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Law in action, law in books: the practicality of medieval theft law

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ABSTRACT. This article approaches the medieval law of theft from a ‘functional’ perspective. It seeks, that is, to consider the rules of law principally in relation to the social circumstances which give rise to them and upon which they, in turn, have an impact. Concentrating primarily upon material from England and Wales, the essay considers general issues of definition, jurisdiction and proof in the law of the middle ages before concentrating specifically upon the rules respecting theft. The ideas of manifest and non-manifest theft are explored in an attempt to discover why the law distinguished between them. Potential difficulties concerning the bringing of theft actions and the defences which might be offered to them are also examined and related to the practical world in which perpetrators and victims of theft found themselves. Finally, the possible tension between the satisfaction of the demands of the individual victim and the wider desire to maintain public order is investigated.

It is easy to overlook the problems which a medieval law of theft had to address. The essence of the offence, the taking of property belonging to another, is simple to grasp, perhaps too simple. The historian may trawl records, where they survive, for information about the incidence or demographic detail of this enduring offence, or seek telling details such as about the type of property stolen. Yet the law itself and the procedures which underpin it excite relatively little interest.¹ Maitland’s observation relating to the law of moveables, in the discussion of which he makes some of his most perceptive comments concerning theft, is instructive. We have, Maitland cautioned, ‘too easily believed that the medieval law of chattels was simple and straightforward and in all probability very like modern law’.² This comment seems as appropriate in respect of the law relating

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to the unlawful removal of goods as it is to the question of rights over them – for clearly the one is the converse of the other.

Yet theft law *is* easy, isn't it? It certainly seems to lend itself to relatively concise definition. I recall very little of the law I read as a student, but the definitions of theft which I learned, in respect of both the law of Rome and of that which then pertained to England and Wales, still remain. 'Furtum est contractatio rei fraudulosa vel ipsius rei, vel etiam usus eius possessionisve'.³ 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'.⁴ The eighth commandment receives no explanatory gloss. Surely such a wrong, the essence of which can be conveyed even by lawyers in a single sentence, requires little in the way of analysis.

Yet both the failure to define theft and the act of definition when it is attempted present difficulties. The former approach, which simply names the wrong without explaining it, is characteristic of the earlier English secular law codes.⁵ It implies that either non-paradigmatic cases will not occur or, if they do, will be appropriately resolved. That resolution, by whatever means it is carried out,⁶ is a job within the law, but it is not a job of the law. It will depend upon the particular facts of the individual case.⁷ The law provides the means of finding the answer rather than the answer itself. Explicit legal definitions of offences, on the other hand, when they do come to be given, are conclusions drawn from experience. They emerge when lawyers⁸ attempt to hold the law, to give it form and substance, rather than simply to do the job of settling particular disputes. They flourish with the technology of writing which first serves custom and then commands it.⁹ Even if they accurately encapsulate all the experience of the past (in itself almost inevitably impossible) these definitions cannot foresee the future. Difficult and unusual cases will still arise but lawyers will now seek to solve them by looking to the written law. They will try to find the answer by interpretation. The words, by which it was sought to solve problems, will come to create them.¹⁰

Much medieval legal writing, certainly in England, concerns itself with procedure rather than with definition. Whilst the emphasis on the form rather than the substance of disputes may be overstated by legal historians on occasion,¹¹ it undoubtedly points to a great truth. Procedure was important. Our sources address the two issues crucial to the determination of disputes, those of jurisdiction and of proof. Where and how the case is to be settled are questions the answers to which explain much of what we know of medieval law. These procedural questions become more evident when written procedures are established and they develop as 'legal' questions in their own right. They may also prompt the authoritative definition of categories of substantive wrong, as, for example, when

jurisdiction is disputed over a particular offence.¹² The questions are old ones, though. They must originally have been solved in accordance with custom and/or pragmatism (if we can divide these concepts this easily) from the earliest days of disputing in a public forum.

Even when legal rules are written down details of their role in maintaining social order remain elusive. Even in our own day the rules of law are only one element of the drama of dispute formulation and resolution, and sometimes only the backdrop before which that drama is enacted. Many crimes are unreported, many broken contracts unlitigated. Compensation for road traffic accidents is generally settled by negotiations between insurance companies, not by judicial process. Authority, generality and finance, all potent motivations for the incorporation of legal material into written record, may be less pressing in relation to other forms of regulation and settlement. Records may not have been created or may not survive. Nor should we assume that the relationships between the recorded and the unrecorded or between the legal and the extra-legal remain constant. Attitudes towards law and its application, as well as towards the recording of events in writing, change through time alongside social conditions. That which once went unrecorded may begin to enter the written evidence; that which once was settled without the law moves within it. Or (for we must be careful not simply to assume a unilinear development) the pattern may be reversed.

Disputes arise not only between individuals but within communities. This is an important point despite the difficulty that the concept of the relevant 'community' itself is a complex and variable one. So, for example, the identification of theft as an offence against 'the state' which we accept today might be a less clearly recognized characteristic in other times. Yet analysis of the characteristics of a community may help us to understand the way in which it deals with its problems. Anthropologists have drawn our attention to the linkage of certain types of dispute settlement with the values and beliefs of the communities employing them.¹³ My own work on the response to criminality in nineteenth-century Wales has convinced me that we should view 'informal' resolutions even at that time less as instances of deviation from a legal norm and more as assertions of a different mentality, a different dominant normative framework.¹⁴ By this I mean simply that we should look not only to the absence of law but also to the presence of other social beliefs and structures which may explain it. A medieval world of small face-to-face communities, with complex interrelations of loyalty and protection and a belief that judgement in this world is only a simulacrum of the Real Thing to come in the next, will not necessarily view its laws and their use in the same way as the individual in the modern post-industrial state. All this is not to say

that 'law' and 'state' were unimportant in medieval society, it is to suggest that their importance should be considered in an appropriate context.¹⁵

My point is not only the familiar one that law is not the only means of settling disputes. That much is obvious, yet not so obvious that it does not need repetition. Rather it is important to see law as occupying a particular place amongst a range of possibilities. Let me give an example. Both the early-medieval Welsh and English laws specify sums of compensation to be paid in the event of wrongdoing. These tariffs, as has been argued elsewhere,¹⁶ are not to be understood as a simple alternative to feud, still less as a later mitigation of it. Feud and compensation are necessarily interconnected – for the right to financial redress is an empty one without a potent sanction to supplement it, while a society which has no means of terminating interpersonal violence cannot, I suggest, survive as a society at all.¹⁷ Yet I do not believe for one moment that – whatever they might have come to mean¹⁸ and no matter how detailed and precise they might be – the laws prescribing compensation payments had their genesis as a sort of actuarial table or price list to determine the sum which would inevitably be paid. It is true that I cannot prove this negative. Yet there can seldom have been an arm broken in a fight, an illicit sexual relationship or a sword taken from another without a context for that fight, that embrace, that taking. The law, as we noted, tries to dam the infinite variety of human experience behind the inadequate barrier of a few words. Issues of intention, insult, provocation, affection and the rest will all, I submit, determine the reaction to the wrong and the compensation fixed upon if compensation is considered appropriate.¹⁹ What the law offers (if indeed it offers anything of practical value at all rather than being simply a symbolic totem of power²⁰) is, to use Miller's perceptive image, a 'default setting'²¹ – an authoritative external valuation if the parties cannot agree their own, although it may well form an important element in the arrival at that agreement.²² 'If you can't sort it out yourself, then this is what you'll get' may be what such laws originally meant.²³ Evidence of the use of compensation codes in cultures closer in time to us than those we have been considering suggests that such an interpretation is a possible one, though anthropological comparisons are of course potentially dangerous.²⁴

My view of how such codes operated in medieval society is based more on beliefs about mentality than on specific evidence of social practice which, though it has left us some records, may not have preserved that which was regular and routine for many within society. Others with more knowledge of the extra-legal sources may arrive at different conclusions, but as one whose interest is in the social meanings and functions of law

I maintain that the interpretation I have offered here is not only possible, it is almost inevitable.

All of which leads me to my purpose in writing this piece, for so far I have had some things to say about law, but very little about theft. My aim is to explore this idea of social meaning and purpose against which the law of theft may be read, to strip the legal texts in an attempt to discover the practical themes which they may reveal. As such what follows is by no means a detailed history of the law of theft. Nor, despite its consideration of provisions from both England and Wales, is it intended to be a comparative piece.²⁵ I have instead simply tried to look at the types of activity which the law of theft must regulate and the problems which inhere in that regulation. That may seem to be a rather limited exercise.

It is also one which employs more than one perspective. In some instances, such as in the discussion of manifest and non-manifest theft, I have started with the legal regulations and tried to understand what it was about the world that made them material. At other times, such as in the discussion of the regulation of butchery, I have started at the other end of the process, trying to imagine what would happen in practice and then looking to see if the law made any intervention. The aims of this article then may sound either absurdly reductivist or potentially pretentious, while its methodology invites accusations of naivety or confusion. Nonetheless I believe that by considering the law alongside the activity it seeks to regulate and the society in which it operates we may better understand the relationship between the law and that society. What follows then may help us to grasp not narrowly what medieval theft law was, but why it was so.

It is because of the particular approach adopted here that I feel happy to commit what would be, in an orthodox doctrinal history of criminal law, an unpardonable sin. I would not normally place the evidence of a law of Aethelstan in the same sentence as a thirteenth-century eyre roll case. In a piece which seeks to link law with cultural practice such a conjunction might seem *a fortiori* misguided. Of course there were major changes within the period surveyed in this article, and by no means the least dramatic, in England at any rate, relate to the creation and administration of law.²⁶ Yet this article concentrates primarily on the underlying social continuities around which legal rules and procedures are constructed. That there were such continuities will I hope become apparent. I do not doubt, then, that the increase in penalties relating to thieves in the laws of one king, or the changes in obligations to pursue them in the laws of another, the replacement of ancient jurisdictions by a new model of royal court, or of trial by ordeal by jury are all important matters. Yet they are not the focus of this discussion. To this extent the essay is not

an ‘historical’ one, nor (to invoke the useful contrast drawn by Wormald) do I see it as predominantly ‘juristic’.²⁷ It is, for want of a better term, functional. In 950 or 1350 a thief would look to dispose of or consume stolen goods in a safe manner and the victim of theft would be obliged to confront both the loss of goods which he would presumably rather still have had and the wrong of the person who had removed them. I hope to show in the analysis below, rather more clearly perhaps than in the explanation offered above, why I feel it legitimate to regard the restrictions of chronology and jurisdiction as permeable membranes in an exercise of this nature.

THEFT, MANIFEST AND NON-MANIFEST

The distinction between the thief caught in the act and the suspect taken in other circumstances is one familiar to those who have knowledge of the texts of English, Welsh and, indeed, Roman law. Some procedural differences in England continue to be noted in relation to the treatment of the manifest thief for a considerable period of time, certainly well into the thirteenth century.²⁸ The greater punishment prescribed for the thief caught in the act in some earlier English and some of the Welsh provisions may seem *prima facie* to run counter to our expectation that a wrong which is done secretly in small-scale societies is more socially divisive than that which is overt. We know, for example, that killing by poison is a graver offence than killing in a public brawl.²⁹ What I wish to do here is to examine not how the law treats the manifest thief differently from his non-manifest counterpart, but why.

One argument which has been advanced by some of our most distinguished legal commentators is that the manifest thief is in the position of an outlaw. Yet this is either no explanation at all or one which reverses the process which we have considered earlier, whereby legal definitions emerge as interim conclusions from customary behaviour. Let me explain. To allow, as some of our early laws do, that a man taken in the act may be summarily killed is, indeed, to treat him as an outlaw, for that is in origin what the idea of outlawry means – the individual is put beyond the protection of the law. But this is not to explain the phenomenon, merely to restate it. On the other hand it may be that what is being advanced is that the position of the manifest thief is in some way derived as a conclusion from some conceptual formulation of outlawry. Yet this would seem improbable on two grounds. Firstly I would argue that such a construction is logically doubtful. Why is manifest theft alone so treated? To state the conclusion is still not to explain it. How does the automatically outlawed thief magically become ‘inlawed’ again by passage of time – for

if he is not taken in the act his position will be the same as any other? His status as outlaw or 'inlaw' depends on the accident of discovery and must move from one to the other if that discovery fails to occur. Secondly, given the antiquity of the provisions relating to manifest offenders, the idea that the concept of outlawry predates and explains the manifest theft provisions seems historically improbable. The manifest thief and the outlaw may both be in the same boat, but we still have no guidance as to the reason for the former's embarkation.

Retaliation would seem an obvious factor to explain why the manifest thief is treated differently from others. In a society which is imbued with ideas of honour and status (and we would expect the law to encode the values of its elites before those of anyone else) the response considered natural, indeed proper, to the man found driving off my cattle before my very eyes, or indeed the man found sleeping with my wife, may not be to consult my solicitor. To stay the hand is to bear the insult as well as the loss and this, despite the entreaties of religion, may be too much to bear. If revenge is the underlying explanation for the differential treatment of the man taken in the act then we would expect to find it first as a defence to an otherwise impermissible action. In England, at any rate, we do; the laws of Ine and of Wihtraed in the seventh century protect a man who kills a manifest thief from subsequent, otherwise legitimate, jeopardy. Surely, then, this explanation is enough?³⁰

I think not. If I have been away for a while and return to find that my neighbour has taken my goods or indeed slept with my wife it is surely the discovery of the wrong which makes the blood boil, not the precise circumstances of that discovery. Perhaps, in practice, the man who kills in that circumstance too will be regarded as having done so with justification. But that is not what the laws say, and it is certainly not compatible with the later formulations of the 'manifest thief' doctrine which will be discussed below. Neither of these is a compelling argument against the proposition, but they do perhaps give some reason for further thought.

Surely we have to add into the explanation the crucial concept of proof and the associated doctrine of jurisdiction. The importance of the taking in the act is that the person so taken cannot deny his guilt. There is no case to be proven, no need for a forum in which the proof need be rehearsed. It really is as simple as this.³¹ Let us pursue these questions of proof and jurisdiction further.

The rise, decline and precise nature of the jurisdictional privileges relating to 'handhaving' thieves has been well investigated elsewhere.³² Clearly it is no surprise to find lords interested, physically or financially, in the punishment of offenders, and the disciplining of their 'own' men or the redress of wrongs on their own land would seem natural claims

(or, from a royal point of view, concessions) until royal courts had both the capacity and the authority to assert their pre-eminence in matters of theft. Yet the apparent restriction to cases of the manifest offender which Goebel finds in the early jurisdictional privilege of *furis comprehensio* and which seems etymologically to underlie the later one of *infangthief* deserves some mention.³³ As Goebel points out, the right, indeed subsequently the duty, to deal summarily with the thief taken in the act is a common, not a lordly right.³⁴ It devolves upon all and confers, in effect, a universal ‘jurisdiction’, not one which depends on lordship. Why then is the same qualifying boundary imposed on the more specific jurisdictional privilege which does depend upon lordship? The answer again lies in the issue of proof. Here too the handhaving thief can be extracted from the mass of complexity which can, as we shall see, make other thieves so relatively difficult for the legal system. He stands out above them, ready to be picked for a variety of purposes, because he is a factual premise, not a legal conclusion.³⁵

Such a state of affairs will not endure, given what we have seen about the fundamental change in law which is wrought by its becoming an intellectual discipline rooted in words rather than a practical job rooted in action. I have argued elsewhere that the inability of the manifest thief to deny his offence is originally a statement of a practical rather than a legal disability. The medieval legal world is not, despite the caricatures which still appear in print, one of blind irrational formulae. If you see someone running out of your house with your cooking pot and chase them round a corner to meet me, holding the pot, then other circumstances – whether I am out of breath, known to be an honest man, able to explain myself – will determine whether I am the clearly guilty man envisaged by the legal provisions. I must be not only ‘handhaving’ but also a ‘thief’. Yet ‘lawyers’ law’ will seek to explain to us not simply what to do with the manifest thief; it will also try to tell us what these words mean. The creature becomes conceptual rather than factual. When we look in the Welsh laws we find the boundaries of the concept being explored. Is it enough to find someone walking behind stolen cattle? Or with stolen goods in his house, or thrown on the floor near to him? The late, professional *Llyfr y Damweiniau* addressed these questions with, I feel, the air of a teacher raising and answering a tutorial problem. There are, insofar as I am aware, no parallel explanations in English Law, but the attempts to provide satisfactory, uniform definitions for jurisdictional rights such as *infangthief* may be evidence of a similar process of juridical development.³⁶ The need to proclaim these against an expansionist royal jurisdiction would provide the impetus for that process. The point, however, remains. The manifest thief has a *de facto* existence before he has this *de iure* one.

The idea of jurisdiction should make us aware of one further issue specifically in relation to the English law of theft. That customary practice might have varied in relation to the offence before standard formulations were devised is evidenced in England by the passage in *Glanvill* where the author declines to discuss theft because he is concerned only with actions in the King's Court, not with variant custom.³⁷ What can be meant by this statement? Insofar as it can be taken as suggesting that theft actions are never heard by royal courts, it is clearly untrue. The author of the earlier *Dialogus de Scaccario* knows that cases of theft could be heard before royal justices,³⁸ and the Assizes of Clarendon and Northampton are explicit on the point that thieves (though, as we shall see, this may not mean the same as cases of theft) may be dealt with by royal commissioners. Moreover even the author of *Glanvill* himself, in his discussion of the procedure of voucher to warranty, seems fully aware of the fact that royal jurisdiction may be invoked.³⁹ What the author must be telling us is no more than that there was in the reign of Henry II no feeling that the King's Court was exclusively, or even normally, the place for determination of cases of theft. Despite the tough words of the Assizes it would have been impossible for this most prevalent of offences to have been dealt with by the king's justices alone. Nor indeed would that be necessarily desirable. For theft has elements of both a private (that is, to the victim) and a public wrong (that is, to the community, however that be defined, including to the king as representing the 'state'). A jurisdictional allocation which privileged only the public aspect might not be acceptable. For in not every case may the offence to the respective injured interests be identically construed. There may be instances where the individual victim's satisfaction may be felt to be more important than the public vindication of property rights. To such a possibility we will return in a while.

THE NON-MANIFEST THIEF

So far we have concentrated on 'easy' incidences of theft, where the stolen property is taken with the offender. What of the more difficult cases where it is not? From the victim's perspective the first resort may be to seek to pursue the property. References in Anglo-Saxon law show the importance of following the trail of livestock which have gone missing. Under Aethelstan the communal obligation of this task is stressed, as too is the presumptive probative power of a trail which leads onto another's land but not off it again.⁴⁰ It is not surprising to find references to such an eminently practical response to theft within the legal sources. Property other than livestock could not generally be pursued in this way, however.

Physical evidence of the movement of inanimate property might be less easy to come across. So just as, in the trial by ordeal, the legal system involved supernatural agency when human powers were incapable of resolving a difficulty, so too did victims of crime. Such latter matters are, by their nature, less susceptible to legal regulation, for they require no secular forum nor any jurisdictional procedure. ‘Thief magic’ could be employed to discover the location of goods, the identity of the taker, or both. In late-medieval Norfolk we know that a magic formula inscribed on a wax tablet might reveal a thief’s identity in a dream if the victim slept with it beneath his head.⁴¹ Indeed a charm to ward off theft before it happened might take its place alongside the more earthly precautions of earmarking beasts⁴² and maintenance of frankpledge as evidence that prevention was better than cure.

If a theft had been accomplished, however, the offender too might have his own problems. In centres of population the disposal of stolen goods might be more easily accomplished or alternatively the network of travellers who communicated with those centres might be employed.⁴³ In more static rural communities in an age when life was lived in public the thief’s enjoyment of the profits of his actions might not have been a simple matter. Theft of livestock, a lucrative offence in the middle ages, needs some thought if the profits of the crime are to be enjoyed. I cannot simply place my neighbour’s sheep in my field and hope that no-one notices. If the animals come from a distance I may be able to produce a reason for having them, even if that reason depends on a degree of generosity by another.⁴⁴ I might try to conceal cattle in my house, though presumably not indefinitely.⁴⁵ Disguise might be possible – a case from 1347 shows the white horns of cattle being burned⁴⁶ – but hardly reliable. A more satisfactory method of changing livestock would be to transform them into money or goods. It is then no surprise to find regulation of cattle sales appearing in English law.⁴⁷ A final option open to the thief would be to butcher the stock. Again the Anglo-Saxon corpus of theft legislation attempts to address this possibility directly, a law of Aethelred instructing that sheep and cows should be killed before witnesses and the hide and head retained for three days.⁴⁸ A case from the fourteenth century proves how efficacious the remains of a slaughtered beast might be in determining its provenance.⁴⁹

If the problem of tracing stolen goods is one familiar to the modern reader the next problem which the medieval victim of crime may have had to confront is, outside certain subcultural groupings, one which is less apparent in the present day. Consider the case, then, where I have indeed placed your sheep in my field but I have simply too much power – economic, social or merely physical – to be perturbed by your knowledge

of the fact. The simple observation of Davies and Fouracre that ‘early medieval institutions were difficult to use against the strong’⁵⁰ is perhaps insufficiently acknowledged in an age such as our own when, at least in theory, the idea of equality before the law is axiomatic. Yet with the onus generally cast upon the victim to seek legal redress, the practical difficulties of raising the head above the parapet might outweigh any theoretical legal issues. In Welsh law the timorous victim is provided with a specific mechanism of interposing both the power of the lord and the presumed objectivity of the church between himself and the man he accuses.⁵¹ Aethelstan’s laws directly address the question of the intimidating plaintiff in England.⁵² A further tradition which might offer some consolation to the victim in England (though we should not, I think, overstate its efficacy) is the alternative to individual prosecution in the form of communal presentment of crime.

As to the origin, as opposed to the function, of the presenting jury I propose to add nothing, for enough debate has taken place on this subject.⁵³ Suffice it to say, then, that there seems to have been nothing new in the idea of communal prosecution of crime when Henry II employed it in the Assizes of Clarendon and Northampton. Indeed from the functionalist perspective adopted in this article innovation looks to be less likely than it might appear in one which starts from textual references alone. When, for reasons of policy, money, or ideology, the ‘state’ begins to take a serious interest in crime it will soon become aware of the inherent limitations of allowing prosecutions to remain entirely at the discretion of private individuals.⁵⁴ Yet Henry’s reforms are important. Theft thereafter becomes an established matter for royal court jurisdiction even if the victim fails to prosecute in person. Yet, and this is perhaps the point of *Glanvill*’s jurisdictional observation, it would be impossible for the king’s justices to determine every case of theft in which no individual prosecutor appeared. If the Assize of Clarendon began as a one-off suppression of disorder then its reference to thieves may have an implied application to those who had committed not a single act of theft but who were considered to be generally dishonest.⁵⁵ Whether this is true or not we may acknowledge that the tension between treating theft as a wrong against an individual and as a wrong against the social body, whilst by no means created by Angevin legal reforms, is nonetheless exemplified by them. If the law is serious about theft as an offence against more than simply the individual then it will of necessity have to make provision for dealing with, amongst others, the intimidating offender.

Let us return, however, to our victim of an individual theft. In the preceding discussion we have considered the case where a defendant is found but is contemptuous of legal process. There must have been many cases,

however, where the defendant was willing to defend himself in the legal arena and did so by claiming that he had a better right to the goods than the prosecutor. Whilst many claims of this kind might be lost behind the ‘general issue’, tested by battle or ordeal or the verdict of a jury, we would expect to find reference to common formulae of claims of better right and our legal sources do indeed reflect some of these arguments. Let us deal with them in turn.

‘It is not yours, it has always been mine’ may be the accused’s claim. In relation to coins or coats or axes it might be difficult to invoke particular connections rather than simply to appeal to common knowledge to link the owner to the goods. With livestock, however, there is an extra possibility. Medieval man might not understand fingerprints but he could understand pedigree. It is not surprising then that in both Welsh laws relating to animal pleas and in *Bracton’s* discussion of answers to an appeal of larceny the defence of birth and rearing appears first.⁵⁶ Yet it may do so not because of its frequency of use but simply because pleas of this kind will settle an easy sort of argument: the defendant establishes his right from the creation of the goods allegedly stolen. Of course there may still be difficulties of proof, but the argument is a simple and intelligible one.

Many defences will rely on the transferability of chattels, though. ‘I bought it’, says the defendant. Again there are degrees of difficulty in such a response. ‘I bought it from X’ is a rather easier case for the law to settle than ‘I bought it from a man in a pub whom I didn’t know.’ In the former case we are in the familiar territory of voucher to warranty. If the vouchee can be found and accepts the warranty then the original defendant simply drops out of the picture to be replaced by the man through whom he claims the right. Yet even with this apparently simple process there may be problems. The dispute must be settled; there must be a limit to the number of hands through which the goods can have passed before the warranty system imperils the task of dispute resolution by submerging the instant claim in ancient history. The issue is faced by both Welsh and English sources. In the latter it would seem that even in *Glanvill’s* time the extent of a permissible chain of warranty was still being determined, at least insofar as the king’s court was concerned.⁵⁷ One other problem of voucher may be mentioned: the accuser has had the courage to bring the complaint against one party, only to find him vouching another, more difficult, opponent. In Welsh law the *Llyfr y Damweiniau* poses the jurisdictional problem – what if the vouchee is in holy orders?⁵⁸ In English law the well-known case of Elias Piggun involved the defendant in an appeal of felony attempting to vouch the professional champion Piggun to warranty. Since the appeal was, of course, triable by battle, the

prosecutor faced the danger of combat with a trained fighter. Such a clever and logical ploy on the part of the defendant could, if it had succeeded, have opened the criminal trial to the professional fighter in much the same way as the civil settlement of writs of right had been.⁵⁹ But the prosecution of wrong has a more visceral immediacy than the pursuit of right. The justices recognized the abuse of process (in this case at any rate, though we cannot know how many times it was tried and succeeded) and Piggun's career was ended by his mutilation.⁶⁰

Voucher depends on a vouchee who is known and named. The harder question for a court to deal with is where the defendant claims to have bought the goods from someone whom he cannot, or will not, identify. The question is hard for the law because it is really not a legal question at all. Its resolution depends upon a matter of proof rather than of law. At least in voucher all the parties concerned appear before the court. In the 'unknown seller' example there is a plausible but contestable reason for the defendant's possession of goods. We have seen medieval custom hardened into writing and writing worked over by professional refinement, but at heart the sophistication of all medieval criminal jurisprudence turns into the leap of faith. In a religious age it may be entirely sensible to trust God to reveal truth when no other proof is possible. The alternative, however – placing faith in man rather than in God – becomes conceptually more troublesome. We have become so used to the idea that we can ask twelve people who have no knowledge of an event to pronounce upon it that we forget what a remarkable idea that seems when it is first being canvassed.⁶¹ However, after 1215 in English law the appeal to God can be maintained only where accuser and accused are both before the court and both consent to being so tried. Whilst the continuance of trial by battle in such circumstances is often seen as an atavistic survival, we can see that, as stated in the form just given, it is not only unexceptional, but it might have seemed offensive to some medieval sensibilities to prevent it. In Welsh law texts the primacy of compurgation as a mode of proof overtly concentrates upon the credibility of the actor: a current status rather than a past act. The English trial jury emerging after 1215 can only judge a defendant if that defendant specifically places himself upon it; in other words his fate is juridically dependent on his competence as much as on theirs.⁶² I do not wish to suggest that the opinion of the neighbourhood is something which it had any difficulty in formulating a jury may by virtue of its proximity to the dispute be a perfectly good way of resolving a contest over truth. The point is that medieval law is centrally concerned with the establishing of circumstances and modes of proof to be applied. But proof is not a legal issue; it is sought when law runs out.

Let us return to the issue of the purchase from the anonymous man in the pub. The law can only seek to deal with this defence, which must have been common, by regulating the conditions of sale, so as to attempt to limit its applicability. We have noted earlier the rules relating to animal sales, which would have touched particularly valuable transactions. In *Bracton's* treatment of theft the author allows that if the goods were purchased in an open sale then the defendant, *ex hypothesi* a victim of the thief himself, need do no more than restore the item to its original owner.⁶³ The law, faced inescapably with a judgement of Solomon, backs the prior possessor.

One other practical claim may be made by the defendant in a case of theft. 'I got the goods', he says, 'from the claimant himself, and hold them rightfully on that account.' This is either a very simple dispute (the claimant denying the transaction⁶⁴) or potentially a very complex one, involving questions of respective rights in bailment. This latter is a complex business and one which involves a concept (property) over which much lawyers' ink will be spilt, rather than only an issue of proof. A consideration of this lawyers' law is not my purpose here, yet disputes involving such claims are likely to be early and natural grievances over moveables.

IDENTIFYING THE VICTIM

Let us conclude with a basic tension within the law of theft, to which we have alluded earlier. Theft is an offence both against an individual and against the trust upon which community depends. It challenges both private right and public order, an offence – as it comes to be formulated – against both the owner and the king. The individual victim, though he may indeed want revenge, may have as his primary purpose the recovery of his goods or their equivalent in his pursuit of the thief. On the other hand a royal policy of maintenance of social control may insist on punishment.⁶⁵ We have seen that in England execution was at first a right and then a duty of those who took thieves in the act. In later Saxon law, urged Goebel, 'the adult thief now suffers death and forfeiture, irrespective of how he is taken or convicted'. Wormald sees Aethelstan's introduction of the death penalty for all thieves, however taken, as part of a war against theft which had become 'almost an obsession' for that king.⁶⁶ Similar apparently unqualified prescriptions of punishment appear in Cnut's code. It may be that we should not take the purport of these laws at face value, for I have suggested above in relation to the Assizes of Clarendon and Northampton that it is not necessary to read a law which tells us what should be done with 'thieves' as necessarily meaning by that word

‘anyone who has committed a single act of theft’. Yet even if we do then they certainly never reflected an inflexible social practice. The problem of making theft subject to afflictive punishment is that the ‘prosecutor’ may not desire this.⁶⁷ The absolute nature of the death penalty may particularly focus the mind along these lines but other penalties such as mutilation or enslavement are not immune from this consideration.

We know certainly that thieves might be killed. In the twelfth century, for example, we are assured that Ralph Bassett hanged 44 in one place.⁶⁸ We know from this case too (for he had another six blinded and castrated) that they might be mutilated, and a number of sources, including the medieval hagiographical trope of miraculous organ regeneration, confirm the plausibility of the infliction of this penalty at particular times.⁶⁹ We should not believe, however, that loss of life or member was an inevitable consequence of a conviction for theft, even when the law suggests this, still less a consequence of its discovery.⁷⁰

Of course the law itself allowed some flexibility, as was inevitable in an offence which covered such a range of behaviour. The mitigating effects of youth might be acknowledged.⁷¹ Even apart from that, both English and Welsh law recognized that not all thieves merited the full rigour of the law. An easy way to draw the line was to restrict the harshest penalties to those (more accurately, given my earlier comments, to some of those) whose booty exceeded a certain monetary value.⁷² Such an arbitrary boundary invites manipulation. On the one hand, we find in a well-known twelfth-century case people bringing additional goods to put in with those taken on the person of the accused to push the crime over the limit.⁷³ On the other, the idea (familiar to historians of later periods) of undervaluing stolen goods to render the offence less serious has, I think, early origins.⁷⁴ Certainly by the thirteenth century imprisonment, lesser corporal punishment, or (in Summerson’s admirable phrase) principles of ‘publicity and exclusion’ were the most that petty thieves, or those whose personalities or offences were found to merit their treatment as such, had to fear.⁷⁵

We have lost the victim in this. What of his claim to recover the stolen goods? The *angyld* of Anglo-Saxon law and the *dirwy* of Welsh law are early financial recognitions of the pursuer’s own interest in theft. In English law the punitive and restitutory elements of the theft action begin to be driven apart by the question of jurisdiction. The process will not be traced here,⁷⁶ but some observations are in order. We must not assume that because common lawyers came increasingly to see the ‘civil’ action of trespass and the ‘criminal’ prosecution of appeal of felony as conceptually distinct that other people did so too, or at least did so at the same rate. Nor must we assume that because the law provides a means of

resolving a dispute that those means will in fact be used in resolving that dispute. We must recognize another feature of recourse to law which it is easy to overlook if our gaze is permanently turned only to the law in books, namely its instrumental value. We have argued earlier that methods of negotiated settlement between parties in a case of theft long survive the desuetude of the compensation tables. It seems clear that even when the King's courts are driving a wedge between the notions of 'civil' and 'criminal' the victim of theft would use the law to get what he wanted from the process irrespective of the conceptual distinction.⁷⁷ An appeal of felony may be started and then dropped, either entirely or in respect of the felonious allegation, in an attempt to put pressure on a defendant to come to terms with his victim. Here law is being used as an alternative or an addition to other more diffuse social pressures to bring the malefactor to settlement. It may be a particularly important tool for the poor victim, for whom the accident of the coincidence of the king's condemnation of thieves may be the only lever he has to gain his own goal – the restitution of goods and/or a financial or other settlement. The criminal law is being used in such cases as a means of applying pressure. Royal judges, it would seem, began to take offence at this distortion of legal process. It became increasingly condemned as royal courts began to provide their own (more expensive) 'civil' means of gaining restitution through the writ of trespass within the thirteenth century.⁷⁸ A stricter judicial policy towards settlement seems to have discouraged the use of appeals in cases of theft as well as in other offences.⁷⁹ But victims of crime know what they want and they know how to get it. They will bring a 'criminal' prosecution to produce a 'civil' remedy if they think it will benefit them. Practical rather than conceptual arguments are likely to determine directly their actions.

I hope that this discussion will have offered a rather different approach to looking at medieval theft law than is usual. It certainly makes no claim to be a complete, or even a particularly detailed, discussion of the law of theft. Nor, as I have said, despite its invocation of both English and Welsh law, is its intention a comparative one. I have tried to undertake a functional analysis of the problems to which an act of theft may give rise. The law is then seen to arise from them, not them from the law, although law itself then creates, and does not simply respond to, social conditions. From this perspective, continuity across time and similarity between jurisdictions seem predictable rather than exceptional, and difference in the regulation of such basic forms of conduct seems more interesting as an avenue of investigation. I hope the reader will have found some of the observations presented here to be rather obvious. That is, in a sense, the point. It is easy for the medieval legal historian entranced by the complexity and beauty of the trees to forget about the wood.

ACKNOWLEDGEMENTS

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ENDNOTES

- 1 S. F. C. Milsom *Historical foundations of the common law* (1st publ. London, 1969) famously declared, having described murder and theft as 'legal monoliths' (p. 353) that 'Crime has never been the business of lawyers' (p. 374). Both statements were excised from the second edition. For a fascinating account of the social insights which may be derived from studying the records of crime see H. Summerson, 'The criminal underworld of medieval England', *Journal of Legal History* 17 (1996), 197.
- 2 F. Pollock and F. W. Maitland, *The history of English law before the time of Edward I* (2nd edn, Cambridge, 1911), vol. II, 150.
- 3 Justinian, *Institutes* IV.1.1.
- 4 Theft Act 1968 s1(1).
- 5 For example, the earliest English law code, the Laws of Aethelbirt, bypasses entirely the nature of the wrong in providing a remedy. In the references to Anglo-Saxon laws which follow I have used the numbering and translations in F. L. Attenborough, *The laws of the earliest English kings* (Cambridge, 1922) and A. J. Robertson, *The laws of the kings of England from Edmund to Henry I* (Cambridge, 1925). The numbering, though traditional, is at times in error; see for example P. Wormald, *The making of English law: King Alfred to the twelfth century* (Oxford, 1999), 290–1, note 129 on the 'enslavement' of legal studies to the irrational numbering of Aethelstan's legislation. I too plead guilty, on the grounds that the texts I refer to are convenient for the reader to consult. Serious students of Anglo-Saxon laws should of course read them alongside Wormald's detailed commentaries.
- 6 These forms may be human or divine, as we shall see.
- 7 Of course the non-written understanding of the term 'theft' will encompass the more usual instances of the offence – the paradigmatic cases. Sufficient experience may enlarge the content of the paradigm as it is understood. Yet the unusual case will remain a problem.
- 8 This is a difficult word to use: in a sense the 'lawyer' (as opposed to, say, 'spokesman' or something similar) can only exist in an era of circumscribed knowledge. I am trying to avoid the kind of semantic wrangling which has bedevilled legal-anthropological discussion of the boundary between 'law' and 'custom'.
- 9 I am interested in the implications in the common linguistic formula which speaks of the 'reduction' of custom to writing. For the flexibility of the oral see M. T. Clanchy, 'Remembering the past and the good old law', *History* 55 (1970), 165 *et seq.* For a discussion of the transformative power of professional expertise in the nature and content of rules see B. Z. Tamanaha, *A general jurisprudence of law and society* (Oxford, 2001), 71–6. He suggests (p. 74) that 'The more law becomes a specialized body of knowledge, the greater its potential to diverge in form and outcome from the understandings of the society to which it is attached.' This is a much more general problem than that which occurs when later texts attempt to maintain the current authority of earlier ones for ideological reasons (on which see for example D. A. Binchy, 'The linguistic and historical value of the Irish law tracts' *Proceedings of the British Academy* 29 (1943), 195) but it is intrinsic in the very process of constraining social norms within

- fixed verbal formulae. As Stacey puts it, 'It is axiomatic that the complexities of human social interaction can never be entirely textualized: the written word cannot possibly contain the multivalent elements of communal life and thought' (R. C. Stacey, *The road to judgment: from custom to court in medieval Ireland and Wales* (Philadelphia, 1994), 112).
- 10 See the illuminating analysis of David Ibbetson in 'The danger of definition: *contractatio* and appropriation', in A. Lewis and D. Ibbetson eds., *The Roman law tradition* (Cambridge, 1994), 54. Compare the view of Susan Reynolds: 'Without written records, forms of words are unlikely to be fixed, and without some form of publication, definitions and decisions cannot be authoritative' (*Kingdoms and communities in Western Europe 900–1300* (Oxford, 1984), 14).
 - 11 J. H. Baker, in the third edition of his leading text, *An introduction to English legal history* (London, 1990), stated that 'Much of our legal history will defy comprehension unless the separation of law from procedure is put out of mind ... The learning about writs, forms of action and pleading was fundamental to the common law, not simply because lawyers were more punctilious about form than they now are, but because the procedural institutions preceded the substantive law as now understood. The principles of the common law were not laid down in the abstract, but grew around the forms through which justice was centralized and administered by the King's courts. There was a law of writs before there was a law of property, or of contract, or of tort' (p. 63). I have quoted at length to give Baker's context, which is clearly an explanation of the development of common-law doctrine. Yet the 'as now understood' of the second sentence was the handkerchief beneath which the conjuring trick was accomplished. Clearly procedure is not formulated 'in the abstract' either – it is designed with an end, a right, a remedy, or a conception of order in relations in mind. As with the definitions we discussed earlier, the procedures may then 'control' the law. But they do not precede it, unless 'law' is circularly defined as that which is produced by specific procedures. A man who drafts (or buys) a writ must have some conception of property or contract or tort (though he may not use those words) or he is simply the proverbial authorial monkey with a typewriter. Baker has clearly recognized this. In the fourth edition of *An introduction to English legal history* (London, 2002) this passage is omitted and the author accepts that 'No doubt, in its earliest stages, the common law must have been anterior to the forms' (p. 53). I quote the earlier argument merely because it allows consideration of this interesting relationship.
 - 12 So, for example, if one court claims exclusive jurisdiction over 'robbery' that claim may be the reason for a more precise legal definition of that offence.
 - 13 See, for example, S. Roberts, *Order and dispute* (Harmondsworth, 1979), 54.
 - 14 See, for example, the discussion in R. W. Ireland, 'Perhaps my mother murdered me: child death and the law in Victorian Carmarthenshire', in C. Brooks and M. Lobban eds., *Communities and courts in Britain 1100–1900* (London, 1997), 229, and 'Putting oneself on whose country? Carmarthenshire juries in the mid-nineteenth century', in T. G. Watkin, *Legal Wales: its past, its future* (Cardiff, 2001), 63.
 - 15 P. Wormald ('Giving God and king their due: conflict and its regulation in the early English state', in his *Legal culture in the early medieval west* (London, 1999), at p. 341) argues that an aggressive and interventionist later Anglo-Saxon legal system should be recognized as a corrective to an assumption that England at that time was analogous to the 'stateless societies' which have been studied by anthropologists. I do not doubt Wormald's reconstruction of Anglo-Saxon governmental expansion. But the pendulum must not swing too far. As I have indicated earlier, the state is not the only relevant community (even if it thinks it is!) in which a dispute is located, nor are its own norms

- and procedures the only ones which may fall to be invoked. Nineteenth-century rural Wales certainly was most certainly not a classic 'stateless society' and the penetration of governmental norms and (importantly) enforcement agencies into the local social fabric was, I suggest, certainly no less than in tenth-century England. Nonetheless the limitations on viewing dispute settlement as solely, or even mainly, a matter for the state and its law in Carmarthenshire in the 1860s are, in my view, apparent. I have no doubt that the state may be in many ways efficient and aggressive without establishing itself as the dominant organ of dispute resolution in popular consciousness for all types of dispute in other times and places.
- 16 C. Harding and R. W. Ireland, *Punishment: rhetoric, rule, and practice* (London, 1989), 133–4. See also P. Wormald, 'Lex scripta and verbum regis: legislation and Germanic kingship from Euric to Cnut' in Wormald, *Legal Culture*, at p. 8.
 - 17 For an excellent discussion of dispute settlement which is of importance for jurisdictions beyond its central focus see W. I. Miller, *Bloodtaking and peacemaking: feud, law and society in saga Iceland* (Chicago, 1990). As to the fundamental importance of law restricting interpersonal violence for social survival see H. L. A. Hart, *The concept of law* (Oxford, 1961), Ch. ix, though note that Hart's method is analytical rather than historical.
 - 18 I have in mind here Wormald's important argument that *bot* in Anglo-Saxon law becomes a sum payable to the king rather than the victim or his kin. See, for example, P. Wormald, 'Frederic William Maitland and the earliest English law', in *Legal culture*, at p. 61 *et seq.* Given the interrelationship between the payment and the agents of its enforcement such a change seems natural as royal intervention increases.
 - 19 Compare Miller's observation on compensation in medieval Iceland: 'Awards were also able to reflect implicitly considerations of fault, excuse, justification, moral character, and social status of victims and principals', *Bloodtaking and Peacemaking* p. 276.
 - 20 For the wider argument concerning the status of certain early law codes see P. Wormald's thesis as developed in a number of the papers collected in his *Legal culture* and now in the magisterial *The making of English law: King Alfred to the twelfth century* (Oxford, 1999). Alan Harding provides the following synopsis of the argument: 'As Patrick Wormald argues, the ancient law-codes of the Frankish people were largely "inert symbols" of their empire and historical identity, and the erratically preserved Anglo-Saxon "legislation", waxing and waning with the "imperial consciousness" of English kings, was never cited in the legal hearings of which we have record'; see A. Harding, *Medieval law and the foundations of the state* (Oxford, 2002), 38. In an essay such as the present one, which stresses the divergence between law in text and law in books, such a finding is a very important one. Yet I do, of course, in the discussion which follows, cite Anglo-Saxon and Welsh law texts as illustrative of issues connected with the law of theft. As I hope will become clear, my argument is not that these laws were practically applied in particular cases, but merely that they sometimes illustrate practical issues which, I argue, necessarily must arise in disputes over the taking of property. As representing the law as actually applied they must remain only, in Wormald's terminology, 'indirect' evidence ('Lex scripta', in his *Legal culture*, at p. 38). Note too the comment of W. Davies and P. Fouracre in *The settlement of disputes in early medieval Europe* (Cambridge, 1986), at p. 228: 'although the law codes have some practical reality they are over-schematic; legal practice was more 'matter-of-fact' than has been recognized by many legal historians'. For the role of the Welsh (and Irish) law codes see Stacey, *The road to judgment*, Ch. 1.
 - 21 Miller, *Bloodtaking and peacemaking*, 228.

- 22 The influential role of the 'legal' may still be important when disputes are 'privately' settled. We have too often ignored the complexity of the interrelationship, on which see again Wormald, 'God and king' in his *Legal culture*, 335.
- 23 If Wormald is right (I have neither reason nor sufficient knowledge of the subject to doubt it) about *bot* payable to the king, it is possible that the tariffs specified became more routinely those actually collected in those circumstances in which the law was actually invoked, kings having less personal and more purely financial interest in the outcome of wrongs. I have no idea if this did happen but if so it would be another instance of the capacity of the written formulation of law directing its social function away from its original roots. The possibly divergent aims of the immediate parties to the dispute and the holder of the jurisdiction is a theme to which I will return later in the article.
- 24 See Harding and Ireland, *Punishment*, 130.
- 25 I would like to have included reference to other systems, such as Irish law, which I believe reveals interesting examples which could illuminate the analysis. Despite having had the benefit of hearing a paper from Fergus Kelly on the subject of theft I do not have the confidence with the materials to comment. My discussion of Welsh law is sufficient boldness for a non-expert in one article!
- 26 In the Welsh law texts evidence of transition is, in the general absence of other supporting information, to be gathered from within the texts themselves. See Stacey, *The road to judgment*, Chs. 6 and 7. For England there is, of course, much more evidence. We have noted how recent scholarship by Wormald has pushed back the dating of 'state' intervention. So too has it brought forward the existence of 'non-state' processes. I am, in respect of the latter, entirely in agreement with John Hudson when he states, in relation to the period c. 900–c. 1166 that 'it is important to remember that ... royal action co-existed with other methods of pursuing, and processing cases. Direct action – the word 'feud' may on occasion be appropriate – out-of-court negotiations, compromise and compensation all continued to be important in the Anglo-Saxon period and beyond' (J. Hudson, 'Violence, theft, and the making of the English common law', in T. Haskett ed., *Crime and punishment in the middle ages* (Victoria, 1998), 31. For other analyses which consider the elements of consistency of practice and mentality even beyond the changes of the twelfth century see M. T. Clanchy, 'Law and love in the middle ages', in J. Bossy ed., *Disputes and settlements* (Cambridge, 1983), Reynolds, *Kingdoms and communities*, Ch. 2, and Davies and Fouracre, *Settlement of disputes*, 238. It is with these broad continuities not the precise modalities of 'royal action', with which I am here principally concerned.
- 27 Wormald, *Making of English law*, 23–4.
- 28 I have discussed the development of English law on the topic in 'The presumption of guilt in the history of English criminal procedure', *Journal of Legal History* 7 (1986), 243. I justify citing my own work so often only on the basis that no-one else does!
- 29 See R. W. Ireland, 'Medicine, necromancy and the law: aspects of medieval poisoning', *Cambrian Law Review* 18 (1987), 52.
- 30 Ine 35; Wihtraed 25; Ireland, 'Presumption of guilt', 244. For the context of Ine's regulation see P. Wormald, 'Inter cetera bona genti suae', in his *Legal culture*, 191. For observations on Wihtraed's and Ine's treatment of manifest thieves see *ibid.*, 193–4, 196.
- 31 I concede, of course, that those outlawed by legal process are liable to be executed on the basis of that status, which is a matter of fact. But it is a fact by virtue (in later law at any rate) of contempt for legal process, not its redundancy.
- 32 J. Goebel, *Felony and misdemeanour* (New York, 1937), 347–61, 367–8; J. Post, 'Local Jurisdictions and judgement of death in later medieval England', *Criminal Justice*

- History IV* (1983), 1; and P. Wormald 'Lordship and justice in the early English kingdom: Oswaldslow revisited', in his *Legal culture*, 313.
- 33 Goebel, *Felony and misdemeanour*, 357–67; Post, 'Local jurisdictions', 4.
- 34 Goebel, *Felony and misdemeanour*, 368; Ireland, 'Presumption of guilt', 244.
- 35 Note the similarity, then, with the confessed thief; see Post, 'Local jurisdictions', 5–6; Ireland, 'Presumption of guilt', 246–7; and Jenkins, *The law of Hywel Dda* (Llandysul, 1986), 158.
- 36 See Post, 'Local jurisdictions', 4. Post refers to a process of 'blurring the definition'; it may be that these are attempts to *establish* a definition on a uniform national rather than a particular local level. But note the observation of Reynolds (*Kingdoms and communities*, p. 64): 'The creation and development of defined jurisdictions ... were the effect less of new thoughts than of new power. Theorizing came later'. See also *ibid.*, 45.
- 37 *Glanvill* xiv, 8. See the edition by G. D. G. Hall (Oxford, 1993), 177.
- 38 *Dialogus de Scaccario*, ed. C. Johnson (London, 1950), 102.
- 39 See *Glanvill* x, 15–16. *A fortiori* if Ranulf de Glanvill had in fact been the author of the treatise that bears his name, for he had been personally involved in just such a case; see R. Van Caenegem *English lawsuits from William I to Richard I*, Selden Society, 107 (London, 1991), case no. 553, where Glanvill brings Gilbert de Plumpton before the king in a case which involves, though is not restricted to, an allegation of theft.
- 40 V As 2, VI As 4 and see II Ed 4. Tracking as a practice does seem to be evidenced in a real dispute, the earlier record of *Helmstan's Case*, discussed in Wormald, *Making of English law*, 144 *et seq.*, though notice also the mention of a bramble scratch as evidence against him. Note also that Wormald uses the case to illustrate the lack of any reference to written law in the determination of the case.
- 41 S. Wilson, *The magical universe: everyday ritual and magic in pre-Modern Europe* (London, 2000), 390. Note too the possibility of invocation of supernatural punishment upon the thief, as in Stacey's example from Ireland (*The road to judgment*, 299–300).
- 42 For which see Maitland, *History of English law*, vol. II, 152.
- 43 Summerson, 'Criminal underworld', 208–9.
- 44 See the story in *Placita corone*, ed. J. M. Kaye (London, 1966), 16.
- 45 *Ibid.*, 18.
- 46 Summerson, 'Criminal underworld', 210.
- 47 See II As 10, 24, I Aethelred 3. Compare the comments in *Bracton* F.151 (ed. S. Thorne (Chicago, 1968)), vol. II, 427.
- 48 III Aethelred 9.
- 49 See B. Hanawalt, *Crime and conflict in English communities 1300–1348* (Cambridge, Mass., 1979), 51–2. I am indebted to Christopher Anderson for this reference.
- 50 Davies and Fouracre, *Settlement of disputes*, 230.
- 51 Jenkins, *Law of Hywel*, 159.
- 52 III As 6, IV As 3.
- 53 See, for example, Wormald, 'Frederic William Maitland', 54 *et seq.*
- 54 Note in this respect the later rules relating to the appeal of felony which allow a discontinued appeal of felony to be prosecuted 'at the King's suit'. One reason for such discontinuance, to be discussed shortly, is of course compromise. We will see a developing royal hostility to this persistent practice. See on this the discussion in D. Klerman, 'Settlement and the decline of private prosecution in Thirteenth-Century England' *Law and History Review* 19 (2001), 1.
- 55 See also the observations of A. Harding on the pressures on presenting juries in *Roll of the Shropshire Eyre*, Selden Society, 96 (London, 1980), xxxiv, and the same author's *Medieval law*, 242.

- 56 *Bracton* F.151 (Thorne, vol. II, 426); Jenkins, *Law of Hywel*, 162. (For *Bracton*, see Baker, *Introduction* (4th edn), 175.) Note the separation in this last of the defence of 'keeping before loss' where the claim is not that D *always* had it, but that he had it before P claims to have lost it! Note too that Welsh law, deals with the neat case (again the source is the *Llyfr y Damweiniau*) of the ownership of the progeny of a stolen cow (p. 169).
- 57 Jenkins, *Law of Hywel*, 163; *Glanvill* X, 15; *Bracton* F.151 (Thorne, vol. II, 426 *et seq.*).
- 58 Jenkins, *Law of Hywel*, 163–4. Or what if the vouchee is dead?
- 59 On which see, for example, R. W. Ireland, 'First catch your toad: medieval attitudes to ordeal and Battle', *Cambrian Law Review* **II** (1980), at pp. 54–6. The ploy failed in this case; it might, of course, have gone undetected in others.
- 60 See *Bracton* F.151 (Thorne, vol. II, 427).
- 61 Of course the self-informing medieval jury can speak of its suspicions or its prejudices. It may indeed work on the same model of present reliability (rather than past action) as does compurgation. We do not know reasons for the juries' decisions. My point is simply that human knowledge is finite. The restriction of proof by God, which is presumably not subject to such limitation, is theoretically significant in this respect.
- 62 On which see R. W. Ireland, 'He hanged Rumbold: the iconology of judicial partiality in the middle Ages', *Law and Critique* **VII** (1996), at pp. 22–3.
- 63 *Ibid.* But this was not always the case at first; see the discussion by R. D. Groot, 'Teaching each other: judges, clerks, jurors and malefactors define the guilt/innocence jury', in J. A. Bush and A. Wijffels eds., *Learning the law: the teaching and transmission of law in England, 1150–1900* (London, 1999), 17 *et seq.*
- 64 See, for example, the denial in *Placita corone* at p. 24.
- 65 There may be an intermediate stage between pure individualism and an ideology of social control, namely where the king 'muscles in' to take his financial cut of the prosecution profits. For a detailed analysis of the timing and process of 'state' intervention in England see P. Wormald, 'Giving God and king their due', 333 *et seq.*
- 66 *Making of English Law*, 305.
- 67 Of course communal prosecution avoids this hurdle which is, as has been argued, one of the reasons for its development. Again, though, note the argument that it may have been rooted in the status of the wrongdoer as 'thief' rather than being a simple alternative to an individual complaint.
- 68 The instance is taken from the Anglo-Saxon Chronicle; see R. Van Caenegem, *English lawsuits*, case no. 237. There is also the case referring to beheading (no. 350) a penalty normally associated with the *sacrabar* cases.
- 69 See for example the discussion in Wormald, *Making of English law*, 125–6; Van Caenegem, *English lawsuits*, cases 210, 472.
- 70 Studies of punishment of later periods show that it is possible to reserve the execution which the law specifies as apparently the 'appropriate' punishment for an offence for a carefully selected minority of offenders; see, for example, J. M. Beattie, *Crime and the courts in England 1660–1800* (Oxford, 1986), Ch. 8. It is of course, dangerous to read these studies back into the middle ages. It is, I think, even more dangerous for medievalists not to read them at all!
- 71 See II As 1, and compare VI As 12, and also *Placita corone*, 24.
- 72 4d in Welsh law (Jenkins, *Law of Hywel*, p. 164), 8d in II As 1, though 12d in VI As 1. *Bracton* (F.151; Thorne, vol. II, 427) gives the principle without specifying the sum. Thereafter 12d becomes standard; see, for example, *Britton* xvi.1, ed. F. M. Nichols (Oxford, 1865), vol. 1, 56. And note also the discussion of cutpurses in *Fleta* (1.38) where only the gravest offenders 'tenendi sunt pro burse scissura'; see H. Richardson

and G. Sayles Selden Society, 72 (London, 1955), 92. I would suggest (though it may be otherwise in VI Ath) that the origin of this rule probably lies in the rules of individual prosecution where (rather like wergild) it would have ensured a degree of proportionality in the response to crime. In communal prosecution, as I have suggested, the process of checks and balances is more easily achieved. Interestingly the discussions in *Bracton*, *Britton* and *Fleta* (these latter two texts perhaps unsurprisingly, given their relation to the former) the monetary limit is mentioned in the discussion of appeals of felony.

- 73 See Ailward's Case, Van Caenegem, *English lawsuits*, vol. 2, Selden Society, 102 (London, 1991), case no. 471. This is another case of mutilation followed by miraculous regeneration.
- 74 See R. W. Ireland, 'Theory and practice in the medieval English prison', *American Journal of Legal History* xxxi (1987), at pp. 64 *et seq.*
- 75 H. Summerson, 'Maitland and the criminal law in the age of *Bracton*', in J. Hudson ed., *The history of English law: centenary essays on 'Pollock and Maitland'* (Oxford, 1996), p. 115 at p. 122 *et seq.*
- 76 See Harding, *Shropshire eyre*, xxxii *et seq.*
- 77 For the instrumental view of law see Tamanaha, *General jurisprudence*. Consider also M. Gluckman, *Politics, law and ritual in tribal society* (Oxford, 1965), 195. But note too Miller's point that the decisions within a process may be influenced by others than simply the victim him/herself (*Bloodtaking and peacemaking*, Ch. 8).
- 78 See Harding, *Shropshire eyre*, xxxii. On this point see the discussion by Klerman in Part 3c of his 'Settlement and the decline of private prosecution'.
- 79 For a detailed discussion of appeals and their relationship with settlement see now Klerman, 'Settlement and the decline of private prosecution'. For later use of the appeal see also C. Whittick, 'The role of the criminal appeal in the fifteenth century', in J. Guy and H. Beale eds., *Law and social change in British history* (London, 1984), 55 *et seq.*