Crime and Settlement:

Extra-Judicial Dispute Resolution in Medieval England

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Murder, theft, rape. **Revenge.** Disputes in Medieval England, as they are today, were often characterized by violence, reciprocal violence, damaged familial reputations and divided communities. What is more, formal court based dispute resolutions were often unsatisfying and provided little to no compensation to the victim and to his or her family. Women and impoverished persons faced disadvantages in attaining a fair trial, and resolutions in the court were costly and rarely provided the victim with tangible benefits.

Not all disputes were resolved in court, however. Men and women, poor and wealthy, also had the opportunity to resolve their disputes via a settlement. A settlement, in this time period, was an agreement produced by two parties desiring to resolve their disputes outside of the court system (an "extra-judicial settlement").[1] Although a settlement might resolve a wide range of issues during this time period, this thesis will primarily focus on settlements that occurred following a criminal act such as an assault, murder or rape. In such cases, many more people that just the victim were typically involved, and agreements in these cases often reflect a broader sense of resolution between the affected families and kinspeople. Although our modern court system controls many aspects of today's settlements, settlement during this time was far less regulated. In a settlement agreement for accused criminal actions, the two parties were not bound by standardized legal procedures, nor did they have to base their agreements on precedent. Actual settlement practices in twelfth and thirteenth century Medieval England existed in a wide variety of forms. If unable to work out a settlement directly, the parties involved had a number of options in choosing mediators to aid in reaching an agreement. They

[1] The term "settlement" will be used throughout this thesis, a term which indicates an "extra-judicial settlement." The term "settlement" will be used as both a noun ("the provisions of the settlement were…") and as a verb: ("the two parties settled").

could be assisted in making mediation decisions by friends, could each select an arbitrator to negotiate on their behalf, and, in the event that the arbitrators could not reach a suitable agreement, an "umpire" could be appointed not only to make a decision, but to mediate broader issues between the two parties. Often, the parties involved appointed a respected member of the community, and, occasionally, a lord may have been appointed to resolve issues on his land. Although typically reflecting a give-and-take style arrangement, Joseph Biancalana explains that, at the other extreme, decisions made by arbitrators sometimes strongly "resembled adjudication without a jury."[2] Although Biancalana recognizes that in civil cases, such as an inheritance issue, decisions were based primarily on more standardized procedures, in Medieval criminal cases, in which there was "seldom one side to the story, and there was enough blame to go around,"[3] the settlement typically "reflected the damages caused"[4] rather than being based on systematic standards.

This is not to say, however, that people in this time period did not have regular access to courts, a topic that will be explored in greater detail in the next chapter. Further, people in this time could appeal to higher courts if they believed that they would not receive a fair trial (particularly if they believed that the judge held a bias or was being bribed), women had court access either with their husband as co-prosecutor or in individually prosecuting the murder of their husband, and courts had provisions to alleviate some degree of financial strain for those of low income or low status.

2. Joseph Biancialana, "The Legal Framework of Arbitration in Fifteenth Century England," *The American Journal of Legal History 47, No. 4* (2005): 349.
3. Biancalana, 351.
4. Biancalana, 351.

With relatively available access for men, women, rich and poor, the goal of this thesis will be to investigate why individuals, families and kinspeople in Medieval England, specifically in the late twelfth and in the thirteenth century, utilized non-court based settlement options in order to resolve their disputes. More broadly, this thesis aims to provide an understanding of the elements of dispute that were better resolved via a settlement, in the hopes that it might offer insight into the important dispute elements prevalent at the time of the institutionalization of basic principles of the legal system that exists today in England, the United States and places around the world. This thesis further hopes to argue that the importance of settlement to the true *resolution* of disputes, not just to providing a ruling on a dispute, during the creation of legal procedures in early common law, provided for the long-term co-existence of settlement and court based resolutions. Settlement practices, although now regulated by the courts, remain crucial to dispute resolution in modern times, and understanding the importance of settlement practices at a key time in legal history helps us understand why settlement as a practice in our system of dispute resolution has prevailed for hundreds of years.

Selecting the time period of late twelfth and thirteenth century in England was not an arbitrary decision, and much of the significance of settlement in this century is related to this period in legal history. This thesis focuses on a time in which the legal system that grandfathered the modern legal systems of England, the United States and other parts of the world was becoming more standardized. Despite the standardizing legal system, extra-judicial settlements were regularly respected by the courts during this time. More specifically, this thesis focuses on the period after the conceptualization and institutionalization of the Angevin King's common law (legal processes *common* to the

people of England), but prior to the mid thirteenth century, at a point in which the courts no longer regularly honored settlements (until about 1220, as many as ninety per cent of settlements were respected by the courts).[5] Thus, this thesis hypothesizes, this was a period in which people could seek a settlement with the understanding that the courts would honor the outcome. The implication of this, then, is that we can get a better sense for the reasons people in Medieval England would opt for a settlement over the court system if they knew that their settlement would be respected.

During this time period, settlement remained the primary way of seeking actual compensation for the prosecuting party, serving as a powerful, inexpensive and rapid means to achieving not only an agreement, but an arrangement that facilitated peace and harmony in the wake of crime. This thesis examines a collection of case studies that expose an array of motives for seeking settlement, and argues that the key reasons for seeking a settlement are a fundamental and human desire for a resolution that provides for overall community peace, opportunities women and socially disadvantaged persons and for direct, meaningful compensation. The final case study in this thesis points to a key intersection between established settlement practices and the desire to encompass the aforementioned goals of a settlement into a court procedure.

The case studies examined reflect a wide range of cases from the twelfth and thirteenth centuries. They reflect the most common types of criminal cases from this time period; assault, homicide, theft, and rape.[6] Some of the cases are from local record books,

5. Daniel Klerman, "Settlement and the Decline of Private Prosecution in Thirteenth Century England," *Law and History Review* 19*, No. 1* (2001): 38.
6. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 Yale Journal of Law and Humanities 271 (2002): 6.

while others come from the King of England's own courts. All of the cases presented here have been translated into English from Latin or French.

Secondary literature on legal history in twelfth and thirteenth century England often focuses on the rise of the English Common Law system and, explains legal historian Edward Powell, the history of extra-judicial settlement remains largely understudied. Scholarship in the last century often regards settlement and litigation as mutually exclusive practices, and some historians, such as Professor John Bellamy, describe extra-judicial settlement during the period under investigation as "symptomatic of dysfunction" in the early Medieval English court system.[7] The scholarly neglect to study settlement, Powell explains, "is no doubt attributable to the precocious development of Common Law."[8] Yet, recent studies of primary documents reveal "elaborate and well-established methods of arbitration"[9] developing during the early Medieval period and point to important intersections between the two forms of dispute resolution.

Although current scholarship generally acknowledges and even provides analysis of specific instances of settlements, literature to this date has not focused specifically on categorizing and analyzing the wide range of motives for settling outside of the court in this time period, and fails to offer a broader perspective of the human elements that were, and continue to be, crucial to settlement processes. Likewise, current literature fails to

7. John Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London: Routledge and Kegan Paul, 1973): 114.
8. Edward Powell, "Settlement of Disputes by Arbitration in Fifteenth-Century England*," Law and History Review 2* (1984): 21.
9. J. W. Spargo, "Chaucer's Love-Days," *Speculum Xxxiii* (1940).

argue that the importance of settlement to satisfying the needs of the people resulted in direct changes to court procedures.

Before delving into cases from the twelfth and thirteenth centuries, a brief introduction to a very recent and famous case that resulted in a settlement will, hopefully, offer the reader a sense of the relevance of this thesis: in 2003, a famous basketball player by the name of Kobe Bryant was accused by a nineteen year old woman of rape. Although a lawsuit was filed against Bryant for "mental injuries, scorn and public humiliation,"[10] and a jury was assembled, the case never made it to trial due to the young woman's refusal to testify in court, and Bryant and the alleged victim agreed to a settlement. Yet, unlike settlements in Medieval England, the settlement between Bryant and the alleged victim was restricted by law, and is enforceable by the courts. In particular, this case was restricted in the amount of financial compensation involved as based on the law of Colorado, in which the alleged event took place. Following the settlement, a statement was released that reported that matter had been resolved to the satisfaction of both parties.[11] The significance of many elements of this case, I hope, will become clear in this thesis, and the case will be analyzed in greater depth in the conclusion.

The information presented in this thesis is important because it reveals what people desired from dispute resolutions during a time in which the courts were likely to respect their agreement if they settled out of court. More generally, the research presented here points to basic human desires that underpin modern dispute resolution systems. At the end of this thesis, a key point of intersection between settlement practices and the

10. Associated Press, *Suit Settlement ends Bryant saga,* 2005, [online], *available from* http://nbcsports.msnbc.com/id/7019659/ns/bryant_sexual_assault_lawsuit/page/2/ , 15 March 2011.
11. Associated Press, 2005.

courts will be assessed, and will show that the compensation people desired from a settlement became an institutionalized aspect of court based dispute resolution, and provided for long term co-existence of settlement and court based resolution.

Chapter 1: Scholarly and Historical Context

> *Where any of them has the choice, in accordance with justice, of amicable agreement or legal proceedings, and he chooses amicable agreement, this shall be as binding as a legal decision itself.*
>
> *For an agreement supersedes the law and amicable settlement a court judgment.*[12]
>
> *—Leges Henrici Primi, 1109-1118*

The time period in question is better understood by placing it in the larger picture of the legal context in Medieval England. A settlement for a criminal case is by no means an idea original or attributable to this period. In fact, argues scholar Ian Rowney, settlements "rank among the earliest features of human society."[13] Variations of extra-judicial settlement practices, which offered plaintiffs and defendants an efficient and inexpensive alternative to the court system, regularly functioned as far back as Ancient Greece and Rome. Records reveal that settlements occurred regularly during England's Anglo-Saxon period (which lasted from approximately the fifth century until the Norman Conquest of 1066), and far outdated the Common Law system. Anglo-Saxon forms of arbitration often utilized the Wergeld system, which "reflected the principle that a human life has a compensatory value, payable in full if a person is killed, or proportionately for

12. Translated by L.J. Downer in *Leges Henrici Primi, Oxford: Clarendon Press 1972,* 165-173.
13. Ian Rowney, "Arbitration in Gentry Disputes in the Middle Ages," *History 67 Issue 221.*

injury or insult."[14] Even in Anglo-Saxon times, dispute settlement between parties served a meaningful community function. Patrick Wormald explains that predating common law, "dispute settlement signified a broader sense of regional peacekeeping beyond individual cases of slaying, wounding and cattle-stealing."[15] Utilized among members of all different classes and backgrounds, the power of extra judicial settlement lied in its ability to repair the consequences of violent actions in a way that would restore peace and provide a basis for future peaceful relations between the disputants.

Recognizing the history of dispute resolution practices in the Anglo-Saxon period, the more modern primary debates about extra judicial settlement in twelfth and thirteenth century England focus not on whether settlements existed, but rather on the peacekeeping role that settlement played, the ties which connected settlements to the kings and Church, and, most importantly, the stark contrast between the practices and outcomes of dispute resolution in settlement versus those in the court system. Primary materials reveal that settlement practices were powerful in settling disputes and stood in clear distinction from the court system during the twelfth and early thirteenth centuries. Although the courts had a minimal relationship with settlement practices during first century of Common Law, by the latter half of the thirteenth century, the two systems were systematically becoming less polarized.

The anonymously written Leges Henrici Primi, quoted at the introduction of this chapter, reveals that the distinction between outcomes in extra-judicial settlements versus outcomes in court rulings was a topic of discussion prior to the late twelfth century. A commonly translated phrase from the Leges Henrici Primi is "Pactum enim legem uincit

14. Patrick Wormald, *Disputes in Anglo Saxon England*. In The Settlement of Disputes in Early MedievalEurope. Ed. Davies, Wendy and Paul Fouracre. (Cambridge University Press, 1986),167.
15. Wormald, 167.

et amor iudicium," which L.J. Downer translates as "For an agreement supersedes law and amicable settlement a court judgment."[16] Debate exists as to the extent of the prevalence of the idea of "love superseding law" in the earlier twelfth century, but also during the time period this thesis examines. Some historians, such as Michael Clanchy, interpret this statement to mean that settlement was an overall better option in twelfth and thirteenth century England. He argues, specifically, that existing evidence suggests that the proposition of the Leges, that 'love supersedes law,' was well-understood and even commonplace even in the thirteenth century.[17] As evidence, he cites a 1282 case in which a person named William le Despencer was summoned to "make law, meaning that he was to produce oath helpers to swear to his innocence in accordance with the custom of the law"[18] ('oath helpers' in this time were kinsmen who could attest to his character and actions). However, observes Clanchy, a subsequent note in the margin of the court record states that William "may wage an out-of-court settlement and, at a later meeting of the court, it was noted in the margin of the roll that the case concerning William was waged in love (vadiata fuit in amore)" and was thus settled out of court.[19] Argues Clanchy; "this enrolling clerk was familiar with the idea that law is a process duly done in court, whereas love involves an agreement out of court,"[20] thus suggesting that this mindset was generally acknowledged in the royal courts of this time.

Yet, Richard Keyser argues that this phrase may often be interpreted too strongly. Keyser argues that the author of the Leges Henrici Primi did not so much "reject judicial

16. Downer, 165.
17. M.T. Clanchy, "Law and Love in the Middle Ages," In Settlements and Disputes: law and Human Relations in the West, John Bossy Ed. 47-67, (Cambridge University Press): 49-50.
18. Clanchy, 49-50.
19. Ibid
20. Ibid

institutions so much as express ambivalence about the practical efficacy and moral validity of human judgment itself."[21] Further, that the key point in the document is that flexibility was a "key condition for growth of any type of agreement."[22] Keyser thus argues that the prevalence of the idea of 'love superseding law' was probably very minimal in the court setting during this time period. Research from the late twelfth and the thirteenth century generally tends to support Keyer's argument. Little court language reflects these principles and, though often inherently suggested by the nature of a settlement, the presence of the language of love and law is notably absent in settlement agreements.

Crucial to understanding the significance of settlement practices in twelfth and thirteenth century England, explains Paul Hyams, is understanding the "existence of feud as a feature of society"[23] during the period in question, but also in the centuries that predated it. Hyams does not emphasize any role for the Leges, but instead argues that disputes and settlements during this time reflect feud as an element of society. The feud system, argues Hyams, emphasizes familial and clan relationships and an 'eye for an eye' form of conflict. The best chance for longevity of resolution in this form of dispute, then, is one that emphasizes a payoff structure and achieves closure for both parties in the long run.

Hyams argues that arbitration and mediation practices during this time stood in clear distinction from the court system, and were powerful because they provided a peacekeeping opportunity and a chance for a more tangible benefit to the victim or

21. Richard Keyser, *"Agreement Supercedes Law, and Love Judgement:" Legal Flexibility and Amicable Settlement in Anglo-Normal England* Manuscript. 9.
22. Keyser manuscript, 9
23. Paul Hyams, *Rancor and Reconciliation in Medieval England*, (Ithaca: Cornell University Press, 2003): 18.

victims than the courts could provide prior to the second half of the thirteenth century. Indeed, argues Hyams, for criminal cases, the "tit for tat strategy appears more robust than all or most of the alternatives."[24] The position of settlement during the Early Medieval period of England was further strengthened by royal efforts to promote the "king's peace."[25] Hyams emphasizes a collective effort on the part of kings and clerics to "coerce [the parties] into future co-operation and implement a royal but also Christian view of public peace."[26] Like Hyams, Daniel Klerman identifies key motivations for both plaintiffs and defendants in a criminal case to utilize mediation practices. Klerman explains that in twelfth and early thirteenth century England, the courts offered "no routine royal remedy by which victims could obtain damages for personal injury or property damage."[27] If the accuser was successful in the trial, she or he would receive no compensation, and the guilty party faced death or a fine to the king.

Klerman, unlike Hyams, places little emphasis on the feud structure of Early Medieval England in framing the power of settlement, but instead emphasizes that an accused person facing heavy fines or hanging at the hands of the court had a "powerful reason to negotiate with his or her accusers."[28] In criminal cases, the fact that the settlement might spare the life of a guilty party contributed to the frequency of settlement procedures.

Frederick Maitland provides a very general overview of the way that the court system functioned during the twelfth and early thirteenth century. For most people in England who wanted to settle a dispute via the court system, the first point of contact was

24. Hyams, 20.
25. Hyams, 82.
26. Hyams, 19.
27. Klerman, 38.
28. Ibid, 38.

a feudal or communal court, where their complains could be heard before the sheriff of the town and, in some cases, a judge appointed by the royal cabinet. The act of prosecution itself was called an 'appeal' during this time, a term that has no relation to the modern legal use of appeals. However, when a person believed that they could not get a fair trial at this level (for example, the victim believed that the defendant or his kinsmen have been involved in bribery), the accusing party could seek to have their case tried in a court of their lord's lord, and then this man's lord. Eventually, it would reach the king's courts. Maitland explains that the kings courts saw three main types of cases; pleas of the crown (cases in which royal rights are concerned), litigation between the king's tenants in chief (this would have been their proper court) and complains of default of justice in lower courts.[29] However, Maitland distinguishes this process from the more modern system of appeals. When a prosecuting party sought a higher court (appealed), it was not with a goal of overturning a previous decision, but rather to try the case in front of a fair judge.[30] Hyams further explains that chance and enterprising pleaders perhaps opened the way into royal justice, and the simpler case of misuse of the king's public procedure paved the way for appeal exceptions to follow. Hyams also explains that during the time period in question, a "new wave of school-trained lawyers [was] beginning to penetrate the common law courts."[31]

If a criminal case was brought to court, and if there was no clear evidence for one side or the other, the outcome of a case would sometimes be decided via an ordeal. In an ordeal, guilt or innocence would be decided when the accused person or persons

29. Maitland, Frederick W. (Ed. A.H. Chaytor) *Equity also the Forms of Action at Common Law*. (Cambridge: University Press, 1909), 314-315.
30. Maitland, 314.
31. Hyams, 183.

underwent some type of dangerous experience. For example, a person might have to reach his hand into a pot of boiling water to retrieve a stone. Afterwards, the person's hand was bound. The hand might be examined a few days later to see if it was festering or if it was healing. If, after those few days, the hand was not healing, the person might be found guilty. The process of the ordeal rested on the idea of judicium dei, reflecting the idea that God would reveal innocence. In this example, God would be responsible for healing the wounds. The concept of judicium dei was likewise found in the trial by battle, another potential means of determining guilt or innocence. Explains Maitland of those involved in the ordeal; "They have not come there to convince the court, they have not come there to be examined and cross-examined like modern witnesses, they have come there to bring upon themselves the wrath of God if what they say be not true."[32] This process is known in England as 'making one's law;' a litigant who is adjudged to prove his case in this way is said to 'wage his law' (vadiare legem)."[33] In the trial by battle, the prosecutor and the defendant fought against one another, and the winner was believed to be right in the case. A settlement, therefor, would have been a good option for anyone wishing to avoid a duel. Particularly, the prosecuting kin in a murder case might prefer not to risk losing another kinsmen in a trial by battle. An example of a case in which a trial by battle was utilized will be examined in greater detail in chapter five.

The later half of the twelfth century saw significant legal reform, beginning with the Angevin kings who reigned during the twelfth century in England. Henry II (r. 1154-1189) is often credited with initiating the most significant changes. John Hudson offers multiple perspectives on the impetus for legal reforms during this time. He explains that

32. Maitland, 309.
33. Ibid

one possible reason was that rulers sought to prevent the violent action that often resulted as result of a failure to truly resolve a dispute, and sought to channel disputes through royal law.[34] In addition, Hudson argues, "a unified law of the realm was important to establishing a relationship between the king and his people as a whole, rather than simply the great men of their realm."[35] Two of Henry II's key legal reform acts, the Assize of Clarendon in 1166 and the Assize of Northhampton in 1176 "demonstrated an effort to clamp down on serious offenders,"[36] and provided for royal justices to travel throughout the land to institute more standardized legal practices. It is with these traveling royal justices that we see the beginnings of the "jury of twelve," the predecessor to our modern grand jury. Explains Hudson, their "accusations did not replace, but rather supplemented, the traditional form of prosecution where the victim, or the relative in cases of homicide, had to bring an individual accusation against the suspect."[37] Hudson hypothesizes that Henry II regarded the traditional methods of jury presentment as "insufficient."[38] It is important to note, however, that juries during this time served a significantly different role than the modern jury. In this time, members of the juries were the fact finders in a case. They were responsible for investigating the elements of the case and presenting the facts in court.

Much of the information historians have about law in the late twelfth and early-mid thirteenth centuries comes from the writing of two key figures in the history of English law. The first of these figures, Ranulf de Glanville, served as Justiciar of England

34. John Hudson, *Common Law- Henry II and the Birth of a State*, 2010, [online], available from http://www.bbc.co.uk/history/british/middle_ages/henryii_law_01.shtml#two, 14 February 2011.
35. Hudson, 2010.
36. Ibid.
37. Ibid.
38. Ibid.

from 1180-1189. Glanville is generally credited with writing the De Legibus Anglie, the first great treatise on English law.[39] The second of these figures, Henri de Bracton, wrote extensively during the mid thirteenth century. An English Justice Itinerant during the reign of Henry III, Bracton wrote about the practice of law in England. W. W. Edwards argues that, "no one can doubt that the law as laid down by Bracton was the then accepted law of England."[40]

The early thirteenth century, a time characterized by high taxes and unsuccessful wars, also saw the first issue of the Magna Carta, in 1215. The first version of the Magna Carta contained provisions that limited the king's power and asserted certain liberties for the people. The treatise also argued that no one, including the king, was above the law. A rebellion ensued when then king, John, quashed the treatise, and the fighting escalated into civil war. Civil wars in this time period, argues Hyams, "tended to be much more emotionally charged than foreign ones."[41] During this time, men often chose their loyalties in national conflicts on grounds of local loyalties, to fight with friends and against enemies."[42] This sense of loyalty, kinship and fighting against a cause is seen on a much smaller scale in settlements, and suggests that this was an acceptable dispute style during this time period. The Magna Carta treatise was re-issued in various forms throughout the thirteenth century, and in 1237, the Charter was confirmed and granted in perpetuity.[43]

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39. There is, however, significant debate about Glanville's role in writing the De Legibus Anglie. Josiah Cox Russell (1970) argues that the treatise appears to be the work of the clerks of the royal court, not a great jusiticiar. http://www.jstor.org/stable/2855985
40. W.W. Edwards, *Brachton and his Relation to the Roman Civil Law*, 4 Green Bag 196 (1892): 196.
41. Hyams, 252.
42. Hyams 252.
43. J.C. Holt, Magna Carta 2nd edition (Cambridge University Press, 1992): 394.

The works of Glanville and Bracton, the issuing of the Magna Carta (and the chaos that ensued), as well as significant collections of court records reveal that the later twelfth and early thirteenth centuries were a period of legal transition, and the institutionalization of law in England was not an immediate, but rather a slow and muddled, process. The case studies presented here should, therefor, not be viewed and judged by their lack of clear cut decisions, or their sense of right or wrong, but rather assessed by their intricate and imperfect transitional nature, as was representative of cases in this time.

Chapter Two: Community Peacekeeping

Although one might think of a conflict as existing solely between two people, the wrongdoer and the wronged, in reality, others are always involved. The two principles are not isolated individuals. "If they were," explains Hyams, "the avenger might not have acknowledged an obligation to avenge; the dead man was in no position to insist."[44] Hyams explains that vengeance in feud culture was much less a matter to be pursued in isolation from one's friends than was the later duel of honor. Further, in these house or clan assaults, attackers and defenders each sought security in numbers. Often, in times of known enmities, each side mustered maximum force. It also took the friends of the clans and respected city members' maximum force to quell such disputes. This is not to suggest, however, that disputes were 'wrong' or unfounded in this time. Explains

44. Hyams, 4.

Clanchy; "disputes, far from being pathological, were normal and inevitable as people struggled to secure their objectives."[45]

Like studying instances of violence from this time period, studying instances of settlement reveals a sense that the resolution of a dispute had a significant impact on more than just the victim and the accused offender. Such cases often demonstrate the importance of kinspeople (a term that is used to describe a wide range of relationships, including close ties within families, extended family, close friends or neighbors and people who lived under the rule of a particular lord) in settling a dispute. Disputes, particularly violent ones, might affect entire communities, and, quite possibly could reflect a broader community dispute. In turn, a dispute *resolution* might reflect a broader sense of regional peacekeeping.

The settlement that results after of the murder of Drew Chamberlain in 1207 exposes two key reasons why a settlement would have been desirable during this time. First, the case reveals the power and strength of kinship bonds in this time, and the effect of violence on more than just the victim. The second issue this case presents is that conflict between people in a region has an effect on the region as a whole. The resolution in this case illustrates a desire for broader peacekeeping.[46]

In 1207, Herbert of Patsley murdered Drew Chamberlain by a heavy blow to the head with his bow. "Not content" with this, Herbert also stabbed him in the heart with a knife "so that he died." The following year, Drew's brother, John, "appealed Herbert of the homicide" and the parties "were preparing for a duel by the time the proceedings

45. Clanchy, 50.
46. The case description that follows is based off of a translation by Paul Hyams from records in Norfolk, England.

came before royal justices."[47] A local notable, Thomas of Ingoldisthorp, who had served on several grand juries with another Patsley kinsman "accepted responsibility for Herbert" and, pending the duel, guaranteed his appearance on that day. In the meantime, he prepared a settlement between the two parties, thus keeping the dispute resolution outside of the court system. Thomas himself accepted a heavy fine for a "royal license to settle" between the parties. Thomas arranged terms which mandated that Herbert was to go to Jerusalem within forty days to serve God in the Holy Land for seven years to the benefit of the deceased man's soul, and, should he return before the allotted amount of time, was "liable to execution as a convicted homicide."[48] Thomas also offers to pay for one of the dead man's kinsmen to become a monk or canon at a local monastery, as well as requires that Herbert pay an amount of money to the Chamberlain family by the following year (to be completed before Herbert departs for the Holy Land). Thomas arranged for eight local knights to stand surety for Thomas' financial offer to the king and "also perhaps for the settlement itself."[49]

This case clearly shows the strength of kinsmen ties in a conflict, and the widespread impact of a conflict. Though he has no direct role in the homicide, Thomas of Ingoldisthorp takes financial responsibility for permission to settle, and for paying the presumably hefty price of paying for a Chamberlain kinsman to become a monk, all based on his relationship to Herbert via a mutual acquaintance. In order to understand Thomas of Ingoldisthorp's motive, understanding 'feud' as a feature of Medieval English society is key. Hyams defines feud as "the obligation to avenge wrong, that is understood as something personal, incumbent on the victim or on individuals closely related to

47. Hyams, 273.
48. Ibid
49. Ibid

him."[50] Hyams takes a step further in this definition and explains that, "social identities reflect, and are reflected in, group membership, so the initial act creates a state of hostility between collectivities as well as individuals."[51] Although other scholars debate the nature of 'feud,' what emerges from studying cases such as the settlement between the Patsleys and the Chamberlains is a sense that harming an individual in a group harms the group as a whole, and consequently, reparations are valued by the group as a whole. In this particular case, Thomas of Ingoldisthorpe essentially protects his kinsman, Patsley, from a trial where he would likely be sentenced to imprisonment or death.

Indeed, a trial, in this case, would have had produced an exceptionally different outcome than the arranged settlement. If tried in court, Herbert would have been sentenced to severe punishment, fine or even death, while the Chamberlains had little actual compensation. A trial would have also placed a financial burden on the Chamberlains, yet it is likely that a trial would not have been satisfying for the Chamberlain family and it is likely that the blood feud would have been perpetuated.

Although the direct goal of the settlement is preventing a perpetuation of the blood feud between the Patsleys and the Chamberlains, the resulting arrangement reveals that a sense of group peacekeeping is broader even than the two clans. The actual settlement itself serves both a moral and a pragmatic community function. From a moral perspective, Thomas devises an arrangement that provides a sense of compensation for the broader community. First, he arranges for not one, but eight sentries to guarantee that the fine is paid to the king. This arrangement likely served the function of publicizing the acts of compensation to the community. What is more, Thomas' arrangement actually

50. Hyams, 9.
51. Ibid

honors Chamberlain in the community by paying for a Chamberlain kinsman to become a monk and encouraging Herbert to serve seven years in the Holy Land. From a pragmatic perspective, Thomas' arrangement serves a useful function for the community. He essentially provides for Herbert to spend his penance a continent away, removing him from the community long enough to calm the conflict and cool tensions between the clans. By adding a direct financial compensation for the Chamberlains, it can be estimated that the settlement promoted an arrangement which likely suited both the victim's and the guilty party's kinsmen. This position is further strengthened when one considers that, had the Chamberlains brought the case to court, and that Patsley was found guilty, the punishment for Patsley might have been seen as a perpetuation of vengeance by the Chamberlains. On a broader scale, by pursuing the alleged wrongdoer in court, the alleged victim and his kinsmen can be seen as simply pursuing the blood feud through more legal means. Clanchy and his contemporaries argue that because law officers were often corrupt, enforcement of punishments as a result of a court ruling could actually increase community distress. He suggests that "it might even be argued that royal power contributed to disorder and the judicial authority of the crown was a public nuisance."[52] Thus, settlement may have been tolerated by royal authorities as a means of maintaining public peace.

Similar settlements also reflect broader goals of maintaining honor in the community and promoting a broader peace. In a mid 1200s case, Sir Simon of Stanstead is believed to be involved in the death of Julian F William. Simon promises the family of Williams "that he would fund three masses a year for the dead man's soul, that he would feed a pauper every day of his own life and that he would donate valuable land to a

52. Clanchy, 65.

[charitable institution]."[53] It would appear that donating substantial sums of money to the community, in this case, points to a goal of minimizing resentment and a sense of 'saving face.' Although some parties might be more pleased with direct monetary compensation, this example points out the role of recognizing the victim's honor in dispute settlements, and efforts of good will that served as an important facet of the publicity game- a sense of a public declaration that "all wrongs to date were forgiven."[54]

Although the idea of keeping a "Christian peace" is religious in tone, and settlements like both of the previous cases often resulted in a contribution of some form to religious institutions, it is critical to understand that extra judicial settlement was distinct, and, in fact, in direct opposition to ecclesiastical methods of dispute resolution. The Catholic Church in England did not promote the eye-for-an-eye method of conflict during this time because the Church believed that ultimately, vengeance must be left up to God. In the thirteenth century, a collection of writings related to the Catholic Church called the Glossa Ordinaria, affirmed that vengeance was more properly affirmed in the courts, because the "lust for vengeance is vicious."[55] The Glossa Ordinaria affirmed the standard Christian message that removes the right to act from the individuals involved and confers it as a duty on properly authorized judges and courts. To take vengeance is to return evil for evil, whereas a just judge, motivated by the love of justice, imitates God in returning good [justice] for the original evil."[56] Therefor, by seeking a settlement, the victim and the offender and their kinsmen were not only acting outside of the court, but

53. Hyams, 200. This explanation is based on Paul Hyam's translation from the Stanstead Concord.
54. Hyams, 201.
55. From the Glossa Ordinaria, as found in Hyams, 202.
56. Hyams, 45

also outside of the church, suggesting that motivation for settlements that achieved a broader sense of peace was high.

Occasionally, however, instances in which the church was involved in a settlement are revealed. In the Chronicle of the Abbey of Bury St. Edmunds, a brief late twelfth century report reads as follows;

> A young girl, who begged food from door to door complained to the abbot that one of the sons of Richard, son of Drogo raped her. The abbot arranged a settlement whereby she was awarded one mark, and Richard paid the abbot four marks for making the settlement. Then the abbot ordered the total sum, five marks, to be given at once to a merchant, on condition that he marry the little beggar girl."[57]

This particular case, which will be analyzed in greater detail in the next section, demonstrates that, on occasion, the value of Christian peace in this time occasionally outweighed church practices. Furthermore, the young girl's appeal to the abbot shows that the church, too, served a generally respected justice role in the time period. In fact, argues R.H. Helmholz, Ecclesiastic courts, courts run by the church in the twelfth and thirteenth centuries regularly dealt with marriage and matrimonial disputes.[58] However, these were typically not related to settlements, and particularly not in rape cases. A particularly interesting facet of this case is that the abbot charges the accused rapist for creating a settlement for the parties involved, and then uses this money to essentially purchase a marriage for the beggar girl.

In sum, although royal courts and churches were designed to follow particular codes, settlements often occurred that related to these institutions. This suggests that

57. As translated by the editors. Diana Greenway and Jane Sayers, ed., Jocelin of Brakelond: Chronicle of the Abbey of Bury St Edmunds, (Oxford: Oxford University Press 1989), 41.
58. R. H. Helmholz, Marriage Litigation in Medieval England, (Cambridge: Cambridge University Press, 1974), 1.

broader peacekeeping between families and communities, and preventing chaos and vengeful feud was of high priority in this time.

Chapter Three: Women and Settlement

In addition to providing for broader peacekeeping, settlements offered some disadvantaged groups, including women and the poor, the chance for dispute resolution that they might not otherwise be able to afford (or have the time for) or have access to in the court system's often lengthy trials.

Klerman's research on female prosecutors in Medieval England provides insight into the ways in which women utilized the court system. Women's ability to pursue a case in court was heavily restricted by law during this time. In order to bring a lawsuit to court, women were required to be joined by their husbands, and could serve only a co-plaintiff "feme covert."[59] This system of requiring the husband to be involved is representative of a key legal concept in this time period; the idea of coverture, meaning that a woman's individual legal status was suspended during her marriage. The key exception was that widowed women had a legally protected right to prosecute her husband's death. The right to prosecute a husband's death is, in fact, directly protected in the 1215 version, and subsequent versions, of the Magna Carta: "No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband."[60] Klerman suggests that, in actuality, a family might prefer to have a man's widow prosecute his death because women, during this time, were exempt from the

59. Klerman, "Women Prosecutors in Thirteenth Century England," 275.
60. Translation by G.R.C. Davis; G.R.C Davis *Magna Carta*, Revised Edition, British Library, 1989. http://www.fordham.edu/halsall/source/magnacarta.html 26 March 2011

ordeal, specifically trial by battle. Klerman argues that, subsequently, a family may wish to reduce the likelihood of losing another family member to the defendant's family.[61] The exemption from the ordeal could possibly have accounted for other cases in which a woman co-prosecuted a case with her husband. Klerman's data reveals that in England between 1194 and 1294, women were responsible for prosecuting 65% of all homicide cases and 36% of all criminal cases (includes assault, homicide, rape and "other crimes").[62]

During this time, women were responsible for prosecuting 100% of rape cases.[63] From her research on women in Medieval England, Helen Jewell explains that although women in this time had a similar fertility span as women today, canon law permitted women to be married at twelve.[64] She argues that the dangers of youthful pregnancy were known to contemporaries, and some records indicate laws that expected women to be kept chaste between twelve and fourteen.[65] In concordance with an awareness of the dangers of youthful pregnancy, Medieval English law provided for instances in which chastity was not preserved. Jewel argues that, "laws made a bold effort to restrain physical violence to women, and also laid down protection for widows."[66] Explains Corinne Saunders, Anglo-Saxon law was particularly clear in condemning the 'crime of raptus,' which distinguished between rape and abduction (considered a crime of property). In twelfth century England, Glanvill (the first of the two well known English Justiciars in this time period) specifically equated the crime of raptus with rape: "In the

61. Klerman, 291-292.
62. Klerman, women prosecutors 287. Klerman's data includes cases from all areas of England.
63. Ibid
64. Helen Jewell, *Women in Medieval England* (Manchester: Manchester University Press 1996): 187.
65. Jewell, 187.
66. Jewell, 27.

crime of rape a woman charges a man with violating her by force in the peace of the lord king."[67] Bracton, equating raptus with the rape of virgins, provides a suggested penalty for such action in a treatise: "If he is convicted… (this) punishment follows: the loss of members, that there be member for member, for when a virgin is defiled she loses her member and therefore let her defiler be punished in the parts in which he offended."[68] Bracton's suggested punishment shows that "eye for an eye" style dispute was still prevalent in the English culture of vengeance, and was even pervasive in legal ideology. In 1275, abduction, as it applied to cases of raptus, also became a felony.

With legal avenues by which women could pursue rape cases established, and, indeed, one hundred percent of rape cases brought to the court by women, why would a settlement have been more desirable? In theory, there are a number of reasons why a settlement would have been desirable, but strong arguments can be made for instances in which a settlement minimized the humiliation, embarrassment and re-telling of the instance; for an increased likelihood that the outcome would benefit the woman and her family; and that resolutions could be made swiftly and inexpensively. Evidence for all three of these issues can be found in the 1241 case of Gunora who, though initially bringing the case to court, withdrew here case in favor of settling:

> "Gunora, daughter of John Gronge, appealed Geoffrey, son of William Broketherl, that he forcibly lay with her and deflowered her, etc. And Geoffrey comes and denies everything and puts himself on the country [that is, pleads "not guilty" and submits to jury trial]. And the jurors say that, in fact, the aforesaid Geoffrey lay forcibly with the

67. Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla Voactor: The Treatise on the Law and Customs of the Realm of England Commonly Called Glanvill, ed. And tr. G.D.G. Hall, Medieval Texts Series (London, 1965), XIV, vi, p. 175. In: Corinne Sanders, "Middle English Romance and the Laws of Raptus," In *Medieval Women and the Law,* ed. Noel James Menuge (Woodbridge: The Boydell Press, 2000): 108.
68. Corinne Sanders, "Middle English Romance and the Laws of Raptus," In *Medieval Women and the Law,* ed. Noel James Menuge (Woodbridge: The Boydell Press, 2000): 108.

> aforesaid Gunora and deflowered her, because immediately afterwards she was seen by the headborough and by respectable men and women who saw that she was sticky with blood and had been mistreated. Therefore let Geoffrey be taken into custody. Later, the aforesaid Geoffrey comes and with permission [of the court] gives the aforesaid Gunora two acres of land in Mundham with their appurtenances. Therefore the sheriff is ordered to cause her to have seisin. And she retracts her appeal. She is poor [and is therefore not fined for retracting her appeal]. And Geoffrey made fine for his amercement by four marks [that is, promised to pay the king four marks] by sureties [names of sureties omitted]."[69]

It is likely that, if a trial had been held in Gunora's case, she would have endured significant embarrassment and emotional trauma. In this time, juries continued to serve as the fact finders in cases. In Gunora's case, the jury describes the facts, as they see them, that respectable people in the community witnessed Gunora immediately after the event. Not only would there have been a high level of embarrassment and divulging of personal information in the jury's investigation, but the purported victim, herself, would have to divulge the facts of the case in bringing the case before the court. In this time, trained lawyers hired by either side were rarely present in local feudal courts, so, in the courtroom, women themselves usually had to "describe the rape publically in shameful detail, and defendants often were allowed to introduce evidence of the woman's sexual history and reputation."[70] Likewise, the investigation of the case was sure to bring shame and unwanted attention to the accused defendant. Avoiding the shame inherent in a rape investigation could give both parties a strong motive to settle.

A second strong motive to settle, particularly for the victim, was that the resulting agreement would likely have tangible benefits for the victim and her family. Although the dismemberment punishment recommended by Bracton may not have actually occurred systematically, the court's guilty rulings typically resulted in punishment for the guilty

69. Klerman, "Settlement and the Decline of Private Prosecution in Thirteenth Century England,"15.
70. Klerman, "Women Prosecutors in Thirteenth Century England," 293.

defendant and did not provide the victim with redress of any kind. Perhaps more desirous to the victim and her family following rape, however, were physical reparations. In Gunora's case, the provisions of the settlement are detailed in the court records; she and her family will receive two acres of land, and all that the land entails.

Besides land or monetary compensation, a commonly documented compensatory provision of a settlement in a rape case was a marriage. Although at first glance, it might seem counterintuitive for a woman to seek to marry someone who committed physical violence against her, there are several explanations for these types of marriages. First, in a time in which virginity in brides was highly valued, a woman in such a position might have limited marriage options. Further, the high rate of rape case settlements resulting in marriage "probably reflected the grim economic prospects of single women in this situation, and marriage to the rapist might have been the prosecutor's best alternative, albeit a rather unfortunate one."[71] A second possible motive for settlement resulting in marriage was for social and economic status climbing. The writers of Glanvill's late twelfth century treatise, explains Klerman, "abhorred such settlements" because they allowed men of humble birth to coerce men of noble status into a marriage agreement with a woman in their family.[72] The treatise does, however, state that such settlements were permissible by law.[73] A third possible motive was that a woman might accuse her lover of rape if it became clear that he did not intend to marry her. In such a case, a settlement resulting in marriage might have been the actual desired outcome.[74]

71. Klerman, 302.
72. Ibid
73. Ibid
74. Barbara Hanawalt, Crime and Conflict in English Communities, 1300-1348 (1979): 106.

A third, and perhaps most obvious, reason for a woman to desire to settle a case outside of the court system was that a trial might cause financial and time strains. The court acknowledges that, in this case, Gunora and her family are poor, and thus not fined for retracting her appeal. However, if she were to pursue this case, she would likely face an undue expense, and a significant amount of time would be consumed pursuing the trial, time that she and her family might have a better use for.

With these three major issues in mind, the settlement mentioned at the end of the previous chapter, in which an abbot arranges a settlement whereby a poor beggar girl is compensated with money from the offending party, and a marriage is arranged for the girl, becomes much more understandable. Although uncharacteristic according to the laws of church, in this instance, the abbot is well aware that the girl would be unable, on her own, to financially pursue a case against the defendant. Further, the combination of destitution and lost virginity makes her prospects of Christian marriage all the more grim. Ultimately, settlements for women, particularly in rape cases, provided options that were more desirable for financial and pragmatic reasons, but also that were more emotionally desirable.

Although a settlement may serve the needs of limited resource populations and restore a broader sense of community peace, the power of resolving a dispute by mediation was severely limited by the court's respect and acknowledgment of the settlement that resulted. In this sense, any power the settlement might have in a resolution was subservient to the court's power to prosecute. Disregard for settlements "severely undercut the victim's bargaining position"[75] and, if the settlement did not protect the accused from a trial, settlement was essentially a foolish option. Klerman charts judicial respect for settlements by recording the percentage of non-prosecuted appeals, cases in which judges let the appellee go free without trial. His research reveals that settlements were "almost always respected in the late twelfth and early thirteenth centuries"[76] and that in ninety percent or more of non-prosecuted appeals during this time, the appellee went free without trial.[77] The waxing and waning of anti-settlement policies during the thirteenth century directly correlates with the number of trials held for non-prosecuted appeals- that is, cases that were tried without the victim bringing a lawsuit to court. Klerman points to an approximate date of 1220 as a point at which "judges began disregarding settlements, letting appellees [defendants] go free without trial in barely one-third of non-prosecuted appeals."[78] By the 1260s, Klerman explains, "nearly all appellees [defendants] in non-prosecuted appeals were required to submit to jury trial."[79]

75. Klerman, 38.
76. Ibid
77. Ibid
78. Ibid
79. Ibid

Thus, many fewer criminal cases were pursued through dispute resolution systems of any kind, and numerous crimes went unpunished.

Such cases are evident in legal records, and some mention that a settlement occurred or was prepared, but that the accused was brought to trial regardless. Often the language of these types of cases report something similar to this 1206 case: "the defendant pleaded in bar that the suit had already been determined by arbitration."[80]

The following case provides an example of a situation in which, although the terms of the settlement are not detailed, a settlement is reported has having been arranged, but was disregarded by the courts. This case exemplifies the reliance of the parties involved in a settlement on the respect of the courts. In this situation, the accused were required to pay fines and stand trial in addition to of any previous settlement provisions:

> "John son of Benedict appealed Ivo Quarel, Osbert Cokel and Henry Wyncard in country court of [breach of the] kings peace, wounds and imprisonment, etc. And he [John] now comes and does not want to prosecute them. Therefore let him be committed to jail and his pledges, Ayltrrop Balliol and Walter son of Odo, are in mercy [fined]. And Ivo and the others come [to court]. And the jurors testify that they [John, Ivo, and the others have settled and they say that, in truth, the aforesaid Ivo and the other came to the property of Matthew of Leyham in Barford and fished there without Matthew's permission and contrary to his wishes.] The aforesaid John came along and asked them for a pledge, and the aforesaid Ivo would not give him one but instead struck the aforesaid John in the head with a hatchet and made two wounds each three inches long down the crest of the head and they [Ivo and the others] beat him badly… Therefore let aforesaid Ivo and others be taken into custody. Later Ivo came and paid and made fine for 40 marksby pledges Ralf Ridel [and eleven others].[81]

This case brings up a number of issues. First, John, Son of Benedict is actually imprisoned for withdrawing his case from the court, and his pledges (persons who may

80. Powell, 25.
81. Translated by Daniel Klerman, 14.

have acted as witnesses or as people to attest to his character) are fined. Despite John's request to withdraw the case, the defendants are brought to court. During the trial, the jury, who in this time acted as the fact finders in a case prior to the trial, report that the men previously settled, and explain the details of the case. The record then explains that the defendants were taken into custody and fined. Thus, the judge was aware of the settlement, but disregarded it.

Klerman's research data and the case John son of Benedict versus Ivo Quarel, Osbert Cokel and Henry Wyncard suggest another motive for settling during this time period. Prior to 1220, settlement almost always protected the offending party because judges let them go free without a trial if the victim did not wish to further prosecute. Yet, courts did not particularly wish for offending persons to go completely unpunished. So, if a settlement was not arranged, the suspect or suspects would be brought to court by a town leader, most likely a sheriff, and the alleged victim or victims would have to become involved in the trial. Thus, a victim wishing to avoid the court system completely may arrange a settlement to avoid having to take part in a trial.

As may be apparent by this point, the common thread in all of the previously examined settlement cases is compensation to the victim or his or her kin. In the settlement between the Patsleys and the Chamberlains, the terms require that the defendant's kinsman and negotiator, Thomas, will pay for one of the dead man's kinsmen to become a monk or canon at a local monastery, as well as requiring the defendant, Herbert, to pay an amount of money to the Chamberlain family by the following year (before he departs to the Holy Land to pray for the dead man's soul). Likewise, the accusation that Simon of Stenstad is involved in a murder is enough to prompt him to fund three masses a year for the dead man's soul, to feed a pauper every day of his own life and to donate valuable land to a charitable institution."[82] Similarly, Gunora and her family receive a significant amount of property and everything it entails following her alleged rape. The role of compensation in a settlement is further exposed in the case of Benedict versus Ivo Quarel, Osbert Cokel and Henry Wyncard, in that when the injured person does not feel compensated, retaliation, violence and further legal trouble often result. Of all of the motives to settle, the desire for compensation appears to be the most simple and perhaps most basically humanistic reason.

Settlements resulting in tangible, substantive compensation prior to the mid thirteenth century were not restricted to violent cases like murder and rape, however. The following 1199 case, an original writ from a judge to the sheriff of Norfolk, reveals an instance in which a judge is aware of a settlement and speculates on the outcome:

> "Nothing about this plea appears in the Michaelmas or Hilary terms 1199-1200, but in the quindene of Easter 1200 Brichmer the miller

82. Hyams, 200.

> came and withdrew himself from the writ of novel disseisin (dispossession) which he had brought against Walter Guntard touching a mill and 28 acres of land in Welton and quitclaimed them to Walter for ever for 5 marks of silver. And he put himself in mercy. Although this is not a final concord the parties and clearly come to an agreement. It is unlikely that Brichmer's amercement (fine) would exceed half a mark. He therefore would be the gainer by 4 marks and a half and Walter Guntard kep the mill and land. The Assize of novel dissesin gave to title recognized by the courts to the successful party. In all probability the agreement was ratified by a document, possibly a chirography." [83]

Essentially, Brichmer the miller attempts to dispossess the land near or on which Walter Guntard's mills is located. He withdraws his case and wants Guntard to pay five marks of silver for the land. This case is not tried by the court, but the judge speculates that Brichmer the miller would not be fined more than half a mark for withdrawing his case, so Brichmer receives payment and Guntard keeps his land and mill in what the judge identifies to be an agreement between the parties. Thus, compensation was a key component of a wide range of settlements, and appears to be a highly powerful motivator for the victim or kinsperson to settle.

As arguably the most basic desire in a settlement, it is not surprising that compensation is the key element of settlement adapted to by the court system. Interestingly, the act of including opportunities for compensation in court is strongly related to a decline in *respect* for settlement, an issue suggested in the previous chapter. Klerman, Hyams and Melville Bigelow weigh in on possible reasons for the decline of respected settlements after 1220, and specifically acknowledge the role of trespass action in the court system. Trespass, explains Klerman, was an action that could be brought to the court for "most of the same offenses as appeals, including assaults and thefts… and

83. Doris Mary Stenton, *Pleas Before the King or His Justices 1198-1202*, vol 67-68 of *The Volumes of the Selden Society* (London: Bernard Quaritch, 1953), 401.

eventually became a general tort action by which plaintiffs could garner monetary damages."[84] Trespass litigation provided a comparable motive to settlement for plaintiffs seeking damages, and thus, judges were less concerned with the number of unpunished wrongdoers and they subsequently assumed a strong anti-settlement policy.[85] Bigelow explains that there is "no indication of the existence of the writ of trespass in any settled form prior to the mid thirteenth century."[86] Hyams notes that Bracton paid very little attention to trespass in the earlier part of the thirteenth century, suggesting that that he did not yet see common-law trespass as even a topic worth substantial treatment.[87] Bigelow, like Klerman, emphasizes that trespass cases reflected the "money-debt"[88] system which was characteristic of extra-judicial settlement at the time, and, like settlement, served as a real action for redress"[89]

Prior to trespass actions, courts did not provide means by which a victim could be compensated money or land and they also did not provide means by which a person could seek damages for issues like mental trauma associated with the incident. A defendant found guilty faced a range of punishments such as fine, imprisonment or death and the victim's kin received no redress. Examples of this situation are ample in court records, and also offer insight into acceptable punishments of the time. As previously mentioned, a case lacking clear evidence might be settled by ordeal or by trial by battle. In the following example, Herbert son of Hereward of Sutton accuses William son of Roger of

84. Klerman, 43.
85. Klerman, 43.
86. Melville Madison Bigelow, *History of Procedure in England from the Norman Conquest*. (Boston: Brown, Little and Co., 1880),160.
87. Hyams, 239.
88. Bigelow, 160.
89. Ibid

assault. When William denies breaking the charge, and accuses Herbert of malice, a trial by battle is arranged to determine guilt or innocence:

> Herbert son of Hereward of Sutton appealed William son of Roger of the same village that in the pace of the lord king, wickedly and in felony, he wounded him in the head and this he offers to prove against him as the court shall adjudge. William comes and denies the breaking of the king's peace, and the felony and the whole word for word and says that he appeals him for malice and hatred… The shire court bears witness that the suit was reasonably made and that he showed a recent wound. The jurors bear witness to the same and say that thy suspect this Nicholas of the would. It is adjudged that the duel be made between them… Herbert's amercement is pardoned because he is poor and Nicholas has made fine by half a mark because he is poor.[90]

When reading cases such as this, it is important to remember that the intended outcome of the duel was believed to be based not on the physical strength of the prosecutor and defendant, but on the ruling of justice by God. If found guilty via ordeal, the defendant would likely be fined or face a steeper punishment. Likewise, in cases in which the defendant admits guilt, a duel or an ordeal might not have been needed. These cases resulted directly in steep fines or even beheading. The following case, from the 1218-1219 Pleas of the Crown, provides an example; "Henry son of Osmund killed Henry son of Hugh the chaplain of Woolley and being taken in flight and acknowledging the deed, he was beheaded."[91]

A different possibility all together was 'outlawry.' Cases that resulted in this penalty meant that the guilty party was outlawed, or put outside of the protection of the law. In such a case, a person might be later killed or robbed without legal ramifications. An example of this type of punishment can also be found in the Pleas of the Crown

90. Stenton, 228.
91. Stenton, 214.

records: “Ralf son of Orm wounded Adam de Kelet so that he died thereof, and he is suspected and therefore let him be interrogated and outlawed.”[92]

Returning to the argument from chapter two that a dispute typically involved more than two individuals, and might affect entire communities, a case from the thirteenth century reveals that entire villages could be involved in a suit:

> “William son of Inglesent was killed in the fields of Middleton near Ilkley by robes and it is not known who the robbers were… Afterwards, the coroners say that it was presented to them that Elias of Wheatley and Reginald of Denton were suspected and both are dead and they were in the house when William was killed. The jurors and the village concealed the robbery and therefore to judgment touching them. The village of Middleton is in mercy [fined] because it did not present that suit to the coroners.”[93]

Notably absent from this wide range of court issued punishments and processes is a sense of compensation to the victim(s). The absence of compensation in court rulings began to change in the thirteenth century, primarily with the establishment of trespass.

The main reason that if, in a trial, a guilty party was required to pay a fine to the king, and not to the victim himself or herself, it was because their crime was seen as a felony. In this time, a felony, by definition, meant that it was essentially a breach of the king’s peace. The orientation of the law was not towards the victim, but towards a sense of wrongdoing towards the king or to the lord or sheriff of the town. In fact, to be tried in a royal court, a case had to involve breach of king’s peace. This is evident in the previously discussed case in which the arranged settlement was not respected by the court; “John son of Benedict appealed Ivo Quarel, Osbert Cokel and Henry Wyncard in country court *of [breach of the] kings peace*, wounds and imprisonment, etc.” Explains

92. Stenton, 244
93. Stenton, 267.

Milsom, prior to trespass actions in royal courts, in a case in which a claim could easily be made against another person or party, seeking a royal decision was not a straightforward act. Essentially, the prosecutor has to find a way to frame it as a breach of the king's peace. Milsom provides an example in which this format made seeking justice in a royal court challenging to the prosecutor; "If a person wanted to sue his blacksmith for professional negligence and for doing a poor job on the shoeing of his horse, and it resulted in the horse's death, and he wanted justice in a royal court, he would have to argue the case as something along the lines of 'why with force and arms the defendant killed the plaintiff's horse, to his damage and against the king's peace.'"[94] Prior to trespass, the injury to the prosecutor would be much easier to redress via a settlement, especially because a judge would likely rule "no" to the breach of king's peace element of this case. Trespass changed this, and, in essence, re-oriented the issue to the people involved.

Hyams, advocating a "dramatic expansion of trespass cases in the years after 1258"[95] takes a strong stance on the importance of trespass cases to the status of settlement. Hyams explains that trespass litigation "may have been pivotal"[96] because it allowed subjects to bring their grievances before judges for an acknowledgement of wrong and a response of redress. He explains that like settlement of the previous century, these cases were often clearly tied to vengeance motives. Trespass cases also reflected settlement procedure in that plaintiffs had the power to "nominate one's own judges" and

94. S.F.C. Milsom, *Historical Foundations of the Common Law,* (London: Butterworth and Co. Publishers LTD., 1969), 249.
95. Hyams, 264.
96. Hyams, 264.

typically had a high rate of success.[97] Hyams also attributes the decline of extra judicial settlement respect to sociological changes sparked by the spread of common law practices. He explains that unlike the earlier part of the thirteenth century, in which

> "enmities still satisfied the peace-treaty test and called forth peacemaking up to the highest levels of the kingdom… most scholars believe that by this time men could no longer comfortably regard open violence in pursuit of their private interests and quarrels as legitimate or justifiable."[98]

It is also during this time, explains Hyams, that newly institutionalized aspects of common law "offered in its new forms of action fresh channels for the same old urges."[99]

Further, the "flourishing eyre system"[100] of the late thirteenth century made it increasingly difficult to conceal unnatural death, as well as extra judicial settlements, from prosecution by juries. The combination of disregard for settlement with sociological changes made "overt feud action, whether for blood or money much rarer."[101] With respect to the authors' varying degree of emphasis on trespass, the scholars ultimately agree that extra judicial settlement was losing its key distinctions, in terms of compensation, from opportunities in the court system. Further, due to the degree of control asserted by the courts over settlement practices, settlement became increasingly more centered on, and influenced by, the court system's practices. Regardless of the overall influence of trespass actions, the procedure marks a turning point in the distinct status of settlement and reveals ways in which settlement and arbitration were slowly becoming less polarized.

97. Hyams, 264.
98. Ibid
99. Ibid
100. Hyams, 265.
101. Ibid

An early example of a case resolved via a trespass action reveals that compensation was mandated by the court, and that the compensation is enforced by the courts, by imprisoning the guilty party until he pays the victim. The following court record from the case of William de Leighton vs Master Thomas West from early fourteenth century, lays out the issues and the subsequent court ruling:

> "(Lincolshire 1308) Master Thomas West of Louth in mercy for several defaults. The same Master Thomas was attached to answer William de Leighton, vicar of the church of Louth concerning a plea why with force and arms he assaulted the same William at Louth and beat, wounded and ill'treated him, and other enormities etc., to the damage of forty pounds, and against the peace etc. And thereof he complains that the aforesaid Master Thomas on St Guthlac's day in the thirty-fifth year of the reign of King Edward, the father of the present king, did the aforesaid trespass to him. Whereby he says he is deteriorated and has damage to the value of forty pounds. And thereof he produces his suit etc. And the aforesaid Master Thomas comes and denies force and wrong when etc. And he says that he is in no wise guilty of the aforesaid trespass and of this he puts himself on the country; the aforesaid William does likewise.
>
> Afterwards, three weeks from Easter… the aforesaid parties came in their own persons. And likewise the jurors came, who, being chosen with the consent of the parties, say on their oath that the aforesaid Mast Thomas met the aforesaid William the vicar riding on his mare and took his horse by the bridal and turned it around so that the aforesaid vicar fell to the ground and broke both his shoulder blades to the damage of twenty pounds.
>
> Therefore it is considered that the same William the vicar recover against the aforesaid Master Thomas his aforesaid damages of twenty pounds. And the same Master Thomas, who is present in court, is committed to the marshal until he satisfies William with respect to the damages.
>
> Afterwards the aforesaid Master Thomas comes and makes fine with the lord king as appears in the Michaelmas roll for the third year et. And also he satisfied the aforesaid William de Leighton with respect to the damages etc. Therefore let him be delivered

> from prison etc. Damages of 20 pounds, whereof 40s to the clerks.[102]

In this case, the records specifically state that prosecutor William de Leighton is satisfied with the damages awarded by the court, and the defendant, Thomas, is released from imprisonment. The rise of trespass action towards the end of the thirteenth century shows that the courts were systematically recognizing the human need for compensation when feeling wronged. This may not have been ideal for defendants, though, who still faced steep punishment in the hands of the court in addition to providing the mandated compensation.

Although trespass actions helped to resolve many of the issues related to compensation, it did not solve the issues of broader peacekeeping or providing opportunities for women, and for those of limited financial means. Because these two issues were prevalent and important to resolving an issue, and because the courts did not accommodate these issues in practice, settlement remained an important facet of dispute resolution for centuries. However, settlement after the later part of the thirteenth century became increasingly under the control of royal courts. As there is debate about the power of settlement in the twelfth and thirteenth centuries, there also exists debate on the status and power of extra-judicial settlement during the fourteenth and fifteenth centuries. Scholars ultimately agree that, regardless of its relationship with the court system, settlement practices continued to serve as a fast, cheap and compromise based practice during the later Medieval Period in England. Settlement practices, explains Edward Powell, differed in procedure from twelfth and thirteenth century arbitration methods in that they "became widely standardized and followed a well-defined pattern… and

102. Morris S. Arnold, *Select Cases of Trespass from the King's Courts 1307-1399 Volume I,* vol. 100 of *The Publications of the Selden Society* (London: Selden Society, 1985), 3.

undoubtedly reflect the influence of legal development and the active participation of lawyers in many arbitration efforts."[103] The primary debates about the desirability of settlement in fourteenth and fifteenth century England function first around the overall strength of settlement during this time and second, around the argument of an inextricable tie between settlement and litigation. Primary sources most strongly support the view that settlement was a powerful tool in dispute resolution practices during this time, but, unlike during the twelfth and thirteenth centuries, extra-judicial settlement functioned in direct conjunction with, and in subservience to, the court system.

As mentioned in the introduction to this thesis, some historians, such as John Bellamy argue that settlements were "symptomatic of dysfunction in the machinery of justice"[104] throughout the twelfth, thirteenth, fourteenth and fifteenth centuries in England. Yet, other historians like Powell argue that, during this time, settlements continued to "perform functions to which the courts could not aspire: they could settle feuds, make peace and restore harmonious social relations between disputing neighbors"[105] and that "kings and great magnates deliberately promoted and encouraged settlement by negotiation."[106] Powell argues that one of the reasons that settlement was able to maintain its power over a period of the four centuries was the "flexibility and lack of formalism that constituted the greatest advantages of an arbitrated settlement…"[107]

Powell offers an example of a settlement from the fifteenth century that, like the early cases in the thirteenth century, is oriented towards broader peacekeeping between kinspeople and demonstrates the level of flexibility in fifteenth century settlements. This

103. Powell, 33.
104. Powell, 22.
105. Powell, 24.
106. Powell, 22.
107. Powell, 28.

particular settlement case provides not only for the immediate issue at hand, but also creates provisions for resolving subsequent lesser disputes by arbitration; In the 1427, two gentlemen of Shropshire, John Bruyn of Bridgnorth and John Gatacre of Gatacre had a conflict during the previous year which had escalated into armed confrontation. "In the course of the melee between the adherents of the two parties, involving more than fifty men, A Roger Lockwood was struck and killed by an arrow fired by one of Bruyn's supporters."[108] Gatacre encouraged Lockwood's widow to appeal of homicide to the court of the king's bench. Bruyn pleaded not guilty. In 1427, a trial jury was summoned to appear in the following term. In the meantime, the two sides submitted their dispute to a panel comprised of four arbitrators, "two prelates and two influential gentlemen."[109] The mediators in the settlement were empowered to deal with all elements of discord between the two parties, including the death of the Bruyn supporter. Over fifty supporters of the Bruyn and Gatacre were also party to the award. The arbitrators provided a number of stipulations for the award. Bruyn and Gatacre each had to pay for the maintenance of a chaplain for one year to celebrate masses for Lockwood's soul, with remaining funds going to his widow. Lordships were arranged and a number of "subsidiary clauses were arranged for any lesser disputes still unresolved for determination."[110] The arbitrator's awards authorized provisions which "restored the peace and laid the basis for future harmonious relations between the disputants."[111]

108. Powell, 28.
109. Ibid
110. Ibid
111. Ibid

Concluding Thoughts

Trespass action, like settlement, was not a perfect tool for resolving cases. Trespass actions and all court cases in the late thirteenth century and after retained many of the issues that settlements sought to mitigate. A court resolution was typically restricted to the individuals involved, and therefor did not intrinsically provide for a broader sense of peacekeeping between clans or within a community. Further, seeking a court action could still be seen as an act of vengeance in which the guilty party would face serious punishment. Court rulings, in this type of situation, did little to effectively resolve bigger conflicts. Likewise, trespass action in courts did little to improve legal opportunities for women, who likely still endured humiliation and trauma as they re-counted instances of violence against them. Women remained limited by rules mandating that co-prosecute with her husband or a male family member. Because these issues were proven to be crucial to people in the late twelfth and the thirteenth century, while key legal changes in common law were becoming institutionalized, the needs of the people were preserved by maintaining both trespass action and settlement actions. Thus, although declining in frequency and respect by the court, settlement remained a desirable action through the end of the thirteenth century and well into subsequent centuries.

The important elements of a dispute resolution raised in this thesis are by no means unique to the twelfth and thirteenth century, to England or to any place with standardized legal procedures. They are simply human. People with any form of social identity and group membership may feel a sense of hostility when a person in their group is aggrieved. A resolution of any form, between persons from any social or identity group could reflect a broader sense of peacekeeping. Likewise, when a dispute resolution

system is unfair to any group of persons, it is an unfair system. From ancient times, people have desired redress for wronging against them. With these very human issues in mind, we return to our modern case; that of famous basketball player Kobe Bryant.

Bryant and the defendant, a young woman from Colorado, agreed to settle before the case reached a trial. Although the specific provisions of the settlement mandate that the details of the settlement not be released, it is known that Bryant agreed to a monetary settlement.[112] Civil juries in Colorado can award damages of "no more than $366,000 for pain and suffering,"[113] and the total amount that a plaintiff can win is about $2.5 million. However, legal experts agree that the settlement probably exceeded that amount because it "included a confidentiality agreement, but that the damage to Bryant's reputation from the criminal charge might have weakened the accuser's leverage."[114] As explained in the introduction to this thesis, the only formal statement made between either of the parties was that the matter had been resolved "to the satisfaction of both parties," and a motion for dismissal stipulating that the case never be refilled was filed in Denver federal court.[115]

It is important to note here that the dispute resolution in the form of a settlement was only for the civil elements of the case – emotional suffering, financial issues, lost endorsements, etc. It is no longer the case that one can settle a criminal case outside of the courts. The closest action to a settlement for criminal cases in modern times is a plea bargain. A plea bargain is an agreement made in a criminal case in which the prosecutor offers a lesser charge than the original criminal charge to the defendant if he or she

[112] AP online
[113] AP online
[114] Ap online
[115] Ibid

admits guilt. For example, a felony charge with jail time may be reduced to a misdemeanor charge that may not involve jail time. This option reduces lengthy, expensive trials for all involved. The reason provided for why Bryant's case was not brought to trial at all was that the defendant was unwilling to testify.

Granting the seven hundred year time gap, major changes in women's rights and sizably different legal contexts, many of the human desires prevalent in the Bryant case mirror the desires prevalent in the previously analyzed settlement cases from the twelfth and thirteenth centuries. Bryant's obvious association with the National Basketball Association essentially positions him as person part of a well known group. Damage to the reputation of a famous member of this group reflects damage to the reputation of the group itself. A trial, in this situation, would likely have only perpetuated the damage to the organization as a whole. Thus, the NBA also likely benefitted from the private resolution reached in this case. The alleged victim, her family and the owners of the hotel in which the alleged rape took place also were likely protected from extensive emotional trauma and financial issues through the privacy of the settlement. Had the case gone to court, the previously mentioned parties would have to re-hear all of the potentially humiliating details. What is more, Bryant held a number of endorsement deals at the time. The settlement likely minimized damage to the endorsing companies that might have been associated with the trial.

The most striking parallels between settlement in the time period investigated and modern day can be drawn when one considers the position of the alleged female victim in the case. According to the article, legal experts believed that it was unlikely that the woman who accused Bryant of rape "relished the prospect of divulging potentially

embarrassing, intimate details in a courtroom." One legal expert cited by the AP article argued that one of the strongest incentives for both parties to settle was that he did not have to give a deposition and the "lurid details would not be posted online." Likewise, she did not have to "face the rigors of having a deposition by his lawyers," thereby salvaging some privacy.[116]

The case also shows that compensation to the victim remains a prevalent desire in modern cases. Initially, the woman filed a lawsuit in court seeking damages for "mental images, public scorn and humiliation."[117] The ability for any person to seek damages via a trial stems from the thirteenth century and the incorporation of trespass actions in the legal system during this time. The settlement provisions likewise reflect the alleged victim's desire for physical compensation rather than direct punishment to Bryant.

Ultimately, settlement served as a valuable option to people in the twelfth and thirteenth century, and serves as a viable option for men and women today. The motives for settlement from the period investigated reveal that settlement was well suited to addressing very human desires in a dispute resolution when the courts could not or would not offer true solutions to often widespread problems.

[116] Ibid
[117] Ibid

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