarily always to be applied, particularly when other concerns (security, propriety, necessity) might argue against it. This was as true in the application of monastic discipline as it was in the setting of penitential punishments and in the legal courts of the *saeculum*.

Mercy as a Precept

The effect of linking *misericordia* to *consilium* was to frame mercy as one judicial strategy amongst many. Yet there was an equally powerful case to be made for *misericordia* as an immutable precept, binding upon all. This argument derived ultimately from the way in which theologians conceptualised the relationship between Old and New Law. Those who wished to argue that mercy was a precept incumbent upon all judges cited Matthew v.43-4: 'you have heard that it was said, "love your neighbour and hate your enemy", but I tell you: love your enemies and pray for those who persecute you'.

[87] This personification of mercy and debate between different types of virtue owes much to the *conflictus* genre developed in the earlier Middle Ages, in which vices and virtues exchanged arguments according to the rhetorical device of *prosopopoeia*. See Gregory the Great's *Moralia in Iob*, ed. Adriaen Marcus, CCSL 143 (3 vols., Turnhout, 1979), 31.90, iii, pp. 1611-2.

This passage seemed to imply that the difference between the two laws turned on the merciful treatment of one's enemies. Commentary on the passage typically noted that hatred of enemies under Mosaic Law was given as a 'permissio, non praeceptum'.[88] As such, this permission had been retracted with the Incarnation, the implication being that Christians were bound now to love their enemies. The anonymous Victorine commentator on the Rule of Augustine, for one, endorsed the idea that to exercise mercy towards all humankind was a divine precept. The author explains (albeit in the context of expounding a monastic rule aimed at *spirituales*) that simply to love one's neighbour is not really a particularly virtuous or meritorious action.[89] Many love their neighbours merely because they are united by social ties, in other words, from 'natural' love (*affectus carnis*). Whilst scripture does not condemn this love, he argues, it will never attain the rewards promised to *caritas*, namely, salvation. This at least seems to imply that, without *misericordia*, no-one will be saved – in which case mercy should be considered to have the status of a precept. This too, agreed with some of the most basic and oft-cited discussions of *misericordia* found in scripture – particularly that 'judgement without mercy will be to him who has shown no mercy' (James ii.3).[90] God's strict judgement of humankind would amount to damnation: only mercy could and would win mercy for one's own soul. This logic, too, raised *misericordia* to the status of precept, and not merely a precept for *claustrales*.[91] Of course, there is a certain ambiguity in this argument: when the commentator concludes that only those who keep to the rule of *caritas* are worthy of being considered *discipulos Dei*, this term could be read in a restricted sense, applying only to those who have taken religious vows, or, alternatively, with a more general meaning, as all who follow Christ are *christiani*.

[88] e.g. *Enarrationes in Matthaeum*, PL.162.1302C.
[89] *Expositio*, PL.176.918C-D.
[90] Above, p. 37.
[91] e.g. Peter Damian had glossed James ii.3 as 'apostolicum praeceptum', *Contra intemperantes clericos*, PL.144.423.

Amongst authors writing in an English context, a particularly detailed consideration of the status of mercy as a precept is found in Peter of Blois' *De charitate Dei et proximi*, a work paired with Peter's better-known treatise on Christian friendship, *De amicitia Christiana*.[92] The text aims to bring contemporary monastic teachings about the importance of love to the attention of a broader audience. As such it explains why the need to love, and do good towards, one's enemies must be understood as a precept. Christ, Peter explained, had referred to the command to love one's enemies as 'praeceptum meum'. Peter further notes that Christians are obliged to love our enemies 'ex praecepto Dei'.[93] In this context, Peter examines the natural conflict between the will of humankind – which is to hate their enemies – and the command of *caritas* to love those enemies, arguing that however strong the urge to do the former, Christians must struggle to obey the latter. If an individual truly loves God, he adds, then they must love all humans for his sake – this includes enduring enemies with patience and indulging their errors with clemency (*indulgeat clementer*).[94] It is striking that Peter singles out *misericordia* as a precept, *expressis verbis*. He observes that other virtuous actions mentioned in the gospels – virginity, alms-giving, selling one's possessions and distributing them to the poor – all fall under the category of 'counsel from God' (*consilium habemus a Domino*).[95] These actions are not necessary to ensuring salvation, and those who perform them may hope for additional divine reward. In contrast to these counsels, Peter continues: 'however, love of enemies is a fixed and clear decree of the law, which the Lord bound us to in the gospel: if you do not love your enemy, you are found to be a violator of divine law (*divinae legis praevaricator*)'.[96] Peter of Blois is explicit in claiming judicial mercy is a precept, not a counsel. Moreover, Peter makes this

[92] Cotts, *The Clerical Dilemma*, pp. 241-3.
[93] Peter of Blois, *De charitate Dei et proximi*, 35, PL.207.935C.
[94] Ibid, 39, 938C.
[95] Ibid, 38, 936.
[96] Ibid, 38, 936.

argument in a work (*De charitate Dei et proximi*) which addresses not only a monastic audience, of whom higher standards of love and tolerance for enemies might have been applied, but also secular clerics. Peter's conclusion is explicit: only those who love their enemies and do good to their persecutors can hope to be considered as 'sons of your father in heaven'. Those who disregard the command to show mercy deviate from the central teaching of Christ and, as such, cannot be considered to be his followers (*Christi discipuli*). Peter argues that this 'dilectionis decretum' (decree of love) towards enemies is the central message of Christ. In this, he goes beyond his contemporaries who argued simply that the message of the New Law was love – in fact, the commandment is far more taxing: the message of the New Law is love of *enemies.* Peter concludes his argument with a flourish, noting that if even under the Old Law, David and Joseph could love their persecutors, Christians living under the new dispensation are even more greatly obliged to do so.

Turning the Other Cheek

At various different points in the New Testament, Christians were told (whether ordered or counselled) to love their enemies; to pray for them; to do good to their persecutors; to feed their hungry enemies; and to offer up the other cheek to those who had already injured them.[97] Thus, even if an individual accepted that to love their enemy was Christ's command, what exactly did such a command imply in practice? Moreover, of these various commands, which one should be thought of as applying to the laity, and which to the perfect alone?[98] Reflecting the difficulty of resolving this latter issue, one of the questions which Abelard set out in the *Sic et Non* was whether 'love of neighbour'

[97] Matthew v.44; Luke vi.27; Romans xii.20; Matthew v.39.
[98] The *Glossa ordinaria*, for example, notes that to love one's enemies and pray for them is the 'summit of perfection' (*cumulus perfectionis*), but does not spell out the implications of this idea – are we then to infer that only the perfect aspire to praying for their enemies (PL.114.98C)?

was considered to apply to all humans, and, if so, in what senses it applied.[99] Hugh of St. Victor also considered this point when commenting on Paul's letter to the Galatians, quoting a statement he attributes to Gregory the Great, who had set the bar for Christians in general rather low: 'it is enough (*sufficit*) not to hate our enemies, that is, to wish for their salvation'.[100] Hugh considered the generality of Christians to be obliged only to wish for their enemies' good, not bound to perform any acts of mercy towards those enemies: 'we hold as a precept that we should wish the salvation of all, but it belongs to the duties of the pious to treat enemies as they would the infirm; to the less perfect (*minos perfectos*) it is a counsel, which is to the perfect a precept'.[101]

The question of what behaviour, exactly, Christians are required to exhibit towards their enemies is addressed in detail in the works of two English authors. Robert of Melun responded to the question of 'whether we are commanded to love our enemies who do not repent the injuries they have done to us' in his *Questiones de divina pagina* (between 1145 and 1155).[102] The objection to doing so, Robert notes, would seem to be that even God does not forgive those who show no repentance: thus to love an unrepentant enemy would make us more merciful than God, which surely cannot be virtuous. Robert's solution still ultimately resolves the question in favour of loving even one's unrepentant enemy. Humans, he argues, should not seek to imitate God who dwells in heaven, he who pronounces 'vengeance is mine, I will repay' (Romans xii.19), but rather God 'as he walked on the earth as a man, and who prayed for his crucifiers'. Robert's formulation, then, at least implies that Christians are – as far as is possible – not only to love, but to forgive and pray for their enemies, following the example of Christ. It

[99] Abelard, *Sic et Non*, 36, pp. 463-4; Abelard's discussion is primarily drawn from Augustine's *De doctrina Christiana* and Ambrosiaster's *Commentarius in epistolas Pauli ad Romanos*.
[100] Hugh of St. Victor, *Quaestiones in epistolas Pauli: IV in epistolam ad Galatas*, PL.175.567-8, discussing Luke iv, 'diligite inimicos vestros'.
[101] Ibid, 568.
[102] Robert of Melun, *QDP*, q.90, pp. 45-6.

was Christ, not the judge of the Last Judgement, who provided an imitable and useful model for resolving human judicial problems concerning the place of mercy in judgement. Further to this, Robert – like a number of his contemporaries in the mid-twelfth century and later scholastic authors– addressed the related question of whether it was better to love one's enemies or one's friends. This question admitted a variety of solutions – for example, William of Auvergne argued that it was better for the perfect to love their enemies, but better for the imperfect to love their friends;[103] Simon of Tournai argued that it was better – for any individual – to love an enemy, because by doing that which they are less bound to do, they earn more merit with God.[104] Robert of Melun concluded that it was indeed a greater virtue to love one's enemy that a friend, although that love was less likely to be returned.[105]

The second English theologian who provides a strikingly detailed discussion of how 'love your enemies' is to be interpreted is Thomas of Chobham in his *Summa confessorum* (c. 1217). As far as Thomas was concerned, the distinction between levels of perfection was all-important and he according has a far more limited view of the duties of ordinary Christians to love their neighbours than either Robert of Melun or Peter of Blois. Thomas makes a distinction between the layman and the 'perfectus'. Those who do not aspire to perfection are not obliged to show forgiveness towards unrepentant enemies, or those who do not make satisfaction for their injuries. Nor is the ordinary Christian obliged to wish for the salvation of an enemy in the same way as they wish for the salvation of their family and friends.[106] Indeed, the difference between the mercy and love to be exhibited by the 'simplex' and that which is due from the perfect is quite stark. The imperfect are not obliged to remit any injuries or debts from their enemies, and may

[103] William of Auxerre, *Summa aurea*, 15.5, iii, p. 277.
[104] Simon of Tournai, *Disputatio* 86.5, p. 249; cf. 89.5, p. 257.
[105] Robert of Melun, *QEP*, q.122, p. 61.
[106] Thomas of Chobham, *SC*, 6.5.6a, p. 320.

rightly seek satisfaction for those injuries in a court of law.[107] Thomas further considers just what level of perfection is required before a Christian is obliged to give the 'kiss of peace' as a gesture of reconciliation with his enemies. The *osculum pacis*, he notes, is be useful as instrument of secular peace in the community: the most notorious recent demonstration of this in twelfth-century English politics had of course been Henry II's public refusal to grant Thomas Becket the kiss of peace at their supposed moment of reconciliation.[108] However, in most cases, ordinary Christians are not in any way obliged to offer the kiss of peace to their assailants, because such an action of reconciliation and peace could cause the dismissal of any suits they have against the offender. Thomas does grant the exception that, *in summa necessitate*, there may be a case for making peace. The *vir perfectus*, however, is never excused from performing the kiss of peace – he is always obliged to forgive his enemies, whether in the case of personal injury or material debts. Thomas concludes by noting that it was the perfect to whom Christ addressed himself when he commanded 'love your enemies, pray for those who persecute you'.[109]

The sharp distinction between the mercy practised by the simple laity (*simplex*) and by the perfect is reflected in the organisation of another of Thomas' works, his *Summa de commendatione virtutum et extirpatione vitiorum* (c. 1220). When addressing the virtue of *iustitia*, Thomas finds it most convenient to categorise the virtue according to the level of its practitioners, discussing *iustitia maiorum* (referring to the justice of judges and princes), *iustitia minorum* (the justice governing monastic life) and *iustitia omnium* (justice amongst humankind in general). Patience which does not take revenge (*vindicare*), he points out, is considered a virtue which is practised exclusively by monastic *minores*. Judicial mercy which spares lives or mitigates the worst excesses of

[107] Ibid, 6.1.3a, p. 245.
[108] On this incident see Timothy Reuter, '*Velle sibi fieri in forma hac*: Symbolic Acts in the Becket Dispute', *Medieval Polities and Modern Mentalities*, pp. 182-3.
[109] *SC*, 6.1.3a, p. 245.

punishment is considered with reference to the *maiores*. The section *de iustitia omnium*, by contrast, sets a relatively undemanding level of justice for the laity.[110] Indeed, *misericordia* is not mentioned in relation to their duties: the only justice that all are obliged to show is the justice of proper restitution and the undertaking always to speak the truth. The focus here, moreover, is questions of material restitution, for which Thomas runs through numerous scenarios – for example, if a criminal dies, are his wife and children obliged to make restitution to those from whom he stole? By contrast, when Thomas cites scriptural precepts such as 'dimitte nobis debita nostra', or raises the threat of 'judgement without mercy', these are invoked solely in relation to the actions of the *maiores* – princes and judges.[111] Thomas of Chobham's argument that different standards of justice apply to different groups within society (rather than different levels of perfection) is markedly unusual. In general twelfth-century authors did not draw sharp distinctions between the levels of justice required of different groups of believers, for two reasons. First, theologians noted that preachers exhorting listeners to justice might often be speaking to a 'mixed' audience, and, in that context, drawing sharp distinctions between groups would not be appropriate or effective.[112] Secondly, theologians appreciated that to apply categories such as 'iustitia maiorum' was not a straightforward exercise. Princes and judges sometimes act in an official capacity, sometimes as private individuals. As public officials they might be obliged to uphold justice, to avenge injuries in order to preserve the stability of the political community, whilst as private individuals they might wish to turn the other cheek, and forgive any injuries done to them.[113] Given the problems of context, few theologians tried to formulate hard and fast rules about forgiveness.

[110] *SCV*, 4.2.2.3, p. 169.
[111] Ibid, 4.2.2.1, pp. 150-1.
[112] e.g. Guerric of Saint-Quentin, *Quaestiones de quolibet*, ed. Walter H. Principe (Toronto, 2002), appendix 1, pp. 396-7.
[113] e.g. Simon of Tournai, *Disputatio* 29, pp. 88-91; cf. *VA*, 2.9, pp. 648-50.

Dissolving the Difference between Precept and Counsel.

For all the careful attempts to categorise each utterance of Christ according to its status either as an imperative precept or as persuasive counsel, there was an important sense in which theologians dissolved much of the force of this theoretical distinction in practice. Although distinguishing between counsel and precept was valuable in terms of doctrine, in a pastoral context (in which many, if not all of the authors cited here operated), the dividing line was deliberately blurred. As the Victorine commentator on the Rule of Augustine had observed, even if it were possible for an individual to live their life fulfilling only those commands which would assure salvation, this was not particularly praiseworthy, and it was, in his opinion, certainly not what Christians ought to strive for. Even though a distinction between imperfect and perfect was constructed in the physical walls between secular world and the cloister, the 'imperfect' should still be challenged and exhorted to follow *all* the counsels they were capable of fulfilling. As a result, sermons on mercy and justice deliberately softened the distinction between precept and counsel when it came to exhortation and practice.

One revealing demonstration of this is found in Alan of Lille's *Summa de arte praedicandi* (1198), a text which instructs the priest how to preach – with maximum effectiveness – to a variety of groups, and on different occasions. Alan advises priests to exhort their flock (in this case, imperfect humans) to exclude anger from their minds. He suggests the preacher employ the words of Christ, exhorting the injured party not to place restrictions on their forgiveness towards an offender, but 'forgive up to seventy times seven' (Matthew xviii.22).[114] This argument for repeated forgiveness of those who have caused one injury is to be used to instruct the laity in general, even if it is considered only

[114] Alan of Lille, *Summa de arte praedicandi*, 9, PL.210.129D-131C.

to be a counsel. In Alan of Lille's view, it is certainly not an exclusive value of the cloister. Alan adds that all must do their best to observe this: 'if we are not among those perfect enough to pay back good for evil, at least let us return as little evil as possible for evil'.[115] The cumulative effect of these exhortations to mercy is to blur the distinction between those actions strictly necessary for salvation (precepts) and those which are merely desirable in a good Christian (counsels). Alan of Lille drew a close connection between *misericordia*, *consilium* and the petition for forgiveness of sins elsewhere in his writing, most clearly in his *De virtutibus de vitiis et de donis spiritus sancti* (c. 1170-80).[116] It is noteable that his work on preaching, however, whilst it retains the link between *misericordia* and the petition 'dimitte', presents this in a much less schematic way. He instead prefers to exhort his audience to mercy though reference to the parable of the unforgiving servant:

> Frequently we ought to bring to mind what is taught in the gospels – where we read of the man whose lord dismissed his debt, but who did not wish to forgive his fellow debtor. Similar to this is he who does not remit the injuries done to him by his neighbour, but extracts the greatest possible punishment for each offence.[117]

Similarly, Alan simplifies the complex exegetical commentary surrounding the Incarnation and the traditions of *Cur Deus homo*, asking 'for what was the incarnation of Christ if not an act of *misericordia*?'[118]

Arguments over the precise status of counsel and precept prompt the question of whether twelfth- and thirteenth-century theologians truly believed that the laity would take up the call to mercy, and that the precepts of the Sermon on the Mount could be fulfilled by all Christians in practice. A variety of responses can be observed. Rupert of Deutz, for example, criticised those individuals who, 'in their foolishness', considered the

[115] Ibid, 131A.
[116] Alan of Lille, *De virtutibus*, 3.2, p. 54.
[117] Ibid, 3.2, p. 54; above, pp. 131-3.
[118] Alan of Lille, *Summa de arte praedicandi*, 17, PL.210.147C-9D.

many precepts of God to be impossible to fulfil.[119] Rupert was explicitly thinking here of the precept 'love your enemy'. Those who averred that it was impossible to fulfil such a precept, he states, claimed that it was enough for humans simply not to hate their enemies, since to love them would be more than nature could endure. But Rupert is adamant in his rejection of this argument: it is entirely possible to love one's enemy, and this can be seen in practice on earth. Rupert here provided the example of Christ's prayers for his crucifiers, and, strikingly, seems to believe that this act of mercy could be imitated by twelfth-century Christians, clergy and laity alike. Likewise, he offers the (again, imitable) examples of the proto-martyr Stephen praying for those who stoned him, and King David weeping over his persecutors. Rupert may have been writing in a monastic context, but his comments suggest that there was at least some practical consideration of how far divine precepts were achievable on earth, beyond the walls of the cloister. Even those theologians who took the opposite view and conceded that some precepts could not be fulfilled in this life, did not attribute this to any cause so simple as an irredeemably violent society which would always ignore Church teaching. Instead, they argued, it was because of the conflicted nature of post-lapsarian humankind in whom the will to obey God's commands was often at variance with the will of the flesh, and, as such, although no amount of exhortation could actually cure man of this sinful nature, it was still valuable to dwell on those precepts. This is a compromise position, demonstrated by Hugh of St. Victor, who explains that God sometimes prohibits actions which humans cannot avoid. Hugh gives the example here of the command to love God with all our heart (but he might just as easily have chosen 'love your enemies'). Hugh cites Augustine, who had argued that no-one could fulfil this precept in the present life, where

[119] Rupert of Deutz, *De gloria et honore filii hominis super Mattheum*, ed. H. Haacke, CCCM 29 (Turnhout, 1979),5.46-8, p. 147 (glossing Matthew v.46, 'if you love only those who love you').

loving God *ex toto corde, ex toto anima, ex toto mente* was impossible.[120] Hugh added to this his own comment that, although God did indeed prohibit that which no-one was completely able to avoid, and command that which no-one was completely able to fulfil, he did this for a reason. Attempting to fulfil these precepts would humble the spirits of the proud and prepare the worthy to receive grace. Even if one could not achieve it, this was still good practice – and an exhortation worth repeating.[121]

Amongst English theologians, the concern over whether any divine precept might be truly fulfilled in the present life was also raised by Robert Grosseteste in his pastoral treatise on the Ten Commandments. Grosseteste noted that carnal *concupiscentia* was prohibited by the ninth commandments. However, he adds, given man's sinful and fleshly nature, 'we cannot just so prohibit ourselves from committing carnal concupiscence, as if we were able to do so for all our lives'.[122] Even those who kept their minds always on the Law, he points out, would never observe this prohibition completely. The point of its inclusion in the Decalogue, he concludes, was not to command something which was unachievable, but to encourage and exhort men to make an effort to diminish, mortify and limit their sinful urges. Grosseteste, like Hugh of St.Victor, cites the same passage from Augustine on this point – there are some precepts which cannot be complete in this life, and will only be perfected in the future life. Grosseteste added his own reassurance, 'nor are we transgressors of this precept, although we are not able to fully perfect it'.[123] In a move which effectively dissolves the strictness of a hierarchical distinction between counsel and precept, he argued that simply to move towards the fulfilment of an impossible command was to be regarded, in the circumstances of the human prolapsarian condition, as fulfilment of it.

[120] Augustine, *De spiritu et littera*, p. 225.
[121] Hugh of St. Victor, *Questiones in epistolas D. Pauli*: *In Epistolam ad Romanos*, q.172, PL.175.478C-D; q.173, 474D-5A.
[122] Robert Grosseteste, *De decem mandatis*, 9.9, p. 88.
[123] Ibid, 9.9, p. 89.

The categories of precept and counsel are fundamental to understanding the connection between how mercy was theorised and how it was practised in twelfth- and early thirteenth-century England. Discussion of precept as a category fed directly into debates about the validity, virtue and righteousness of dispensing from law. Theologians determined that there were multiple categories of precept, binding in different ways, and, as such, the law (even secular law) was not a single authoritative statement which applied for all time, but a set of rules responsive to circumstance. Discussions of counsel, meanwhile, prompted reflection on how, exactly, gospel teachings of mercy should be interpreted, and how that mercy could be realised in practice.

This question of the practice of mercy in medieval England is a particularly contentious issue. Recent works of historiography have tended to argue against the prevalence of mercy as a social institution in English society. Paul Hyams, for example, has argued that the exhortations to mercy found in twelfth- and thirteenth-century English sermons and *summae* are reflections and products of a world dominated by feud and violent self-help. The officers of the Church were desperately attempting to present a message of forgiveness and reconciliation to a general populace more interested in vengeance. These sermons are at best desperate imprecations which ultimately had little impact on the bloody and violent society of Angevin England, which would have had little time for the subtle distinctions between precept and counsel.[124] This sort of argument, however, seems rather reductive, and founded upon a very partial reading of these sermons and arguments. Hyams is perhaps correct in so far as a theologian such as Thomas of Chobham (whom Hyams takes, perhaps unwisely, as a representative figure) did not demand the same standards of justice or mercy from the laity as he did on those in

[124] Hyams, *Rancor and Reconciliation*, pp. 141-83.

the cloister. Yet we should not assume that the reason such injunctions to mercy were continually repeated in sermons was because the laity continually ignored those standards. As theologians emphasised, love – and consequently love and mercy even towards one's enemies – was the centre of Christ's message, then this naturally was a central component of any sermon or commentary on the gospels, and a message to be frequently and repeatedly expounded.

The connections between mercy and counsel were established as part of a commonplace scheme in twelfth-century theological texts, one aspect of a more general chain that linked each of the seven capital vices to an opposing (and corresponding) petition of the Lord's Prayer, gift of the Spirit, virtue and beatitude. As Hugh of St. Victor described it, one could speak of a scheme 'of five sevens' (*de quinque septenis*). This overarching design represented a fundamental conceptual tool for understanding the basic patterns of the Bible, and was taught therefore as a fundamental principle. Yet such a connection between mercy and counsel, perhaps because it occurs so frequently, has only really been remarked upon in Lottin's work on scholastic thought.[125] Lottin's consideration was, however, more of a survey on the frequency of this connection in scholastic *summae* than any close study of the potential implications of the particular connections between each beatitude, gift and virtue. Yet the particular connection between *consilium* and *misericordia* is striking for the role it plays in focussing attention on the nature of the theory and practice of justice in the twelfth and thirteenth centuries. In terms of an intellectual history of justice, the connection between mercy and counsel reveals a level of theological uncertainty regarding the extent to which mercy was an obligation for all Christians, and what forms Christian mercy should take. Moreover, just as the appropriate form of mercy required renewed consideration in each context, so too,

[125] Lottin, *Psychologie et morale*, iii, pp. 330-456.

theologians emphasised, was dispensation from law a question of circumstances. Theological and canonistic traditions, moreover, reinforced the idea that, even in a world of systematic secular law, dispensation was still a moral necessity. By the late twelfth century it was being argued that common law, too, needed to be interpreted in relation to judicial duties of *caritas* and moral goods. Blanket rules could not be given; intent and context had always to be specified. In sum, what theological attention to the question of counsel and precept established was that systematic law, governance by rule, could not function without a moral underpinning. There arguments preserved the importance of the spirit (that is, circumstance) over the letter (the specifities of the written law), and, in doing so preserved a space and moral justification for discretion, even as the world of law itself was becoming more routine, regular and standardised.

Chapter 4. The Varieties of Royal and Ecclesiastical Judgement

The nature and practice of justice was a topic of intense debate in Anglo-Norman and Angevin England, a concern as prevalent in popular allegories such as the 'Four Daughters of God' as it was in scholastic disputation. It was also a problem which loomed as large in the minds of common lawyers as it did in the writings of canonists. The same debates can be found in both legal and theological writings because both lawyers and theologians ultimately looked to the same sources for their definition of justice, attempting to locate it within a complex and often apparently contradictory scriptural tradition. Beyond highlighting those shared debates and their common point of origin, however, an even more direct comparison existed between ideas of mercy and justice in canon and common law. In the eyes of contemporaries, this took the form, in the first instance, of a comparison between the respective 'spirits' of secular and ecclesiastical judicial practice. Questions about the interaction between the two laws have been well discussed in recent historiography, and, as such, the relationship between secular and ecclesiastical laws and their respective jurisdictions have received extensive analysis elsewhere. The concept of sanctuary, and its changing status, in particular, has been examined for what it can reveal about the jurisdictional relations between secular and ecclesiastical power in medieval England.[1] At issue here, by contrast, is a more basic moral question – whether mercy and justice were understood in the same way in secular and ecclesiastical courts and by secular and ecclesiastical judges. Were these two categories of judge expected to look to different sets of judicial *exempla* to guide them in imposing, or mitigating, punishment? The underlying and unchallenged presupposition of much historiography on English justice has been the assumption that strict justice was the

[1] T.B. Lambert, 'Spiritual Protection and Secular Power: The Evolution of Sanctuary and Legal Privilege in Ripon and Beverley, 900-1300', in T.B. Lambert and D. Rollason (eds.), *Peace and Protection in the Middle Ages* (Durham, 2009), pp. 121-40.

prerogative of common law, whereas more lenient mercy lay in the gift of the *canones*. It is an assumption that needs testing. There are two ways to approach this issue. The first is to consider how judges themselves approached the task of judgement – how they described their activities and conceived of their responsibilities. Do royal and ecclesiastical judges differ, or differ significantly, in their understanding of where mercy fits within the system of laws? The second is to consider whether secular and ecclesiastical judges understood the purpose of punishment in the same way. This purpose is best addressed in an examination of judicial arguments in two prominent and much discussed cases from Angevin England in the 1160s: a discussion between English bishops over the treatment of heretics discovered in the diocese of Worcester, c. 1165, and the Becket controversy (1163-70).

It may seem an uncontentious claim that ecclesiastical justice (at least when its judgements concerned individuals rather than property rights) differs fundamentally from secular justice. The former has a celestial goal, after all, and aims, ultimately, at winning the salvation of the offender through correction. Likewise, when clerics served as judges in secular courts, they were, at least in theory, prohibited from passing sentences of mutilation or capital punishment.[2] Once the salvific aim of church law is taken into consideration, this would seem to set ecclesiastical judgement (whether that of the priest setting penance or the verdicts of church courts) apart from the workings of royal or seigneurial courts. And yet this is not necessarily the case. Regardless of the forum, salvation was *always* at stake in *any* judgement – because even in a 'secular' court, the salvation of the judge himself depended on passing an impartial and indeed, 'merciful' sentence. Good judgement was a matter on which the scales of damnation and salvation turned. Thus, even if different motivations prompted 'merciful' judgement (whether this

[2] For a discussion of this practice in Angevin-England see Turner, 'Clerical Judges in English Secular Courts', pp. 159-79.

was the merciful desire to allow the offender the opportunity to reform or the more 'selfish' hope of winning mercy for the judge's own soul), the duty of mercy was as incumbent on a judge in a secular court as it was in the penitential forum. Even in the context of the royal courts, moreover, there was a case to be made that merciful punishment was sometimes the most effective way to achieve the reform of the offender.[3] The relationship between merciful judgements and royal courts in twelfth-century England, has, however, been obscured by the traditional focus of historiographical narrative on the punishments meted out by the crown. There was, in fact, a complex balance to be struck between mercy and justice in both secular and ecclesiastical courts, a point which can only be appreciated by considering how the judicial roles of princes and bishops were understood by contemporaries.

The Historiographical Problem

The legal historiography of the twelfth century has traced an implicit contrast between the rigour of royal justice and the slackness of its ecclesiastical counterpart. At the most basic level, this perception hangs on a certain portrayal of the temperament and character of Anglo-Norman and Angevin rulers, and, in particular, of Henry I and Henry II. As far as their personalities can be gleaned from contemporary chronicles, these two kings are typically regarded as fierce rulers and punitive judges.[4] For example, Alan Cooper has recently argued that the subjects of Henry I were so wary of provoking his wrath, and so fearful of his punishments, that no chronicler risked giving an honest assessment of the king's vicious and capricious character until he was safely buried.[5] More important for the characterisation of Henry II's judicial tendencies, however, is the

[3] Below, pp. 265-75.
[4] C. Warren Hollister, *Henry I* (London, 2001), pp. 349-69; W.L. Warren, *Henry II* (London, 1973), pp. 387-8; cf. p. 630; see also Joliffe, *Angevin Kingship*, pp. 87-109, on royal *ira et malevolentia*.
[5] Alan Cooper, '"The feet of those who bark shall be cut off": Timorous Historians and the Personality of Henry I', *Anglo-Norman Studies* 23 (2001), pp. 47-68.

historical context of his reign. Typically Henry II is depicted as the stern judge who restored the rigour and bite of his grandfather's laws, laws which had lapsed under the stewardship of Stephen.[6] Tied to the perception of a renewal of royal judicial activity under Henry is the understanding that, around 1155, the deterrent force of common law was renewed. Although historians may no longer lionise Henry II as the *fons et origo* of English law, the conviction persists that he presided over a 'rational revolution' in English justice.[7]

A further historiographical current contributing to a picture of common law rigour directly addresses the relative severity of royal and ecclesiastical judgements. It derives from commentary on the conflict between Henry II and Thomas Becket, and, in particular, the third clause of the Constitutions of Clarendon, concerning the punishment of 'felonious' or 'criminous' clerks.[8] This is the principle on which Becket made his stand at Clarendon in 1164: the idea of *non iudicat bis in idipsum*, or the doctrine of 'double punishment'.[9] Becket's position was that it belonged only to the Church to reprimand any man in clerical orders who committed an offence against God which was also considered a felony (an offence such as theft or murder). The Constitutions of Clarendon specified that such a cleric, once deposed by a church court, might subsequently to be handed over to the secular arm in order to be punished for the same offence. Accounts of the Becket dispute have tended to treat this clash as an explicit conflict of principles of punishment, and, in that argument, the majority of historians have expressed a degree of sympathy for Henry's apparent desire to punish malefactors 'properly'. Charles Duggan, for example, described the royal policy that felons be punished by secular justice as 'both reasonable

[6] e.g. Warren, *Henry II*, p. 388.
[7] Cf. Paul Brand, 'Henry II and the Creation of the English Common Law' in C. Harper-Bill and Nicholas Vincent (eds.), *Henry II: New Interpretations* (Woodbridge, 2007), pp. 215-7.
[8] For the Constitutions see David Douglas and George Greenway (eds.), *English Historical Documents 2, 1042-1189* (London, 1953), pp. 766-770.
[9] For Becket's arguments on this principle see Beryl Smalley, *The Becket Conflict and the Schools* (Oxford, 1973), pp. 124-8.

and realistic'.[10] This is not simply because Becket – hair shirt beneath bejewelled vestments notwithstanding – is a difficult man to love.[11] A certain 'whiggish' measure of approval for Henry's stance on criminal law has outlasted the nineteenth century and is still to be found in modern accounts. On the issue of what would in later centuries come to be known as 'benefit of clergy', one historian notes that 'one's sympathies may quite naturally be with the secular authorities':[12] no right-thinking person could believe that removal from priestly office amounted to sufficient punishment for murder. In these accounts, Henry's position is more modern – and implicitly, more 'rational' – than that of the bishops. From this assumption, histories slip quite easily into characterising ecclesiastical punishments as 'sloppy and lax'.[13] When pitted against the predestined forward march of the 'rational' common law, such negative verdicts on permissive medieval ecclesiastical courts can hardly be avoided.[14] Church courts were an 'easy option', a place of perfunctory and soft justice.

Modern historians' verdicts on the question of church justice at Clarendon do, to some extent, reflect those of their medieval forebears. William of Newburgh, for example, characterised the entire dispute between Becket and Henry as a quarrel over the issue of punishment. His *Historia rerum Anglicarum* (c. 1196-8) praises Henry for

[10] Charles Duggan, 'The Becket Dispute and the Criminous Clerks', *Bulletin of the Institute of Historical Research* 35 (1962), p. 2.
[11] See James W. Alexander, 'The Becket Conflict in Recent Historiography', *Journal of British Studies* 9 (1970), pp. 1-26. On the question of Becket's hair shirt, Michael Staunton, *The Lives of Thomas Becket* (Manchester, 2001), p. 75.
[12] Deploring abuses of 'benefit of clergy' in the centuries following the Becket crisis, Leona C. Gabel, *Benefit of Clergy in England In the Later Middle Ages* (New York, 1969): p. 117: 'a boon to qualified evil-doers.... [with] baneful effects upon society at large', p. 120.
[13] A.K. McHardy, 'Church Courts and Criminous Clerks in the Later Middle Ages', in M.J. Franklin and C. Harper-Bill (eds.), *Medieval Ecclesiastical Studies in Honour of Dorothy M. Owen* (Woodbridge, 1995), p. 166.
[14] See Maitland's comment in *The History of English Law*, i, p. 443; John G. Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London, 1973), p. 144, describing the practice of compurgation in those courts as an 'easy option' which permitted offenders to escape the law; R.H. Helmholz, *The Ius Commune in England*, p. 89: 'sensible men complained that the cleric was required to do no more than to undergo a perfunctory compurgation before being returned unchastened and unpunished to the world".

restoring the 'public discipline' which had decayed in the preceding years of civil war.[15] When the king, William recounts, turned his attention to ecclesiastical affairs, he was horrified by the laxity of church punishments against serious felons. William deplores the 'languid' (*languida*) justice of the Church, and criticises the bishops who believe that the protection of wicked priests against royal justice is a part of their office.[16] William of Newburgh's view has largely been that of posterity.

The contrast between royal stricture and ecclesiastical mildness evident in modern historiography of the common law has also been affirmed more recently in intellectual history. Philippe Buc's *L'Ambiguïté du livre* has argued for a similar contrast between punitive royal power and merciful ecclesiastical lordship. Buc studied the theological foundations for, and legitimation of, royal power according to Parisian theologians, based on his readings of numerous biblical glosses produced in the schools of the twelfth and thirteenth centuries.[17] His comments are worth considering here because this is one point at which the intellectual history of 'power' and the legal and social history of English law do seem to converge in their judgements. Although Buc deals with biblical commentaries composed in Paris, his work pays particular attention to the writings of English theologians such as Stephen Langton and Ralph Niger, and also to a number of masters who had a considerable influence on English authors, such as Peter Comestor and Peter the Chanter. Buc argues that, from late antiquity onwards, theologians considered *iustitia* to be the defining attribute of royal *potestas*, whereas *misericordia* was the dominant aspect of priestly power: 'punir est essentiellement royal, épargner essentiellement

[15] William of Newburgh, *Historia rerum Anglicarum*, ed. R.W. Howlett, *Chronicles of the Reigns of Stephen, Henry II and Richard I*, RS 82 (4 vols., London, 1884-90), 2.1, i, pp. 101-2.
[16] William of Newburgh, *Historia*, 2.16, i, pp. 140-1. Herbert of Bosham similarly characterises the argument of Henry II: as members of the clergy were held to higher moral standards, they ought to expect more serious punishments when guilty of crimes (*Vita S. Thomae*, *MTB*, 3.23, iii, pp. 299-300).
[17] Philippe Buc, *L'ambiguïté du livre*. See also Buc's article '*Principes gentium dominatur eorum:* Princely Power between Legitimacy and Illegitimacy in Twelfth-Century Exegesis', in T.N. Bisson (ed.), *Cultures of Power: Lordship, Status and Process in Twelfth-Century Europe* (Philadelphia, 1995), pp. 310-31.

sacerdotal'.[18] Excess of *misericordia* defines a martyr, endowed with 'spiritual' power but lacking in temporal authority; excess of punitive power is the hallmark of a tyrant, one who commands great *iustitia* but lacks merciful virtue. Buc asserts that only Christ was believed to be capable of 'the paradoxical and unique synthesis of the two orders and the two virtues', namely justice and mercy.[19]

For Buc, the polarisation of Church and 'state' as mercy and justice respectively provides the intellectual context for a dramatic change in the way in which twelfth-century theologians conceived of *potestas*. Certain scriptural commentators, Buc argues, began to reassess the foundations of royal power, considering whether it might not have some positive functions. If the origin of royal power did not lie in an Augustinian punishment for sin (*remedium peccati*), it might claim a basis for authority equal to, but separate from, ecclesiastical power. What prompted these discussions, Buc argues, was that the absence of mercy in royal power became increasingly apparent in the century or so following the 'feudal revolution', as European rulers became more assertive. It was only in exceptional cases (for example, that of the saintly Louis IX) that a king of outstanding virtue might be relied upon to incorporate merciful principles into the practice of secular rule.[20] There is here, then, an intellectual background for the complaints of those English chroniclers who observed the apparently excessive mercies of English ecclesiastical law.

It is worth expanding on the intellectual genealogy of the dichotomy set out by Buc, who merely notes that it had its origins in antiquity. This scheme of church-state relations dates back to Constantine and the beginnings of Christian *imperium*. It is not the Church's office to punish; rather its members should be arguing against the excessive severity of secular justice. The role of the bishop is to rebuke the ruler who wields the

[18] Buc, *L'Ambiguïté*, p. 51.
[19] Ibid, pp. 176-7.
[20] Ibid, p. 185.

sword unnecessarily, as, to borrow an image frequently invoked in *specula principum*, Ambrose of Milan had reprimanded the emperor Theodosius for permitting a massacre to take place at Thessalonica.[21] The holy man intercedes to save the life of the condemned villain; individual churches, shrines and abbeys provide sanctuary to the accused. This *topos* of episcopal intervention in secular justice recurs frequently in medieval hagiography, including the hagiography of twelfth- and thirteenth-century England. It derives ultimately from the writings of Augustine, who argued that it is incumbent on a bishop always to sue for mercy in secular courts, always to argue against a capital sentence – the Church, and its representatives, must attempt to rehabilitate, rather than condemn.[22] Augustine's letters abound with such ideals of intercession: the bishop has a place within the Roman courts, mitigating their punitive excesses and reminding them of the higher laws of clemency. Augustine carved out a functional role for the bishop as intercessor, a figure as integral to the working of the secular courts as the prosecutor or defence counsel.

An example of this principle explicitly spelled out in an English (or Angevin) context can be found in the *Practica legum et decretorum* attributed to William Longchamp, Bishop of Ely and Chancellor of England under Richard I. The *Practica legum*, composed c. 1183-8, is William's summary of Roman law procedure, intended as guide to the laws of the Angevin dominions in France, and a text largely concerned with the correct enactment and ordering of the laws.[23] It is, however, prefaced with several paragraphs remarking on the nature, purpose and value of law, amongst which are contained William's reflections on the respective role of law in the hands of the clergy and in the hands of secular rulers. William's remarks often verge on the formulaic, but it

[21] The penance of Theodosius before Ambrose was a popular depiction of the harmonious cooperation of royal and ecclesiastical power, e.g. *Policraticus*, 4.3, 1:516.
[22] e.g. Augustine, *Epistulae 124-184*, ed. A. Goldbacher, CSEL 44 (Vienna, 1904), Ep. 153.3, p. 398.
[23] William Longchamp, *Practica legum et decretorum*, in E. Caillemar, *Le droit civil dans les provinces anglo-normandes au XII siècle* (Caen, 1883), pp. 50-70.

is instructive to consider the assumptions of an individual who, after all, exercised the highest legal authority in the Angevin Empire. William explains that there are two types of law, as there are two swords, and it is the secular ruler who wields the more severe power (*duritia*) in order to correct the excesses of the laity. By contrast, the clergy are concerned, as fishers of men, only to moderate the laity, and must do so with care (*diligentia*).[24] Thus, William implies, the ecclesiastical law is defined against the secular, and as such, is distinguished by its more gentle approach to wrongdoers.

Further support for a 'complementary' interpretation of the judicial functions of bishop (or priest) and king (or judge) may be glimpsed in practice in an incident recounted in the *Chronica* of Roger of Howden.[25] In 1183, that is, around the same time that William Longchamp was composing his *Practica legum*, the then-Bishop of Worcester, Baldwin of Ford, was riding past a gallows when he encountered a group of royal officials about to hang a knight who had been condemned to death on the false charges of the king's justiciar, Ranulf de Glanvill. Baldwin commanded these officials that they should not put the knight to death, for it was a Sunday and the feast day of Mary Magdalene, and no execution could be carried out on such a holy day. The force of Baldwin's argument for mercy towards the knight may have been supported by the popular reputation of the Magdalene: as the greatest of sinners, but one who had nonetheless been granted forgiveness by Christ, she was frequently invoked in sermons and discussions of penance as an avatar for human sin, human repentance and divine mercy.[26] Whatever the details of Baldwin's actual argument (which are not provided in Howden's account), Baldwin managed to sway the royal officials, delaying the execution:

[24] Ibid, 5, p. 51.
[25] Roger of Howden, *Chronica*, ed. W. Stubbs, RS 51 (4 vols., London 1868-71), i, pp. 314-6.
[26] Cf. the tract attributed to Stephen Langton (or his brother Simon), 'De poenitentia sub persona Magdalenae', Corpus Christi College Cambridge, Parker Library MS 226; see also N. Bériou, 'La Madeleine dans les sermons parisiens du XIIIe siècle', *Mélanges de L'école française de Rome, moyen âge* 104 (1992), pp. 269-340.

ultimately the knight's innocence was proven and the sentence of death retracted. What is most striking about this incident, however, is Henry II's apparent response. According to Howden, when news reached Henry of the bishop's intervention in the execution, the king did not rage at an affront to his justice, but determined to promote Baldwin to the see of Canterbury. It seems that Baldwin performed his role precisely according to the rules of Augustinian political theory, embodying the mercy that was a necessary dictate of his office. Likewise, Henry II understood the unspoken, customary relationship between the punitive royal arm and merciful ecclesiastical intercessors: to sue for mercy was one of the primary political roles of his bishops.

These *exempla* seem to support arguments for a contrast in contemporary understanding between the purposes of royal and ecclesiastical judgement and punishment, indeed, they lend weight to a specifically 'Augustinian' perspective on how the two should relate to one another. In a post-lapsarian world, in which harmonious political organisation is nearly impossible, royal power must aim at preserving the peace and protecting the righteous.[27] Princes exist to punish malefactors. The Church, by contrast, occupies itself with the more lofty aim of bringing humankind back into a proper relationship with God. Royal power is punitive, church power merciful. The king puts the wicked to the sword, the Church attempts to save souls. The two institutions take different approaches but perform complementary roles in the prosecution of justice. This complementary interpretation, however, has the potential to become profoundly misleading. Buc's polarisation of Church and crown, *misericordia* and *iustitia*, may provide an orderly intellectual resolution, but is not entirely convincing when compared to the comments of twelfth-century authors on judicial duties. The first problem is that Buc's concentration on the origins and legitimacy of royal *potestas* results in a focus on

[27] For Augustine's discussion of this question see Robert Markus, *Saeculum: History and Society in the Thought of St. Augustine* (Cambridge, 1970), esp. pp. 133-53.

royal justice alone. As such, he offers a detailed account of how *misericordia* might or might not fit within the prince's role, but he does not cover the same ground for sacerdotal rulers. Whilst Buc does concede that the difference between king and priest lies in the proportion of mercy to justice found in their judgements, he fails to consider whether those proportions could pose as much of a problem in the Church as they might in secular courtrooms.[28] The difficulties which a priest might encounter in determining an appropriate penance or the many possible strategies (some mild, some more severe) which an English bishop might adopt when dealing with a group of heretics, go some way to illustrating this problem of proportions.[29] Judges in *both* common *and* canon law were faced with a choice of possible punishments, of differing degrees of mercy and strict justice.

The second problem is to determine how well Buc's theory accords with English, rather than French, practice. His complementary model was forged in the process of compartmentalising various twelfth- and thirteenth-century theologians into three categories, representing either 'theocratic', 'monarchical' or 'egalitarian' ways of conceiving of the relationship between royal and ecclesiastical *potestas.* Buc's approach thus sets up a dynamic in which those two powers must be in competition for primacy, as theorists of royal power seek to justify its dominion. Buc begins from a point in which the relationship between *regnum* and *sacerdotium* has broken down. Whilst this may be evident in certain biblical passages on which Buc's chosen glossators focussed (not least the Book of Judges, in which kingship is instituted as punishment for the failures of the Israelite priesthood), this position does not represent the daily reality of relations between king and crown in Anglo-Norman and Angevin England. In practice we might very well expect a royal judge to have been 'counselled' by the ecclesiastical power in some way –

[28] Buc, *L'Ambiguïté*, pp. 176-7.
[29] Below, pp. 202-25.

that is, for royal power to take on the ideas of mercy to the extent that one can no longer usefully use the terms *iustitia* and *misericordia* to describe the differences between the two powers. Such 'counsel' could take a number of forms: royal judges might be recruited from amongst the ranks of the Church (as Henry II famously did);[30] it might be found in the correspondence between royal justices and members of the Church, in s*peculum principis* treatises, in the advice provided in a letter, or merciful principles might simply be imbibed through study, exposure to scripture and preaching. Thus, whilst the idea of a contrast between royal severity and ecclesiastical leniency should not be discarded altogether, it does at least need to be redrawn, and the contrast softened. Ecclesiastical mercy was not ordinarily expected to act as a check on over-zealous royal justices. In the same way, whilst it is possible to perceive in the Becket conflict certain elements of a struggle between royal and ecclesiastical jurisdictions, this should not be allowed to set the tone for the entirety of the twelfth century. It is, for example, no longer uncritically accepted that medieval conflicts over the right to sanctuary represent a clash between ecclesiastical rights and the secular power's desire to bring all of England under a single legal system, excising the ancient exceptions and anomalies within the common law, of which sanctuary was one.[31] In the same way, our understanding of the role of judicial power in twelfth-century England requires reassessment. For a better understanding of how judicial power was exercised, we must look beyond the high drama of the Becket crisis, and consider the more mundane world of moral theology.

Royal Mercy

[30] Ralph Diceto, *Ymagines Historiarium*, ii, pp. 434-6. Diceto notes that Henry was so at a loss for judges who would be *amatores iusticiae* that he recruited men from the Church; a practice later condemned by Grosseteste, Ep. 28, pp. 108-13; Ep. 72, pp. 201-4.

[31] See G. Rosser, 'Sanctuary and Social Negotiation', in J. Blair and B. Golding (eds.), *The Cloister and the World: Essays in Medieval History in Honour of Barbara Harvey* (Oxford, 1996), pp. 57-79; William Chester Jordan, 'A Fresh Look at Medieval Sanctuary', in Ruth Mazzo Karras, Joel Kaye and E. Ann Matter (eds.), *Law and the Illicit in Medieval Europe* (Philadelphia, PA, 2008), pp. 17-32.

Twelfth- and thirteenth-century moral theology argues that the judicial responsibilities of princes and bishops were founded on a common moral basis. Theologians sketch an image of judicial power which carefully and deliberately blurs the distinction between common and canon-law courts, addressing all judges as unified by a shared commitment to mercy. This is the case in the presentation of judicial power in a sermon preached by Thomas of Chobham, a Paris-trained theologian and sub-dean of Salisbury Cathedral.[32] In this particular sermon, preached at the abbey of Saint-Germain-des-Prés in the 1220s, Thomas addresses what he describes as 'the difficult dispute between justice and mercy (*controversie inter iustitiam et misericordiam*)'.[33] The sermon considers how the contradictory passages of the Bible treating justice and mercy are to be translated into practical instructions for the judge. Thomas's conclusion is that mercy is always to be preferred to strict justice. In fact, the entire corpus of Thomas's sermons overflows with judicial guidance.[34] Elsewhere, for example, Thomas considers how the judge who presides over a doubtful case should proceed. When the motive of the accused is unclear, Thomas notes, the judge is advised always to interpret 'for the better', that is, to attribute to them the best possible motive to the accused, and to hand down the least punitive sentence.[35] Relatively little is known about the context in which these sermons were preached. Thomas had served Bishop Herbert le Poore in Salisbury as an expert on penitential discipline until the death of the bishop in 1217; some time after this Thomas returned to Paris for a second period of study. It seems that many of these sermons, some of which are known to have been preached at the churches of Saint-Germain-des-Prés,

[32] On the sermons see Franco Morenzoni, *Des écoles aux paroisses: Thomas de Chobham et la promotion de la prédication au début du XIIIe siècle* (Paris, 1995), and G.R. Evans, 'Thomas of Chobham on Preaching and Exegesis', *RTAM* 52 (1985), pp. 159-70.
[33] Thomas of Chobham, *Sermo* 11, p. 112.
[34] Morenzoni counts that in Thomas's 25 extant sermons, the term *iustitia* occurs 32 times (along with *iustus*-39; *iudicare*-36; *iudicium*-66). Justice is by far the most frequently discussed cardinal virtue in the sermons. Likewise, *misericordia* occurs 44 times, more often than *fortitudo*, *prudentia* or *temperantia*. *Des écoles aux paroisses*, p. 261.
[35] Thomas of Chobham, *Sermo* 2, p. 23.

Saint-Jacques and Saint-Victor, date from that second period in Paris, between 1222 and 1228. It is possible, however, that others were adapted from earlier sermons Thomas had given in Salisbury, and thus touch upon themes on which he had previously preached, or would subsequently preach on, in England.

One potential challenge in utilising Thomas of Chobham's sermons (which, in any case, represent an incomplete body of work, and are not ordered by any organising principle) is that most seem to have been preached to educated clerics, some to 'university' audiences, and others, as the rubrics suggest, to monastic *claustrales*. Unlike in Thomas's earlier work, the *Summa confessorum*, the education and edification of the laity or the ignorant priest was not a priority in these sermons.[36] Yet although not written for a general audience, the sermon texts do still illuminate Thomas's understanding of *iustitia* and *misericordia* as the two ideas operated in the secular world. In fact, what is of interest here is not the audience for these sermons (for Thomas is not particularly concerned to exhort them to justice in judgement), but the content, which provides a sophisticated reflection on the relationship between secular and ecclesiastical processes of judgement. Strikingly, Thomas does not invoke any species of mercy particular to those in clerical office. Rather he argues that the particular mercy required in judges derives from the more general mercy which *all* Christians are obliged to show when they restrain themselves from doing harm. This is the duty of all Christians called to judge, Thomas argues, and one which we are bound to through baptism. The oil with which Christian children are anointed with at baptism symbolises the oil of mercy.[37] As the name 'Christiani' derives from 'Christus', meaning chrism, all Christians are known as 'anointed ones', that is to say, 'anointed with mercy'. Thomas took this etymological

[36] Above, pp. 164-6, p. 174.
[37] Thomas of Chobham, *Sermo* 11, p. 117.

connection between Christianity, chrism and mercy from Augustine.[38] For the Bishop of Hippo, however, writing eight centuries earlier, this idea would have held significantly different implications. Baptism was not then routine sacrament given to all children – as it had become by the twelfth century – but an act of dedication of one's life more usually undertaken by committed adult Christians.[39] For Thomas of Chobham, however, that all were baptised meant that all were obliged to be merciful.

Thomas of Chobham is rare – if not unique – in drawing out the relationship between mercy, unction and baptism so explicitly and to such a didactic end. Other twelfth-century authors, however, do support the connection between *oleum* (oil) and *misericordia*, the commonest explanatory gloss being that mercy is exalted above justice just as, in nature, oil floats on the surface of water.[40] The description of the 'oil of mercy' also builds on a patristic commonplace: for Gregory the Great, the exemplary case of mercy in scripture was found in the actions of the Samaritan towards the wounded man he discovered on the roadside (Luke x.34). Thus the application of oil to heal (*sanare*) the wounds of the injured man represents the application of mercy to those spiritually in need of it. Indeed, the entire incident prefigures the mercy of Christ (symbolised by the Samaritan) curing the sinful through his offer of mercy.[41] The relationship between the oil of unction and mercy is quite conventional in allegorical commentaries on scripture; it seems that Thomas of Chobham simply developed this connection a little further, turning the allegory to the moral end best fitted for his preaching. Other authors, however, do tentatively approach the same idea: Stephen Langton draws out the link between baptism and the duty to be merciful (although without directly invoking the idea of unction) in his

[38] Augustine, *In Johannis Evangelium*, 15.27, p. 162.
[39] See Peter Cramer, *Baptism and Change in the Early Middle Ages c. 200-c. 1150* (Cambridge, 1993), pp. 117-24; 131-6.
[40] *VA*, 1.64, p. 429; Stephen Langton on Leviticus ii.1, BnF MS Latin 384, ff.4v-5r, 'per oleum elemosina designatur, sicut enim oleum supernatat, ita opera misercordie semper supernatatur'.
[41] Gregory, *Regula pastoralis*, ed. F. Rommel (2 vols., Paris, 1992), 2.6, i, p. 216.

commentary on Leviticus.[42] The association between unction, mercy and baptism is also hinted at in another (anonymous) thirteenth-century sermon, which describes the *unctio* of chrism as *oleo et balsamo*.[43] William of Auvergne provided a slightly different interpretation when discussing the virtue of clemency, but one which also stressed the role of anointing and the parallels between priestly and royal duties: 'both authorities [i.e. secular and ecclesiastical] are conferred through anointing, in order that, through sacred unction, kings and priests recognise that they preside over their subjects not as executioners, but as tender guardians and governors'.[44]

Thomas of Chobham further emphasises the duty of mercy for secular magnates in another sermon, preached in Paris at the recently-founded Dominican convent of St. Jacques.[45] His topic is the symbolism of kingship, represented by three items: the crown, the sceptre and act of unction, and Thomas glosses the symbolic meaning of each one. The crown of gold denotes the royal duty to reward the good and distribute largesse. The other two, the sceptre and the act of unction, symbolise two complementary aspects of kingship which need to be kept in balance – mercy and justice, lenient and punitive principles.[46] Speaking of unction, Thomas repeats the admonition of his earlier sermon: *misericordia* is a duty of all Christians. When he comes to the sceptre, he glosses this item as the sword with which kings punish the wicked. Even here, however, Thomas is extremely reticent to license unchecked royal retribution against malefactors, and royal judges are counselled to use discretion (*discretio*). Christ's command to his followers 'put your sword back in its place' (Matthew xxvi.52), applies to kings when they act as judges: it instructs them to pity, rather than condemn, the accused man. In Thomas of

[42] BnF MS Latin 384, f.15r-15v, glossing Leviticus vi.2, 'in baptismo commmendavit nobis omnes virtutes misericordiam et iusticiam et omnis alias et ideo misericordes esse debemus deinde estote misericordes sicut et pater vester misericorde est'.
[43] BnF MS Latin 338, f.58v, 'De chrismate et confirmatione dicendum est'.
[44] William of Auvergne, *De virtutibus*, 12, i, p. 163.
[45] Thomas of Chobham, *Sermo* 20, pp. 210-7; preached between 1222 and 1228.
[46] Ibid, *Sermo* 20, pp. 212-7.

Chobham's view, therefore, kings must take it upon themselves to pass lenient, merciful sentences, not wait for episcopal intervention. Any 'complementary' model of punitive royal power mitigated by merciful ecclesiastical influence would, on this reckoning, fail to respect an obligation incumbent upon *all* Christian judges. Likewise, the judge in the episcopal court – who is, in any case, not permitted to pass a capital sentence – must address the same problem in weighing punishment and leniency, in judging whether to adhere to or diverge from the law. The dual duties of mercy and punishment are symbolised in the royal office by sword and unction, and in the priestly office by the *virga et baculum*, the rod and the staff. One punishes and chastises offenders, the other comforts the wretched.

In order to understand the significance of Thomas' discussion of the iconography of rulership, it is necessary to appreciate just how often this image of *virga et baculum* was employed in *pastoralia*. The image is drawn from scripture, where, for example, the Psalmist describes God's rod and staff as his comfort.[47] Across twelfth-century Europe the image is a commonplace used to define the pastoral role of priests. It is set out, for example, in the writings of the Benedictine Honorius of Autun, and was later explained at great length in the *Rationale divinorum officiorum* of William Durand (before 1286).[48] It is used by Adam of Eynsham in his *vita* of Hugh of Lincoln (c. 1212) to demonstrate the same principle of the necessary balance in ecclesiastical judgement between chastisement and mercy.[49] Peter the Chanter, whose *Verbum abbreviatum* provides a guide to the most basic – and important – principles of pastoral theology, offers the same point in different form, advising the priest to punish with the rod of the father (*verbera patris*) and comfort

[47] Psalm xxiii.4; cf. Isaiah x.5.
[48] Honorius of Autun, *De gemma animae*, 1.218, PL.172.609D-10A; William Durand, *Rationale divinorum officiorum*, ed. A. Davril and T.M. Thibodeau, CCCM 140 (3 vols., Turnholt, 1995), 3.1-7, i, p. 214-7.
[49] Adam of Eynsham, *Magna vita Sancti Hugonis*, 5.3, ii, p. 85; cf. Gerald of Wales, *Itinerarium Kambriae*, ed. J.F. Dimock, RS 21 (London, 1868), 2.4, p. 121.

with the nourishing breasts of the mother (*ubera matris*).[50] Thomas of Chobham's pronouncement is repeated to the same didactic effect in the *Liber poenitentialis* of Robert of Flamborough, his near contemporary. The *baculus pastoralis*, he writes, symbolises the rectitude of rule; the rod is the instrument through which the priest is sparing to the humble and subdues the proud (*parcere subiectis et debellare superbos*).[51] Robert also recalls a few lines of poetry attributed to Stephen Langton on this very subject of the balance of severity and mercy, a recipe for pastoral effectiveness ('rally the wanderers, support the infirm, rouse the lazy: this is the office of the pastor, this is symbolised in the rod').[52]

The *virga et baculum* constitutes a well-worn *topos*, an iconographical scheme so familiar that it has been passed over without comment by medieval historians. Indeed, it sometimes seems a rather meaningless pastoral platitude. Yet it was an image so often repeated because it was thought to be foundational to the judicial-pastoral conception of ecclesiastical office. It embodied the essential truth – a truth which was also a profound practical problem – that the ecclesiastical judge has a duty to chastise as much as pardon. This presents a rather less dramatic contrast than that of an invariably merciful priest challenging the unyielding and severe king. It is not easy, given the abundance of iconographical evidence, to preserve Buc's argument of strict division: that punishment belongs to the king, mercy to the priest. The primary problem for the Church is not to ensure its officers intervene in secular courts because of the general lack of mercy in other men – it is finding a workable pastoral compromise within its *own* courts of judgement.

Thomas of Chobham's sermons provide the most detailed explanation of the common foundation of royal and ecclesiastical judgement: kings and bishops, when

[50] *VA*, 2.30, pp. 715-22.
[51] Robert of Flamborough, *Liber poenitentialis*, ed. J.J.F. Firth (Toronto, 1971), 3, p. 115.
[52] Ibid, 3, p. 115.

sitting as judges, ought to perform the same roles in the same way. The point is also made explicit by Robert Grossesteste, in a *dictum* which compares the roles of kings and priests. Grosseteste explains:

> The third duty (*officium*) of a king is to amend the laws: rewarding the good and punishing the wicked according to the laws. This is also done by the prelates of the Church when they reward the good according to the statutes of the fathers and canonical sanctions, and coerce (*cohercent*) the audacity of the wicked with just penalties.[53]

Naturally, there are qualifications and caveats to be made. To assert that ecclesiastical and royal judges faced the same problem is not to say that theologians equated the setting of penance to the act of giving judgement in a secular court. These were clearly different actions, with different intentions, as Nicole Bériou has demonstrated.[54] The point is rather that the moral duties for the executors of canon and common law looked rather similar, even if those laws inflicted discipline quite differently. All judges inhabited the same moral universe.

Ecclesiastical Mercy and Other Strategies

The roles of ecclesiastical and royal judges were not and should not be perceived as fundamentally different during this period. Instead of a model that polarises royal severity and ecclesiastical leniency, judicial office in both religious and secular *fora* ought to be understood as defined by choice: the choice to wield either the *virga* or the *baculum*, as the particulars of the case demanded. Even if the tradition and transmission of the two laws (common and canon) look very different, the underlying principles are the same. Of course the bishop, like Daniel in the case of Susannah, had an obligation to intervene in secular justice when he witnessed a judicial abuse, but this was the duty of

[53] Grosseteste, *Dictum* 51, f.38r-v; cf. 37r.
[54] Bériou, 'La confession', pp. 278-9.

every diligent minister, and, indeed, all virtuous Christians.[55] The greatest problem for church judges in the twelfth century, however, was not the question of how to limit the excesses of secular punishment, but was rather an internal, ecclesiastical, argument about how mercy and justice should be realised in sentencing in church courts.

The role of England in the development of canon law and the decretal tradition has been well discussed.[56] There is also a growing body of scholarship which has considered the place of mercy within in the *canones* and decretals.[57] Bruce Brasington, for example, has discussed at length the intellectual and textual problems faced by canonists who attempted to order *canones* which offered profoundly differing opinions on the severity of punishments to be imposed for identical offences.[58] What is lacking in this historiography, however, is a discussion of how that canonical conflict of mercy and justice played out in practice. That is to say, whilst the importance of the Augustinian maxim 'have charity and do what you will' has been acknowledged,[59] no-one has asked how such a fundamentally ambiguous principle was to be employed in practice, in the diocese or parish. And yet what becomes immediately apparent is the sheer breadth of judicial strategies concerning punishment which were available within, and suggested by, canon law. Canonical collections (even the authoritative *Decretum*) did not give firm or fool-proof guidance on this range of penalties: instead, application of punishment was left to the discretion of the ecclesiastical judge. In this sense, the same point as regards the secular judge holds true when thinking about the application of punishments under canon law: despite the limitations imposed by procedural requirements, there remained ample

[55] Thomas of Chobham, *SC*, 6.4.11a, p. 307.
[56] See Kutter and Rathbone, 'Anglo-Norman Canonists'; M.G. Cheney, 'Pope Alexander III and Roger, Bishop of Worcester, 1164-79: The Exchange of Ideas', in Stephan Kuttner (ed.), *Proceedings of the Fourth International Congress of Medieval Canon Law* (Rome, 1976), pp. 207-28; C. Duggan, 'Primitive Decretal Collections in the British Museum', in idem, *Canon Law in Medieval England: The Becket Dispute and Decretal Collections* (London, 1982), IV, pp. 132-95.
[57] Above, pp. 47-50.
[58] Brasington, 'Lessons of Love', pp. 129-47.
[59] Above, p. 38.

space for the exercise of judicial discretion, in which an individual was required to choose between the distinct judicial strategies of justice and mercy. There was space for the familiar ideal of ecclesiastical leniency; but there was room also for severity in church punishment. This of course, was the great advantage of the flexible iconography of the *virga et baculum.*

The seemingly intuitive picture of an unchanging ecclesiastical preference for leniency can be unpicked by setting dramatic set-piece displays of justice (the gallows-side tales of ecclesiastical intervention in pernicious and corrupt secular justice)[60] in a broader context, a context in which the decision to show mercy was simply one amongst a variety of judicial strategies, and one amongst a range of attitudes within the Church towards the chastisement of offenders.[61] One demonstration of this variety of penalties can be found in the analogy frequently employed by theologians to describe the setting of ecclesiastical punishments. This was the comparison between the sentencing judge as the physician (*medicus*), who determined the treatment of an illness according to the severity of a disease. For a mild sickness, that is, a minor offence, only a mild reprimand would be required. In the case of a more serious illness, the doctor might have to consider amputation of the infected parts of the body, just as the judge faced with great crimes might need to impose severe punishment for the sake of the public good. This image – the judge as surgeon – was an ancient *topos*, first used by the late-antique theologian John Cassian, who had described the priest as a physician prescribing a penance which would restore a sinner to spiritual health.[62] By the eleventh century the term *medicus* had, in canonical literature, been extended to describe not only the role of priest in the

[60] See Valerie I.J. Flint, 'The Saint and the Operations of the Law: Reflections upon the Miracles of St. Thomas Cantilupe', in Richard Gameson and Henrietta Leyser (eds.), *Belief and Culture in the Middle Ages: Essays Presented to Henry Mayr-Harting* (Oxford, 2001), pp. 342-57.
[61] See T. Shogimen, 'From Disobedience to Toleration: William of Ockham and the Medieval Discourse on Fraternal Correction', *Journal of Ecclesiastical History* 52 (2001), pp. 599-622.
[62] J.T. McNeill, 'Medicine for Sin as Prescribed in the Penitentials', *Church History* 1 (1932), pp. 14-26.

confessional forum, but also the bishop sitting as judge.[63] The comparison could be used to argue for either severity or mercy: the physician cured sometimes with harsh, sometimes with gentle remedies, according to the degree of the sickness.

This division between mercy and justice is sometimes difficult to discern within the decretals themselves, for, as 'working documents' of developing canon law, they contain, at most, only implicit discussions, and very rarely employ the terminology of *iustitia* and *misericordia*.[64] This is partly a function of form: decretals, or the canonical commentaries thereon, typically provide some brief instruction on procedure but limited explanation of the rationale behind judicial decisions. More practical guidance about how mercy and justice were to be realised in ecclesiastical *fora* can be found in penitential writings, for there the appeal to concepts of justice and mercy as principles of judgement is most explicit.

It is a recognised feature of twelfth-century penitential writing that it reflects an increasing emphasis on judicial discretion, the product of a gradual shift away from a system of penance based on prescribed tariffs for each sin, towards a system which emphasised the role of priestly judgement in determining penance.[65] A renewed focus on the ethics of intention had complicated *all* acts of judgment, introducing the argument that the severity of a crime should be linked to the circumstances of its commission (and therefore creating increased space for mitigation).[66] Consideration of the circumstances of

[63] e.g. Ivo of Chartres, *Prologue*, p. 117. The nineteenth book of Burchard's *Decretum* was entitled 'corrector, seu medicus': *Das Dekret des Bischofs Burchard von Worms*, ed. Hartmut Hoffmann (Munich, 1991); cf. *Policraticus*, 4.8, 1:529.
[64] Cf. Charles Duggan, 'Equity and Compassion in Papal Marriage Decretals to England', in idem, *Decretals and the Creation of "New Law" in the Twelfth Century: Judges, Judgements, Equity and Law* (Aldershot, 1998), IX, pp. 59-87.
[65] On penitential tariffs, see Arnold Angenendt, Thomas Braucks, Rolf Busch and Hubertus Lutterbach, 'Counting Piety in the Early and High Middle Ages', in Bernhard Jussen (ed.) and Pamela Selywn (trans.), *Ordering Medieval Society: Perspectives on Intellectual and Practical Modes of Shaping Social Relations* (Philadelphia, PA, 2001), pp. 15-54.
[66] Above, p. 13. See also P. Michaud-Quantin, 'A propos de premières *Summae confessorum*: théologie et droit canonique, *RTAM* 26 (1959), pp. 264-306; Joseph Goering, 'The Internal Forum and the Literature of Penance', in Wilfried Hartmann and Kenneth Pennington (eds.), *The History of Medieval Canon Law in the*

the offence created the possibility of mitigation of punishment. Moreover, in penitential literature, the critical role of judicial discretion was also increased by an emphasis on contrition – not entirely new, but certainly renewed in prominence in the twelfth century.[67] The purpose of setting a penance was to ensure repentance, to combat an individual's *voluntas peccandi*. Thus the priest was to judge the quality of the offender and offence, and adapt the penance accordingly. Penitential tariffs were all too blunt for this delicate work. Whilst this development should not be oversimplified as a shift from strictly prescribed penance to a system given over entirely to the caprice of the priest,[68] twelfth-century changes did, nevertheless, concentrate attention on the priest's ability to weigh each sin and penance appropriately: 'by the beginning of the thirteenth century he [the confessor] could no longer be considered the administrator of a hard and fast penal code. He had become a judge in the full sense with the obligation to base his decisions on the principles of newborn moral theology'.[69]

The section of the *Decretum* which deals with penance – a section which draws heavily on the late eleventh-century treatise *De vera et falsa poenitentia*, a work then mistakenly attributed to Augustine – enjoins the judge to consider seven factors which had a bearing on the severity of the offence: *causa*, *persona*, *loco*, *tempore*, *qualitate*, *quantitate* and *eventu*, an admission of the almost endless variety and circumstances of sin, and the intricate calculations needed to reckon a penance.[70] No less significantly, punishment was also moderated according to whether the crime was committed publicly

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Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX (Washington, DC, 2008), pp. 379-428.

[67] On the growth of 'contritionism' see the important qualifications made by Karen Theresa Wagner, '*De vera et falsa pentitentia*: An Edition and Study' (University of Toronto Ph.D. thesis, 1995), pp. 111-29.

[68] Ibid, pp. 156-8.

[69] Broomfield, *SC*, p. xv; cf. Wagner, '*De vera et falsa penitentia*', p. 175, 189, for the possible significance of the choice between 'iudex' and 'medicus' to describe the confessor.

[70] *Decretum*, *De poenitentia*, D.III, c.19, 1:1161-2, circumstances drawn from Cicero, *De inventione*, 2.151, pp. 318-21.

or privately, and the ensuing possibility for scandal.[71] How then was a bishop, priest or confessor to calibrate an individual penance whilst still remaining within the framework established by the canons? In his guidebook for confessors, *Summa confessorum* (c. 1215), Thomas of Chobham dedicates a chapter to explaining that certain penitential punishments may be moderated whilst others are immutable.[72] Thomas pays special attention to the contrast between 'ancient' canons and modern approaches, arguing that 'modern man' (*homo nostri temporis*) cannot be expected to endure the punishments of fasting, vigils and exile meted out in ancient times. Those canons which most severely test the body are to be mitigated according to the will and prudential discretion of the priest. Explaining this, Thomas notes that the key criterion here must be that of pastoral efficacy: the severity of the canons, if it cannot be endured, will drive sinners away from repentance.

Thomas of Chobham's advice to confessors gives voice to the need to strike a compromise between adherence to canonical ruling and appropriate pastoral practice. He serves to make the more general point that it was widely considered necessary that moral theology should sometimes 'adjust' the teachings of the canons. Indeed, some historians have gone as far as to assert that one can recognise a specifically 'English' contribution to penitential literature, characterised by a desire to adapt and modify penitential punishments to increase their pastoral efficacy. This desire, it has been claimed, derived from a characteristically English interest in practical matters.[73] Certainly uncertainty regarding the measure of severity or mercy in penance had enormous and widespread implications. Setting penance – the ability to judge sin and impose punishment – was

[71] On the public-private distinction and its reception in canon law, see R.M. Fraher, 'The Theoretical Justification for the New Criminal Law of the High Middle Ages: "Rei publicae interest, ne crimina remaneant impunita"', *University of Illinois Law Review* (1984), pp. 577-95.
[72] *SC*, 7.1.1a, p. 325.
[73] Broomfield, *SC*, p. xx; cf. R.W. Southern, 'The Place of England in the Twelfth-Century Renaissance', in idem, *Medieval Humanism and Other Studies* (Oxford, 1970), pp. 158-80; Cheney, *Roger of Worcester*, pp. 193-212.

amongst the most basic of pastoral duties, and the need to instruct priests in the subtleties and practicalities of penance in turn, therefore, gave rise to the genre of *summa de poenitentia* (or *summa confessorum*) – effectively guides to confessional judgement. These were typically aimed at clerics who had attended cathedral schools or received monastic education in theology, and were expected, once their studies were completed, to take up church positions with pastoral functions.[74] This was a task which became more demanding as the canon law tradition became increasingly complex. Thus Odo of Cheriton, writing his *summa* on penitence (after 1230), and thinking of the instruction of the 'simple' priest in penitential practice, could write: 'the forest of laws is now so involved and so contradictory that hardly anyone can find the way. So many laws have now been made by the Pope and the cardinals, by prelates and abbots, that we can hardly live without giving offence'.[75]

Typically, the historiography of penitential and pastoral literature and *summae confessorum* has focussed on the thirteenth century.[76] Across Europe, the Fourth Lateran Council provided a stimulus to such activity, making provision for the proper instruction of the priesthood, so that they might in turn minister to their flock correctly.[77] In England, Stephen Langton's Statutes of Canterbury (between July 1213 and July 1214) mark a watershed moment, specifying the need for a well-instructed priest able to teach his flock.[78] The priest must at least be able to administer the sacraments and perform the liturgy correctly.[79] The requirement for the provision of free clerical instruction was a

[74] See the discussion in Goering and Mantello's introduction to Grosseteste's *Templum Dei*, pp. 6-7.
[75] A.C. Friend, 'The Life and Unprinted Works of Master Odo of Cheriton' (University of Oxford D.Phil. thesis, 1925), p. 150.
[76] Morenzoni, *Des écoles aux paroisses*, pp. 135-187.
[77] Canon 11, in H.J. Schroeder, *Disciplinary Decrees of the General Councils: Text, Translation and Commentary* (St. Louis, 1937), pp. 566-7. See also Canon 18 of the Third Lateran Council, ibid, p. 556.
[78] See Baldwin, *Masters, Princes and Merchants*, i, pp. 25-31; cf. C.R. Cheney, 'Statute-Making in the English Church in the Thirteenth Century', in idem, *Medieval Texts and Studies* (Oxford, 1973), pp. 138-57.
[79] *Councils and Synods with Other Documents relating to the English Church. II: A.D. 1205-1313*, ed F.M. Powicke and C.R. Cheney (Oxford, 1964), pp. 33-4 [51].

premise then repeated in Richard Poore's Statutes of Salisbury (between 1217 and 1219),[80] and the diocesan statutes of Robert Grosseteste (c. 1239).[81] The ability to administer confession and penance correctly was therefore clearly central to the instruction of the clergy. But this was not necessarily or exclusively prompted by the external stimulus and stipulations of the Fourth Lateran Council: instead, it was a concern which arose from the practical problems of setting penance, or, more accurately, in understanding how to apply the (newly and increasingly systematised) bodies of twelfth-century canon law in a penitential forum, and the role of the priest as judge. That judge was caught between sometimes ambiguous laws and the problems of his own arbitrary judgement. Those pastoral concerns are apparent long before 1215.

An excellent twelfth-century example of an attempt to provide exactly such practical guidance is the *Penitential* of Bartholomew, Bishop of Exeter. Bartholomew was fêted by Pope Alexander III (1159-81) as one of the leading lights of the English episcopacy, praised for his probity, knowledge of the canons and his extensive service as a papal judge-delegate.[82] What is noteworthy about his penitential, however, a work which was probably composed whilst Bartholomew was still an archdeacon, or in the early years of his episcopate (between approximately 1155 and 1165),[83] is that it concentrates on the role of the priest as judge in a different court – the court of confession and penance. It should be stressed that Bartholomew's penitential was not a work at the cutting edge of scholarship: he prefers to employ the *Decretum* (and also the older collections of Burchard of Worms and Ivo of Chartres) rather than newer canonical

[80] *Councils and Synods II*, p. 94 [105]. Thomas of Chobham may have had a hand in the composition of the Salisbury statutes: see C.R. Cheney, 'Aspects de la legislation diocésaine en Angleterre au XIII^{e} siècle', in *Études d'histoire du droit canonique dédiées à Gabriel le Bras* (2 vols., Paris, 1965), i, pp. 41-54.
[81] *Councils and Synods II*, pp. 267-78 [7].
[82] Gerald of Wales, *Vita sancti Remigii*, 28, pp. 57-60; see A. Morey, *Bartholomew of Exeter, Bishop and Canonist: A Study in the Twelfth Century* (Cambridge, 1937), pp. 44-78.
[83] Morey, *Bartholomew of Exeter*, p. 108.

commentaries.[84] The role of instructing the priest in confessional judgement was a task which was deliberately removed from cutting-edge scholastic developments. It was an exercise in providing an appropriate and adequate level of guidance to clergy who had *not* studied in Paris or Bologna. As such, it collected the best and most instructive passages from older (but still entirely respectable) traditions: Gratian's *Decretum*, the authoritative *Sentences* of Peter Lombard and the writings of the Church Fathers. The popularity of the *Penitential* suggests its utility and its success.[85]

Bartholomew's *Penitential*, 'basic' as it may be as a guide for clergy, expresses quite clearly the challenges of setting punishment. A priest must be aware of the various circumstances in which a sin has been committed: was that sin trivial (*levia*) or mortal (*mortalia*); committed publicly (*publicum*) or secretly (*occultum*); done deliberately (*scienter*) or accidentally (*ignoranter*); performed willingly (*sponte*) or unwillingly (*non sponte*)? Equally important is that the judge remains aware of his own biases in setting penance, and acts to avoid them.[86] This can only be achieved through what Bartholomew describes as the will of a prudent pastor (*per prudentis pastoris arbitrium*).[87] The text of the *Penitential* is accordingly full of concern for how a penance ought to be calculated and set. Bartholomew dedicates a whole chapter (quoting from the Greek father John Chrystostom via the *Decretum*) to explaining the importance of *misericordia* in the setting of penitential punishments:

> The individual on whom you impose an oppressive burden of penance, will either reject the penance, or undertaking that which they are not able to do, will fall into a greater sin. Hence, if we err in the degree of penance we impose, surely it is better to give a ruling motivated by mercy (*misericordia*), rather than cruelty? For

[84] Ibid, pp. 173-4.
[85] Morey, *Bartholomew of Exeter*, notes 18 extant copies of the *Penitential*, a testament to its widespread popularity, p. 163.
[86] *Penitential* (published in Morey, *Bartholomew of Exeter*), 26, p. 195 (attributed to Augustine, quoted in the *Decretum, De poenitentia*, q.5, c.1, 1:1238.
[87] *Penitential*, 37, p. 203; cf. 26, p. 195, where he also refers to the measuring of the canons 'in arbitrio sacerdotis intelligentis' (quoting *Decretum, De poenitentia*, q.3, c.86, 1:1183).

> where a Lord is bountiful, his steward ought not to be stingy. If God is mild (*benignus*), will he wish his priest to appear bitter (*austerus*)?[88]

Elsewhere Bartholomew offered a similar admonition on the need to mitigate penalties, counselling that excessive austerity is to be avoided.[89] Bartholomew summarises the guidance of the canons for his reader by again invoking that familiar analogy of the priest as *sapiens medicus*.[90]

Bartholomew of Exeter was not alone in the late twelfth century in pondering the mechanics of setting penance. Whilst no other contemporary English bishop has left a penitential, there are indications that there was widespread concern for the practical implications of canonical principles across the dioceses of England. For example, Roger, Bishop of Worcester, employed a man known as Senatus as his *archpresbiterum* in the 1170s, whose role has been described as that of 'master of penances'.[91] Like Bartholomew of Exeter, Roger of Worcester is known for his reputation as a papal judge-delegate,[92] but here we find him setting questions to a theologian who specialised in resolving penitential and pastoral problems. Roger's letters to Senatus seem to have been particularly concerned with questions of absolution and indulgences and Senatus's replies set down some familiar principles: the rigour of the canons must be carefully modified, lest the penitent become arrogant through easy penances or come to despair under the burden of excessive punishment.[93] But Senatus also poses (and answers) more awkward practical questions: if the prescribed penances of the canons may be modified through softening, may they also be substituted with works – for example, by asking the rich to

[88] *Penitential*, 34, p. 201; from *Decretum*, C.XXVI, c.12, q.7, 1:1044.
[89] Morey, *Bartholomew of Exeter*, p. 173. Cf. *Penitential*, 11, p. 182.
[90] *Penitential*, 36, p. 202; cf. 26, p. 195; above, pp. 204-5.
[91] P. Delhaye, 'Deux textes de Senatus de Worcester sur la pénitence', *RTAM* 19 (1952), pp. 203-24; for Senatus see Cheney, *Roger of Worcester*, pp. 58-67, and N. Karn, 'Monastic Letter-Writers in Twelfth-Century England' (University of Oxford D.Phil. thesis, 2002), appendix 2.
[92] Gerald of Wales, *Vita sancti Remigii*, 28, pp. 57-60; Sayers, *Papal Judges-Delegate*, p. 10.
[93] Delhaye, 'Deux textes', p. 206.

found hospitals, build bridges or consecrate churches as part of their penance?[94] Similarly, at Hereford in the last decade of the twelfth century, Bishop William de Vere also commissioned an instructional treatise on penance, in this case from Guy, prior of the Augustinian canons of Southwick, a work likely intended for the edification of the clergy of Hereford.[95] From what little we know of Guy, he seems to have studied theology at Oxford or at least interacted closely with the masters there.[96] Considered as a group, these late twelfth-century texts demonstrate, quite plainly, the evident interest of English priests in working out the relationship between penitential theory and penitential practice, and the connection between canon law (to which the subject of penitential practice strictly belonged) and theology – for the authors of these texts were trained theologians.

Whilst the tradition of works of penitential instruction certainly burgeoned in the thirteenth century, authors continued to address very much the same problems as their twelfth-century predecessors.[97] Thus Robert of Flamborough's *Liber poenitentialis* (composed c. 1208-13), commissioned by Richard Poore, dean of Salisbury and future bishop of Chichester, Salisbury and Durham, drew closely on the work of Bartholomew of Exeter. Robert's penitential returns to the question of how to distinguish between a 'reasonable' and an 'unreasonable' sentence.

> No-one ought to believe that, in accordance with rigour and strictness constituted by the canons, penance always ought to be imposed without any mercy (*misericordia*). But the rigour of the canons ought to be tempered, not on account of what is pleasing to the priest (*sacerdotium libito*), but through canonical dispensation, in order that in setting penance the priest always be mindful of both the demand for satisfaction which sinners are held to for their their fault, and also

[94] Ibid, p. 207.
[95] D.A. Wilmart, 'Un opuscule sur la confession composé par Guy de Southwick vers la fin du XIIe siècle', *RTAM* 7 (1935), pp. 337-52.
[96] Wilmart, 'Un opuscule', p. 339.
[97] L.E. Boyle, 'A Study of the Works attributed to William of Pagula with Special Reference to the *Oculum sacerdotus* and *Summa summarum*' (University of Oxford D.Phil. thesis, 1956), pp. 188-281.

> of indulgence (*indulgentia*), by which the canons truly come to the aid of the penitent through mercy (*misericordia*).[98]

Robert's work was rapidly followed by Thomas of Chobham's *Summa confessorum*, a work begun before 1215, but adapted in light of the canons of the Fourth Lateran Council.[99] Thomas warns that there are three ways in which a pastor may set an unjust penance. *Ordines iudicii* (manuals which set down acceptable and expected standards for proof and legal process), he warns, will only guard against one of these (disregard for procedure).[100] The pastor must still ensure that he does not pass false sentence by ignoring the evidence, or, indeed, 'ex animo' – through his own anger or jealousy.[101] Thomas of Chobham also advises the parish priest that, if some cases of penitence are simply too difficult to judge (for example, when they concern a particularly incorrigible offender who now wishes to be absolved), then they can be referred upwards to a superior.[102]

Robert of Flamborough's penitential writings also had a marked influence on Robert Grosseteste, who borrowed from his *Liber poenitentialis* when compiling his own schematic work on priestly pastoral responsibilities, *Templum Dei* (c. 1220-30). Indeed, if Grosseteste was in Paris between 1209 and 1214, he may himself have come under the penitential jurisdiction of the abbey of Saint Victor, and its then-penitentiary, Robert of Flamborough.[103] Grosseteste, in a second pastoral treatise, focussed on confession, *Deus est* (probably composed during the same period as his *Templum Dei*), once again emphasised that the greatest pastoral challenge for the priest was to adapt his stance

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[98] Robert of Flamborough, *Liber poenitentialis*, 5.12, pp. 273-4.
[99] Broomfield, *SC*, p. xv.
[100] For the development of the romano-canonical *ordo iudiciarius* in the twelfth century see K. Pennington, 'Due Process, Community, and the Prince in the Evolution of the *Ordo iudicarius*', *Revista internazionale di diritto comune* 9 (1998), pp. 9-47.
[101] *SC*, 5.1.3a, p. 201.
[102] Ibid, 5.1.12a, p. 217.
[103] J. Goering and F.A.C. Mantello, 'The Early Penitential Writings of Robert Grosseteste', *RTAM* 54 (1987), pp. 56-7.

according to the attitude of the penitent.[104] There are those, Grosseteste warned, who are convinced they will be forgiven (the vice of *praesumptio*) and those who despair of their salvation (the vice of *desperatio*), believing that they will never receive mercy from God. Those in the latter group are to be treated with particular gentleness.[105] Across the tradition of English penitential literature in the early thirteenth century, the theologians' focus is on alerting pastors to the variability of penance and the need to moderate their sentences accordingly.[106] These later English texts were, of course, influenced by continental works of canon law, not least Raymond de Peñafort's *Summa de casibus poenitentiae* (composed 1222-9, and revised in 1235).[107] There was widespread concern across the English church about the practical consequences of ecclesiastical judgements. This was an interest that may have intensified in the thirteenth century, but it repeated questions which had been raised over the previous century. Those questions primarily addressed how to set an appropriate penance, how to realise in practice the directions of the canons, and how to formulate an effective reprimand.

Concerns about the appropriate moderation of the canons, however, are also demonstrated outside the realm of strictly 'penitential' or canonical writing, in works of moral instruction. Peter of Blois, for example, wrote to an abbot, identified only as 'W', berating him for excessive severity in the treatment of monks in his care.[108] Peter recognises this as the greatest pastoral challenge of the age, for 'those who exercise zeal

[104] Siegfried Wenzel, 'Robert Grosseteste's Treatise on Confession "Deus Est"', *Franciscan Studies* 30 (1970), pp. 218-93.
[105] Wenzel, 'Deus Est', pp. 260-1.
[106] For further English contributions to this genre see A. Teetaert, 'Quelques *Summae de Poenitentia* anonymes de la Bibliothèque Nationale', in *Miscellanea Giovanni Mercati II* (Rome, 1946), pp. 326-9; J. Goering, 'The "Summa de penitentia" of John of Kent', *Bulletin of Medieval Canon Law* 18 (1988), pp. 13-31; J. Goering, 'The *summa Qui bene presunt* and its Author', in R.G. Newhauser and J.A. Alford (eds.), *Literature and Religion in the Later Middle Ages: Philological Studies in Honor of Siegfried Wenzel* (Binghamton, NY, 1995), pp. 143-59.
[107] Robert of Flamborough also made (unacknowledged) use of Huguccio's *Summa in Decretum*; Firth, 'The "Poenitentiale" of Robert of Flamborough, *Traditio* 16 (1960), p. 550.
[108] Peter of Blois, *De poenitentia vel satisfactione*, PL.207.1091-98. The letter merits only a single line of comment in John Cotts' recent biography of Peter, *The Clerical Dilemma*, p. 234.

of justice in scourging, not in leavening, in order to satisfy their anger, do not produce new growth for Christ'.[109] The idea that excessive zeal could easily overcome a confessor is repeated in a story from Walter Map's *De nugis curialium* (a work of the 1180s) which presents an *exemplum* which draws attention to the pastoral dangers incurred by an unforgiving confessor. Walter, himself a canon at St. Pauls and Hereford, and archdeacon of Oxford, appears keenly interested in defining proper behaviour for members of the clergy; indeed, he informs his readers that he was a member of Henry II's delegation to the Third Lateran Council.[110] Walter Map relates the story of Eudo the knight, who was tempted by a devil and committed many wicked acts.[111] Twice Eudo repented his sins and made half-hearted confession to a certain bishop, but he soon afterwards returned to his criminal ways. When the death of his first-born son finally prompted him to sincere contrition, the bishop was no longer willing to offer him absolution. Eudo's pleading was so sincere and eloquent that it won him the sympathy of his former enemies, but it had no effect on the bishop, who had 'shut up the bowels of mercy against him and hardened his heart, not to heal the sick'. When, in desperation, Eudo offered to perform any penance imposed upon him, the bishop, then standing in front of a pyre constructed for the burning of a witch, 'angry, disbelieving and hardened, as if to test him and in derision, uttered a hasty sentence (*stultis precipitavit sentenciam*) with foolish lips and said: "I lay upon you for your sins that you leap into that fire"'. Eudo joyfully leapt onto the pyre and was consumed by the fire.

Map's comment on this sequence of events is forceful, and constitutes a rebuke to the insufficiently responsive penitential judge:

> The reader and hearer may debate whether the knight had a right zeal (*rectum zelum*) in obeying the hasty sentence (*precipitatam sentenciam*) of the unwise and

[109] *De poenitentia*, PL.207.1094A.
[110] *DNC*, 1.31, pp. 124-7.
[111] Ibid, 4.6, pp. 314-41.

> angry prelate. What shepherd shuts the fold against the sheep that is returning from the wilderness, does not open to it before he hears its bleating, does not call it his own, recognizes it, and yet does not pardon it, is not beforehand with it when it is driven away?[112]

The scenario Walter Map sketches out in *De nugis* may seem wildly exaggerated and unrealistic, but, however elaborate, it serves to make a vital didactic point, illustrating the principle that a confessor ought never to refuse to forgive. A foolish or hasty sentence could have great ramifications, in this world as much as in heavenly terms. Modulation of penance was a delicate, difficult business. By the same token, if mercy was vital in a confessor, its application could be taken too far. There was thus evident concern that those setting penance should achieve the right balance in moderating the letter of the canons whilst adhering to their spirit. This question remained a constant throughout the period – it was not a problem which could be resolved by new canonical compilations or by the issuing of new decretals, for it touched not on law but on the more fundamental topic of judicial discretion which was ultimately dependent on individual judgement and individual circumstances. A canon of the Fourth Lateran Council, for example, criticises those priests 'who through indiscrete (*indiscretas*) and excessive indulgence' lighten penitential burdens, and admonishes them that the indulgences granted with the consecration of a new church ought not to exceed one year.[113] Robert Grosseteste, considering the implications of the scriptural quotation 'sacerdotes tui induantur iusticiam' (Psalm cxxxi.9), concluded with the injunction: 'let not our justice become excessively strict through your rigidity; nor let it become lax and feeble (*laxa et fluida*) through forgiveness (*per remissionem*)'.[114] For Grosseteste, thinking particularly of the judge who might be tempted to take the part of the poor or the downtrodden and extend to them a special degree of mercy, this was as serious a problem as the corruption of a judge

[112] Ibid, 4.6, pp. 340-1.
[113] *Disciplinary Decrees*, ii, p. 573 [62].
[114] Grosseteste, *Dictum* 5, f.5v.

whose sentence was swayed by bribery. English bishops and priests were faced with the question of how to forge pastorally-effective tools from a law code which was not silent on the question of mercy, but conflicted in determining exactly the best way to save souls. Despite the judicial rules put in place in the twelfth century, and despite the increasing importance of procedure in church law in the thirteenth century, there remained a great deal of ambiguity in exactly how and when the canons ought to be moderated by individual judges.

A practical demonstration of the difficulty of determining how to act on these admonitions, which makes great appeal to concepts of justice and mercy without ever defining the precise terms of their implementation, can be gleaned from the letters of Gilbert Foliot. Before entering the monastery of Cluny (c. 1130), Foliot had gained a considerable reputation as a scholar. He had studied Roman law, possibly in Bologna, and theology, possibly in Exeter under the tutelage of Robert Pullen.[115] This learning is evident in Foliot's letters from the 1160s, composed when he was Bishop of Hereford. In particular, the problem of deciding upon an appropriate course of action – and the judicial vacillation this could induce – is demonstrated in two letters from Foliot concerning the treatment of a group of heretics. The letter collection provides a wealth of material on mercy and justice, as it shows Foliot – whether as an archdeacon, Bishop of Hereford or Bishop of London – intervening in judicial cases and monastic affairs to ask a judge or abbot for leniency on behalf of an associate and discussing the 'justice' of various canonical measures. Concerning the interdict, for example, Foliot asks whether such a punishment can be justified when it is imposed on many who have committed no crime themselves.[116]

[115]Adrien Morey and C.N.L. Brooke, *Gilbert Foliot and His Letters* (Cambridge, 1965), pp. 52-72.
[116] *GFL*, Ep. 22, pp. 56-7, to Henry of Blois, asking him to temper the severity of the interdict on Hereford; see also P.D. Clarke, *The Interdict in the Thirteenth Century: A Question of Collective Guilt* (Oxford, 2007), pp. 12-23.

Exactly how discussions of mercy and justice apply in cases concerning heretics was acknowledged to be a difficult question. From the late eleventh century onwards, prosecution of heretics became much more zealous, and indeed, severe.[117] In historiographical terms, the attack on heretics provides the definition of a 'persecuting society', because they form a case study for prosecution in the 'public interest', a new way for the Church to define crime.[118] Indeed, such was the public and political interest that secular powers too participated in these prosecutions.[119] The increased vehemence with which heretics were persecuted and punished is typically ascribed to the influence of Roman law, as civil law punishments for an offence of *laesa maiestas* against the emperor were applied to those guilty of an offence against the *maiestas* of God. Gratian quoted the *Codex* on this point,[120] and Innocent III's *Vergentis in senium* (1199) enjoins 'ecclesiastica districtio' on heretics.[121] Yet clear rulings on how to deal with heretics only emerged towards the end of the twelfth century, with Innocent's decretal arguably marking a watershed; a full body of legislation on the subject was established only in the thirteenth century.[122] Gilbert Foliot, addressing the question of what to do with a group of heretics in the 1160s, was in a far less certain position vis-à-vis the canons.[123] The *Decretum* itself did not resolve this ambiguity but set out a broad range of possible strategies for the punishment of heretics, including whipping, imprisonment, exile,

[117] R.I. Moore, *The Formation of a Persecuting Society: Power and Deviance in Western Europe, 950-1250* (Oxford, 1987), esp. pp. 4-5.
[118] Edward M. Peters, 'The Prosecution of Heresy and Theories of Criminal Justice in the Twelfth and Thirteenth Centuries', in Heinz Mohnhaupt and Dieter Simon (eds.), *Vorträge zur Justizforschung: Geschichte und Theorie, Volume 2* (Frankfurt, 1993), pp. 25-42, esp. 34-5.
[119] Cf. Peter Diehl, 'Ad abolendam (X 5.7.9) and Imperial Legislation against Heresy', *Bulletin of Medieval Canon Law* 19 (1989), pp. 1-11.
[120] *Decretum*, C.VI, q.1 c.22, 1:560, quoting *Codex* 9.8.5, 2:373-4; cf. *Digest*, 48.4, 1:844-5.
[121] X.5.7.10 (*Corpus Iuris Canonici*, 2:782-3). Cf. W. Ullmann, 'The Significance of Innocent III's Decretal "*Vergentis*", *Etudes d'histoire du droit canonique*, i, pp. 729-41.
[122] Cf. R.M. Fraher, 'IV Lateran's Revolution in Criminal Procedure: The Birth of the Inquisitio, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics', in Rosalio Josepho (ed.), *Studia in honorem Eminentissimi Cardinalis Alfonsi M. Stickler* (Rome, 1992), pp. 97-111.
[123] This letter (c. 1164-5) falls before the stipulations of c. 27 of the Third Lateran Council. See Anne J. Duggan, 'Conciliar Law 1123-1215: The Legislation of the Four Lateran Councils', *Canon Law in the Classical Period*, p. 337.

confiscation of goods or even a death sentence.[124] Nor was the role of the bishop in punishing heretics clearly defined, particularly in reference to the involvement of the lay power, which would have been involved at least in enforcing sentences such as exile or capital punishment.[125] All these factors invite a consideration of exactly how far discussions of the treatment of heretics stood within or without the typical canonical frames of mercy and justice. The two letters of Foliot which concern the treatment of heretics date to 1165. They are addressed to Roger, Bishop of Worcester, and although Roger's own part in the correspondence has not survived, it seems that he had written to Foliot, seeking his advice on how to deal with a group of heretical weavers (likely to have been continental Cathars) who had entered his diocese. It is not particularly surprising that Roger should have sought the advice of his colleague in this respect: the letter dates to the beginning of his episcopacy, and Roger, who was not a trained canonist, sought the legal opinions of more experienced bishops on other occasions.[126] Moreover, and perhaps most importantly, heresy was an unusual occurrence in twelfth-century England, and English bishops did not have the same degree of experience as their continental colleagues in dealing with it.[127]

The two letters in fact represent two drafts of the same letter, although they differ somewhat in their style and argument: one seems to be a letter of advice, advocating a clear course of action, whilst the other shows Foliot in a more reflective mood. It is not known which (if either) of these two drafts represents the letter actually sent to Roger. It would, however, be unwise to dismiss either or both of the letters as a purely literary exercise, included in the collection only to teach or to impress posterity. When other

[124] *Decretum*, C.XXIII, 1:889.
[125] R.I. Moore, *The Origins of European Dissent* (London, 1977), p. 252.
[126] M.G. Cheney, *Roger, Bishop of Worcester, 1164-1179* (Oxford, 1980), p. 187, pp. 247-9.
[127] Cheney, *Roger of Worcester*, pp. 68-9, argues that heresy was almost unheard of in England at this time, but the extent of heretical activity in medieval England is difficult to quantify. Cf. H.G. Richardson, 'Heresy and the Lay Power under Richard II', *English Historical Review* 51 (1936), pp. 1-2.

letters from Foliot's collection are checked against those known to have been sent – such as those contained the manuscripts of the Becket correspondence – the 'drafts' from Foliot's collection are markedly faithful to the final, sent, version.[128] The balance of evidence argues that, in general, the collection offers faithful copies of the texts which Foliot intended to send.

Letters 157 and 158 are found only in the principal manuscript of Foliot's letters, Bodleian MS E Musaeo 249, which contains almost all of Foliot's extant letters and charters.[129] The two letters concerning the heretics do not occur together: letter 157 is found at f.141r, letter 158 at 161v, and they belong to different 'sections' of the manuscript. Letter 157 is fairly straightforward, advising Roger that the heretics ought to be placed in solitary confinement and treated with 'moderate severity' until a gathering of the clergy is able to settle the question of what is to be done with them:

> But in the meantime you should hold them separately, lest together they persevere in wicked conversation. And it is appropriate that good and serious men, men of proven faith, learned in divine law and letters be appointed their guards, and visit them with holy words of preaching, softening them with warnings, and scaring them with threats and fear of punishment, and in the meanwhile coercing them with whips and lashings of moderate severity (*moderata severitate*), that they attend to calling them back to the unity of the Church, in all the ways furnished by *caritas*. The examples of the saints show to us the corrective medicines of the Church, in order that we might act with love for the salvation of the people.[130]

The second letter (158) is altogether more expansive. It does not mention the physical discipline of the group, but simply advises Roger to place the heretics in solitary confinement, lest their continued association inspire them to defiance. Foliot repeats the idea that the heretics are to be visited by 'your most worthy and prudent' priests, who ought to call them to penance and back to unity with the Church, in the hope that preaching will rouse them. Perhaps Foliot here kept in mind the principle espoused in the

[128] Morey and Brooke, *Gilbert Foliot*, p. 10.
[129] Ibid, p. 29.
[130] *GFL*, Ep. 157, pp. 207-8.

Decretum: that when dealing which heresy, force was only of limited utility, representing a temporary, not a long-term solution, and, as such, 'kindness (*benivolentia*), rather than severity, is to be shown towards those in need of correction'.[131] Other than these instructions, the text of Letter 158 is taken up with a disquisition on rival theories on the treatment of heretics. As a result, it appears more vacillating than the first, as Foliot enumerates the various courses of action open to a bishop in Roger's unenviable position. It may be tempting to infer, on this basis, that 157 represents the letter sent to Roger – with practical counsel – whilst 158 is the draft written by Foliot to be included in his collection for the instruction of posterity, with an account of the various possibilties for action against heretics. Yet even if this is the case, both letters demonstrate that Foliot was aware that his advice required some justification and that there was no sure or efficacious course for turning the heretical back to God.[132] Moreover, Foliot notes that this is no new question – the problem of how best to minister to heretics had been a topic for debate in the early Church. He outlines the positions in this debate in the following way:

> It is a great question, and one considered by the holy fathers and doctors of the Church not without confusion, namely, how far the Church ought to preach gentleness and clemency (*mansuetudinem et clementiam*), according to the expression 'the law of clemency is on her tongue' [Proverbs xxxi.26], and the words of the Lord, 'nor do I condemn you' [John viii.11], lest many are destroyed in such holy punishments by fervent and pious zeal. Some advise that those frantic sons must be kept in chains, in order to be watched over; others protest that all must be committed to irons, for injuring divine religion, by which, according to the Julian laws [i.e. *Digest* 48.4], they threaten majesty by public crime; others, judging by example, sentence them to burning alive; others temper severity with the opinion of Augustine, who did not kill the Donatists, but by whipping and punishing them exhorted them to emendation.[133]

[131] *Decretum*, D.XLV, c.6, 1:162.
[132] Jason Taliadoros, 'Law & Theology in Gilbert of Foliot's (c. 1105/10–1187/88) Correspondence', *Haskins Society Journal* 16 (2005), p. 93, notes that Foliot seems unaware of the provisions made for treatment of heretics from the Council of Tours in 1163.
[133] *GFL*, Ep. 158, p. 210; cf. Augustine, *Epistulae 185-270*, ed. A. Goldbacher, CSEL 57 (Vienna, 1911), Ep. 185, pp. 1-44.

Letter 158 goes on to suggest that concerning the treatment of heretics, the patristic judicial struggle between justice and mercy still applies. The problem of dealing with heretics is, for the judge, the same challenge of working out the most prudent course of action for the particular case. Questions of severity *versus* mercy, and the spirit of the law *versus* its letter, must still be debated by his contemporaries. Whilst there is mention of the Roman law offence of *laesa maiestas* as comparable to heresy, this reference is subordinate to the scriptural argument that the Church must apply all its punishments with gentleness and concern for its pastoral mission. Foliot himself offers no indication of which choice here is to be preferred. Taking these conflicting opinions as a demonstration of the difficulty of the subject, he concludes by reserving judgement of the treatment of the heretics 'to a general gathering of our brothers'.[134] The episcopal council of 1166 determined that the group were to be handed over to the secular power, to be whipped, branded and exiled.[135]

Foliot's two letters are all the more striking when consideration is given to their place within the manuscript (a context which is lost in the modern edition). The first, 157, is preceded by a letter to Matthew, archdeacon of Gloucester, in response to a question about a woman accused of adultery.[136] Like Roger of Worcester, Matthew had written to Foliot for guidance on a question of legal practice: a woman accused of adultery by her husband, had, under threat, promised to undergo the ordeal of red-hot iron in order to determine her innocence or guilt. Matthew asked Foliot whether the woman was bound to undergo the ordeal or whether she might only be required to swear an oath as proof of her innocence. Foliot's reply to the problem of judicial process is simple enough: he advises that in a case where adultery is only suspected, and where there are no witnesses to the

[134] Ibid, Ep. 158, p. 210.
[135] For the narrative: Diceto, *Abbreviationes chronicorum*, i, p. 318; William of Newburgh, *Historia*, 2.13, i, p. 131; Walter Map, *DNC*, 1.30, pp. 120-3.
[136] *GFL*, Ep. 237, pp. 309-10.

crime, an oath provides sufficient determination of guilt or innocence. Moreover, he added, citing the *Decretum* on this point, the woman was not under any obligation to undergo the ordeal, for any promise extracted by force or fear cannot be binding.[137] The real interest of this preceding letter, however, is Foliot's subsequent explanation of contemporary laws relating to adultery. He explains that the Incarnation and the consequent law of grace had modified, and, indeed, mollified, the harsh punishments for adultery specified in Mosaic and Roman law.

> The law of the emperors punished both adulterers and adulteresses, and threatened with numerous punishments those wretched individuals who had slipped morally. Thanks to the Lord Jesus who made everything new and better, and the tears of Mary mixed with the wood of the cross, he tempered the harsh and bitter law. Thus he freed the wicked, the arrested, the guilty and the led away, and he replaced the harsh laws, stone by stone.[138]

Foliot further explains that the 'stones' which were thrown at adulterers under the Old Law today have an allegorical meaning, representing the steps of chastisement to be administered to a sinner. Rather than physical punishment, these stones represent the need 'to reprove, to rebuke and to challenge sinners in many ways: to tears, to sighs, to confession and satisfaction'. He concludes by citing John viii.11, Christ's words to the woman caught in adultery, 'nor do I condemn you', a citation which he also provides in Letter 158, discussing the level of clemency appropriate in the treatment of heretics.

Jason Taliadoros, who has made the leading modern study of Foliot's life and works, has argued that whilst Foliot may have been proficient in canon law, he was, first and foremost, a theologian.[139] The juxtaposition of these letters certainly demonstrates how theology influenced Foliot's reading of the canons. Foliot notes, in line with basic canonical tenets, that a mere suspicion of adultery is not enough to force anyone to undergo the ordeal – witnesses are required. Yet, in invoking John viii.1, the words of

[137] Cf. *Decretum*, C.XV, q.6, c.1, 1:754-5.
[138] *GFL*, Ep. 237, p. 310.
[139] Taliadoros, 'Law & Theology', pp. 77-94.

Christ to the woman caught in adultery, Foliot does not give a canonist's reading of the passage. Lawyers, both civil and canon, used the pericope 'nor do I condemn you' to illustrate the principle of *iudex secundum allegata, non secundum conscientiam iudicat*. Christ had instructed the judge, in other words, to convict only according to the evidence presented to him by witnesses, not according to his private knowledge of the crime.[140] Thus the pericope was read by canonists as a procedural instruction: without witnesses, all judgements risked a false verdict which would endanger the soul of the judge. The role of John viii in canonical commentaries, in short, was not an example of Christ's merciful behaviour, but a case which fell down on a judicial technicality. This is, however, not the sense in which Foliot invokes the passage. He gives a 'theological' gloss on the event, implying that Christ's unwillingness to condemn the woman was due not to lack of witnesses, but due to the merciful nature of the New Law. Foliot's interpretation owes more to moral theology to than legal doctrine, which held that the incident showed a woman justly condemned, but granted mercy. In short, it was an admonition to judicial clemency. It is striking that Foliot (or his clerks, in directing the compilation of his letters) chose to place a discussion of the clemency of the law of Christ just before Foliot's first consideration of the treatment of heretics.[141] The letters are not otherwise ordered by date or addressee, although this section does seem to deal thematically with Foliot's letters on judgement and judicial procedure.[142]

Letter 158, Foliot's lengthier and more ambivalent discussion of the treatment appropriate to heretics, also occurs in the manuscript in a section of letters on judicial problems. It is preceded by a question of rights to appeal and followed by a letter on the question of the restoration of a husband who had deserted his wife.[143] Although neither of

[140] Above, pp. 87-8.
[141] Cheney, *Letters and Charters*, p. 4, for the level of Foliot's involvement in the collection.
[142] e.g. it is followed by Ep. 294, p. 357, a settlement on the division of the revenues of a church.
[143] *GFL*, Ep. 110, pp. 151-2; Ep. 268, p. 332.

these letters provides the same depth of commentary on justice and mercy as Letter 237, they do provide a significant commentary on some further aspects of the relationship between the two concepts. The letter concerning the restoration of an errant husband is written to an unidentified bishop, exhorting him to compel the husband to return to his wife. Foliot asks the bishop to do this out of consideration for the strictures of the canons concerning marriage:

> I extend to you, my brother, affectionate prayers, beseeching and entreating you in the Lord, that, on account of your reverence for God, you censure him with the severity of the canons and he should make the provision due to his wife and, to keep good this undertaking, you ought to compel him through the strict justice of the Church, in order that the zeal of the law of Christ be known, as much by you as it is to us, and do not let him believe that avengers are lacking against transgressors.[144]

The invocation of canonical severity and strict justice here may seem at odds with Foliot's previous advocacy of the lenient treatment of transgressors. However, to juxtapose the two texts in this way would be to misunderstand his approach. Foliot's ability to switch between a merciful interpretation of the canons (in the case of adulterers) and a strict invocation of unbending justice (in the case of a man who had abandoned his wife) is, in fact, an excellent demonstration of his understanding of the more general relationship between justice, mercy and canonical discretion. Twelfth-century canonical jurisprudence – and indeed, the 'Ivonian' theory of justice and mercy subsequently adopted by Gratian and written into the *Decretum* – did not demand its practitioners consistently advocate either justice or mercy, *always* to be unbending or *always* to be lenient. Rather, it offered judges a choice, not to harmonise justice with mercy, but to select the course most appropriate to the particular case in front of them.

A codicil to these explicitly 'judicial' letters is provided by Foliot's examination of justice and mercy in the correspondence which otherwise does not, at first glance,

[144] Ibid, Ep. 268, p. 332.

seem particularly relevant to this theme. This is the Becket crisis, a topic which has generated so much historiographical attention on the subject of conflicting laws and the relation of canon law to secular authority.[145] And yet the Becket conflict too can be explored with reference to the ideals of judicial severity and mercy. Indeed, recent historiography has affirmed the fact that the 'conflict', 'controversy' or 'dispute' (however one chooses to describe it) was likewise as much a question of theology as law. The legitimacy of Becket's stance could be, and was, assessed according to principles of canon law and correct canonical process; but hagiographies, histories and letters were also places in which the 'righteousness' (*iustitia*) of Becket and Henry II's respective roles was debated.[146] Theology and law were intertwined, and the force of scripture was deployed to support legal argument. Examining the letters of some of the major figures in the controversy – Becket, Gilbert Foliot and John of Salisbury – for what they reveal about the pastoral role of the judge in the English Church in the mid-twelfth century provides a fresh perspective on the events of 1163-70.

Whilst the dispute between the king and archbishop was a question of custom and law, Becket's stance on these issues and his responses to royal claims prompted a further debate within the English Church. The ensuing friction within the English Church, however, was not as simple as asking whether or not the ecclesiastical hierarchy should stand with Becket. Instead it turned on how the Church should reprimand a king in order to turn him towards reform. Whilst the split between different approaches to the rebuke and punishment of a king was not the driving force behind the conflict between Becket

[145] In addition to C. Duggan, 'Criminous Clerks', see also his 'The Reception of Canon Law in England in the Later-Twelfth Century', in S. Kuttner and J. Ryan (eds.), *Proceedings of the Second International Congress of Medieval Canon Law* (Rome, 1965), pp. 359-90; M. Cheney, 'The Compromise of Avranches of 1172 and the Spread of Canon Law in England', *English Historical Review* 56 (1941), pp. 177-97. For a recent assessment of these arguments see Christopher P. Hill, 'Gilbert Foliot and the Two Swords: Law and Political Theory in Twelfth-Century England' (University of Austin, Texas, Ph.D. thesis, 2008), pp. 184-94, 207-9.

[146] See Staunton, *Thomas Becket and his Biographers*, p. 182.

and Henry, a closer analysis of the rhetoric and imagery invoked in these letters does reveal the divide in language between two parties within the Church. This can be understood as an internal debate within the English Church about the relative political and spiritual merits of merciful and severe judicial positions. Becket presented this as a dispute between his supporters – advocates for the liberty of the Church – and the wicked, arguing that 'anyone who does not hurry to check what should be corrected is regarded as being in agreement with the wrong-doer'.[147] It was through his letters that Becket disseminated precisely such a picture.[148]

In the exchange of letters between Thomas Becket and Gilbert Foliot, the effective head of the English Church during Becket's exile, the major cause of dissension in their correspondence is the question of *judicial* strategy. Did Becket's call for an anathema to be pronounced on Henry II, the excommunication of certain English bishops and an interdict to be placed on the English Church represent appropriate punishment or an immoderate, ill-considered response to the king's offences against the Church and its custom? Reading Foliot's letters, it seems that Becket's 'fault' is his failure to recognise that in order to rebuke a prince effectively, the would-be corrector must sometimes temper and soften his censures. Becket's response to Foliot's criticism is typically to state that a king should be censured as strongly as an unknown, undistinguished individual would be.

The most famous letter in the conflict is perhaps Foliot's *Multiplicem nobis* (1166), in which the Bishop of London attributes the roots of the conflict to Becket's manifold failures of character, and defends his own attitude towards the king. But *Multiplicem* was itself a response to a letter which Becket had addressed to Foliot in July

[147] *Becket correspondence*, Ep. 78, i, p. 309, quoting *Decretum*, D.LXXXIII, c.5, 1:294.
[148] See D.J.A. Matthew, 'The Letter-Writing of Archbishop Becket', *Belief and Culture in the Middle Ages*, pp. 287-303.

1166, following the appeal of the English bishops against their excommunication.[149] Becket's address to Foliot was a justification of his severe approach to Henry and royal infractions:

> You express surprise at the threatening letter (*comminatorio*) which we sent to him [i.e. Henry II].[150] What father sees his son go astray and remains silent? What father does not strike with a rod, lest his son incur the sword? A father despairs of his son if he does not reprove him by threat or the whip.[151]

Becket here (alluding to both Proverbs xiii.24 and Hebrews xii.7) employs the familiar imagery of both paternal discipline and the necessity for the ecclesiastical officer to wield the rod – two figures of salutary punishment. This is an approach matched by Becket's supporters – not least John of Salisbury, whose letters on behalf of Becket to the English episcopacy follow the same line of reasoning. John exploits a series of scriptural *exempla* to explain to the bishops why Becket is unable – indeed, morally forbidden – from coming to a peaceful accommodation with Henry over the legal issues involved. The oldest and most venerable traditions of ecclesiastical office demand that Becket rebuke Henry's sins, not make accommodation for them.

John dwells on those precedents in some detail. In a letter of late 1166, John tackles the counter-argument, presumably one which had been used against Becket, that scripture in fact permitted that sinners might sometimes be only *lightly* upbraided, citing the example that John the Baptist had merely criticised, not rebuked, Herod for sleeping with his brother's wife whilst his brother was still living (Matthew xiv.3-4). Did not this imply that the Church might sometimes treat failing temporal rulers with gentleness, and mitigate the harshness of its criticisms? John's response is to dismiss this episode entirely as a precedent for how the Church ought to deal with Henry II:

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[149] For *Multiplicem*, Morey and Brooke, *Gilbert Foliot*, pp. 166-73. Barlow, *Thomas Becket*, pp. 147-8; for the appeal see *Becket Correspondence*, Ep. 93, i, pp. 373-83.
[150] This was the letter *Desiderio desideravi* (1166), the second of Becket's three appeals to Henry, *Becket Correspondence*, Ep. 74, i, pp. 292-9.
[151] *Becket Correspondence*, Ep. 96, i, p. 431.

> John [the Baptist] upbraided Herod in a gentle spirit (*in spiritu lenitatis*), when he told him it was unlawful to sleep with his living brother's wife. [But] he who says as much is taking shelter behind cowardice rather than ignorance, however certain it may be that John was not on that occasion playing the role of a bishop whose function it is to correct sins, but of the Word's herald, to whom it fell to announce what was to be done and to denounce men's vices. [H]eli indeed reproved his sons, but with a father's kindly affection rather than the severe authority of a bishop. Therefore for every point in the divine law one must fight, stand up against the powers and with all one's strength strive to overthrow whatever attacks charity, which is the fulfilment of the Law.[152]

John counters the argument by invoking the counter-example of Heli and his sons,[153] asserting that episcopal authority is at least in part defined by its ability to wield punitive authority and punish sin, a duty which must not be neglected.

Multiplicem nobis demonstrates exactly where Gilbert Foliot stood on this line of argument, definding the position that the Church's rigour might rightly and justly be occasionally softened. The final section of *Multiplicem* urges Becket to take a more conciliatory line towards Henry II, and cautions against an excessively severe attack on the king's vices (vices which Foliot does not deny Henry has shown).[154] What is most striking here is again the language in which Foliot couches this counsel to Becket: he invokes the image of the *medicus*. If Becket is to be a physician to cure the sickness in the English political community, then he must wield his scalpel with care:

> Does anyone reckon it among a doctor's skills to cure one wound by inflicting another, far greater and far more dangerous? Who calls it discretion (*discretioni quis attribuat*) to desert his Church in this way for what could be obtained very quickly and very easily, to rise against his prince, and, having destroyed the peace of the whole Church throughout the realm, not to trouble about the dangers to the souls and bodies of his subjects?[155]

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[152] John of Salisbury, *Letters*, Ep. 187, ii, p. 235.
[153] Above, pp. 80-3.
[154] Cf. the bishops' appeal, drafted by Foliot (*Becket Correspondence*, Ep. 93, i, p. 379): 'we are not saying, in fact, that the lord king has never sinned; but we confidently declare and proclaim that he is always ready to make amends to the Lord'.
[155] *Becket Correspondence*, Ep. 109, i, p. 533 [=*GFL*, Ep. 170].

This, of course, is Foliot's adaptation of the medical analogy so frequently used to discuss the role of the priest in setting penance for sinners. Becket's medicine for sin – the severe punishment of the king – is worse than the malady, given its deleterious effect on the peace of the English Church. Foliot invokes the same metaphor of the priest as physician when writing to Alexander III, urging him not to approve any sentence of excommunication that Becket may pronounce:

> Moderate for a time, if it so please you, within the bounds of zeal which is kindled by the flames of the Divine Spirit to avenge each injury done to the Church of God; lest by pronouncing an interdict or the extreme sentence of excommunication, you may have to lament that numberless churches are subverted... For it is as good for the limb to be joined to the head, even though wounded, as to be cast away from the body when cut off. For wounded limbs return to a state of health, whereas, when once cut off they have great difficulty in adhering to the body. To cut off a limb is to entail desperation; whereas the cautious treatment of the surgeon will very frequently heal the wound.[156]

In *Multiplicem* Foliot also constructs an argument from history, presenting the precedents for the Church adopting a more 'gentle' attitude to rebuking Henry. Foliot explains that it is only ever conciliatory attitudes and moderated criticism which have succeeded in the reform of sinners. Foliot grounds his argument in English ecclesiastical history, citing the example of Augustine of Canterbury, sent by Gregory the Great to convert the English from their pagan practices. Augstine of Canterbury, Foliot explains, challenged wicked custom not with abuse and threats but with preaching, exhortation and persuasion.[157] Foliot does not deny the need to alter Henry's attitudes and position, but instead claims that Becket's excessively severe strategy will never achieve his desired end. Foliot goes as far as to argue that Becket's position – that is, his attempt to impose an anathema on Henry II – is contrary to the canons. He cites a passage from the *Decretum* (in turn, drawn from the letters of Augustine), which counsels caution before

[156] *GFL*, Ep. 155, p. 206.
[157] *Becket Correspondence*, Ep. 109, i, p. 529.

imposing a sentence and careful consideration as to whether punishment will serve the advantage of the English Church:

> In fact, sacred authority teaches thus: "in cases of this kind, where through grave rifts and dissensions there is danger not to this or that man but confusion for the whole people, some severity must be laid aside (*detrahendum est aliquid severitati*), so that true charity may assist in curing more serious ills".[158]

Finally, Foliot invokes the most powerful scriptural *exemplum* he can muster. The last paragraph of his letter is dedicated to reprimanding Becket's excessive severity in judgement, *severitas* which, Foliot laments, has failed to live up to the apostolic ideal of gentle fraternal correction. In his severe and unyielding condemnation of the king's vices, Foliot notes, Becket has ignored the fundamental principle of Christ's law, namely *caritas*.

> The Lord put forward a child as an example to the Apostles: he is not angered when hurt, he is not quick to remember injuries, he does not undertake anything out of malice[159]... He who absolved those who were crucifying him is himself the unique example of virtue, who, with all-embracing love (*lata caritate*), commands that persecutors and bearers of ill-will should be loved, and orders us to pardon the brother who sins against us, not seven times, but seventy times seven times [Mark xviii.21-2]. What cannot this humility achieve with our lord the king, what can this perfect path not obtain?[160]

There were two fundamental charges which Foliot levelled at Becket's approach to pastoral justice. The first, evident not least in the letters he wrote to Pope Alexander, was that Becket's actions were illegitimate because of the disturbance they caused to the Church. This contention held true regardless of whether Becket's severity was justified in the fight against sin and vice. Justice was never true if it threatened to overturn the peace of the Church, and hence zeal and severity had always to be moderated out of concern for

[158] *Becket Correspondence*, Ep. 109, i, p. 531, *Decretum*, D.L, c.25, 1:187, quoting Augustine, Ep. 185.10.45, CSEL 57, pp. 39-40.
[159] Cf. Luke ix.47-8, Proverbs iii.29.
[160] *Becket Correspondence*, Ep. 109, i, p. 537.

the flock.[161] It is for this reason that, elsewhere in *Multiplicem*, Foliot casts Becket, not Henry, as 'disturber of the peace'.[162] The second charge brought by Foliot was to claim that Becket's zeal for justice had led him to ignore the demands of Christian love. Theological schemes of the virtues privileged *caritas* over *iustitia*, for the coming of Christ and the new dispensation symbolised the victory of forgiving love over strict justice.[163] Actions which were not motivated by *caritas* could not truly be said to be just, regardless of their legal status. This reasoning allows Foliot to assume the moral high ground in the argument: Becket's zeal for justice may be admirable, but only *caritas* was properly and literally Christian, for to elevate *caritas* over judgement was characteristic of Christ himself.

Foliot's first charge – that Becket ought to show appropriate moderation in rebuking Henry – had already been addressed by John of Salisbury, who had considered the argument that an erring king, due to his status, deserved moderate treatment, lest harsh correction disturb the peace of the realm. This argument, however, John claims, cannot be upheld, for it is in flat contradiction of what the New Testament teaches about judicial objectivity and the condemnation of vice. John instead praises Becket for his refusal to moderate his criticism, which is consistent with the Apostle's command 'reprove, rebuke, exhort, in season, out of season' (2 Timothy iv.2).[164] Becket's response to Foliot's second charge, namely that he was obliged to act with love towards his king, could not take the form of entering into a debate the relative merits of *iustitia* and *caritas*, as the priority of *caritas* was a basic and unchallenged theological tenet. Instead, Becket was obliged to frame Foliot's understanding of *caritas* as an example of special

[161] *Becket Correspondence*, Ep. 93, i, p. 381 [=*GFL*, Ep. 166]: 'do not continue by too hasty a judgement to ruin and destroy, but let your paternal kindness endeavour to make provision that the sheep committed to your charge may have life, peace and security'.
[162] *Becket Correspondence*, Ep. 109, i, 513.
[163] Above, pp. 75-8.
[164] John of Salisbury, *Letters*, Ep. 101, i, p. 479.

treatment, of judicial partiality.[165] When Becket explains his stance, therefore, and in particular his unwillingness to moderate his condemnation of Henry despite the pleas of the English bishops, he makes a defence of judicial principle which is grounded in both law and morality. Henry, having sinned, should be punished no less than any other sinner, for the laws of the Church demand that the judge should show no respect for persons:

> For the canon excepts neither the great man nor the private citizen, but strikes those who sin equally with an equal penalty, unless you believe, perhaps**,** that ecclesiastical laws should be compared to Civilian laws which, as Anarcarsis complains, are like spiders' webs, which catch and trap little flies, but allow the greater flying creatures to pass through, when they are torn aside[166]... But not thus is the law of the Lord, which initiates vengeance in his sanctuary, and inflicts a very severe judgement on those who rule, and commands that the great should be greatly punished. We read that when Israel fornicated with the Midianites, its princes were struck with penalty for the crime; for the Lord says, 'take all the princes of the people and string them up on scaffolds facing the sun' [Numbers xxv.4].[167]

Becket, accordingly, denounces any call for accommodation with Henry as special pleading. He appeals to an alternative conception of the judge – not as someone who balances severity and mercy, but as someone who weighs all cases with true impartiality. Defending his position to Alexander III in 1167, Becket concludes that it is only the he, the Archbishop of Canterbury, who can be relied on to provide an impartial sentence in this matter, he concludes, for he alone is 'a maintainer of justice and equity (*equitatis et iustitie observatorem*); not a regarder of persons, sparing no one in judgement, fairly and faithfully dispensing equity and justice as much to the king as to the ordinary man'.[168]

Modern historiography has overplayed the contrast between the attitudes of the English Church and the English crown to the punishment of offenders, whilst

[165] Bernard of Clairvaux had used a similar argument in his attack on Peter the Venerable and cluniac observances, claiming that what Peter termed *caritas* was in fact laxity. See above, p. 155.
[166] For the reference see Plutarch, *Lives, Volume 1*, trans. Bernadotte Perrin (London, 1914), [Solon], pp. 414-5.
[167] *Becket correspondence*, Ep. 117, i, p. 567.
[168] Ibid, Ep. 124, i, p. 595, for equity (*aequitas*) see above, pp. 39-40, p. 49.

underplaying the dilemma – shared by both sets of judges – of choosing between the competing judicial strategies of justice and mercy. Although royal judicial authority was certainly resurgent in the twelfth century, royal responsibility for law did not equate to setting aside mercy altogether, which remained a fundamental part of how royal authority was constituted and perceived by contemporaries. In the well-functioning political societies envisaged by twelfth-century authors, English bishops and princes did not intervene in one another's judicial functions, because, as a matter of routine, they did not need to. A wise bishop could be expected to demonstrate appropriate severity, whilst the well-instructed prince understood the need for the judicious exercise of mercy in certain cases. Similarly, both ecclesiastical and secular judges had to contend with the same dilemma – how judicial discretion can correctly decide between justice and mercy.

The critical question of how the righteous exercise of judicial discretion was to be distinguished from arbitrary will is most sharply exemplified in the exchange of letters between Gilbert Foliot, Thomas Becket and John of Salisbury. This dilemma was not simply a polemical product of the conditions of a bitter twelfth-century ecclesiastical dispute – it lay embedded in scripture, in the principle that the judge ought to be no respecter of persons. This was an ideal that was open to a multiplicity of interpretations. Certainly the judge ought to refuse bribes, to be no respecter of wealth. Whether he ought to have sympathy for the poor, the weak or the wretched, however, was rather less clear – was this appropriate compassion or still shameful partiality? Becket's judicial strategy, Foliot lamented, was, in practice, harming the poor, the weak and the wretched, all of whom suffered with the institutional damage being caused to the English Church. Mercy towards the wretched was, moreover, the essence of justice, not in the sense of payment of due, but in an 'Augustinian' definition of justice as *subveniendo miseris*. Whilst a judge therefore ought not to be a respecter of persons, of wealth or status, he was

expected to have some regard for circumstance. This concerned both the circumstances of the crime (as is evident in the pardons of common law and the penitentials of canon law), but also the circumstances of punishment.

The preeminent importance of the circumstances of a crime, combined with the need to apply written law always in a spirit of *caritas*, were not commands which concerned only the ecclesiastical judge. Twelfth-century theologians argued that the obligation of *all* judges was to heal rather than harm, a principle which held true both in church and in secular courts. From the perspective of moral theology, the inherent challenge of passing sentence looked the same concerning any offence – whether a sin revealed in confession, a crime admitted to in the common law courts, or an offence, like heresy, which could be considered both crime and sin. In all these instances, the judge had a choice. His role was not to combine justice and mercy in a single judgement, but to determine, through his use of discretion, which of those two approaches best fitted the offence. Ecclesiastical judges could not claim a monopoly on mercy, and strict punishment was not the prerogative of royal justices alone.

Chapter 5. Histories of Justice

The twelfth century witnessed a series of scholastic and pastoral debates which concerned the extent to which the merciful counsels of scripture, as opposed to precepts, should be considered to be binding on the laity. Closely related to this issue was the question of how far the use of counsel (in a different sense), argument and persuasion was able to advance the virtue of justice. Precisely because the truly 'just' course of action was often uncertain, and dependent on variable circumstances which every judge needed to take into consideration, the meaning of *iustitia* as a practical objective became a topic for *rhetorical* argument. This, in turn, meant that persuasion and counsel were accepted as playing a central role in the determination and realisation of justice, and argument was as significant in determining judicial behaviour as procedural rules established by law. In the first instance, the classical rhetorical tradition provided judges and commentators with the conceptual tools to structure practical debates over justice and judicial action. The already complex proposition of 'doing justice' was thus further complicated because medieval authors had a Roman rhetorical vocabulary at their fingertips: a vocabulary which provided the tools both to defend and to pick apart specific judicial verdicts. In order to understand how justice should be applied in practice, therefore, twelfth-century authors recognised that it was essential to grasp the relationship between the virtue of justice as an ideal objective and the role of rhetoric in attaining it. In the second instance, however, this relationship presented problems all of its own. The complexities and political dilemmas which arose from this close connection become abundantly clear from the narratives of justice that appear in contemporary histories and chronicles.

Justice as a Rhetorical Choice

The ambivalent relationship, and sometimes uneasy accommodation, between medieval thought and classical rhetoric has been extensively discussed in modern historiography. With some reservations, Christian thought licensed the use of classical techniques in order to endow their works with persuasive and didactic power and literary ornament.[1] The exploitation of Roman rhetoric was justified on the grounds that God had blessed the Israelites in their theft and despoliation of the treasures of the Egyptians (Exodus xii.36). For the theologians and preachers of the High Middle Ages, classical rhetorical techniques (and the renewed engagement with classical texts which characterised the Twelfth-Century Renaissance) could be readily and usefully adapted when serving the laity.[2] As Thomas of Chobham explained, although one could not require every preacher to display *eloquentia*, skill in the manipulation of rhetoric would enable them to impress their case more powerfully on their audience.[3] The main mode of transmission of rhetorical ideas was through the study of Cicero: the two key texts here were *De inventione* and the pseudo-Ciceronian *Rhetorica ad Herennium*, both of which were studied in the schools, whilst other Ciceronian works were also examined by students at earlier levels of their education. The study of rhetoric was, of course, itself part of the *trivium* of the schools, alongside the arts of *grammatica* and *dialectica*.[4] No other classical texts were quite as influential as *De inventione* and the *Ad Herennium*: whilst Cicero's *De oratore* and Quintilian's *Institutio oratoria* were known during this period, they were rarely employed as teaching texts, and, as such, there is no extant

[1] See James J. Murphy, 'Saint Augustine and the Debate about a Christian Rhetoric', *Quarterly Journal of Speech* 46 (1960), pp. 1-10; idem, 'Saint Augustine and Rabanus Maurus: The Genesis of Medieval Rhetoric', *Western Speech* 31 (1967), pp. 97-110.
[2] See H. Caplan, 'Classical Rhetoric and the Mediaeval Theory of Preaching', *Classical Philology* 28 (1933), pp. 76-96.
[3] Cf. Morenzoni, *Des écoles aux paroisses*, pp. 43-4.
[4] See P.O. Lewry, 'Grammar, Logic and Rhetoric', in J.I. Catto (ed.), *The Early Oxford Schools* (Oxford, 1984), pp. 401-33.

commentary tradition upon them which might reveal how they were read and utilised.[5] By contrast, at least fifteen commentaries on the *De inventione* and *Ad Herennium* were composed in the twelfth century.[6]

Cicero's *De inventione* and *Ad Herennium*, and the medieval commentaries upon them, explained to readers that rhetorical argumentation could be divided into three genres: epideictic (or demonstrative), judicial (or forensic) and political (or deliberative). Epideictic was that rhetoric which spoke in praise of virtue or condemnation of vice; judicial the type which was found in the law courts, governing the way in which accusations and defence were presented; political rhetoric was an argument over the righteousness and advantageousness of a certain course of action.[7] In twelfth- and thirteenth-century arguments over the relationship between justice and mercy, it is the category of *political* rhetoric which emerged as central to the discussion. The issue of whether questions of justice and mercy belong to the category of judicial, rather than political rhetoric was an argument which engaged medieval commentators. Revealing in this regard is a late eleventh-century gloss on the *Rhetorica ad Herennium*, today only extant in English manuscript copies, including a twelfth-century copy from the Augustinian abbey at Leicester. This gloss, known as *In primis* (and possibly attributable to the Parisian master William of Champeaux[8]), notes a disagreement between two medieval commentators as to whether each type of rhetoric (epideictic, judicial, political) was confined to a particular place. For example, was judicial rhetoric only ever to be used in the courtroom, epideictic rhetoric only on formal occasions such as ceremonies or

[5] Mary Dickey, 'Some Commentaries on the *De inventione* and *Ad Herennium* of the Eleventh and Early Twelfth Centuries', *Mediaeval and Renaissance Studies* 6 (1968), p. 1.
[6] Karin Margareta Fredborg, 'Ciceronian Rhetoric and the Schools', *Learning Institutionalised*, pp. 21-2; B. Munk Olsen, 'La popularité des textes classiques', p. 177.
[7] *Ad Herennium*, 2.1, pp. 58-9.
[8] Constant Mews, '*Logica* in the Service of Philosophy: William of Champeaux and his Influence', in Rainer Berndt (ed.), *Schrift, Schreiber, Schenker: Studien zur Abtei Sankt Viktor in Paris und den Viktorinern* (Berlin, 2005), pp. 89-96; attributes the commentary to William of Champeaux, and argues that it cannot have been written before the 1090s.

funerals? *In primis* notes that, whilst this was the answer of Manegold of Lautenbach – that each type of rhetoric always held its proper place – this was not the answer of Anselm of Laon, who argued that any of the three types of rhetoric might be used anywhere (*indiscrete ubique aguntur*).[9] This latter argument, attributed to Anselm, demonstrated agreement with the arguments of Boethius concerning the types of rhetoric. Boethius had stated that the type (epideictic, judicial or political) was determined according to the purpose at which the orator aimed. Thus rhetoric which aimed at justice was judicial, that which set forth an advantageous course of action was political, and that which discussed virtue was epideictic.[10] Boethius's principle that subject matter, rather than venue, determined the type of rhetoric, was endorsed by Petrus Helias (c. 1100-1166) in his important commentary on *De inventione*.[11]

Not all medieval authors, however, agreed with the idea that the virtue of *iustitia* should be the subject of rhetorical argument at all. The *Formula honestae vitae* of the sixth-century bishop Martin of Braga, a text often attributed to Seneca during this period, argued that the principles of persuasion so often used to inform rhetorical argument, had no place when discussing *iustitia*, for 'in justice, there is no room for discussing what is expedient (*quid expediat*)'.[12] In this question, the explicitly political, pragmatic reasoning which is the basis for rhetorical persuasion should have no bearing on virtue. This position, however, was challenged in a number of twelfth- and thirteenth-century texts. Thomas of Chobham explicitly recommended the use of rhetorical techniques in exhorting men to virtue and in condemning vice. In sermons, he argued, the preacher seeks not to prove, but to persuade – and so, as a result, the preacher must resort to

[9] Dickey, 'Some Commentaries', p. 40.
[10] Boethius, *De differentiis topicis*, 4, PL.64.1207C.
[11] K.M. Fredborg, 'Petrus Helias's *Summa* on Cicero's *De inventione*', *Traditio* 64 (2009), p. 175.
[12] Martin of Braga, *Formula honestae vita*, in *Opera omnia*, ed. Claude W. Barlow (New Haven, CT, 1950), 5, p. 246; Stephan Kuttner, 'A Forgotten Definition of Justice', *Studia Gratiana* 20 (1976), p. 100.

rhetorical techniques.[13] If the priest wishes to see the growth of justice in the community, he must be able to persuade the sinful to a course of action which runs contrary to their usual habits.[14]

The principle that Christian rhetoric and virtue were compatible was espoused by the Benedictine theologian, Rupert of Deutz, in his *De operibus spiritus sancti* (before 1117), which included a section on the operation of rhetoric.[15] For Rupert, the best demonstration of the virtuous power of rhetoric was to be found in the Bible. Rupert explains an argument over the forgiveness of a sinner between Christ and his disciples according to rhetorical principles. This is the scene described in Luke vii.39-50, in which the disciple Simon objects to Christ's feet being washed and anointed by a sinful woman. Christ replies that the woman's act, her tears and her care for his body are demonstrations of her repentance. He then explains that because of the 'greatness' of the woman's love, her many sins have been forgiven – and, in turn, iterates the principle that whoever demonstrates only a little love will receive only little forgiveness for their sins (Luke vii.47). For Rupert of Deutz, this passage provides one example of *controversia* – a point in debate between Simon and Christ. It demonstrates the opposition of Christ's *mansuetudo* or *temperantia* on the one hand and, on the other, the *invidia* of those who resented the repentant woman's position and who wished to deny her forgiveness. The expression 'whoever loves greatly, will be greatly forgiven; whoever loves little, will have little of their sins forgiven', is, for Rupert, a powerful piece of persuasive rhetoric as much as it is a judicial statement.[16] The significance of Rupert's rhetorical exegesis lies here in the implication that even in decisions concerning the forgiveness of sins, argument was to be expected. Even Christ, in other words, was not above resorting to

[13] Thomas of Chobam, *SAP*, 3, p. 123.
[14] Ibid, 7.2.1, p. 269.
[15] Rupert of Deutz, *De sancta trinitate*, 40.8, CCCM 24, pp. 2051-60.
[16] Ibid, 40.8, p. 2054.

rhetorical techniques to defend the righteousness of his actions as a judge of the good and the wicked.

Twelfth- and thirteenth-century authors recognised the rhetoric which concerned the preservation of justice as a type of political rhetoric. *De inventione* had determined the two ends of political rhetoric as *honestus* and *utile* (the honourable and the expedient).[17] Arguments over judicial decision-making and sentencing are concerned with these two qualities above all else. Will the punishment be 'good' for the criminal, and, indeed, for the soul of the judge? Will it be expedient, both in achieving the correction of the wicked, and in ensuring peace for the community?[18] Even the supposedly 'strict' Roman law could provide contradictory messages on the purpose of punishment. On the one hand, Roman law established the purpose of punishment as securing the tranquillity of the state, checking crime through fear of retribution: *Digest* 1.1.1 gives the purpose of the law as the restraint of wrongdoers (*bonus metu poenarium efficere*).[19] On the other hand, jurists such as Paulus suggested that reform of the criminal should also be an object of punishment, and thus bestowed on the judge the ability to temper the laws with gentleness (*benignitas*).[20]

Because justice was not simply a personal virtue but also a public duty for rulers, it was, in the eyes of twelfth-century authors, an appropriate subject for deliberative oratory. The idea that rhetoric can serve justice is explicitly endorsed by the early twelfth-century legal text, the *Leges Henrici Primi*, which begins with a classification of the three kinds of rhetorical argument (epideictic, demonstrative and deliberative), and cautions that, in court, rhetoric must be used to serve truth and justice, not private advantage.[21] When the judge (whether royal or ecclesiastical) is in a position of public authority, any

[17] e.g. *De inventione*, 2.55, p. 216; 2.168-9, pp. 332-6.
[18] Above, p. 82.
[19] *Digest*, 1.1.1, 1:29.
[20] Ibid, 48.19.20, 1:867; cf. 48.19.11, 1:866.
[21] *Leges Henrici Primi*, 4.1-5, p. 83.

exercise of judicial virtue (be that *misericordia* or *iustitia*) has clear implications for public welfare, for 'the rigour of the chastiser is peace for the people'.[22] This relationship had been made explicit in the definition of justice provided by Cicero, in which the act of *suum cuique tribuens* was established for the purpose of serving the good, the 'utility' (*utilitas*) of the community.[23] Roman law made the same point about the centrality of the public good to the offices of law-maker and judge.[24] But it was not necessary to possess an education in civil law to draw this connection between justice and public good: it was equally evident from classical literature, and can be found repeated in twelfth-century works of moral theology and *florilegia*.[25] Alan of Lille, for example, emphasises that *severitas* in particular, amongst all other judicial strategies, preserves the *communis utilitas*, by refusing to relinquish the due penalties of law.[26]

Of course, discussing the idea of medieval 'public good' is a fraught endeavour. The idea of action that was justified *ratione utilitatis publicae*, is, unfortunately, inextricably linked with historiographical ideas about the origins of the 'State' (with a capital 's') in the twelfth and thirteenth centuries.[27] Recent authors have challenged the proposition that any such medieval entity worthy of the name of 'state' existed, and, in doing so, have maintained that royal justice was little more than brute violence exercised from a desire for domination and profit.[28] Bisson, for example, argues that exactly this notion of *communis utilitas* represents a fundamental misreading of twelfth-century texts. For Bisson, the concept was foreign to those operating the levers of power, and it

[22] Gervase of Tilbury, *Otia imperialia*, preface, p. 3.
[23] *De inventione*, 2.160, p. 328 ('iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem'); *De officiis*, 1.31, p. 32 ('fundamenta iustitiae, primum ut ne cui noceatur deinde ut communi utilitati serviatur'). Above, p. 31.
[24] e.g. *Digest*, 9.2.51.2, 1:162 (*communis utilitas* sometimes outweighs the arguments of reason); 43.1.2.1, 1:728; 47.10.5.11, 1:831 (*publica utilitas*).
[25] e.g. *Florilegium Gallicum*, p. 257, 271.
[26] Alan of Lille, *De virtutibus*,1.2, p. 31.
[27] e.g. Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton, 1964), pp. 241-309.
[28] Above, p. 17.

represents the imposition of anachronistic Roman terminology on a very different medieval social reality. The idea of public good was advanced, he argues, only by authors who imagined themselves to inhabit a Roman world, self-consciously classicising individuals participating in an academic *renovatio*, a group which had no connection to the real exercise of power.[29] A fundamental flaw in Bisson's argument, however, is that twelfth-century writers and commentators did not need a complex classical vocabulary or an elaborate notion of the 'state' to appreciate the idea that justice should serve the good of the people or the kingdom. This is a patristic commonplace, and an idea so common as to be almost axiomatic. According to Augustine, the very least that individuals should expect from a ruler is that he ensure peace and protect his people from wrongdoers.[30] Moreover, the role of classical rhetorical structures was profoundly important for the way in which the debate about the nature and purpose of justice was conceptualised. Roman rhetoric demonstrated how questions about the judicial action which best served the community could be debated. Yet twelfth- and thirteenth-century authors were applying classical rhetorical terms to problems which existed in practice, in order to highlight real political dilemmas for Anglo-Norman and Angevin rulers. They borrowed a Ciceronian intellectual framework to cast new light on a pre-existing debate; they did not dream up that debate by overindulging in classical texts.

A 'rhetorical' approach to justice (and the public good that was to be achieved through justice) could be used both to vindicate and to problematise judicial choices. Admittedly, there were numerous ways in which authors envisioned a hierarchy of mercy and justice, and not all twelfth-century writers chose to appeal to Ciceronian ideas.[31] The most important, however, of all discussions concerning judicial deliberation over

[29] Bisson, *Crisis*, pp. 10-1, 490-2.
[30] Augustine, *De civitate Dei*, 1.21, p. 23.
[31] e.g. Augustine, *De sermone domini in monte*, 2.18, p. 154, provides 'in meliorem partem interpretemus' as an alternative judical principle; cf. *GO* on Romans xiv.4, PL.114.514D-5A, repeated in Peter Lombard's commentary on Romans, PL.191.1513; Robert of Melun, *QEP*, on Romans xiv.4, p. 162.

punishment was drawn from the tradition of deliberative (i.e. political) rhetoric. Classical rhetorical theory explained how a certain course of action could be defended according to its righteousness (for example, the punitive sentence which served to discourage other offenders). Yet the toolkit of deliberative rhetoric also provided the means by which to challenge such a verdict. Particularly important in this context was the discussion of deliberative rhetoric found in the *Rhetorica ad Herennium*. The idea introduced in the *Ad Herennium* (which differed slightly to the terminology used in *De inventione*) was that deliberative rhetoric aimed at persuading listeners to follow the course which was *utile*, useful. *Utilitas*, however, contained within it two principles: *tutus* (safety) and *honestus* (the honourable or morally worthy course of action).[32] This idea was taken up in twelfth-century discussions of the virtue of justice: for example, the *Moralium dogma philosophorum* explains that *negligentia* is a vice opposed to justice precisely because it represents a failure to defend this objective of safety.[33] John of Salisbury explained that it was possible for the prince to dispense from the law, so long as the principles of both *honestus* and *utilitas* were preserved.[34] Usually the two principles of safety and worthy action will be united in a single judicial decision, but, the *Ad Herennium* allows, on occasion the two will not be in agreement. If this is the case, when deliberating, one must choose between two courses, one of which secures what is honourable or worthy, the other ensures security. This rhetorical choice between the 'morally worthy' and the 'safe' course of action was repeated in *De inventione*.[35] Access to that rhetorical terminology provided twelfth-century authors with a further way of conceptualising the conflict between justice and mercy, depicting it as a battle of rhetorical persuasion. In turn,

[32] Cf. *Ad Herennium*, 3.2.3, pp. 160-1.
[33] *Moralium dogma philosophorum*, p. 28.
[34] *Policraticus*, 4.7, 1:527; see above, pp. 158-9.
[35] *De inventione*, 2.174, p. 340.

however, this might only serve to make the conflict between the two principles more intractable.

This polarisation of *tutus* and *honestus* was, occasionally and revealingly, used by twelfth- and thirteenth-century authors to describe the dichotomy between *misericordia* and *iustitia*. It is found, for example, in the *Verbum abbreviatum* of Peter the Chanter, when discussing the setting of punishments.[36] Peter argues that mercy or leniency is in fact the 'safer' option: *tutius est tamen in remissione peccati quam in rigore*. Considering how the term *tutius* is being used here, it seems that safety must in this case refer not to the political community, but to the safety of the individual. The Chanter may either be suggesting that it is 'safer' to be merciful, for the penitent faced with too heavy a sentence may refuse to make satisfaction altogether; or he may otherwise be thinking of 'safety' for the judge, who will be treated more severely by the divine judge for being excessively punitive than he will for being excessively merciful. In this sense, Peter argues, it is always safer for the good man, conscious of his ultimate fate, to err on the side of leniency. This statement is followed by a précis of the reasons why mercy is to be preferred to stricter punishments. Mercy lies in adherence to the mean course (between excessive severity and excessive laxity), an action praised by classical writers such as Horace, Ovid and Terence; mercy is safer for the soul, and merciful action also secures worldly glory, for 'glorious is the king who punishes less than is deserved'.[37]

The same oratorical terminology of *tutus* versus *honestus* is employed by Robert of Flamborough in his *Liber poenitentialis*. That Robert was a pupil of Peter the Chanter may be significant in this regard.[38] The *Liber poentitentialis* uses the language of *tutus* and *honestus* most explicitly when discussing how and when penitential punishment can be modified. Robert uses the principle of following a 'safer' course of action as a

[36] *VA*, 1.66, p. 437.
[37] Ibid, 1.66, p. 438.
[38] Baldwin, *Masters, Princes and Merchants*, i, pp. 32-4.

justification for lessening heavy penances, despite the fact that such punishments are advocated in ancient canons:

> These punishments are so excessively oppressive (*graves admodum*) and severe (*asperae*) that there is scarcely anyone who is willing to undertake them or impose them. Besides which, although you do not find this expressed clearly in a single one of the penitential books, it is safer (*tutior*) and more worthy (*honestior*) that, having the ancient authorities before our eyes, we, in this way, and by our consideration, perhaps disentangle these punishments and mitigate them.[39]

In this case, Robert notes, the safer course also agrees with the more worthy action, i.e. it is both *tutior* and *honestior* to consider the mitigation of penance. In context, it can be inferred that the idea of *tutius* carries the connotation that penitents may refuse an excessively harsh punishment. In this sense it is safer for the soul of the sinner that the confessor apply a softer form of correction, as the lighter form of penitential discipline is more likely to be followed.

The relationship between *tutus* and *honestus* is a theme which runs throughout the *Liber poenitentialis*, and Robert pays particular attention to the course of action which is *tutius* (although he does not always advocate such a course). In another context, Robert notes that whilst it may be permissible for a priest who has committed *crimen maximum* (an offence such as homicide) secretly, and subsequently done penance for the crime, to be restored to office and even advanced, it is safer (*tutius*) that he not be permitted to return to his former position.[40] Although dispensation could be made in this context, Robert advises that such a course should not be followed. Here the safety Robert presumably has in mind is the preservation of the integrity of the Church and the prevention of possible scandal. Given that the question of the restoration of a priest guilty of *crimen maximum* to office was a fairly controversial point amongst canonists during

[39] *Liber poenitentialis*, 5, prologue, p. 203.
[40] Ibid, 3.3, p. 118.

this period, Robert's arguments are not revolutionary.[41] What is striking, however, is that he invokes classical rhetorical vocabulary to explain the way in which judicial dilemmas can be resolved.

Much of Robert of Flamborough's further discussion about the 'safer' courses of judicial action focuses on similar questions concerning how best to deal with a disgraced priest, although the direct comparison of action *tutus* with *honestus* is less explicit. He advises, for example, that it is 'safer', *ad salutem animarum*, to send a simoniac to Rome to be judged by the Pope, than ask a lesser judge to decide the question.[42] Elsewhere he gives the same advice – it is in all cases the safer judicial option to refer questions to Rome than to rely on one's own opinion.[43] In the works of other authors it is possible to glimpse appeals to these classical rhetorical ideals, and they are consistently invoked in explicitly judicial contexts. John of Salisbury's *Policraticus*, for example, remarks that mercy is the 'safer' (*tutius*) course in sentencing.[44] Given Peter the Chanter seems to have raised the idea in his teaching, the choice between 'worthy' and 'safe' judicial decisions would have been in the minds of the English students who studied under him, and indeed, those who had access to his great *Verbum abbreviatum*.[45] This is in addition to those who could consider the question of *tutus–honestus* as a judicial principle through their direct reading of the classics.

What is most striking of all, however, is that only thirty years after Peter the Chanter had influentially discussed *tutus* and *honestus* as principles of penitential punishment, at least one English author was considering how the same considerations

[41] Cf. Morey, *Penitential*, 72, pp. 240-1. Much of the discussion about restoration of priests focussed on the decretal 'Presibterum': Stephan Kuttner, 'The Decretal "Presbiterum" (JL 13912) – a letter of Leo IX', *Bulletin of Medieval Canon Law* 5 (1975), pp. 133-5; Kuttner and Rathbone, 'Anglo-Norman Canonists', pp. 310-11.
[42] *Liber poenitentialis*, 3.3, p. 141.
[43] Ibid, 3.3, p. 143.
[44] John of Salisbury, *Policraticus*, 4.8, 1:530, 'quia tutius est cordas remitti intensius quam protendi'.
[45] For the influence of this text see above, p. 46.

might apply in common law. The lawbook Bracton (c. 1235) discusses the principles for 'safe' action when advising a judge on whether he may depart from the law in passing sentence.

> Yet although it is safer (*tutius*) to render a final account from mercy (*misericordia*) rather than judgement (*iudicium*), it is safest (*tutissimum*) that [a judge's] eyes precede his steps, that judgement not become uncertain through lack of prudence nor mercy (*misericordia*) debased by indiscriminate application, for mercy (*misericordia*) is indeed unjust (*iniusta*) when it is extended to the incorrigible.[46]

The contrast of *tutus* with *honestus* is, of course, only implicit, but given the judicial scenario which the author of *Bracton* is envisioning, the possibility of a classical rhetorical influence should at least be considered. In *Bracton*, *misericordia* is not necessarily the 'safest' option for the judge, because such a decision may cause the judge to depart from law and reason. Whilst the term *tutus* is used in Roman law, and *Bracton*'s author may have drawn his terminology exclusively from this source, his use of the term to describe a choice in judicial sentencing in fact carries a meaning far closer to the contexts of deliberative rhetoric, namely by explaining the 'safe' course of judgement with reference to both its moral worth and political utility. By contrast, the invocation of the term *tutus* in Roman law usually implies a more general sense of legal protection.[47]

The frequent recourse to the principle of *tutus* in explaining more contentious judicial decisions suggests that the language and terminology of deliberative rhetoric directly impinged upon judicial decision and perceptions of the act of judgement. It opened practical justice up to alternatives and to question. The crucial point here is that, in the twelfth century, it was acknowledged in theory and in practice that, in the act of doing justice there was space for *argument*. Procedural guides provided only instruction

[46] *Bracton*, ii, p. 306.
[47] e.g. *Digest*, 4.2.14, 1:81, 'item si, cum exceptione adversus te perpetua tutus essem, coegero te acceptum mihi facere, cessare hoc edictum, quia nihil tibi abest'; cf. *Digest*, 4.2.14.11, 1:81-2. *Bracton* does elsewhere invoke the idea of *tutus* in a more general sense of 'safety': see *Bracton*, ii, p. 104; iii, p. 58; iii, p. 73; iv, p. 86; iv. p. 138; iv, p. 190; iv, p.191.

for avoiding the worst excesses of bad judgement, but when a judicial decision had 'political' implications (as the sentencing of criminals did), the best, most useful, most honourable, or safest course of action was not always clear. In other words, it was not always apparent which of these principles – mercy or justice, mitigation of punishment or severity – was most closely aligned with rightful judgement. For those positions to be justified, they had first to be debated.[48]

To appreciate the ambiguity of some judicial decision making, and the role of rhetoric in both problematising and resolving judicial dilemmas, an instructive text to consider is the *Speculum universale* of Raoul Ardens, written in the last decade of the twelfth century. Raoul was trained in Paris, in the circle of Peter the Chanter, and served as a chaplain to Richard I: whilst not 'English', Raoul at least had a significant link to England, and to the master who influenced so many English theologians.[49] The *Speculum universale* is a work of ethics, and its tenth book is dedicated to a discussion of justice. In this book, Raoul identifies *clementia* as an accessory (*collateralis*) virtue of *iustitia*, and explains that the role of *clementia* is to temper justice.[50] This prompts Raoul to consider different species of *clementia*, which he identifies as *clementia temperata*, *clementia remissa* and *clementia laxa*.[51] He then goes on to explain and rank these species. The first, *clementia temperata*, which might best be understood as 'controlled clemency', is, in Raoul's opinion, the most praiseworthy – it is *rationabilis*, in the sense that its role within justice is the rational calculation of which particular offenders ought to be spared. The third type, meanwhile, *clementia laxa*, is in fact not a virtue at all, but a vice (*vicium*)

[48] Historians of rhetoric have traditionally argued that classical rhetorical theory had very little influence on the reality of political discussion. See J.O. Ward, 'The Commentator's Rhetoric: From Antiquity to the Renaissance, Glosses and Commentaries on Cicero's Rhetorica', in J.J. Murphy (ed.), *Medieval Eloquence: Studies in the Theory and Practice of Medieval Rhetoric* (Berkeley, CA, 1978), pp. 126-73; Dickey, 'Some Commentaries'.
[49] Ferruolo, *The Origins of the University*, p. 193; see also J. Gründel, 'L'Oeuvre encyclopédique de Raoul Ardent, le *Speculum universale*', *Cahiers d'histoire mondiale* 9 (1966), pp. 553-70.
[50] 'Speculum universale', BnF, MS Latin 3240, X.57, f.41r.
[51] Ibid, X.59, f.42r.

– it is thoroughly irrational (*penitus irrationabilis*), for it indifferently spares both those guilty of great offences and those who commit lesser crimes. It is a vice because it excuses both *excusabilia* and *inexcusabilia*. It is Raoul's middle category of *clementia remissa* which is by far the most interesting. This type of clemency is 'less temperate' (*minus temperata*) than 'controlled clemency', Raoul notes, but it is not altogether lacking in control: it is also *minus rationabilis*, but not entirely lacking in reason either. This type of clemency sometimes spares great crimes, finding reason to pardon the offender. The verb Raoul uses here – *invenitur* – is significant: it can bear the neutral translation of 'finding' or 'discovering' the reasons for pardon; on the other hand, the connotation is also that of 'contriving' reasons for pardon. What Raoul seems to recognise in this category is a grey area between the virtuous type of forgiveness and the lax pardon which is most assuredly vice. The borders of this category – the point at which clemency slides from being somewhat lacking in reason to being completely unreasonable and vicious – are, clearly, not easily delineated.

Raoul employs the same structure to explain the virtue of judicial justice.[52] There is, he explained, *iustitia clemens*, merciful justice, which is rational and the most temperate virtue; there is also *iustitia crudelis*, cruel justice, which is clearly a vice and spares no-one. Between the vice and the virtue, however, lies a middle category, *iustitia severa* – strict justice – which is less tempered and less rational than merciful justice, and which occasionally fails to spare those whom it ought to pardon. It is this middle category of justice which is the most revealing, because it contains some reason and some measure of virtue, but its righteousness is debatable. Moreover, the model presented by Raoul – a sliding scale between perfect justice and damnable excess – would not be possible had he adhered to an 'Aristotelian' model of virtue as a golden mean, with justice lying between

[52] Ibid, X.60, f.42r.

excessive laxity and excessive clemency.[53] Instead, justice and clemency are discussed on two separate scales. There is no suggestion that justice is the mid-point between excessive severity and excessive laxity. Instead the *Speculum universale* presents a hierarchy – merciful justice sits at the top, with actions becoming less just and less rational as they descend towards the bottom of the scale, towards cruelty.

Raoul extends his tripartite classification one step further elsewhere in his *Speculum*, when he considers the concepts of *iustum*, *honestus* and *expediens*.[54] Raoul tackles each one of these terms in turn. Beginning with state of being just, Raoul again explains that there are three levels to this.[55] The first is simply *iustum*: this is the state in which one returns good for good. The second, higher, level is *iustius*: this is a person who (or the act which) returns good for good, but who, in addition, refuses to return evil for evil. The final level or state of justice is *iusti summum*: this is an individual who returns good for evil – an act of perfect justice. The implication is obvious here: some humans are more just than others. Raoul follows this with a discussion of the different degrees of *honestus*, or morally worthy behaviour.[56] The discussion begins by explaining that *honestus* is 'a good which is never mixed with shameful behaviour (*bonum nichil turpitudinis admixtum*)', a definition which broadly corresponds to the notions of *honestus* in classical texts. *Honestus* (and here Raoul is thinking about the idea in a spiritual context) may be divided into three categories, on a sliding scale: *magnum honestus*, the least of the three, which is displayed by the infirm; *maius honestus*, which is displayed by the 'proficient', and finally, *maximum honestus*, which only the accomplished (*profectum*) have mastered. The *Speculum* then goes on to define the quality of expediency (*expediens*), a concept which Raoul discusses in much less detail

[53] Above, pp. 34-6.
[54] 'Speculum universale', BnF MS Latin 3229.
[55] Ibid, I.15, f.3v.
[56] Ibid, I.16, f.4v.

than *honestus*, but which follows a near-identical structure.[57] *Expediens*, as it is used here, has broadly similar connotations to the Ciceronian idea of *utilitas*. Raoul, however, goes on to explain that expediency is the quality which, when considered in a spiritual sense, pertains to the shortest (*compendiose*) path to salvation. The lowest level is that which is simply expedient (*expediens*), the second, higher level, that which is more expedient (*expedientius*), and the third and highest level (*expendientius summum*), that which is most expedient to salvation.

That all three of these concepts – justness, moral worth and expediency – can be measured on a sliding scale is reflected in the diagrams which with Raoul illustrates his *Speculum*.[58] With regard to the latter two categories – *honestus* and *expediens* – Raoul's arguments serve to provide a further nuance to the language of medieval deliberative rhetoric, over and above what it derived from the classical tradition. In Raoul's view, a course of action cannot merely be described as expedient without clarifying the degree of that expediency. Raoul raises the possibility that, in an ethical context, a choice may need to be made between two courses which, according to the measure of their *utilitas*, are both morally admissible, yet one will be more expedient, more profitable or advantageous, than the other. Finally, Raoul explains that these three concepts – the just, the honourable and the expedient – are ultimately in agreement (*congruenciam*).[59] That is, a just act is also honourable and expedient. This approach echoes the presupposition of the third book of Cicero's *De officiis* – that which is honourable is also that which is *utile*.

Raoul Ardens – with his categories of 'middlingly' or 'partially' just acts – demonstrates that twelfth- and thirteenth-century theologians considered the 'rationality' of some types of justice (and indeed, some acts of mercy) to be debatable. It is this consideration which underlies the treatment of justice in English histories and chronicles

[57] Ibid, I.17, f.4v.
[58] See appendix, figs.1-3, pp. 309-11.
[59] BnF, MS Latin 3229, I.18, f.5v.

of the twelfth and thirteenth centuries, namely the assumption that this was a subject of *debate*, not of clear-cut categories, and a debate which involved all sorts of consideration of circumstances. Kings, lords and judges argued over what the truly 'just' course of action was, invoking terms and ideas borrowed from the world of classical deliberative rhetoric, and applying them directly to the events they had to deal with in court. And yet, making justice subject to rhetorical debate, a question of persuasion, invited further problems. As Raoul Ardens makes clear, it is not always apparent how the distinction between admirable clemency and vicious laxity should be drawn. Much depends on the intention and attitude of the judge. This was a problem made clear, for example, in contemporary legends of the Four Daughters of God. In that text Truth and Justice, Mercy and Peace seek opposed political ends, but all four pleaders before the Lord presented cases which were (self-evidently) based on virtuous principles.[60] But, above all, in the political context set out in twelfth- and thirteenth-century histories and chronicles, a judge (or king) may never be entirely sure whether his counsellors were presenting the case for justice or mercy because they were motivated by prudence, virtue, and concern for the political community, or because of the machinations of their own *voluntas*. This was, after all, the criticism frequently levelled against the exercise of pardon: that it was a product of partiality and favouritism, not the rational weighing of the merits of judicial arguments.[61] This issue of intention touched on a long-running point of concern for medieval rhetorical theorists – to whether rhetorical skill should be utilised to argue against virtue. According to classical definitions, the accomplished and persuasive orator was also to be a morally good individual (Quintilian had described the orator as *vir*

[60] Above, pp. 131-2.
[61] Above, pp. 65-6.

bonus, dicendi peritus).[62] This point is neatly demonstrated in commentaries on Sallust's *Bellum Catilinae*. One commentator (possibly to be identified as Alan of Lille) noted that, although Catiline had skill in speech, he could never be described as an orator, because he lacked virtue: he possessed *eloquentia* without *sapientia*.[63] If justice is achieved through persuasion, then injustice may quite as easily be achieved through manipulation. It is precisely such a dilemma that is presented in English histories.

Writing the History of Justice

English chroniclers were particularly interested in the place of justice within royal office. Justice is a key theme for many historical narratives, for it is the critical variable by which the success of a reign is measured. The English coronation oath, both as it had been set down in Old English in the tenth and eleventh centuries, and in a twelfth-century Latin version, bound kings to show both justice and mercy (*in omnibus iudiciis equitatem et misericordiam praecipiam*).[64] Narrative histories report on both issues of law and questions of justice, suggesting that no sharp distinction should be drawn between legal and historical endeavours, but rather that, in terms of content and purpose, they could serve complementary purposes. With any examination of these histories, however, the relationship between historical writing and legal record must be considered. How can one ascertain the *historicity* of legal judgements portrayed in narrative sources? When chroniclers move away from simply recording the text of assizes and instead recount acts of judgement or incidents of injustice, how can the historian be sure of the veracity of their testimony? There are two possible approaches to this problem. The first is to

[62] Quintilian, *Institutio oratoria*, ed. and trans. D.A. Russell (5 vols., London, 2001), 12.1.1, v, p. 196; a definition repeated by Isidore of Seville, *Etymologies*, 2.3, p. 69. See Richard McKeon, 'Rhetoric in the Middle Ages', *Speculum* 17 (1942), p. 15.
[63] Caplan, 'A Medieval Commentary', pp. 247-70.
[64] L.G. Wickham Legg, *English Coronation Records* (Westminster, 1901), pp. 30-1; Mary Clayton, 'The Old English *Promissio regis*', *Anglo-Saxon England* 37 (2008), pp. 91-150.

scrutinise moments at which legal records and chronicles describe the same incidents. The difficulty in this case is that, given the state of the evidence, it is rare to find an historical example of a 'criminal' offence which is documented both in legal and narrative sources. One important exception to this, however, is an incident which is recorded both in Matthew Paris's *Chronica maiora* and in the crown's legal record. The relationship between these two sources – narrative and legal – was examined by Michael Clanchy in a valuable article, whose findings merit discussion here.[65] Clanchy took the *Chronica maiora*'s account of a robbery and trial at Alton, Hampshire (which occurred in January and February of 1244), also documented in a membrane from the eyre roll and in select crown pleas.[66] He demonstrated that the legal record largely corroborates Matthew Paris's representation of the incident, although conceding that the *Chronica* 'probably simplified and over-dramatised' the events.[67] Clanchy argues, on the basis of this extended comparison and careful scrutiny, that Matthew Paris ought to be considered a more reliable and accurate source than he is sometimes thought to be. It should certainly not be assumed that a chronicle is a less valuable historical source than plea rolls, simply by virtue of the official status of the latter, for such documents may also contain contradictions, distortions and mistakes.[68]

In fact, not only does Matthew Paris provide a largely accurate report of the legal process, but the *Chronica maiora* also serves to set that legal process in its political context. In this incident, for instance, the *Chronica* describes how Henry III personally intervened in the case – a notorious robbery – a detail which is lost if reliant solely on the legal records. Clanchy concluded that Matthew's reporting was so accurate and detailed

[65] M.T. Clanchy, 'Highway Robbery and Trial by Battle in the Hampshire Eyre of 1249', in R.F. Hunnisett and J.B. Post (eds.), *Medieval Legal Records: Edited in Memory of C.A.F. Meekings* (London, 1978), pp. 26-61.
[66] *Chronica Maiora*, v, pp. 56-60.
[67] Clanchy, 'Highway Robbery', p. 37.
[68] Ibid, pp. 46-7.

on the legal mechanics of the case that it is possible he had access to copies of the crown rolls themselves. This possibility is further supported by a second comparative study of Matthew's *Chronica* and the official crown record – this time focussing on a speech given by Henry III at the Exchequer in October 1256.[69] David Carpenter scrutinised Matthew Paris's reporting of this speech, and concluded that it gave the impression of 'substantial accuracy mixed with the occasionally erroneous detail'.[70] Matthew Paris must have been close to the Exchequer, was well-informed, and, crucially, a reliable witness for the thirteenth century. This is perhaps a surprising conclusion, given that historiography has traditionally cast Matthew Paris in the role of a distinctly unreliable witness, prone to exaggeration and flights of fancy.[71]

Naturally, care must still be taken over historical accounts of judgement. There are limitations to the generalisations which can be drawn from the two case-studies of Matthew Paris, and his accounts of other historical events may well be less reliable. However, a number of English chroniclers of the twelfth and early thirteenth centuries certainly did have good access to legal and royal records, in addition to experience as witnesses of judicial judgements.[72] These historians and chroniclers should, by and large, be assumed to be well-informed men who recounted incidents of justice from informed and often privileged positions. The historian Roger of Howden, for example, had served Henry II as a clerk and later as a justice of the forest, and thus his interest in royal legislative activity is far from surprising.[73] Moreover, Roger's *Chronica*, a history of England from the time of Bede to the year 1201, is found in its earliest manuscript copy

[69] D.A. Carpenter, 'Matthew Paris and Henry III's Speech at the Exchequer in October 1256', *The Reign of Henry III*, pp. 137-50.
[70] Ibid, p. 140.
[71] e.g. R. Vaughan, *Matthew Paris* (Cambridge, 1958), pp. 134-39.
[72] Below, pp. 271-2.
[73] For Howden's involvement in royal affairs see David Corner, 'The *Gesta regis Henrici secundi* and *Chronica* of Roger, Parson of Howden', *Bulletin of the Institute of Historical Research* 56 (1983), pp. 126-44.

(possibly with the author's own annotations) bound with a number of legal texts, including the laws of William I, *Glanvill*, and the assizes of Henry II, suggesting that contemporaries envisioned a close connection between historical writing and legal records.[74]

There are also 'histories', however, which do not record *actual* political debates or historical events. The focus in those texts is the *moral* and *rhetorical* arguments surrounding questions of judgement. Some of these 'histories' may contain *argumenta*, stories which were considered to be historically plausible, rather than *historiae*, relating events whose veracity was beyond doubt.[75] By explaining how a prudent king could be persuaded into an unjust judgement, authors were performing the same function as *speculum principis* literature. Yet the value of their portrayals in historical sources was that they contained an element of truth – they are not pure invention, and they cannot be dismissed as entirely unrealistic accounts, belonging to the category of *fabulae*. Indeed, if, as will be argued here, the portrayal of legal arguments in chronicles was intended to serve a morally-instructive purpose, to make a didactic point about judicial duties, then the effectiveness of their inclusion depended on an author presenting a plausible verisimilitude of the reality of legal argument and courtroom behaviour.[76] Person, setting and narrative detail might be adjusted to sharpen the instructive value of the tale – but these texts were intimately connected to the 'real world'. They revealed the problems of doing justice to their readers, and the moral dangers which assailed the judge. In particular they highlight the moral and political problems attendant on the granting of

[74] The manuscript is British Library, MS Royal 14 C.II; see Howden, *Chronica*, ii, pp. 215-52; David Corner, 'The Earliest Surviving Manuscripts of Roger of Howden's "Chronica"', *English Historical Review* 98 (1983), pp. 297-310.
[75] For the distinction, Isidore of Seville, *Etymologies*, 1.44, p. 67. Cf. P. Mehtonen, *Old Concepts and New Poetics: 'Historia', 'Argumentum', and 'Fabula' in Twelfth- and Early Thirteenth-Century Latin Poetics of Fiction* (Helsinki, 1996).
[76] Cf. Cynthia Hahn, 'Proper Behaviour for Knights and Kings: The Hagiography of Matthew Paris, Monk of St. Albans', *Haskins Society Journal* 2 (1990), pp. 237-48.

judicial (royal) pardon, and the reconciliation of conflicting arguments in the administration of justice.

Orderic Vitalis and the Judicial Failings of Norman Kings

The *Historia ecclesiastica* of the Anglo-Norman monk Orderic Vitalis (1075 - c. 1142) is a monumental work in thirteen books which spans the period from the creation of the earth to the year 1141. Within this frame, Orderic presents a multitude of *exempla* of justice and injustice, and an extensive commentary on the proper place of *misericordia* in the earthly world. Indeed, Orderic never doubts the importance of *misericordia* and repentance, for his own Benedictine abbey at St. Evroult, he recounts, was founded by a penitent thief, and the first monks comprised the repentant outlaws of the forest whom the saint had drawn away from a life of criminality.[77] But perhaps the most persistent – and certainly the most striking – theme in the *Historia ecclesiastica* concerns the nature of intercession and the role of persuasion in pardoning. Orderic's exploration of the idea in the case of his explicitly historical narrative reveals how twelfth-century authors understood just how important it was to unpick and analyse not just mercy and justice but judgement and counsel. Orderic raises doubts in particular about the motives of those who seek pardon on behalf of another, and implies that pardon often poses a danger to the national peace.

The problem begins with William I, who, on his deathbed in 1087, makes a speech recalling the judgements he had given as a duke and king. The dying ruler recounts how he has done justice in ruling England and thus preserved peace in the land he conquered:

[77] *EH*, 6.9, iii, pp. 273-5.

> I have condemned many to captivity deservedly for their own disloyalty, and many others for fear of future treachery. Right custom requires, and the divine law given through Moses commands earthly rulers to restrain evil doers so that they cannot injure the innocent... But now that I am at the point of death, as I myself hope to be saved and by the mercy of God pardon for my sins (*per misericordiam Dei a reatibus meis absolvi*), I command all prisons to be opened immediately, and all prisoners released, except my brother the bishop of Bayeux. I set them free for love of God, so that God may have mercy on me (*michi misereatur*). But before they leave prison they shall first enter into an obligation by taking an oath to the officials of the realm to preserve the peace in England and Normandy.[78]

What is so revealing about Orderic's account is the emphasis he gives to the latent tension here between William's Christian duty of forgiveness and his obligations as a king. William needs divine mercy, given, as Orderic recounts, the blood he spilt to achieve and secure the crown. Yet the only way to achieve that divine mercy is by showing it to others, a politically dangerous action. As a lawgiver, William had been bound to ensure peace by threatening and punishing the men who threaten the poor, the weak and the Church; as a sinful man he must, according to the gospel formula, show kindness towards those disturbers of the peace. Mindful, perhaps, of the undertaking in his coronation oath to observe both justice and mercy,[79] here William is presented as attempting to plot a middle course: he will free all captives but one from their prisons, but they must first undertake to observe the royal peace. He offers a theologically-correct leniency, hedged with pragmatic caveats. Not the least of these is his refusal to pardon his brother, Odo, Bishop of Bayeux.

Orderic follows the account of the king's speech with an equally arresting comment: this pronouncement did not satisfy the counsellors surrounding the dying king. Robert, Count of Mortain, begs William to release Odo of Bayeux as well. But William justifies his decision, and explaining he speaks 'not through hatred as an enemy, but as

[78] *EH*, 7.16, v, p. 97.
[79] Above, p. 254.

the father of my country, providing for the welfare of my Christian subjects',[80] he rebukes those who would seek pardon for Odo:

> I am amazed that you do not appreciate what kind of a man this is for whom you plead. Are you not interceding (*petitis*) for a man who has long been an enemy of the Church and a cunning instigator of treacherous rebellion? Have I not kept under restraint for four years this bishop who, when he should have been a most just viceroy in England, became the worst oppressor the people and destroyer of monasteries? You are ill-advised to free this traitor and you are asking for serious trouble for yourselves.[81]

The insistence of the magnates, however, ultimately wears down the king, and Odo is granted his freedom. But William's prediction that the barons of England only store up trouble for themselves in seeking Odo's release is eventually proven true and Orderic deliberately draws attention to the lesson. In the next book of Orderic's history, the Conqueror is dead and William II now rules England, but it is once again Odo of Bayeux who threatens the peace of the country. Orderic devises a very similar scene in which William II is now granted the opportunity to exercise strict royal 'justice' against the malevolent Odo, at the siege of Rochester in 1088. Once again, the barons of England counsel the king to pardon Odo's offences and let him go free. Once again, a Norman king is initially set against leniency, as William, like his father, declares:

> He who spares traitors and robbers, oppressors and accused men, destroys the peace and security of the innocent and sows the seeds of endless massacres and troubles for good, defenceless people.[82]

What ensues in this second debate is a more detailed argument over biblical precedents and typologies of justice. In defence of his decision to condemn Odo, William cites the example of David hanging Baanah and Rehab for the crime of murder (2 Kings iv.9-12), arguing that this is the kingly precedent he should follow. His opponents respond by

[80] *EH*, 7.16, v, p. 101.
[81] Ibid, 7.16, v, p. 99.
[82] Ibid, 8.2, v, p. 131.

bringing forth the example of King David sparing Shimei, the man who had cursed him (2 Kings xix.15-23). Ultimately, William Rufus is persuaded to release Odo, who, as Orderic recounts, goes on to plot against the realm and cause much destruction. Whilst this debate over punishment and pardon could stand alone in Orderic's history, the fact that it is parallelled in a third debate, this time involving William II's successor, Henry I, strongly implies that Orderic intended to demonstrate to his readers that pardon was a recurring problem for Anglo-Norman rulers.

The third and final episode in this series concerns Henry I at the siege of Bridgenorth in 1102. This time the traitor is not Odo of Bayeux (by then dead), but Robert of Bellême, a man whom Orderic considered an even more malevolent influence on Normandy than the Bishop of Bayeux.[83] The basic structure of the scene, however, deliberately remains the same. Once again, Orderic makes sure that the special pleading and persuasion of self-interested nobles is presented as endangering the performance of implacable royal justice. On this occasion, Orderic shows the nobles conspiring together, before the siege, to ensure that Robert of Bellême is not punished. Their reasoning is presented as follows:

> If the king defeats a mighty earl by force and carries his enmity (*pertinacia*) to the point of destroying him, as he is now striving to do, he will from that moment trample on us like helpless slavegirls.[84]

Thus, when Henry is victorious at the siege, the noble lords attempt to assuage his anger and encourage him to make peace with Robert of Bellême. What they do not count on, however, and what makes this scene different from Orderic's previous examples of intercession in Norman history, is the presence of a group of knights (*milites*).[85] The

[83] See K. Thompson, 'Orderic and Robert of Bellême', *Journal of Medieval History* 20 (1994), pp. 133-41.
[84] *EH*, 11.3, vi, p. 27.
[85] On this group see Chibnall's comment, *EH*, vi, pp. 26-7.

knights, having overheard the barons arguing for leniency for Robert, make their own appeal to the king, shouting out:

> Henry, Lord King; don't trust these traitors. They are out to deceive you and undermine the rigour of your royal justice (*regalis iustitiae rigorem tibi tollere*). Why do you listen to men who urge you to spare a traitor and let a conspiracy against your life go unpunished? See now, we all stand loyally by you and are ready to obey the least command. Storm the fortress, press the traitor relentlessly from all sides and make no peace with him until you have him in your hands, alive or dead.[86]

On hearing these words, Orderic recounts, Henry stands firm in his original course of action and refuses to make peace with Robert. The schemes of his 'seditious lords' are confounded. Orderic's sequence of episodes presents a consistent pattern of royal justice and mercy. It is only with Henry – and with the warning of the knights who are mindful of the duties of royal justice – that the cycle of the wicked escaping their deserved punishments is broken. It is the counsel of his knights that strengthens Henry's resolve to exact appropriate punishment. Orderic's *Historia ecclesiastica* does not argue against all forms of judicial mercy, but clearly demonstrates the dangers of pardon when it is motivated purely by self-interest. It is necessary for the safety of the political community that the wicked receive appropriate punishment. The recurring dilemma in each of the episodes involving the first three Norman rulers of England is presented by Orderic as a problem about the way in which mercy is obtained. Intercession, in Orderic's account, turns on a number of motives, and not all of them admirable. The saint who intercedes with God for the redemption of a sinner is to be trusted;[87] the magnates who beg the king to overlook the crimes of an associate, much less so.

Orderic's history here sets out exactly why counsel was such a pressing problem for Anglo-Norman kings. This was the case even before the emergence of truly

[86] *EH*, 11.3, vi, p. 27.
[87] Above, p. 258.

systematic law in England, during the 1130s, as Orderic was composing his history, and it was a problem which would only intensify with later Angevin legal reforms. However, even in the early part of this period, a ruler was bound (both pragmatically and 'constitutionally') to listen to the advice of the leading men of the realm. As the *Leges Henrici Primi* averred, the king was crowned 'communi consilio et assensu baronum regni Anglie'.[88] Orderic's history addresses a series of scenarios in which the *consilium* of the barons supports a course of action contrary to justice and peace. Ruling between different counsels – or ascertaining what is sage political advice and what is simply an argument from self-interest – was a far more difficult prospect than a royal promise to heed baronial counsel might imply. As the traditions of deliberative rhetoric made clear, the advantageous course of action could easily be divorced from that which was morally righteous. Worse still, an accomplished or deceitful orator could attempt to disguise the truly moral course of political action. It is just this warning which is found in John of Salisbury's *Policraticus*, which, composed several decades after Orderic's *Historia*, discusses some of the same themes in much greater detail. John was deeply concerned with justice and right order in the court and realm. In order, however, to achieve justice, John explains, one must overcome the problem of flattery and dishonest counsel. Whilst 'it is impossible to rule profitably, if the prince does not follow the counsels of the wise',[89] John admonishes the ruler to distinguish between worthy and wicked counsel, for there are those at court who, in order to pursue their own ends, are willing to call good deeds wicked and wicked actions good.[90] The flatterer is really, in essence, a courtier who seeks to further his own ends by obscuring the distinction between just and unjust actions. This self-serving behaviour is demonstrated in the flatterer's refusal to rebuke the failures of great, for fear of losing favour. Thus John warns, quoting the words of Solomon, that it

[88] *LHP*, 1.1, p. 80.
[89] *Policraticus*, 5.6, 1:550.
[90] Ibid, 3.6, 1:486.

is preferable to receive rebuke from a friend than the deceitful kiss and praise of a flatterer.[91] True and wise advice is not always palatable: 'the truth is bitter and brings with it trouble, for it refuses to flatter anyone. But the bitterness of truth is more useful and more welcome to sound sense than the honey dripping from the lips of a harlot'.[92] Flatterers at the Angevin court are often disguised as counsellors; the danger is so powerful because the flatterer suggests an easy solution when really, justice is a most difficult and trying art. This is why John gives guidance as to exactly the sort of counsellors the king ought to select, criteria of wisdom and prudence being foremost in his mind.[93]

Orderic Vitalis and John of Salisbury both sound a note of warning. Twelfth-century commentators on scripture had established that the role of counsellors was to guide in setting justice and mercy in their proper order. This was typified in the scriptural *topoi* of Esther and Daniel, who argued against excessive punishment and through their skill in argument, saved the innocent and prevented judicial cruelty.[94] Their intercession in the process of judgement had prevented the perversion of justice through the arbitrary exercise of judicial will. Yet as is evident from Orderic's three case-studies, counsellors might also become an extension of the 'arbitrary will' problem: they did not simply lend support to a just verdict, but could also challenge justice through the power of their appeals to deliberative rhetoric. The false counsellor, through a well-spoken appeal to unworthy ideas of utility or political honour was able to confuse the debate over mercy and justice, obscuring the judge's perception of which judicial strategy was most appropriate to the case before him.

[91] Ibid, 3.6, 1:486 (quoting Proverbs xxvii.6).
[92] Ibid, 3.6, 1:486.
[93] Ibid, 5.9, 1:560-2.
[94] For Esther see Lois L. Huneycutt, 'Intercession and the High-Medieval Queen: The Esther Topos', in Jennifer Carpenter and Sally-Beth MacLean (eds.), *Power of the Weak: Studies in Medieval Women* (Toronto, 1990), pp. 126-46; for Daniel, above, pp. 85-6.

Debating the Judicial Virtues of King Stephen

Orderic Vitalis had employed the early history of the Norman rulers of England as a means of demonstrating the vulnerability of even powerful rulers to misleading counsel and the deceptions of political rhetoric. The arguments made by Orderic in his history, however, were sharpened and debated in much greater detail by subsequent histories, prompted by events in England between 1135 and 1154 – the period of the 'Anarchy'.[95] The reign of Stephen, and a number of particular incidents in his struggle with Matilda for the English crown, provided historians and chroniclers with opportunities to address the questions of the relative merits of just and merciful rulership. Stephen's reign broadened the debate about royal justice and mercy, because the techniques of deliberative rhetoric could be utilised both by the king's partisans and his detractors, either to praise his commitment to morally worthy justice or to attack his neglect of the safety and utility of the people of England.

The most important and impassioned debates in contemporary and near-contemporary histories of the Anarchy concern the righteousness of Stephen's merciful behaviour towards his enemies.[96] On one hand, those historians who were hostile to Stephen employed the techniques of political rhetoric to cast this behaviour as utterly remiss *lenitas*, damaging to the political community. On the other, those histories more favourable to Stephen describe his treatment of his enemies as a demonstration of virtuous *pietas*, through which the king attempted to bring peace to the realm. The case

[95] Cf. G. White, 'The Myth of the Anarchy', *Anglo-Norman Studies* 12 (2000), pp. 323-37.
[96] Later authors too, such as Gervase of Tilbury, took Stephen as a case-study in the failures of royal justice: *Otia Imperialia*, pp. 481-2; cf. Bjorn Weiler, 'Kingship, Usurpation and Propaganda in Twelfth-Century Europe: The Case of Stephen', *Anglo-Norman Studies* 23 (2001), pp. 299-326.

against Stephen is best summarised by the chronicler John of Worcester, passing a contemporaneous verdict on Stephen's reign in 1141:[97]

> Stephen is the king of peace. If only he were the king of firm justice (*rex rigoris iustitie*), crushing his enemies under foot, assessing all things with the balanced lance of judgement (*equa lance iudicii decernens omnia*), protecting and strengthening with his mighty power the friends of peace.[98]

John's point here is clear: the king who seeks to establish peace in the realm cannot himself be a peaceful man – he must be prepared to wield the sword against the enemies of peace.[99] As such, virtue does not exist in a vacuum, but is measured according to political circumstance. Strikingly, John makes this observation before describing how, in 1139, Stephen's forces had surrounded Matilda, the rival claimant to the throne, only to permit her to escape from his clutches, by granting her safe passage from Arundel to Bristol. Matilda was able to join her supporters and continue her campaign against Stephen.[100]

In the same vein, William of Malmesbury considers the relationship between Stephen's judicial virtues and his rulership in his *Historia novella* (a work composed between late 1140 and early 1143).[101] William writes as supporter of Matilda, the history having been 'commissioned' by her half-brother and chief ally, Robert of Gloucester.[102] William describes Stephen as a man lacking in judgement (*imprudens*), one 'lenient to his enemies and easily appeased, courteous to all' (*lenis et exorabilis hostibus, affabilis*

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[97] For John, Martin Brett, 'John of Worcester and His Contemporaries', in R.H.C. Davis and J.M. Wallace Hadrill (eds.), *The Writing of History in the Middle Ages: Essays Presented to R.W. Southern* (Oxford, 1981), pp. 101-26.
[98] *The Chronicle of John of Worcester,* trans. Jennifer Bray and P. McGurk (3 vols., Oxford, 1995), iii, pp. 268-9.
[99] For discussion of medieval fears of the 'false peace' which gives succour to the wicked see Jehangir Yezdi Malgeam, *The Sleep of Behemoth: Disputing Peace and Violence in Medieval Europe, 1000-1200* (Ithaca, NY, 2013), esp. pp. 1-7.
[100] See Edmund King's introduction in E. King (ed.), *The Anarchy of King Stephen's Reign* (Oxford, 1994), pp. 17-9.
[101] William of Malmesbury, *Historia novella*, ed. and trans. Edmund King and K.R. Potter (Oxford, 1998), introduction, p. xxxiii.
[102] Ibid, p. xxix; cf. Joe W. Leedom, 'William of Malmesbury and Robert of Gloucester Reconsidered', *Albion* 6 (1974), pp. 251-65.

omnibus).[103] In many ways, this is an odd mixture of both positive and negative qualities, but it, in fact, amounts to a condemnation. William concedes that Stephen is 'courteous' only to demonstrate just how inappropriate this quality is in a ruler in his particular position. In the political context of the 1130s and 1140s, *lenitas* is not propitious for the realm or the people. William demonstrates the political flaw in Stephen's apparent virtue when he considers why the powerful men of the realm lent their support to his bid for the crown. Those who supported Stephen, William explains, were those who, under the strict rule of Henry I, had been prevented from plundering churches and attacking the innocent: 'all these had gladly given their support to a prince whom with little trouble they could influence to their own advantage, pushing their own fortunes at the expense of the people of the country'.[104]

William of Malmesbury's account does not condemn Stephen's character outright. He describes him as 'a very kindly man (*mansuetissimi hominis*)', and, perhaps surprisingly, agrees that the virtue of *mansuetudo* is an adornment of royal character (*regiae personae decorum*).[105] The *Historia novella* is not a work of character assassination: the problem is simply that, in the particular political circumstances of the Anarchy, Stephen cannot be a good ruler, for he lacks the judgement, and indeed, the strength of character, to rule over the wicked and to bring them to heel.[106] Stephen is incapable of acting as a strict judge, unable to curb the rapacious barons as his uncle, Henry I, had done. Most telling of all, however, is how similar William of Malmesbury's account of Stephen's character is to that given in the history known as the *Gesta Stephani*. The work is anonymous, although sometimes attributed to the bishop of Bath, Robert of Lewes. The piece, written in two parts (the first in 1148, the second after

[103] *Historia novella*, i.15, pp. 28-9.
[104] Ibid, 1.17, pp. 32-33.
[105] Ibid, 1.19, pp. 36-37.
[106] Cf. *Historia novella*, 2.30, pp. 58-59, describing Stephen as a man of worthy promises but no action.

1153),[107] is largely supportive of the king, although it ultimately understands Stephen's defeat as a judgement of God for his sins.[108] The *Gesta*, in fact, delivers much the same verdict as William of Malmesbury on Stephen's character – the difference being that the *Gesta* praises Stephen's merciful behaviour, which demonstrated his discretion (*discretus*):

> He made himself affable and amenable (*habilem et flexibilem*) to all of whatever age. He was even of such a kindly and gentle disposition (*tam benigni etiam tamque mansueti erat animi*) that he commonly forgot a king's exalted rank and in many affairs saw himself not superior to his men, but in every way their equal, sometimes actually their inferior.[109]

Once again, the term *mansuetudo* is applied to Stephen's character. But to the author of the *Gesta*, this virtue is a guarantee of peace and tranquillity (*pacem, quietam*), for, thanks to Stephen's virtue, England can be brought under control without violence. Indeed, Stephen's willingness to treat with his enemies is presented as a strategic masterstroke:

> The king, preferring to employ kindly patience towards them (*benigna uti patientia*) and to make every effort of affection before resorting to war, sent some of his counsellors... to bring them to a cordial understanding.[110]

Stephen and his counsellors resort to persuasion and promises rather than military action, 'coaxing them [Stephen's enemies] with cajoling words and intimidating them with threats'. Even the most difficult aspect of Stephen's political judgement to explain – his willingness to let Matilda flee in 1139, when he was on the verge of capturing his challenger to the throne – is accounted for by the *Gesta Stephani* as an action motivated by concern for the good of the country, and a decision made with the counsel of the

[107] *Gesta Stephani*, ed. and trans. K.R. Potter and R.H.C. Davis (Oxford, 1976), introduction, p. xxi.
[108] Ibid, p. xxxiii.
[109] *Gesta Stephani*, p. 23.
[110] Ibid, p. 25.

Bishop of Winchester (his brother, Henry of Blois). Stephen sought to spare the people another bloody and indecisive battle:

> For if he were preparing to besiege the Countess of Anjou in one part of England, her brother would immediately rise up to disturb the kingdom in another; and so it was wiser (*consultius*) for the king himself and more beneficial to the kingdom (*regno salubrius*) to let her go to her brother unharmed, that when both their forces had been brought into one place he might more easily devote himself to shattering their enterprise.[111]

Clearly visible in this passage of the *Gesta Stephani* is a defence of the righteousness of Stephen's actions founded on the principles of deliberative rhetoric. The text emphasises that Stephen's decision to let Matilda go free was *consultius* – a term bearing the connotations of prudent deliberation and counsel – a considered decision, made after debate. Moreover, in defence of Stephen, the king's behaviour is described as seeking the *salus*, or health, of the kingdom. This too marks an appeal to deliberative rhetoric, as *salus* serves as a synonym for *tutus*, safety.[112] Stephen determines that it is 'safer' for the kingdom that Matilda be defeated decisively in a single battle, rather than spreading the conflict across the land.

The *Gesta Stephani* uses all the techniques of classical rhetorical argumentation not only to vindicate Stephan's use of *mansuetudo* as a tool of government, but to attack Matilda's rule over London as excessively strict, even inhumane.

> [She] was going beyond the bounds of moderation and sorely oppressing them [the Londoners], nor did they hope that in time to come she would have bowels of mercy or compassion (*mansuetudinis vel pietatis viscera*) for them, seeing that at the very beginning of her reign she had no pity (*nequaquam miserta*) on her subjects and demanded what they could not bear.[113]

[111] Ibid, 41, p. 89.
[112] For this connection see also *Policraticus*, 4.9, 1:562.
[113] *Gesta Stephani*, 61, pp. 123-5. On this incident see J.A. Truax, 'Winning over the Londoners: King Stephen, the Empress Matilda and the Politics of Personality', *Haskins Society Journal* 8 (1996), pp. 43-62.

Ultimately, then, what these historical battles to describe the soul of King Stephen (and define his place in history) amount to is an argument over the proper place and exercise of *mansuetudo* in royal government. Classical rhetorical theory provided twelfth-century authors with two ways of measuring the success of a royal reign – moral worth and political success – and those two categories helped frame contemporary historical arguments over whether Stephen was either virtuously merciful or entirely lacking in justice.

The praise afforded to Stephen's *mansuetudo* and *affabilitas* in these mid-twelfth-century texts, however, also prompts a discussion of the historical development of these ideals in courtly society. These discussions of Stephen's leniency towards those who ought to have been his enemies can be understood as evidence for the development of a kind of chivalry *avant la lettre*. John Gillingham, for example, has suggested that the Norman Conquest had brought a new set of attitudes into England: culturally 'French' values which privileged ideals of clemency and courtesy.[114] If these ideals had been imported into England c. 1066, it seems they were beginning to exert an influence at Stephen's court in the 1140s.[115] Those values included a reluctance to wield the sword against defeated men (or indeed women) of noble birth. The connection between Stephen's *mansuetudo* and a nascent sense of chivalric clemency and courtesy is evident in a passage of the *Gesta Stephani* which describes Stephen's lenient behaviour towards captured prisoners:

> The king... had won a complete victory over his enemies... and therefore it was more consonant with his lofty position and more befitting royal clemency (*regiae*

[114] J. Gillingham, '1066 and the Introduction of Chivalry into England', and 'Conquering the Barbarians: War and Chivalry in Twelfth-Century Britain and Ireland', both in idem, *The English in the Twelfth Century: Imperialism, National Identity and Political Values* (Woodbridge, 2000), pp. 209-31; 41-58.
[115] Above, pp. 96-7.

> *pietati competentius*) to grant life to the suppliant prisoners than by inflicting the death penalty ruthlessly to deprive them of the little life they had left.[116]

What the conflicting attitudes to Stephen's gentle treatment of noble enemies found in the histories of the Anarchy suggests, however, is that this 'affable' ethos still seemed problematic to a generation of monastic authors who thought in terms of traditional expectations of kingly behaviour. Strikingly, these conflicting attitudes towards royal *mansuetudo* (a virtue or a vice?) do not seem to have been entirely resolved almost fifty years later. Gerald of Wales, writing his account of the Angevin dynasty, denounced similar behaviour in the Young King Henry. Henry presided over a court full of virtue and affability, but, Gerald complained, such affability made it a refuge for evil-doers.[117] At stake in such debates, then, was the question of whether justice or mercy best served the good of the *regnum*.

Walter Map and the Justice of the Simple Ruler

The histories of Stephen's reign provide a demonstration of how the political conflicts of the 1130s and 1140s further polarised the debate over whether mercy was really a quality which befitted a royal ruler and a royal judge. This was not a discussion, however, which ended with the death of Stephen and the adeption of Henry II. An extensive discussion of the ramifications of royal leniency is found in Walter Map's *De nugis curialium* ('Courtiers' Trifles'), a text composed in the 1180s. The book is both an excoriating commentary on the behaviour of some contemporary Angevin officials and administrators, and a didactic work which aims, as Map explains it, either 'to excite merriment or edify morals (*vel iocunditas excitetur vel edificetur ethica*)'.[118] The morals particularly concerning to him are those which impinge on the practice of justice. *De*

[116] *Gesta Stephani*, 20, pp. 43; on the connection between 'mansuetudo' and noble behaviour see Bjorn Weiler, 'William of Malmesbury on Kingship', *History* 90 (2005), p. 10.
[117] Above, pp. 100-1.
[118] *DNC*, 3.1, p. 211.

nugis examines the judicial behaviour of a number of European rulers, both contemporary and historical.

At the Angevin court, Walter Map had lived through, and observed, significant changes in the common law and the introduction of more rigorous and routine justice. He had, moreover, practical experience of judgement, serving twice as a justice-in-eyre, in 1172-3 and 1184-5. His fullest discussion of royal mercy, however, is to be found in his description of contemporary France. Like the historians of Stephen's reign, Map considers the potential dangers to the safety and security of the realm posed by an excessively lenient king. What is most striking about Map's account is his appreciation of a key idea drawn from deliberative rhetoric – that whilst mercy may appear a virtue, it is, in many circumstances, a political menace. In the fifth book of *De nugis*, Map presents a seemingly positive portrayal of the merciful acts (*pietates*) of Louis VII, a king who seemed, in his virtue, to be worthy of the title of *rex christianissimus*.[119] Piety was a virtue closely aligned with, and, indeed, sometimes a synonym for *misericordia*.[120] At first sight, Walter Map seems to approve of the virtuous Capetian monarchy, having Louis VII describe his own kingdom as remarkable for its peace and happiness:

> As the wealth of kings is diverse, so it is marked out by many differences... Your lord, the king of England, who wants for nothing, has men, horses, gold, silk, jewels, fruits, game and everything else. We in France have nothing but bread and wine and gaiety.[121]

This statement, alongside a sketch of Louis who is so well-loved that he has nothing to fear from his subjects and may sleep, unguarded, in the open air, has become something of a *locus classicus* for describing the serenity of Capetian government (particularly when compared with the dynastic rebellions which shook Angevin territories during the 1170s

[119] Ibid, 5.5, pp. 443-55.
[120] Above, p. 39.
[121] *DNC*, 5.5, p. 451.

and 1180s).[122] Gerald of Wales, who himself had experience of Capetian kingship, borrowed the same description of 'bread and wine and gaiety' to characterize the idyllic nature of Capetian rule.[123]

Yet Walter Map has some significant reservations about Capetian justice, and he complicates the picture of Capetian rulership when he relates the story of a knight named Waleran. Waleran had publicly accused the chamberlain and provost of Louis VII of stealing from royal revenues, and had sung *obscena carmina*, slandering both a noble woman and the king. In both cases the accusations were true, but the powerful men of the court demanded Waleran's exile, and that Louis seize his lands and possessions.[124] Waleran, however, devised a way of winning the royal mercy. Having fled to England, he contrived (with the assistance of Henry II) to appear before Louis having assumed a guise of poverty, riding a broken horse, ragged and unshaven. When Louis saw the pathetic spectacle, he did not realise that it was feigned, and 'conceived disgust at his over-severity (*suum excessum*)'. The king then remarked that:

> For a word he [Waleran] should have been chastened by words, not cudgelled and proscribed. Alas! How merciless (*inmisericordem*) did I perceive myself just now, when I saw how miserable (*miserabilem*) I have made him.[125]

The *exemplum* concludes with Louis's previous sentence being undone, as Waleran is restored to his former position. Crucial to understanding Walter Map's intention in including this story in *De nugis* is recognising which of the two parties – Louis VII or Waleran – has acted unjustly. Is Louis to be understood as a confused judge, or had Waleran done wrong by using deception to win his restoration to favour? Whilst neither of the two men is presented in a particularly favourable light, Walter Map's primary focus

[122] G. Koziol, 'England, France and the Problem of Sacrality', pp. 124-48.
[123] Gerald of Wales, *DPI*, 3.30, p. 318.
[124] *DNC*, 5.5, pp. 447-9.
[125] Ibid, 5.5, pp. 449-51.

is on Louis, and the king's judicial fickleness in particular. Indeed, Map may have intended his readers to be surprised not by the mercy Louis shows in forgiving Waleran, but by the harshness of his original sentence of expulsion.

An important passage in discussions of clemency and royal patience was the Roman law stipulation pertaining to 'flagrant insolence and wicked speech (*improbo petulantique maledicto*)'. That law specified that no penalty was to be enforced for slander, whether spoken out of drunkenness, insanity or malice.[126] Gerald of Wales, for example, cites this Roman law in his own *speculum principis*, linking it to biblical exhortations praising royal patience.[127] Moreover, good humour in enduring insults was considered a praiseworthy characteristic in a ruler.[128] Map would certainly have expected learned readers to infer that Louis's original judgement, in giving way to the cries of the powerful who had wished Waleran to be exiled, had therefore contradicted Roman law, as well as scriptural and kingly precedent. Map blames the incident on the quality of Louis's *simplicitas*, which had allowed the king to be manipulated, both by Waleran's accusers and, ultimately, by Waleran himself. Indeed, the tale of Waleran is accompanied by two other stories in which Louis is dissuaded from inflicting due punishment by appeals to his mercy.[129] Map remarks: 'he was a man of such kindliness and simple mildness (*tam simplicis mansuetudinis*)... that he might have been thought an imbecile (*ydiota*)'.[130] Indeed, William of Newburgh makes a similar remark on Louis VII's character, linking the king's leniency to a lack of political guile: the king was 'exceptional in his mildness

[126] *Codex*, 9.7.1, 2:373; e.g. *Policraticus*, 3.14, 1:511.
[127] Gerald of Wales, *DPI*, 1.5, pp. 15-8.
[128] e.g. Geoffrey Gaimar, *Estoire des Engleis*, ed. and trans. Ian Short (Oxford, 2009), ll.5943-4, p. 322; cf. Orderic Vitalis's interpolated comment on William I's severe punishment of his slanderers at Alençon, in *Gesta Normannorum Ducum*, ed. E.M.C. Van Houts (2 vols., Oxford, 1992-5), ii, pp. 124-5.
[129] *DNC*, 5.5, pp. 443-7; p. 455.
[130] Ibid, 5.5, p. 443; cf. the story of Raso who also suffers for his 'innocencia', *DNC*, 3.5, p. 271.

(*eximiae lenitatis*) towards his subjects... however, he was a little too simple (*paulo simplicior*) than befits a prince'.[131]

By employing the term *simplicitas*, Map uses a classical rhetorical technique of re-description (*paradiastole*), disguising a vice in virtuous terms.[132] The same approach was practised by William of Malmesbury, who described Edward the Confessor as 'the Simple' (*simplex*), and cited his 'simplicity' as the reason why Edward was content with the kingdom of England, never attempting also to rule Norway.[133] The docility of *simplicitas*, being suggestible and attending to poor counsel, is the other side of the coin to praiseworthy *mansuetudo*. Whilst Walter Map does advocate leniency, it is Henry II, rather than Louis, who strikes the correct balance as a king proficient in governance but also capable of demonstrating mercy (*pietas*). In the chapter which immediately follows his account of Louis's mercy, Map focuses on the justice of the Angevin court. Map's verdict on the Angevin administration of justice is ambivalent, to say the least – the court is flawed, full of avaricious officials – yet it does seem to have some redeeming features.[134] He recounts how a man who had stolen and forged the royal seal was brought before Henry and condemned to be hanged; yet, when Henry saw the virtuous brother of the forger weeping for the criminal, he spared the thief's life, [135] although he has the forger tonsured, 'lest his pity should appear more indulgent than was right (*ne remissa nimium videretur pietas*)'. Given that such forgery was a serious offence, Henry appears

[131] William of Newburgh, *Historia*, 2.4, i, p. 223.
[132] Cf. Quintilian, *Institutio oratoria*, 9.3.65, p. 138. See also Gregory the Great, *Moralia in Job*, 3.33.65, i, p. 155.
[133] William of Malmesbury, *Gesta regum Anglorum*, ed. and trans. R.A.B. Mynors, R.M. Thomson and M. Winterbottom (2 vols., Oxford, 1998), 3.259, i, pp. 479.
[134] e.g. *DNC*, 1.1, p. 5; cf. 2.1, p. 133.
[135] Ibid, 5.6, p. 495.

quite lenient in his punishment, but, according to Map, the king did not overstep the bounds of acceptable mercy.[136]

In these two paired chapters Walter Map provides an insight into the more general problem presented by the rhetorical re-description of the virtues of judgement. Louis VII's *misericordia* and *simplicitas*, when considered according to their effects on the political community, cannot be defined as true justice. Those virtues begin to resemble royal failings, if not vices. Personal acts of mercy in Louis, whilst perhaps testament to his piety, reveal his apparent inability to govern: he first passes an inappropriate sentence; he is subsequently 'fooled' into recanting a just judgement. Henry II, on the other hand, was, in Walter Map's judgement, distinguished by the ability to set appropriate punishments, and to apply royal discretion prudently and justly.

Richard of Devizes and Matthew Paris: Due Process and Rhetoric

Twelfth-century historians seized on the possibility of making *iustitia* the subject for deliberative rhetoric, and the possibilities for argument which this strategy created. Not all chroniclers, however, thought the opportunity to debate the nature of true justice was, necessarily, a beneficial innovation. This is a problem evident in two later histories – the *Cronicon de rebus gestis Ricardi Primi* of Richard of Devizes (1192) and the *Chronica maiora* of Matthew Paris.[137] These histories, which both consider the doings of English kings and English judges outside of England, argue that justice must be understood as an inflexible and unchanging ideal. That is, *iustitia* is not open to the sort of debate suggested by the traditions of classical deliberative rhetoric – justice is

[136] *Glanvill*, 14.7, pp. 176-7 (on *crimen falsi*); cf. H. Summerson, 'Counterfeiters, Forgers and Felons in English Courts 1200-1400', in A. Musson (ed.), *Expectations of Law in the Middle Ages* (Woodbridge, 2001), pp. 105-16.
[137] *Chronica maiora*, ed. H.R. Luard, RS 57 (7 vols., London, 1872-81).

identified as a refusal to deviate from the stipulations of the law. It is striking that these two histories – composed after Henry II's 'revolution' in law – emphasise the danger that rhetorical argument over justice can be a disguise for the disruption of proper legal procedure. Matthew Paris's *Chronica* (covering the years 1236-59), in particular, includes detailed entries describing the punishments inflicted on those who were found to have transgressed the laws of the realm.[138] Moreover, like Walter Map had done in the 1180s, these two works identify a concern for proper legal process, and adherence to the principles of law, as characteristically 'English' concerns. It is not surprising, perhaps, that these historians display 'patriotism' and a sense of national loyalty – Matthew Paris's belief in the superiority of the English people is well-established.[139] What is more striking, and potentially suggestive, however, is that by the late twelfth century, historians were trying to link admirable English behaviour to English adherence to strict legal process.

This is the principle praised by Richard of Devizes in his *Cronicon*, a history of events in England and the Holy Land during the crusade of Richard I.[140] Richard of Devizes argues that it is King Richard's consistent and unwavering application of just judicial standards which makes him a more virtuous ruler than his French counterpart, Philip II. He recounts an incident which took place in Messina, where both English and French soldiers were camped, and where men from both armies committed crimes:

> The King of England, immediately on the next day, had gallows built outside the camp, on which to hang thieves and plunderers. The judges he designated spared neither sex nor age, and the law and the punishment were the same for the guilty, whether they were foreigners or natives. The King of France concealed whatever his men did or suffered, or kept silent about it. The King of England, giving no heed to the nationality of anyone involved in a crime, considered every man his subject and left no offence unpunished.[141]

[138] e.g. *Chronica maiora*, v, pp. 34-5; v, p. 49; v, p. 95.
[139] See Vaughan, *Matthew Paris*, esp. p. 142; cf. *Chronica maiora*, v, p. 131.
[140] For Richard see Gransden, *Historical Writing*, i, pp. 248-52.
[141] Richard of Devizes, *Cronicon*, ed. J.T. Appleby (London, 1963), pp. 16-7.

What is revealing about this paragraph is not the rhetorical features of Richard's vocabulary – although he was well-versed in classical literature, he does not draw on any of the ideas of classical deliberative rhetoric – but their absence.[142] Richard I is unwilling to engage in debate as to whether there are mitigating circumstances to the offence, or even whether the offenders are technically his subjects. Impartial justice is the criterion for righteous rulership in this case. Justice is a universal value, binding upon all nationalities, applicable in all times and places. Those 'circumstances' of crime (in this instance the age, sex and nationality of the offender) so important in the determination of sentence according to classical philosophy, canon law and, indeed, parts of the common law tradition, do not excuse crime and have no effect on sentencing.[143]

Likewise, it is again the context of a crusade which provides Matthew Paris with the opportunity of discussing the vital importance of impartial judgement. Matthew's account suggests that arguments which attempt to mitigate a sentence by considering the political impact of a judgement are often attempts to subvert justice entirely. Whilst Matthew Paris's discussion clearly serves to demonstrate a more general problem for those writing about judgement – that the vocabulary of deliberative rhetoric can be used to subvert justice – his writing must also be understood in light of events in England during the personal rule of Henry III, and charges that the king had tried to establish his rule through royal will, exercising *potentia absoluta*, rather than being bound by the established processes of the common law.[144] The *Chronica maiora* reveals a clear anxiety about Henry's ability to subvert, even abuse, the tools of royal *gratia* and royal pardon.[145] The most revealing discussion of the relationship between rhetoric and justice, however,

[142] For Richard's reading of the classics see H. Blurton, 'Richard of Devizes's *Cronicon*, Menippean Satire, and the Jews of Winchester', *Exemplaria* 22 (2010), pp. 265-84.
[143] On the question of 'circumstances' in sentencing see above, p. 210.
[144] See M.T. Clanchy, 'Did Henry III have a Policy?', *History* 53 (1968), pp. 203-16; D.A. Carpenter, 'King, Magnates, and Society: The Personal Rule of Henry III, 1234-58', *Speculum* 60 (1985), pp. 39-70.
[145] *Chronica maiora*, iv, p. 57.

is found in the *Chronica*'s description of the experiences of an English knight, William Longespee.[146] In 1250, Matthew recounts, Longespee was serving with the French in the East. There the crusader witnessed a series of violent robberies committed by Robert I, Count of Artois, and immediately reported these offences to the French king, Louis IX, demanding that justice be done. Louis, however, refused, replying that although he was aware of the crimes, he would not discipline the count (his brother), as such punishment might damage the wavering morale of the crusaders and, in turn, endanger the success of the crusade. Louis justifies his decision with an appeal to a familiar theme of political rhetoric – that a specific injustice may be overlooked if to prosecute it would damage the good of the community, namely, the crusading army:

> Now, my friend, you can understand. A division (*scisma*) can so easily arise in the army – God forbid! At a time of crisis it is necessary to tolerate (*tolere*) such things and even worse with equanimity.[147]

Matthew observes that Louis presented this argument with the appearance of piety (*vultu piissimus*). Such apparently pious reasoning, however, does not convince Longespee, who replies:

> Therefore you are no king, since you are incapable of doing justice (*iustificare*) towards your men, or punishing (*punire*) delinquents... I will not serve such a king, I will not serve such a lord.[148]

Longespee immediately departs the French camp, and, Matthew relates, the crusaders soon felt the loss of such a fine fighter. Of course, there is a degree of irony in this outcome: Louis IX has refused to punish his brother, for fear that doing so would damage the morale and success of his army (in the terms of classical rhetoric, privileging *utilitas*

[146] See S. Lloyd and T. Hunt, 'William Longespee', *Nottingham Medieval Studies* 35 (1991), pp. 41-69; 36 (1992), pp. 79-125.
[147] *Chronica maiora*, v, p. 133. A similar assertion about the danger of internal disputes within a crusading army is made in the *Itinerarium peregrinorum et gesta Regis Ricardi*, trans. H. Nicholson (Aldershot, 1997), p. 151.
[148] *Chronica maiora*, v, pp. 133-4.

over *honestus*). Yet in failing to show strict and impartial justice, Louis not only sacrifices his moral virtue, but also weakens his army anyway, because his injustice prompts the resignation of his leading knight. Matthew clearly focuses his readers' attention on the question of whether there really are circumstances in which criminal behaviour should be allowed to go unpunished, out of a concern for the good of the political community. In raising the question of what behaviour might be 'tolerated' (*tolere*) for the sake of political advantage, Matthew Paris was invoking a series of questions which would have been familiar to learned readers. Augustine's discussion of tolerating social evils which could not be tackled without worsening them had been repeated in the *Decretum* and formed the typical basis for medieval discussion on this issue.[149] But whilst Augustine had offered a more tempered view – that sometimes the (ecclesiastical) ruler was obliged to suffer delinquency to avoid greater evils – Matthew suggests that, in this context, *tolerantia* is simply a cloak for *iniustitia*.

Matthew, however, clearly did not intend this incident concerning the French king to be read as an argument for summary justice. Rather it is an exhortation to regular and routine judicial procedure, even when on crusade. This is demonstrated in the incident which soon follows this account, which provides a counterpoint to Louis IX's unwillingness to punish his men adequately. Matthew turns to describe events in the enemy camp. The Sultan of Babylon, whom Matthew characterises as a proud and merciless man (*superbus nimis et immisericors*), is organising the defence of Cairo against the crusaders. A prince who had been unable to defend the port of Damietta against the Christian attack is brought before the Sultan and summarily executed. This would not be a remarkable incident, but for the comment which Matthew makes:

[149] e.g. *Decretum*, C.XXIII, q.4, c.37, 1:916-7; cf. I.P. Bejczy, '*Tolerantia*: A Medieval Concept', *Journal of the History of Ideas* 58 (1997), pp. 365-84.

> Although in the judgement of others the aforementioned prince could have adequately exculpated himself, however, the Sultan, rising up against him very cruelly, ordered him to be hanged on the gallows as a traitor and blasphemer.[150]

In other words, Matthew has now presents the other 'extreme' of partial justice – the refusal to listen to a legitimate defence. Just as the Sultan's arbitrary will finds reason to condemn those who have committed no crime, so the French ruler has devised reasons to exculpate the guilty and excuse them of all punishment. The parallel between the two is made more explicit when Matthew spells out the consequences of the execution. The dead prince's brother determines to defect to the side of the French, taking with him a cohort of troops. Matthew provides explicit reasoning for this decision, the prince stating that he cannot serve a ruler who lacks justice:

> He [the Sultan] hanged my brother on the gallows...but no reasons backed by evidence could in any way lend support to him... This criminal accusation of his was most untrue... That which the Sultan has done to my brother he would undoubtedly now do to me, if I fell into his hands, although I am innocent.[151]

Here the parallel with the French example is unmistakable – judicial partiality caused Louis IX to lose one of his finest fighters, just as judicial partiality caused the Sultan of Babylon to be abandoned by his troops. Both rulers, in seeking that which was politically advantageous rather than that which was morally right and legally correct, have ultimately damaged their own causes. Like Richard of Devizes, Matthew Paris draws the moral – and salutary warning to the thirteenth-century judge – that it is dangerous to allow rhetorical arguments over the impact of a judgement to remove the obligation to do justice altogether.

Norman Sicily: A Comparative Study in Justice and Mercy

[150] *Chronica maiora*, v, p. 140.
[151] Ibid, v, p. 141.

English arguments about the choice between *iustitia* and *misericordia* were the products of changing legal realities and the more exacting standards specified by the regularisation of justice and judicial procedures. Intellectual argument was shaped by context, focussed on the iniquities of Forest Law, or the particular behaviour of English rulers. But very similar debates can be detected in other twelfth-century European kingdoms, demonstrating quite how the growth of legal systems moved the question of justice and mercy from a merely academic question to a practical dilemma about rulership. Scholastic reasoning and the revival of classical rhetorical learning – intellectual approaches which transcended national boundaries – provided the means of comprehending and addressing the conceptual conflict. A compelling parallel with English attempts to come to terms with the relationship of justice and mercy is provided by events in Sicily in the latter half of the twelfth century. This comparison does not rest on the administrative and dynastic connections between the two Norman realms, a connection which has sometimes been overstated.[152] Rather more important is the fact that Sicily, like England, was undergoing dramatic legal and intellectual development during the twelfth century. In Sicily there did exist those two key ingredients necessary to start a debate about justice: the presence of scholastically-trained men serving as administrators at the royal court, and the assertion of royal control over an increasingly professionalised legal system. A case-study of the Sicilian crown's judicial dilemmas demonstrates, once again, that justice was a matter of debate as much as it was procedure. It further illustrates how legal change altered the dimensions of debate on justice over the course of the twelfth century. The following discussion is intended to suggest the

[152] Cf. C.H. Haskins, 'England and Sicily in the Twelfth Century', *English Historical Review* 26 (1911), pp. 641-65; E. Jamison, 'The Sicilian Norman Kingdom in the Minds of Anglo-Norman Contemporaries', and 'Alliance of England and Sicily in the Second Half of the Twelfth Century', both in eadem, *Studies on the History of Medieval Sicily and South Italy* (Aalen, 1992), pp. 159-207; 301-313.

potentially fruitful dimensions of further research, rather than provide the last word on the subject.

There are a few suggestive documents which imply that the complex meaning of *iustitia* was being examined at the Sicilian court in the twelfth century. Laborans, a canonist and future cardinal, composed an *opusculum* entitled *De iustitia et iusto*, which he dedicated to Maio of Bari (d.1160), the Grand Admiral of Sicily and the most influential of the counsellors of William I (1154-1166).[153] Maio himself, the son of a royal judge, had begun his career as a legal notary. But Maio was also engaged in with theological learning, composing a commentary on the Lord's Prayer in the scholastic style.[154] Moreover, in twelfth-century Sicily, as in England, royal control over a centralised legal system was asserted comparatively early, with law swiftly becoming the domain of a professional class of advocates and judges.[155] In the reign of Roger II (1130-54), trained jurists were employed at the Sicilian court, compiling collections of laws, with Palermo the centre of sophisticated legal work on a similar level to that taking place in Bologna.[156] Whilst the textual history of Roger's law code, known as the 'Assizes of Ariano', is complex, and the precise date of its promulgation is not attested, the Assizes were evidently influenced by the latest developments of Bolognese jurisprudence, the product of renewed and specialised engagement with Roman law.[157] What is most striking, however, is how Roger's law code, and particularly his prologue, reiterates many

[153] *De iustitia et iusto*, in *Laborantis Cardinalis opuscula*, ed. Artur Landgraf (Bonn, 1932), pp. 6-42. For Laborans as a canonist see N. Martin, 'Die "Compilatio decretorum" des Kardinal Laborans', in Peter Linehan (ed.), *Proceedings of the Seventh International Congress of Medieval Canon Law* (Rome, 1988), pp. 125-39.
[154] D.J.A. Matthews, 'Maio of Bari's Commentary on the Lord's Prayer', in Lesley Smith and Benedicta Ward (eds.), *Intellectual Life in the Middle Ages: Essays Presented to Magaret Gibson* (London, 1991), pp. 119-44.
[155] E. Jamison, '*Judex Tarentinus*: The career of Judex Tarentinus *magne curie justiciarius* and the Emergence of the Sicilian *regalis magna curia* under William I and the Regency of Margaret of Navarre, 1156-1172', *Proceedings of the British Academy* 53 (1967), pp. 289-344.
[156] K. Pennington, 'The Normans in Palermo: King Roger II's Legislation', *Haskins Society Journal* 18 (2006), pp. 140-67.
[157] For a discussion of the assizes, Hubert Houbin, *Roger II of Sicily: A Ruler between East and West*, trans. Graham A. Loud and Diane Kilburn (Cambridge, 2002), pp. 135-47.

themes in the discussion of justice which have been highlighted in the English case. Roger instructs that laws, when put into action, are to be interpreted by mercy. These commands are supported by scriptural quotations. The opening speaks of Roger's ambition for the laws, and his desire to imbue them with a spirit of mercy, softening the excessively harsh penalties imposed by previous rulers:

> Therefore we who hold the authority of justice and law through His grace ought in part to make the laws better, and in part to reform them. And those of us who have received mercy (*misericordia*) ought to handle the laws more mercifully (*misericordius*) in all things, and interpret them more benevolently (*benignius*), especially when the severity of the law leads to inhumane action (*inhumanitatem*)... It seems appropriate in our judgement that, because we have done wrong on many occasions and because we are more prone to doing wrong, those who offend should be spared, with the moderation proper to our times. For the Christ himself instructed us in this, saying: "Be you merciful just as your Father is merciful" [Luke vi.36], and the King and Prophet says: "All the ways of the Lord are mercy and truth" [Psalm xv.10], and without doubt, he who has given judgement without mercy shall receive judgement without mercy [James ii.13].[158]

Of course the prologue to a legal code, setting out royal ambitions, is as much a political statement as a legal one.[159] Further work remains to be done on these documents, in establishing whether Roger really had mitigated the laws of the past, or whether these claims to mercy were mere rhetorical flourishes.

Roger's ostentatious rhetorical displays of mercy, however, are all the more striking given that his reign was thought, by contemporary European chroniclers, to represent excessive, even tyrannous cruelty. Sicily and its rulers became a salutary *exemplum* in European arguments about the appropriate balance of justice and mercy in rulership. Orderic Vitalis describes a king who, 'with passionate violence destroyed men

[158] The text of the assizes is printed in Gennaro Maria Monti, *Lo stato normanno svevo: lineamenti e ricerche* (Trani, 1945), pp. 114-184, here pp. 115-16.
[159] For law codes as political statements see Patrick Wormald, '*Lex scripta* and *verbum regis*: Legislation and Germanic Kingship from Euric to Cnut', in P. Sawyer and I. Wood (eds.), *Early Medieval Kingship* (Leeds, 1977), pp. 105-38.

near and far and, by cruelly causing much bloodshed and mourning, grew to greatness'.[160] Gerald of Wales offers a similarly critical verdict, which may be partly influenced by the classicising view that all islands were prone to the development of tyrannies – and Sicily had precedent in its former rulers.[161] Thus, when the historian known as 'pseudo-Hugo Falcandus' composed his *History of the Kings of Sicily*, although his focus was the reign of William I and his son, William II (the years 1154-69), he could not avoid addressing the delicate issue of Roger's supposed 'tyranny'. Indeed, Hugo considers this problem in his opening statement, and defends Roger in terms of the necessity of severity:

> As regards the fact that some writers categorise many of his actions as tyrannical and call him inhuman because he imposed on many men penalties that were severe and not prescribed by the laws (*multis penas graviores et legibus incognitas irrogaverit*), it is my opinion that as a prudent man who was circumspect in all things, he intentionally behaved in his way when his monarchy was only recently established so that wicked men should not be able to wheedle any impunity for their crimes, and that those who deserve well (to whom he showed himself mild) should not be discouraged by excessive severity, there should nevertheless be no place for contempt as a result of excessive mildness (*ex nimia mansuetudine*).[162]

Hugo has some difficulty in rehabilitating Roger's reputation, when he must concede that his punishments of his enemies were sometimes more severe than law required. He excuses Roger, however, with an explanation strikingly similar to that proffered by William of Malmesbury concerning the reputed severity of Henry I during the early years of his rule. William partially exculpates the English king by reasoning that he was obliged to appear more rigorous in punishment at the beginning of his reign in order to deter the wicked – but once the kingdom was more settled, Henry's punishments fell into line with

[160] *EH*, 13.15, vi, p. 435.
[161] H. Wieruszowski, 'Roger II of Sicily, *Rex Tyrannus*, in Twelfth-Century Political Thought', *Speculum* 38 (1963), pp. 46-78; Gerald of Wales, *De regimine principum*, 3.27, p. 303; cf. Gervase of Tilbury, *Ottia imperialia*, 2.12, pp. 334-5, describing Sicily as 'the nurse of tyrants' (*nutrix semper tirannorum*).
[162] *The History of the Tyrants of Sicily by 'Hugo Falcundus', 1154-1169*, trans. Graham A. Loud and Thomas Wiedemann (Manchester, 1998), prologue, p. 58.

'reasonable' law.[163] Hugo is markedly more concerned with justifying Roger as a ruler according to law than previous Sicilian chroniclers had been. Alexander of Telese's *Ystoria Rogerii* (c. 1136) for example, justifies Roger's apparent cruelty simply by saying that it was all divinely approved: Roger had been sent by God as an avenging king, to punish the wicked Sicilians for their many sins, particularly their abuses of the Church.[164]

The most compelling parallel between Hugo and twelfth-century English chroniclers, however, is found in his extensive discussion of how mercy is constantly at odds with the requirements of strict and consistent legal justice. During the minority of William II, the queen regnant, Margaret of Navarre, invited a number of administrators from northern Europe to fill places at the court. Amongst this group was her relative, the Frenchman Stephen de Perche, who came to Palermo to take up the office of chancellor – the most powerful position at the court. According to Hugo's account, Stephen de Perche immediately attempted to reform legal procedure in Sicily.[165] His ambitions were demonstrated when the chancellor attempted to punish a court notary who had attacked men who had refused to bribe him. The notary was arrested, tried and imprisoned, contrary to previous court custom. This action supposedly led the Bishop-Elect of Syracuse to make the telling observation that 'perhaps it was the sort of decision that was customary in France, but such a judgement had no validity in Sicily. The notaries of the court had great authority and they should not be condemned so easily'.[166] Whilst it is possible to overemphasise the significance of this single incident, Hugo's account does

[163] William of Malmesbury, *Gesta regum Anglorum*, 411, i, pp. 742-4. Otto of Freising had similarly noted that the severity of the 'tyrannus' Roger could be defended as necessary to secure peace: *Chronica: sive, Historia de duabus civitatibus,* ed. A. Hofmeister, MGH: Scriptores rerum Germanicarum 16 (Hannover, 1912), 7.23, pp. 346-7.
[164] Alexander of Telese, *Ystoria Rogerii Regis Siciliae, Calabriae atque Apuliae*, ed. L. de Nara (Rome, 1991).
[165] *History of the Tyrants of Sicily*, introduction, pp. 13-28, discusses the problems of relying on Hugo's account, as a rare source for Sicilian history for this period.
[166] Ibid, 39, p. 164.

strongly suggest that the nature of justice at the Sicilian court was changing, as a stricter attitude towards procedure limited the opportunities for special pleading.

This impression is reinforced when the Chancellor is described as initiating a reform of legal procedures throughout the kingdom:

> He [Stephen] wanted to preserve the rigour of the law (*iustitie rigorem*) to such an extent that he thought that neither his friends nor even the magnates of the court should be spared. He would not allow the subject population to be oppressed by powerful persons, and would not pass over any injury to the poor by pretending to be unaware of it... News of this soon spread throughout the realm, and he won the favour and support of the common people and made his name so famous that everyone was saying he had been sent by God like an angel of comfort, who would put right the state of the court so as to restore the Golden Age.[167]

As a result of this action, so many men flocked to the court, Hugo reports, that there were not enough judges to examine all the cases, nor enough notaries to compose the necessary writs. Stephen de Perche was lauded as a man who 'could not be deflected from the path of justice'.[168] This is a significant choice of words, given that strict, unbending justice is often criticised by those advocating mercy as unyielding and unwilling to take into account the particular mitigating circumstances of individual cases.

The changes brought about by Stephen de Perche ultimately brought before the royal courts a man whom the people had previously been too frightened to accuse – one Robert of Calatabiano. Robert attempted, as had previously been standard practice, to bribe officials and prevent the case being brought before the courts. But this attempt failed, and, knowing he is to be judged according to strict justice, he begged the intercession of the king and queen, weeping and falling to his knees. He asked to be spared from justice on the grounds that his lordship was essential to the well-being of the realm. This intercession for mercy caused serious problems for the chancellor. Hugo

[167] Ibid, 40, p. 165.
[168] Ibid, 41, p. 166.

explained that the he faced a choice between fulfilling the promises of impartial justice he had given and a politically-expedient act of mercy:

> On one side the populace was shouting that this particularly evil man should not be allowed to go unpunished, that the business was being handled in a negligent and lukewarm way by the chancellor (*negligenter a cancellario tepideque rem geri*) and that he seemed to be deviating from his excellent intentions.....From this particular case it would become quite clear whether he would keep up that love of justice (*iuris amorem*)...forever, as something innate, or whether it was something that he had deliberately made a pretence of for the occasion.[169]

Ultimately, the problem was resolved by Stephen de Perche's attempts to steer a 'middle way'. At the request of the king, he promised not to investigate the crimes of Robert of Calatabiano which would, if proven, result in execution. However he did undertake to examine the offences which Robert is accused of committing against the Church – perjury, incest and adultery – and punish them to the full extent that ecclesiastical severity would permit (that is, short of a capital sentence).

The same conflict – between the promise of strict justice and the political rewards of offering mercy to a powerful magnate – occurs again in the case of Richard, Stratigotus of Messina.[170] Once again, Hugo relates, Stephen de Perche felt bound to rule in a spirit of strict justice because of the earlier promises he had made. The chancellor hoped to postpone Richard's case, believing that the Stratigotus would make a useful political ally. This hope, however, was thwarted, when the people of Messina appeared before him, demanding the rights of justice, namely prompt prosecution. Hugo reports that this popular fervour effectively forced the chancellor to hand over Richard to the master justiciars of Sicily to hear the case. The *History*, if it can be taken as a fairly accurate record of events at the Sicilian court, demonstrates dramatically and clearly the implications of a systematised, regularised administration of justice which touches all and

[169] Ibid, 41, p. 167.
[170] Ibid, 53, p. 183.

before which, allegedly, all are equal: the offer of special treatment to some becomes a divisive political question. It offers something of a window on the way in which the consequences of dramatic legal change unfolded in Sicily – challenges both practical and intellectual.

The conflict between the legal duty to strict justice and the political pressures of mercy clearly forms an important theme in Hugo's writing. But what is still more striking is that it seems that before this period of rapid legal change, as far as is evident, historical writing in Norman Sicily had a much less 'legalistic' flavour. For example, Geoffrey Malaterra's *De gestis Rogerii* (probably composed before 1101), says very little about justice or law.[171] Moreover, Geoffrey finds no difficulty in reconciling the demands of justice and mercy placed on a prince – he simply assumes that the two will function in harmony. Geoffrey suggests that sometimes a king will be merciful, sometimes he will punish more severely – there is no need for him to be consistent, as all is reconciled with recourse to Psalm lxxxv.11, 'mercy and truth have met each other, justice and peace have kissed'.[172] With this injunction in place, he is content to leave the question of mercy to royal discretion.[173]

Hugo, writing after a dramatic shift in administration of law, has much in common with his twelfth-century English contemporaries: he inhabits a world in which judicial decisions are a matter of public scrutiny and the object of open debate. The politics of reforming and administering Sicilian law in the twelfth century highlight many of the same themes dilemmas apparent in the history of English justice between 1100 and 1250: the choice between merciful virtue and 'effective' justice; the ever present ambiguity between the exercise of judicial discretion and the imposition of arbitrary will on the law.

[171] Geoffrey Malaterra, *De rebus gestis Rogerii Calabriae et Siciliae comitis*, ed. E. Pontiere (Bologna, 1927-8).
[172] Above, p. 131.
[173] *De rebus gestis Rogerii*, p. 166.

Is a severe king to be characterised as tyrannous or prescient? The Sicilian example is also striking with its invocation of a *populus* inspired by the idea of equal justice (due for due) and the demand driving prosecution; the *public* aspect of the law and the potential conflicts with private purposes to which the law could be put. Even considered briefly, *The History of the Tyrants of Sicily* highlights the dangers, political and legal, which rulers opened up for themselves when they made public or legislative pronouncements about their commitment to either justice.

Naturally, it is necessary to add the caveat that the Sicilian experience of systematised law in the twelfth century, whilst demonstrating certain striking similarities with the English experience, was, of course, was different in a number of respects. Any more comprehensive reading of the texts and narratives outlined here must pay careful attention to the historical context of the Sicilian kingdom and Sicilian law, and the wealth of different legal jurisdictions and traditions on the island (including, for example, the presence of Islamic courts and Islamic jurisprudence).[174] Of course a Mediterranean island kingdom, regardless of its links to the jurisprudence of Bologna or the presence northern European administrators, will have a different historical trajectory to the Angevin kingdom of England. The real interest, however, lies in discerning just how different those two kingdoms were in the way in which they dealt with the challenges of systematised law and systematised mercy. These would be fruitful objects for further study. The intersection of systematic law, royal ambition and the intellectual ferment of scholasticism could generate profound debate about the nature of judgement.

Classical rhetorical tools allowed English authors to call attention to the complexities and the dangers of doing justice in Norman and Angevin England. The

[174] Cf. Alex Metcalfe, *Muslims and Christians in Norman Sicily* (Abingdon, 2003), pp. 34-9.

weight of the problem is neatly summarised by the theologian Raoul Ardens, who, turning to consider what type of man a judge ought to be, wrote that so great was the responsibility of judgement (particularly when the penalty may run to the life of the accused) that the duty of the judge is 'agonizare pro iusticia', to struggle for justice.[175] Justice is a task which demands very great things of a judge, demands which extend beyond the procedural stipulations of legal textbooks and *ordines*, to the operational criteria of prudence and wisdom.[176] As such, it would be a misreading to understand the histories of Orderic Vitalis, the chroniclers of the reign of Stephen, Walter Map, Richard of Devizes or Matthew Paris as constructing arguments against mercy. In all these works, only one passage really constitutes an attack on *misericordia* or *mansuetudo* per se, the criticism of Stephen's hazardous *lenitas*. And even this position (the assumption that a merciful ruler is necessarily an injudicious judge) is challenged by the *Gesta Stephani*.

When Anglo-Norman, Angevin and, indeed, Sicilian authors discussed judgement they were most interested in describing how the moral virtues of an individual judge were exercised in relation to the circumstances of the specific case before him. This is, however, a debate which advances in sophistication and complexity in the course of approximately 150 years. For Orderic Vitalis, writing before the emergence of truly systematic law or 'routine' justice in England, the choice between justice and mercy is determined by the royal counsellors with whom the king surrounds himself. When William I, William II or Henry I make a wrongful decision about the punishment of a magnate the problem stems (as it had done in the biblical case of Susannah and Daniel) from bad advice, from deceitful counsellors. The events of the Anarchy, however, clearly complicated this debate in two ways. First, histories of the period explicitly state that the major political conflict was in fact an argument about whether justice or mercy was the

[175] *Speculum universale*, X.64, BnF Latin 3240, f.44r; an allusion to Ecclesiastes v.33, 'pro iustitia agonizare pro anima tua, et usque ad mortem certa pro iustitia'.
[176] Cf. Grosseteste, Ep. 80, p. 257, on the difficulties of finding an impartial judge.

best way to rule England. The argument between *iustitia* and *misericordia* was widely acknowledged as one way of understanding the political struggles of contemporary English history. Secondly, those histories demonstrate a marked increase in the level of sophistication with which they discuss political action founded on classical rhetorical principles. Quite how sophisticated that discussion had become by the end of the twelfth century is visible in the tripartite schema of Raoul Ardens. Similarly, the histories critical of Stephen do not argue that he was badly counselled, but that he chose the course of action inappropriate to the political circumstances. That is, these histories point out that morally-worthy mercy and politically-advantageous justice might, sometimes, be entirely opposed choices. They demonstrate how this apparently theoretical argument between *honestus* and *utile* could be seen in the real political and military conflicts of the Anarchy. By the late twelfth century, moreover, it is apparent that parts of this rhetorical debate are coming into conflict with the emergence of more rigorous systematic principles of law. Walter Map's *De nugis* recognises – with some admiration – the speed and reach of Angevin administrative reforms, where no action escapes the ever-watchful eyes of the king or his officials. Louis VII, by contrast, may inhabit a world of bread, wine and gaiety – but it is also a world of persuasion and arbitrary will. A *simplex* king cannot prosper in a world of such judicial complexity. Richard of Devizes and Matthew Paris, finally, raise concerns that classical deliberative rhetoric can become a cover for legal abuses, rather than a means of debating the most appropriate course of judicial conduct. There is room for pleading and argument, but that must be part of, not an alternative to, standardised legal process.

The histories of both England and Anglo-Norman Sicily remind their readers that royal judicial decisions are political choices, with serious ramifications for the good of

the realm.[177] This, in turn, demonstrates the absolute centrality of counsel to twelfth- and thirteenth-century arguments about justice and mercy. Merciful counsel was understood to be a virtue which had the endorsement of Christian teaching, but, as thrown into sharp definition by classical rhetoric, it was also understood that counsel is not always virtuous and counsellors could not always be trusted. Opening the practice of justice to discussion allowed kings to hear the advice of the virtuous, yet equally it allowed the judge to be persuaded away from virtue. The deliberative rhetoric which made the implications of different judicial strategies more stark – the appeal to the concepts of *honestus*, *utile*, *salus*, and *tutus* – in fact made the choice between *iustitia* and *misericordia* more fraught. In theory, justice was a subject for debate. In practice, in twelfth- and early thirteenth-century England, it was the source of bitter, often irresolvable, conflicts.

[177] Cf. S.D. White, 'The Ambiguity of Treason in Anglo-Norman-French Law, c.1150-c.1250', *Law and the Illicit*, pp. 89-102, esp. p. 91.

Conclusion

The precise meaning and purpose of justice was the subject of a sophisticated and substantial debate in the twelfth and early thirteenth centuries. Discussions of justice prior to the translation of the entirety of Aristotle's *Ethics* were complicated, but not chaotic. What appears to be intellectual disorder in twelfth- and thirteenth-century scholasticism is, in fact, not a product of unclear thinking nor the absence of a categorical and systematic approach, but a reasonable response to the diversity of legal principles and the variety of circumstances with which individual judges were faced and which scholastic authors sought to comprehend. Scripture itself provided many different examples of justice, which were not easily contained under a single unifying theory. The classical inheritance on the subject of justice was not, primarily, the orderly principles of the jurists, but moral ambiguity over the relative merits of *clementia* and *severitas*, and a recognition of the need for discretion in order to assess the particularity of circumstances. In the courts of the common law, the English legal system made flesh the conceptual tug-of-war between *iustitia* and *misericordia* when it argued over the merits of pardon.

Modern scholars of canon law have argued that, in church law, at least by the late twelfth century, canonists recognised a pressing need for the dissolute and confused legal concept of *misericordia* to be replaced with a more reasonable, rigorous and clear principle of *aequitas*, in order to arbitrate in difficult cases.[1] Whilst it is true that a clearly-defined concept of *aequitas* did replace the broader notion of *misericordia*, this teleological narrative should not be allowed to obscure the considerable and enduring conceptual attractions of the idea of *misericordia* in the world of moral theology. It was an idea which, after all, was still being invoked in 1250. The great advantage of citing

[1] Above, p. 49.

misericordia as a judicial principle lay in its rhetorical and political flexibility, and in its many nuanced and varied inflections. *Misericordia* was not lacking in rigour – it was complex because it was multifaceted. Precisely because scholastic authors were aware of how *misericordia* might be open to abuse as a category – when it was exploited as an excuse for laxity or for excessive indulgence – they were assiduously careful in how they employed it. It is exactly for this reason that so much ink was spilt in discussing and defining the circumstances of its use. This principle was neatly summarised by Robert Grosseteste when he commented that 'there is no true mercy except ordered mercy' (*non est vera misericordia nisi sit ordinata*).[2] For Grosseteste, lecturing in the 1220s and 1230s, *misericordia* remained a valid and vital principle for the judge, but such mercy could only be understood properly, and implemented appropriately, when it was related to the circumstances of judgement, and thereby had its place defined. In defining that place, scholastic theologians were not trying to achieve a 'balance' between *iustitia* and *misericordia*. Theologians recognised that justice did not correspond to the model of a 'golden mean', where true justice might be triangulated as lying equally distant from excessive severity and excessive leniency.[3] Instead, they recognised that in any practical judgement, rarely, if ever, could the judge combine *iustitia* (as strict punishment) with *misericordia* (as charitable mitigation) in a single sentence. The judge could demonstrate both qualities over a lifetime's worth of sentences in a judicial career, but in each judgement he was obliged to make the singular choice between justice and mercy anew, to weigh, once again, a conflicting body of precedents and counsel.

The contention that twelfth-century thought on justice is better characterised as diversity rather than disorder is not a quibble over semantics. It impinges on how historians appreciate and situate the intellectual developments of the twelfth-century

[2] Grosseteste, *Dictum* 2, f.3r.
[3] Above, pp. 34-6.

schools, and how they understand the way in which 'the Middle Ages' assimilated the legacies of classical and patristic thought. In turn, the assertion that twelfth-century thought on justice was different from, but not less sophisticated than, the scholastic syntheses of the later thirteenth century – invites a consideration of the second part of Odon Lottin's thesis: that the reception of Aristotle did fundamentally change medieval ways of thinking about justice, and that 1250 marks a decisive shift in the way in which the relationship between *iustitia* and *misericordia* was conceptualised.

First-hand knowledge of Aristotle's works had been increasing in western Europe since the mid-twelfth century.[4] The *Ethica vetus*, a translation of the second and third books of the *Nicomachean Ethics*, had been in circulation since the late twelfth century, and the *Ethica nova*, a translation of the first book, from the early thirteenth century.[5] These two texts, however, did not cover what Aristotle had to say about justice, or about its moderation. In order to explore the core of Aristotle's teachings on justice, the fifth book of the *Ethics* was required, a text which only became accessible to most European readers with Robert Grosseteste's complete translation, c. 1246/7. It was this translation (and indeed, Grosseteste's accompanying commentary and his distillation of Greek commentaries on the text) which provided 'a flying start to the whole study of the *Ethics* in the schools'.[6] Aristotle's discussion of justice provided thirteenth-century theologians with a radically new structure for the understanding of justice. The *Nicomachean Ethics* did not employ the term 'cardinal' virtues, nor describe a group of four virtues privileged

[4] See C.J. Nederman, 'Nature, Ethics, and the Doctrine of *Habitus*: Aristotelian Moral Pyschology in the Twelfth Century', *Traditio* 45 (1989-90), pp. 87-110, and the response of Marcia L. Colish, '*Habitus* Revisited: A Reply to Cary Nederman', *Tradito* 48 (1993), pp. 77-92.
[5] For these texts, C. Marchesi, *L'Etica nicomachea nella tradizione latina medievale. Documenti e appunti* (Messina, 1904), appendix, pp. 1-xxvi (*Ethica vetus*), xxvii-xl (*Ethica nova*).
[6] Jean Dunbabin, 'Robert Grosseteste as Translator, Transmitter and Commentator: The Nichomachean Ethics', *Traditio* 28 (1972), p. 472.

above all others.[7] Aristotle presented his own solution to the broad implications of 'justice' by dividing the concept into two – general and the particular (*iustitia generalis, iustitia particularis* in Latin terminology).[8] General justice describes the just, or virtuous life; particular justice refers to the rightful distribution of goods – be that rewards or punishment, honour or money. It is into this second category which the justice of the courts (*iustitia legalis*) falls. Particular justice is then divided into three further categories, distributive, reciprocal and rectificatory.[9] What is most important here is to recognise that Aristotle's distributive justice – that justice which 'when distributing goods, treats equals equally and unequals proportionately unequally according to merit',[10] is fundamentally in accordance with a definition of justice as a return of proportionate due.[11] Aquinas, for example, considering Aristotle's discussion of justice, recognised its agreement with a 'Ciceronian' definition of justice as *suum cuique tribuens*.[12]

Yet, for all this acknowledged continuity, Lottin is right to say that the reception of Aristotle did fundamentally alter the way in which medieval authors dealt with justice, and, further, with the relationship between justice and mercy. This was the result of two distinctive innovations brought about by Aristotelian thought.[13] The first is general, and stems from the orientation of Aristotle's political philosophy: it is ordered primarily towards the good of the community. This is a fact noted by Albertus Magnus in his *Commentary on the Sentences*, when discussing the distinctiveness of Aristotelian justice:

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[7] See Bejczy, 'Medieval Commentaries on the Nicomachean Ethics', pp. 199-221; Roberto Lambertini, 'Political Prudence in Some Medieval Commentaries on the Sixth Book of the Nicomachean Ethics', *Virtue Ethics in the Middle Ages*, pp. 223-46.
[8] e.g. *ST*, IIaIIae, q.58, ix, pp. 9-20.
[9] Aristotle, *Nichomachean Ethics*, trans. Roger Crisp (Port Chester, NY, 2000), 5.3-5, pp. 85-92.
[10] See Howard J. Curzer, *Aristotle and the Virtues* (Oxford, 2012), pp. 223-246, quotation at p. 238.
[11] A definition repeated in the *Rhetoric*, i.9, ed. and trans. R.C. Jebb and John Edwin Sandys (Cambridge, 1909), p. 37.
[12] Cf. Matthias Perkhams, 'Aquinas's Interpretation of the Aristotelian Virtue of Justice and His Doctrine of Natural Law', *Virtue Ethics in the Middle Ages*, p. 136.
[13] There is some sense of transition here, however: for example, William of Auxerre's *Summa aurea* (c. 1215-20) employs the terminology of *generalis-specialis*, but bases its discussion of justice on scripture, Augustine and Cicero, not Aristotle. 3.28.1-2, iv, pp. 547-60.

> Justice, however, because it is not predicated absolutely, is of another order: it falls under the order of the civil law, namely, statutes and votes, and its cases vary accordingly. And therefore it concerns the order of the public community (*ordinem communis civitatis*): and it seems that Aristotle follows this order in his *Ethics*, as is clearly apparent in the new translation.[14]

That is to say, Aristotle's legal justice has no particular regard for the soul of the person who is involved in passing judgement. Justice is ordered according to the 'public community'.[15] Certainly *communis utilitas* was a crucial aspect of justice in the period before the reception of Aristotle, particularly emphasised in the definitions provided by Cicero.[16] But Aristotle's perspective here cuts out the measurement of 'justice' according to its impact on the judge's own soul. It effectively excludes the relevance of reciprocal mercy – that every sentence the judge passes on earth must be accounted for on the day of judgement.[17] This principle had set up the possibility for conflict when choosing between strict justice, beneficial for the realm (for example in the capital punishment of an offender), and the mercy – the pardon or reprieve – which was an act of personal virtue for the judge. Public good, however, is always the motivation of the Aristotelian judge: thus Albertus Magnus recognises him as acting 'propter bonum civile'.[18] The separation of 'general' justice, i.e. justice as a virtue, and 'particular' justice, the business of giving legal judgement, to some extent excluded any consideration of how calculations about personal virtue and salvation might work their way into sentencing.

The second Aristotelian innovation which fundamentally altered the way in which justice was discussed was the introduction of *epikeia*, defined by Aristotle in book V.10

[14] Albertus Magnus, *Commentarii in librum Sententiarum*, in *Opera omnia*, ed. Auguste Borgnet (38 vols., Paris, 1890-1899), 3.33.1 ad.11, p. 608.
[15] Cf. *Nichomachean Ethics*, 5.6, pp. 92-3.
[16] Above, p. 242.
[17] Above, p. 37.
[18] Albertus Magnus, *De bono*, ed. H. Kühle et al. (Aschendorff, 1951), 4.2, p. 301; *Commentarii in librum Sententarium*, 3.33.1, p. 608.

of the *Ethics*. This term, latinised from the Greek, *epikeia* (ἐπιείκεια), is typically translated as 'moderation'. Aristotle explains that *epikeia* is the part of justice which 'corrects' the occasional inadequacies of legal justice. The term *epikeia* had not been available to authors in western Europe until the translations of the mid-thirteenth century, and, strikingly, one of the first attested uses of the term *epikeia* was made by Robert Grosseteste. Grosseteste used the term at the papal curia at Lyons in 1250, when challenging the idea of a papal exaction which was legal, but unreasonable, that is, opposed to the spirit of the law, in conflict with the principle of *epikeia*.[19] The introduction of *epikeia* represented much more than an additional synonym for *misericordia*, because of the way in which it was defined and deployed, and due to its relationship to particular justice (*iustitia particularis*). *Epikeia* fundamentally restructured the way in which scholastic texts dealt with questions of mercy and judgement. The process is not dissimilar to the developments described earlier in canon law: from the final decades of the twelfth century onwards, the general terms *misericordia* and *caritas*, principles which had licensed dispensation from the canons, were replaced with the more rigid, juridical terminology of *aequitas*. That term, borrowed from civil law, bore a more precise and more limited meaning. The emergence of *epikeia* hints at much the same process taking place in scholasticism after the reception of the *Ethics*. The reasons for this change are beyond the purview of this study. However, given what has been argued here about the flexibility and adaptability of *misericordia* as a conceptual tool, this transition cannot be explained with the straightforward assertion that *epikeia* replaced *misericordia* because it represents a superior conceptual principle for the ordering of justice. The success of *epikeia*, it seems, is equally bound up with the more general uptake of

[19] S. Gieben, 'Robert Grosseteste at the Papal Curia: Edition of the Documents', *Collectanea Franciscana* 41 (1971), p. 386.

Aristotelian ethical terminology in the thirteenth century.[20] The significance of the reception of *epikeia* is well demonstrated in the *Summa theologica* of Aquinas, who, following *Ethics* 5.10, explains that *epikeia* is part of the virtue of justice and aims at producing equity (*aequitas*) as its outcome. *Epikeia* is the virtue which allows a judge to set aside the letter of the law and follow the dictates of justice and the common good.[21] Scholasticism in the twelfth century and in the first part of the thirteenth century already had a notion of moderation of judgement – and keenly discussed precisely this question.[22] What *epikeia* brought, however, was a more limited sense of how that moderation should apply: it spoke specifically to *legal* judgement – whereas the great advantage (and the great conceptual challenge) of *misericordia* (and its cognates such as *clementia* or *caritas*), was that it impinged on almost *any* action of judgement, whether personal or political, not only legal. Any action which fell short of being truly just was open to correction; indeed, this intersection of general and the particular was what gave rise to substantial intellectual problems such as Moses's intercession for the Israelites.[23] 1250 does not mark the end of intellectual or political arguments about justice therefore, nor the use of judicial discretion or pardon. But it does mark a change in the way the question was debated. The same fundamental arguments continued to be raised in later centuries: the rightful exercise of pardon; the status of mercy as a particularly royal virtue; and the need to protect the courts from the arbitrary whim of the judge.[24] But the separation of

[20] See Stefano Simonetta, 'Searching for an Uneasy Synthesis Between Aristotelian Political Language and Christian Political Theology', in L. Bianchi (ed.), *Christian Readings of Aristotle from the Middle Ages to the Renaissance* (Turnhout, 2011), pp. 273-85.
[21] *ST*, IIaIIae, q.120, a.1, ix, pp. 468-9; cf. Albertus Magnus, *Super Ethica: Commentum et quaestiones: Pars 1: Libri quinque priores*, ed. Wilhelm Kübel (Aschendorff, 1972), 14.1, pp. 378-83.
[22] Above, pp. 34-43.
[23] Above, pp. 88-92.
[24] For later medieval examples see Helen Lacey, *The Royal Pardon: Access to Mercy in Fourteenth-Century England* (Woodbridge, 2009), and, for a French perspective, Claude Gauvard, *"De grace especial": Crime, état et société en France à la fin du moyen âge* (2 vols., Paris, 1991).

justice into general and particular, and the adoption of the principle of *epikeia*, put an end to the conceptual diversity of twelfth- and early thirteenth-century approaches to justice.[25]

If the first fundamental argument of this thesis has been to counter Lottin's characterisation of pre-Aristotelian thought on justice, the second fundamental argument has focussed on the case of England in the twelfth and thirteenth centuries. It contends that theological arguments about justice impinged, meaningfully and discernibly, on the practice of law and politics in Anglo-Norman and Angevin England – in other words, that theory was inextricably linked to practice. This part of the thesis constitutes a challenge to the arguments of cultural historians, and the long-standing traditions and assumptions of English legal history in particular. Hyams' revisionist cultural history rests on the idea of a disconnection between highly latinate texts (legal or theological) and the more limited understanding of the 'common' man or woman. It maintains that the individuals engaged in writing texts advanced sophisticated ideas of justice which had almost no bearing on the 'social realities' of power. The real world, by contrast, was governed by power exercised without regard for the semantic niceties and scholastic debates concerning *iustitia* and *misericordia*. Such revisionist narratives are ultimately founded on a fundamental disparity between the value of justice as defined by, and associated with, the mechanisms of officialdom, and the value of vengeance, a 'popular' idea. This difference is essentially the distinction between 'learned' and 'unlearned' approaches to law. On Hyams' account, the minority who had studied in the schools, or relied on scholastic learning – whether in Paris, Bologna or Oxford – had imbibed an approach to law which was entirely different to that of the majority of English people. It was predicated on different values, practised in different settings and judged by different standards: an

[25] For *epikeia* in later Christian thought, see Lawrence J. Riley, *The History, Nature and Use of Epikeia in Moral Theology* (Washington, DC, 1948).

opposition between learned and unlearned, or, alternatively, between 'learned and vernacular' sources of law and legitimacy.[26]

It is always hazardous to postulate any strict separation of 'popular' and 'elite' ideas in any context, let alone about justice, and any such claim would naturally have to be supported with evidence rather than assumptions. This thesis has argued that the images of justice presented to the unlettered population of England were actually rather sophisticated, and did not shy away from addressing the potential contradictions between justice and mercy. Indeed, the conflict was made deliberately apparent in popular sermons: allegories such as that of the Four Daughters of God staged the heavenly dispute over the relative merits of justice and mercy at the Incarnation in terms of an argument between a lord and his children, quite literally bringing a divine conflict down to Earth. Arguments over justice and mercy pervaded all forms of twelfth- and thirteenth-century writing: it was a feature of theological commentaries, but also powerfully evident in sermons, in the writing of histories, and as a pressing (and practical) question in political argument. It is, at best, problematic, and, at worst, patronising to assume that the laity was not capable of grasping the concept of a potential conflict between justice and mercy. This was an argument which could be made on many levels: it could be expressed simply and pithily (not least in the juxtaposition of some very familiar quotations from the gospels); yet it was also a problem which could fill volumes of scholastic *quaestiones* and *disputationes*. The picture is vastly more complicated than that of the Church promoting a gospel message of love and forgiveness confronting a laity bent on un-Christian vengeance. Hyams' argument is centred upon the contention that 'vengeance', not 'justice' was the principle around which Anglo-Norman and Angevin society was

[26] P.R. Hyams, 'Thinking English Law in French: The Angevins and the Common Law', in Belle S. Tuten and Tracey L. Billado (eds.), *Feud, Violence and Practice* (Farnham, 2010), p. 195; see also his 'What did Edwardian Villagers Understand by "Law"?', in Z. Razi and R.M. Smith (eds.), *Medieval Society and the Manor Court* (Oxford, 1996), pp. 69-102.

organised. 'Rancor and reconciliation' were more important than principles of justice and mercy. This thesis cannot, for reasons of space, address the vast secondary literature on the question of 'vengeance' and its place in medieval English society. However, it is worth at least noting that the categories of vengeance and justice are not incompatible. Indeed, the very concept of vengeance – the return of one injury for another – can be included within an overarching category of *iustitia*, when justice is defined as the return of dues, and vengeance the return of due punishment.[27]

The bluntly reductionist idea propounded by Bisson of a sharp distinction between power as theorised and power as experienced can be countered along much the same lines. The contrast between the 'real world' and the 'world of the schools' is profoundly misleading – some forty years ago both R.W. Southern and John Baldwin argued that the purpose of scholastic thought (and most particularly scholastic thought on justice) was profoundly practical.[28] So many of the men involved in judgement had received the benefits of a scholastic education (or were advised by counsellors who had been trained in the theology of judgement); and those men clearly took time and care to think about the processes of justice and the social implications of the punishments they handed down. Ultimately, perhaps, this comes down to a difference of perspective on medieval rulers and how seriously they are thought to have taken their judicial responsibilities: whether Henry II took greater concern over his realm than over his coffers cannot ever, tangibly, be demonstrated. However, the texts examined here demonstrate just how far medieval authors attempted to press home the 'practical' dimensions of their arguments, and the increasing sophistication of those 'practical' arguments as they developed over the course of a century and a half. Indeed, as Cicero had defined it, the very purpose of doing justice by 'giving to each their due' was in order to protect and preserve the good of the

[27] Alan of Lille, for example, noted that *vindicta* was to be defined as the licit return of *iniuria* for *iniuria*: *De virtutibus*, 1.2, p. 31; see above, p. 44.
[28] Above, pp. 28-9.

community.[29] The point was a practical one, as John of Salisbury emphasised: those who failed to divide equally the wealth of the nation and the dues of punishment could not expect to reign for long.[30] This was evident in the biblical example of Heli,[31] but also in the demands for public, impartial justice that are articulated in Magna Carta.[32] What Bisson perceives as an abstruse, classicising flight of fancy is, in fact, the sound of scholastic authors stating a basic principle of successful rulership: to deny justice is to risk rebellion. This was not academic speculation, but a political certainty; these authors found the problem borne out in cases from scriptural, classical but also contemporary history. Marginalised intellectuals did not 'force' Roman ideas and a classical judicial vocabulary onto reluctant rulers.

As for the contention of modern English legal historians, that theology had no place within law (or was, at best, 'window dressing' added after the practical business of the law had been decided), an attempt has been made here to demonstrate that even men engaged in the 'practical' business of judgement needed theology in order to supply the material needed for the moments at which written law fell short. Judges required the moral guidance provided by theologians precisely because of the way in which the English legal system had evolved and was developing: its status as a partly public, partly private forum, together with the expectations placed on the judge as both royal servant and impartial arbiter, thrust the question of judicial virtue to the fore. The simple but salient fact that judges operated within a Christian moral universe should not be overlooked. The judge was faced with a set of uncertain calculations in which he could not avoid addressing questions which were as much about virtue as they were about political or legal goods: would the mercy that spared an offender offer him the chance to

[29] Above, p. 242.
[30] *Policraticus*, 4.11-12, 1:533-8.
[31] Above, pp. 80-3.
[32] Clanchy, 'Magna Carta and the Common Pleas', pp. 219-32.

reform, or simply provide the opportunity to commit more grievous crimes and inflict further damage on the community? How was one to discern the difference between the admirable virtue which sought pardon from pity, and the partiality which ought never to be admitted in a court of law? The importance of these moral questions was underlined because judgement carried not merely political implications for the *regnum*, but heavenly repercussions for the soul of the judge. It encompassed both community and individual, even if sometimes the community and the individual sought irreconcilable forms of justice. Contrary to traditional characterisations, scholastic thought on justice was not a metaphorical rabbit hole which led down to ever more abstract and speculative debates. On the contrary, one crucial function of the intellectual debate was precisely to highlight the practical problems of justice. That is, theologians explained that the choice between mercy and justice – and it *was* a choice, as justice and mercy could not be contained within a single sentence – could only be resolved at the judge's individual discretion. The intellectual debate, in other words, explicitly carved out a large space for practical action. This theme of judicial discretion is one which has been almost entirely neglected in the modern historiography of the common law, in its presumption that procedure furnished all the answers. And yet it was precisely this space for discretion which provided the room for the judge to weigh up the relative advantages of justice and mercy in individual cases.

It is an accepted narrative in medieval historiography that some of the most significant debates of the eleventh, twelfth and thirteenth centuries were the conflicts over how the meaning and value of certain fundamental ideals – celibacy and poverty, for example – should be transferred from text to practice. In the case of clerical celibacy and Franciscan poverty, moreover, attempts to put scriptural ideals into practice had profound practical ramifications which altered the face of medieval society. Why then, should the

same process not be found occurring in contemporary conflicts concerning the meaning and implementation of justice? That conflict was real and it was debated at every level: this is as evident in the arguments over the cost of pardon at the Angevin court as it is in debates over the exact quantity and qualities of the divine mitigation which would be shown to unrepentant sinners. The argument over the relationship between justice and mercy did not necessarily produce consensus, but it did create the conceptual structures which allowed medieval authors to understand the shape of the world and the shape of history: the twin opposed and polarising pillars of *iustitia* and *misericordia* stretched from the work of Creation to the day of the Last Judgement. They were as problematic in pronouncements made by Christ as they were in the mundane judgements of the provincial Angevin justice-at-eyre.

All who judged, or who studied judgement, were bound to ask themselves: where did virtue fit within the law? The precision of scholastic thought provided two mutually exclusive answers. *Either* justice was a strict matter of due which left no place for mercy, in which case the judge's own merciless soul was imperilled; *or* justice was a matter of extending Christian mercy to the guilty, in which case, the judicial system was faced with the almost impossible task of maintaining a distinction between virtuous *caritas* and wicked partiality. Neither option was a simple one for the judge, for both positions could be – and were – eloquently defended and supported by the full weight of classical philosophical and theological argument depending on the particular intellectual, political and legal circumstances. Between 1100 and 1250 much changed in the way in which *iustitia* was defined and discussed. Systematic law became a social reality; an assertive crown and ambitious royal servants could rightfully claim that justice had become a 'routine' matter. It is in this basic sense that grand narratives of English legal development do hold true. Likewise, in the schools, *iustitia* was the subject of

increasingly sophisticated intellectual labours which moved from a recapitulation of Ciceronian and Macrobian definitions to an analysis of whether true justice was ever embodied in a legal system. What commentators in 1250 recognised explicitly, however, was an idea implicit in the legal practice of a century earlier: personal virtue and discretion were integral to the exercise of justice. The English judge in 1250 inhabited a more ordered world – legally and intellectually – than any of his predecessors. Rather than resolving the vagaries of the relationship between justice and mercy, however, legal and intellectual order served only to highlight the moral complexities and pastoral challenges inherent in the act of judgement.

Appendix

Figure 1. Raoul Ardens, *Speculum universale*, I.15. Quid sit iustum, BnF Latin 3229, f.4v.

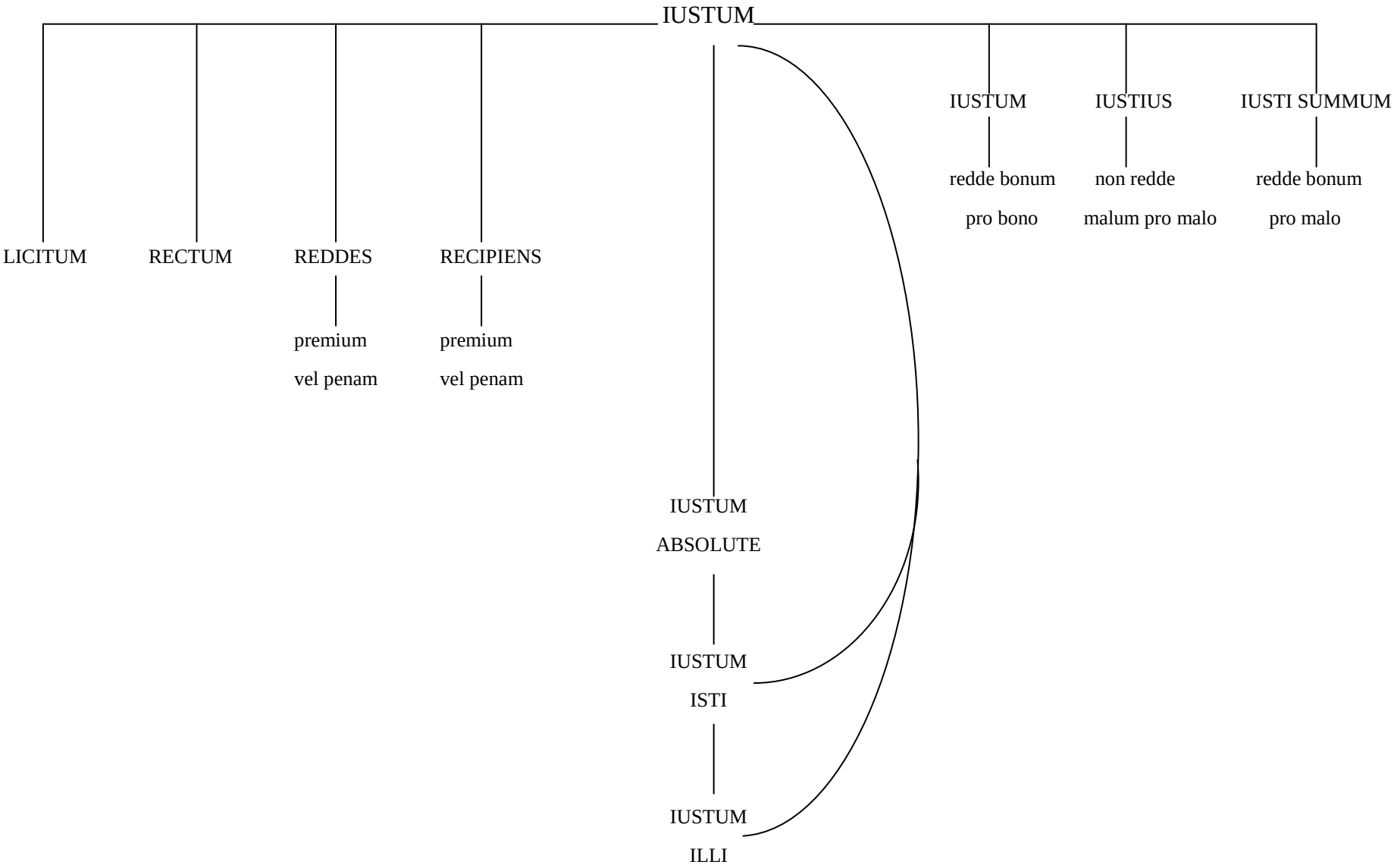


Figure 2. Raoul Ardens, *Speculum universale*, I.16. Quid sit honestum, BnF Latin 3229, f.5r.

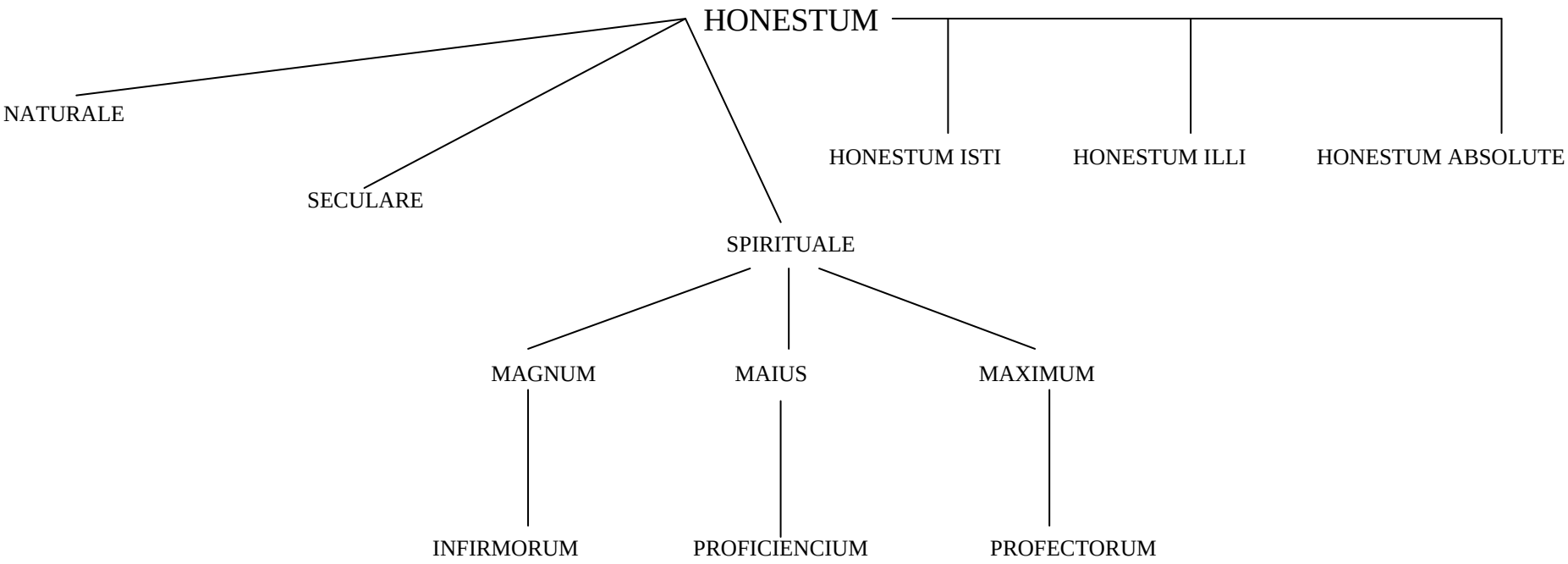
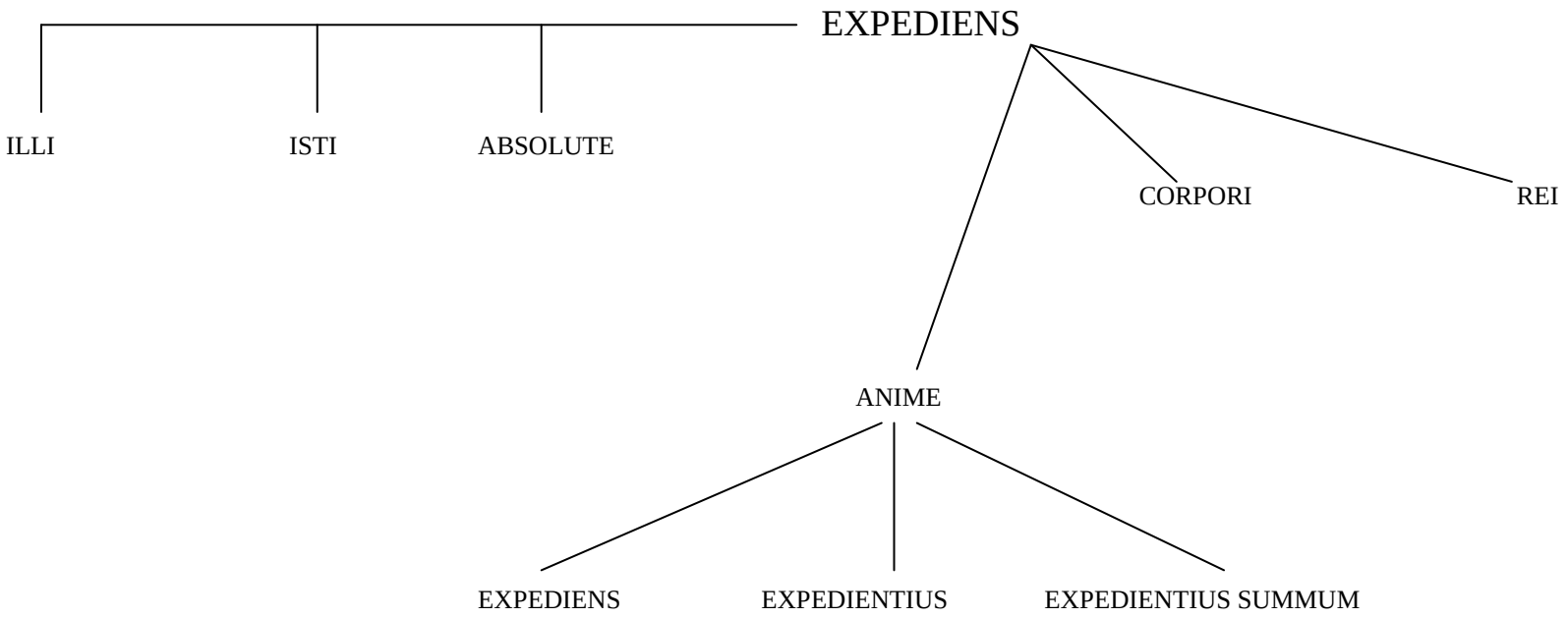


Figure 3. Raoul Ardens, *Speculum universale*, I.17. Quid sit expediens. BnF Latin 3229, f.5r.



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