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Peine Forte et Dure: The Medieval Practice

> They'll make you do penance [peine forte et dure], oh yes indeed – / And maybe you'll never get yourself freed. / That's why it's better to come live in the woods / Than lie chained up in the Bishop's slammer. / Such a long hard penance does nobody good – / You can get out from under, why wait for the hammer?
>
> *The Outlaw's Song of Trailbaston* (fourteenth century)[1]

When an accused felon refused to plead at arraignment, the court was stuck in limbo. Without the defendant's consent to jury trial, implied in denial of guilt and a pledge to undergo jury trial, it had no other means to try the defendant. Contumacy derailed the entire system. What were they to do? In the minds of English jurists, the only *reasonable* alternative was to return the accused to prison and submit him or her to horrific treatment in order to coerce the accused into accepting the normal means of trial. Otherwise, medieval England's prisons – and there were not many of them in the early thirteenth century – would have been teeming with presumably guilty felons who chose to stand

[1] Carter Revard, ed., "*The Outlaw's Song of Trailbaston*," in Thomas Ohlgren, ed., *Medieval Outlaws: Ten Tales in Modern English* (Stroud: Sutton, 1998), 104. Although the translation takes some poetic liberties, it aligns with the meaning of the original: *E soffryr messayse e trop dure penaunce, / E par cas n'averez james delyveraunce. / Pur ce valt plus ov moi a bois demorer, / Q'en prisone le evesque fyergé gyser. / Trop est la penaunce e dure a soffrer. / Quy le mieux puet eslyre, fol est qe ne velt choyser?* Isabel Aspin, ed., *Anglo-Norman Political Songs* (Anglo-Norman Text Society, vol. IX, 1953).

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mute knowing that any plea might well lead to an ignoble end. The peine's origin story is critical to remember: while it is often depicted in histories as a method of torture or execution, it was in fact a coercive measure designed to tackle contumacy and compel cooperation with common-law procedure. The moment the defendant agreed to submit to jury trial, conditions in prison improved. The coercive nature of peine forte et dure is underscored in the legal treatises of the thirteenth century. The author of *Fleta* (*c.*1290–1300) writes that peine forte et dure will continue "until he has learnt his lesson and asks leave to acquit himself of the charge according to the law."[2] *Britton* (*c.*1291–2) states simply, "he shall be put to penance, until he be prepared to answer better."[3]

To comprehend why the English adopted peine forte et dure, it is useful to examine it against the backdrop of coexisting practices with similar aims. Coercive measures akin to peine forte et dure had a long history in medieval law. Excommunication is the prime example. A formidable weapon forged in the fires of contumacy, it was the normal sentence for those who failed to reform their behavior or comply with the church's mandates. While people today tend to think of excommunication as expulsion from the church, in the Middle Ages its reach touched all walks of Christian society. Since interaction with an excommunicate resulted in spiritual pollution and further excommunication, the ban had sweeping consequences on business relationships, families, friendships, and even lodging and dining arrangements. The excommunicate was prohibited from entering a church as well as participating in the mass or any of the other sacraments, a pressing concern if one were to take ill and be denied anointing of the sick or last rites. Legal disability extended into the secular realm. An excommunicate had no legal protections or rights and, according to some canonists, all contracts with an excommunicate were declared null and void. No one could survive long in Christian society as an excommunicate, but that was the point. Excommunication was a temporary measure meant to make life so difficult that one capitulates and willingly rejoins the Christian

[2] Henry Richardson and George Sayles, eds., *Fleta* (SS, vol. LXXII, 1953), 86.
[3] Francis Nichols, ed., *Britton: An English Translation and Notes*, 2 vols. (Washington, DC: John Byrne and Co., 1901), vol. I, 85.

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community. An excommunicate was only permitted to persist in excommunication for so long. After forty days, the church raised the stakes by mobilizing the secular arm of the law in a process known as caption to arrest and incarcerate the excommunicate (another coercive measure), until he or she assented to reconciliation.

Coercion was also a customary part of secular English law. Feudal lords had long relied upon distraint to deal with the nonperformance of services, by seizing a tenant's chattels and keeping them until performance of what was owed. This was not as extra-legal as it sounds; a lord had to obtain judgment in his own court before he might lawfully pursue this course of action.[4] Similarly, a tenant who was behind on rent sometimes discovered his or her lands seized as gage. The law prohibited the lord from profiting off the land – he was not permitted to harvest its crops, for example – and he had to be prepared to return it directly upon payment of the arrears. Coercion applied to not only a person's property, but also one's body. In the twelfth century, the Crown experimented with coercive imprisonment for securing payments into the exchequer on royal debts.[5] Similarly, incarceration as a coercive measure had a part to play in criminal pleas: as Glanvill (*c.*1187–9) observes, because felonies involve the interests of the king, an appellor is bound to prosecute. Thus, if the appellor fails to pursue the suit, he or she is immediately incarcerated and remains in prison "until he is willing to prosecute his appeal."[6]

The appeals process itself was one of the most popular forms of coercion. The Crown probably did not recognize it as such, but litigants certainly did. Victims or their families turned to the courts when they could not persuade the perpetrator into negotiation for an out-of-court settlement without the coercive power of the Crown. Despite *Glanvill*'s ominous statement above, the failure of most appellors to pursue their suits through to completion was due in large part to undocumented settlements: once faced with court-appointed damages (in civil pleas), or the looming possibility of execution (in crown pleas), arbitration and an out-of-court

[4] P&M, vol. 1, 353–4.
[5] Ralph Pugh, *Imprisonment in Medieval England* (Cambridge University Press, 1968), 5.
[6] George Hall, ed., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford: Clarendon Press, 1993), 21.

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settlement suddenly seemed much more attractive. Englishmen and women recognized the value of an appeal as a form of blackmail with a good record for success.[7]

The twelfth and thirteenth centuries saw coercive practices expand in number and application, taking on a more extensive role in the everyday practice of the law. During this period, excommunication was refined to incorporate a greater number of variations (minor, major, *latae sententiae*/automatic, anathema/permanent) in order to produce a more flexible and awe-inspiring tool, and so that the degree of exclusion involved in the pronouncement more precisely reflected the nature of the offense. In England, the Crown imported excommunication as a concept into secular law and merged it with the existing practice of outlawry. Initially, much like the Scandinavians, the English employed outlawry as a punishment. Those believed to be guilty of a felony were ousted from the protections of the law so that killing an outlaw was not considered homicide. In Richard I's reign (r. 1189–99), an outlaw's head netted its hunter a reward of five shillings, as the government subcontracted law enforcement to private body hunters. During the thirteenth century, however, outlawry transitioned in status from a punishment to a process. It became "an engine for compelling the contumacious to abide the judgment of the courts."[8] After four consecutive failures to respond to a court summons, the sheriff passed a sentence of outlawry against the absent defendant. Once again, the purpose was to strong-arm the accused. Living on the fringes of society, without any legal standing, outlaws suffered similar disabilities as excommunicates, with the added injustice of felony forfeiture, the penalty for fleeing the scene of a crime. As a result, many outlaws eventually succumbed to coercion, turning themselves in and submitting to trial in the hopes of an acquittal and resumption of a normal life.

The myriad uses of incarceration in the thirteenth century reveal just how much the English Crown had come to appreciate its utility as a coercive measure. Incarceration was implemented to address contumacy in a wide variety of forms. Fine-breakers, that is, those

[7] Daniel Klerman, "Settlement and the Decline of Private Prosecution in Thirteenth-Century England," *L&HR* 19.1 (2001): 1–65.

[8] S. F. C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 1969), 449.

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who failed to pay amercements, found themselves in jail; payment of the overdue fine led to an immediate release. The most significant extension of the practice is apparent when it comes to statutes relating to debt. The Statute of Acton Burnell (1283) saw coercive imprisonment applied to the recovery of private debts by merchants who had the foresight to oblige clients to acknowledge their obligations publicly before city officials. If the appointed date came and went without repayment, the debtor's chattels were subject to distraint; if the debtor lacked goods to distrain, the solution was imprisonment until debts were paid in full.[9] The Statute of Merchants (1285) allowed creditors to bypass distraint altogether, authorizing immediate incarceration of a delinquent debtor.[10] Finally, a statute passed in 1352 simplified the process by eliminating any need for formal registration of the debt. This was a bold move that significantly empowered creditors. As Ralph Pugh explains, this "placed the common creditor in the same position as the crown and gave him the power of imprisoning his debtor's body until the debt in dispute should have been settled."[11]

These are not, by far, the only examples of coercive measures in medieval law. The *subpoena*, a writ commanding a defendant's appearance in court on pain of imprisonment, is an obvious if late example. Even judicial torture, reintroduced into European law in the aftermath of Lateran IV (1215), was envisaged as a coercive measure. Judicial torture was not a penalty, but a tool to pressure a reluctant defendant into supplying a confession. All of these developments are the necessary framework against which the practice of peine forte et dure must be examined. It was just one coercive measure among many that emerged over the course of the thirteenth century in order to compel a reluctant defendant into acknowledging royal authority. That medieval justices understood it in this fashion is emphasized not only in the legal treatises, but also in the arraignment of Adam le Walker of Garsington in 1315, which saw the king's justices drawing a conscious connection between peine forte et dure and another coercive measure: outlawry. When Adam stood mute in response to multiple appeals of felony, justices of jail delivery announced his silence as

[9] Statute of Acton Burnell, 11 Edw. I (1283), *SR*, vol. 1, 54.
[10] Statute of Merchants, 13 Edw. I (1285), *SR*, vol. 1, 99. [11] Pugh, *Imprisonment*, 46.

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a rejection of the common law. He was thus "outlawed to the penance [peine forte et dure]."[12]

This wider context is a valuable reminder that when examining peine forte et dure in the medieval setting, it needs to be approached afresh, without any preconceptions wrought by the more widely touted example of Margaret Clitheroe, whose infamous execution does not fit the model of the usual experience of peine forte et dure. As this chapter will outline, peine forte et dure should be conceived as a broad category that includes a range of coercive measures from fasting to pressing. Inspired by ecclesiastical penology, the primary goal behind the practice was spiritual reorientation, although as our comparison of hard prison with the more normal prison experience hopes to impress, the effectiveness of the practice likely had much to do with the degree of privation. Already accustomed to a subsistence lifestyle, the poor had less to fear from peine forte et dure than did the nobleman – and as we will see, nobility was no bar to sentences of peine forte et dure. While high rank typically functioned as a waiver to bypass the normal system of law for English subjects, this was not true at all when it comes to peine forte et dure. There were numerous spectacular cases of noblemen subjected to this coercive device. Moreover, while peine forte et dure was primarily a coercive measure, there were times when jailers or the courts imposed it punitively, and towards the end of the period, justices were more likely to see it as a form of capital punishment. Nonetheless, the practice never fully shed the trappings of its coercive origins.

Prison Forte et Dure v. Peine Forte et Dure

Prison forte et dure (that is, "strong and hard prison") is usually described as being the precursor to peine forte et dure. Mention of the practice appears first in a 1275 statute that recommends its use for notorious felons who refused to plead. Because written law regularly lagged a full step behind legal practice in medieval England, there is no reason to assume that the statute's drafting necessarily signals the birth of a new practice. More likely the legislation indicates instead that members of parliament believed an existing practice needed statutory justification in order to continue. Abuse of the practice, or excessive

[12] TNA JUST 3/75, m. 34 (1315).

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reliance upon it by the king, may have prompted members of parliament to demand codification as a defensive move, as was the case with the Great Treason Statute of 1352. The specific language of the 1275 statute is edifying:

> It is provided also, that notorious felons, and which openly be of evil name, and will not put themselves in inquests of felonies, that men shall charge them with before the justices at the king's suit, [shall have] strong and hard imprisonment (*le prison forte & dure*), as they which refuse to stand to the common law of the land: But this is not to be understood of such prisoners as be taken [of] light suspicion.[13]

It is noteworthy that prison forte et dure was not originally intended for *all* those who refused jury trial, only "notorious felons, and which openly be of evil name." If this principle reflects early court practice, then England's justices who worried about the spiritual consequences of sentencing a person to death must have taken comfort knowing such an arduous torment was inflicted only on those who were guilty of some crime, if not necessarily the felony that brought the individual to court in the first place. Of course, the cautious approach dictated by this statutory provision did not last long. The court records indicate that prison forte et dure quickly came to apply to all those who stood mute.

What is absent from the statute is just as striking as what it includes. Nowhere does the legislation designate hard prison as a coercive measure intended to extract the defendant's consent to jury trial, as it was employed throughout much of the medieval period. Without this stipulation, hard prison might just as easily have been a judicially sanctioned death penalty for notorious felons. Indeed, the failure of the statute to define in even the vaguest terms what is meant by prison forte et dure has prompted notable commentary. Pollock and Maitland posited that "probably there was for many years much doubt as to the exact nature of the means that were to be employed in order to extort the requisite submission [to jury trial]."[14] The failure to identify exactly what "strong and hard prison" constituted in the minds of the legislators has left some to assume that the statute's ambiguity was purposeful, intended to grant the jailer *carte blanche*. However, it is

[13] Statute of Westminster I, 3 Edw. I, c. 12 (1275); *SR*, vol. I, 29. [14] P&M, vol. II, 651.

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more probable that this legislation held greater meaning for a medieval audience than for a modern one. The statute was not introducing prison forte et dure to English law; it was authorizing a pre-existing practice. No definition of the term was needed because its writers anticipated an audience already familiar with the practice. Furthermore, to dispel any budding suspicions that legislators framed the statute in a deliberately vague manner in order to slip judicial torture in without the king noticing, it should be clarified that this kind of imprecision was typical of the medieval English. In general, legislators and jurists preferred to name offenses and practices without explaining them. They were infinitely more concerned with procedure than with definition. As Richard Ireland observes, definitions materialized only when "lawyers attempt to hold the law, to give it form and substance," more often than not, in the midst of a legal challenge.[15]

Fixated on the wording of the statute, time and again historians have drawn a firm distinction between the "statutory penalty" of prison forte et dure, generally understood to mean spartan jail conditions and a starvation diet, and its derivative, the "nonstatutory" peine forte et dure, which added pressing with weights into the mix.[16] Yet, given the opacity of the statute and the medieval approach to legislation in general, these classifications, and the illegality implied by the descriptor "nonstatutory," are much more rigorous and distinct than the evidence would seem to support. Rather, this book adopts the standpoint that "prison forte et dure" and "peine forte et dure" should be used interchangeably to refer to a category constituting a number of discrete forms of deprivation that fluctuated depending on the nature of the alleged crime. Instead of two distinct procedures, one authorized by law, the other only by precedent, pressing was simply a more painful variation of the usual attributes of hard prison.

Nor do the records of law in practice give witness to the weighty connotations historians have attached to these two terms. While legal historians routinely use these two phrases, medieval scribes seldom

[15] Richard Ireland, "Law in Action, Law in Books: The Practicality of Medieval Theft Law," *C&C* 17.3 (2002): 310.

[16] Anthony Musson, with Edward Powell, eds., *Crime, Law and Society in the Later Middle Ages* (Manchester University Press, 2009), 142.

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did. The phrase peine forte et dure surfaces intermittently in year-book dialogues between justices and sergeants, but it does not appear even once in the 481 cases drawn from jail deliveries under examination in this study. Why, then, is peine forte et dure the label that has come to dominate legal discourse? The popularity of the phrase among legal scholars seems to derive principally from its usage in the early modern era by such prominent jurists as Edward Coke (d.1634) and William Blackstone (d.1780). At 4.78 percent (or twenty-three of 481 cases), the phrase prison forte et dure was more common in the records of medieval England's jail deliveries, but still far from routine. However, the phrase does seem to have enjoyed fame among commoners as the Middle English "hard prison." The fifteenth-century Chancery petition of John Welles, vicar of Sparsholt, provides an instructive example when he complains of being kept "in hard prison in irons, as if he were a strong felon."[17] Similarly, when Thomas Payn of Glamorgan, former secretary to John Oldcastle, complained to parliament of his continued incarceration in 1422, he explained that he had been "detained a long time in hard prison, without indictment, impeachment, or other reasonable cause, but by suspicion, without being able to respond." He thus respectfully requested to be tried by members of parliament, as the law requires.[18] In these instances, though, "hard prison" would seem to refer simply to insufferable prison conditions rather than specifically a starvation diet or pressing.

If the scribes assigned to justices of jail delivery did not label this punitive measure as either prison forte et dure or peine forte et dure, which terms did they use? In practice, they employed a range of descriptors. As the records reveal, punishment (*pœna/pena* in Latin, or *peine* in French) dominates the pool, appearing 186 times, or in 38.7 percent of the 481 cases. The term is also incorporated into diverse phrases that appear multiple times, such as "punishment according to the ordinance" (*pœnam inde ordinatam*), or the "punishment of the statute" (*ad penam statuti*). *Pena* also appears regularly as a marginal notation: scribes typically provided an abbreviated summary of the key facts of a case (county; fate of

[17] TNA C 1/64/702, Welles v. The Sheriff of Hampshire (1475 X 1485). *OED*, "strong. adj.," no. 8g. "Of a malefactor: flagrantly guilty, habitually offending. Chiefly a strong thief."

[18] TNA SC 8/24/1186 (1422).

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accused; monies owed to the king, scratched out if those monies had already been collected) in the margin of the roll so that the information might be retrieved at a glance. *Pena* regularly appears in those margins.

Jail delivery records routinely make note of a defendant sent back to prison and condemned "to the diet" (*ad dietam*): 150 of the 481 cases, or 31.2 percent, include sentences *ad dietam*. This label also appears as a common marginal notation, such as "to the diet" (*ad dietam*), or simply *dietam*.[19] The starvation diet is also the focal point of our earliest account of *prison forte et dure*, which comes from the late thirteenth-century legal treatise *Britton*.[20] In a dialogue on forgers "who will not put themselves upon their acquittal," *Britton* advises they be "put to their penance until they pray to do it." The author explains penance (*penitentia*) in the following manner:

> and let their penance be this, that they be barefooted, ungirt and bareheaded, in the worst place in the prison, upon the bare ground continually night and day, that they eat only bread made of barley or bran, and that they drink not the day they eat, nor eat the day they drink, nor drink anything but water, and that they be put in irons.[21]

Britton mentions nothing about being pressed with irons; the author remarks instead that the accused felon be "put in irons," that is, chained to the wall, a standard practice in English prisons intended to deter escapes and referenced in *The Outlaw's Song of Trailbaston*, a fourteenth-century political poem protesting the corruptions of royal justices assigned to trailbaston.[22] Jailers allowed prisoners who swore an oath promising not to escape to pay a fee known as "le sewet" in order to be relieved of their chains.[23] The fee was so widespread that only those who could not afford to pay or were suspected of plotting a jailbreak wore fetters in prison. The implication in *Britton*'s treatise is

[19] For example, see the case of Richard of Crochill of Melton, TNA JUST 3/77/2, m. 6 (1336).

[20] For the dating of *Britton*, see David Seipp, "The *Mirror of Justices*," in Jonathan Bush and Alain Wijffels, eds., *Learning the Law: Teaching and the Transmission of the Law in England, 1150–1900* (London: Hambledon, 1999), 91.

[21] Nichols, ed., *Britton*, vol. 1, 21–2.

[22] "*The Outlaw's Song of Trailbaston*," 104.

[23] Jonathan Rose, "*Feodo de Compedibus Vocato le Sewet*: The Medieval Prison 'oeconomy'," in Paul Brand, Andrew Lewis, and Paul Mitchell, eds., *Law in the City* (London: Four Courts Press, 2005), 72–94.

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that the "mute by malice" forfeited the right to have one's shackles removed even if one might afford to pay the fee for their removal.

When it comes to descriptors, penance (*penitencia*) places a close third, with 117 of the 481 cases, or, 24.3 percent. More often than not, its usage adheres to the following pattern: in 1293 when John Blanke, indicted for the homicide of Brother Robert of Brierley of Rye House, stood mute before justices of jail delivery, they ordered him returned to prison to "have his penance" (*Et habeat penitentiam*).[24] Others were "sentenced to the penance" (*adiudicatur ad penam*), returned to prison "to endure the penance" (*ad penitenciam suam duratur*), and "committed to penance" (*commitatur ad penitentiam*). Penance also held pride of place in common parlance, translated into the Norman French as *penaunce* in *The Outlaw's Song of Trailbaston*.

Why did so many different terms exist for the same practice? Scribes using distinct vocabulary were most likely trying to denote different degrees of punishment. For example, a scribe assigned to royal justices in York noted that on August 2, 1352, Justice William Basset and his associates returned Thomas of Standon, accused of receiving, theft, and of being a common thief, to prison *ad penam*.[25] Just seven months later, and only five membranes apart in the same jail delivery roll (written in the same hand), Robert of Carleton stood mute before the exact same justices at the same castle, accused of two counts of theft and of being a common thief. This time, the scribe described his sentence as the diet (*ad dietam*).[26] While I cannot say for certain why different terms were employed, presumably, Justice Basset and his associates believed different degrees of punishment were warranted because of the different allegations against them, although given the vagueness of the term *pena*, it is impossible to discover whether this was the lighter or more severe of the two sentences.

Pressing with irons may have eventually come to define peine forte et dure, but that was not the case in the medieval era. Exactly *when* pressing as a practice joined the motley crew of deprivations is not clear. Historians typically point to Bartholomew Cotton's *Historia Anglicana* for the first documented evidence of peine forte et dure.[27]

[24] TNA JUST 1/1098, m. 72d (1293). [25] TNA JUST 3/79/1, m. 9d (1352).
[26] TNA JUST 3/79/1, m. 14 (1352).
[27] First noted by Alfred Marks, *Tyburn Tree: Its History and Annals* (London: Brown, Langham and Co., 1908), 37–8.

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Cotton's chronicle relates the 1293 Norfolk trial in which fourteen Englishmen stood accused of cruelly murdering sailors from Holland and Zeeland, stealing their goods, then setting fire to their ships – as one might imagine, a nightmare for international relations and trading partnerships, necessitating a swift and harsh judicial response. Justices sentenced thirteen of the accused to hang. The fourteenth refused to submit to jury trial. He was remanded to prison *ad dietam*, with the "cheapest bread" (*vilissimo pane*) and drinking only "putrid water" (*aqua putrida*). In addition, justices declared "that he should sit naked save for a linen garment, on the bare ground, and he should be loaded with irons from the hands to the elbows, and from feet to the knees, until he should make his submission."[28] In terms of the legal record, an indictment on charges of homicide just three years before Cotton's chronicle employs the phrase "severe pressing punishment" (*gravum pena constrictus*); it seems logical to assume that this was a reference to pressing with weights.[29] The year-book summaries of the 1302 trials of John of Darley and Sir Ralph de Bloyou (or, Bloyho) provide the first overt accounts of pressing in the legal record. Indicted of various felonies, the two separately refused to submit to jury trial and eventually died in prison. When justices returned Darley to jail, they commanded him to suffer his penance, describing it as being "put in a house on the ground in his shirt, laden with as much iron as he could bear," in addition to the usual diet of alternating days on meager rations of bread and water "that came neither from fountain nor river."[30]

However, a deeper survey of chronicle materials suggests that we might be able to push the date of the practice's emergence back even further in time. Let us consider two vignettes, detailing infamous, but instructive events drawn from chronicles regarding the reigns of two of England's most well-known Angevin monarchs, father and son. When Henry II (d.1189) entered into marriage with Eleanor of Aquitaine (d.1204). he acquired additional titles, becoming also count of Poitou and duke of Aquitaine. While Henry's heavy-handed ruling style

[28] Henry Luard, ed., *Bartholomaei de Cotton, Monachi Norwicensis, Historia Anglicana* (RS, vol. xvi, 1859), 227–8.

[29] See the indictment of Philip Lauweles of Ireland, TNA JUST 1/547A, m. 6d (1290).

[30] Alfred Horwood, ed., *Year Books of the Reign of Edward the First: Years XXX and XXXI (1302–1303)* (RS, n. 31, pt. A, vol. 3, 1863), 510–11 (Seipp, 1302.200rs).

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encouraged submission in the northern part of his empire, his French subjects were vocal in their complaints about his contempt for regional traditions. His brash and domineering behavior prompted a series of noble revolts in defense of local political autonomy. In 1167, the counts and viscounts of Angoulême, March, Lusignan, Sillé, and Thouars rose up against the king, with the full and enthusiastic support of the French monarchy, with whom Henry was already engaged in open war. Henry's reaction was swift and brutal: he marched south with his army, razing towns and castles in his wake, crushing the rebel forces. While the leaders of the resistance were eventually forced into submission, even the exchange of a kiss of peace with a defeated party did not stop Henry from exacting his brutal revenge. According to the chronicle of Geoffrey de Vigeois, the Manceaux lord Robert de Seilhac bore the full brunt of the king's wrath. Henry had the rebel lord cast into prison, where he commanded that he be "cruelly clad in steel, with spare bread and little water to drink until he died."[31]

Flash forward forty-one years. Roger of Wendover relates that in 1209, soon after Innocent III's excommunication of King John (d.1216) had been pronounced but not yet formally published, the news traveled swiftly throughout the kingdom, provoking a great deal of unquiet and growing alarm. Rumors about his excommunicate state became public at Westminster during a session of the exchequer one day, at which point Geoffrey of Norwich, an exchequer official, remarked to his colleagues that beneficed clerics were taking a pronounced risk by continuing to work in John's employ. He then departed the exchequer without troubling to ask the king's permission to do so. John soon became aware of the contentious Westminster quip. Not just a little annoyed, he sent one of his men to arrest the opinionated official. He had Geoffrey shackled and jailed. After several days languishing in prison, John ordered a cope of lead placed upon the prisoner. A short time later, "[f]or want of food and crushed by the weight of the cope, he departed to the Lord."[32]

[31] Geoffrey de Vigeois, *Chronica*, in Martin Bouquet, et al., eds., *Recueil des Historiens des Gaules et de la France*, 24 vols. (Paris: Victor Palmé, 1734–1904), vol. XII, 442. Robert de Seilhac is also known as Robert de Sillé and Robert Sillet.

[32] Roger of Wendover, *Flores historiarum*, ed. Henry Hewlett, 3 vols. (RS, 1886–9), vol. II, 53. Wendover makes several errors in the retelling of this story. First, he identifies the wrong Geoffrey of Norwich, assuming that it was Geoffrey de Burgh, archdeacon of

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Neither of these chroniclers employed the term peine forte et dure; yet, that torment is exactly what these two noblemen forty-some years apart endured for their political crimes. Was the cope of lead in which Geoffrey of Norwich was dressed the very same one used by John's father on Robert de Seilhac all those years before? These events took place long before Bartholomew Cotton's account of the fourteenth rebellious sailor, confirming that the thirteenth century did not in fact witness the birth of the starvation diet and pressing as a punishment. Both Henry II and his son John reserved usage of starvation and the lead cope for their political enemies and in these two instances, it was plainly a means of execution, not a coercive measure. Henry's penchant for starving his opponents to death in prison was a trait inherited by both royal sons. Richard I and John brandished starvation as a weapon in wars on their enemies, too. Richard resorted to starvation chiefly as a vehicle for revenge. Upon returning to England after his crusade, Richard ordered one of the nobles who backed John's rebellion starved to death as punishment.[33] He similarly decreed the starvation of a man who had attempted to prevent his release from German captivity.[34]

John's approach was more politically astute: starvation as a coercive measure was his specialty. It was one among many "coercive measures

Norwich, when in fact it was Geoffrey of Norwich, justice of the Jews, who was involved in a conspiracy against the king with Robert Fitz Walter and Eustace de Vesci. Wendover also mistakenly dates the event to 1209 when it should be 1212. Despite these small inaccuracies, Painter sees no reason to doubt that the event actually took place. Sidney Painter, "Norwich's Three Geoffreys," *Speculum* 28.4 (1953): 808–13. Wilfred Warren, whose biography was intended to debunk the negative reputation of King John, sees the story as a fabrication to blacken John's name. Wilfred Warren, *King John* (London: Eyre and Spottiswoode, 1961), 12–15. The story also appears in Ralph de Coggeshall, *Chronicon Anglicanum*, ed. Joseph Stevenson (London: Longmans, 1875), 165; and in Henry Luard, ed., "Annales Prioratus de Dunstaplia (AD 1–1297)," in *Annales Monastici*, 3 vols. (London: Longmans, 1866), vol. III, 34; and Thomas Arnold, ed., *Memorials of St. Edmund's Abbey*, 2 vols. (London: Eyre and Spottiswoode, 1892), 25, although here, he is described simply as being dressed in iron (*ferro vestitus*). Marc Morris, author of *King John: Treachery, Tyranny and the Road to Magna Carta* (London: Hutchinson, 2015), mentions this episode most recently in his article "Starved to Death," *History Today* (January 29, 2016), www.historytoday.com /starved-death (accessed June 25, 2019).

[33] Ralph Turner, "England in 1215: An Authoritarian Angevin Dynasty Facing Multiple Threats," in Janet Senderowitz Loengard, ed., *Magna Carta and the England of King John* (Woodbridge: Boydell, 2010), 18.

[34] Morris, "Starved to Death."

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of a peculiarly draconian kind" he exercised in order to bring his political machinations to fruition.[35] In 1202, in an effort to pressure his rival Arthur of Brittany into ending his rebellion, he had twenty-two of Arthur's noblemen incarcerated at Corfe. When Arthur refused to capitulate or desist, John had the noblemen slowly starved to death. In 1210, he experimented with starvation as a means to compel repayment of Crown loans and incite a return to loyalty. William de Briouze, fourth lord of Bramber and once John's favorite, owed a debt of £13,000 to the Crown for the Irish honor of Limerick in northern Munster. In an effort to get him to repay it, John seized his Welsh properties; William retaliated by raising a force to retake the confiscated castles, and when that failed, he burned Leominster to the ground and fled with his troops to Ireland. In order to pressure William into returning to England, John had his wife Matilda and son (also named William) flung into the dungeon at either Windsor or Corfe. When William neglected to reappear, his wife and son withered away without food or drink. Their deaths became one of the worst atrocities of John's reign, a close second to the secretive "disappearance" of his nephew Arthur, of course. John employed similar threats against the rebel baron Oliver d'Argentan in 1215 and a few months later with William d'Aubigné, another dissident baron.[36]

What these tactics tell us is that long before hard prison made its way into legislation, English kings were experimenting with similar practices on political enemies as both a means of execution and a coercive measure. These test runs provided the English Crown the opportunity to witness the horror with which such treatment was met, ensuring the tool's effectiveness as a coercive device. At the same time, the lurid retellings in chronicles and gossip circles ensured that starvation and irons were broadly understood to be the antidote administered to those who disrespected royal authority. Experimentation of this kind is probably also the reason why parliament eventually saw fit to legislate the practice, to rein in royal enthusiasm for starvation and pressing of those the king deemed his enemies.

[35] John Maddicott, "The Oath of Marlborough, 1209: Fear, Government and Popular Allegiance in the Reign of King John," *EHR* 126.519 (2011): 312.
[36] Morris, "Starved to Death."

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Nonetheless, even after the formal appearance of pressing, there is no evidence to document the practice supplanting or even surpassing the more traditional method of the starvation diet. It seems noteworthy that there is no equivalent of the marginal notation *ad dietam* to refer to pressing with weights (perhaps something along the lines of *ad ferram?*); nor is it at all clear that *pena* or *penitencia* were meant to refer to pressing rather than simply hard prison. While 1290 marks the first documented incident of judicial pressing, long after that date the Crown issued pardons to men and women seemingly sentenced exclusively, or mainly, to a starvation diet. In April of 1357, the king pardoned Cecily, widow of John of Ridgeway, with the explanation that after forty days in a "narrow prison without food or drink," her continued survival was nothing short of a miracle.[37] A 1384 pardon issued to John atte Puttes of Bishopsden produced a similar justification: he had survived for so long on the diet it must be a miracle.[38] In 1390, the queen saw fit to intercede on behalf of Thomas Herry of Braunston, who also withstood death after enduring the peine for such a long time; he, too, was the beneficiary of the king's grace.[39] Admittedly, these examples are exceptional: royal officials did not typically leap to the conclusion of a miracle. They were more likely to finger the jailer for unlawfully and covertly assisting the condemned, as they did when William of Podmore, sentenced to undergo peine forte et dure at Stafford, December 6, 1305, was found still alive on July 15, 1306. Royal justices suspected the sheriff had improperly supplied him with food and drink.[40] What is perhaps most striking about William's case is that after seven months of incarceration, he finally agreed to jury trial and was acquitted.[41]

These instances confirm that long after authorities first experimented with pressing it had still not become routine for those sentenced to hard prison. If pressing had been imposed on any of these

[37] *CPR*, Edward III, vol. VII (1345–58), 529.

[38] *CPR*, Richard II, vol. II (1381–5), 373. The English calendar uses the term peine forte et dure; however, the Latin of the original explains that he was sentenced to the diet (*ad dietam suam poni*).

[39] *CPR*, Richard II, vol. IV (1389–92), 333.

[40] George Sayles, ed., *Select Cases in the Court of King's Bench*, 7 vols. (SS, 1936–71), vol. II, clv (also, TNA JUST 1/809, mm. 9 and 15).

[41] George Wrottesley, ed., "Extracts from the Plea Rolls, AD 1294 to AD 1307," in Wrottesley, ed., *Staffordshire Historical Collections*, vol. VII, 171.

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men and women, they could not have survived for as long as they did. The chronicler of the *Vita Edwardi Secundi* (*c.*1326) acknowledges this point specifically in relating the prison death of Sir Robert le Ewer (or Lewer) in 1322. Accused of multiple felonies, including theft and sedition, when Ewer stood mute the king's justices sentenced him to both the diet and pressing "with as great a weight of iron as his wretched body can bear," remarking that "He who survives this punishment beyond the fifth or sixth day would have strength beyond that of normal human nature."[42] Admittedly, on its own, the starvation diet was a severe enough punishment that irons only hastened an already fast-approaching death. Sixty percent of the human body is comprised of water: without replenishment, the body typically begins to fail after only three or four days. A few mouthfuls of "cloudy and stinking water" every second day would soon take its toll.[43] Therefore, when a prisoner died just four days after being returned to prison, as was the case in the 1304 death of Robert de Talonse, a London cordwainer appealed for robbery, there is no reason to believe that weights should have been a part of his hard prison experience.[44]

There is no evidence to claim that the diet was a precursor of the pressing punishment, as is usually argued.[45] That justices of jail delivery were still sentencing men and women to the diet in the fifteenth century, over two centuries after pressing came into being, is evidence of the coexistence of practices rather than a clear evolution from one to the other. At the 1425 trial of John Norham of Harldsey, a shepherd accused of murdering his wife, when he refused to plead justices assigned him to penance, "namely to the diet" (*videlicet ad dietam*).[46] Even in the late fifteenth century, suspected felons who refused to plead continued to be incarcerated *ad dietam*.[47] It seems more likely that the diet remained the most common version of hard

[42] Wendy Childs, ed., *Vita Edwardi Secundi: The Life of Edward the Second* (Oxford: Clarendon Press, 2005), 216–18.
[43] Childs, ed., *Vita Edwardi Secundi*, 216. [44] TNA JUST 3/38, m. 5 (1304).
[45] See Edward White, "Peine Forte et Dure," in his *Legal Antiquities: A Collection of Essays upon Ancient Laws and Customs* (St. Louis: Nixon-Jones Printing Co., 1913), 180.
[46] TNA JUST 3/199, m. 2d (1415).
[47] Anthony Fitzherbert, *La Graunde Abridgement* (London: John Rastell and Wynkyn de Worde, 1516), fo. 246, no. 65.

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prison assigned by the courts, but if justices were faced with hardened criminals or political upstarts, pressing was an additional strategy that might be employed.

Margaret Clitheroe survived only fifteen minutes after the weights were piled onto the door balanced on her chest. The manner and swiftness of the saint's death may have been typical by the 1580s. Thomas Smith's *De Republica Anglorum* (1583) – predating Margaret's execution by three years – dubs peine forte et dure "one of the cruellest deathes that may be." He explains it accordingly: "he is layd upon a table, and another uppon him, and another weight of stones or lead laide upon that table, while as his bodie be crushed, and his life by the violence taken from him." Only "some strong and stout hearted man" chooses a death of this nature.[48] As he explains it, this methodology bears a striking similarity to that imposed upon Saint Margaret. It would seem that this was just the beginning of perfecting the process of using the peine as a particularly sadistic form of capital punishment. By the eighteenth century, prisons installed "press rooms," devoted exclusively to carrying out the sentence. The eighteenth-century defendant was loaded with a more modest weight of 350 pounds (the 700 pounds used in Margaret's case was probably overkill), and yet it was still rare for the accused to survive more than fifteen minutes.[49] None of this resembles the medieval peine forte et dure in which an accused felon survived for days, even months at a time.[50] The inescapable conclusion is that peine forte et dure in medieval England was a different beast altogether.

How much weight was involved in the medieval practice? If the objective was to make sure that a person made weak by malnourishment and dehydration could not remove the irons, it did

[48] Thomas Smith, *De republica Anglorum: A Discourse on the Commonwealth of England*, ed. Leonard Alston (Cambridge University Press, 1906), 97.

[49] McKenzie, "'This Death'," 281–7.

[50] Thomas Bernard took four days to die: he stood mute March 17, 1316 (TNA JUST 3/30/1, m. 35), and was found dead March 21, 1316 (JUST 2/94A, m. 5). John of Flexham took nineteen days to die: he stood mute July 31, 1344 (JUST 3/130, m. 90d), and was found dead August 19, 1344 (JUST 2/195, m. 13d). John Hoveden died twenty-three days after incarceration: he stood mute August 1, 1392 (JUST 3/177, m. 87), and was found dead August 24, 1392 (JUST 2/85, m. 2d). Robert Everard took forty-two days to die: he stood mute on July 23, 1323, and died September 3, 1323 (JUST 3/115B, m. 7).

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not have to weigh more than a few pounds. The *Mirror of Justices* (*c.*1285–90) states specifically that it is an abuse of power to load a prisoner with more than twelve pounds in weight.[51] Did wardens adhere to this standard? And where on the body was that iron placed? The early modern evidence characteristically describes weights placed on a board or a door balanced on the defendant's chest. If enough weight was added to the board, it would crush the defendant's lungs, guaranteeing a quick death. But how much weight is too much? In this respect, Roderick Smith's and L. B. Lim's 1995 study of crush barriers, in which they draw an historical comparison with peine forte et dure, is instructive. The purpose of the study was to rethink safety guidelines at sports grounds. The two engineers from the University of Sheffield hoped to simulate the pressures of a crowd behind crush barriers at a sporting event in order to better understand just how much pressure a human body can safely endure. In their study, the subjects themselves operated a hydraulic jack with a hand pump and instantaneous release. Their findings are useful for our purposes. First, Smith and Lim argue that their subjects were most comfortable with flat barriers placed on the upper chest, suggesting that the addition of the board or door piled with weights might have actually helped to alleviate some of the defendant's pain. Second, the mean load of discomfort was 94 pounds of force, with a minimum of 25 pounds and a maximum of 174 pounds, experienced in 30-second increments.[52] All of this implies that if jailers adhered to the *Mirror*'s suggested twelve pounds in weight, the defendant might have been sufficiently "comfortable" (obviously a highly subjective term) to withstand the torment for some time.

Yet, balancing a board on the defendant's chest is not mentioned anywhere in the medieval evidence; therefore, it might have been a sixteenth-century innovation, as we see in the example of Margaret Clitheroe. The medieval instructions for the practice typically combined the diet with pressing: placing a board on the defendant's chest would prevent the defendant from eating or drinking, making the medieval dietary stipulations somewhat superfluous. Bartholomew Cotton described weights being loaded on the hands to the elbow

[51] William Whittaker, ed., *The Mirror of Justices* (SS, vol. VII, 1893), 160.
[52] Roderick Smith and L. Lim, "Experiments to Investigate the Level of 'Comfortable' Loads for People against Crush Barriers," *Safety Science* 18 (1995): 329–35.

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and the feet to the knees, hinting that it might in fact have been seen as a variant of a pillory which limited movement in the four limbs.[53] If jailers followed this model, presumably lifting the weights off at least one hand for occasional eating or drinking, the suspect might endure peine forte et dure for an extended period, although not without serious physical, not to mention psychological, trauma. Prolonged interruption to blood flow would eventually cause the feet and hands to fester in self-amputation, but the defendant might still live for some time in this state.

In defining hard prison, the presence or absence of irons was not the only variation. Time in prison itself was seen as part of the punishment. It is striking that the York eyre of 1293 condemned multiple mute defendants to prison sentences,[54] others simply to the penance of prison,[55] some to both.[56] Life imprisonment – described as perpetual penance (*ad penitentiam suam perpetuo*), or penance until death (*penitentia ad mortem*) – surfaces as a possibility as early as 1327.[57] Incarceration under horrific conditions may also have been a loose interpretation of hard prison. *Dure prisoun* for Brother Thomas Dunheved (d.1327) was a deep pit in which he was cast after storming Berkeley castle where Edward II (d.1327) was being held, momentarily springing him from his prison. The *Annales Paulini* report that he died pitifully there, but only after he attempted to rally the other prisoners into a massive jail-break.[58]

[53] Luard, ed., *Bartholomaei de Cotton*, 228.

[54] For example, Richard Attestede of Pickill, TNA JUST 1/1098, m. 87d (1293).

[55] See Robert of Beeston, TNA JUST 1/1098, m. 81d (1293). Note: Richard Clerk of Ormskirk (*de Oskyrk*) was sentenced to the penance of prison for a period of six months. See TNA JUST 3/79/3, m. 2d (1377).

[56] See Simon le Conestable, TNA JUST 1/1098, m. 80d (1293).

[57] A man arrested on a felony indictment was placed in the prison stocks; while so engaged, another individual rescued him and the two broke out of prison. When the first man stood next before justices on the charge of prison break, he did not stand mute; he willingly agreed to undergo jury trial. However, as an accomplice in the escape, he could not be tried until the principal had been attainted and the principal had yet to be arrested. Thus, the presiding justice declared that he would "remain in the grace of the king," and "have perpetual prison, or another penance, according to what the king wishes." YB Trin. Term, 1327, fo. 16b (Seipp 1327.096).

[58] George Aungier, ed., *Croniques de London, depuis l'an 44 Hen. III jusqu'à 17 Edw. III* (London: Camden Society 1844), 58. William Stubbs, ed., "Annales Paulini," in *Chronicles of the Reigns of Edward I and Edward II* (London: Longman and Co., 1883), vol. 1, 337.

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The conclusion to all of this is that when a suspected felon in a medieval prison was sentenced to what legal historians typically refer to as peine forte et dure, the punishment imposed did not necessarily include pressing to death. Rather, pressing belonged to a category of punishments that included also rigorous fasting, nakedness, and shackles.

Why Pressing? The Legal Historian's Perspective

Understanding why jailers decided to inflict pressing with irons and weights on their famished inmates is a question that has preoccupied legal historians for quite some time. William Blackstone was the first to propose that peine forte et dure (in his mind referring expressly to pressing with weights) was borne in error, a corruption of the scribal abbreviation for *prison*.[59] This notion has won plentiful support among legal scholars who cannot otherwise account for what they see as a transition from a starvation diet to pressing with weights. In the 2019 edition of his textbook, John Baker rehearses this venerable story, explaining that the peine derives from "a grisly misunderstanding" in which "the *prison* of the statute was inexplicably read as *peine* [that is, pain]."[60] Not only does this account conflict with the medieval evidence, cited above, in which the diet and pressing co-existed, it raises some additional concerns. First, in Anglo-Norman French "peine" does not translate to "pain," but to "penalty, penance, punishment."[61] While any one of these procedures might include pain, the ambit was much broader than corporal punishment: "penalties" at common law included amercements, "penance" sometimes referred to pilgrimage.[62] There is

[59] *Blackstone*, vol. IV, ch. 25.

[60] John Baker, *An Introduction to English Legal History*, 5th edn. (Oxford University Press, 2019), 549.

[61] John Baker, *Manual of Law French*, 2nd edn. (Aldershot: Scholar Press, 1990), 167. That "peyne" does not refer to "pain" is made clear from looking at the term in context. For example, the Statute of Winchester explains that a *peyne* will be enforced for the concealment of felonies; the context makes it clear that the *peyne* was an amercement, not corporal punishment. See "Statute of Winchester," 13 Edw. I (1285), *SR*, vol. I, 96.

[62] In Middle English, *peine* sometimes referred to physical pain; although it could just as easily refer to punishment, amercement, threats, torture, or time in purgatory; but the statutes are written in French not English. See *Middle English Dictionary* entry for "peine" (n), in "Middle English Compendium" (Ann Arbor: University of Michigan,

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little reason to suppose such a misreading led to the Crown's historic decision to torment silent defendants by piling weights upon their naked bodies.

Second, a survey of the various abbreviations used by medieval scribes helps us to assess the potential for such an error in transmission. Because of the haphazard development of abbreviations across time and space, often multiple forms existed for the same term. Looking first to the Latin, the language of record for English law, it is hard to see how a scribe could have mistaken "prison" for "punishment." English scribes were disinclined to abbreviate *prisona*. More often than not, it is spelled out in full or it crops up in the marginal notation *r' pr* (returned to prison).[63] Often, the records use instead the word *gaola* (jail). Given the evidence, a misreading of *prisona* is not likely. For punishment (*pœna*, or *pena*), English legal documents make use of *p̃*^{a}, *pe*^{a}, *p̃e*^{a}, *pen'*, *p̃na*, or for the plural (*pœnae/penae)*, *pẽ*. None of these look anything like *prisona* or its abbreviation *pr*. We see something similar when it comes to Latin abbreviations for penance (*pœnitentia,* or *penitentia*). Scribes abbreviated penance as *pñia*, *p̃n*^{a}, *p̃ẽia*, *p̃ña*, *pn̄a*, *p̃ñia*, $\overline{pnia}$, *pen*^{t}*ẽtia*, and for the plural (*pœnitentiae*), *p̃ñie*.

Law French, employed in the writing of statutes and legal treatises, also presents few opportunities for error. For prison (*prisone*), the scribes who worked for royal justices regularly spelled the word out in full (*prison, pryson*), or abbreviated it as *prison*, *p'son*, or *p'sone*. The same holds true for punishment (*peine*): at only five letters *peine* rarely appears abbreviated. It is improbable that even a poorly qualified scribe might have confused *p'son* for *peine*. Penance (*penaunce*) also leaves little room for corruption: it was usually abbreviated as *penanc̄, penaunc̄*, *penā ce*, *pen̄n̄ce*, or spelled in full as *penaunce* or *penans*. Apart from the initial letter, there is not enough overlap to point to scribal corruption as the originator of a new practice.

2018), https://quod.lib.umich.edu/m/middle-english-dictionary/dictionary/MED32728/track?counter=1&search_id=1138482 (accessed June 18, 2019).

[63] Charles Trice Martin includes no abbreviations whatsoever for *prisona*. See his *The Record Interpreter*, 2nd edn. (1892; repr. Chichester: Phillimore and Co., 1999); nor does Adrian Cappelli, *The Elements of Abbreviation in Medieval Latin Paleography* (Lawrence: University of Kansas Libraries, 1982); nor does Olaf Pluta, *Abbreviationes* (1993–2015), www.ruhr-uni-bochum.de/philosophy/projects/abbreviationes/index.html (accessed June 1, 2015).

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Abbreviations in French and Latin notwithstanding, it is even more difficult to imagine that England's small central corps of royal justices, responsible for preserving the judicial system's institutional memory, simply "forgot" the meaning of the statute. Work in the common law required a trained memory: serjeants-at-law typically memorized all of the statutes, so that they did not have to waste their time in court looking up legislation. Moreover, while standing mute was not common, justices did encounter it on a relatively regular basis. An analysis of the fourteenth-century jail delivery rolls by decade – indicating trial dates as opposed to date of crime – highlight that a small minority of defendants habitually stood mute:

TABLE 1.1 *Numbers of defendants who stood mute in fourteenth-century England by decade*

Decade	Defendants who stood mute
1300–9	75
1310–19	76
1320–9	67
1330–9	41
1340–9	74
1350–9	24
1360–9	23
1370–9	17
1380–9	18
1390–9	18

Blackstone's contention that the peine developed from a misreading of the legislation gives little credit to the institutional memory and legal literacy of England's royal justices. This hypothesis also, quite frankly, makes medieval justices seem like bumbling fools faking their way through justice – an impression that we know to be false.

Rather, pressing needs to be recognized as a conscious innovation. Both Henry Summerson and John Bellamy have proposed a hypothesis that makes good logical sense. They suggest that peine forte et dure came into existence as a coercive measure because of the need for speed. Justices of jail delivery hoped to bend an indicted felon's will

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and induce him or her to plead all while the court remained *in situ*.[64] English justices worked at breakneck speed; medieval prisons were habitually delivered in just one or two long, exhausting days of work, producing swift justice with individual trials of anywhere between fifteen and thirty minutes.[65] Pressing was part and parcel of that efficiency: the intensity of the pain produced a plea with much greater haste than did slow starvation and cramped surroundings. Indeed, the defendant might be prepared to plead before justices left town, thus helping to clear the prisons and make badly needed space available for the persistent overflow of prisoners.

Despite the inherent sensibility of this explanation, once again the evidence furnishes little support. In reality, justices were not so meticulous in their performance, driven to try each and every accused rather than simply returning the problematic cases to prison before moving on to deliver the next jail. Royal justices commonly ordered defendants returned to prison for one defect or another. The most popular deficiencies were: the nonappearance of key persons in the legal process (jurors summoned who failed to appear, an absent coroner); insufficient paperwork, especially a missing writ *de bono et malo* or indictment; incomplete process (accomplices could not be tried until the principal was sentenced or proof of the principal's outlawry was presented); and insufficient evidence (justices needed further inquiry before the trial might continue). In fact, at some deliveries, it was not at all unusual to see more prisoners returned to jail than actually tried. Perhaps the greater question to ask here is: why would royal justices feel any more sympathetic to the notorious felon who refused to plead by making sure he had access to swift justice when others did not? Again, none of this suggests that Bellamy's and Summerson's theory is incorrect; but given the evidence, it does not seem that speedy justice was their foremost concern.

A more likely explanation is that the English adopted the practice of pressing in cases where justices believed that the nature of the crime

[64] John Bellamy, *The Criminal Trial in Later Medieval England* (University of Toronto Press, 1998), 13.

[65] Ralph Pugh, "The Duration of Criminal Trials in Medieval England," in Eric Ives and Anthony Manchester, eds., *Law, Litigants and the Legal Profession* (London: RHS, 1983), 108.

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justified escalating the horrors of prison forte et dure. The fact that those who stood mute for political crimes were usually subjected to pressing in addition to the diet, lends this theory some weight. Comforts in prison existed on a continuum: while the poor made do without bedding, the well-to-do paid for a drawing room and servants. Wouldn't it be fair to assume that the same might be said of hardship in prison? It, too, existed on a continuum: fasting, denial of necessities, darkness, dampness, solitude, and discomfort due to chains or weights were all possible weapons in the war on defiance of the king's law.

Origins of Prison/Peine Forte et Dure

Norman law has traditionally been understood as England's inspiration to adopt hard prison as a coercive device.[66] The Norman customals see a very similar usage of hard prison, chiefly in instances in which a suspected felon refuses jury trial. *L'Ancienne Coutume de Normandie* recommends hard prison for up to a year and a day for an individual rumored to be guilty of murder and "communally blamed," in the hopes of persuading him to submit to jury trial.[67] The same holds true for suspected receivers of felons who decline trial by sworn inquest.[68] The one deviation is that the Normans also prescribed a year and a day of hard prison (*forte prison*) as a punishment for wives strongly suspected of heinous activity.[69]

Nevertheless, the Normans did not transmit the concept of hard prison to the English; rather the Normans and the English adopted it from the same source. It is the contention of this book that the concept was harvested from ecclesiastical soil. The church's early forays into penal enclosure as a penitential practice led to the establishment of *murus strictus* (severe imprisonment), the forerunner of England's hard prison. Indeed, it would seem to be the common progenitor of hard prison also as it appeared in royal prisons across Europe. While English historians tend to associate hard prison chiefly with England, it was used as both a tool of punishment and coercion in a number of

[66] P&M, vol. II, 648.
[67] William de Gruchy, ed., *L'Ancienne Coutume de Normandie* (Jersey: Charles le Feuvre, 1881), 167.
[68] de Gruchy, ed., *L'Ancienne Coutume*, 184–5.
[69] de Gruchy, ed., *L'Ancienne Coutume*, 182.

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European states. French letters of remission speak frequently of incarceration on a diet of bread and water for months at a time, occasionally resulting in the prisoner's early demise. The practice's penitential origins are hinted at by the Parisians' view that such a sentence was "a form of atonement, like a pilgrimage to be performed."[70] In Sweden, hard prison (*svårare fängelse*) also operated as a coercive measure. Jailers typically handcuffed suspects and hung them on the wall, administering lashes also to the most obstinate of prisoners, with the superior objective of forcing a confession.[71] Scotland also seems to have espoused a form of hard prison. In 1437, when Robert Grame was arrested for having stabbed King James I to death in conspiracy with Walter Stewart, Earl of Atholl, he was cast violently into "soore and fulle harde presune," wearing only a rough Scottish mantle.[72]

Scholars of penology have long recognized that the Catholic church's precocious experimentation with penal cloistering (*detrusio*), also referred to as "monastic exile," guided secular authorities in the eventual development of carceral theory and practice across Christendom.[73] In fact, prior to the twelfth-century English prison-building campaign, initiated by King Henry II's Assize of Clarendon (1166) and which mandated that sheriffs erect jails in every county, references to prisons in England invariably referred to either restraint within the stocks or a monastic cell.[74] At this early stage, the incarcerated were not ordinary sinners; the king's reach expanded also to include monastic space within his realm, thus many of those subjected to penal cloistering were in fact laymen accused of worldly crimes, more often than not political rebels or murderers. Confinement in a monastery was the most common form of public penance (*paenitentia publica*), so called because of the nature of the sin rather than the penance. Its

[70] Bronislaw Geremek, *The Margins of Society in Late Medieval Paris* (Cambridge University Press, 2006), 17.

[71] Heikki Pihlajamäki, "The Painful Question: The Fate of Judicial Torture in Early Modern Sweden," *L&HR* 25.3 (2007): 565.

[72] Margaret Connelly, ed., "The Dethe of the Kynge of Scotis: A New Edition," *The Scottish Historical Review* 71.191/192, parts 1&2 (1992): 67.

[73] Mayke de Jong, "Monastic Prisoners, or Opting Out? Political Coercion and Honour in the Frankish Kingdoms," in Mayke de Jong, Frans Theuws, and Carine van Rhijn, eds., *Topographies of Power in the Early Middle Ages* (Leiden: Brill, 2001), 293.

[74] Pugh, *Imprisonment*, 1.

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purpose was in part punitive: sin is an affront to God's majesty, therefore, punishment in one form or another as compensation for that offense is compulsory. However, the ultimate goal was spiritual conversion. The monastery's sacred location was thought to sanctify its religious community; imprisonment in that space then, in conjunction with the deprivations that attended it, created the ideal conditions for the sinner's rehabilitation through suffering, contemplation, and a selfless existence.[75] The penitential nature of prison is emphasized in the term "penitentiary" (*penitentiarius* in Latin, or *penitenciarie* in Middle English), stemming from the word penitence (meaning contrition), which the medieval church employed to refer to its prisons.

The concept of gradations in penitential experiences according to the nature of the sin committed was a central part of the penology crafted by the church. This concept dates back as far as antiquity, although it is commonly believed that public penance fell out of favor during the early Middle Ages only to be revived by the Carolingian church during the penitential reform of 813.[76] The "Carolingian dichotomy" in penance promoted the idea that secret sins should be expiated by private penance, while public sins – that is, sins that had become scandals, and thus set a poor example for one's Christian neighbors – required public penance. Although, as Mayke de Jong has noted, apart from the solemn ceremony prior to incarceration or at the end of the term reconciling the penitent to his community, there was nothing public about the nature of public penance. Imprisonment in a monastery effectively meant withdrawing from the world.[77]

Public penance (in Old English, *opene dædbote*) was in place in England as early as the ninth century in association with crimes such as homicide and oath-breaking.[78] The pastoral letters of Ælfric, Abbot of Eynsham (d.1010) also repeat the necessity of public penance for public sins, and give us some insight into how the English believed

[75] de Jong, "Monastic Prisoners," 300.

[76] Mayke de Jong, "What was Public about Public Penance? *Paenitentia Publica* and Justice in the Carolingian World," *Settimane di Studio del Centro Italiano di Studi Sull'Alto Medioevo* 44 (1997): 867.

[77] de Jong, "What was Public about Public Penance?," 872.

[78] Sarah Hamilton, "Rites for Public Penance in Late Anglo-Saxon England," in Helen Gittos and Bradford Bedingfield, eds., *The Liturgy of the Late Anglo-Saxon Church* (Woodbridge: Boydell, 2005), 65–103.

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time in prison should be spent.[79] According to Ælfric, the penitent assigned to public penance:

> should not wash himself in a bath, nor shave, nor cut his nails, nor sleep under coverings, but on the naked ground. He should walk about in a hairshirt, unarmed and barefoot. Day and night he should bewail his sins and with tearful prayers seek grace from the Lord. He shall not enter the church, nor shall he accept the kiss of peace; he should abstain from meat and wine and copulation with his wife. He must not communicate as long as he is penitent, unless he should be stricken with terminal illness.[80]

Homo quidam (*c.*1155–65), an anonymous Anglo-Norman *ordines*, describes the nature of public penance needed to atone for homicide as seven years of fasting on water and bread without salt (*panem sine sale*) while sitting on the earth without a table; penitential whipping; and abstention from wine, mead, and malted ale.[81] It is undeniable that public penance of this nature shares a good deal with hard prison as it was employed in the king's prisons.

By the thirteenth century, public penance in a church-run prison had come to assume two distinct variations: *murus largus* ("light imprisonment") and *murus strictus* ("severe imprisonment"), sometimes described also as being placed *in stricto carcere* ("in severe prison").[82] *Murus largus* purportedly resembled life in a typical monastery. Institutional living with no license to leave, although prisoners were permitted to converse among themselves and move about inside the prison and there was a general willingness of authorities to permit visitors entry into the prison environment. Most importantly, the sentence was finite. *Murus strictus* was another beast altogether. It has been called the medieval equivalent of a maximum-security prison, or even solitary confinement. Bernard Hamilton explains that the practice was likely modeled on the lifestyle of the

[79] Bernhard Fehr, ed., "Teile aus Ælfrics Priesterauszug," in *Die hirtenbriefe Ælfrics in altenglischer und lateinischer fasung* (Hamburg: Verlag von Henri Grand, 1914), 243.

[80] Fehr, ed., "Teile aus Ælfrics Priesterauszug," 246; translated by Brad Bedingfield, "Public Penance in Anglo-Saxon England," *Anglo-Saxon England* 31 (2002): 235.

[81] Pierre Michaud-Quantin, ed., "Un manuel de confession archaïque dans le manuscrit Avranches 136," *Sacris Erudiri* 17.1 (1966): 23–4.

[82] Megan Cassidy-Welch, *Imprisonment in the Medieval Religious Imagination, c. 1150–1400* (Basingstoke: Palgrave Macmillan, 2011), 64.

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stylite saints, early Christian ascetics who lived on pillars high up in the air and endorsed the notion that extreme mortification of the body offered a more expedient route to salvation.[83] *Murus strictus* typically involved life imprisonment, described as "perpetual penance," in a single cell "of the smallest size and worst description, dark and unsavoury," forbidden all visitors except spouses, and sentenced to chains and iron fetters binding the feet, the only sustenance on offer "the bread of sorrow and the water of tribulation."[84] *Murus strictus* was typically reserved for those whose offense had been particularly scandalous. For example, in 1226 a monk of Jouy found himself sentenced to perpetual imprisonment of the worst kind for threatening to kill his abbot with a razor.[85]

In Christian penitential theology, punishment of the body results in purification of the soul. Thus, the intent behind such a brutal form of incarceration was not so much revenge as reform, sacrificing the prisoner's earthly life in an effort to salvage the prospect of an afterlife in heaven. The spiritual overhaul envisioned by the creators of *murus strictus* was commendable, yet it was not without problems. Penance is most effective when undertaken voluntarily. To return to the case of Robert le Ewer mentioned briefly earlier, this is exactly what the anonymous chronicler of the *Vita Edwardi Secundi* was referring to when he declared that Robert's death by peine forte et dure was "a punishment fitting for his crimes and *healthy for his soul, provided that he bore it with resignation*."[86] Christian penitential theology supports the notion that an individual cannot be compelled into penance against his will: one must accept one's fate, show contrition for past sins, and believe that the suffering one is undergoing will make one worthy of reconciliation with God. Forcing it upon the impious in the hopes of eventual acceptance and submission before God might well be an act in futility. However, the medieval English believed compelled penance might have some benefits. As *Homo quidam* acknowledges, "[a] sinner

[83] Bernard Hamilton, *The Medieval Inquisition* (New York: Holmes and Meier Publishers, Inc., 1989), 53.
[84] Arthur Turberville, *Mediaeval Heresy and the Inquisition* (London: C. Lockwood and Son, 1920), 215; Cassidy-Welch, *Imprisonment*, 64.
[85] Megan Cassidy-Welch, "Incarceration and Liberation: Prisons in the Cistercian Monastery," *Viator* 32 (2001): 30.
[86] Italics are mine. Childs, ed., *Vita Edwardi Secundi*, 218–19.

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should hold back from inflicting such physical correction upon himself by his own initiative, for when it is imposed by someone else it provokes shame and this shame," so the text argues, "forms part of the penance."[87]

While *murus strictus* began as punitive incarceration with a penitential mission, in the hands of the Languedocian inquisitors desperately battling the Cathar heresy, it evolved into a coercive measure, not long before prison forte et dure made its first appearance in legislation. How else were they to pressure the uncooperative masses into providing evidence against friends and family who belonged to the Cathar heresy, or to confess themselves? Ecclesiastical authorities did not sanction the use of torture for interrogation until 1252 under Pope Innocent IV; yet even after this watershed moment, inquisitors were hesitant to employ torture except in extreme circumstances. They generally preferred to subject reluctant witnesses to extended periods of hard prison than rely on instruments of torture.[88] Inquisitorial treatises of the era acknowledge the psychological benefits of hard prison. *De inquisitione hereticorum,* penned by German mystic David of Augsburg (d.1271), recommends breaking the will of fractious witnesses through time in solitary confinement on a reduced diet, explaining that: "[t]he fear of death and the hope of life [will] quickly soften a heart that could otherwise hardly be moved."[89] In his *Practice Inquisitionis*, Bernard Gui (d.1331) made a similar observation: "Imprisonment – coupled if necessary with hunger, shackles, and torture – could . . . loosen the tongues of even the most obdurate." Gui also endorsed solitary confinement to shake their confidence, because "suspects housed together could encourage one another to remain silent."[90] When imposed as a punishment, however, *murus strictus* was earmarked for heresiarchs and Cathar priests. This is reflected in the numbers. In early fourteenth-century Toulouse, 3.2 percent of penitents were sentenced to *murus strictus*; 57.6 percent to the more relaxed *murus largus*.[91]

[87] As cited in Rob Meens, *Penance in Medieval Europe, 600–1200* (Cambridge University Press, 2014), 211. *Homo quidam* can be found in Michaud-Quantin, ed., "Un manuel de confession archaïque," 5–54.

[88] James Given, *Inquisition and Medieval Society: Power, Discipline, and Resistance in Languedoc* (Ithaca: Cornell University Press, 1997), 54.

[89] Given, *Inquisition,* 54. [90] Given, *Inquisition,* 54–5.

[91] Andrew Roach, "Penance and the Making of the Inquisition in Languedoc," *Journal of Ecclesiastical History* 52.3 (2001): 426.

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Admittedly, detailed evidence of the practice of *murus strictus* in the English church in the period leading up to the 1275 statute that officially sanctioned hard prison is scanty, but it does exist. For example, a letter written by Roger, Bishop of Worcester to Gilbert Foliot, Bishop of London, in 1165 seeks advice regarding a group of heretics who had entered into his diocese. Foliot's response was to arrest them and put them in solitary confinement with imprisonment of "moderate severity" until they could decide exactly what should be done with them. "But in the meantime you should hold them separately, lest together they persevere in wicked conversation ... softening them with warnings, and scaring them with threats and fear of punishment, and in the meanwhile curbing with whips and lashings with moderate severity."[92] During his time in office as Archbishop of Canterbury, Boniface of Savoy (d.1270) recommended the "perpetual penance" of *murus strictus* for "ungracious clerks, taken in crime or convicted," who are "so malicious or incorrigible and so accustomed to mischief." Boniface was also responsible for requiring bishops to establish prisons in the first place; thus, the need for an environment conducive to *murus strictus* may well have been taken into consideration in the design and construction of episcopal prisons under his watch.[93]

It became the standard policy of the church that clerks who had confessed to a crime or were notorious or publicly defamed were banned from purgation; once delivered out of the hands of the king's officials, they were locked up in prison in perpetual penance.[94] A 1351 mandate issued by Simon Islip, Archbishop of Canterbury (d.1366), details the nature of the conditions under which they were to be incarcerated. They were to exist on a diet consisting solely of the bread of sorrow (*de pane doloris*) and the water of anguish (*aqua angustiae*), the same phrase noted above. When Islip explained what he meant by this, the phrase appears to translate out to six days of the week on bread and weak beer; but on the seventh day, because the

[92] Gilbert Foliot, *The Letters and Charters of Gilbert Foliot, Abbot of Gloucester (1139–48), Bishop of Hereford (1148–63), and London (1163–87)*, ed. Zachary Brooke, Adrian Morey, and Christopher Brooke (Cambridge University Press, 1967), 207–8.

[93] Pugh, *Imprisonment*, 135.

[94] This is spelled out in statute law in 1377; Pugh, *Imprisonment*, 49.

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Sabbath should be honored, the prisoners might also partake in vegetables, providing they were contributed through alms or donations from their family members.[95] Those in bishops' prisons were also regularly shackled, and there does not seem to have been an ecclesiastical version of a *sewet*, that is, a fee paid in the king's prisons to have those shackles removed.[96]

These deprivations were not reserved solely for those sentenced to perpetual penance; indeed, they were shared also by the clergyman who was delivered to the ordinary as *clericus convictus*, that is a convicted clerk, having been tried by a jury in the king's courts and found guilty. Because clergymen were bound to be tried by the ordinary at a specially constituted ecclesiastical tribunal, the secular verdict was not considered valid. Yet, bishops did not hasten to command purgation (trial). As Alison McHardy has observed, it was normal to sit in a bishop's prison for years at a time awaiting one's purgation. Most often, terms of two, four, or six years were the norm; however, her study uncovered a number of individuals whose prison terms stretched out to seventeen, twenty-five, or even twenty-six years.[97] The length of time spent in prison before trial did not correspond to the nature of the crime; indeed, McHardy's study shows that the matter of punishment was "both illogical and haphazard." However, denying a cleric purgation upon entrance was deliberate. Time spent in prison was intended to be rehabilitative. Only after doing his time might a clergymen be considered eligible for purgation.[98] By 1352, perpetual penance applied also to all criminous clergymen who failed purgation, as mandated by the common-law statute *pro clero*.[99]

The English church also regularly employed some of the tactics of *murus strictus* as a coercive measure on the laity. Sanctuary-seekers

[95] David Wilkins, ed., *Concilia Magna Brittaniae et Hiberniae a Synodo Verulamensi anno 446 ad Londinensem 1717*, 4 vols. (London: R. Gosling, et al., 1685–1745), vol. III, 13–14.

[96] Margaret McGlynn, "Ecclesiastical Prisons and Royal Authority in the Reign of Henry VII," *Journal of Ecclesiastical History* 70.4 (2019): 760.

[97] Alison McHardy, "Church Courts and Criminous Clerks in the Later Middle Ages," in Michael Franklin and Christopher Harper-Bill, eds., *Medieval Ecclesiastical Studies in Honour of Dorothy M. Owen* (Woodbridge: Boydell, 1995), 172–3.

[98] McHardy, "Church Courts," 173 and 183.

[99] John Bullard and Chalmer Bell, eds., *Lyndwood's Provinciale: The Text of the Canons Therein Contained, Reprinted from the Translation made in 1534* (London: Faith Press, 1929), 144. *Statutum pro clero,* 25 Edw. III, c. 4 (1352), *SR*, vol. I, 316–18.

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were permitted thirty-nine days of shelter in any church, chapel, or cemetery, at which point they were expected either to confess and undergo trial in the king's court or abjure the realm. For those who overstayed their welcome, the church turned to the deprivations of *murus strictus*. In its justification of the practice, *Bracton* asks what else might be done in this situation. "I see no remedy except that food be denied him that he may come forth voluntarily and seek what he has scornfully refused, and that he who supplies food to him be deemed the king's enemy and one contemptuous of the peace."[100] The fifteenth-century Chancery bill of the tailor John from Kent of Winchester clarifies that some laymen merited the full rigors of *murus strictus*. From a cell in the Bishop of Winchester's prison at Wolvesey castle, he complained that he was "most straightly kept," loaded with "as much irons as he may bear and more" and deprived of the company of his wife and friends, all "to the jeopardy of his life."[101]

Several points are critical here. First, the penitential origins of hard prison indicate that the practice is in fact much older than recognized to date. Incarceration in solitary confinement in nakedness, on a fasting diet, deprived of all comforts, with or without the addition of a hairshirt or shackles, was imposed on sinners and criminals long before the 1275 statute. Second, the objective of incarceration, as the church devised it, is spiritual rehabilitation. Recognizing this has a profound impact on historical interpretations of the function of prison/peine forte et dure. Again, this aspect will be explored in greater detail in Chapter 4. Finally, this history helps us to sever the psychological link between England and hard prison. In the minds of most legal historians, hard prison and peine forte et dure are integrally associated with English history. As such, these practices have presented a puzzle to historians who fail to understand how they align with thirteenth-century England's larger legal reform program. Acknowledging that hard prison did not originate in England, and that variations of it existed across Europe in ecclesiastical prisons and also in some secular prisons helps us to put England back into a European context and forces us to realize that English common law does not hold all the answers to this puzzle.

[100] *Bracton*, vol. II, 383.
[101] TNA C 1/184/22, Kent v. Bishop of Winchester (1493–1500).

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Hard Prison in Context

How horrific was the experience of hard prison? Any assessment of hard prison must gauge its privations against the more typical experience of prison. This means first expunging the virulent mythology that surrounds medieval incarceration. In the Middle Ages we see regularly on the big screen, *all prison* is hard prison. Prisoners are cast into damp, dark dungeons, replete with shackles, gruel, and rats for company. If the normal prison experience in medieval England had been that horrendous, then hard prison would not have been all that effective as a coercive measure. Moreover, medieval prisons had a different purpose than do prisons today. In the modern West, most crimes are punished with incarceration. Prison thus exists chiefly as a form of punishment. This is not true of the European Middle Ages, in which the majority of prisoners were incarcerated awaiting trial. Convicted felons were never lodged in medieval jails because when a jury voted unanimously to convict, the defendant was escorted directly to the gallows for execution. Of course, prisons did contain some convicted petty thieves, vagrants, and debtors, but most inmates were suspects awaiting trial and likely to be acquitted. My point is that prisoners in general were not necessarily the kind of hardened criminals one might be inclined to lock up in a dungeon and throw away the key. Indeed, the fact that the vast majority of felons fled the scene of the crime implies that those who stuck around for trial were often innocent, or repentant and thus hopeful that their neighbors would give them a second chance and not convict.

That prison was *not* as horrific as movies and television make it out to be is substantiated by the fact that the French public insisted that prisoners be permitted to eat their meals at tables like ordinary human beings.[102] Evidently, there was a desire to maintain some semblance of normal life. Secular jails were housed in castles or city gates, the only highly fortified buildings in the English landscape. The setting meant that they did not have the same kind of institutional feel as prisons do today, but they were still rigorously organized. The Fleet prison in London in many respects represents the medieval ideal. The prison was divided into

[102] Patricia Turning, "The Right to Punish: Jurisdictional Disputes between Royal and Municipal Officials in Medieval Toulouse," *French History* 24.1 (2010): 11.

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six wards: (1) the barons' ward (for the wealthy), (2) the women's ward, (3) the two-penny ward (that is, where accommodations cost two penny a night), (4) the beggars' ward (accommodations were free), (5) Bolton's ward (the most fortified section of the prison where dangerous felons could be bolted to walls or floors), and (6) the tower chambers (for political prisoners).[103] Quality of life in prison differed considerably depending upon the ward in which a person was housed. For the price of two shillings, four pence per week, prisoners lodged in the barons' ward had separate rooms with use of a parlor and servants to attend to their needs; and friends could come and go as they pleased. Affluent inmates might even find incarceration conducive to writing, as the works of Sir Thomas Wyatt, Henry Howard Earl of Surrey, and Sir Thomas More would seem to suggest.

Margery Bassett tells us, "[s]o 'unprisonlike' was the atmosphere that the warden was forbidden to arm his officers unless he suspected a plot to escape was brewing."[104] Excessive use of irons by prison guards was also grounds for dismissal.[105] Guards shackled only two types of prisoners: (1) those whom the jailer feared might escape, and (2) those who could not afford to pay the *sewet*. Irons secured the legs, but also sometimes the neck.[106] Regulations governing the practice required wardens to charge a "reasonable suwette."[107] What was considered reasonable though was not the same across the board. The keeper of Winchester jail in 1358 charged a one-time fee of five pence.[108] The prison code of Coventry issued in 1515, designated two pennies as an acceptable sum, while the keeper of the county jail of Somerset charged one shilling a week for his prisoners to be free from irons.[109]

As these rates should suggest, the costs associated with prison were the greatest hardship. The Crown's strategy for funding penal institutions was to shift the burden of the expenses onto the backs of those housed in the facilities. The Crown appointed sheriffs to assume responsibility for the prisons within their jurisdictions. Sheriffs, in

[103] Margery Bassett, "The Fleet Prison in the Middle Ages," *The University of Toronto Law Journal* 5 (1944): 393.
[104] Bassett, "Fleet Prison," 398. [105] Rose, "*Feodo de Compedibus*," 78.
[106] TNA C 1/64/356, Comford v. JPs of York (1475–80, or 1483–5).
[107] Rose, "*Feodo de Compedibus*," 80. [108] Pugh, *Imprisonment*, 179.
[109] Pugh, *Imprisonment,* 170 and 180.

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turn, retained jailers whose positions were either low-paid or unpaid. Jailers expected to support themselves out of the monies tendered by prisoners for a wide variety of fee payments, although select fees were funneled directly to Crown revenues. The costs associated with incarceration were multiple and varied. Prisoners doled out cash for every expense imaginable. There were entry fees, which included a round of drinks for prison personnel to celebrate one's arrival in prison and tips for the chamberlain, porter, and jailer, as well as fees for meals and bedding; wood for a fire; candles for light; a bond for good behavior, another for the removal of iron shackles; and of course a discharge fee upon deliverance. Rates were based upon one's ability to pay, with differential pricing for lords, knights, gentry, ordinary folk, and beggars. Indicted felons paid their expenses out of their confiscated properties – under rules of felony forfeiture, upon arrest indicted felons had their private property confiscated to the king. In practice, this meant that the king's escheator sold the movables and the monies garnered from their sale supported the inmate until trial. The remainder was returned upon acquittal, providing the defendant had never fled the king's justice.

Not everyone was happy with this system.[110] The *Mirror of Justices*, written on the heels of the crisis of 1289 that led to the wholesale dismissal of Edward I's array of justices and ministers, presents the most utopian vision of all the treatises. Its author rejects the notion that prisoners should be charged for anything other than basic amenities. In particular, it decries entrance and exit fees as an abuse.[111] *Britton* also speaks of the dangers of exit fees, grousing about prisoners whose sentences dragged on because they could not meet their financial obligations.[112] *Britton* advocates fees of a reasonable nature, declaring that prisoners should not be expected to pay more than four pence altogether, and that the poor should be exempt

[110] A late medieval sermon complains: "Now they are taken to the king's bench, now they are hurled into Marshalsea, and although they may be worth twenty or forty pounds before they come into their custody, these tricks and deceits shall bring such a writ of *Nichil Habet* on their heads that they are not left with a single penny." Patrick Horner, ed., *A Macaronic Sermon Collection from Late Medieval England: Oxford MS Bodley 649* (Toronto: PIMS, 2006), 182. *Nichil Habet* is a return made by the sheriff on a *scire facias* or other such writ indicating that the defendant has no property.

[111] Whittaker, ed., *Mirror of Justices*, 160. [112] Nichols, ed., *Britton*, vol. 1, 46–7.

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entirely.[113] The treatise either proposed or reflected contemporary ideals: Newgate prison was limited to collecting four pence from its prisoners when regulation of fees began in 1346.[114] Periodic amendment to municipal guidelines concerning the scope of prison fees and their approved rates, as well as repeated attempts to eliminate entry and exit fees, substantiate that the regulation of prison fees was a widespread concern.

Inmates were not left to starve in prison because they could not afford to buy food. Poorer prisoners relied heavily upon charity. Because assisting prisoners fulfilled four of the seven Corporal Acts of Mercy (to feed the hungry; to give drink to the thirsty; to clothe the naked; to visit the imprisoned), regular charity was forthcoming. Assistance from bequests, parish fundraisers, royal alms, and individual donations were supplemented in a variety of ways. At times, jailers released impoverished prisoners to beg for alms in the marketplace during the day. For suspected felons who needed to be secured, prison wardens had to resort to unconventional practices. For example, in fourteenth-century Colchester, they chained prisoners to poles outside the moothall to beg during the day. Prisoners might support themselves in a variety of other ways. In Coventry, prisoners continued to work in their own trades at the prison to fund their upkeep.[115] The Fleet in London authorized some debtors to pernoctate, meaning, to go about their own business each day, spending only their nights in prison.[116] Charity on a larger scale was also sometimes organized by the city. In London, confiscated food that violated ordinances controlling weight, packing, and freshness was sent to Newgate to feed the poor.[117] The outcome is that few people starved to death in prison, although they may have survived by eating stinking fish, stale loaves of bread, and watery ale.[118]

[113] Nichols, ed., *Britton*, vol. 1, 46–7. [114] Pugh, *Imprisonment*, 170.
[115] Helen Carrel, "The Ideology of Punishment in Late Medieval English Towns," *Social History* 34.3 (2009): 314–15.
[116] Jean Dunbabin, *Captivity and Imprisonment in Medieval Europe, 1000–1300* (New York: Palgrave, 2002), 96.
[117] Margery Bassett, "Newgate Prison in the Middle Ages," *Speculum* 18.2 (1943): 245.
[118] Guy Geltner, *The Medieval Prison: A Social History* (Princeton University Press, 2008), 102; Christine Winter, "Prisons and Punishments in Late Medieval London," (PhD Diss., Royal Holloway, University of London, 2012), 238.

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Most of the evidence regarding living conditions inside prisons comes from complaints, which centered on deteriorating buildings, access to fresh water, poisonous vapors (that is, miasmas) that endangered the prisoners' welfare, and jail fever, an illness that periodically ravaged the prisons. Though, too much weight should not be accorded to criticisms voiced by prisoners and their families as decrying prison conditions was a popular means of challenging the political leadership of local authorities.[119] Dirty prisons filled with starving prisoners made a mayor look bad to his constituents. Recent studies surprisingly offer a relatively positive assessment of medieval prison conditions. In Venice, Florence, Bologna, and London, prison death rates were low.[120] Few prison deaths imply that actual conditions could not have been as bad as petitions imply. Christine Winter goes a step further to emphasize "[t]he complete absence of any reference to a violence-related death in [Newgate] prison is remarkable, especially considering the close proximity, the conditions and the potential for confrontation."[121] The general conclusion is that life in medieval prison was a "tolerable if unpleasant experience."[122]

The intention of this discussion is not to present a rosy image of prison life in the medieval era. Obviously, for anyone elderly or suffering from a health condition, incarceration was no picnic; and during cold and flu season, the lack of available healthcare together with the dense living conditions must have made them feel as if they were sitting ducks. Nonetheless, the experience was not as dire as is often portrayed in the popular media. Indeed, the very public nature of prison life in the Middle Ages acted as a safeguard to thwart seriously deteriorating prison

[119] Carrel, "Ideology of Punishment," 310.
[120] Geltner, *Medieval Prison*, 102; Winter, "Prisons and Punishments," 238.
[121] Winter, "Prisons and Punishments," 221.
[122] Geltner, *Medieval Prison*, 102. Having a reputation for decent living conditions was a source of pride for some wardens. Because wardenships generally stayed within families, family honor turned on running a respectable institution. In her study of prison conditions in southern France, Patricia Turning remarks upon the dedication of jailers and guards to keeping up appearances. In order to maintain the public's respect, they needed to "present themselves as both disciplinarian and humanitarian." Patricia Turning, "Competition for the Prisoner's Body: Wardens and Jailers in Fourteenth-Century Southern France," in Albrecht Classen and Connie Scarborough, eds., *Crime and Punishment in the Middle Ages and Early Modern Age: Mental-Historical Investigations of Basic Human Problems and Social Responses* (Berlin: De Gruyter, 2012), 286.

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conditions. Here, a comparison between modern and medieval approaches to prison as an institution and its relationship with society is useful to consider. In the modern-day West, prisons are typically situated in isolated locations, away from prying public eyes, with strict regulations limiting outsiders' access to a room within the prison appointed specifically for the purpose of visiting. The implications of this arrangement are twofold. First, society is capable of hiding all evidence of nonconformity and immorality, such that prisoners are merely statistics to the rest of society rather than real persons in need of rehabilitation. Second, the conduct of prison wardens and guards takes place in a world beyond public scrutiny, relying chiefly on the moral rectitude of the warden to keep an orderly and humane prison that adheres to state regulation between supervisory visits. The medieval world would have judged modern prison conditions as being ripe for misuse. The public nature of medieval prisons was deliberate, founded on the ideal that the shameful nature of prison life functions as a visible deterrent to crime. As a result, penal institutions were located in highly central, urban locations, and prison life had a "porous flow" with inmates and visitors moving back and forth between prison and city.[123] Indeed, male prisoners' wives sometimes opted to relocate to prison with their husbands rather than support a household on their own. Most prisons did not supply meals at all, relying instead on the inmates' family members to bring them in at appointed times throughout the day. The constant presence of outsiders as visitors in the prison meant increased scrutiny and a steady flow of complaints dispatched to municipal authorities and the king.

None of this is to suggest that abuses of power did not happen in the prison environment. Under the wrong leadership, or with the employment of inept or cruel jailers, abuses happened, and the Crown's oversight was not proactive but reactive: it relied on complaint, rather than taking an active stance and regularly monitoring the conditions in prison. Both *Fleta* and the *Mirror of Justices* acknowledge the problems engendered by this approach. The cruelties singled out by the author of *Fleta* are disturbing: hanging by the feet, tearing out nails, and loading with irons, the final element obviously associated most closely with peine forte et dure.[124] Yet, the treatises make it just as clear that such behavior

[123] Turning, "Competition," 286. [124] Richardson and Sayles, eds., *Fleta*, 68.

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was unacceptable and was strenuously discouraged and punished. The *Mirror* adopts a strong stance, declaring "[t]he law wills that no one be placed among vermin or putrefaction, or in any horrible or dangerous place, or in the water, or in the dark, or any other torment."[125]

How does any of this help us to better understand hard prison? First, it provides a sense of the disparity between normal prison experiences and that of hard prison. For the poorly clothed beggar, accustomed to sleeping on straw-laden floors and relying on charity for sustenance, the leap from prison to hard prison was not as great as it was for the gentleman debtor, who continued to employ manservants and entertain guests in a drawing room. For both, as accustomed as they were to seeing prison as a vital and regular part of the larger community in which they had constant access to a support network that expanded well beyond one's family, the greatest adversity presented by hard prison was its isolation. Solitude alone was probably enough to prompt many reluctant defendants into a swift change of heart. Isolation had other benefits: it signaled the Crown's intolerance of disobedience to the suspect's family and friends. Punishment in the Middle Ages was about legal performance: typically, it was carried out in front of a great audience. Therefore, the assumption was that any punishment that took place in private must be truly horrific. Why else would it need to be hidden from public view? All of this implies that as a coercive measure, hard prison was probably effective enough for most prisoners to change their minds without having to include pressing with weights.

Second, the numerous complaints over the course of the period signal that men and women had set expectations regarding the quality of life in prison. There were limits to what a prisoner might endure. *The Mirror of Justices* insinuates that this was true also of peine forte et dure. The treatise denounced the practice, stating that "it is an abuse that a prisoner should be loaded with iron or put in pain before he is attainted of felony."[126] The treatise's author also spells out the spiritual implications. The overzealous jailer who kills "a man in prison by excessive pains when he is adjudged to do penance [peine forte et dure]" falls into the sin of homicide.[127]

[125] Whittaker, ed., *Mirror of Justices*, 52.
[126] Whittaker, ed., *Mirror of Justices*, 160; this statement is repeated in slightly different words on 185.
[127] Whittaker, ed., *Mirror of Justices*, 24.

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Prison/Peine Forte et Dure as Punishment

Up to now, this chapter has dwelt on the fact that prison/peine forte et dure existed as a coercive measure, thus the fact that justices insisted on referring to it as a punishment (peine) is more than a little perplexing. Technically, it was not a punishment. When the medieval English punished felony, the impact was intended to be permanent: death, mutilation, exile. As a coercive measure, peine forte et dure was only temporary. The practice also put ultimate control in the hands of the defendant. As soon as he or she agreed to jury trial, the suffering came to an end. Nonetheless, the distortion in function apparent in the judges' labeling should not be overlooked. Was peine forte et dure sometimes employed specifically as a punishment?

To be clear, the language of the legal record declares that one was *sentenced* to suffer peine forte et dure by justices of jail delivery (*adiudicatur ad penam*) for refusing to participate in judicial proceedings. As Chapter 2 will address, justices probably understood peine forte et dure as an appropriate punishment for contempt. In addition, recognizing the prompt efficiency of the practice as a coercive device, over time jailers and royal justices branched out in its usage beyond those who refused to plead in felony indictments. In the following instances, there is good reason to see that peine forte et dure functioned simultaneously as both coercive measure and punishment for individuals whom the judiciary and prison wardens, if not always the legislature, held in especially low regard.

(1) Approvers

A career felon who turned king's evidence provided a valuable service to the Crown. By voluntarily appealing all his former criminal associates in exchange for his life, an approver's confession enabled the king to put to bed numerous cold cases with a minimum of effort. Professional criminals often operated out of gangs; their appeals, then, were a valuable crime-fighting tool, affording the Crown the means to reduce a gang's numbers and even stomp it out of existence. The Crown was enormously supportive of approvement: in the twelfth century, for example, the Crown expended "huge sums of money" on special king's approvers retained on a professional

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basis.[128] Eager to please their employers, jailers were also keen to persuade notorious felons under their care of the merits of turning approver. Complaints about jailer behavior expressed in parliamentary petitions suggests that zealousness led some jailers to draw on familiar practices, specifically those associated with hard prison.[129] Prisoners' stories make clear that withholding food and drink was a common tactic used by jailers on this quest.[130] At his trial for larceny at Salisbury, Robert the chandler of Somerset maintained that his keepers not only denied him food and drink, they also tied his hands behind his back for three days and nights.[131] In his petition to the chancellor, John Hanger and his three fellow complainants imprisoned at Lydford (Devon), purportedly "without any cause reasonable," alleged that they were being held in "a great and horrible dungeon of the said prison," deprived of light and "kept under the most cruel" conditions. The jailer regularly shackled and starved them. At the time of their writing this had been going on for a period of thirty weeks. The four complainants urged the chancellor to act swiftly, for they "fear that they be likely to perish."[132] In her 1495 complaint to Star Chamber, Alice, widow of William Tapton of Thoverton (Devon) claims her torment continued for twenty-four weeks, or so. She relates that when city officials came to arrest her, they beat her, dragged her out of her home by her hair and imprisoned her at Exeter. There she was fettered in leg irons weighing thirty pounds and more and tied up with a chain. During her time in prison, her jailer forbid her clothes or straw to lie on. She had no choice but to sleep on bare boards and when she asked for a surgeon to dress her wounds, her request was denied.[133]

None of these complainants were in prison because they refused to plead to a felony indictment; yet, the nature of their treatment is eerily

[128] Anthony Musson, "Turning King's Evidence: The Prosecution of Crime in Late Medieval England," *Oxford Journal of Legal Studies* 19.3 (1999): 471.

[129] John Bellamy, *The Criminal Trial in Later Medieval England* (University of Toronto Press, 1998), 41.

[130] Musson, "Turning King's Evidence," 470.

[131] TNA JUST 3/156 m. 5 (1366), as cited in Musson, "Turning King's Evidence," 470.

[132] TNA C 1/319/23, Hanger v. Furse (1504–15).

[133] Isaac Leadam, ed., *Select Cases before the King's Council in the Star Chamber, Commonly Called the Court of Star Chamber* AD*1477–1509*, 2 vols. (SS, vols. XVI and XXV, 1903–11), vol. 1, 51–2.

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similar to what we see in sentences of peine forte et dure. Either they fabricated their narratives with that experience in mind; or, they were being tormented for other reasons with the methods a jailer already had at his disposal. The Crown did not sanction this usage of prison forte et dure. This is made clear in its response to prisoners' complaints. In 1326–7, Edward II initiated an inquiry into jailers who manhandled prisoners in order to persuade them to turn king's evidence. The Crown not only listened to prisoners' grievances, but it assigned commissions to investigate instances in which prison forte et dure was imposed without judicial sanction. In December of 1379, a commission of oyer and terminer was tasked with inquiring into the complaint of John of Kingston, prior of Sandwell, who complained that he had been assaulted, held hostage, and subjected to prison forte et dure against his will by eight of his fellow clergymen. The purpose of the attack was extortion: once he agreed to renounce his estate and possessions and revoke all proceedings in Court Christian against the abbot of St. Peter's, one of his attackers, and bind himself over in the sum of £200 should he retract his consent, his jailers permitted him to go free.[134]

What is not clear is whether the judiciary covertly supported this behavior. Presumably, when jailers' unorthodox methods resulted in a conviction without complaint, they were approving. However, there is good reason to think that justices wanted penance applied with restraint. The 1290 conviction of Richard of Harlow (*de Herlawe*) makes this point. As a servant to the jailer John Gille (since deceased), Richard was held responsible for the death of one of his prisoners, Philip Lauweles of Ireland. Richard kept Philip in such "grave pressing penance" (*gravum pena constrictus*) that he died his second day in prison. Richard was immediately arrested for homicide and imprisoned also at Newgate, presumably a dreadful experience for a former prison guard.[135] Despite being incarcerated for suspected homicide, Richard sought bail on the grounds that he had been indicted out of hate and spite (*de odio et atya*). The investigation into his claim resulted in one of the rare instances in which the jury dissented with the prisoner who footed the bill for the inquest. The jury declared that Richard was wholly guilty:

[134] *CPR*, Richard II, vol. 1 (1377–81), 423. [135] TNA JUST 1/547A, m. 6d (1290).

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he held the prisoner out of malice and true ferocity with chains and iron devices, to the extent that the neck of the aforesaid Philip was broken by the extreme pressure and constriction of those chains and devices, and the bones of the back of the aforesaid Philip were broken through the middle. They [the jurors] say also that the aforesaid Richard, in order to produce a greater injury in the aforesaid Philip and in order to hasten his death more greatly, seated himself on the neck of the aforesaid Philip.[136]

The jury's verdict was not the final word on the matter; it merely resulted in Richard being denied bail. Given the jury's uncommonly tough stance, it comes as no surprise that Richard's trial jury also found him guilty, and he was hanged. Richard of Harlow's punishment makes clear that a sentence of peine forte et dure was not an excuse for prison wardens and their officials to torture a prisoner mercilessly. Both justices and jurors expected prison staff to adhere to standards that did not include such inhumane treatment as sitting on the prisoner's neck.

Nonetheless, it is critical to acknowledge the elephant in the room: when immoral jailers employed these practices to coerce accused felons into confessing and turning approver, their activities were deemed reprehensible. Yet, when a defendant stood mute, the decree of a royal justice made that very same conduct commendable.

(2) Idlers

While the Crown did not endorse prison forte et dure as a punishment for approvers, idlers were another matter altogether. Legislators found infractions of the labor laws in the period after the Black Death so disconcerting that they turned to prison forte et dure as a solution. One of the unexpected outcomes of the pandemic was a serious workforce crisis in which laborers were in such great demand they could exploit their bargaining power by holding out for higher wages, regular pay, and better working conditions. When the aristocracy realized they had lost control of the workforce and risked either paying what they deemed to be excessive wages or having fields remain unplowed, they turned to the law, drafting the Statute of Laborers (1349), followed soon after by the Ordinance of Laborers (1351).

[136] C 144/30, no. 16 (August 1, 1290). Many thanks to Leslie Lockett of The Ohio State University for her assistance with this transcription and translation.

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The objective of this two-pronged legislative attack on the newly empowered laborer was to return English labor relations to the pre-plague status quo. As Lawrence Poos writes, the laws were "enacted by a Parliament comprised of magnates and gentry with strong vested interests in maintaining an assured supply of cheap labour for production on their own manorial demesnes."[137] Doing so required an "unprecedented intervention" by the Crown in labor relations, traditionally left to the local courts to regulate.[138] Although the legislation of 1349 preserved the authority of local elites, the 1351 follow-up handed jurisdiction to the central courts. Expansion of the Crown's dominion into a hitherto private area of law was greatly resented by the English populace. The "unmistakable tone of moral guardianship" evident in the legislation signaled also the early stages of a new social policy in which the English Crown began to intrude heavy-handedly into the daily lives of its subjects, including the kinds of clothes and food permitted according to social rank (sumptuary laws of 1336, 1337, 1363, 1463, and 1483), the variety of games and sports in which they engaged (the prohibition of tennis, quoits, dice, skittles, and football in legislation of 1351, 1388, 1410, and 1478), the kind of dogs they might own (a ban on hunting dogs by persons of low status in 1390), etc.[139]

Active resistance to the labor legislation resulted in widespread refusals to swear the compulsory oath to abide by the statutes' expectations. Constables compiled long lists of "rebellious" and "disobedient" laborers unwilling to take the oath.[140] Early enforcement efforts show the Crown intent on making its authority known. Between the years 1349 and 1359, the Crown appointed 671 men as "justices of labourers."[141] The vast majority of the penalties

[137] Lawrence Poos, "The Social Context of Statute of Labourers Enforcement," *L&HR* 1.1 (1983): 28.

[138] Paul Booth, "The Enforcement of the Ordinance and Statute of Labourers in Cheshire, 1349 to 1374," *Archives* 127 (2013): 1.

[139] Chris Given-Wilson, "Service, Serfdom and English Labour Legislation, 1350–1500," in Anne Curry and Elizabeth Matthew, eds., *Concepts and Patterns of Service in the Later Middle Ages* (Woodbridge: Boydell, 2000), 34–5.

[140] Bertha Putnam, *The Enforcement of the Statutes of Labourers: During the First Decade after the Black Death, 1349–1359* (New York: Longmans, Green and Co., 1908).

[141] Putnam, *Enforcement*, 20.

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imposed for violations were fines, somewhere between forty pence and one pound, although the total amounts amassed per county per year are striking.[142] Colchester evidence for the year 1352 records 7,556 violations of the statute in the shire, amounting to a total collective fine of £719 10s.[143]

Members of parliament were particularly contemptuous of those who spurned offers of employment in search of something better. Hence, compulsory service for all under the age of sixty was one of the many requirements of the 1349 statute. Anyone who refused to work was to be incarcerated, "under strait keeping" until one might find a surety to guarantee one's future hard work.[144] What exactly was meant by "straight keeping" is not clarified in English law, although as the petition of the tailor John from Kent of Winchester above suggests, when he used the phrase to describe the conditions in the Wolvesey prison, it very much resembled peine forte et dure.[145] Here, the literature of the period helps us to fill in the gaps in the legal record. The "Plowing of the Half Acre" in William Langland's fourteenth-century poem *Piers Plowman* also hints that straight keeping was most likely peine forte et dure. Langland's poem is an extended commentary in narrative form on the new labor legislation by which Langland hoped to communicate his distaste for parliament's heavy-handed treatment of the poor. The 1349 statute effectively criminalized begging and homelessness. At the same time, it stipulated that charity must be qualified: anyone giving alms to the able-bodied poor risked imprisonment. Through satire, Langland aspired to remind his audience that hunger is no basis for a solid work ethic and that giving to the poor (*all* the poor, able-bodied or not) is a Christian duty. That "Piers Plowman" became a rallying cry and "in-group code language" for the rebels in the 1381 English Rising indicates that Langland's apprehensions were shared by a larger group.[146]

Passus VI begins with Piers and his new companions eager to see his half acre plowed so that they might embark on their collective pilgrimage. Everyone pitches in. Even the knight, who knows nothing

[142] Booth, "Enforcement," 7. [143] Poos, "Social Context," 44.
[144] "The Statute of Labourers," 23 Edw. III, c. 1 (1349), *SR,* vol. 1, 307.
[145] TNA C 1/184/22, Kent v. Bishop of Winchester (1493–1500).
[146] Michael Johnston, "William Langland and John Ball," *YLS* 30 (2016): 29.

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about farming. Everything is going well – some are digging, others are pulling weeds – and then Piers spies some of his workers lazing about, cheering on the plow with a "ho trolley-lolley" while gulping down their ale. Piers instructs them to get back to work, but instead the wasters begin boldly to feign disabilities: some pretend to be blind; others claim to have missing limbs – an uncanny analogy to those who "feign muteness" before the courts. But Piers will not be fooled:

> "If it be soth," quod Pieres, "that ye seyne, I shal it sone asspye. / Ye ben wastoures, I wote well, and Treuthe wote the sothe, / And I am his [holde] hyne and [aughte] hym to warne / Which thei were in this worlde his werkemen appeyred. / Ye wasten that men wynnen with travaille and with tene. / Ac Treuthe shal teche yow his teme to dryve, / Or ye shal ete barly bred and of the broke drynke."
>
> ("If what you say is so," said Piers, "I'll soon find out. / I know you're ne'er-do-wells, and Truth knows what's right, / And I'm his sworn servant and so should warn him /
>
> You waste what men win with toil and trouble. / But Truth shall teach you how his team should be driven, Or you'll eat barley bread and use the brook for drink[.]")[147]

With this passage, Langland is mocking the perception embraced by England's elites that vagrants and beggars are frauds: that is, they only pretend to be disabled because they prefer begging to hard work. Yet, in doing so, his passage sketches out what punishment awaits the waster: a diet of barley bread and brook water, an unmistakable allusion to the fasting diet reserved for those in hard prison.[148] Straight keeping, it would seem, was merely another term for prison forte et dure.

A 1376 petition to parliament provides evidence to substantiate this link. Complaining of reluctant laborers, "staffstrikers"[149] and "fugitive servants whose names are not known," the petition demands that the punishment of the statute and ordinances be imposed; although, it is striking that in this instance, punishment is

[147] B.6. 129–35. William Langland, *Piers Plowman*, trans. Talbot Donaldson, ed. Elizabeth Robertson and Stephen Shepherd (New York: W. W. Norton and Company, 2006), 102–3.

[148] For a reference to "brook water," in particular, see Chief Justice Robert Danby's response to Robert Eypton in Chapter 3 of this book.

[149] According to *OED*, "a sturdy beggar, tramp."

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described as *la penance*, as was typical of peine forte et dure. More important still, in describing what needs to be done with them, the petition encourages parliament to order their arrest and incarceration until they are prepared to return to their homes and labor according to the legislation. If they refuse to identify themselves by name, their masters by name, and also the hundreds and counties from which they had come, they should remain in prison on bread and water (*payne et ewe*).[150]

If members of parliament did indeed intend to inflict hard prison upon idlers and vagabonds, their scurrilous plans were undermined by officers of law enforcement, who only occasionally saw fit to sentence offenders to prison. For example, Putnam came across one instance of an offender incarcerated after a second infraction of receipt of excess wages who was adjudged to prison for forty days.[151] A similar reluctance to impose the full rigors of the law is evident also with the 1361 statute, in which parliament declared that monetary fines for violations were to be abolished (although reinstated the following year) and replaced with imprisonment and branding on the forehead with the letter "F" for falsity. No evidence exists to suggest that this brutal form of mutilation was ever carried out.[152] As a result, the legislation was never as effective an "instrument of social control" as members of parliament envisioned.[153]

(3) Heretics

The rising popularity of Lollardy, an evangelical proto-Protestant sect energized by the writings of Oxford theologian John Wycliffe (d.1384), persuaded parliament to turn once again to hard prison. In 1382, in the aftermath of the English Rising, and believing the kingdom to be overrun by heretics openly preaching sacrilegious doctrine "to the great emblemishing of the Christian faith, and destruction of the law, and of the estate of the Holy Church, to the great perils of the souls of the people, and of all the realm of England," parliament recommended the arrest and incarceration of heretics in strong prison (*forte prisone*)

[150] John Strachey, et al., eds., *Rotuli Parliamentorum: ut et petitiones, et placita in parliamento*, 7 vols. (London: HMSO, 1767-77), vol. II, 340–1.
[151] Putnam, *Enforcement*, 83. [152] Given-Wilson, "Service, Serfdom," 27–8.
[153] Poos, "Social Context," 36.

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until "they will justify themselves according to the law and reason of Holy Church."[154] This was a short-lived experiment: the subsequent parliament nullified the statute, presumably because of the number of high-status individuals in good standing with the king who were drawn to the idealism of this dynamic sect.[155] However, even if it was not sanctioned by statute, there is reason to believe that justices and jailers alike continued to see hard prison as appropriate to inflict on suspected Lollards. Thomas Payn of Glamorgan, a clerk and the chief counsellor to John Oldcastle, leader of a rebellion in the name of Lollardy, was imprisoned between 1419 and 1422. In his petition to parliament complaining of his treatment, he asserted that he had been "detained for a long time in a hard prison without indictment, impeachment or other reasonable cause, but by suspicion without being able to respond."[156]

(4) Petty Thieves

The Statute of Westminster I (1275) was the first to define petty larceny, setting twelve pence, roughly the value of a sheep, as the firm boundary marking the distinction between trespass and felony.[157] One week's incarceration for every penny stolen was the most frequent penalty, although Ralph Pugh observed that forty-day sentences, mirroring the Lenten period, were also common.[158] The statute says nothing about the nature of the prison conditions tied to the sentence. Yet, it is noteworthy that the penitential language normally reserved for hard prison also appears in the legal record for myriad petty thefts of an egregious nature, implying that the judiciary interpreted parliament's measures as approving prison forte et dure, at their discretion. At the 1394 Nottingham jail delivery, John, servant of Walter Derlyng of South Carleton was tried for having stolen seven-penny worth of goods and chattels from Agnes Perker, also of South

[154] 5 Ric II, Stat. 2, c. 5 (1382), *SR*, vol. II, 25–6.
[155] Strachey, et al., eds., *Rotuli Parliamentorum*, vol. III, 141, item 53.
[156] TNA SC 8/24/1186, as cited in Maureen Jurkowski, "Henry V's Suppression of the Oldcastle Revolt," in Gwilym Dodd, ed., *Henry V: New Interpretations* (York Medieval Press, 2013), 125.
[157] Statute of Westminster I, 3 Edw. I, c. 15 (1275), *SR*, vol. I, 30.
[158] Pugh, *Imprisonment*, 27 and 30.

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Carleton. Although the indictment described him as having done so "feloniously," at seven pence his offense did not rise to the level of serious crime. When the jurors delivered a guilty verdict, they also recognized the small value of the goods he had stolen. For his punishment, justices declared that he should be returned to prison, "to have his penance" (*pro penitentia sua habenda*).[159] Justices may have meant simply that he should use his time in prison to think carefully about his misconduct and strive to lead a more Christian life. This perception, however, is undermined by usage: in the jail delivery rolls, when scribes inserted the term penance it invariably refers to hard prison. This case is not an anomaly. Justices sent many others off to prison "to have their penance" in similar cases of petty theft.[160]

Why would petty thieves have been candidates for hard punishment? Medieval society particularly despised any act that incorporated premeditation and secrecy. Those characteristics pushed a killing over the edge from simple homicide into the realm of murder. For jurors, an assault turned fatal in hot blood might easily be justified as an impulsive act, quickly regretted, and unlikely to reoccur; whereas, a planned homicide, in which the perpetrator lay in wait for his victim under the cover of night betrayed a calculating and disturbed mind that might not easily be rehabilitated. Jurors' fear of secret crime and their desire to thwart recidivism led them to convict murderers at a much higher rate than regular homicides. Theft was much more likely than homicide to involve premeditation and secrecy. With the dense living of medieval society, a good thief had to choose his time well in order to carry it out without witnesses. Not to mention, selling the proceeds of thievery added yet another layer of deception. While the offense was not egregious enough to reach the level of a felony, justices wanted a stiff punishment to discourage future lapses in behavior. If his short-lived stint in jail included elements of hard prison – presumably just enough to nudge him into a spiritual reform without also endangering his life – surely he

[159] TNA JUST 3/177, m. 52 (1394).

[160] Among others, see: TNA JUST 3/177, m. 68 (John of Howden, 1389); JUST 3/177, m. 76d (William Clerk, 1391); JUST 3/164, m. 17d (John Mason, 1378); JUST 3/164, m. 22 (John Stodham, 1382); JUST 3/185, 18 (Thomas Stede of Willougby, 1398).

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might think twice before pocketing his neighbors' possessions in the future.

Peine Forte et Dure as Capital Punishment

Blackstone contends that the fifteenth century saw peine forte et dure morph from coercive measure to capital punishment. Specifically, he dates the transition to the 1406 arraignment of two indicted felons accused of robbery, a case that appears in the year books with an animated courtroom discussion full of conflict and lawyerly banter. Blackstone sees this moment as a turning point in the history of hard prison; instead of "continuing until he answered, it was directed to continue until he die."[161] After 1406, pressing became an especially gruesome form of execution, but one that suspected felons willingly endured to protect their heirs. It is only recently that historians have begun to question Blackstone's timeline. Andrea McKenzie, for example, observes that pressing retained both functions in eighteenth-century England: while justices sometimes assigned pressing as a form of capital punishment, they also continued to employ it as a coercive measure, when the situation called for it.[162] This leads us to question whether the 1406 case was in fact the defining moment that it has traditionally been regarded to have been.

While Blackstone may have inflated the impact of the 1406 arraignment, he was correct in seeing the case as groundbreaking. The dialogue between sergeants and pleaders represents the first serious deliberation of hard prison as a form of capital punishment that made its way into print. Faced with two indicted felons who adamantly refused to plead, Chief Justice William Gascoigne ordered the marshal to send them to their penance, and return the goods to the appellor. Here, we are fortunate enough to have Gascoigne define what precisely he meant by penance: the defendants should be placed

> in various low dungeons and that they should lie on the ground naked except for their arms, and that they should put upon each of them as much iron and weight as they could bear, so that they could not lift it, and that they should have no food or drink except the worst bread that could be found and from the worst place near the gaol door running water, and on the days they had bread

[161] *Blackstone*, vol. IV, ch. 25. [162] McKenzie, "'This Death'," 279–313.

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they would have no water and *vice versa*, and that they should lie thus *until they were dead*.[163]

This grim sentence launched the assembled justices and pleaders into a debate about the role of hard prison in the English judicial system. Sergeant Robert Hill saw the suspected thieves' refusal to plead as contempt of court; accordingly, he declared that "penance unto death, so that it is a judgment of life and limb" should be their punishment. At this point, the older and wiser chief justice interjected to clarify that peine forte et dure "cannot be called a judgment of life and limb, for it may happen that they stay alive for several years, despite such a penance."[164] Moreover, as Sergeant Richard Norton reminded his colleagues, only felony merits a judgment of life and limb and disobedience to the law was not a felony, nor had these two, in fact, been convicted of a felony.[165] As such, he reminded his colleagues that peine forte et dure was not a punishment in the traditional sense.

Why Blackstone and other legal scholars after him saw this case as a watershed moment is easy to understand. Even if the assembled lawmen concluded that hard prison was not a death sentence, the dialogue makes it clear that this was merely a technicality: whether it was death on the gallows or death in prison, the end result was all the same. When exactly this change in policy occurred is not clear, but there is reason to believe justices had come to see the potential for peine forte et dure to function as a death penalty long before 1406. As early as 1329, the year books include an instance of justices condemning an accused felon to penance "unto death." In this instance, the defendant did not stand mute: in fact, he agreed to jury trial, but then immediately began challenging the composition of the jury. Chief Justice Scrope warned him that if he refused three full arrays he would be condemned to both the fasting diet and pressing with weights, and that this punishment would "continue until he died." Of course, this is exactly how it all played out.[166] Language of this type appears also in the

[163] Italics are mine. Alfred Kiralfy, ed., *Source Book of English Law* (London: Sweet and Maxwell Limited, 1957), 15. YB, Mich. 8, Hen. 4, fos. 1b-2b (Seipp 1406.101).
[164] Kiralfy, ed., *Source Book*, 16 (Seipp, 1406.101).
[165] Kiralfy, ed., *Source Book*, 14–16 (Seipp, 1406.101).
[166] Donald Sutherland, ed., *The Eyre of Northamptonshire, 3–4 Edward III (1329–1330)*, 2 vols. (SS, vols. XCVII and XCVIII, 1983), vol. I, 179 (Seipp 1330.325ss).

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formal records from the same era. A 1336 London coroner's roll remarks that Hugh le Bevere (or Benere) died in Newgate prison after refusing to plead to charges of uxoricide. The justices assigned to his case remanded him to prison to "remain in penance until he died."[167]

Yet, there exists also evidence to the contrary. Deaths in prison were subject to coroners' inquests, but very few investigations seem to have centered on deaths brought about by peine forte et dure.[168] Naturally, because the primary task of these inspections was to exonerate the warden of abusive behavior, it is possible that coroners' reports failed to mention the circumstances of the prisoner's death because they were not relevant to his mission. Thus, the myriad deaths in prison tersely recorded in the coroners' rolls may conceal examples of deaths by penance. Coroners may also have recorded the cause of death as natural: after all, death is the natural result of a starvation diet. Of course, it is equally possible that justices appreciated both functions of peine forte et dure: as capital punishment and as coercive device. There are numerous examples of hard prison as coercive measure after 1329. As late as September of 1373, the Crown permitted John Tailor of Monmouth to turn approver after his brief exposure to the horrors of *penitentia*.[169] Presumably in instances like this, the decision was made at the justices' discretion, much as Andrea McKenzie discovered in her eighteenth-century sample.

Conclusion

When the English adopted prison forte et dure in the thirteenth century, they did so out of a sense of necessity. Without a means to coerce suspects into pleading at their arraignments, the prisons risked dangerously filling beyond their capacity. Prison forte et dure, then, was a coercive measure, existing within a system founded on the concept that coercion is the normal means to enforce compliance with the law. Isolation, confiscation of property, and bodily restraint were all standard tools of justice, and the necessary context into which hard prison must be inserted. When the practice first emerged, the

[167] Reginald Sharpe, ed., *Calendar of Coroners' Rolls of the City of London,* AD *1300–1378* (London: R. Clay and Sons, Limited, 1913), 177–8.
[168] This study uncovered only fourteen instances in the coroners' rolls.
[169] TNA JUST 3/161, m. 11 (1373).

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focus was on deprivation along penitential lines in order to turn the mind: fasting, isolation, and a loss of all comforts formed the corpus of tactics employed by jailers. Over time, pressing with weights (in moderation) was added to the mix of possibilities. In this respect, there is no rigid distinction between prison forte et dure and peine forte et dure, nor is one a scribal corruption of the other. The terms themselves were rarely used in the period and were probably considered interchangeable.

The penitential origins of the practices employed in hard prison are critical. Chapter 4 will return to this discussion, to underscore that hard prison was a form of public penance in a world where penitential justice was the norm. Yet, peine forte et dure might have different meanings to different people. Legislators may have viewed the peine as a form of penance with a public utility; jailers, however, may have been more attracted to its punitive role. This is especially apparent in those instances in which justices and jailers experimented with usage of peine forte et dure outside the normal parameters, specifically for approvers, idlers, heretics, and petty thieves. By the fourteenth century, hard prison grew also into a form of capital punishment. However, the evidence implies that justices, upon their own discretion, continued to use peine forte et dure as a coercive measure when it best suited them.

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