# Hanging Matters: Petty Theft, Sentence of Death, and a Lost Statute of Edward I

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The late thirteenth-century legal treatise *The Mirror of Justices,* although acclaimed and valued by seventeenth-century antiquaries and politicians, acquired a decidedly equivocal reputation in the late nineteenth century, largely due to a withering assessment by Frederic William Maitland.[1] An attempt at rehabilitation has been made in modern times, however, and its standing may perhaps be further enhanced by recognition that it cites, succinctly and with apparent accuracy, an enactment of Edward I whose text is lost and which has therefore gone unremarked.[2] In the words of the treatise: "King Edward set a limit to the amount of robbery or larceny [that would serve to hang a man] in this manner, to wit, that no one should be adjudged to death if his larceny, hamsoken, or robbery did not exceed twelve pence sterling."[3] The *Mirror's* résumé is supported

1. William.J. Whittaker, ed. and trans., *The Mirror of Justices*, with an introduction by Frederic W. Maitland, Selden Society 7 (London: Quaritch, 1895 for 1893).

2. David J. Seipp, "The Mirror of Justices," in *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900*, ed. Jonathan A. Bush and Alain Wijfells (London and Rio Grande: Hambledon Continuum, 1999), 85–112.

3. Whittaker, *The Mirror*, 141.

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The author thanks Paul Brand for reading an earlier draft of this article and making some valuable suggestions for its improvement, an acknowledgement that should not be understood as claiming that he agrees with everything it contains. Note 47 contains a reference that the author owes to Paul Brand. This article is heavily dependent upon unpublished documents in The National Archives (TNA), London, United Kingdom. Its preparation, completed during the 2021 Covid-19 lockdown, would have been impossible without the access to TNA records provided by AALT (Anglo-American Legal Tradition), the digital archive assembled by Robert C. Palmer, Elspeth K. Palmer and Susanne Jenks, and available at aalt.law.uh.edu/aalt.html. The four-figure numbers presented after TNA citations are those of images made accessible by that project. Note 60: I am advised by Paul Brand that the precise status of this order is problematic.

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by references in eyre and gaol delivery reports and records from Edward I's reign, permitting the conclusion that although the statute in question was soon lost to sight, it had some significant consequences. As well as proclaiming the authority of the king, it made a clear distinction for the first time between petty and capital larceny in terms of monetary value, enhanced the role in court proceedings of the trial jury, which supplied the necessary valuations, and prompted the development of forms of punishment appropriate for minor offenders, notably penal imprisonment.

## Early Distinctions

There was nothing novel in *The Mirror's* distinguishing between petty and capital larceny, because this was done in the law codes of the pre-Conquest Kings Æthelstan, Æthelred, and Cnut.[4] The treatise *Leges Henrici Primi,* and details in stories of a miracle of St Thomas Becket, show that the difference continued to be observed thereafter, as do court records from the early thirteenth century.[5] The treatise *De Legibus et Consuetudinibus Angliae*, commonly known as *Bracton*, which was largely a product of the 1220s and 1230s, followed suit in declaring that "No christian [*sic*] is to be put to death for petty theft or a trifle . . .", but was notably imprecise as to what actually constituted petty theft, and the courts, too, were slow to define it in all but general terms, usually doing so by reference to the nature of the goods taken rather than to their value.[6] Twelve pence in goods or money has been suggested as the point which, after about 1200, separated petty from capital theft, and a man convicted at a delivery of Oakham gaol in 1256 of the theft of goods worth exactly that sum escaped the gallows.[7]

4. Frederick L. Attenborough, ed. and trans., *The Laws of the Earliest English Kings* (Cambridge: Cambridge University Press, 1931), 127, 169; and Agnes J. Robertson, ed. and trans., *The Laws of England from Edmund to Henry I* (Cambridge: Cambridge University Press, 1925), 81, 95, 177.

5. L.J. Downer, ed. and trans., *Leges Henrici Primi* (Oxford: Oxford University Press, 1972), 189 (59: 20); Raoul C. Van Caenegem, ed. and trans., *English Lawsuits from William I to Richard I*, 2 vols., 106–7 (London: Selden Society, 1990–91), vol. ii, no. 471, 507–14; *Curia Regis Rolls ix, 1220* (London: Her Majesty's Stationery Office, 1952), 7–8; and *Curia Regis Rolls xii, 1225–1226* (London: Her Majesty's Stationery Office, 1957), nos. 1582, 327 and 2098, 426.

6. George.E. Woodbine, ed., *Bracton De Legibus et Consuetudinibus Angliæ*, 4 vols., trans. Samuel E. Thorne (Cambridge, MA: Belknap, 1968–77), ii:427–28 (fol. 151b). *Curia Regis Rolls xii: 1225–1226*, no. 1217, 248 is a rare exception to this rule.

7. TNA, JUST 1/1185 rot. 5d (0758). The suggestion concerning value is that of Roger D. Groot, "Petit Larceny, Jury Lenity and Parliament," in *"The Dearest Birth Right of the People of England": The Jury in the History of the Common Law*, ed, John W. Cairns

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But when at the 1261 Oxfordshire eyre the justices penalized the abbot of Eynsham's court at Charlbury for hanging one Gilbert of Evenlode for stealing a sheepskin worth 4d—"so small a theft"—they made no effort to define the amount for which that court could have legitimately given judgment of death..[8]

For much of the thirteenth century there was probably no certain dividing line, just as no single punishment was prescribed for minor transgressors. Mutilation was a possibility—in one case a thief lost his right foot, but the splitting or severance of ears was commoner—and expulsion from a vicinity was another.[9] But the commonest response to pilfering was the demand that the offender should find pledges willing to guarantee his or her future good behavior (*fidelitas*), perhaps with the rider that anyone unable to do so must clear out. A recidivist might have to do this anyway, while a persistent re-offender could still be hanged, however trivial his individual misdeeds. Such was the fate of Robert Onhere, as recorded at the 1263 Rutland eyre. Having had his ears slit for stealing bacon, he had the remains of them cut off after a further theft, and was finally hanged for a third transgression.[10]

In the late 1250s, harvest failures and a widespread famine—"a great dearth" (*magna caristia*)—led to a number of people appearing in court charged with thefts that were then attributed to "want," or "extreme hunger," or "want and very great poverty."[11] In such circumstances, one might have expected their offenses to be defined in monetary terms, but there is no record of this happening, and the definition of petty theft remained vague. In February 1274, one Richard de Bery, arrested for the theft of "silk surplices and other things pertaining to holy church," was hanged at Newgate after confessing himself "a thief of those and other things," even though the stolen property was valued at just 6d.[12] Only in 1275 was the issue of value ostensibly settled, when chapter 15 of the

and Grant McLeod (Oxford and Portland, OR: Hart, 2002), 47–61, a fine study although over-dependent on printed records.

8. TNA, JUST 1/701 rot. 19d (8049). The offense was one of several which led to the abbot having to pay a thirty mark (£20) fine.

9. TNA, JUST 1/951A rot. 5d (7017—foot), JUST 1/775 rot. 21 (5680—ears), JUST 1/912A rot. 25d (0159—expulsion).

10. TNA, JUST 1/721 rot. 12d (0378)

11. *Close Rolls of Henry III, 1256–1259* (London: His Majesty's Stationery Office, 1932), 212; TNA, JUST 1/82 rots. 27 (0493), 30 (0499), 34d (0579); JUST 1/343 rots. 11 (1768), 12 (1771); JUST 1/1179 rots. 19 (0452-3), 25d (0520); JUST 1/1189 rots. 13 (0029), 13d (0063). Two deaths attributed to hunger and want at the 1262 Buckinghamshire eyre may also have resulted from this disaster, JUST 1/58 rots. 22 (1187), 24 (1191).

12. TNA, JUST 3/35A rot. 3d (0022).

first Statute of Westminster declared that suspected thieves could be released to bail if they had been arrested "on slight suspicion or for petty larceny amounting to not more than twelve pence in value . . .".[13]

## The Edwardian Statute

This was not the end of the matter, however, and the application of this definition to acts of felony required further legislation. The earliest evidence of a statute specifically distinguishing between petty and capital theft comes from the record of the Sussex eyre, which began on June 25, 1279, in the form of the justices' response to the presentment that one Alexander son of Edelina had been prosecuted for the theft of a linen sheet worth 6d in the Earl of Gloucester's court at Rotherfield, convicted, and hanged: "And as the suitors hanged him for a lesser value than 12*d*., and contrary to the statute," the sheriff was ordered to make them come to the eyre, where their action cost them five marks (£3 6s 8d).[14] Then at the 1280-1 Hampshire eyre, William de Valence at Newton Valence's court was recorded as having hanged a certain John Longsomer for theft of "chattels worth less than 12*d.,* and this after the king's statute, namely the seventh year."[15] At the 1289 Wiltshire eyre, Beatrice de Mohun's court at Mildenhall was found to have hanged a man for stealing an overcoat, "contrary to the statute, for the theft of only 5*d*."; this time the penalty for the suitors was a two marks fine (£1 6s 8d).[16] At gaol deliveries at Lincoln and Nottingham in 1293, petty thieves were released by reference to the statute—at Nottingham one Richard Treweman was freed after his conviction of taking clothes worth 6d "because of the smallness [of the theft] in accordance with the king's statute"—and at York in the same year a woman who had stolen a coat was described as "excused through the king's statute issued thereon . . .".[17]

It is argued here that the statute referred to in these cases was not Westminster I c. 15, but a discrete ordinance laying down that theft was not to be treated as a capital felony when the value of the stolen goods was less than 12d. The former was concerned with bail, with the treatment of suspects who had been arrested but had yet to stand trial, whereas the

13. Harry Rothwell, ed., *English Historical Documents iii, 1189–1327* (London: Eyre & Spottiswoode, 1975), 400–401.

14. TNA, JUST 1/921 rot. 10d (3233).

15. TNA, JUST 1/789 rot. 13d (1352).

16. TNA, JUST 1/1011 rot. 47d (0883).

17. TNA, JUST 1/1286 rots. 20 (3420—Lincoln); 30 (3436—Nottingham); 31d (3521—York).

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cases cited previously are all concerned with the treatment of suspects at a later stage, when they came before a court, whether royal or private, and were convicted. It is undeniably possible that the difference reflects only a radical redirection of the 1275 statute by the king's justices (although that would in itself be a development of considerable interest, as being effectively an exercise in constructive legislation), but that does not appear to have been how the author of *The Mirror of Justices* saw it. His presentation of Edward I's enactment, cited at the beginning of this article, is neutral, perhaps even mildly favorable, in tone. But his assessment of Westminster I c. 15 is neither neutral nor favorable, instead denouncing it as "reprehensible."[18] A contradiction that would be both puzzling and surprising if the same enactment were referred to in both passages, ceases to be so if it is understood that the writer was referring to two statutes, the one being doubtless intended to supplement the other. There is reason to believe, moreover, that this second statute contained provision for the treatment of men and women convicted of petty theft. The evidence is presented and discussed subsequently.

The Hampshire case cited here suggests that John Longsomer was hanged in 1278 or 1279, during Edward I's seventh year, in contravention of a statute that had only recently been enacted. The likeliest occasion for its promulgation was the autumn Parliament of 1278, at which arrangements were made for a general eyre in which two sets of justices were to circulate the whole country. Probably containing no more than two or three short clauses, it may have been one of the *articuli* that they were to enforce when they were appointed to act "according to the law and custom of our realm . . .".[19] Several reasons can be proposed for its enactment. Population growth during the thirteenth century brought a corresponding increase in vagrancy, which appears to have added greatly to the number of poor and homeless people who frequented English communities and roads. Cases like those arising from the famine of the late 1250s show that there was a contemporary awareness of a possible connection between poverty and theft, but it was not until late in the thirteenth century that this issue, and its social consequences, found any reflection in legal texts. In its discussion of theft *Bracton* said nothing of poverty as a mitigating factor. But *The Mirror of Justices*, which was composed around 1290, declared that "the poor man who to escape starvation takes victuals to sustain his life, or a garment to prevent death by cold, if thereby he saves himself

18. Whittaker, *The Mirror*, 186.

19. TNA, C 66/97 m. 6 (0345). The phrase is omitted from the very perfunctory calendar of the commissions published in *Calendar of Patent Rolls, 1272-1281* (London: Her Majesty's Stationery Office, 1901), 277.

from death, is not to be adjudged to death, if he had no power to buy or borrow, for such things are warranted by the law natural . . .”[20] And *Britton*, written at about the same time, also exempted from the penalties of felony “poor people who through hunger enter the house of another for victuals . . .”.[21] Both referred to the 12d limit, which in one text of *Britton* was given elaborate, if not entirely lucid, justification: “At three halfpence a day, 12*d.* would be eight days wages; and as a man going without sustenance for eight days might be expected to die on the ninth, the 12*d.* has regard to the destruction of life, for which offence a man is rightfully put to death . . .”[22]

The increase in pauperism, and of the pilfering associated with it, must have constituted a significant element in the background to Edward I’s statute. And the same is true of shifts in social and legal attitudes toward punishment. *Bracton* had stated that petty theft should be punished in some way, “lest ease of pardon furnish others with the occasion for offending and lest wrongdoing remain unpunished.” Proceedings before royal justices in the mid-1270s show that by then the courts were following a similar line. At the 1276 Bedfordshire eyre Devorguilla de Balliol’s court at Kempston had to pay a 40s fine for discharging two men arrested with half a bushel of malt, when “no-one arrested with stolen goods should be unpunished.”[23] And when at the previous year’s Worcestershire eyre the abbot of Westminster’s court at Pershore was found to have released a petty thief “without any punishment in atonement for his deed”; the justices declared it contrary to the custom of the realm “to release a malefactor who has offended against the dignity of the royal crown without a punishment according to the gravity of his deed.”[24] If the “gravity” of an offense was to dictate its penalty, then a clear yardstick would be needed whereby to assess it.

The launching of Quo Warranto inquests, from 1278 held in every county visited by the king’s justices, suggests a more immediate context for enactment of the statute.[25] The cases cited here show that the statute had nationwide validity, and was to be observed in every court. But the offenses against it were all, as recorded, committed by the courts of

20. Whittaker, *The Mirror*, 141.

21. Francis M. Nichols, ed. and trans., *Britton*, 2 vols. (Oxford: Clarendon Press, 1865), i:42

22. Ibid., i:56, n. 1.

23. TNA, JUST 1/10 rot. 39d (0924).

24. Jens Röhrkasten, ed., *The Worcester Eyre of 1275*, Worcestershire Historical Society, new series 22 (2008), no. 907, 422–23.

25. For details, see Donald W. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I, 1278–1294* (Oxford: Oxford University Press, 1963).

liberties. Some may have followed their lords' example by acting in deliberate defiance of the king's authority; the Earl of Gloucester was particularly given to disregarding royal rights and commands. Other executions may reflect a resolve on the part of lords or their officers to retain their franchises by ensuring that they were used when occasion arose. This second consideration was not a new one. From the late 1230s onwards, Henry III's government had been determined not only to preserve the king's own rights and revenues, but also to ensure that holders of franchises—rights of government in private hands—exercised them both properly and fully. The Wiltshire landowner William Mauduit temporarily forfeited his court in 1249 because it failed to hang two men caught in possession of stolen goods.[26] That this was a consideration that private courts kept in mind is argued by two cases recorded at the 1278 Hertfordshire eyre, but probably dating from the early 1270s, in which three petty thieves were hanged by William de Say's court at Sawbridgeworth: a man for the theft of six capons and two women for stealing a linen sheet and a hand-towel.[27] The justices clearly did not doubt that the court had acted wrongly (its steward had to make a £10 fine), but no less significant is the fact that no value is recorded as having been set upon the objects taken, again illustrating the need for definition.

Edward I's statute did not bring an instant end to such injustices. At the 1286 Norfolk eyre, for instance, it was presented that at Michaelmas in the previous year the court of John de Crek at Fundenhall had hanged one Roger Bomund for the theft of grain worth only 4d, a "trespass" that cost the court two marks.[28] And it also brought a problem of interpretation., on a point seemingly trivial but potentially vital to those concerned; namely, whether theft became capital when the value of stolen goods reached 12d, or only when it exceeded that sum. The legal texts of the years around 1290 are unclear, even contradictory, on the point, and the king's justices may themselves have been initially uncertain.[29] At the 1287 Gloucestershire eyre, a man was hanged for stealing a sheep valued at exactly 12d, and a report from the 1293–94 Yorkshire eyre describes a Pontefract man who had abstracted fish worth 10d from another man's ponds as being informed by the bench that he would have gone to prison for 3 years "if the two fishes had been worth as much as a man would be hanged for the theft thereof, namely twelve or thirteen pence

26. Cecil A.F. Meekings, ed., *Crown Pleas of the Wiltshire Eyre, 1249*, Wiltshire Record Society 16 (Devizes, 1961 for 1960), no. 323, 213–14.

27. TNA, JUST 1/324A rot. 34d (0119-20). See also TNA, JUST 1/278 rot. 64d (5477).

28. TNA, JUST 1/579 rot. 15 (0037).

29. See especially Henry G. Richardson and George O. Sayles, ed. and trans., *Fleta*, Volume II, Selden Society 72 (London: Quaritch, 1955 for 1953), 92.

. . .".[30] But ultimately the tendency was towards leniency. At a delivery of Newgate gaol in September 1279, for instance, at which Walter of Enfield was convicted of stealing a coat and a sheet, again worth precisely 12d, he was sent to the pillory rather than the gallows, "because this theft does not exceed (*superonerat*) that whereby he should undergo judgment of death,"[31] and during the years that followed it appears to have become accepted that it was exceeding, rather than attaining, the sum that brought sentence of death for thieves. And so when in May 1300 Gilbert de Thorp was arrested and convicted at Newgate "for a purse stolen with thirteen pence," the justices did not hesitate to pass "judgment of hanging" upon him.[32]

## Punishing Petty Theft

The contemporary outlook noted previously makes it seem very likely that the statute declared that those convicted of petty theft were to be punished, probably by imprisonment or in some other appropriate way, according to the discretion of the justices (where the court was royal, or of the presiding officer in a liberty court). And so when William Warin of Aston was convicted at the 1287 Gloucestershire eyre of stealing a coat, it was decided that "as the overcoat is valued at only 8*d.,* he is quit for the present, but he is committed to prison according to the statute."[33] Seventy-three men and women were convicted of petty theft during the gaol delivery of the 1293–94 Yorkshire eyre, and on the evidence of the plea roll they were all promptly released. But reports of some of the same proceedings give a rather different impression, with the presiding justice telling the thief of a hanging and a sheet, together valued at 9½d, that had his pickings been worth 2½d more he would have been hanged, "but as ill-doing (*maleficium*) should not remain unpunished, you will remain in prison for eight days"..[34] As matters turned out, imprisonment was only one possible punishment for petty theft, but Edward I's statute appears to have given it official status.

30. TNA, JUST 1/278 rot. 39d (7214); British Library, London (hereafter BL), MS Additional 31826, fol. 210r, the case of Adam Scherewynt in the eyre roll, JUST 1/1101 rot. 54d (8149).

31. TNA, JUST 3/35B rot. 49d (0206).

32. TNA, JUST 3/38/1 rot. 5 (0010).

33. TNA, JUST 1/284 rot. 40d (7217).

34. BL, MS Additional 31826 fol. 208r, probably to be identified with the case of Adam del Blank in TNA, JUST 1/1098 rot. 76 (7360).

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The statute may also have prescribed forfeiture of chattels. Another report from the 1293–94 Yorkshire eyre records the justice as explaining to a woman whom he was allowing to go free because the clothes she had stolen were worth only 9d (in words that do not in the least resemble a discourse upon Westminster I c. 15), that Edward I had "granted that no man should be hanged for theft unless that theft amounts to at least 12*d.,* wherefore although the present king has remitted judgment of blood up to the quantity of 12*d.,* he has not because of this remitted forfeiture of chattels, but he who has been convicted of theft below the quantity of 12*d.* will lose all his chattels . . .".[35] Although a great many convicted pilferers will have had no chattels to lose, the report is supported by an entry in the record of the 1293 Northumberland eyre, setting out that Walter of Babbington, convicted of stealing goods worth 10½d, was saved from execution by the small value of his theft, "but his chattels remain forfeited to the king for that felony"—they were valued at 10s 2d—and also by evidence like that of Kentish gaol deliveries in the reign of Edward II, at which a number of petty thieves were either said to have no chattels, showing that had they not been paupers they would have lost them, or were recorded as forfeiting what they had.[36]

Some of the petty thieves who appeared at the 1293–94 Yorkshire eyre were permitted to make fines following conviction, seemingly to avoid prison rather than to keep their belongings out of the king's hands.[37] They would hardly have been in a position to do so had all their chattels just been confiscated, and the apparent inconsistency suggests that the punishment of petty thieves was ultimately decided by the justices, who at eyres, in particular, may have preferred to avoid adding to the number of prisoners packed into already overcrowded gaols. In Yorkshire not only did the county gaol have to accommodate hundreds of prisoners while the 1293–94 eyre was in progress, but also their number was greatly augmented by suspects who now surrendered to prison in order to stand trial and thereby avoid outlawry. Many of them were said to have starved to death after proceedings were indefinitely adjourned in June 1294.[38]

There is a further possibility, although this can only be a matter of inference, that the statute either clarified or elaborated upon contemporary

35. BL, MS Additional 31826 fols. 208r-v, the case of Alice Blaunchard in the eyre roll, TNA, JUST 1/1098 rot. 78 (7363).

36. TNA, JUST 1/653 rot. 33d (0148); Bertha H. Putnam, ed., *Kent Keepers of the Peace, 1316–1317*, Kent Records 13 (Ashford, 1933), 99.

37. TNA, JUST 1/1098 rots. 76d (7437), 77d (7440), 78d (7442), 79d (7446-7), 82 (7372), 85 (7378), 88d (7464). See also TNA, JUST 1/137 rot. 31 (7536).

38. Ralph B. Pugh, *Imprisonment in Medieval England* (Cambridge: Cambridge University Press, 1968), 319.

definitions of petty theft. This is suggested by a single entry, but one involving two suspects, from the gaol delivery of the 1286 Buckinghamshire eyre.[39] The first prisoner, William Bruning, charged with stealing relics, was found to have received them in pawn from an unnamed woman. He was not said to have stolen them himself, but he had received them "knowingly" (*scienter*) and "contrary to the statute," and was therefore taken into custody, subsequently making fine by 6s 8d for what was described as his trespass. In their discussions of capital larceny, *Bracton*, and later *Fleta*, laid down that the conscious receiver of stolen goods should incur the same punishment as the original thief. Perhaps the Edwardian statute corrected a belief that when the proceeds of crime were of small monetary value, the receivers of them could be regarded as having committed no offense. The second prisoner, Ralph le White of Ivinghoe was charged with stealing one and a half bushels of corn, worth 9d, from the granary of his lord, by night. The Yardley jurors convicted him, and in the words of the plea roll, "as he committed that felony by night, so he is hanged." The clear implication is that had Ralph stolen the grain in broad daylight he would have been spared, saved by the statute. That breaking and entering in order to steal would likewise have excluded suspects from the protection of the statute is suggested by some carefully worded verdicts from the 1290s and later. Robert son of Gillian atte Crucche went quit at the 1293 Kent eyre after a jury described how he entered the mill he was accused of burgling through a gap in its wall, and took flour worth 8d by pouring it out of a chest rather than breaking into it.[40] In other cases, thieves who took goods of small value were no less deliberately presented as having entered the houses where they stole them through open doors.[41]

## Problems of Implementation

The role of jurors in all cases involving theft before a royal court was crucial, since they provided the valuations of allegedly stolen goods and so decided the fate of those convicted. They were certainly not squeamish about convicting thieves, who could be hanged in considerable numbers (no fewer than 279 men and women were recorded as having perished thus after being convicted of theft and associated offenses in the gaol deliveries that formed part of the 1293–4 Yorkshire eyre), but they were not

39. TNA, JUST 1/66 rot. 15d (2495).

40. TNA, JUST 1/376 rot. 72d (3487).

41. TNA, JUST 3/26/3 rots. 14d (0173), 28 (0132); JUST 3/103 rot. 7 (0016); JUST 3/116 rot. 11d (0039); JUST 3/1/3 rot. 5 (0116).

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reckless either, and must often have been prepared to give suspects the benefit of the doubt, especially if they already knew these suspects and their reputations. Thanks to the statute, jurors could now do this not only by acquitting the suspects altogether, but also by assessing what they had stolen at a lower value than had been originally specified. The justices, for their part, are not recorded as having objected to the jurors' doing so. Hence a case like that of Alexander son of Simon le Swyk, charged at the 1293 Kent eyre with stealing bees, sheep "and other thefts." The bees were allegedly worth 2s, but the Maidstone jurors, while convicting Alexander of taking them, reduced their value to 6d. and cleared him of the other offenses, with the result that he was sent to gaol "for the smallness of the theft" instead of being hanged.[42]

The nature of what was allegedly stolen will sometimes have made a difference. In a case like that of Gilbert de Thorp, cited previously, the fact that what he had taken was money left very little opportunity for assessment, as the coins he stole could be added up and their number will have determined his fate. But in many cases there was opportunity for calculation. Inevitably it is impossible to prove that juries deliberately undervalued stolen goods in order to spare suspects' lives, but it can certainly be said that some petty thieves came very close to the gallows. William the Bowyer, for instance, convicted at Southwark in 1307 of stealing wool from sheeps' backs worth 10½d, along with a cock valued at 1d., and other men and women whose thefts were valued at 11d.[43] In such cases, the testimony of the juries may be evidence for clemency on their part, or it could simply demonstrate the conscientiousness with which they undertook the task of assessment. The justices, for their part, may not usually have minded very much whether cutpurses or pilferers were executed or not, as long as the valuations were not flagrantly inaccurate, or the accused notorious evildoers (something about which a county's officials could doubtless have informed them).

The fact that cutpurses and other minor offenders might be assaulted and even killed by the people they targeted suggest that there may well have been times when the courts appeared unduly indulgent in the eyes of victims of petty theft, for some of whom 12d could easily have represented a significant sum.[44] Be that as it may, the evidence suggests that the Edwardian statute did not intend pilferers and pickpockets to escape

42. TNA, JUST 1/376 rot. 78 (3317).

43. TNA, JUST 1/1339 rot. 19 (3113—William the Bowyer); JUST 3/35B rot. 22 (0046); JUST 3/36/2 rot. 3d (0041); JUST 3/26/3 rot. 10d (0164).

44. Examples include TNA, JUST 1/1043 rot. 15 (1345); JUST 1/1078 rot. 63 (1389); JUST 1/710 rot. 51 (9590); JUST 1/896 m. 4 (1401).

scot-free, but provided for their being punished by imprisonment or in some other appropriate way. One possibility was a severe beating, a punishment inflicted on John son of Magge of Capernwray, convicted at Lancaster in 1303 of stealing a sheep. The animal was worth only 8d, and so John was sent to prison with an order that he be thrashed—*fustigetur*.[45] Cutpurses, in particular, were liable to have their ears slit or amputated (a punishment recommended for them by both *Fleta* and *Britton*), while repeat offenders were executed. The value of the second offense might not even be recorded, since the state of their ears was sufficient evidence of past crimes.[46] A number of petty thieves were sent to the pillory, and sometimes had their ears cropped as well.[47] A session in the pillory seems to have lasted for an hour in the 1270s, and for considerably longer by the 1290s, when a man convicted at Berkhamstead of stealing a sword was ordered to stand in the pillory "from prime to nones": from daybreak until the early afternoon.[48] There was also the possibility of a repeat appearance. Estrilda of Worcester, convicted at Newgate in 1313 of cutting a purse containing 6d was sent to the pillory for three market days (perhaps the one recorded in the parish of St Peter, Wood Street, not far from the gaol).[49]

## The Development of Penal Imprisonment

From the last two decades of the thirteenth century onwards there was a growing tendency for men and women convicted of petty theft to be sent to gaol. This was a significant change from previous practice. For much of the thirteenth century petty thieves were usually required to find pledges for their remaining law abiding in the future, but as the country's vagrant population grew, many drifters must have been unable to find such guarantors, just as at the same time the doctrine that every offense required an appropriate punishment must have done much to militate against poultry thieves and cutpurses being set free without some kind

45. TNA, JUST 1/417 rot. 6 (2523). A similar punishment was recorded at York in 1302, TNA, JUST 3/74/2 rot. 4 (0021).

46. See., for example, the arraignment of Roger le Ficheler at Newgate in 1283 for purse-cutting TNA, JUST 3/35B rot. 30d (0172).

47. TNA, JUST 1/761 rot. 33 (3985). The slitting of an ear on release from the pillory is also recorded in Sussex in 1306, TNA, JUST 1/934 rot. 19d (5755), and in the Bench in 1297, TNA, CP 40/121 rot. 131d (0966).

48. TNA, JUST 3/35A rot. 3 (0009); JUST 3/91 rot. 5 (0330).

49. TNA, JUST 3/40/2 rot. 19 (0085). Reginald R. Sharpe, ed., *Calendar of Wills Proved and Enrolled in the Court of Husting, London*, 2 vols. (London: Her Majesty's Stationery Office, 1889–90), i:74, records the pillory. See also TNA, JUST 3/26/2 rot. 2d (0048).

of chastisement. The doubtless stern warning not to offend again, which is occasionally recorded as having been handed down from the bench, hardly met this need.[50]

Gaol sentences could vary greatly and in some cases were not specified. At a delivery of Colchester gaol in 1280 one Roger Born was "returned to prison to stay there for half a year as penance as he was convicted of [stealing] a bushel of oats worth 2½*d*."[51] The unusual severity of his sentence, coming very soon after the issuing of the statute, may reflect uncertainty about its implementation. More often people like Roger were sent to gaol for several weeks, while others were released following conviction because they had been interned for long, or even very long, periods before coming up for trial. At Leicester in 1306 a woman convicted of stealing a bronze pan was discharged after the sheriff testified that she had been imprisoned for 4 years, and although that was exceptional, in December 1323 a man convicted at a Newgate gaol delivery of stealing clothes worth 8d was freed "at the discretion of the justices" because he had been held in prison awaiting trial for a whole year, far longer than any sentence he could have expected to incur for his offense.[52]

That discretion was probably quite often exercised, despite a temporary trend toward precision in sentencing in the years around 1300. At the gaol delivery of the curtailed Surrey eyre that began on May 28, 1294, convicted pilferers were variously remanded to the feasts of Pentecost (June 6), Trinity Sunday (June 13), the Nativity of St John the Baptist (June 24) and St Margaret (July 20), and in addition, sentences of 3 weeks, 1 month, and 6 weeks were imposed.[53] Similar offenders were treated in like fashion at the Kent and Middlesex eyres of the early 1290s, except in one Middlesex case in which a man and a woman who had stolen poultry worth 10d were sent to prison "while the justices remain in this county."[54] William Fycays, convicted on July 23, 1299 of stealing lead worth 8d from a chapel in St Paul's Cathedral in London, was sentenced to remain in prison until the next delivery of Newgate gaol, which did not take place until November 20, 4 months later.[55] Perhaps his offense was regarded as sacrilegious, and therefore meriting an unusually long sentence. At Kent trailbaston sessions in 1305 the justices usually imposed a term of a week in gaol for every penny's worth of goods stolen—6 weeks

50. TNA, JUST 1/1286 rot. 51d (3549); BL, MS Additional 31826 fol. 208r. For an earlier example see TNA, JUST 1/1189 rot. 13 (0029).

51. TNA, JUST 3/18/1 rot. 14 (0204).

52. TNA, JUST 1/467 rot. 14d (0937); JUST 3/43/1 rot. 24d (0118).

53. Details from TNA, JUST 1/883 rots. 3-5 (0504-8, 0513-16).

54. TNA, JUST 1/544 rot. 69d (4681).

55. TNA, JUST 3/37/4 rot. 6d (0145).

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for whitings valued at 6d for instance, and 8 weeks for a sheep worth 8d[56]—a policy that was further refined at later trailbaston sessions. William the Bowyer, whose conviction in 1307 has been noted, was sent to prison for 11 weeks and 3 days for his theft of goods worth 11½d, and the sentences for other petty offenders were no less minutely calculated.[57]

This apparent trend toward consistency in sentencing was fleeting, however. In 1315–16, an atrocious famine must have made petty thieves more numerous and perhaps made the justices more lenient, and a consensus may then have developed that the former should spend only a day in prison for every penny's worth of stolen property. In 1316 a malefactor convicted at Newgate of stealing malt worth 9d was sent to gaol for 9 days, and in the following year, the tariff for two hens and a duck valued at 5d was 5 days in prison.[58] But it is hard to see any settled sentencing policy at this time, and some gaol delivery rolls from Edward II's later years show no punishment at all for minor offenders, although again the possibility should not be discounted that a suspect's discharge was due to his or her having been long in prison before coming up for trial.[59]

A further issue raised by Edward I's statute concerning petty theft was the treatment of escapers from gaol. In the 1270s, the law still treated fugitives from prison as self-confessed felons, who by the very fact of his flight had admitted his guilt and should therefore be treated with the utmost rigour when recaptured, regardless of his alleged offense. By declaring that the theft of goods under the value of 12d was not, in normal circumstances, a capital offense, the statute should have prevented the execution of people suspected of it, and may well have been a factor behind the order given in 1295, sometimes referred to as a statute, which declared that in future the escaper should receive only the punishment appropriate to the offense for which he or she had been imprisoned.[60] During assizes held in Essex in 1278, the jurors in an action of novel disseisin over land in Walthamstow told how its previous possessor had been arrested for the theft of a strongbox worth 3½d, had escaped from prison, and had been

56. TNA, JUST 3/26/3 rots. 2 (0073), 18 (0112).

57. For instance Margery, wife of Adam the Taylor, a Middlesex woman who was imprisoned for 6 weeks and 3 and a half days for the theft of goods valued at 6½d, TNA, JUST 1/1339 rot. 2 (3075). A roll of sessions for Middlesex, Sussex, Surrey, and Kent, this record contains several other cases of petty thieves being sentenced to a week in prison for every pennyworth of goods stolen.

58. TNA, JUST 3/40/2 rot. 32 (0113); JUST 3/41/1 rot. 7d (0086).

59. For example the case of Hugh Glen at Bedford in 1321, TNA, JUST 3/1/3 rot. 5 (0116).

60. For details see Pugh, *Imprisonment*, 227–29.

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hanged after being caught.[61] Nothing was said to suggest that his execution was regarded as having been excessive or unjust, something that would have been hardly possible 20 years later.

## Conclusion

It seems reasonable to suggest that Edward I's statute, by making a clear distinction between capital and petty larceny, and prescribing punishments for the latter that fell short of hanging, had the effect of making English criminal law somewhat more humane, even though this was probably not the principal aim of the men who drafted it. Its most likely purpose, indeed, was to assert the authority of the crown by regulating the conduct of the courts of liberties, and so to increase the authority of the crown at the expense of the numerous lords who claimed to possess the franchise of gallows. Judicial records from the years following the enactment of the statute show why it was needed, although at the same time suggesting that miscarriages of justice of the kind it was intended to remedy were not, in fact, very frequent.

After 1294, references to the statute disappear. Quickly absorbed into the mainstream of judicial practice, it vanished together with the eyre, which was always the government's principal agency for enforcing it, having nevertheless contributed significantly to three long-term developments. It fostered the employment of imprisonment as a form of punishment, to an extent arguably greater than has previously been appreciated.[62] It established a lasting dividing line between kinds of theft. And it significantly enhanced the importance of juries, by giving them something of the discretionary role in trials of theft, which they were acquiring at around the same time in cases of homicide, and on much the same grounds. For just as homicide could be made pardonable by a jury's verdict of self-defense,[63] so self-preservation was by the 1290s accepted as a justification for theft, albeit in a limited way, since what was stolen had to be goods of low value that could plausibly be regarded as having been taken in desperation. Where that value was concerned, responsibility for appraisal was in the hands of the trial jurors, who in the Yorkshire reports and in many court records are explicitly said to have been required by the justices to provide the necessary assessment. They were doubtless expected to undertake this

61. TNA, JUST 1/240 rot. 13d (7920).

62. Pugh, *Imprisonment*, 26–27, deals only briefly with the subject.

63. See, in particular, Thomas A. Green, "Societal Concepts of Criminal Liability for Homicide in Medieval England," *Speculum* 47 (1972): 669–94.

task in an objective manner, and may usually have done so. But whether they were conscientious or casual in their approach, or whether they were influenced by friendship, by a sense of justice, by corruption, or by compassion—the last a quality surely shown in verdicts like those on a Kentish widow who stole grain "out of very great want," and a Devon man who made off with food when "in the grip of very great hunger"—it was they who decided which way the scales of justice were to incline, and it was their valuation that could make the difference between life and death.[64]

64. TNA, JUST 3/26/3 rot. 28 (0132—Kent); JUST 3/116 rot. 11d (0039—Devon).

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