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The Roots of Punitive Damages at Common Law: A Longer History

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THE ROOTS OF PUNITIVE DAMAGES AT COMMON LAW: A LONGER HISTORY

JASON TALIADOROS*

ABSTRACT

This Article aims to revisit the historical development of the doctrine of exemplary or punitive damages. Punitive damages are anomalous in that they lie in both tort and crime, a matter that has led to much criticism by modern commentators. Yet, a definitive history of punitive damages does not exist to explain this anomaly. The main contribution of this Article, then, is to begin such a history by way of a meta-narrative. It identifies and links the historically significant moments that led to punitive damages, beginning with the background period of classical Roman law, its renewed reception in Western Europe in the twelfth and thirteenth centuries that coincided with the emergence of the English common law, the English statutes of the late thirteenth century, to the court cases of *Wilkes v. Wood* and *Huckle v. Money* in the eighteenth century that heralded the “first explicit articulation” of the legal principle of punitive damages. This Article argues that this history is not linear in nature but historically contingent. This is a corrective to present scholarship, which fails to adequately connect or contextualize these historical moments, or over-simplifies this development over time.

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INTRODUCTION

Compensation is the dominant remedy, if not the purpose, of modern tort law, but fault still has a prominent place in many forms of wrongdoing. The concept of fault is deeply rooted in English law's comingling of tort and crime. Thus, the

apparent anomaly of fault within the compensatory framework of modern tort law can be reconciled by tracing the roots of fault to the doctrines that support both tort and crime in English common law.¹

Punitive, or exemplary, damages are an exception to the most fundamental principle in the modern law of remedies that tort damages should restore the victim to the pre-tort condition (*restitutio in integrum*).² I will use the terms punitive damages and exemplary damages interchangeably throughout this Article. Punitive damages are used as a supplementary sanction in exceptional cases where compensatory damages do not provide sufficient levels of deterrence and retribution.³ Known by various names, including penal, retributory, or vindictive damages, punitive damages are damages “over and above those necessary to compensate the plaintiff.”⁴ Punitive damages are awarded for three main reasons: (1) “to punish the defendant and provide retribution,” (2) “to act as a deterrent to the defendant and others minded to behave in a similar way,” and (3) “to demonstrate the court’s disapproval of such conduct.”⁵ Punitive damages differ in purpose from “aggravated damages.” Punitive damages are awarded to punish the wrongdoer, whereas, aggravated damages “are awarded to compensate the plaintiff for increased mental suffering due to the manner in which the defendant behaved in committing the wrong or thereafter.”⁶

Punitive damages are anomalous and frequently criticized because the rationales behind them lie in both tort and crime.⁷ A definitive history of punitive damages has not yet been written to explain this anomaly. This Article aims to revisit the main historical developments that are linked to the development of the doctrine of punitive damages. This Article will formulate a longer meta-narrative that rejects linearity and allows for historical contingency. This Article is a corrective to present scholarship, which fails to adequately connect the historical moments that link punitive damages to its roots in tort and crime.

Current scholarship begins the story of punitive damages in the classical period of Roman law. From there, the story jumps to the newly emerging common law of

¹ See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149-50 (Austl.) (Windeyer J).

² See, e.g., *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958); *Livingstone v. Rawyards Coal Co.* [1880] 5 App. Cas. 25 (HL) 39 (appeal taken from Scot.) (Lord Blackburn); RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM. LAW INST. 1979) (“[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.”).

³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (explaining that punitive damages as compared with compensatory damages “serve a broader function . . . aimed at deterrence and retribution.”).

⁴ *Nat’l Australia Bank Ltd v Sahin* [2011] VSC 505, [43] (Austl.) (quoting *Carter v Walker* [2010] VSCA 340, [284] (Austl.)).

⁵ HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH [1.7.1], 71 (4th ed. 2002) (footnotes omitted).

⁶ *Id.*

⁷ ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (rev. ed. 2012); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 86-87 (2003).

Western Europe in the twelfth and thirteenth centuries that revived Roman law and then to the English statutes of the later thirteenth century. Finally, current scholarship finishes the tale of punitive damages by citing the court cases of *Wilkes v. Wood* and *Huckle v. Money* in 1763 that led to the “first explicit articulation” of the legal principle of exemplary damages.⁸

This Article reveals that there is no overarching doctrinal unity in the development of punitive damages, but rather a series of historical and doctrinal circumstances that intersected to give rise to concepts recognizable as pre-modern cognates of punitive damages. In discussing these issues, I can present only a few selected texts, rather than a complete narrative. I am aware that, in treating some topics, I only touch the surface of problems that would require a deeper and more detailed analysis of the source material to provide a full-scale treatment of them. Such treatment is unavoidable in pursuing a limited theme through a variety of sources over a period of several centuries, and further analysis remains a task for this author and others.

This Article begins with an outline of the current dilemma that Anglo-American law perceives in the doctrine of punitive damages and how Anglo-American legal history reflects this dilemma. This Article then analyzes three significant historical moments. The first of these historical moments is the sensational litigation that erupted after the 1763 publication of *The North Briton*, No. 45. This Article examines the *Wilkes v. Wood* and *Huckle v. Money* cases heard before Lord Chief Justice Pratt to illustrate the tension between judicial attempts to control doctrinal development of the law of damages and the ostensibly uncontrolled role of juries in awarding damages without recourse to such legal considerations.

This Article uses these eighteenth-century cases to suggest that the courts awarded exemplary damages based on the Roman law concept of *iniuria*, which is best translated as “affront to feelings” or “outrage.” The Article examines the doctrinal development of the concept of *iniuria* from its classical Roman law origins to its provenance in the Justinianic Roman law of the medieval West, and suggests its reception in the English common law in the twelfth and thirteenth centuries.

The second historical moment of note that is often cited as a pre-modern analogue of exemplary damages is the late thirteenth-century English statutes that provided for “multiple” damages. This section of the Article suggests that the Roman law concept of *iniuria* played an influential role in late thirteenth-century statutory drafting and the adoption of “multiple” damages.

The third historical moment often mentioned in the history of exemplary damages is the Anglo-Saxon “money compositions.” The Article suggests that the money compositions were part of a parallel narrative in which, by the end of the thirteenth century, the common law began to discern a qualitative significance between crime and tort.

⁸ *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498; (1763) Lofft 1 (“[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment”); *Huckle v. Money* (1763) 95 Eng. Rep. 768, 769; 3 Wils. K.B. 205 (introducing the term “exemplary damages” to explain an award that exceeded actual damage).

I. BACKGROUND

A. *The Origins of the Punitive Damages Dilemma*

The leading modern decision in the Anglo-American law of punitive damages is the 1964 House of Lords' decision, in particular the leading judgment of Lord Devlin, in *Rookes v. Barnard*.⁹ In a seminal account of the origins and history of the development of punitive damages, Lord Devlin, citing Street's 1962 edition of *Principles of the Law of Damages*, stated that punitives "originated just 200 years ago in the cause célèbre of John Wilkes and *The North Briton* in which the legality of a general warrant was successfully challenged."¹⁰ Lord Devlin's reference was to the 1763 cases of *Wilkes v. Wood* and *Huckle v. Money*.

Other common-law countries have also noted the origins of the concept of punitive damages in *Wilkes v. Wood* and *Huckle v. Money*. The United States Supreme Court cited *Wilkes* and two late eighteenth-century American cases for the proposition that punitive damages have been a traditional part of state law.¹¹ The Australian High Court also acknowledged that *Wilkes* was the earliest authority to use the term exemplary damages,¹² but doubted whether its origins lay there.¹³

B. *The Conflicting Policies Underlying the Punitive Damages Dilemma*

In addition to its discussion of the historical origins of exemplary damages, Lord Devlin and the House of Lords in *Rookes* reflected on the fundamental policy dilemma inherent in punitive damages doctrine. After reviewing the authorities for the case, Lord Devlin noted an anomaly: "when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed."¹⁴

Lord Devlin continued, adding, "there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal."¹⁵ His Lordship then went on to define certain circumstances in which exemplary damages would be available to a defendant. These categories were threefold: (1) "oppressive, arbitrary

⁹ *Rookes v. Barnard* [1964] AC 1129 (HL) (appeal taken from Eng.).

¹⁰ *Id.* at 1221-22 (Lord Devlin) (quoting HARRY STREET, *PRINCIPLES OF THE LAW OF DAMAGES* 28 (1962)). Elsewhere in that same textbook, the author referred to the role of the Roman law notion of *iniuria* in damages, which I discuss later in this part.

¹¹ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (citing *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 498; (1763) Lofft 1; *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 6 (1784); *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791)); *id.* at 25 (Scalia, J., concurring) (citing the nineteenth-century text books published in the United States: THEODORE SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* 35 (4th ed. 1868); and GEORGE W. FIELD, *A TREATISE ON THE LAW OF DAMAGES* 66 (1876)).

¹² *New South Wales v Ibbett* (2006) 229 CLR 638, 648 (Austl.).

¹³ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 152 (Austl.) (Windeyer J) (noting that its origins occurred before 1763).

¹⁴ *Rookes* [1964] AC at 1221 (Lord Devlin).

¹⁵ *Id.* at 1226.

or unconstitutional action by the servants of the government”; (2) where the “defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff”; and (3) where “exemplary damages are expressly authorised by statute.”¹⁶

Other common-law countries, however, have not taken such a confined and categorical approach to awarding exemplary damages. In the United States, exemplary damages are a well-settled principle of common law,¹⁷ but their application differs from state to state, as exemplary damages are generally a matter of state law. In many states, punitive damages are determined based on statute. Whereas in other states, punitive damages may be determined based solely on case law.¹⁸

In Australia, the High Court rejected the notion that awards of exemplary damages could only occur if one of the three categories in *Rookes* were satisfied. In actions for tort, according to the High Court, exemplary damages may be awarded for any conduct of a sufficiently reprehensible kind, whether it fell within the three categories or not.¹⁹ The principles were summarized in this way:

It seems from the award of damages that the jury took the view that the publication of the libel in the first edition and again in the second was in each case wanton conduct and had the colour of a contumelious disregard of [the plaintiff’s] reputation both as a man and a member of Parliament. The jury could only express their disapproval or “detestation” (a word used by Pratt C.J. in *Wilkes v. Wood*) by awarding exemplary damages. That is the purpose of exemplary damages. I think taking all the circumstances of the case into consideration and the summing up, that the jury were moved to punish the defendant in that way.²⁰

The High Court downplayed the restrictive nature of Lord Devlin’s tripartite categorization of exemplary damages, writing that “his Lordship was not purporting to state any new principle. Nor was he stating one the application of which depended upon the official position of the defendant; the principle was stated in general terms as one which had application to a tortious act committed by any person.”²¹ In the High Court’s view, the law relating to exemplary damages both in England and in Australia was that exemplary damages might be awarded “if it appeared that, in the

¹⁶ *Id.* at 1226-27.

¹⁷ See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 380 (Cal. Ct. App. 1981); see also Ronen Perry, *Economic Loss, Punitive Damages, and the Exxon Valdez Litigation*, 45 GA L. REV. 409, 440-41 (2011).

¹⁸ See Perry, *supra* note 17, at 441-43.

¹⁹ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138 (Taylor J) (Austl.). The United Kingdom Privy Council (as it was then the ultimate court of appeal) confirmed the correctness of the High Court of Australia’s approach in this case under Australian law. *Australian Consol Press Ltd v Uren* (1967) 117 CLR 221 (PC) 241 (appeal taken from Austl.) (Eng.). The Australian High Court was of the view that there was a reasonably clear concept of exemplary damages in Australian law prior to *Rookes*, as set out in the previous Australian High Court case of *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ) (Austl.).

²⁰ *Uren* (1966) 117 CLR at 127 (McTiernan J) (Austl.).

²¹ *Id.* at 133 (Taylor J).

commission of the wrong complained of, the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights."²² The decision in *Rookes*, despite its trenchant criticism by the Australian High Court,²³ as well as other jurisdictions, was subsequently upheld by a 4-3 majority of the House of Lords and thus remains the law of England today.²⁴

C. The Difference Between Aggravated and Punitive Damages

One further aspect of note in Lord Devlin's seminal judgment in *Rookes* was its attempt to distinguish punitive damages from aggravated damages. Lord Devlin stated that the numerous epithets for punitive damages—"willful, wanton, high-handed, oppressive, malicious, outrageous"—were merely descriptive of the circumstances of the case and were insufficient justification for punitive damages,²⁵ he explained that punitive damages must be distinguished from the category of aggravated damages, "in which injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied."²⁶ While exemplary damages had a punitive element, aggravated damages, in contrast, compensated the defendant for the aggravated nature of the defendant's conduct. Lord Devlin then declared: "This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject."²⁷

Thus, in the context of the Anglo-American law of punitive damages, the decision in *Rookes* is significant in highlighting three matters of ongoing contention and debate regarding punitive damages: (1) their origins in English legal history; (2) the uncertainty of whether their philosophical or jurisprudential foundations lie in criminal law or tort law and; (3) their conceptual differentiation and distinction from aggravated damages. The purpose of this Article is to shed light on these issues by a historical examination of the roots of punitive damages.

II. PUNITIVE OR COMPENSATORY? PUNITIVE DAMAGES ON TRIAL

A. The North Briton, No. 45 Cases and The Role of Juries and Judges in Eighteenth-Century Damages Awards

The two seminal cases of *Wilkes v. Wood* and *Huckle v. Money* are the first explicit articulation of the doctrine of punitive damages. Lord Chief Justice Pratt decided these cases on the legality of a series of arrests under general warrant following the publication of the politically provocative pamphlet *The North Briton*, No. 45 that was critical of King George III and his ministers. The following sections

²² *Id.* at 129; *see also id.* at 138 ("Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights.") (quoting *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ)).

²³ *See id.* at 138-39; *see also Lamb v Cotogno* (1987) 164 CLR 1, 7-8 (Austl.).

²⁴ *Broome v. Cassell & Co. Ltd.* [1972] AC 1027 (HL) 1029 (appeal taken from Eng.).

²⁵ *Rookes v. Barnard* [1964] A.C. 1129 (HL) 1229 (Lord Devlin) (appeal taken from Eng.).

²⁶ *Id.*

²⁷ *Id.* at 1230 (Lord Devlin).

examine these cases and the principles expressed in them concerning punitive damages.

The following sections further examine the importance, during the late eighteenth century, of the respective roles of the jury, the judiciary, and practitioners in the determination of damages awards that might be excessive. Any narrative of doctrinal development must take into account the contingencies that unpredictable jury awards might represent. I conclude this section, however, by observing the beginning of a systematic approach to legal learning in the eighteenth century that paralleled this apparently unimpeded jury power.

1. *The North Briton*, No. 45 Cases: *Wilkes v. Wood* and *Huckle v. Money*

In *Wilkes v. Wood*, Mr. Wilkes's house was the subject of a search under a general warrant of arrest, and he brought an action in trespass against the official who executed the search.²⁸ His counsel asked for "large and exemplary damages," since trivial damages would not put a stop to such proceedings.²⁹ Lord Chief Justice Pratt instructed the jury that "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."³⁰ Lord Devlin categorized this and another case under the first category of oppressive conduct by servants of the government. The other case was *Huckle v. Money*.

In *Huckle*, government messengers arrested and confined the printer of *The North Briton* pamphlet for six hours on the orders of the Secretary of State.³¹ Although treated well, Huckle brought a suit alleging trespass, assault, and false imprisonment against the official executing the warrant.³² The jury awarded a verdict in favour of Huckle for £300 in damages.³³ Lord Chief Justice Pratt, the presiding judge, refused the application to set aside the jury verdict as excessive.³⁴ Despite the fact that actual damages amounted to £20 at most, His Lordship stated:

[I] think they [the court] have done right in giving exemplary damages. To enter a man's home by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack upon the liberty of the subject.³⁵

Further, Pratt stated:

²⁸ *Wilkes v. Wood* (1763) 98 Eng. Rep. 489, 489; (1763) Lofft 1 (Lord Pratt CJ).

²⁹ *Id.* at 490.

³⁰ *Id.* at 498-99.

³¹ *Huckle v. Money* (1763) 95 Eng. Rep. 768, 768; 3 Wils. K.B. 205.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 769.

³⁵ *Id.*

[P]erhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great points of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate all over the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom³⁶

Wilkes and *Huckle* are cited as the paradigmatic exemplars of circumstances when punitive damages might be awarded.³⁷ Yet histories of punitive damages rarely venture beyond these two cases. Nor do these cases explain that the precedents discussed by Pratt LCJ in *Wilkes* and *Huckle*, and other cases of the time, occurred in a context when juries had near-total control over damages awards.

2. The Role of Juries and Judges in Determining Damages Awards

It is important to understand the nature of jury verdicts awarding damages in the context of the common law in the late eighteenth century. At this time, juries had virtually carte blanche in awarding damages.³⁸ From its classical form, the jury was a group of twelve local people who knew the facts of the case and came to a *verdictum* (lit. “truth-telling,” or verdict).³⁹ There were, however, some checks and balances put in place by the court to control the damages awards granted by juries.

The writ of attain was the primary form of controlling a jury prior to the eighteenth century.⁴⁰ By 1202, the jury of attain was a well-established procedure; it was comprised of twenty-four knights who were summoned to form a grand jury to review the verdict of a petty jury and to assess, on a re-trying of the evidence, whether the original verdict was or was not “unjust.”⁴¹ The aim of this writ was to prevent criminal abuse of the process of justice, specifically perjury by jurors. The punishment for a false verdict was capital punishment.⁴²

The application of attain was originally confined to verdicts of assizes only. Attain expanded to all trespass actions in the thirteenth century, to land disputes in the late thirteenth century, and to all pleas after 1360.⁴³ The first use of attain solely

³⁶ *Id.* at 768-69.

³⁷ See *Rookes v. Barnard* [1964] AC 1129 (HL) 1221-23 (appeal taken from Eng.). Lord Devlin also cited a third case, *Benson v. Frederick* (1766) 97 Eng. Rep. 1130; 3 Burr. 1845, in which a soldier obtained damages of 150 pounds against his colonel who had ordered him to be flogged “so as to vex a fellow officer.” *Rookes* [1964] AC at 1222-23. Lord Mansfield acknowledged that the quantum of damages was beyond the actual harm suffered, but nevertheless upheld the sum. See *Benson*, (1766) 97 Eng. Rep. at 1130.

³⁸ See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 66 (2006).

³⁹ Ralph V. Turner, *The Origins of the Medieval English Jury: Frankish, English, or Scandinavian?* 7 J. BRIT. ST. no. 2, May 1968, at 3-4.

⁴⁰ George T. Washington, *Damages in Contract at Common Law* (pt. 1), 47 L.Q. REV. 345, 346 (1931).

⁴¹ *Id.*

⁴² *Id.* at 347.

⁴³ *Id.*

on the basis of the erroneous assessment of damages was in the early thirteenth century, in the forms of the “certifications” required of juries. That use, however, did not persist beyond the fourteenth century.⁴⁴ Later in the thirteenth century, the first Statute of Westminster of 1275 permitted, as a matter of “grace,” a means of reducing awards of damages if the amount was “outrageous” to the grand jurors and the plaintiff was out of pocket as a result.⁴⁵

The doctrine of attainder expanded in the fifteenth century. The court *nisi prius* (at first instance) could question the jury and make a recommendation on the record of matters within the court’s “certain knowledge” (*conusans*) that would lead to the full court *in banc* at Westminster increasing the award.⁴⁶ Only cases, such as battery or mayhem (not so trespass to land and goods), could be matters of *conusans*, since the court could review the evidence with its own eyes before entering judgment.⁴⁷ By the sixteenth century, the procedure of attainder was obsolete, and was formally abolished in 1825.⁴⁸

However, scholars have pointed out that juries were not entirely omnipotent. For example, Richard Helmholz qualifies the notion that juries had a virtual *carte blanche* in damages awards up to the eighteenth century.⁴⁹ He argues that in slander cases during the late sixteenth and early seventeenth centuries, the judge’s instructions to the jury and lawyers’ submissions to the jury as to the factors to be taken into account in awarding damages played a significant role in the jury award.⁵⁰ Furthermore, George T. Washington observes instances of judicial control over awards in a number of non-slander instances before the mid-seventeenth century, such as cases of debt, novel disseisin, detinue, and replevin.⁵¹

Helmholz notes, too, that by the sixteenth century, a motion “in arrest of judgment” in a slander case provided a means for decreasing (*remittitur*) or, possibly, increasing (*additur*) the damages award of a jury.⁵² The procedure of *remittitur* involved the plaintiff voluntarily forgiving the excessive component of the damages award. In practice, the initiative to forgive excessive damages came by means of persuasion from the judge refusing to enter judgment until such a concession was made.⁵³ This practice survived until 1622.⁵⁴

⁴⁴ *Id.* at 348.

⁴⁵ *Id.* at 347, 349.

⁴⁶ *Id.* at 354-55.

⁴⁷ *Id.* at 355, 357.

⁴⁸ See The Juries Act 1825, 6 Geo. 4 c. 50, § 60.

⁴⁹ *But see* OLDHAM, *supra* note 38, at 66.

⁵⁰ R. H. Helmholz, *Damages in Actions for Slander at Common Law*, 103 L.Q. Rev. 624, 624-29 (1987) [hereinafter Helmholz, *Slander at Common Law*].

⁵¹ Washington, *supra* note 40, at 351-53.

⁵² Helmholz, *Slander at Common Law*, *supra* note 50, at 629-35. See also J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 72-74 (2d ed. 1979), on the three forms of motion for reviewing jury verdicts that existed by the sixteenth century, namely in arrest of judgment, *non obstante veredicto*, and a new trial.

⁵³ Helmholz, *Slander at Common Law*, *supra* note 50, at 630.

3. The Shift in Power from Jury to Judge Under the Motion for New Trial

By far the most significant moment in shifting the balance of power from jury to judge was the availability of the motion to order a new trial, which developed by the late 1700s. As early as the 1590s, common-law courts granted new trials in circumstances where juries violated procedural rules set up to control their “official department.”⁵⁵ But the procedure only fully took root in the second half of the seventeenth century, no doubt a reaction by the common-law courts to the like recourse that litigants had in the courts of equity.

The seminal decision was the 1655 decision of *Wood v. Gunston*, an “action of trespass for words.”⁵⁶ In this case, the defendant called the plaintiff a “traytor” and the jury awarded £1,500 pounds in damages.⁵⁷ The defendant’s counsel sought a new trial on the basis that “it was a packed business else there could not have been such great damages.”⁵⁸ There is a difference of opinion on the significance of this case, however. Some commentators note that this case marked the point at which a new trial was granted “on the merits, as distinguished from the old practice of setting aside a verdict for certain types of misconduct by the jury.”⁵⁹ But near-contemporary Pratt LCJ believed that this was on the basis of jury misconduct because there was tampering with the jury (“a packed business”).⁶⁰

Nevertheless, in the late 1600s and early 1700s, a more liberal attitude to granting new trials prevailed. In 1726, there is an instance that signals a determination of such matters “on discretion” in the case of *Chambers v. Robinson*.⁶¹

While the King’s Bench used its discretion to grant new trials in instances of excessive jury verdicts on damages, the Court of Common Pleas adopted instead the “rule of certainty,” which provided that it would only interfere with the decision at first instance if there was certain evidence of error.⁶² Washington characterizes the cases of the 1760s, such as *Huckle* and *Beardmore v. Carrington*, as instances of the

⁵⁴ *Hawkins v. Sciet* (1622) 81 Eng. Rep. 1099; (1622) Palmer 314 (in which the court declined to set aside a verdict of £150 for slander, resolving to “leave such matters of fact to be found by the jury, who better understand [conusont] the quality and estate of the parties, and the damages sustained”).

⁵⁵ Washington, *supra* note 40, at 358.

⁵⁶ *Wood v. Gunston* (1655) 82 Eng. Rep. 863, 867; (1655) Style 462.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Washington, *supra* note 40, at 362; *see also* William Renwick Riddell, *New Trial at Common Law*, 26 YALE L.J. 49, 55 n.13 (1916).

⁶⁰ *Beardmore v. Carrington* (1764) 95 Eng. Rep. 790, 792; 2 Wils. K.B. 244 (Lord Pratt CJ). Although the printed report by Wilson gives only a per curiam opinion, the first textbook on damages by Joseph Sayer, written six years later, indicates that it was Pratt LCJ who spoke for the court. *See* OLDHAM, *supra* note 38, at 66 (citing JOSEPH SAYER, THE LAW OF DAMAGES 222-227 (2d ed. 1792) (1770)).

⁶¹ *Chambers v. Robinson* (1726) 93 Eng. Rep. 787; 2 Strange 693 (Holt J) (granting a new trial, stating, “it was but reasonable he [the defendant] should try another jury, before he was finally charged”); *see also* Washington, *supra* note 40, at 363.

⁶² Washington, *supra* note 40, at 363.

rule of certainty: “only in cases where the damages were certain as a matter of law would a new trial be granted if the jury made an erroneous assessment.”⁶³ In these cases, the assessment was not a matter of law, but one for the jurors as “constitutional judges” of the amount of recovery.⁶⁴ By the end of the eighteenth century, the position was that the Court of Common Pleas would not grant a new trial in tort unless the amount given was so “monstrous and enormous” that all mankind would blush.⁶⁵ In contrast, the King’s Bench stated that it would exercise its discretion in each case.⁶⁶ The question of quantum of damages had by this time become reviewable as a matter of law, and not just a question of fact for the jury.

But, if it was only in the eighteenth century that jury awards became subject to “review” by the motion of seeking a new trial as a matter of law, was there any point going back in time before this to investigate awards of exemplary or punitive damages? As Mark Lunney states: “It is only in the eighteenth century that points can be reserved from trial at *nisi prius* to be taken back to the court in banc [full court, sitting at Westminster] and it is no surprise that most of the substantive law begins from that period.”⁶⁷ The answer, then, is an emphatic “yes.”

The reason to delve further into history is that the common-law courts in the 1760s, when looking to interpret the law on means of controlling damages verdicts by juries, looked backwards in time rather than seeing themselves as at the beginning of a new phase in this development (i.e., adopting the test of certainty). Evidence of this lies in the first textbook on damages published by Sayer in 1770, who, despite living through the changes that were taking place, had no presentiment of their significance by privileging and citing authorities that focused on the “older law.”⁶⁸

B. Possible Route of Doctrinal Development of Punitive Damages in Eighteenth-Century English Common Law

Sayer’s textbook is worth investigating further for its development of doctrine on exemplary damages, even though it is not the only example of regard to developed precedent. Sayer’s textbook, *The Law of Damages*, published in 1770, was the first

⁶³ *Id.* at 363.

⁶⁴ *Id.*

⁶⁵ *Beardmore*, 95 Eng. Rep. at 793. But in applying this principle to the facts of the case, Pratt LCJ stated:

[C]an we say that that 1000l. [pounds] are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man’s house, and prys into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days. It is an unlawful power assumed by a great minister of State. Can any body state that a guinea per diem is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King’s subjects? We cannot say the damages of 1000l. are enormous; and therefore the rule to shew cause why a new trial should not be granted must be discharged.

Id. at 793-94.

⁶⁶ Washington, *supra* note 40, at 364.

⁶⁷ Private communication with the author, and on file.

⁶⁸ George T. Washington, *Damages in Contract at Common Law* (pt. 2), 48 L.Q. REV. 90, 93 (1932).

such text on damages.⁶⁹ Sayer's analysis mirrors that of Pratt LCJ's judgment in *Beardmore*, where a new trial was granted in cases where excessive damages were awarded.⁷⁰ Like Pratt LCJ, Sayer refers to *Ash v. Ash*⁷¹ and *Chambers v. Robinson*.⁷²

In *Ash*, a new trial was permitted where a jury awarded the plaintiff £2,000 on a count of false imprisonment by her mother for two or three hours.⁷³ Holt CJ stated that the jury's power in awarding a verdict was not "absolute," but was to come to its finding with the assistance of the judge and "to give their reason for finding the verdict as it is intended to be found, that if they proceeded upon a wrong notion they may be set right."⁷⁴ In *Chambers*, Sayer reports that a new trial was granted after a jury award of £1,000 for malicious prosecution was granted because the damages were excessive, and that it was "fit that the defendant should try another jury" before such an amount was imposed on the defendant.⁷⁵ Unlike Sayer, Pratt LCJ rejected both of these cases as representing sound rationales for overturning jury awards of damages.⁷⁶

Another line of inquiry is suggestive in providing a link between Pratt LCJ's awarding of punitive damages in the late eighteenth-century and the doctrinal thinking that preceded it. This thinking is centered on the concept of awarding "multiple damages" by statute. In his judgment in *Beardmore*, Pratt LCJ discloses that he had recourse to medieval statutes and Year Books in discussing the law on new trials being granted in cases of excessive verdicts in torts.⁷⁷ Pratt LCJ indicates that his search for authorities included the Year Books of the mid 1300s and 1400s, in which courts did not grant new trials, but instead decreased or increased the

⁶⁹ JOSEPH SAYER, *THE LAW OF DAMAGES* (2d ed. 1792) (1770). Although a textbook is not necessarily conclusive evidence of legal doctrine and practice in its contemporaneous context, it nevertheless provides contemporary evidence of directions in legal thought. More so, it is difficult to ignore in the absence of other contrary contemporaneous evidence.

⁷⁰ *Beardmore*, 95 Eng. Rep. at 793.

⁷¹ (1701) 90 Eng. Rep. 526; (1701) Comberbach 357.

⁷² (1726) 93 Eng. Rep. 787; 2 Strange 691; *see also* SAYER, *supra* note 69, at 215-16.

⁷³ *Ash*, 90 Eng. Rep. at 526.

⁷⁴ SAYER, *supra* note 69, at 216.

⁷⁵ *Id.*

⁷⁶ Pratt LCJ read *Wood v. Gunston* not as demonstrating the authority of a court to order a new trial in the case of excessive damages but instead showing that this could be done in instances only of jury misbehavior. The overturning of the jury award in the case of *Ash v. Ash*, according to Pratt LCJ, was "plainly for the misdemeanor of the jury in refusing to answer the Judge when he asked what ground or reason they went upon." *Beardmore v. Carrington* (1764) 95 Eng. Rep. 790, 792; 2 Wils. K.B. 244. In the case of *Chambers v. Robinson*, Pratt LCJ said it was the "only case where ever a new trial was granted merely for the excessiveness of damages only," but disagreed with the rationale of that decision, namely that of giving the defendant "a chance of another jury . . . and would be a reason for a third and fourth trial, and would be digging up by the constitution by the roots; and therefore we are free to say that this case is not law." *Id.* at 792.

⁷⁷ *Id.*

damages award themselves “upon view of plaintiff’s mayhem⁷⁸ and identifying his person,” that is, after viewing the wronged plaintiff and seeing the impact of the tort.⁷⁹

Pratt LCJ was not alone in this recourse to medieval authorities, particularly statute books. The text book writer, Sayer, delved back as far as the 1400s in a chapter entitled “Of Double and Treble Damages,” where, against the general rule that “single damages [only were] recoverable,” he observed that double, or treble, damages were given “by particular statutes.”⁸⁰ These included statutes from: 1689, which provided for multiple damages in cases of breach of the process of distraint;⁸¹ 1429 in cases of forcible entry;⁸² and 1601 for an action in trespass against an overseer of the poor brought in 1755.⁸³

⁷⁸ The offense of mayhem at the time of Bracton was defined as an aggravated act that incapacitated a man from fighting. See Graham McBain, *Modernising the Common Law Offences of Assault and Battery*, 4 INT’L L. RES. 1, 53 (2015), <http://dx.doi.org/10.5539/ilr.v4n1p39>.

⁷⁹ Pratt LCJ referred to cases from 1348 on battery; 1401 and 1405 on conspiracy; 1407, where damages were not increased despite the Justice of Nisi Prius considering them too low without “seeing the mayhem”; 1430 on debt, in which the court increased the damages amount. His Lordship concluded:

From these ancient cases it was argued, that Courts of Justice have in all times considered themselves authorized to review the damages given by juries in all kinds of actions, and either to abridge or increase them; and since that practice has been disused, and abridging damages by the Court has been looked upon as unconstitutional, new trials have been granted for excessive damages.

Beardmore, 95 Eng. Rep. at 792.

⁸⁰ SAYER, *supra* note 69, at 242-43.

⁸¹ *Id.* at 243-45; see also 2 W. & M. c. 5, in 6 STATUTES OF THE REALM 169-70 (reprt. ed. 1963). Chapter 5 enables the sale of goods that have been distrained for rent where the rent has not been paid on time, providing five days elapse from the time notice is given. *Id.* Paragraph 3, however, allows the person whose goods are distrained for the rent to recover “their Treble Damages and Costs of Suite against the Offender” in any “Rescous or Pound-Breach.” *Id.* Further, section 4 provides that the person whose goods are distrained may “recover double the value of the goods” in an action of trespass on the case “where in truth noe Rent is arreare or due.” *Id.*

⁸² 8 Hen. 6 c. 9, in 2 STATUTES OF THE REALM 246 (reprt. ed. 1963). Chapter 9 provides a recital of 15 Rich. 2 c. 2 against forcible entry and permitting the assize of novel disseisin, including the provision that a plaintiff successful in recovering their land under the assize of novel disseisin “shall recover his Treble Damages against the Defendant” in cases where the defendant “entered with Force into the Lands and Tenements, or them after his Entry did hold with Force.” 8 Hen. 6 c. 9.

⁸³ 43 Eliz. 1 c. 2, § 18, in 4(2) STATUTES OF THE REALM 965 (reprt. ed. 1963). Chapter 2, section 18 provides that a plaintiff who brings an action of trespass against a defendant who purports to distrain or sell the plaintiff’s property for the purposes of this statute shall proceed in the normal way to trial by jury, requiring the defendant to avow their justification for the use of the property. In the event that the defendant is successful, “the same Defendant to recover Treble Damages, by reason of his wrongfull vexacion in that behalfe, with his Costs also in that same parte susteyned, and also that to be assessed by the same Jurie or Writ to inquire of the Damages, as the same shall require.” *Id.*

In addition to Sayer's list, there were other statutes giving rise to multiple damages, and which judges, lawyers, and legal writers of the eighteenth century may have known. Section 5 of the Habeas Corpus Act (1679) provided that an officer's failure to deliver the charged person within the required time meant "for the first offence forfeit to the prisoner or party grieved the sum of one hundred pounds; and for the second offence the sum of two hundred pounds."⁸⁴ The Statute of Monopolies (1624), moved by Sir Edward Coke, provided for the limiting of Crown-granted monopolies under pain of triple damages to those aggrieved by seizure of their goods or chattels "by occasion or pretexts of any Monopolies."⁸⁵ These laws indicate that the notion of multiple damages was known to common lawyers of the eighteenth century in the form of statutes from as early as the 1270s and 1420s that still operated to exact double or treble damages for certain forms of wrongdoing.

C. Distinguishing Exemplary from Aggravated Damages in Eighteenth-Century English Common Law

One conceptual difficulty that emerges in examining these cases from the 1760s is the lack of a clear differentiation between excessive awards on the basis of punitive damages and those based on aggravated damages. Especially in cases of slander, as the courts have noted in modern times, there is likely to be considerable overlap between aggravated damages and punitive damages. This was so in the context of the cases in the 1760s.

Alongside the cases just discussed concerning publication of *The North Briton*, No. 45, there were other cases in which juries awarded large verdicts for mental suffering, wounded dignity, and injured feelings—in other words, for aggravated damages. These circumstances also include seduction, as in the 1769 case of *Tullidge v. Wade*, involving the action for loss of a daughter's services, and, as noted by Justice Bathurst, "the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room."⁸⁶ Paul Mitchell cites *Tullidge* as an example of eighteenth-century courts taking inspiration from the Roman law concept of *iniuria* to award exemplary damages, as discussed further below.⁸⁷

Paul Mitchell's historical analysis examines factors that could increase damage awards apart from special damage. He begins with the general principle stated by Pratt LCJ in *Huckle* that the "state, degree, quality, trade or profession of the party injured, as well of the person who did the injury, must be, and generally are, considered by the jury in giving damages."⁸⁸ Malice could evince an improper motive that made it worse. In explaining the relevance of malice to damages in nineteenth-century case law, Mitchell posits

⁸⁴ 31 Car. 2 c. 2, § 5, in 5 STATUTES OF THE REALM 936 (reprt. ed. 1963); see also 31 Car. 2 c. 1, § 16, in 5 STATUTES OF THE REALM 929 (reprt. ed. 1963) (referring to payment of "Treble Damages" by a party offending the Act); 31 Car. 2 c. 1, § 31, in 5 STATUTES OF THE REALM 934 (reprt. ed. 1963) (referring to defendants being able to "recover their treble Costs" if a suit against him or her does not succeed).

⁸⁵ 21 Jac. 1 c. 3, § 4, in 4(2) STATUTES OF THE REALM 1212 (reprt. ed. 1963).

⁸⁶ *Tullidge v. Wade* (1769) 95 Eng. Rep. 909; 3 Wils. K.B. 18.

⁸⁷ PAUL MITCHELL, *THE MAKING OF THE MODERN LAW OF DEFAMATION* 66-67 (2005).

⁸⁸ *Id.* at 64 (quoting *Huckle v. Money* (1763) 95 Eng. Rep. 768; 2 Wils. K.B. 205).

an approach to compensation different to the one we are familiar with today [This approach] awarded damages for loss *and* to mark the fact that the claimant had suffered a wrong. “Injury” . . . was not a synonym for loss. It was both the wrong and its consequences.⁸⁹

Mitchell identified a trend towards awarding damages taking into account both the actual loss and the method of inflicting the damage, including malice. He cites two cases by way of example.

In the first case, *Sears v. Lyons*, in 1818, the defendant deliberately scattered poisoned barley on the plaintiff’s land in order to kill his poultry.⁹⁰ The judge directed the jury to consider the motive in awarding something beyond mere pecuniary damages.⁹¹ The second case, from 1814, *Merest v. Harvey*, involved a drunk and wealthy defendant who threatened the plaintiff with legal action through his office as a magistrate if he refused him the right to shoot on the plaintiff’s land.⁹² The plaintiff received an enormous award of damages (500 pounds), and the Court of King’s Bench refused to set it aside as excessive.⁹³ Was this to compensate for injured feelings (aggravated damages) or to make an example of the defendant’s poor conduct (exemplary damages)? Chief Justice Gibbs and Justice Heath in *Merest* suggested that such an award “goes to prevent the practice of dueling, if juries are permitted to punish by exemplary damages,” thus indicating the latter.⁹⁴

The notion of malice is a factor that might increase damages beyond the actual harm suffered. But is it to be considered as part of the circumstances relevant to *aggravated* damages, namely those damages payable because of the aggravated nature of the circumstances in which the wrongdoer carries out the wrongdoing? Or, is malice part of the contempt shown to the victim and therefore part of *exemplary* damages? In 1770, the Court of Common Pleas in *Bruce v. Rawlins* reflected this uncertainty.⁹⁵ In that case, customs officers entered the plaintiff’s house to search for goods on which they suspected no customs dues had been paid.⁹⁶ Despite a search, the officers found none.⁹⁷ The jury awarded plaintiff £100 in damages, which the court refused to interfere with on a writ of inquiry.⁹⁸

The three judges differed on their grounds for refusing the writ. Chief Justice Wilmot focused on the conduct of the customs officers and the injury to the plaintiff’s reputation.⁹⁹ This line of reasoning follows the *Huckle* and *Wilkes*

⁸⁹ *Id.* at 65.

⁹⁰ *Sears v. Lyons* (1818) 171 Eng. Rep. 658; 2 Stark 317.

⁹¹ *Id.*

⁹² *Merest v. Harvey* (1814) 128 Eng. Rep. 761; 5 Taunt 442.

⁹³ *Id.* at 761.

⁹⁴ *Id.* at 761 (Gibbs CJ & Heath J).

⁹⁵ *Bruce v. Rawlins* (1770) 95 Eng. Rep. 934; 3 Wils. K.B. 61.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 934-35.

⁹⁹ *Id.* at 934 (Wilmot CJ).

decisions, implying that exemplary, not aggravated, damages are relevant in *Bruce*. Justice Yates is more explicit in articulating exemplary damages as the basis of the jury award, following the reasoning in *Beardmore* that the “case must be very gross, and the damages enormous” for the award to be disturbed.¹⁰⁰ Justice Gould, on the other hand, specifically notes that the defendant’s conduct in “entering the plaintiff’s house under colour of legal authority, aggravates the trespass.”¹⁰¹ It is pertinent to note, that these early cases demonstrate some slipperiness in clearly identifying earlier lineages of concepts of exemplary damages and must be treated with caution.

D. Iniuria and Punitive Damages

The slippery distinction between exemplary damages and aggravated damages in these early cases prior to their explicit differentiation in *Rookes*, nevertheless reflects the existence of an underlying notion to award damages beyond mere compensatory purposes and to award damages, additionally, for some further hurt to the victim by the very nature of the wrongdoer’s conduct. Pre-modern cognates to this intuited, yet difficult to articulate concept, lie in the Roman law notion of *iniuria*.

In its essence, *iniuria* is the antonym of *ius* (law or right). That is to say, it denotes simply unlawfulness or the absence of a right.¹⁰² As the name of a particular delict in Roman law, this may be rendered in English by the word “insult” or “outrage,” although the full width of the Roman idea included “any contumelious disregard of another’s rights of personality.”¹⁰³ It thus included not merely physical assaults and oral or written assaults and abuse, but any affront to another’s dignity or reputation and any disregard of another’s public or private rights, provided always that the act was done wilfully and with contumelious intent.¹⁰⁴ The applicable penalty for the delict of *iniuria*, therefore, reflected the nature of the delict itself in not simply awarding compensation for actual harm suffered, but for the additional contumely suffered.

Paul Mitchell has noted the provenance of the concept of *iniuria* in common-law cases of the eighteenth and nineteenth centuries, as discussed above.¹⁰⁵ He notes factors that could be “taken into account to increase damages” in *Huckle*, and demonstrations of this in the nineteenth-century cases *Sears* and *Merest*.¹⁰⁶ Mitchell expands further on the notion of *iniuria*, when he notes that in *Merest* the presiding judge cited an example of how, if the recovery for trespass were limited to pecuniary damage, a man might repeatedly commit a trespass in a most invasive and offensive manner, but only give the claimant a halfpenny damages to settle his legal liability.¹⁰⁷ This example, Mitchell observes, is “suspiciously similar” to a problem discussed in the Roman texts of a man, knowing that damages for *iniuria* were fixed,

¹⁰⁰ *Id.* at 935 (Yates J).

¹⁰¹ *Id.* (Gould J).

¹⁰² BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 216 (reprt. 1982).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 215-16.

¹⁰⁵ MITCHELL, *supra* note 87, at 65-67.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 66.

going around slapping people's faces and then instructing his slave to hand over the fixed payment.¹⁰⁸

A second example examined by Mitchell is the earlier 1769 case of *Tullidge*, involving the action for loss of a daughter's services.¹⁰⁹ Bathurst J noted that "the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room."¹¹⁰ This is compared with Justinian's *Institutes* 4.4.9, in which one of the factors said to make an affront more serious is "the place where it is committed, e.g., whether the affront were perpetrated in the theatre or in the market place."¹¹¹ Mitchell dismisses the call for the common law to follow the Roman law of *iniuria* on such matters,¹¹² claiming that the common law already heeded the call in the eighteenth century, as demonstrated in the cases just discussed.¹¹³ In this regard, he notes that the High Court of Australia has borrowed the vocabulary from Roman law roots of punitive damages, approving the test that there must be a case of "conscious wrongdoing in contumelious disregard of another's rights."¹¹⁴ The following section attempts provide what Mitchell does not: A historical lineage by which the concept of *iniuria* was received into the English common law.

1. Origins of the Notion of *Iniuria*

In classical Roman law, *iniuria* in general meant simply *omne quod non iure fit* ("everything that is not lawful").¹¹⁵ As a special delict, however, it meant *contumelia*, insult or outrage.¹¹⁶ Based on outraged feelings rather than on economic loss, the *actio iniuriarum* was, as Buckland noted, *vindictam spirans*.¹¹⁷ The money

¹⁰⁸ *Id.*; see also JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 217 (2006) (clarifying that this story dates from the third century and was recorded in AULUS GELLIUS, NOCTES ATTICAE 20.1 (Albert Lion ed. 1825)).

¹⁰⁹ *Tullidge v. Wade* (1769) 95 Eng. Rep. 909; 3 Wils. K.B. 18.

¹¹⁰ *Id.* at 910 (Bathurst J).

¹¹¹ MITCHELL, *supra* note 87, at 67; cf. G. INST. 3.220 (F. de Zulueta trans., 1946).

¹¹² See Peter Birks, *Harassment and Hubris: The Right to an Equality of Respect*, 32 IRISH JURIST 1, 10 (1997).

¹¹³ MITCHELL, *supra* note 87, at 67.

¹¹⁴ *Id.* (quoting *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ) (Austl.)). Mitchell suggests that the phrase "contumelious" was taken from a passage in Salmond's 1920 edition of his textbook on torts, where he discussed the Roman approach to compensation for insult, in which the Latin term *contumelia* ("contempt") was used to describe the kind of conduct that was actionable. *Id.* (discussing JOHN W. SALMOND, TREATISE ON THE LAW OF TORTS 129 (5th ed. 1920)). But Knox CJ in his judgment makes no mention of this textbook. See *Whitfield*, 29 CLR at 77 (Knox CJ).

¹¹⁵ John S. Beckerman, *Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOUR OF SAMUEL E. THORNE 159, 176-77 (Morris S. Arnold et al. eds., 1981); see also J. INST. 4.4.7 (Peter Birks & Grant McLeod trans., 1987).

¹¹⁶ W. W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 584 (1921).

¹¹⁷ *Id.* at 586.

payment sought represented “solace for injured feelings or affronted dignity,” not compensation for economic loss.¹¹⁸ A wide variety of wrongs came to be encompassed by the *actio iniuriarum*, related by the fact that they showed contempt of the victim’s personality or tended to disparage him, or were intended to do so.¹¹⁹

The delict of *iniuria* has its origins in Gaius’s *Institutes* 3.220, describing an *iniuria* as committed when a person is struck, vocally attacked, or subject to defamatory conduct, including writing, sexual harassment, and miscellaneous other examples.¹²⁰ Peter Birks, similarly, argues that the delict *iniuria* protected “one’s fair share of respect.”¹²¹ Birks summarized the delict of *iniuria* as comprising four elements: (1) an act of harassment, in its broad meaning, (*iniuria*) by the tortfeasor; (2) carried out by the tortfeasor with contempt; (3) typically causing harm to the victim in the nature of “anger and humiliation (the desire for revenge, joined with grief)”; and (4) violating “the victim’s right to his or her proper share of respect.”¹²² An important rider attaches to the delict, namely that the tortfeasor’s conduct be *iniuria*, i.e., non-*iure*, not lawful or “unlawful.”¹²³

This Praetorian remedy was for what we would call damages, although the essence of the delict was not economic loss but insult. Therefore, the money payment must usually have represented not compensation in the ordinary sense, but rather solace for injured feelings or affronted dignity.¹²⁴ Barry Nicholas narrates the development of this Praetorian remedy, based on the story related by Mitchell, when the fall in the value of money deprived the fixed penalties in the Twelve Tables of their efficacy: a Roman followed by his slave with a purse went about slapping the faces of respectable persons and bidding the slave to tender to each the statutory penalty.¹²⁵ This, we are told, drove the Praetors to intervene,¹²⁶ which they did by providing an action not for a fixed penalty, but for damages at large.¹²⁷

2. The Reception of *Iniuria* into the English Common Law via Early Development of Defamation

By the time of Emperor Justinian in the sixth century, Roman law was compiled into the *Corpus Iuris Civilis*. This body of law, which attempted to codify and abridge the sources of law from the “classical period” of Roman law, including

¹¹⁸ NICHOLAS, *supra* note 102, at 217.

¹¹⁹ BUCKLAND, *supra* note 116, at 585.

¹²⁰ On the delict of *iniuria*, see G. INST., *supra* note 111, at 3.220; see also DIG. 47.10; J. INST., *supra* note 115, at 4.4; CODE JUST. 9.35 (Diocletian & Maximian 290); J. A. C. THOMAS, TEXTBOOK OF ROMAN LAW 369-72 (1976); NICHOLAS, *supra* note 102, at 216.

¹²¹ Birks, *supra* note 112, at 10.

¹²² *Id.* at 7-11.

¹²³ *Id.* at 11.

¹²⁴ NICHOLAS, *supra* note 102, at 217.

¹²⁵ *Id.* at 216-17.

¹²⁶ DIG. 47.10.15.26 (Ulpian, Ad Edictum 67).

¹²⁷ NICHOLAS, *supra* note 102, at 216-17; see also Peter B. H. Birks, *The Early History of Iniuria*, 37 LEGAL HIST. REV. 163, 174-175 (1969) (discussing this story of Lucius Veratius as reported by Gellius and attributed to Labeo).

Gaius's *Institutes*, forbade reference to the earlier law.¹²⁸ The renewed study of Justinianic Roman law, after more than half a millennium of neglect, occurred in the 1100s in Bologna, Italy.¹²⁹ This was Roman law according to the Justinian compilations of ancient text-writers, rather than the ancient texts of the jurists themselves.¹³⁰ Justinian's *Institutes* 4.4 (*De iniuriis*), heavily reliant on Gaius's earlier text, emphasized that the notion of contempt rendered the *iniuria* actionable.¹³¹ Although it did not form a coherent body of doctrine identifiable with the modern descendants of defamation, it stated that, "anyone who shall formulate a writing or slanderous words publicly against the reputation of another, if he does not prove the writing, shall be whipped."¹³²

The precursor to the action of defamation was the action on the case for words, which emerged in the sixteenth century.¹³³ Prior to this time, actions for harmful words were dealt with under two canon law "regimes."¹³⁴ One of these regimes was based on the texts from the *Decretum* and Justinian's *Institutes*, and the related canonistic commentary that emerged after 1140,¹³⁵ namely the canon law collections the *Decretals* (1234) of Gregory IX, also called the *Liber Extra*, the *Liber Sextus* (1298), issued by Boniface VIII, and the commentaries on these texts.¹³⁶ The other was the 1222 statute *Auctoritate dei patris*, a provincial constitution that excommunicated any person who maliciously imputed another of a crime.¹³⁷ The influence of the earlier canon law on the drafting of the provisions of the statute that took place at the Council of Oxford statute is "quite possible," according to

¹²⁸ JOHN HENRY MERRYMAN & ROGELIO PEREZ PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 6-7 (3d ed. 2007); see also NICHOLAS, *supra* note 102, at 42-43.

¹²⁹ ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* 149 (2000).

¹³⁰ But the texts within the Justinianic corpus itself were received into medieval Western Europe in the twelfth century at different times and in variants, for example the *Florentina* and the *Vulgata* manuscripts of the *Digest*. See Harry Dondorp & Elto J. H. Schrage, *The Sources of Medieval Learned Law*, in *THE CREATION OF THE IUS COMMUNE: FROM CASUS TO REGULA* 7, 13-15 (John W. Cairns & Paul J. du Plessis eds., 2010).

¹³¹ J. INST., *supra* note 115, at 4.4.6 ("nisi in contumeliam tuam pulsatus sit, tunc enim competit et tibi iniuriarum actio.").

¹³² R. H. HELMHOLZ, *SELECT CASES ON DEFAMATION TO 1600 xvii* (1985) [hereinafter HELMHOLZ, DEFAMATION] (quoting C.5 q.1 c.1) (translating "[q]ui in alterius famam publice scripturam aut uerba contumeliosa confinxerit, et repertus scripta non probauerit, flagelletur").

¹³³ See 1 R. H. HELMHOLZ, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S* 572, 590 (2004) [hereinafter HELMHOLZ, OXFORD HISTORY]; see also Van Vechten Veeder, *The History of the Law of Defamation*, in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 446, 448 (John Henry Wigmore et al. eds., 1909); Frank Carr, *The English Law of Defamation* (pt. 2), 18 L.Q. REV. 388, 393 (1902); Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052-58 (1962).

¹³⁴ HELMHOLZ, OXFORD HISTORY, *supra* note 133, at 562-72.

¹³⁵ *Id.* at 567-72.

¹³⁶ *Id.* at 94.

¹³⁷ *Id.* at 572.

Helmholz.¹³⁸ This is more likely given that a church council convoked by the Archbishop of Canterbury Stephen Langton, a man deeply learned in canon law, passed the statute.¹³⁹

This statute provided a narrower ground of action than, and was independent of, the grounds in the *Decretum*. It did not replace the earlier canon law principles, but sharpened them. The canon law texts and commentaries adopted the Roman law concept of *iniuria* as one of the ways a person might be injured, through *contumelia* (hurting the feelings of others), while the statute of *Auctoritate dei patris* confined itself strictly to the imputation of crime.¹⁴⁰

One prominent canon law commentator, Hostiensis, observed that the English ecclesiastical courts were merely fulfilling the supplementary role enjoined on them by canon law in the *Liber Extra*.¹⁴¹ Helmholz supports this by noting the operation of the two schemas in complementary ways, as evidenced by proof of *maliciose*, or malice, by the person making the imputation of crime under the statute.¹⁴² Although this involved subjective questions of motive, this malice might be constructively imputed from the nature of the words without proof of actual malice. Non-canon law legal sources also support the existence of intentionality in *inuria*. The Ordinary Gloss to one of the relevant titles in the *Code* dealing with *iniuria* (*De iniuriis*) provided for a presumption that the defendant intended *iniuria* where certain words were used that gave rise to a necessary implication of it.¹⁴³ Received principles on a judge's discretion to make a finding of *iniuria* in Roman law also had application in this context for attributing the appropriate motive of malice.¹⁴⁴

In practice, plaintiffs litigated actions for words in the ecclesiastical courts, although some were heard in the criminal courts. This trend reversed around 1500, when secular and royal courts experienced a revival in the number of defamation cases in their jurisdictions.¹⁴⁵ The reversal was brought about by a series of actions in the early 1500s that heightened the jurisdictional demarcation between the two spheres.

This jurisdictional separation was on the basis of the underlying wrongdoing being either secular or ecclesiastical. Thus, the Church was restricted to entertaining defamation cases only when the underlying matter was wholly spiritual.¹⁴⁶ There is evidence that this demarcation may have occurred in practice by the last two decades

¹³⁸ HELMHOLZ, DEFAMATION, *supra* note 132, at xvii.

¹³⁹ HELMHOLZ, OXFORD HISTORY, *supra* note 133, at 133.

¹⁴⁰ HELMHOLZ, DEFAMATION, *supra* note 132, at xix.

¹⁴¹ *Id.* at xix n.1 (citing HOSTIENSIS, LECTURA AD X 2.2.11 (Ex tenore), no. 9).

¹⁴² *Id.* at xxxii.

¹⁴³ *Id.* at xxxii n.4 (citing GLOSSA ORDINARIA AD CODEX 9.35.5 (Si non convicii) s.v. probare potes); LYNDWOOD, PROVINCIALE, 263 s.v. iniuriose).

¹⁴⁴ *Id.* at xxxii n.5 (citing DURANTIS, SPECULUM IUDICIALE, IV, tit. De iniuriis et damno dato, § Scias s.v. concipitur).

¹⁴⁵ *Id.* at xliii-xlv.

¹⁴⁶ This was how the courts interpreted the Statute of Praemunire, 16 Ric. 2 c. 5. See HELMHOLZ, DEFAMATION, *supra* note 132, at xliii.

of the fifteenth century or as early as the fourteenth century.¹⁴⁷ Although this resulted in a loss of litigation by the ecclesiastical courts to the secular courts, it did not spell the demise of ecclesiastical jurisdiction over actions for words altogether, and litigation increased, or at least remained steady, in that sphere in the end of the sixteenth century.

Despite this revival of the secular courts, prior influences remained. The forms of pleading used were borrowed from pre-1500 forms used in respect of the *Auctoritate dei patris* statute, while several cases from the early 1500s show evidence of pleadings that were copied from an ecclesiastical formulary, or precedent book.¹⁴⁸ This was accompanied by one important development in the form of pleading at canon law that was quite separate from the *Auctoritate dei patris*: that any *convicium* (vocal attack) tending to the diminution of the good fame or status of the plaintiff could be punishable by ecclesiastical sanctions.¹⁴⁹ This put the ecclesiastical courts “in the position of enforcing something like the *actio iniuriarum* of Roman law adopted by medieval canonists.”¹⁵⁰

In the local courts, defamation causes were treated the same way as physical actions, namely as trespasses, thus treating slander as one of the many ways *iniuria* might occur. This is evident in several matters in which a plaintiffs’ pleadings set out the damages in precisely the formula of the *actio iniuriarum*.¹⁵¹ The secular courts provided no remedy at all to the early cases of defamation, while the ecclesiastical courts provided the penalty of excommunication.¹⁵²

This changed when the secular courts experienced a revival in the number of defamation cases they heard after 1500 and began to offer successful claimants monetary damages.¹⁵³ In fact, a plaintiff did not have to prove actual loss suffered but merely the utterance of certain words, which, once proven to be spoken, raised a presumption that loss had been suffered.¹⁵⁴ The case was then left to the jury to ascertain the amount of that loss.¹⁵⁵ As discussed, the jury had a great deal of independence in awarding damages, but were under some restrictions.¹⁵⁶ Introducing *iniuria* as an underlying justification for damages awards ameliorates the difficulty of ascertaining legal doctrine in the context of questions of fact concerning damages awards by juries. So, while the sixteenth century witnessed an upsurge in action on the case litigation being heard in royal courts, this did not mean its cessation in ecclesiastical courts. In fact, the two canon law schemas, dealing with actions for

¹⁴⁷ HELMHOLZ, DEFAMATION, *supra* note 132, at xliii n.6 (citing Case of the Abbot of St. Alban’s, Y. B. Trin. 22 Edw. IV (1482), f. 20, pl. 47); *see also id.* at xlvii-xlix.

¹⁴⁸ *Id.* at lxxii.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at xlvi.

¹⁵¹ *Id.* at li, lii, lxv.

¹⁵² *Id.* at xiv, lxviii.

¹⁵³ MITCHELL, *supra* note 87, at 53.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See supra* Part I.

words, continued to develop doctrinally based on the Roman law notion of *iniuria*. This concept informed local courts in their treatment of defamation matters. Thus, the link between the law of proto-defamation under the canon law texts and the statute *Auctoritate dei patris* with the notion of *iniuria* continued well beyond the thirteenth century.¹⁵⁷

The influence of Roman *iniuria* must be considered alongside the related phenomenon of “multiple” damages. The *iniuria* action in Roman law was not for a fixed penalty, but for damages at large.¹⁵⁸ This delictual action was classified as penal (*ad poenam persequendam*), meaning it commonly resulted in the payment of more than compensation. This was in contrast to all other delictual actions, whether *in rem* or *in personam*, which were *ad rem persequendam*, meaning they commonly resulted in the payment of compensation only.¹⁵⁹

E. Multiple Damages in Thirteenth-Century Statutes

The main lines of debate in tracing the lineage of exemplary damages in legal history are indebted to the account of the incomparable Frederic William Maitland. On the phenomenon of exemplary damages in his seminal *History of the English Law* in chapter 8 on crime and tort, Maitland notes that it was “a favourite device” of legislators during the reign of King Edward I of “giving double or treble damages to ‘the party [ag]rieved’. . . it took the form of manyfold reparation, or penal and exemplary damages.”¹⁶⁰ The footnote to this passage makes reference to provisions from three thirteenth-century statutes.

The first is the “double damages” provision appearing in “a crude form” in the Statute of Merton states that if a male ward marries without the lord’s consent, the lord may hold the land for an additional period so as to obtain twice the value of that of which he has been deprived.¹⁶¹ The marriage gift or “marriage portion” was given with the bride, usually to the groom’s lord in the case of a ward, or the groom’s family in the case of non-ward.¹⁶² Second, is the Statute of Westminster I in which

¹⁵⁷ Ironically, as Beckerman has noted, by the time of this “receiving” of the doctrine of defamation into the common law in the sixteenth century as the action on the case for words, tort liability in trespass and case had long excluded solace for injured feelings (*solatium*) or pecuniary retribution for affronted honor, both inherent in the notion of *iniuria*. Beckerman, *supra* note 115, at 181. He therefore argues that the common-law remedies for libel and slander after the sixteenth century developed with a much different jurisprudential framework from the Roman *actio iniuriarum*. *Id.*

¹⁵⁸ NICHOLAS, *supra* note 102, at 216-17.

¹⁵⁹ *Id.* at 210.

¹⁶⁰ 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I 522 (2d ed. 1968).

¹⁶¹ Statute of Merton, 20 Hen. 3 c. 6, in 1 STATUTES OF THE REALM 1, 3 (reprt. ed. 1963) (duplice valore maritagii). On the limitations of the translations and editions of the statutes in this work, see generally THEODORE F. T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY (reprt. ed. 2013). Note that Chapter 6 provides the sole relief to the plaintiff lord; there is no additional measure of fine, amercement, or imprisonment by the King, unlike some of the other provisions discussed below.

¹⁶² For more information on the *maritagium*, see BAKER, *supra* note 52, at 310-11; 2 JOHN HUDSON, THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 871-1216, 787-91 (2012). See also THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED

“double or treble damages are lavishly distributed.”¹⁶³ These provisions will be further discussed below.¹⁶⁴ The third example is of “heavy punishment inflicted on a civil action” from the Statute of Westminster II: An action for “ravishment of ward” may lead to the perpetual imprisonment of the defendant if he does not pay for the *maritagium*.¹⁶⁵ Also relevant to the three statutes mentioned by Maitland, is a fourth statute, the Statute of Gloucester, which awarded treble damages for “waste.”¹⁶⁶ Thus, a key moment in tracing the origins of punitive damages is the thirteenth-century statutes, all of which provided for multiple “damages” in certain cases of wrongdoing.

1. Statute of Westminster I (1275)

The multiple damages provisions in the First Statute of Westminster are indeed “lavish.”¹⁶⁷ The multiple damages provisions in the earlier Statute of Merton and the later Second Statute of Westminster both relate to the phenomenon of *maritagium*, while the Statute of Gloucester’s reference to such damages is in regard to waste.¹⁶⁸ Those in the first Statute of Westminster of 1275, however, relate to a much wider range of wrongdoing.

The statute was drafted during the reign of King Edward I, shortly after his return from the Ninth Crusade and coronation the year before. His first Parliament met on April 22, 1275 at Westminster; its main work was the consideration of the Statute of Westminster I. This was drawn up, not in Latin, but in Norman French, and was passed “par le assentement des erceveskes, eveskes, abbes, priurs, contes, barons, et la communaute de la tere ileokes somons.”¹⁶⁹ Burnell may have played a leading role

GLANVILL 138 (G.D.G. Hall ed., trans., 2d ed. 2002) [hereinafter GLANVILL] (the “reasonable share” or *rationabilis partum*); 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 77 n.21 (Samuel E. Thorne trans., 1968) [hereinafter BRACTON].

¹⁶³ POLLOCK & MAITLAND, *supra* note 160, at 522; Statute of Westminster I 1275, 3 Edw. I, in 1 STATUTES OF THE REALM 26 (reprt. ed. 1963).

¹⁶⁴ See *infra* Part II.E.1.

¹⁶⁵ Statute of Westminster II 1285, 13 Edw. 1 c. 35, in 1 STATUTES OF THE REALM 88 (reprt. ed. 1963); see also POLLOCK & MAITLAND, *supra* note 160, at 522 n.1.

¹⁶⁶ Statute of Gloucester 1278, 6 Edw. 1 c. 5, in 1 STATUTES OF THE REALM 48 (reprt. ed. 1963). “Waste” was the substantial destruction or cutting down of “forests, woods, or any thickets suitable as food or lair.” HUDSON, *supra* note 162, at 409 (quoting RICHARD FITZNIGEL, *DIALOGUS DE SCACCARIO: THE DIALOGUE OF THE EXCHEQUER* 92 (Emile Amt & S.D. Church eds., trans., 2007)).

¹⁶⁷ POLLOCK & MAITLAND, *supra* note 160, at 522.

¹⁶⁸ See *id.* at 522. Compare Statute of Westminster 1285, 13 Edw. 1, in 1 THE STATUTES OF THE REALM, *supra* note 168, at 88, with Statute of Gloucester 1278, 6 Edw. 1, in 1 THE STATUTES OF THE REALM, *supra* note 169, at 48.

¹⁶⁹ SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY: FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 450 (William Stubbs, ed., 6th ed., 1874).

in this legislation, since he held the office of chancellor from September 21, 1274 until his death in 1292, and his influence on the King well attested.¹⁷⁰

Ten provisions of this statute refer to multiple damages. It is convenient to divide the possible damages into four categories based on the offense: (1) trespass against the property or goods of a religious house; (2) abuse of office by sheriffs or other local or royal officials; (3) causing loss to animals taken in a replevin action; and (4) extortion by barons or bailiffs beyond their jurisdiction.

a. Trespass Against the Property or Goods of a Religious House: Chapter 1

Chapter 1 of the Statute of Westminster I sought to prevent the abuse by uninvited guests of the charity, and welcome them as visitors to religious houses. It expresses the concept of the “peace of the Church,” which was being disturbed at this point in time.¹⁷¹ It provides that religious houses need not provide food, lodgings, or anything else to uninvited visitors unless the visitor was in dire need or the religious house agreed to provide something. Chapter 1 makes it an actionable trespass against those who cause any “door, lock, nor window, nor nothing that is shut, to be opened or broken” in a religious house, or to take away any goods or food from that religious house without consent of that house.¹⁷²

If the trespasser fails to pay compensation for the damage, that trespasser will be imprisoned by the king and fined “according to the quantity and manner of the trespass, and after as the king in his Court may think convenient.”¹⁷³ Significantly, if the religious house sues for the trespass, “damages will be awarded to them, and they shall be awarded and restored to the double.”¹⁷⁴ Further, following annual inquests by the king into such trespasses, those indicted must appear in the King’s Court.¹⁷⁵ Failure to do so made them “atteinted” and required “double damages” at the king’s suit to those who suffered damage, as well as a grievous fine. The extra fine

¹⁷⁰ MICHAEL PRESTWICH, EDWARD I 233 (1997). Alan Harding agrees, but is more circumspect:

Because he [Robert Burnell] was so constantly with Edward, there is little written evidence of his relationship with the king, or of his part in the genesis of the great administrative and legal measures of the first half of the reign. It is significant, however, that Burnell’s chancellorship coincided exactly with the period of Edwardian statute making, and no one but the chancellor could have had responsibility for instituting the series of administrative inquiries and handling the growing stream of petitions to the crown that together provided the basis for legislation in parliament.

Alan Harding, *Burnell, Robert (d. 1292)*, OXFORD DICTIONARY OF NAT’L BIOGRAPHY, <http://www.oxforddnb.com/view/article/4055> (last visited Jan. 18, 2016).

¹⁷¹ Statute of Westminster I 1275, 3 Edw. I c. 1, in 1 STATUTES OF THE REALM 26 (reprt. ed. 1963)

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* (*les damages qui il averunt eus, lor serra [regarde] e returne al double*).

¹⁷⁵ *Id.*

provided for under the first Statute of Westminster has further significance in that the Statute of Merton provided for multiple damages, but no fine.¹⁷⁶

b. Sheriffs' or Other Local or Royal Officials' Abuse of Office: Chapters 15, 19, 24, 26, 27, 30, 32

These seven provisions are royal measures taken against corrupt officials. In all of the provisions, either one or more of a fine, amercement, or other penalty accompanies the multiple damages component. Chapter 15 provides that sheriffs or other officials, among other punishments, must pay to the prisoner double any reward (i.e., bribe) wrongfully received by him for delivering a prisoner who is "replevisable."¹⁷⁷ That is, a prisoner who has paid the required surety is to be released, similar to the payment of bail. In addition, the sheriff shall pay an amercement to the king if the prisoner had paid sufficient surety.¹⁷⁸ Alternatively, that same sheriff, should he release a prisoner that is not "replevisable," "shall lose his Fee and Office for ever," or suffer three years imprisonment and "make Fine at the King's Pleasure" if the release is "contrary to the Will of his Lord."¹⁷⁹ In like manner, Chapter 26 provides that any sheriff or other king's officer, who accepts any "reward" other than their payment from the king, must pay "twice as much."¹⁸⁰ In addition, that official shall "be punished at the King's Pleasure."¹⁸¹

Chapter 19, which also deals with sheriffs, provides that a sheriff is to pay to a debtor three times what he receives from that debtor after pursuing the debtor when the debt has already been paid; likewise any other person who does so must pay such an amount.¹⁸² This provision requires the Sheriff to acquit royal debts in the Exchequer, and failure to do so means that Sheriff shall be "atteinted" and pay the plaintiff debtor "thrice as much as he had received" and "shall make Fine at the Kings Pleasure."¹⁸³ The chapter also provides that any other person, who collects royal debts and acquits them before the Exchequer, fails to acquit them and "shall render thrice so much to the Plaintiff, and make Fine in like manner."¹⁸⁴

Chapter 24 related to unlawful possession of property, including land. It provided that "double damages" were payable to a plaintiff for unlawful disseisin of freehold or anything belonging to the freehold by escheators or other officials "by colour of his Office."¹⁸⁵ It is then at the election of the disseisee (person disseised) that either

¹⁷⁶ See Statute of Merton 1235, 20 Hen. 3 c. 6, in 1 STATUTES OF THE REALM 1-11 (reprt. ed. 1963).

¹⁷⁷ Statute of Westminster I 1275, 3 Edw. I c. 15, in 1 STATUTES OF THE REALM 30 (reprt. ed. 1963). The term "replevisable" is used as the English translation of the Old French word "replivisables."

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 3 Edw. I c. 26, in 1 STATUTES OF THE REALM 33 (reprt. ed. 1963).

¹⁸¹ *Id.*

¹⁸² 3 Edw. I c. 19, in 1 STATUTES OF THE REALM 32 (reprt. ed. 1963).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 3 Edw. I c. 24, in 1 STATUTES OF THE REALM 33 (reprt. ed. 1963).

the king can commence office proceedings to amend the disseisin or the disseisee brings a writ of novel disseisin at common law. “[H]e that is attained thereof shall pay double Damages (*il rendra [les damages] <le double> a mesme le pleintif*) to the Plaintiff, and shall be grievously amerced unto the King.”¹⁸⁶

Chapter 27 required that any clerk other than a Clerk of the Justices in Eyre or a Clerk of the Justices in Eyre who took more than the specified amount for delivering “chapters” must pay triple what he took.¹⁸⁷ In addition, the official is punished with a one-year suspension.¹⁸⁸ In a similar vein, according to Chapter 30, an official must repay in triple any amounts taken by extortion.¹⁸⁹ In particular, this penalty applied to Justices Marshals, who, in addition to being “grievously punished at the King’s Pleasure,” must “pay unto [all] Complainants the treble Value (*rendra la treble de ceo qil avera issi pris*) of that they have received in such manner.”¹⁹⁰

In Chapter 32, those who “take part of the King’s Debts, or other Rewards of the King’s Creditors for to make payment of the same Debt,” must pay double that sum.¹⁹¹ Thus, those officials who took food or other things for the king’s use and, after having received payment from the king via the Exchequer, withheld it from the creditors “to their great damage, and slander of the King,” must pay double and “shall be imprisoned at the King’s Will.”¹⁹²

c. Causing Loss to Animals Taken in a Replevin Action: Chapter 17

Replevin was the “usual method of review” in the time of Edward I by which the tenant could seek to recover his chattels that had been distrained by the lord, most often an extra-judicial self-help means of enforcing the lord’s entitlement to services against the tenant.¹⁹³ The action of replevin required the lord, via the intervention of the sheriff, to restore the tenant’s goods to the tenant when the tenant gave surety to bring an action and restore the goods if he lost—that is, the impounded goods were not to be sold or exploited and should be released, when the distrained person gave pledges to appear in court.¹⁹⁴

¹⁸⁶ *Id.* Either “le double” or “al duple.” *Id.* at 33 n.7.

¹⁸⁷ 3 Edw. I c. 27, in 1 STATUTES OF THE REALM 33 (reprt. ed. 1963). Coke renders the Old French as “chapters.” EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 161 (Garland 1979) (1642). However, 1 STATUTES OF THE REALM 33 (reprt. ed. 1963) has “chapitres” and provides the English translation “Chapters.” Coke explains that, in proceedings before the Justices in Eyre, after twelve knights or free men were sworn in, “then were read to them the Chapters or Articles of their charge in writing indented, the one part whereof was delivered to them, and the other part remained with the Justices.” COKE, *supra* note 187, at 211.

¹⁸⁸ 3 Edw. I c. 27, in 1 STATUTES OF THE REALM 33 (reprt. ed. 1963).

¹⁸⁹ 3 Edw. I c. 30, in 1 STATUTES OF THE REALM 34 (reprt. ed. 1963).

¹⁹⁰ *Id.*

¹⁹¹ 3 Edw. I c. 32, in 1 STATUTES OF THE REALM 34 (reprt. ed. 1963).

¹⁹² *Id.*

¹⁹³ *Id.* at 223.

¹⁹⁴ HUDSON, *supra* note 162, at 638 (citing D. W. SUTHERLAND, THE ASSIZE OF NOVEL DISSEISIN 84 (1973)). Note that replevin was the standard method of review not just of the seigniorial use of distraint but also of the use of distraint by others, of which the most frequent

By means of Chapter 17, a plaintiff was entitled to double damages for any losses to his animals that were the subject of a replevin action. Further, the failure to deliver the animals under replevin has the consequence that the castle or fortress where the animals were chased is to be “beaten down without Recovery” and “all the Damages that the Plaintiff hath sustained in his Beasts . . . after the first Demand made by the Sheriff or Bailiff, of the beasts, shall be restored to him the double [by the Lord, or] by him that took the Beasts, if he have whereof.”¹⁹⁵ Again, other penalties could additionally apply to the imposition of multiple damages.

d. Barons or Bailiffs Committing Extortion Beyond Their Jurisdiction: Chapter 35

In Chapter 35, double damages were payable where “Great Men and their Bailiffs” and others extort payment in excess of their jurisdiction and without “especial authority.”¹⁹⁶ In addition, those liable are to be “grievously amerced to the King.”¹⁹⁷ The wrong here is the taking of legal action by these great men and bailiffs against persons in circumstances that imply usurping of royal jurisdiction, that is, “in Prejudice of the King and his Crown, and to the Damage of the People.”¹⁹⁸

These provisions in the Statute of Westminster I, dealing mostly with abuses of royal officials and delegates and interference with property such as land and goods (including animals), are significant. This is because the instances of multiple damages occur in addition to and independently of other “punitive” measures, such as imprisonment, fines, or amercement, and in addition to any compensatory damages.

2. Roman Law Influence on Thirteenth-Century Statutes

Instances of statutorily imposed penalties representing payment to the victim of a multiple of the actual loss sustained have existed in pre-Western ancient cultures for millennia. Scholarly accounts of the history of punitive damages begin with the Babylonian Code of Hammurabi of *c.* 1772 BCE, one of the oldest deciphered writings of significant length in the world. In the Code of Hammurabi, punitive damages, in the sense of multiple damages, were payable for offences, such as stealing cattle (from a temple, thirty-fold; from a freeman, ten-fold), a merchant cheating his agent (six times the amount), or a common carrier failing to deliver goods (five-fold their value).¹⁹⁹

Likewise, under the Hittite Law of 1400 BCE, one who stole a “great” bull or horse had to repay the owner multiple restitution (fifteen bulls).²⁰⁰ The Hindu Code of Manu in 200 BCE, in cases of perjury, theft, and evasion of duties payable on

type was of animals found grazing on arable land or pasture without good reason. See E-mail from Professor Paul Brand, All-Souls College, Oxford University, to Jason Taliadoros (Sept. 15, 2014) (on file with author).

¹⁹⁵ 3 Edw. I c. 17, *in* 1 STATUTES OF THE REALM 31 (reprt. ed. 1963).

¹⁹⁶ 3 Edw. I c. 35, *in* 1 STATUTES OF THE REALM 35 (reprt. ed. 1963).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES 2-3 (6th ed. 2010).

²⁰⁰ *Id.*

goods, also required multiple restitution.²⁰¹ Similarly, there is evidence that ancient Greek law provided multiple damages, as did Ptolemaic law in Egypt.²⁰²

These pre-modern “statutes” specify damages that are characterized by the following: (1) the amount of the damages are beyond mere compensation for the loss sustained; (2) the amount of damages is a fixed multiple of the loss, depending on the nature of the offence; (3) the damages are payable to the victim and so are distinct from fines or penalties payable to the ruler or a regulating or administrative body; and (4) the damages express outrage at the nature of the offence, that is, society’s disapproval of that conduct and its deterrence of such conduct in the future. Jolowicz further explains multiple damages in pre-modern laws: “The penalty is made to fit, not the amount of damage inflicted by the tort, but the nature of the tort itself. In other words, the principle of appropriateness, not . . . reparation, is the guiding one.”²⁰³

Roman law, from its very beginnings, recognized that a wrongdoer might be liable to make payments to the victim for an amount beyond the actual harm suffered. The Twelve Tables, composed in the mid-fifth-century BCE, provided several examples of multiple damages, in the form of fixed money payments, such as where a party failed to carry out a promise, or where a party was a victim of usury.²⁰⁴ This multiple restitution, Jolowicz observes, is “a strong argument for the preponderance of the idea of fittingness over that of reparation in fixing the penalties.”²⁰⁵ Roman law recognized three “great torts:” (1) *furtum*, civil theft, relating to the wrongful distribution of wealth; (2) *damnum iniuria*, “wrongful waste,” directed against the wrongful waste of wealth; and (3) *iniuria*, a not-right or a wrong, which protected personality or personhood.²⁰⁶ Each allowed for multiple damages in the delictual action.

As discussed above, these notions from classical Roman law were transmitted via Justinian’s sixth-century *Corpus Iuris Civilis* into the medieval West, including England. This delictual action was penal and commonly resulted in the payment of more than compensation.²⁰⁷ In terms of civil theft, a *furtum nec manifestum* (a thief by night or “non-manifest theft”) involved double payment, while a manifest theft or *furtum manifestum*, by day, involved a higher fourfold money payment.²⁰⁸ The victim of a theft could demand to make a search with witnesses of any premises on which he thought the goods were hidden.²⁰⁹ If the search was refused, he could exact a fourfold penalty from the occupier. If the search was allowed, and the goods were

²⁰¹ *Id.* at 228.

²⁰² H. F. Jolowicz, *The Assessment of Penalties in Primitive Law*, in *CAMBRIDGE LEGAL ESSAYS WRITTEN IN HONOUR OF AND PRESENTED TO DOCTOR BOND, PROFESSOR BUCKLAND AND PROFESSOR KENNY* 203, 205-08, 216 (Percy H. Winfield & Arnold McNair eds., 1926).

²⁰³ *Id.* at 203-22.

²⁰⁴ NICHOLAS, *supra* note 102, at 216.

²⁰⁵ Jolowicz, *supra* note 202, at 219.

²⁰⁶ Birks, *supra* note 112, at 5-6.

²⁰⁷ J. INST., *supra* note 115, at 1.5.

²⁰⁸ *Id.* at 1.5, 1.19(21).

²⁰⁹ NICHOLAS, *supra* note 102, at 212.

found, the occupier of the premises was liable to a threefold penalty even if he knew nothing of the matter.²¹⁰ The victim could also obtain a threefold penalty from the man who left the goods on the premises, but only if he did so to avoid detection.²¹¹

In terms of *damnum iniuria* or “wrongful waste,” this was dealt with in the *Digest* 9.2 on the *Lex Aquilia*, a plebiscite promulgated by a Tribune of the Plebeian, Aquilius, between 286 and 195 BCE. A text from Gaius on the *Lex Aquilia* provides that “[a]n action for double damages may be brought against a person who makes a denial.”²¹² *Digest* 9.2.23 states: “Where a slave is killed through malice [*dolo*], it is established that his owner can also bring suit under criminal process by the *Lex Cornelia [de iniuriis]*,” which punished three kinds of injury committed by violence, namely *pulsare* (beating), *verberare* (striking), and *domum introire* (forcible invasion of one’s home),²¹³ and if he proceeds under the *Lex Aquilia*, his suit under the *Lex Cornelia* will not be barred.²¹⁴ Further on, *Digest* 9.2.27 states: “If anyone castrates a boy slave, and thereby renders him more valuable, Vivianus says that the *Lex Aquilia* does not apply, but that an action can be brought for injury [*iniuriarum erit agendum*], either under the Edict of the aediles, or for fourfold damages [*in quadruplum*].”²¹⁵

F. The Reception of Iniuria and Statutory Multiple Damages into the Common Law

Maitland implies that the statutes may have been the result of influence from Roman law sources, referring to the broad categorization of actions in *Institutes* 4.6.21.²¹⁶ Maitland does not venture a firm opinion on this issue. Nor does he trace the lines of influence that might have led to this influence. Scholarship dealing with the influence of Continental legal learning on the English common law posits several sources of influence.

In the late twelfth century, the *Liber pauperum* of Master Vacarius is evidence of a school of Justinianic Roman law learning in England. The thirteenth century witnessed an expanded number of texts of this law that would have been known to clerks in the schools and who worked in ecclesiastical households. Peter Stein notes the existence of a “standard package or kit” of Justinianic law learning in England around 1200, which comprised the following: (1) Vacarius’s textbook, the *Liber pauperum*, containing epitomized excerpts of the *Code* and the *Digest*, with gloss spaces containing further excerpts from these titles; (2) the *Institutes*, with glosses, the fundamental learning textbook of Roman law; (3) titles *Digest* 50.15 and 50.17, the first a list of definitions or explanations of certain terms, the second a list of maxims or rules; (3) another work on maxims, such as the *Brocardica Dolum*; and finally (4) a work on Romano-canonical procedure, such as the *Ulpianus de edendo*

²¹⁰ *Id.*

²¹¹ *Id.* at 210; see also 2 FRANCIS DE ZULUETA, THE INSTITUTES OF GAIUS 201 (1953).

²¹² DIG. 9.2.2.1 (Gaius, On the Provincial Edict 7).

²¹³ ADOLF BERGER, ENCYCLOPAEDIC DICTIONARY OF ROMAN LAW 549 (1953) (defining “*lex Cornelia de iniuriis*”); see also J. A. C. THOMAS, TEXTBOOK OF ROMAN LAW 371 (1976).

²¹⁴ DIG. 9.2.23.9 (Ulpianus, On the Edict 18).

²¹⁵ DIG. 9.2.27.28 (Ulpianus, On the Edict 18).

²¹⁶ “Omnes autem actiones vel in simplum conceptae sunt vel in duplum vel in triplum vel in quadruplum: ulterius autem nulla actio extenditur.” J. INST. 4.6.21.

or the *Olim edebatur actio*.²¹⁷ This full kit, or a variation of it, is evidenced by a number of manuscripts from the beginning of the thirteenth century.²¹⁸

Stein also observes that a similar kit, with the addition of the *Decretales*, appears to exist around 1300 in a priory near Canterbury (Eastry).²¹⁹ This indicates that there may have been a continuous tradition from around 1200 to 1300 of such kits in circulation and use, pointing to an ongoing influence of the Roman law learning in England from the late twelfth right through the end of the thirteenth century.²²⁰ Supporting the contention that there was a school of Justinianic Roman law learning in England at or around this time, Stein also refers to the popularity of Johannes Bassianus in England around 1200, as is evident from his commentary on the *Institutes* forming the first substratum for the Vacarian *Lectura super Institutiones*; Stein even postulates that Bassianus may have been in England in the 1190s, but puts forward no evidence in support of this.²²¹

On the reception of Roman law in England, Maitland focused on Bracton. His main concern was whether Bracton was aware of the distinction between crime and tort. He concludes that Bracton did not evince a clear distinction between the two.²²² This is despite Bracton recognizing the difference between compensatory remedies and penalties:

Some personal actions arising *ex maleficio* pursue the penalty only, as the *actio furti*, some the thing and the penalty, as the action *vi bonorum raptorum*, and thus are double, since they are recuperatory [or ‘reipersecutory’, namely they result in payment of compensation only]²²³ and penal, and thus [mixed] both *in rem* and *in personam*.²²⁴

However, in explaining the assize of novel disseisin, the Bracton treatise notes that it is personal, not public, since it is only against the disseisor, but penal because it was done “wrongfully and without judgment,” and reipersecutory.²²⁵

²¹⁷ FRANCIS DE ZULUETA & PETER STEIN, *THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200* xliii (1990).

²¹⁸ *Id.*

²¹⁹ *Id.* at xliii (citing M. R. JAMES, *THE ANCIENT LIBRARIES OF CANTERBURY AND DOVER* 94-95, 106 (1903)).

²²⁰ See John S. Beckerman, *Law Writing and Law Teaching: Treatise Evidence of the Formal Teaching of Law in Late Thirteenth Century England*, in *LEARNING THE LAW: TEACHING AND THE TRANSMISSION OF ENGLISH LAW, 1150-1900*, 1, 33-50 (Jonathan A. Bush & Alain Wijffels eds., 1999) (discussing evidence of treatise/formulary literature in formal law teaching in England before 1300).

²²¹ DE ZULUETA & STEIN, *supra* note 217, at 1.

²²² POLLOCK & MAITLAND, *supra* note 160, at 523.

²²³ NICHOLAS, *supra* note 102, at 210.

²²⁴ BRACTON, *supra* note 162, at 291 (“Personales vero actiones quae nascuntur ex malificio, aliae persequuntur poenam tantum ut actio furti, aliae vero persequuntur ipsam rem et poenam sicut actio vi bonorum raptorum, et ita sint duplices eo quod sunt rei persecutoriae et poena, et ita tam in rem quam in personam.”).

²²⁵ *Id.* at 324 (“Item actio civilis cum aliquando triplex sit et quasi mixta, scilicet personalis, poenalis et rei persecutoria.”).

The action or interdict *unde vi*, according as it is double, that is, recuperatory [reipersecutory] and penal, lies for one forcibly ejected against the person who forcibly ejected him for recovering the possession of the immovable from which he was ejected [in which case it is double in the person of the ejector, as explained below in the portion on the assize of novel disseisin], [and for a penalty], in the computation of which neither death nor accident excuses the ejector.²²⁶

In sum, Bracton's treatise, for Maitland, does not recognize a clear distinction between crime and tort, because, although he is aware of both the reipersecutory and penal elements, the double action and the triple action in the assize of novel disseisin clearly mix both without explanation. Nevertheless, Bracton's treatise indicates a clear understanding of multiple damages for certain wrongdoing where mere compensation for the actual loss suffered was not adequate as a remedy.

The anonymous *Lectura super Institutiones* that is attributed to a pupil of Vacarius and of English provenance, composed several decades earlier than Bracton's treatise, also notes this difference between penal actions and compensatory actions. It notes that the reference in the *Institutes* to *alie tantum penam etc* ("Some [actions] are for a penalty only") is to the *actio doli*, which, although delictual, falls outside the category of "penal" because it is "for the plaintiff's interest."²²⁷ It also notes in respect of *Institutes* 4.18 that there is a difference between public prosecutions, which rest on the "common right," and "actions" on individual right.²²⁸ Private actions sue for pecuniary penalty, while public actions aim for corporal punishment to be carried out.²²⁹ It comments on *Institutes* 4.6.21: "Some actions are for double damages, because they lie for double from the beginning; some are not so from the beginning but become so through some later fact, such as denial of liability or a delay in the case of legacies to sacred places."²³⁰ This last reference to "double" damages is unclear as to whether it differentiates compensatory from penal actions, or compensatory awards representing a multiple of the actual damage suffered.

The commentary then goes to differentiate "aedilician actions" that are available "to penalise our act," unlike the noxal or pauperian action that lies only for the harm caused and available as a direct action; the aedilician action "arises from the owner's neglect".²³¹ On *Institutes* 4.16 the *Lectura* notes that, for knowingly leading false

²²⁶ *Id.* at 296 ("Actio vero sive interdictum unde vi secundum quod duplex est, scilicet rei restitutoria et poenalis, datur contra eum qui vi deiecit, et datur ei qui vi deiectus est ad restitutionem possessionis rei immobilis qua quis vi deiectus est. Et quo casu duplex est in persona deiectoris, secundum quod inferius dicitur in assisa novae disseisinae, et in qua nec mortalitas nec casus fortuitus liberat deiectorem.").

²²⁷ "Actio de dolo, cum sit ex maleficio, extra hanc regulam est, cum sit ad interesse." DE ZULUETA & STEIN, *supra* note 217, at 114.

²²⁸ *Id.* at 138.

²²⁹ *Id.*

²³⁰ *Id.* at 114 ("[Q]uaedam ita sunt in duplum quod ab initio sunt in duplum, quedam non ab in(itia), sed per aliquod post factum, ut per infitiationem uel per dilationem eorum que sacris locis legantur.").

²³¹ *Id.* at 125.

evidence, the pecuniary penalty “is sometimes for simple damages, sometimes for double, sometimes for triple or quadruple.”²³²

The *Lectura super Institutiones* deals with multiple penalties. For example, “when someone delivers another’s slave to the emperor, so that he should free him; there is a threefold liability to the owner and fourfold to the emperor.”²³³ Commenting specifically on the concept of *triplici*, the anonymous *Lectura* continues that this threefold liability is claimed by *condictio*, that is by a “statement of claim” in which the plaintiff details the amount and kind of money or other thing sought, his own action, and the party against whom he was claiming.²³⁴ But if the plaintiff’s claim included a larger sum than was owed to him, and he claimed fraudulently, that plaintiff was liable threefold.²³⁵ The same *Lectura* also observes of *Institutes* 4.9 that if a quadruped kills a man, 200 solidi will be paid, whereas an amount for the medical expenses is paid if the man is merely injured.²³⁶

The preceding references to the Justinianic Roman Law *Lectura* and its differentiation between compensation and penalty occur in the context of the widespread influence of *ius commune* learned law texts among literate and educated English writers. David Ibbetson also points to other texts, some of them available to Bracton and the anonymous author of the earlier *Lectura super Institutiones*, of Justinianic Roman law sources that were known in England in the thirteenth century. These include: (1) the Accursian gloss on the *Corpus iuris civilis* (known to the author of the *Lectura super Institutiones*); (2) the works of Azo, or at the very least his *Summa Codicis*, which was known to have been used by the author of Bracton; (3) the glosses on the Decretals by Bernard of Parma and the commentary of Pope Innocent IV; (4) the *Speculum iudiciale* of William Durandus; and (5) the canon law works of Hostiensis, who is believed to have spent a considerable amount of time in England in the 1230s and 1240s.²³⁷ Ibbetson also notes the availability of the *Decretum* of Gratian, together with glosses on it,²³⁸ procedural works, such as the

²³² *Id.* at 134.

²³³ *Id.* at 115 (“[U]t si seruum alienum quis principi traderet ut liberum faceret: domino namque condemnandus est in triplum, principi in quadruplum.”).

²³⁴ *Id.*

²³⁵ *Id.* at 115 (“Tripl(um) condi(c)tione ex lege iustin(iani) petunt. *conventionis lib(ello)*: dicebantur ille in quo auctor quantitatem et qualitatem pecunie petende siue alterius rei et etiam actionem suam et illum aduersus quem intenderet solebat scribere et exprimere. Si ergo maiorem quantitatem quam sibi deberetur comprehenderet, et hoc in dolo, ut reus maiores preberet sportulas. *tunc id* etc.”).

²³⁶ *Id.* at 125.

²³⁷ David Ibbetson, *Civilian and Canonist Influence on the Writ of Cessavit Per Biennium*, in *LAWS, LAWYERS AND TEXTS: STUDIES IN MEDIEVAL LEGAL HISTORY IN HONOUR OF PAUL BRAND* 91, 95 (Susanne Jenks, et al., eds., 2012).

²³⁸ Ibbetson does not say when this would be available, but we know that Vacarius composed a text on marriage in the late twelfth century (c. 1164-c. 1181) that relied on a close reading of the *Decretum*, so we can estimate it was available by then. See JASON TALIADOROS, *LAW AND THEOLOGY IN TWELFTH-CENTURY ENGLAND: THE WORKS OF MASTER VACARIUS* (C. 1115/1120-c.1200) 56-58 (2006).

Summa de Ordine iudicario of Ricardus Anglicus (1190s); and the *Summa Aurea* of William of Drogheda, which was also known to the author of Bracton.²³⁹

Some Justinianic Roman jurists spent time in England in the course of the thirteenth century, and may have left a legacy that went beyond just their texts. Bishop Stubbs mentioned the Roman civil law jurist, Francis Accursius (1225–1293), son of the famous civilian Accursius of Bologna, as possibly adding “technical consistency” to the local knowledge of custom and experience of others such as Burnell, Hengham, and Britton, in the drafting the Statute of Westminster in 1275.²⁴⁰ Edward brought Francis with him to England when returning from the crusades prior to his coronation, and Francis Accursius served as secretary to Edward I between 1273 and 1281.²⁴¹ The king invited him to Oxford, and in 1275 or 1276, he read lectures on law in the university before returning to Bologna in 1282, where he practiced law until his death.²⁴²

His most important scholarly work was a *Casus* or epitome of the *New Digest* (*Digest* 39.1-50.17).²⁴³ The documentary evidence for this life in England does not link him directly with the activities of statute- drafting,²⁴⁴ and it is likely that his engagement was for the expertise and inside knowledge that his Justinianic Roman law learning in Bologna could offer Edward in his diplomatic dealings.²⁴⁵ But, like

²³⁹ Ibbetson, *supra* note 237, at 95.

²⁴⁰ 2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND: IN ITS ORIGIN AND DEVELOPMENT* 111-12 (6th ed. 1903-1906).

²⁴¹ George L. Haskins, *Francis Accursius: A New Document*, 13 *SPECULUM* 76, 76 (1938).

²⁴² Robert C. Figueira, *Francesco Accursius*, in 1 *MEDIEVAL ITALY: AN ENCYCLOPEDIA* 744-46 (Christopher Kleinhenz ed., 2004).

²⁴³ *Id.* The NEW DIGEST was the name given to DIGEST 39.1-50.17 when the DIGEST was divided into three parts. See F. P. W. SOETERMEER, *UTRUMQUE JUS IN PECHIIS. ASPETTI DELLA PRODUZIONE LIBRARIA A BOLOGNA FRA DUE E TRECENTO [= ORBIS ACADEMICUS VII]* 254-55 (1997); see also W. Senior, *Accursius and His Son Franciscus*, 51 *L. Q. REV.* 513, 515 (1935) (observing that Francis Accursius did not write “anything of value,” but merely “some glosses to the paternal magnum opus” that were “rather a work of supererogation”).

The NEW DIGEST makes reference to double (*duplum*) damages. See *DIG.* at 39.4.1.1, 39.4.1.5, 39.4.1.6, 39.4.1.9, 39.4.1.16; 40.7.10, 40.12.18, 40.12.20, 40.12.21; 41.1.7, 44.6.3, 46.8.20, 47.2.27, 47.2.47, 47.2.49, 47.2.51, 47.2.53, 47.2.56, 47.2.69, 47.2.76, 47.2.90, 47.3.1, 47.4.1, 47.5.1, 47.6.2, 47.6.5, 47.6.6, 47.7, 47.8.1, 47.8.4, 47.9.1, 48.5.28, 48.10.32, 50.8.9.

²⁴⁴ George L. Haskins, *Three English Documents Relating to Francis Accursius*, 54 *L. Q. REV.* 87 (1938); see also George L. Haskins, *The University of Oxford and the “Ius ubique docendi,”* 56 *ENG. HIST. REV.* 281, 281 (1941).

²⁴⁵ George L. Haskins & Ernst H. Kantorowicz, *A Diplomatic Mission of Francis Accursius and His Oration before Pope Nicholas II*, 58 *ENG. HIST. REV.* 424 (1943). But Paul Brand opines:

I think we now know enough about Francis Accursius to suggest that Edward I is most likely to have used his services principally outside England, in diplomatic exchanges and perhaps also for assistance in the parlement of Paris. Certainly there is little to suggest he was consulted or involved in the drafting of English domestic legislation, whose language (even when it was Latin) would have sounded very strange and uncouth to him. There were certainly enough other English advisers around who knew

Master Vacarius a century before him, we should not be too quick in dismissing his possible influence on the court of Edward in matters separate from just diplomatic ones. Haskins noted, that Accursius was not the only Italian at the Royal Court. At about the same time in the chancery or wardrobe of the king were Stefano di San Giorgio, a disciple of the “later school of literary style and associated with those from the inner circle of Petrus de Vineia;” while, subsequent to Stefano’s departure, there is evidence that another Italian clerk was involved in royal letter drafting.²⁴⁶

It is striking that the various kinds of wrongdoing in Statute of Westminster I relate to important issues at law generally at this time, whether in Roman and canon law or local law. Abuse of office was a significant issue in canon law, which was attempting to separate individual clerics from their offices and Church property from personal property.²⁴⁷ Guardianship was also a concern in Roman law, an issue familiar to anyone who read the *Institutes* and its sections on *cura* and *tutela*.²⁴⁸ Further, the provisions on trespass to a religious house had clear resonance in canon law on the protection of church property from secular interference.²⁴⁹ All these concerns would have been matters that anyone with *ius commune* training would see as having some obvious parallels in the English context.

If we can accept that there is the strong suggestion of Justinianic Roman law influence from just before 1200 to around 1300 in England, in the form of legal treatises that were in circulation in the schools and ecclesiastical households and in the form of visiting masters from the law schools of Bologna, then the question of doctrinal influence on the multiple damages provisions in thirteenth-century statutes is no great mystery. Despite their articulation in the Norman French language that was used in the courts, the Roman law concepts of double and triple damages as applied to certain kinds of wrong were nevertheless capable of translation and application into this vernacular by means of local men trained in the laws.

some Roman law for them to have suggested the idea of multiple damages, if a Roman law source is needed.

E-mail from Paul Brand, Professor of English Legal History, All Souls College, to Jason Taliadoros (Aug. 28, 2014) (on file with author).

²⁴⁶ Haskins & Kantorowicz, *supra* note 245, at 424 n.4.

²⁴⁷ Udo Wolter, *The Officium in Medieval Ecclesiastical Law as a Prototype of Modern Administration*, in LEGISLATION AND JUSTICE, THE ORIGINS OF THE MODERN STATE IN EUROPE, THIRTEENTH TO EIGHTEENTH CENTURIES 17-36 (Antonio Padoa-Schioppa ed., 1997).

²⁴⁸ The powers of the guardian in Roman law were akin to those of a fiduciary. A guardian was a “protector and defender” of those placed in his charge. J. INST. 1.13.2. He was required to preserve the real property of the minor and restore it at the end of the guardianship. DIG. 27.9.1 (Ulpianus, On the Edict 35); *see also* GIGLIOLA VILLATA DI RENZO, LA TUTELA. INDAGINI SULLA SCUOLA DEI GLOSSATORI 271-303 (1975). This was so at canon law too. C.12 q.1 c.1. Vacarius himself had added glosses to that effect. THE LIBER PAUPERUM OF VACARIUS 185 (F. de Zulueta ed., 1927).

²⁴⁹ The phrase *appellatione remota* in canon law (X 2.28.53) (= 3 COMP. 2.19.11) was used in the context of appointment of papal judges delegate as a way of providing immediate redress for those whose property had been taken away by force. It restrained the right of the forceful takers of the property to lodge an appeal to the papal court and thereby delay justice.

G. Early English Custom as an Unlikely Source of Multiple Damages

The case for the influence of Roman law on punitive damages is strong, but does not eliminate the possible influence of local custom. As the above discussion of the provisions of the Statute of Westminster I shows, some provisions indicate the “codification” of existing custom rather than the transplantation of outside law. For example, the provisions regarding replevin do no more than codify existing custom.

Maitland—having a “bet each way”—also noted the influence of replevin as a possible precedent from English law for these multiple damages notions.²⁵⁰ Bracton referred to the action of replevin brought against a landlord who had detained or “distrained” the chattels of his tenant.²⁵¹ The chattels were returnable to the tenant through the intervention of the sheriff if and only if the tenant gave surety “by gage and safe pledges” to bring an action in the king’s Court, and make payment or return the goods if he lost.²⁵² The tenant, in this way, then sued the lord for taking the goods, and the lord “avowed” (made his claim) for the services.

The usual context for the writ of replevin was where a lord sought to recover arrears of rents and services from his tenant. Replevin was the “usual method of review” by the time of Edward I.²⁵³ Significantly, in making his avowry of the distraint of a tenant, the lord could allege that the rules for one particular tenancy included a provision for multiplication of the rent once it had not been paid on time, such as a doubling thereof.²⁵⁴

The custom of gavellet in the undated Customs of Kent²⁵⁵ and the assize rolls, and related to the tenure of gavelkind, is analogous to replevin. The *Customs of Kent* state: “Let him nine Times pay, and nine Times repay the Arrears, and Five pounds for the detention of the Rent, before he shall have his Tenement again.”²⁵⁶ We can

²⁵⁰ POLLOCK & MAITLAND, *supra* note 160, at 522.

²⁵¹ *Id.* at 523.

²⁵² *Id.* at 524.

²⁵³ *Id.* at 523. Compare BRACTON, *supra* note 162, at 439-40 n.155, with GLANVILL, *supra* note 162, at 142 (noting that the latter presumed that the chattels were still in the distrainer’s hands, while the former did not). See also BAKER, *supra* note 52, at 271-72, 70; HUDSON, *supra* note 162, at 638.

²⁵⁴ That is, “he was to double the rent the following day and treble it the third day.” Paul Brand, 1300T.59: Richard of Weston v. Prior of Bermondsey and Others (unpublished transcript and translation) (on file with the author). “1300T.5” means it is the fifty-ninth report in Paul Brand’s unpublished transcripts and translations of reports of cases (plus matching enrolments where found) belonging (or probably belonging) to Trinity term 1300. Paul Brand has noted the large number of replevin cases in the thirteenth century up to the date of 1285, beginning with a case as early as 1194. Paul A. Brand, *Legal Change in the Later Thirteenth Century: Statutory and Judicial Remodelling of the Action of Replevin*, 31 AM. J. LEGAL HIST. 43, 51-52 (1987).

²⁵⁵ *Consuetudines Cantiae*, in 1 STATUTES OF THE REALM at 223-25 (reprt. ed. 1963); see also N. Neilson, *Custom and the Common Law in Kent*, 38 HARV. L. REV. 482, 488-89 (1925) (reviewing gavellet custom in Kent).

²⁵⁶ *Consuetudines Cantiae*, in 1 STATUTES OF THE REALM 225 n.1 (reprt. ed. 1963). The words are rendered not in Old French like the rest of the statute, but in Anglo-Saxon. See POLLOCK AND MAITLAND, *supra* note 160, at 187, 271 (noting the similarity to the eleven-fold

see a clear case of influence of replevin or the gavellet on the provisions in Chapter 17 of the Statute of Westminster I of 1275.²⁵⁷

If the provisions of the Statute of Westminster I granting multiple damages were the consequence of local customs, it is surprising then that there is no widespread corroborating evidence linking replevin or gavellet with relief by way of multiple damages in terms of the Roman law concepts *duplum*, *triplum*, or *quadruplum*. This is all the more so since commentators on Edward's thirteenth-century statutes emphasize that the lord-tenant relationship was a problematic one at the time. Powicke regards the statutes of the 1270s as a response to abuses by local and royal officials of rights and liberties, especially practical difficulties within the ambit of common law such as distraint.²⁵⁸

Paul Brand regards statutes from the earlier period, the late 1230s to the late 1260s, as part of the "baronial reform" movement; but, while this may have begun as a "distinctly magnate political movement," the legal reforms enacted tended to favor tenants over their lords and therefore contrary to the interests of the magnates as a group. Brand's research was based on the unpublished and unprinted manuscript material from the plea rolls and Year Books, while Powicke's was built on printed sources.²⁵⁹

But a search of printed sources from the twelfth to fourteenth-centuries does not provide evidence of the custom linking replevin or gavellet with relief by way of multiple damages in terms of the Roman law concepts *duplum*, *triplum*, or *quadruplum*. A search of the Year Books of reported cases under the reign of Henry III (1216-1272) reveals no mention of these concepts, either in the cases before the Common Bench for the period 1268-1272, 1274-1278, or other cases of uncertain dating but occurring before 1279.²⁶⁰ Similarly, a search of the Year Books for the eyres conducted in Yorkshire in July 1268-July 1269, Northumberland in 1269, Lincolnshire in 1272, Cambridgeshire in 1272, Norfolk in 1268-1269, and Northamptonshire in 1269 reveals no results.²⁶¹ Further, a search in the reported eyre cases under the first half of the reign of Edward I (1272-1307) reveals no such evidence in the Bedfordshire eyres of 1276, Hartfordshire eyres of 1278, Cumberland eyres of 1278,²⁶² nor in the reports from the Exchequer of the Jews

payment in the Bishop of Worcester's customs in the *Domesday Book* and a nine-fold geld payable to the king in some cases).

²⁵⁷ See SCHLUETER, *supra* note 199.

²⁵⁸ F. M. POWICKE, *THE THIRTEENTH CENTURY: 1216-1307*, 355, 370 (2d ed. 1962).

²⁵⁹ Paul Brand, *The Making of English Thirteenth-Century Legislation: Some New Evidence*, in *LAW IN THE CITY: PROCEEDINGS OF THE SEVENTEENTH BRITISH LEGAL HISTORY CONFERENCE, 2005*, at 42 (Andrew Lewis et al., eds., 2007). See generally PAUL BRAND, *KINGS, BARONS AND JUSTICES: THE MAKING AND ENFORCEMENT OF LEGISLATION IN THIRTEENTH-CENTURY ENGLAND* (2003).

²⁶⁰ 1 EARLIEST ENGLISH LAW REPORTS 1-183 (Paul Brand ed., 1995).

²⁶¹ 3 EARLIEST ENGLISH LAW REPORTS 1-40 (Paul Brand ed., 2005).

²⁶² *Id.* at 41-61.

between 1272 and 1290; nor other reports from pre-1290.²⁶³ David Seipp's index of the Year Books, to both printed and manuscript versions, also returned no results.²⁶⁴

Printed select cases from the ecclesiastical courts during the reign of Edward (admittedly including only a few cases up to 1275) contain prohibition cases from 1274 and 1275, the former in which the plaintiff is adjudged to "wage his law twelve-handed," but it makes no mention of multiple damages.²⁶⁵ Other ecclesiastical cases date from 1279 and are too late for the purposes of this analysis.²⁶⁶ A large collection of cases extracted from the plea rolls of the 1220s and 1230s appear in *Bracton's Note Book*, on which G. B. Flahiff has undertaken extensive research.²⁶⁷ Yet a word search of multiple damages cognates ("dupl-", "tripl-", and "quad-") failed to find a match, again disclosing no use of the terms *duplum*, *triplum*, or *quadruplum* in those cases selected by Maitland as worthy of editing.

The Patent Rolls (or *Rotuli litterarum patentium*) are a series of administrative records compiled in the English Chancery, running from 1201 to the present day.²⁶⁸ They show no evidence of a discourse linking multiple damages and replevin for the relevant period from 1201-1278. On January 20, 1263, the Rolls note that, in respect of a notification that the king was "perturbed about the injuries, damages and violences lately committed against the church and ecclesiastical persons in the province of Canterbury," and it recorded that those found responsible "shall make

²⁶³ 4 EARLIEST ENGLISH LAW REPORTS 462-590 (Paul Brand ed., 2006).

²⁶⁴ David J. Seipp, *Medieval English Legal History: An Index and Paraphrase of Printed Year Book Reports, 1268 – 1535*, in LEGAL HISTORY: THE YEAR BOOKS, B.U. SCH. OF L. (Sept. 30, 2014, 2:07 PM), <http://www.bu.edu/law/seipp/> (finding the search terms "dupl," "tripl," "quadr," and "multipl" provided no hits that were dated before 1300).

²⁶⁵ SELECT ECCLESIASTICAL CASES FROM THE KING'S COURTS 1272-1307 1 (David Millon ed., 2009); see also David Millon, *Introduction*, in SELECT ECCLESIASTICAL CASES xiv-cxxviii (2009) (showing Selden Society volume and other publications are based on his unpublished PhD dissertation, D. Millon, Canon Law and Common Law During the Reign of Edward I (1982)).

²⁶⁶ SELECT ECCLESIASTICAL CASES, *supra* note 265, at 72-82 (discussing cases from Norfolk eyre of 1286).

²⁶⁷ See generally 1 HENRY DE BRAXTON, BRACTON'S NOTE BOOK: A COLLECTION OF CASES DECIDED IN THE KING'S COURTS DURING THE REIGN OF HENRY THE THIRD (F. W. Maitland ed., 1999); G. B. Flahiff, *The Writ of Prohibition to Court Christian in the Thirteenth Century* (pt. 1), 6 MEDIEVAL STUD. 261 (1944); G. B. Flahiff, *The Writ of Prohibition to Court Christian in the Thirteenth Century* (pt. 2), 7 MEDIAEVAL STUD. 229 (1945).

²⁶⁸ I have consulted the Rolls for the following periods: ROTULI LITTERARUM PATENTIUM IN TURRI LONDINENSI ASSERVATI (Thomas D. Hardy ed., 1835) (reviewing the Rolls for the periods 1201-1216); CALENDAR OF THE PATENT ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE [HENRY III AD 1216-1272] (1901-1913) [hereinafter LETTERS PATENT OF THE REIGN OF HENRY III] (reviewing the Rolls for the periods 1216-1232); 1 CALENDAR OF THE PATENT ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE. [EDWARD I AD 1272-1307] (1893-1901) [hereinafter CALENDARS OF PATENT ROLLS] (reviewing the Rolls for the periods 1232-1278). I used G. R. Boynton, *Calendar of Patent Rolls Search*, U. IOWA LIBR. (Oct. 1, 2014, 10:03 AM), <http://sdr.lib.uiowa.edu/patentrolls>, to search the texts and calendars after 1216 and up to 1452.

competent amends before next Sunday, upon which Letare Jerusalem is sung.”²⁶⁹ There is no evidence of multiple damages here as there was to be in the 1278 statute in clause 1 for forcible entry into religious houses. On June 25, 1256, the Rolls record that “[f]or any trespass in the forest he shall not be amerced above the same sum, on condition that he pay the damages according to a just valuation.”²⁷⁰ Again, there is no mention of multiple damages here. The rolls of parliament, the official records of the meetings of the English parliament from the reign of Edward I (1272-1307) until the reign of Henry VII (1485-1509), do not discuss multiple damages either.²⁷¹ The tentative conclusion from these absences is that there is no obvious evidence of widespread customary use of multiple damages in relation to replevin and its related action of gavelet.²⁷²

H. The Emerging Crime-Tort Distinction Between the Anglo-Saxon Period and the Late Thirteenth Century

A common and oft-cited point of origin to punitive damages is the phenomenon of compensation tariffs in Anglo-Saxon England. This discourse is difficult to separate from the discussions above relating to multiple damages and damages in respect of *iniuria*, as well as the seminal debate as to when the English common law recognized a distinction between tort and crime. Some scholars assert an unbroken line of development between modern punitive damages and the money compositions in pre-conquest England.²⁷³ An understanding of monetary compensation and feuding in pre- and post-Conquest England has undergone considerable revision in recent scholarship, however.

It was a commonplace of nineteenth-century legal history that monetary compensation overtook a feuding and vengeance culture, and that such a development set justice on its way towards its fulfilment in centralized regnal authority, public peace, and state-mandated punishment based on a moral liability received through Christian penitential tradition.²⁷⁴ Against this linear notion of evolution, recent histories emphasize instead the simultaneity of feud/vengeance, compensation, and punishment-based legal enforcement systems.²⁷⁵ Attention

²⁶⁹ 5 LETTERS PATENT OF THE REIGN OF HENRY III, *supra* note 268, at 378.

²⁷⁰ 4 LETTERS PATENT OF THE REIGN OF HENRY III, *supra* note 268, at 484.

²⁷¹ Using Boynton, *supra* note 268, I was unable to find the term “damages” in either 1-6 LETTERS PATENT OF THE REIGN OF HENRY III, *supra* note 268 or 1-2 CALENDARS OF PATENT ROLLS, *supra* note 268.

²⁷² I make no claim to undertaking a definitive search of all relevant sources, which is beyond the scope of this Article. Additional research needs to be conducted on the unprinted manuscript materials to investigate this more comprehensively.

²⁷³ See e.g., *Wise v. Teerpenning*, 2 Edm. Sel. Cas. 112, 119 (N.Y. Sup. Ct. 1849) (stating the provisions as to damages in a 1837 wrongful death statute had such similarity “with the [Anglo-Saxon] past . . . as to induce the belief that it [the Anglo-Saxon customs in seventh-century Britain requiring money compositions for wrongdoing] was in the view of our legislature”).

²⁷⁴ Valerie Allen, *When Compensation Costs an Arm and a Leg*, in CAPITAL AND CORPORAL PUNISHMENT IN ANGLO-SAXON ENGLAND 17 (Jay Paul Gates & Nicole Marafioti eds., 2014).

²⁷⁵ *Id.*

focuses on the gradual change from a system of feud in the seventh century, being the earliest date for recorded Anglo-Saxon law, to one of punishment, a change well underway by the eleventh century.

Tracing change in the historical phenomena of feud/vengeance, compensation, and punishment also has a crucial impact on accounts of when the common law first began to conceive of a conceptual differentiation between tort and crime. It is equally significant for the history of punitive damages. One aspect of this problem is to identify when the common law moved from penalizing wrongdoing by way of “money compositions” under the Anglo-Saxon kings, to one that provided for individual compensation and penalties. The former is regarded as a communal or private system characterized by tariffs and indicative of a system that does not differentiate between torts and crime. The latter is “public” in the sense of being administered by a centralized governing authority that distinguishes capital punishment and fines—that is “crimes” on the one hand and compensation for loss or “torts” on the other.

Another aspect of this issue, is at what time English law recognized crime as distinct from lesser wrongdoing that also involved personal injury, namely what we now call “torts.” The answer, is that compensation and punishment co-existed from the Anglo-Saxon period, and the distinction only became apparent by the last quarter of the thirteenth century.

1. Anglo-Saxon Money Compositions as a Precursor to Crime and Tort Laws

Anglo-Saxon customs and written laws reveal an approach to law that contained a system of monetary compensation capable of redeeming what is nowadays called crimes, including homicide and torts. The Anglo-Saxon laws evidence a “feud” system, which contained both the personal self-help remedy of vengeance by force of arms, and a system in which compensation tariffs were payable for commission of wrongs. The customary laws regarding private vengeance contained the concept of blood feud, which was based on family honor and tribal loyalty.

Although Guy Halsall insists that the term “feud” ought not apply in the context of the Middle Ages because feud applies to reciprocal violence only without the alternative of compensation, other scholars have taken a broader approach to the term.²⁷⁶ What was present in the medieval period is what many other scholars have termed feud, and what Halsall hoped to rename “customary vengeance,” describing situations in which compensation serves as an alternative to violence, with the threat of vengeance serving as motivating force for the payment of such compensation in a composition settlement.²⁷⁷

²⁷⁶ Guy Halsall, *Violence and Society in the Early Medieval West: An Introductory Survey*, in *VIOLENCE AND SOCIETY IN THE EARLY MEDIEVAL WEST* 1, 19-20 (Guy Halsall ed., 1998); cf. Paul R. Hyams, *Was There Really Such a Thing as Feud in the High Middle Ages?*, in *VENGEANCE IN THE MIDDLE AGES* 151 (Susanna A. Throop & Paul R. Hyams eds., 2010) [hereinafter Hyams, *Vengeance in the Middle Ages*] (modifying his earlier work PAUL R. HYAMS, *RANCOR AND RECONCILIATION IN MEDIEVAL ENGLAND* 33 (Barbara H. Rosenwein ed., 2003) [hereinafter HYAMS, *RANCOR AND RECONCILIATION*]); see also John G. H. Hudson, *Faide, Vengeance, Et Violence En Angleterre (ca 900-1200)*, in *LA VENGEANCE 400-1200* 341 (Dominique Barthélemy et al. eds., 2006).

²⁷⁷ Halsall, *supra* note 276, at 22.

This concept of “customary vengeance,” Halsall posits, is fairly close to what was meant by early medieval Germanic terms such as *faithu*, *faida*, and the Anglo-Saxon term *fæhðe*.²⁷⁸ Although Halsall’s narrow use of the term is valuable in drawing attention to the distinction between the role of feud as violence and the system of monetary compositions as means of resolving disputes and wrongdoing, many scholars continue to use “feud” in this early medieval context, albeit by explicitly defining what they understand by that term.²⁷⁹ This section of the Article provides an account of recent histories that have challenged existing understandings of Anglo-Saxon money compositions.

Recent histories stress that compensation and punishment co-existed with vengeance and violence in Anglo-Saxon codes. First, it is necessary to understand the Anglo-Saxon system. The three kinds of payments referred to in this Anglo-Saxon context are the *bot*, the *wergeld*, and the *wite*. Compensation payable to the victim for a non-lethal personal injury was the *bot*.²⁸⁰ Compensation paid to the victim’s kin in reparation for “emendable” homicide was his *wergeld*, payable according to the status of the man slain.²⁸¹ An amount payable as a fine to the king or to a local nobleman for breach of his peace was the *wite*.²⁸²

The earliest known law code in England, composed in the seventh century under King Aethelbert of Kent (c. 602/3), provided for monetary payments. These were in the form of a list of offenses for which compensation was payable to the victim by particular sums of money, calculated according to the social status of the offender and victim.²⁸³ There are numerous examples of multiple damages payments for certain wrongdoing, or what Daniella Fruscione terms “embryonic” examples of punitive damages.²⁸⁴ For example, Chapter 9 states that “[i]f the king is drinking at a

²⁷⁸ *Id.* at 28.

²⁷⁹ HYAMS, RANCOR AND RECONCILIATION, *supra* note 276, at 6-11, 32-33. “[F]eud is one of the main ways in which cultures formalize the working of vengeance, embody it within some patterned format, presumably in order to minimize the risks of dissolution into uncontrolled violence and chaos.” Paul R. Hyams, *Afterword: Neither Unnatural nor Wholly Negative: The Future of Medieval Vengeance*, in VENGEANCE IN THE MIDDLE AGES 203, 206 (Susanna A. Throop & Paul R. Hyams eds., 2010) [hereinafter Hyams, *Neither Unnatural nor Wholly Negative*].

²⁸⁰ HUDSON, *supra* note 162, at 198-99. For *bot* as compensation paid to the victim, see Stanley Rubin, *Bot Compensation in Anglo-Saxon Law: A Reassessment*, 17 J. LEGAL HIST. 144, 148 (1996). Not to be confused with *bot*, the *manbot* was compensation payable to a slain man’s lord, in addition to the *wergeld*. HUDSON, *supra* note 162, at 179. Although this Old English word originally meant “compensation,” it came to mean payments to God, the Church, men in general, or the king, from Alfred’s time (c. 890) onwards. In Alfred’s time it referred to payments to secular lords rather than the victim or kin. *Id.* at 198-99.

²⁸¹ HUDSON, *supra* note 162, at 179. Some forms of killing, linked to betrayal of one’s lord or concealment, were “unamendable,” that is, not able to be satisfied by payment of the *wergeld*. *Id.* at 166.

²⁸² *Id.* at 188-91.

²⁸³ LISI OLIVER, THE BEGINNINGS OF ENGLISH LAW 59-81 (2002).

²⁸⁴ *Id.* at 59-63; see also FELIX LIEBERMANN, DIE GESETZE DER ANGELSACHSEN (reprt. 1960) (1903-1916); Daniela Fruscione, *Beginnings and Legitimation of Punishment in Early Anglo-Saxon Legislation from the Seventh to the Ninth Century*, in CAPITAL AND CORPORAL

man's home, and anyone commits any evil deed there, he is to pay twofold compensation."²⁸⁵

The code has no explicit traces of corporal punishment, but in some of the circumstances for which such compensation is awarded, there is a tacit suggestion of punishment by payment. One example is the large payment for taking off someone's thumbnail.²⁸⁶ This procedure was administered "horizontally," meaning that the wrongdoer's kin was responsible for the restitution if the wrongdoer fled or escaped.²⁸⁷ In addition, the penal nature of some payments was evident: in cases of theft, a *wite* or fine was payable to the king and in cases of murder a *drihtinbeag*, containing both punishment and compensation, was payable to the king (containing both punitive and restitutive elements).²⁸⁸

The influence of Christianity is evident in the codes of Wihtred of Kent, some nine years after those of Aethelbert's laws. In place of compensatory restitution were fines, as well as corporal and capital punishments, exacted by the king, representing the first instance of the application of punishment as a top-down phenomenon.²⁸⁹ Three hundred years later, a code composed, under the West Saxon King, Alfred, witnesses "a real strategy to legitimize punishment. This starts with his long prologue, which contains the Ten Commandments and other precepts from Mosaic Law. Death penalties abound, imposed for murder, copulation with cattle, sacrifices to false gods, and even for failing to enclose a dangerous ox."²⁹⁰ Yet, the *bot* and *wergeld* were also payable in the alternative.²⁹¹

There are three uneasy and co-existent dynamics at play in these compensation systems: vengeance, compensation, and punishment. Punishment and compensation co-existed.²⁹² The place of monetary compensation within this narrative is an uneasy one, because it represents either, "limp substitute for revenge or ideologically-inflected 'progress' towards centralized law."²⁹³ But, for Fruscione, money in the form of compensation tariffs, including the fine or *wite* payable for breaking the king's peace, are crucial to both revenge and punishment: that is, a third party mediates and controls the exchange between the opposing parties by this means.²⁹⁴ The self-help justice of revenge was subject to the authority of "public approval of fair play," while compensation tariffs were exacted by regnal authority.²⁹⁵

PUNISHMENT IN ANGLO-SAXON ENGLAND 34, 35-37 (Jay Paul Gates & Nicole Marafioti eds., 2014).

²⁸⁵ OLIVER, *supra* note 283, at 62-63.

²⁸⁶ *Id.* at 72-73.

²⁸⁷ *Id.* at 66-67.

²⁸⁸ *Id.* at 64-65.

²⁸⁹ Fruscione, *supra* note 284, at 38-39.

²⁹⁰ *Id.* at 41.

²⁹¹ *Id.*

²⁹² *Id.* at 34-35.

²⁹³ Allen, *supra* note 274, at 18.

²⁹⁴ Fruscione, *supra* note 284, at 36.

²⁹⁵ Allen, *supra* note 274, at 19.

Valerie Allen characterizes vengeance and punishment as two vectors of force: vengeance tracking a horizontal line of reciprocal violence between (roughly) equal bodies (whether kin or entire communities), while punishment thrusts vertically and uni-directionally down from top (“state,” ecclesiastical, or regnal power) to bottom with a mandate of authority that preempts, at least in theory, reprisal from family and friends of the disciplined offender.²⁹⁶ The punishment that ensued, in the corporal punishment provisions in the later Anglo-Saxon codes, was a “Christianized violence” that prefigured the twelfth-century “spiritual economics” of purgatory that enabled pre-payment of a sinner’s debt to God and moved social order from a compensatory to a “disciplinary” mindset in a process that involved a “theologizing” of the law.²⁹⁷ It is a moot point whether the revenge/punishment distinction is a valid one. The line between “handing over body parts in payment” (feud-revenge) and having them taken in punishment is a fine one.²⁹⁸ For example, King Edgar’s law of talion provides for mutilations that both deter other possible offenders and save the soul of the offender by provoking suffering without death.²⁹⁹

Controversy remains as to whether these compensation tariffs were adjustable or not. Stanley Rubin argues not, claiming that where personal injury occurred, the *bot* or compensation was fixed regardless of rank, while this criterion determined the amount of one’s *wergeld*, in the case of death.³⁰⁰ Rubin, commenting on the two most important English codes because of their comprehensiveness and coverage—those of Aethelbert of Kent and Alfred of Wessex—notes that the compensation amounts were fixed relative to the *wergeld* of an ordinary freeman.³⁰¹ In contrast, Lisi Oliver infers from the incompleteness of circumstantial detail that the written tariffs constituted the maximum penalty and were therefore adjustable.³⁰² Oliver’s arguments in support of a degree of latitude in the application of the amounts, according to Allen, seems to better support the contemporary historical conditions when coinage was scarce, payment in kind was common, and the lack of precedential binding value of these customs.³⁰³ This suggestion, that the compensation payments were variable and adjustable, further reduces their definite demarcation from more modern concepts of proportionate compensation.

As T. F. T. Plucknett has shown conclusively, an important purpose of Anglo-Saxon legal proceedings was to secure pecuniary compensation, and it was not a

²⁹⁶ *Id.* at 17. Allen cites a recent study by Hyams, although it is quite different from Allen’s formulation. See Hyams, *Neither Unnatural nor Wholly Negative*, *supra* note 279, at 217-18.

²⁹⁷ Caroline Walker Bynum, *The Power in the Blood: Sacrifice, Satisfaction and Substitution in Late Medieval Soteriology*, in *THE REDEMPTION: AN INTERDISCIPLINARY SYMPOSIUM ON CHRIST AS REDEEMER* 177, 192, 198 (Stephen T. David et al. eds., 2004).

²⁹⁸ WILLIAM IAN MILLER, *EYE FOR AN EYE* 35 (2006).

²⁹⁹ Allen, *supra* note 274, at 18.

³⁰⁰ Rubin, *supra* note 280, at 146-51 (noting some exceptions for clergy and for genital damage).

³⁰¹ Rubin, *supra* note 280, at 148.

³⁰² LISI OLIVER, *THE BODY LEGAL IN BARBARIAN LAW* 50-51 (2011).

³⁰³ Allen, *supra* note 274, at 20.

large step from the *bot* to the damages of later law.³⁰⁴ Whether these Anglo-Saxon compensation tariffs of the eleventh century had influence beyond that century, particularly on the doctrine of multiple damages in the thirteenth-century statutes and law, is an issue that, to date has no clear answer. It was Maitland's view that pre-conquest tariffs did not extend beyond the twelfth century.³⁰⁵ The late Patrick Wormald was a staunch and articulate proponent of an opposing view.³⁰⁶ Wormald has few adherents to his line of argument, although many scholars judge that Maitland located the change too early.³⁰⁷ Yet evidence points to the persistence of this Anglo-Saxon system of compensation into at least the early decades of the twelfth century. As John Hudson puts it, in summary of this pre-Conquest system, "[c]ompensation and punishment co-existed, the balance between them a matter of considerable significance."³⁰⁸ For example, the *Leges Willelmi*, or *Leis Willelme*, from the early twelfth century, contains both provisions for compensation for the head of an opponent who could not be produced in court and for the wergeld payment.³⁰⁹

The concept of vengeance also persisted into the twelfth century, as the *Leges Henrici Primi* attests.³¹⁰ Moreover, this law code demonstrates that wrongs were identified as having two elements: first, the damage or loss inflicted, and second, the affront to honor, and related injured feelings, that the deed entailed.³¹¹ Interference with the free enjoyment of landholding related to interference with the free, quiet, and honorable holding of that land, implicitly amounting to an affront to honor, or *iniuria*.³¹² In both pleading formularies and local court records from the thirteenth century, money is frequently demanded not only for economic loss but also for

³⁰⁴ T. F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 370 (5th ed., 1956).

³⁰⁵ See POLLOCK & MAITLAND, *supra* note 160, at 523-24.

³⁰⁶ But Patrick Wormald argues that Maitland was "wrong" to say that late Anglo-Saxon law retained a "scheme of wer and bloodfeud, of bot and wite (blood-price . . . amendment and fine)." Compare 1 PATRICK WORMALD, *THE MAKING OF ENGLISH LAW: KING ALFRED TO THE TWELFTH CENTURY: LEGISLATION AND ITS LIMITS* 17 (1999), with POLLOCK & MAITLAND, *supra* note 160, at 448.

³⁰⁷ Naomi Hurnard, in her study of medieval homicide, observes that the end of the wergeld system occurred in the later years of King Henry I's reign. NAOMI D. HURNARD, *KING'S PARDON FOR HOMICIDE BEFORE AD 1307* 9 (1969).

³⁰⁸ HUDSON, *supra* note 162, at 178.

³⁰⁹ HYAMS, *RANCOR AND RECONCILIATION*, *supra* note 276, at 147-48; LIEBERMANN, *supra* note 284, at 492-520 (referring to *Leges Willelmi* or *Leis Willelme* or "Leges Wmi"); see also *Early English Laws: Texts*, UNIV. OF LONDON <http://www.earlyenglishlaws.ac.uk/laws/texts/leis-w11> (last visited Feb. 3, 2016).

³¹⁰ David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 64 n.28 (1996) (citing LEGES HENRICI PRIMI 261 (L.J. Downer ed. & trans., 1972)). Hudson also notes that the *Leges Henrici Primi* still required compensation by way of wergeld and *wite* for homicide, as well as circumstances requiring physical punishment. See HUDSON, *supra* note 162, at 409-410.

³¹¹ LIEBERMANN, *supra* note 284, at 282-83 (citing Beckerman, *supra* note 115, at 165-66).

³¹² Beckerman, *supra* note 115, at 169.

shame, dishonor, insult or outrage, or disparagement.³¹³ The *Leges Edwardi* shows “limited interest” in *wergelds* and their payment, but hints of payment for homicide remain.³¹⁴

2. The Distinction Between Crime and Tort

When did the English common law recognize a distinction between crime and tort? This Article will not attempt to provide a definitive response to this imponderable, but will instead lay out the nuanced considerations that scholars have marked for attention. For example, according to Paul Hyams, both the action of trespass and the appeal of felony developed by the later thirteenth century at the latest.³¹⁵ Instead of attempting to place a specific date on this change, Hyams instead traces historical developments from around 1100, when a “single undifferentiated action for all serious private secular wrongs” existed, in which there was no clear discernible difference, as we would understand it between torts and crimes.³¹⁶ This undifferentiated action appears in the anonymous *Leges Henrici Primi* (c.1100). The other chronological endpoint is the time by which the felonious appeal, or “appeal,” existed, which represented a clear distinction between crime and tort in the late thirteenth century.³¹⁷ Hyams points to five “necessary conditions” for the separation of trespass and appeal, that led to the differentiation of crime from tort.³¹⁸ It is worth setting out this gradual process in some detail, and in light of other recent scholarship.³¹⁹

First was the need for a doctrinal distinction between law and fact, illustrated by the maxim from *Digest* 3.2.11.4 that “ignorance of the law is not excusable, but ignorance of the fact is.”³²⁰ The distinction between law and fact is also indicated in the widespread use of the jury in royal courts in real property actions. These royal-court juries gave real-property verdicts based on factual issues, not legal ones. This

³¹³ *Id.* at 173-76. In the French law of the formularies the usual term is *huntage* (mod. Fr. *honte*).

³¹⁴ HUDSON, *supra* note 162, at 410 (citing *Leges Edwardi Confessoris*, EARLY ENG. LAWS 18, 12.6, <http://www.earlyenglishlaws.ac.uk/laws/texts/ecf1> (last visited Jan. 18, 2016)).

³¹⁵ Hyams, VENGEANCE IN THE MIDDLE AGES, *supra* note 276, at 159-60.

³¹⁶ *Id.* at 157.

³¹⁷ HYAMS, RANCOR AND RECONCILIATION, *supra* note 276, at 151 (citing Beckerman, *supra* note 115, at 161-81). Müller concurs that the appeal of felony in thirteenth-century England contained the requisite elements of a crime: namely, royal jurisdiction by means of the crown pleas of felonious offences (*placita coronae feloniae*) and which were handled by the king’s officials. This warranted the maximum penalty of execution by around 1200 (for robbery, rape, and manslaughter) and decision-making of guilt by lay juries, not ordeal. Overall, these appeals connoted *crimen* as “mandatory prosecution and sentencing.” WOLFGANG P. MÜLLER, THE CRIMINALIZATION OF ABORTION IN THE WEST: ITS ORIGINS IN MEDIEVAL LAW 67 (2012).

³¹⁸ HYAMS RANCOR AND RECONCILIATION, *supra* note 276, at 216-41.

³¹⁹ *Id.* at 231.

³²⁰ DIG. 3.2.11.4 (Ulpianus, On the Edict 6).

development occurred by the mid-twelfth century as a result of the inheritance of Roman law learning into the schools of England and Western Europe.³²¹

The second requirement was the recognition of the further doctrinal differentiation between crime and tort.³²² This distinction first emerged around 1166, from the reception of Justinianic Roman law in Western Europe and then England, and was recognized in an inchoate way by the Glanvill treatise (c. 1187-1189), which divided pleas between civil and criminal.³²³ The Glanvill treatise, however, when discussing the criminal pleas, included virtually all wrongs within it, including the plea of the king's peace.³²⁴ Further, as T. F. T. Plucknett has observed, Glanvill's distinction bore little relation to the state of law in his time.³²⁵ But it was Bracton's treatise composed in the mid-1220s that ensured the triumph of this distinction, defining crime as a breach of the peace, implying its public nature.³²⁶ Major crimes (often termed *crimina capitalia*) carried punishment to "life and members" (i.e., capital punishment) while minor crimes, such as trespass and replevin, carried pecuniary consequences only.³²⁷

This distinction drawn by Bracton did not settle the matter. By the late thirteenth century the authors of *Fleta* and *Britton*, both writing around 1290, took opposite lines—one adopting Bracton; the other not.³²⁸ This contrasts with the earlier distinction between crime and delict or tort that jurists in canon law and Justinianic Roman law had drawn between the twelfth and fourteenth centuries.³²⁹ The jurists of the "learned laws" articulated to a high level of abstraction by the mid-thirteenth

³²¹ Hyams, *VENGEANCE IN THE MIDDLE AGES*, *supra* note 276, at 157, 162; *see also* HYAMS, *RANCOR AND RECONCILIATION*, *supra* note 276 at 3-33 (indicating that a date around 1166 when Justinianic Roman law learning reached England, thus modifying his earlier.).

³²² Hyams, *Vengeance in the Middle Ages*, *supra* note 276, at 220.

³²³ "Placitorum aliud criminale aliud civile." GLANVILL, *supra* note 162, at i.1, 3.

³²⁴ *Id.* at i.1-4, 3-5; *see also* the editor's introduction, G.D.G. Hall, *Introduction to GLANVILL*, *supra* note 162, at i, xx, (setting out a table listing "civil" and "criminal" pleas); Charles Donahue, Jr., *The Emergence of the Crime-Tort Distinction in England*, in *CONFLICT IN MEDIEVAL EUROPE* 219-28 (Warren Brown & Piotr Górecki eds., 2003); Charles Donahue, Jr., *Relationships Among Roman Law, Common Law, and Modern Civil Law: Ius Commune, Canon Law, and Common Law in England*, 66 *TUL. L. REV.* 1745, 1751 (1992).

³²⁵ PLUCKNETT, *supra* note 304, at 422.

³²⁶ "In primis de pace domini regis et iustitia eius violate per murditores et robbatores et burgatores." BRACTON, *supra* note 162, at 327 n.115.

³²⁷ *Id.* at 334 n.118 (translating "De crimine laesae maiestatis"); *id.* at 340 n.120 (translating "De crimine homicidii et qualiter dividitur"); *id.* at 359 n.127; *see also* Hyams, *Vengeance in the Middle Ages*, *supra* note 276, at 159.

³²⁸ "[B]ecause the lives and members of men, whether to protect or to condemn when they do wrong, are in the power of kings and not of others There is also a certain penalty which is called pecuniary and which . . . is regarded as less than the least corporal punishment." 2 *FLETA*, 34-35 (H.G. Richardson & G.O. Sayles eds., trans., 1955). *FLETA* follows Bracton, while *BRITTON* does not.

³²⁹ Anne Lefebvre-Teillard, *Crime ou délit? Le droit romano -canonique à la recherche d'un critère distinctif*, in *DER EINFLUSS DER KANONISTIK AUF DIE EUROPÄISCHE RECHTSKULTUR* 37 (Orazio Condorelli et al. eds., 2012).

century differences between the two terms, based on the intention of the act, the seriousness of the consequences, and the penalty imposed on the wrongdoing.

The third criterion was the expansion of the king's peace into a national protection for all the king's subjects and all inhabitants of the realm.³³⁰ In this context, peace meant "protection" or "law." One means was by royal grants of protection by charter; thus converting wrongs done to grantees, such as religious houses, into injuries actionable as if done to the king himself.³³¹ Another means was by the proliferation of specific grants of peace.³³² A third means was by the development of the pleading of special contempts ("tickets") that brought new business into the royal courts.

These special contempts were part of the first wave of trespass writs in *quare* form, which did not mention peace at all. The crux was that men and women could seek remedies from the king for wrongs committed against them, as wrongs in breach of "the lord king's peace."³³³ Alan Harding has suggested that the development of special contempts was the impetus for the birth of the trespass writ, with its fundamental focus on breach of the king's peace.³³⁴ Hyams adds that the special contempts or "tickets," which were part of the first wave of trespass writs in *quare* form, do not mention peace at all.³³⁵ Therefore, Hyams argues, it was these private initiatives, just as much as the royal ones that led to the expansion of the king's peace.³³⁶

The fourth and fifth factors are related, and most appropriately considered together. The fourth necessary factor was the rise of the public prosecution of "crime," emerging from the Assizes of Clarendon (1166) and of Northampton (1176), which called for juries of presentment at eyre.³³⁷ Alongside this, grand juries and indictments were established in the last decades of the twelfth century, thus publicizing the king's duty to provide peace for all his subjects.³³⁸ This separated common law trespass from the appeal of felony.

But the individual's sense of his personal injury from an offense against the king's higher authority often brought about an action under the French term *trespas*—consciously excluding the words 'felony' to remove it from more formal procedures of the criminal appeal, as well as removing the risks to their own bodies of that appeal. Richard Fraher marks the beginning of an understanding of criminal law as a matter of public law, rather than private law, at canon law in the 1203

³³⁰ HYAMS, RANCOR AND RECONCILIATION, *supra* note 276, at 224-26.

³³¹ *Id.* at 224.

³³² *Id.* at 224-25.

³³³ *Id.* at 225.

³³⁴ *Id.* at 224.

³³⁵ *Id.* at 226.

³³⁶ *Id.*; cf. Alan Harding, *Introduction*, in THE ROLL OF THE SHROPSHIRE EYRE OF 1256, xlix-li (Alan Harding ed., 1981).

³³⁷ HYAMS, RANCOR AND RECONCILIATION, *supra* note 276, at 226.

³³⁸ *Id.* at 227.

decretal of Pope Innocent III that “as a matter of public utility crimes should not remain unpunished,” which was employed from the thirteenth century onwards.³³⁹

A fifth factor was common-law felonies, which were offenses in the group *felonia* considered appropriate for indictment by juries under the new assize procedure of 1176.³⁴⁰ Hyams opines that the categorization into a term of art of the word “trespass” as expressing a vernacular sense of wrong emerged in the plea rolls after 1258.³⁴¹ These were distinct from the appeal of felony (i.e., criminal law) heard in royal courts because of the exclusion of words of felony.³⁴²

Although situating the emergence of the distinction between crime and tort in the English common law in the thirteenth century, David J. Seipp argues that the distinction arose as a consequence of contingency dependent on whether the plaintiff chose to pursue his right by way of appeal of felony, indictment of felony, or indictment of trespass, which corresponds to modern notions of crime, or by the writ of trespass, which corresponds to modern notions of tort.³⁴³ The recourse to appeal of felony was punishment of a defendant’s “life and members,” i.e., capital punishment often by a death sentence, or, more frequently, corporal punishment without payment of compensation to the plaintiff.³⁴⁴ The writ of trespass alleging force of arms against the king’s peace required a defendant to make payment of compensation to the plaintiff.³⁴⁵ In addition, the courts could impose punishment by way of fine and imprisonment.³⁴⁶

Significantly, the appeals of felony or indictments of felony/trespass arose when a plaintiff sought vengeance over compensation from a defendant—such notions of vengeance replaced bloodfeuds. Royal officers pursued wrongdoers when a plaintiff feared or chose not to do so. “This conceptual distinction [between crime and tort],” Seipp observes, “is best presented as a choice, therefore, among several options available to victims of breaches of the king’s peace.”³⁴⁷ The choice was not dependent on the nature of the wrongdoing, since writs of trespass included any kind of wrong “from murder to a slap on the face to diverting water onto someone’s land,”³⁴⁸ while appeals of felony were available for any of the traditional common

³³⁹ Richard M. Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages: “rei publicae interest, ne crimina remaneant impunita,”* U. ILL. L. REV. 577, 578 (1984).

³⁴⁰ “In omnibus autem placitis de felonia solet accusatus per plegios dimitti preterquam in placito de homicidio ubi ad terrorem aliter statutum est.” GLANVILL, *supra* note 162, at xiv.1, 172.

³⁴¹ HYAMS, RANCOR AND RECONCILIATION, *supra* note 276, at 333.

³⁴² *Id.* at 231-41.

³⁴³ Seipp, *supra* note 310, at 59.

³⁴⁴ *Id.* at 61-62.

³⁴⁵ *Id.* at 61-5.

³⁴⁶ *Id.* at 77.

³⁴⁷ *Id.* at 60.

³⁴⁸ *Id.* at 68. Further, while every felony was a trespass, not every trespass amounted to a felony. In addition, writs of trespass covered the wrongdoing evident in the French language words “tort” and “malfeasance” and the Latin terms “delict” and “injury.” *Id.*

law felonies, including homicide, rape, mayhem (maiming), robbery, burglary, larceny, and arson.³⁴⁹

3. *Iniuria* as the Primary Influence on the Distinction Between Crime and Tort law

The preceding account of the crime-tort distinction largely confirms Hyams's account of an inconsistent, irregular, contingent separation of the two. But, important as his and other scholars' narratives are of this phenomenon, the notion of *iniuria* is largely absent. Despite the decline in importance of the Anglo-Saxon compensation systems, the notion of vengeance and retribution inherent in the concept of feud that was so inextricably linked to such systems of compensation tariffs did not altogether disappear. If part of vengeance was tit-for-tat retribution for affront or dishonor, such notions subsisted in the awards of damages that emerged following the clearer demarcation between the boundaries of tort and crime. How did the English common law deal with the concept of insult, hurt feelings, or shame that sometimes accompanied personal injury caused by wrongdoing?

Insult is notably absent from the modern common-law tradition, which awards compensation for damage or loss suffered, but ignores affronts to honor entirely. An important study by John S. Beckerman observes that other European legal traditions that emerged from Roman law made free use of the concept of insult or outrage, and influenced English law temporarily between around 1166 until the end of the thirteenth century, when records of compensation for wounded honor disappear.³⁵⁰

Beckerman agrees that the Anglo-Saxon forms of monetary compositions continued into the thirteenth century, particularly in local courts, in the sense that money is frequently demanded not only for economic loss, but also for shame, dishonor, insult or outrage, or disparagement.³⁵¹ This research of local court records confirms the findings of Richardson and Sayles on pleading formularies, which they viewed as part of the academic training offered lawyers and estate administrators by the Oxford *dictatores* but which had little influence on pleadings in court.³⁵² The simultaneous continuity of the Roman law concept of *iniuria* is clearly evident here.

Beckerman makes several observations from these court records from the mid- to late-thirteenth century. First, the phrases alleging dishonor appear in lawsuits involving a whole variety of wrongs from defamations to forcible injuries to breaking obligations to defaulting on transactions. "Any of these offenses could be counted a contumely, insult, affront to personal honor. Regardless of the specific circumstances of the wrongs, it is evident that the victims felt dishonored or disparaged by them."³⁵³

Second, the specimen counts from the pleading formularies usually distinguish separate amounts claimed for damage and shame, although most of the examples in the court rolls include an undifferentiated combined sum.³⁵⁴ In only a few cases does

³⁴⁹ POLLOCK & MAITLAND, *supra* note 160, at 470; *see also* Scipp, *supra* note 310, at 61.

³⁵⁰ Beckerman, *supra* note 115, at 179-181.

³⁵¹ *Id.* at 173.

³⁵² H. G. Richardson & G. O. Sayles, *Introduction, in* SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III, xciii-cxv (1941).

³⁵³ Beckerman, *supra* note 115, at 174.

³⁵⁴ *Id.* at 175.

the amount claimed for dishonor exceed the amount claimed for damage, these involving defamation or public insult, in which direct attacks on reputation led to obvious disparagement or dishonour as well as economic loss. A plea of trespass contained three distinct elements: (1) *vim (vi et armis)*³⁵⁵ et (2) *iniuriam* et (3) *damnum suum*.³⁵⁶ Dealing specifically with *iniuria*, it was the concepts of affront that Bracton had in mind when he wrote of the *actio iniuriarum* to describe the English plea of trespass. Here he consciously used the term from Roman law.³⁵⁷ These pecuniary claims for damage and dishonor in thirteenth-century local court records were related to other accusations that mixed civil and criminal elements, such as the appeal that sought damages and the trespass count that alleged felony.³⁵⁸

As the action of trespass flourished in the royal courts, the *iniuria*, or affront to honor, disappeared as an operative element in English tort law, eclipsed totally by the element of economic loss. Beckerman notes that this disappearance occurred by the end of the thirteenth century when, although trespass pleas could still serve both compensatory and penal ends, the means for doing so was by statute, which provided not only compensation, but also punitive damages and, on occasion, imprisonment for the offender.³⁵⁹ The earlier discussion of the thirteenth-century statutes establishes the significance of these enactments in providing for multiple damages, although not necessarily at the *exclusion* of the notion of *iniuria*.³⁶⁰

Beckerman reasons that the disappearance of the notion of *iniuria* was because of the changing nature of the writs of trespass by the end of the thirteenth century.³⁶¹ As documented by Plucknett and Milsom, writs of trespass early in that century almost exclusively concerned what Glanvill had termed “civil” matters, which concerned land or feudal matters.³⁶² That is, these trespass writs, on the one hand, did not deal with “criminal” matters that gave rise to felonious appeals, nor, on the other hand, did they deal with the less serious wrongdoing that we may associate with modern day torts, such as battery and assault.³⁶³

³⁵⁵ S. F. C. Milsom, *Trespass from Henry III to Edward III: More Special Writs and Conclusions* (pt. 3), 74 L.Q. REV. 561, 574 (1958).

³⁵⁶ Beckerman, *supra* note 115, at 176.

³⁵⁷ *Id.* at 176-77; BRACTON, *supra* note 162, 363.

³⁵⁸ George E. Woodbine, *Origins of the Action of Trespass*, 33 YALE L.J. 799, 801-02, n.10 (1924); *see also* Richardson & Sayles, *supra* note 352, at cxxxi-xxxii.

³⁵⁹ Beckerman, *supra* note 115, at 179 (citing PLUCKNETT, *supra* note 304, at 457); *see also* Statute of Westminster 1275, 3 Edw. 1 c. 20, in STATUTES OF THE REALM 32 (reprt. ed. 1963) (stating that a writ of trespass against poachers gave “punitive damages” to the plaintiff as well as a fine and imprisonment); Statute of Westminster 1285, 13 Edw. 1 c. 35, in STATUTES OF THE REALM 88-89 (reprt. ed. 1963) (stating that a writ of trespass gave rise to “punishment” by life imprisonment). Hudson makes a similar argument. *See* HUDSON, *supra* note 162, at 411-12.

³⁶⁰ *See supra* Part II.F.

³⁶¹ Beckerman, *supra* note 115, at 179.

³⁶² GLANVILL, *supra* note 162, at xx.

³⁶³ These types of civil disputes—land/feudal and trivial matters—were dealt with in the royal courts by means of the writs *ostensus quare* (i.e., “to show why” a deed had been done), and contained pleading that the act was done in “breach of the king’s peace” (*contra pacem*)

By the end of the thirteenth century, the forms of words *contra pacem* and *vi et armis* in these civil writs took on such artifice that nearly all non-felonious trespasses came within their remit, and the king's courts took on all of these matters. In principle, such acts were in breach of the king's "peace;" and what made it a breach of the king's peace was "the person, the place, even the season;" and so the concern here was with dishonor to the king—not the personal honor of the king's subjects.³⁶⁴ On the criminal side, as the writ *de odio et atia* taught so clearly, royal justice was not supposed to be used for purposes of private retribution.³⁶⁵ On the civil side, the king's courts provided no remedy by which subjects could vindicate personal honor, leaving the law of defamation to remain undeveloped in the common law in the fourteenth century, as a subject left to the lesser tribunals, local secular courts, and the ecclesiastical courts.³⁶⁶ Thus, Beckerman argues, it was precisely because royal jurisdiction was founded upon the idea of affront to the king's honour that, for everyone else, honor and shame ceased to be legally meaningful categories.³⁶⁷

III. CONCLUSION: *INIURIA* AS THE COMMON THREAD

The extensive meta-narrative presented in this Article suggests that Beckerman may have been somewhat preemptive in signaling the end of the conceptual influence of *iniuria* by the close of the thirteenth century as a pre-modern analogue to the exemplary, retributory, or punitive element that calls for punitive or exemplary damages in tort. The provisions in the Statute of Westminster I that call for multiple damages seem to indicate the continuity of notions of *iniuria* well into the late 1200s. Indeed, the longevity of these provisions in subsequent case law and legislation, and the appearance of multiple damages provisions in later statutes, further suggest the ongoing influence of the concept of *iniuria* and its cognates. This suggestion, of course, depends on the hypothesis that multiple damages in the statutes sprang from Roman law, and more particularly from Roman law notions of *iniuria*.

and "with force and arms" (*vi et armis*). PLUCKNETT, *supra* note 304, at 481. Such "civil" trespasses were an exclusive plea of the crown and thus outside the sheriff's competence and outside the jurisdiction of the manorial courts. *Id.* Plucknett also notes the more familiar forms of trespass: *de clauso fracto* (unlawfully entering on land), *de bonis asportatis* (taking away chattels), and assault. *Id.* at 403; *see also* S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 288 (2d ed., 1981).

³⁶⁴ Beckerman, *supra* note 115, at 180-81 (citing PLUCKNETT, *supra* note 304, at 457); *see also* MILSOM, *supra* note 363, at 286-95.

³⁶⁵ Beckerman, *supra* note 115, at 181.

³⁶⁶ By the end of the twelfth century, malicious prosecutions were seen as a sufficient problem for the royal government to provide a writ to enable a person imprisoned following an appeal to challenge the bona fides of the appeal. POLLOCK & MAITLAND, *supra* note 160, at 587-89. This was the writ *de odio et atia*; it was ostensibly directed against those who brought appeals out of "hate and spite," by expeditiously providing an inquest to investigate appeals alleged to be malicious or exaggerated: the procedure became immensely popular during King John's reign (1166-1216). *Id.*; HURNARD, *supra* note 307, at app. I; *see also* Susanne Jenks, *The Writ and the Exception de odio et atia*, 23 J. LEGAL HIST. 1 (2002) (explaining the differences between the writ *de odio et atia* and the exception *de odio et atia*).

³⁶⁷ Beckerman, *supra* note 115, at 180-81.

Law is ever backward looking. Lord Chief Justice Pratt, when deciding cases in the latter 1700s in a context when his own judicial power to determine damages swung, to some extent back, from the jury to the bench, revealing a search for doctrine by taking a long glance back to the statutes and cases of the late Middle Ages. Sayer's near-contemporaneous textbook on damages reveals a similar inclination. The thirteenth century played a longstanding and pivotal role in the future development of the common law in England. Paul Brand has commented on this century, particularly on the statutes produced under Edward I, in just such a way:

During the later Middle Ages knowledge of the major Edwardian statutes was an essential prerequisite for any practising lawyer. It seems probable that many of them possessed a book of the 'old' statutes, a large part of which contained the legislation of Edward's reign. In the fifteenth and sixteenth centuries lectures on the legislation of Edward's reign formed a core element in the educational curriculum of the Inns of Court. As late as the early seventeenth century, Edward Coke's *Second Institutes*, dealing with the older legislation which a law student would have to master, was concerned mainly with legislation of this reign. In his introduction to the *Second Institutes*, Coke became the first to describe Edward I as 'our Justinian.'³⁶⁸

The extent, nature, and duration of the influence of the "learned laws" on the common law of England is a matter that scholars will continue to debate for generations to come. This Article charts a tentative, but suggestive, pathway that the sources dictate and invites others to pursue the leads I have outlined, and make up their own minds.

³⁶⁸ Paul A. Brand, *Legal Change in the Later Thirteenth Century: Statutory and Judicial Remodelling of the Action of Replevin*, 31 AM. J. LEGAL HIST. 43, 43 n.1 (1987). The *Second Institutes* were published posthumously in 1642. Allen D. Boyer, *Coke, Sir Edward (1552–1634)*, OXFORD DICTIONARY OF NAT'L. BIOGRAPHY, <http://www.oxforddnb.com/view/article/4055> (last visited Feb. 3, 2016).