



Settlement and the Decline of Private Prosecution in  
Thirteenth-Century England

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Although modern societies generally entrust enforcement of the criminal law to public prosecutors, most crimes in pre-modern societies were prosecuted privately. In classical Athens, ninth-century Germany, and England before the nineteenth century, there were no public prosecutors for most crimes.<sup>1</sup> Instead, the victim or a relative initiated and litigated the cases. This article is the first rigorously quantitative analysis of private prosecution. It focuses on thirteenth-century England and uses statistical techniques, such as regression analysis, to explain the changing rate of private prosecution.

Because statistical analysis is extremely uncommon in legal historical scholarship, it is hoped that this article will show more generally that quantitative methods can provide new insights into old puzzles. Because private prosecution was common in many pre-modern societies and remains a subject of theoretical debate among contemporary scholars, a thorough examination of thirteenth-century private prosecutions has relevance not only to English legal historians, but also to historians of other legal systems and to modern criminal procedure scholars. In addition, although the importance of settlement to the resolution of disputes has been widely recognized in both modern and historical scholarship, it is less common for scholars to focus on settlements between victim and accused in the context of criminal cases.<sup>2</sup> Finally, by showing how changes in legal rules

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<sup>1</sup> Here and elsewhere I use the term “crime” somewhat informally to refer to the type of offenses which were privately prosecuted in thirteenth-century England, including homicide, rape, robbery, larceny, burglary, and assault. Some legal systems, including England’s perhaps into the thirteenth century, did not distinguish (or did not distinguish sharply) between civil and criminal cases.

<sup>2</sup> There is, however, a growing literature on such settlements. Much of it focuses on societies in which, unlike thirteenth-century England, feud flourished. Christopher Boehm, *Blood Revenge: The Enactment and Management of Conflict in Montenegro and other Tribal Societies* (1984), 121-142; William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (1990), 259-99; J.M. Wallace-Hadrill, “The Bloodfeud of the Franks,” in *The Long Haired Kings* (1962), 121-47.

affected litigant behavior, and vice versa, this study contributes to understanding the broader relationship between law and society.

In medieval England, private prosecutions were called "appeals." Unlike modern appeals, these appeals were unrelated to the correction of legal errors. To "appeal" simply meant to prosecute. Although appeals continued to be brought until the early nineteenth century, their heyday was the late twelfth and early thirteenth centuries. By the end of the thirteenth century, relatively few criminals were prosecuted by appeal. This article focuses on the appeal during the period 1194-1294 in order to understand the appeal during the period when it was most important and in order to understand why it became so marginal.<sup>3</sup>

The substantive contributions of this article lie primarily in two areas: accurate charting of the trends in the number of appeals and a new explanation for the decline of the appeal.<sup>4</sup>

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There is also some discussion of settlement of criminal disputes by English legal historians. See, e.g., Roger Groot, "The Jury in Private Criminal Prosecutions before 1215," *American Journal of Legal History* 27 (1983): 132-36; Christopher Whittick, "The Role of the Criminal Appeal in the Fifteenth Century," in *Law and Social Change in British History: Papers Presented to the Bristol Legal History Conference, 14 - 17 July 1981*, ed. J. A. Guy and H. G. Beal (London: Royal Historical Society, 1984), 63-65; Douglas Hay, "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay, Peter Linebaugh, et al. (London: Penguin Books, 1975), 41-42.

<sup>3</sup> The choice of these particular starting and ending points was determined by the survival of manuscript sources. See *infra* pp. 30-31.

<sup>4</sup> Other aspects of the appeal are explored in Roger Groot, "The Jury in Private Criminal Prosecutions before 1215," *American Journal of Legal History* 27 (1983): 113; Daniel R. Ernst, "The Moribund Appeal of Death: Compensating Survivors and Controlling Jurors in Early Modern England," *American Journal of Legal History* 28 (1984): 164-88; Christopher Whittick, "The Role of the Criminal Appeal in the Fifteenth Century," in *Law and Social Change in British History: Papers Presented to the Bristol Legal History Conference, 14 - 17 July 1981*, ed. J. A. Guy and H. G. Beal (1984), 55-72; Margaret H. Kerr, "Angevin Reform of the Appeal of Felony," *Law and History Review* 13 (1995): 351-392. General discussions of the appeal can be found in Sir William Holdsworth, *A History of English Law* (4th ed. 1936), 2:256-57, 361-64; Theodore Plucknett, *A Concise History of the Common Law* (5th ed. 1956), 428; S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981), 406-10; J. H. Baker, *An Introduction to English Legal History* (3rd ed. 1990), 574-76.

Part II reports the results of the only systematic, quantitative study of the appeal so far attempted. It reveals large, previously unnoticed changes in the frequency of appeals. The rate of appeals fell by fifty percent between 1200 and the 1220's, climbed back to turn-of-the-century levels by the mid-1240's, and then swiftly dropped by two-thirds and remained at a low level through the end of the century.

Parts III and IV try to explain why the rate at which appeals were brought varied so much over the thirteenth century, and why the overall trend was decline. The most plausible explanation for the wide fluctuations is the changing judicial treatment of private settlements. One of the victim's motives for bringing an appeal was the utility of suit in facilitating monetary settlement. Such settlements were attractive to victims, because there was no routine royal remedy by which victims could get monetary relief for personal injury or property damage until the mid-thirteenth century. Settlement was attractive to the accused, however, only if it protected him from further prosecution. In the late twelfth and early thirteenth centuries, settlement almost always protected the appellee, because judges let the appellee go free without trial if the appellor was unwilling to prosecute. At various times during the thirteenth century, however, judges sent appellees to jury trial even though the appellor was no longer interested in the case. The implementation (and relaxation) of this anti-settlement policy can account for most of the changing frequency with which appeals were brought.

Although changes in judicial respect for settlement are the most plausible explanation for changes in the rate of appeals, Section III.A discusses four other explanations which have been suggested in the literature: (1) the appeal's archaic nature, especially the

use of trial by battle; (2) judicial hostility, which manifested itself in the ease with which appellees could exploit technical defects to nullify appeals; (3) the introduction of presentment,<sup>5</sup> which meant that crimes might be prosecuted even if the victim did not appeal; and (4) the introduction of trespass actions, which were more attractive to victims because they provided money damages. Part IV also discusses three additional alternative explanations which have not appeared in the published literature, but which other scholars have proposed to me orally: (1) appeal rates may have been influenced by crime rates; (2) appeal rates may have mirrored general trends in prosecution, especially trends in presentments of crime; and (3) appeal rates may have been influenced by the possibility of settlement before initiation of an appeal.

Charting and explaining the changing rate of appeals is important for both legal and social history. Appeals have always occupied an important place in the history of English law,<sup>6</sup> yet their long-term decline ever been satisfactorily analyzed. For social historians, understanding private prosecution (of which appeal was the dominant, thirteenth-century form) is important, because private prosecution put awesome power in the hands of ordinary individuals: the power to accuse others of crime and thus to set in motion the coercive powers of the criminal law, including the possibility of pre-trial imprisonment, outlawry, fines, and hanging. Thus, by making appeals less common, the

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<sup>5</sup> Presentment was accusation by a jury, which could be considered a form of public prosecution. See *infra* p. 8.

<sup>6</sup> Appeals have, for example, merited discussion in nearly every comprehensive work on the history of English law. See, e.g., Sir William Holdsworth, *A History of English Law* (4th ed. 1936), 2:256-57, 361-64; Theodore Plucknett, *A Concise History of the Common Law* (5th ed. 1956), 428; S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981), 406-10; J. H. Baker, *An Introduction to English Legal History* (3rd ed. 1990), 574-76.

change in judicial treatment of settlement curtailed a significant power through which people of all classes could and did influence the actions of others.

While most appeals were brought by the victim or the victim's family, there was a special kind of appeal that was brought by a convicted criminal who had already been sentenced to hang. If the convicted criminal successfully appealed several of his accomplices, his life would be spared. Criminals who were appealing their accomplices were called "approvers."<sup>7</sup> This article will focus exclusively on non-approver appeals for two reasons. First, because the prosecutor was a convicted felon seeking clemency rather than the victim or relative seeking retribution or settlement, approver appeals were so different from ordinary appeals that there is little to be gained from studying the two together. Second, the majority of approver suits were heard in gaol (jail) delivery, and, as will be discussed in Appendix D, very few gaol delivery plea rolls (records) have survived. Thus, it would be very difficult to perform a meaningful quantitative analysis of approver appeals.

## **Part I. Background**

This Part provides some basic information and context. Section I.A situates the period discussed in this article (the late twelfth and thirteenth centuries) in the context of the broader history of criminal prosecution in England and America. Section I.B enumerates the offenses for which appeals were brought, while Section I.C explains the procedure for

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<sup>7</sup> For further information on approvers, see Jens Röhrkasten, *Die Englischen Kronzeugen 1130-1330* (1990); Frederick Hamil, "The King's Approvers: A Chapter in the History of English Criminal Law," *Speculum* 11 (1936): 238-58.

bringing and trying an appeal. Section I.D discusses the terms and frequency of settlements, and Section I.E briefly describes the social context of appeals. Sections I.C, I.D, and I.E also contain four cases which illustrate various aspects of the appeal.

### **A. A very short history of criminal prosecution in England**

Although this article focuses on the appeal in the thirteenth century, a brief glance at the broader history of criminal prosecution will help put the article in its proper context. For the purposes of this section, it is useful to divide English history into four periods. Of course, this periodization is crude, but it should suffice to provide background for the more detailed discussion of the appeal in the thirteenth century which follows.

1. The First Age of Private Prosecution (seventh to tenth centuries). During this period criminal prosecutions were almost entirely a private affair. Prosecution was at least partially motivated by the possibility of monetary compensation. Until at least the late tenth century, those convicted of crime were not ordinarily hanged, incarcerated or otherwise punished, but instead owed the victim compensation (*bot*) or, in homicide cases, owed the victim's family the deceased's *wergild*, a monetary payment which varied with the deceased's social status.<sup>8</sup>

2. The Rise of Presentment (tenth to fourteenth centuries). Starting in late tenth centuries, Anglo-Saxon kings began promulgating legislation which changed the nature of criminal prosecution. Aethelred's third code, promulgated around 1000, required the

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<sup>88</sup> Stanley Rubin, "Bot Compensation in Anglo-Saxon Law: A Reassessment," *Journal of Legal History* 17 (1996): 144; Frederick Pollock and Frederic William Maitland, *History of English Law Before the Time of Edward I* (2d. ed. 1968), 2:450-51; J. M. Kaye, "The Making of English Criminal Law: (1) The Beginnings—A General Survey of Criminal Law and Justice Down to 1500," *Criminal Law Review* (1977): 5.

twelve leading thanes of a wapentake (district) to accuse and arrest those suspected of crime in their locality.<sup>9</sup> This procedure seems to foreshadow presentment, which some historians think only became a routine part of judicial administration almost two centuries later, during the reign of Henry II.<sup>10</sup> Under the presentment procedure, leading men were chosen from each locality and were required to present (i.e. report) on oath, crimes committed in their neighborhoods. These leading men were known as the presenting jury, which is the ancestor of the modern grand jury. Like the medieval trial (petit) jury, the presenting jury was self-informing. Little or no evidence was presented in court. The jurors were expected to gather information informally before they came to court and to present their conclusions to the judges.

The nature of criminal penalties also began to change. As early as the late tenth century, *bot* seems to have been payable to church, king, or community at large rather than to the injured kin.<sup>11</sup> There is also archaeological evidence that the death penalty was frequently imposed in the eleventh century.<sup>12</sup> By the late twelfth century, these changes

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<sup>9</sup> Patrick Wormald, "Frederic William Maitland and the Earliest English Law," *Law and History Review* 16 (1998): 10-12; Naomi D. Hurnard, "The Jury of Presentment and the Assize of Clarendon," *English Historical Review* 56 (1941): 374, 376-96; John Hudson, *The Formation of the Common Law* (1996), 65-66. This body of scholarship represents a revision of Maitland's view that presentment did not become an ordinary part of criminal justice until Henry II's reign. Some distinguished scholar's continue to defend Maitland's view. See article cited in next footnote.

<sup>10</sup> R. C. Van Caenegem, "Public Prosecution of Crime in Twelfth-Century England," in *Church and Government in the Middle Ages: Essays Presented to C. R. Cheney*, ed. C. N. L. Brooke (1976), 44-49.

<sup>11</sup> Patrick Wormald, "Frederic William Maitland and the Earliest English Law," *Law and History Review* 16 (1998): 17. Maitland, however, thought that the system of compensatory payments survived until the twelfth century. Frederick Pollock and Frederic William Maitland, *History of English Law Before the Time of Edward I* (2d. ed. 1968), 2:458.

<sup>12</sup> *Ibid.* at 17-18.

were firmly entrenched and are regularly attested to by the surviving records. Hanging and fines payable to the king were the near exclusive criminal penalties. In addition, hanging was usually accompanied by forfeiture of land and chattels.

Although presentment and non-compensatory punishments were becoming increasingly important, no English king even attempted to abolish private prosecutions, which by the late eleventh century were called “appeals.” In fact, until the turn of the fourteenth century, presentments were confined almost exclusively to homicide and theft,<sup>13</sup> and nearly all accusations of rape, mayhem,<sup>14</sup> wounding, false imprisonment, assault and battery were brought by way of appeal, as were large numbers of homicide and theft cases. Although the legal sanction for crime was increasingly death or fines payable to the king, victims (and their families) could appeal and use the threat of legally imposed hanging or fines to induce compensatory monetary settlements. By the end of the thirteenth century, however, the appeal was becoming rare, and presentment had become the way nearly all crimes were prosecuted.

3. The Return of Private Prosecution (fourteenth to nineteenth centuries). As noted above, twelfth and thirteenth century juries (both presenting juries and trial juries) were largely self-informing. During the fourteenth and fifteenth centuries, however, for

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<sup>13</sup> This, at least, is the evidence from the eyre, Bench and court *coram rege*. Presentment may have been used for other offenses at sheriff’s tourn or view of frankpledge. Even in the fourteenth century, presentments of homicide and theft (including larceny, burglary, robbery, and receiving) constituted ninety-eight percent the criminal docket. Counterfeiting, arson, and rape contributed the remaining two percent. Barbara Hanawalt, *Crime and Conflict in English Communities, 1300-1348* (1979), 66.

<sup>14</sup> Mayhem was the infliction of a disabling but non-lethal injury.

reasons that have yet to be fully explained, juries became more passive.<sup>15</sup> Trial juries began to rely on evidence that parties presented in court, and the presenting jury (now called the grand jury) less frequently made accusations based on its own knowledge. Instead, the grand jury primarily screened accusations made by others, declaring "true bill" of accusations ("indictments") it approved.<sup>16</sup> Although these prosecutions were formally brought in the name of the Crown, the predominance of victim initiative suggests that they are properly classified as private prosecutions.<sup>17</sup> Nevertheless, royal officials did provide investigative assistance. From the late twelfth century, the coroner had been gathering evidence in homicide cases.<sup>18</sup> Justices of the peace performed a similar function for other crimes from at latest the sixteenth century, and possibly as early as the fourteenth.<sup>19</sup>

4. The Age of Public Prosecution (nineteenth century to present). In the nineteenth century, partly in response to the growing problem of urban crime, pressure began to mount for public prosecution. Victims frequently did not prosecute, because prosecution was expensive, time consuming, and brought few benefits other than the satisfaction of revenge or justice. Nevertheless, public prosecution was perceived as a threat to liberty,

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<sup>15</sup> Thomas Andrew Green, *Verdict According to Conscience* (1985), 108-13; Thomas Andrew Green, "A Retrospective on the Criminal Trial Jury, 1200-1800," in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, (1988), 367-75.

<sup>16</sup> J.G. Bellamy, *The Criminal Trial in Later Medieval England* (1998), 19-27. Bellamy suggests that the bill procedure started as early as the late thirteenth century.

<sup>17</sup> John Langbein, "Understanding the Short History of Plea Bargaining," *Law & Society* 13 (1979): 266-67; Douglas Hay, "Controlling the English Prosecutor," *Osgoode Hall Law Journal* 21 (1983): 167ff.

<sup>18</sup> R. F. Hunnisett, *The Medieval Coroner* (1961), 1-36.

<sup>19</sup> John H. Langbein, *Prosecuting Crime in the Renaissance: England, German, France* (1974); Thomas Andrew Green, *Verdict According to Conscience*, 109-113 (1985); J.G. Bellamy, *The Criminal Trial in Later Medieval England* (1998), 26, 51 n. 40.

and Parliament did not pass legislation to set up a system of public prosecutors until 1879.<sup>20</sup> Even this statute did not fundamentally undermine private prosecution, because public prosecutors had very limited authority.<sup>21</sup> Nevertheless, by the mid-nineteenth century, most prosecutions were private in name only, as the "private" prosecutor was in most instances a policeman.<sup>22</sup> It was only with the passage of the 1985 Prosecution of Offenses Act that England established an effective system of public prosecution, and even this legislation preserved a limited right of private prosecution.<sup>23</sup> In America, public prosecution seems to have become common somewhat earlier.<sup>24</sup>

As this outline suggests, the thirteenth century was a crucial transition period, the time when self-informing presentment replaced private prosecution. But the thirteenth century was only one of several important transitions. Private prosecution regained its dominant role in early modern times and in turn gave way to public prosecution in the last two centuries.

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<sup>20</sup> Prosecution of Offenses Act, 1879, 42 & 43 Vict., ch. 22; Philip Kurland and D. W. M. Waters, "Public Prosecutions in England, 1854-1879: An Essay in English Legislative History," *Duke Law Journal* (1959): 493-562.

<sup>21</sup> "Proposed Independent Prosecuting Service: The Prosecutor's Viewpoint," *Journal of Criminal Law*, 48 (1984), 302-303. The public prosecutors' power was somewhat increased by the Prosecution of Offenses Act, 1908, 8 Edw. 7, ch. 3, but even so the power of public prosecutors remained small. *Ibid.*; Douglas Hay, "Controlling the English Prosecutor," *Osgoode Hall Law Journal* 21 (1983): 179-80

<sup>22</sup> Douglas Hay, "Controlling the English Prosecutor," *Osgoode Hall Law Journal* 21 (1983): 174-80; Patrick Devlin, *The Criminal Prosecution in England* (1960), 20.

<sup>23</sup> 1985 Prosecution of Offenses Act, 1985, c. 23, § 7; Alec Samuels, "Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals," *Criminal Law Review* (1986): 33-36.

<sup>24</sup> Lawrence Friedman, *Crime and Punishment in American History* (1993), 29-30.

## B. Offenses

The appeal could be used to prosecute a wide range of crimes, from simple assaults to rape and homicide. Table 1 lists the most important crimes in the order of their relative frequency of prosecution.

Table 1. Crimes Prosecuted by Appeal, 1194-1294

Crimes	Percentage of all appeals
Assault (beating, wounding, mayhem)	39%
Homicide	27%
Theft (larceny, robbery, burglary)	12%
Rape	10%
Other crimes	5%
Crime not specified	7%

This table is based on a database of 1230 cases, which is described in Section II.A.

As the table suggests, the appeal was most commonly used for assaults, including beatings, woundings, and mayhems. Next most common was homicide (27%), then theft of various kinds, including larceny, robbery and burglary, which accounted for twelve percent of all appeals. This figure, however, understates the rate at which appeals were brought to prosecute property crimes. About a third of the assault appeals also complained of the wrongful taking of property, as did a few appeals of rape and other crimes. If these accusations were added to thefts, property crimes would have constituted twenty-six percent of all appeals. The next most common crime prosecuted by appeal was rape. During the twelfth century and most of the thirteenth century, rapes could be prosecuted only by appeal. Although one might think that in such a patriarchal society rape would be

seen primarily as a wrong to the woman's father or husband, appeals of rape were brought exclusively by female victims.<sup>25</sup> Finally, five percent of all appeals were brought for a wide array of other offenses, from abduction, arson and attempted burglary to false imprisonment, malicious prosecution, receiving outlaws and selling the king's hawks. It is difficult to define the outer limits of offenses that could be prosecuted by appeal. An appeal required an allegation of breach of the king's peace, but (as later with trespass actions) the allegation seems to have been purely formal and without content. For seven percent of all cases, the crime appealed is not mentioned or is specified merely as a breach of the king's peace.

### **C. Procedure**

Prosecuting an appeal involved a long and complicated process which often took several years. Immediately after the crime, the victim (or the first finder in the case of homicide) was required to "raise the hue and cry," that is to notify his neighbors of the crime by yelling out. The hue and cry brought people to the scene of the crime while the evidence was fresh and could lead to hot pursuit of the criminal. In these times, long before the creation of professional police forces, it was every male's obligation to be armed and ready to pursue suspects.<sup>26</sup> The victim (or prospective appellor) was then

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<sup>25</sup> As with almost all generalizations about thirteenth-century law, there were exceptions. See Ruth Kittel, "Rape In Thirteenth-Century England: A Study of the Common-Law Courts," in *Women and the Law: A Social Historical Perspective*, ed. D. Kelly Weisberg (1982) 2:102 n.9.

<sup>26</sup> Frederick Pollock and Frederic William Maitland, *History of English Law Before the Time of Edward I* (2d. ed. 1968), 1:421 n. 4.

required to make “fresh suit” by publicizing the alleged crime in the four nearest villages and notifying the coroner.<sup>27</sup>

The victim (or family member in homicide and some other cases) was then required to initiate suit at the next county court, which met every four weeks.<sup>28</sup> Appellors could be either male or female, and appeals by women were common. More than a third of all appeals were brought by women, including almost two-thirds of homicide appeals.<sup>29</sup> Suit had to be in person. No attorneys were allowed unless the victim was incapacitated.<sup>30</sup> The appellee was then summoned to appear at the next county court. If he did not appear, however, he was given three more chances. If he did not show up, he was outlawed.<sup>31</sup> An outlaw forfeited all his property, and it was a crime to feed, shelter, or communicate with him. If apprehended, he could be killed without further legal process, if he resisted arrest or fled.<sup>32</sup> Eighteen percent of all appeals ended in outlawry.

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<sup>27</sup> *Bracton on the Laws and Customs of England*, ed. George E. Woodbine, trans. Samuel. E. Thorne (1968-77), 2:394, ff. 139b-40.

<sup>28</sup> In several northern and eastern counties, including Yorkshire, the court met every six weeks. Robert Palmer, *The County Courts of Medieval England: 1150-1350* (1982), 4.

<sup>29</sup> This phenomenon is explored more fully in “Women as Private Prosecutors: Some Surprising Evidence from Thirteenth-Century England” (unpublished manuscript).

<sup>30</sup> *Bracton*, 2:353, ff. 125-b.

<sup>31</sup> *Ibid.*, 2:354, f. 125b.

<sup>32</sup> *Ibid.*, 2:354, 361-62, ff. 125b, 128b; *Placita Corone or La Corone Pledde Devant Justices*, ed. and trans. J. M. Kaye. (Selden Society Supplementary Series, vol. 4, 1966), 25. Bracton argues that the outlaw could be killed only if he fled or resisted arrest, although he acknowledges contrary custom and authority. *Bracton*, 2:354, 362, 378, ff. 125b, 128b, 134.

The appellee, however, was not the only party required to show up at subsequent county courts. The appellor was expected to show up and affirm her<sup>33</sup> prior accusation. If she no longer believed the accusation was true, or if she had settled with the appellee, or if she simply had lost interest in the case, she might not show up or, upon showing up, might retract her accusation.

If the appellor remained steadfast in her accusation and if the appellee appeared in county court before outlawry was pronounced, the appellee would be "attached," that is he would be required to find sureties that he would appear at trial. If he could not find sureties, he could be jailed pending trial. In cases of homicide, all appellees were supposed to be jailed pending trial, although this harsh rule was not always enforced. All procedural steps in county court were recorded by the coroners, the royal officials charged with preserving the king's fiscal rights and supervising the local administration of criminal justice.

Trial, however, could not take place in county court. The sheriff presided over the county court, and, according to custom and Magna Carta, the sheriff lacked the power to try appeals, because they involved an allegation of breach of the king's peace. Trial was postponed until royal justices arrived to handle criminal cases awaiting trial in the countryside. As discussed more fully in Appendix D, delegations of royal justices took many forms, but, for appeals, the most important were called "eyres," from the Latin *iter*. Eyres occurred approximately every four years at the turn of the thirteenth century. The

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<sup>33</sup> In general, I use feminine pronouns for appellors and male pronouns for appellees. This helps to distinguish appellors and apples, and is historically plausible, because a substantial fraction of appellors were women. See *supra* p. 14.

intervals between eyres lengthened as the century progressed, averaging every five to eight years at mid-century and as long as twelve to twenty years at the century's end. At the eyre, the presenting jury reported all appeals to the itinerant justices.<sup>34</sup> Their presentments were compared with the coroners' written record of county court proceedings to ensure that the jury was not concealing appeals. If the appellor was present and wanted to continue her prosecution, she would repeat her accusation. A female appellor would offer to prove the appeal "as the court adjudges." A male appellor, unless he was aged or maimed, had to offer to prove his appeal "by his body," i.e. by battle. About seventeen percent of appeals reached this stage.

The appellee, if present, then pled. His options were to deny commission of the crime or to put forward a technical defense, such as failure to raise the hue and cry, failure to sue at the first county court, or a divergence between the accusation in the county court (as recorded by the coroners) and the appellor's repetition of the accusation in the eyre. If the technical defense was accepted, the appeal was null. This happened in about ten percent of appeals. If the defense was rejected or if the defendant offered no technical defense but merely denied the accusation, the appellee would offer to prove his innocence by battle or, after jury trial became routine in the 1220's,<sup>35</sup> he could "put himself on the country." Battle, however, was only an option if the appellor was a healthy, non-minor male, and even then appellees almost always chose jury trial. If accused by a woman or an

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<sup>34</sup> The presenting jury therefore had two roles. It acted as prosecutor in cases where there was no appellor, and it informed the judges of appeals.

<sup>35</sup> Roger D. Groot, "The Early Thirteenth-Century Criminal Jury" in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, ed. J.S. Cockburn and Thomas A. Green (1988), 3.

aged or maimed male, the appellee was required to accept trial by jury. Jury trial in this period did not involve the presentation of evidence in court. Instead, the jury was expected to know about and perhaps to have investigated the case before trial. Before the abolition of the ordeal in 1215, appellees accused by women and non-battleworthy males were put to the ordeals of cold water or hot iron to prove their innocence.<sup>36</sup>

Appellees convicted of the most serious crimes (homicide and sometimes theft) were hanged, while those convicted of other crimes were usually taken into custody until they offered to pay a fine or “amercement” in an amount determined individually (but probably loosely) according to the offender’s wealth and the severity of the offense. Convicted offenders could also be castrated or blinded, but such punishments were extremely uncommon.<sup>37</sup>

It was relatively rare, however, for appeals to proceed through pleading to proof, i.e. to battle, jury trial or the ordeal. In a majority of cases (fifty-four percent), appellors dropped their prosecution before the case reached the eyre.<sup>38</sup> One of the key legal issues,

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<sup>36</sup> Those put to the ordeal were acquitted more than eighty percent of the time. Margaret Kerr et al. “Cold Water and Hot Iron: Trial by Ordeal in England,” *Journal of Interdisciplinary History* 22 (1992): 573. The ordeal might be thought to have posed a substantial danger of extortion. If many people did not believe that ordeals produced correct verdicts, then it would seem that an unscrupulous person could appeal innocent people, who would then settle to avoid the risk of conviction. This danger was mitigated by the defendant’s ability to get a “medial” jury verdict, which, if favorable would fully acquit him without resort to ordeal, but which, if unfavorable, would put him, as without the medial verdict, to the ordeal. These medial verdicts could be procured by the writ *de odio et atia* or simply by asking or paying eyre justices. See Roger Groot, “The Jury in Private Criminal Prosecutions before 1215,” *American Journal of Legal History* 26 (1982): 1-24.

<sup>37</sup> For a discussion of a case in which such punishments were imposed, see Paul Hyams, “The Strange Case of Thomas of Eldersfield,” *History Today* (June 1986): 9-15.

<sup>38</sup> The attentive reader will note only eighty-nine percent of appeals have been accounted for: 18% outlawed, 17% pled by the plaintiff, 54% non-prosecuted or retracted. In most of the rest, either the records are incomplete or the prosecutor died. Here and elsewhere I group non-prosecuted and retracted appeals together. See *infra* pp. 24 n. 56, 52, 77, 79.

therefore, was the treatment of non-prosecuted appeals. As will be discussed in depth in Section III.B, the treatment of such cases changed several times during the thirteenth century. The judges basically had two options. Either they could acquit the appellee, or they could require the appellee to submit to trial (either by ordeal or by jury) in spite of the fact that the appeal was not prosecuted.<sup>39</sup> In the late twelfth and early thirteenth centuries, appellees were usually acquitted when the appeal was not prosecuted. By the 1250's, judges routinely put appellees to jury trial when appellors did not prosecute. When a non-prosecuted appellee was put to jury trial, the appellee is sometimes said to have been tried "at the king's suit." The case below is typical of the cases in which non-prosecution led to acquittal:

Case 1 (Staffordshire 1199). Nicholas of Salt appeals Reginald son of Thomas and Richard, his brother, of [breach of the] king's peace and robbery. And Nicholas swore an oath to prosecute.<sup>40</sup> And he retracted [his appeal] and so is in the king's mercy [i.e. is to pay a fine]. And the appel-

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<sup>39</sup> In addition to formally acquitting the defendant, the judges could let the defendant go "without day" (*sine die*) or without any judgment at all. While not technically acquittals, such judgments (or non-judgments) effectively freed the defendant, and I will generally treat them as equivalent to acquittals, because I have seen no cases in which a defendant so released was subsequently reprosecuted by appeal or otherwise punished. In the only case which might be so classified, the judges quashed the second appeal. JUST 1/2 m. 14 (Bedfordshire 1227), translated into English by Herbert Fowler in "Roll of the Justices in Eyre at Bedford, 1227," Publications of the Bedfordshire Historical Record Society, vol. 1. (1913), 154-55. It is not explicit, however, that there was no judgment on the first appeal or that the judgment was "without day." Nevertheless, the appellor is twice described as having not prosecuted his first appeal, and non-prosecution (as opposed to formal retraction) usually resulted in no judgment or a judgment of "without day" rather than acquittal. The case is somewhat unclear, however, because, after twice describing the first appeal as not prosecuted, the roll goes on to say that the first appeal was retracted. So it is possible that the appellee was formally acquitted in the first appeal. On the distinction between non-prosecuted and retracted appeals, see *supra* p. 18 n. 38, *infra* pp. 24 n. 56, 51, 77, 79.

<sup>40</sup> Ordinarily, appellors had to find people willing to assure that the appellor would prosecute the case and pay fines if she did not. In some circumstances, especially when the appellor was poor, that requirement was waived and a simple oath to prosecute was deemed sufficient.

lees are acquitted. Nicholas's amercement [fine] is half a mark, by surety of Thomas of Erdington.<sup>41</sup>

Nicholas appealed Reginald and Richard of robbery and then decided not to prosecute (retracted). As a result, the court acquitted the defendants. As is typical in such cases, the non-prosecuting appellor paid a small fine or amercement.

The following, particularly vivid case illustrates the practice of sending non-prosecuted appellees to jury trial. The procedurally important sections have been underlined:

Case 2 (Bedfordshire 1247). John son of Benedict appealed Ivo Quarel, Osbert Cokel and Henry Wyncard in county court of [breach of the] king's 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 sureties, Ayltrop 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, Osbert and Henry] have settled and they say that, in truth, the aforesaid Ivo and the others 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,<sup>42</sup> 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 to the crest<sup>43</sup> of the head. And they [Ivo and the others] beat him badly. And afterwards they took him and bound him and put him in a boat and took him from this county [Bedfordshire] to the county of Huntingtongshire to Ivo's house at Buckden. There they dragged him with a rope to a window of Ivo's solarium<sup>44</sup> and forced him to break the window with

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<sup>41</sup> *Collections for a History of Staffordshire* (William Salt Archaeological Society, vol. 3, 1882), 41. Translation by the author.

<sup>42</sup> The purpose of this pledge is not clear, but pledges were sometimes used to secure a defendant's appearance at court. John probably gave Ivo and the others a choice: either give a pledge that they would show up at court to respond to the charge that they were fishing where they had no right to, or John would attempt to seize some of their property or arrest them on the spot.

<sup>43</sup> This word is very difficult to read in the manuscript. Dr. Paul Brand suggested "crestam" (crest) as the most plausible transcription.

<sup>44</sup> A solarium was a part of the house exposed to the sun. It was usually an upper story room, but, in this context, a ground floor room with windows might make more sense. See R. E. Latham,

an ax. And they painted the wall near the window with the blood flowing from the wounds the aforesaid Ivo had given aforesaid John, and they dragged him through the window and set upon him a blanket and some linen saying that he had stolen them. And they raised the hue [and cry] and caused the men who responded to the hue [and cry] to understand that eighteen thieves had come to his house, and that all except the aforesaid John had gotten away. So they put the blanket and the linen on him and took him to Huntington and gave him to the sheriff to be incarcerated. And he remained in prison until his tithing delivered him.<sup>45</sup> Therefore let the aforesaid Ivo and the others be taken into custody. Later Ivo Quarel came and made fine for forty marks [i.e. promised to pay the king forty marks to be released from custody<sup>46</sup>] by sureties Ralf Ridel [and eleven others.].<sup>47</sup>

In this case, John appealed Ivo and others of wounding and imprisoning him, but then told the eyre justices that he did not want to prosecute the case. The jury provides the motive for non-prosecution—settlement. Unlike Case 1 above, however, non-prosecution did not end the matter. The jurors, presumably at the prompting of the judges, reported fully what they thought happened. The jury’s narrative to the judges constituted “trial” in the era of the self-informing jury. As a result of the jury’s verdict, Ivo and the others were placed in prison, from which Ivo redeemed himself, and perhaps the other defendants as well, by paying a very large fine. The case is thus illustrative of those in which non-prosecuted appellees were tried, found guilty, and punished in spite of settlement.

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*Revised Latin Word-List* (1980), s.v. “sol/”; P. G. W. Glare, *Oxford Latin Dictionary* (1982), s.v. “solarium”; *The Oxford English Dictionary*, (2d ed. 1989), s.v. “sollar.” I thank Dr. Paul Brand, again, for suggesting “solarii” as the most plausible reading of the manuscript.

<sup>45</sup> The tithing probably secured his release, pending trial, upon a promise that they would ensure his presence at trial. If he did not show up for trial, the tithing would be fined. Every adult male was required to be in a tithing, a group whose most important function was producing its members’ attendance in court when necessary.

<sup>46</sup> The justices had no intention of keeping Ivo in prison. Imprisonment, or the threat of it, was used not as punishment, but to induce convicts to pay fines.

The treatment of non-prosecuted appeals was especially important, because it determined the extent to which an appellor could settle with the appellee. If the appellor's failure to prosecute resulted in the appellee's acquittal, appellees would find it quite advantageous to settle with the appellor in return for non-prosecution. On the other hand, if appellees were put to proof even when appellors did not want to prosecute, settlement would offer appellees little benefit.

#### **D. Settlement**

One of the more surprising aspects of appeals is that they were often settled. The appellor simply stopped prosecuting the case if the appellee offered some compensation. The records are usually silent about the terms of settlements. In this respect, Case 2 is typical. Occasionally, the records are more forthcoming. For example, in the case reported below, a rape appeal was settled when the rapist gave the victim two acres of land. The sentences describing the settlement are underlined.

Case 3 (Kent 1241). 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 [i.e. pleads "not guilty" and submits to jury trial]. And the jurors say that, in fact, the aforesaid Geoffrey lay forcibly with the 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 [i.e. promised to pay the king four marks] by sureties [names of sureties omitted].<sup>48</sup>

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<sup>47</sup> JUST 1/4 m. 30.

<sup>48</sup> JUST 1/359 m. 35d.

After the jury returned its guilty verdict, the defendant gave the victim two acres of land. In what was clearly a *quid pro quo*, the appellor then retracted her appeal. In spite of the settlement, however, the appellee still paid a fairly large fine. While in the above case the appellor settled for land, cash settlements were probably more common.<sup>49</sup> Monetary settlements reflect some continuity with the early medieval criminal law, in which monetary payments were the most common official penalty for crime.<sup>50</sup> In rape cases, the appellee sometimes “settled” the case by marrying the victim.<sup>51</sup> This disturbing outcome may be explained by the fact that, at least in some cases, it is clear that the man and woman had consensual sex, but that she thought he was going to marry her. When it became clear that he would not, she brought a rape appeal.<sup>52</sup> In such a context, termination of the case in exchange for marriage is not quite so jarring.

Sometimes settlements were explicitly endorsed by the judges. In the late twelfth and early thirteenth centuries, parties might come to court and ask for a “license to concord,” that is, for judicial approval, which the judges would usually grant in exchange

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<sup>49</sup> See e.g. *Pleas Before the King or His Justices, 1198-1212*, vol. 3, ed. Doris Mary Stenton (Selden Society, vol. 83, 1966), pl. 746 (Shropshire 1203) (10 marks to settle mayhem appeal); *The Roll of the Shropshire Eyre of 1256*, ed. Alan Harding (Selden Society, vol. 96, 1981), pl. 577 (40 shillings to settle false imprisonment and robbery appeal).

<sup>50</sup> See *supra* pp. 7-8.

<sup>51</sup> See e.g. *Rolls of the Justices in Eyre Being Rolls of Pleas and Assizes for Yorkshire in 3 Henry III (1218-19)*, ed. Doris Mary Stenton (Selden Society, vol. 56, 1937), pls. 959, 1086.

<sup>52</sup> See *ibid.*, pl. 669 (The jurors say that “he had her with her good will for a year and that he took another to wife and for this reason she has appealed him.”).

for a monetary payment.<sup>53</sup> This practice became much less common after 1218, probably because judges became more hostile to settlement, as will be discussed more extensively in Section III.B. Case 3, however, shows some continuation of this practice later in the century, in that defendant gave the victim land as compensation “with permission” of the court. More often, the jurors reported that the parties had settled without judicial approval. Such settlements often resulted in a small fine, and in some periods, led to trial of the appellee. The terms of settlements were sometimes written down,<sup>54</sup> although this does not seem to have been common.

It is difficult to estimate how common settlement was. The rolls record whether the parties settled in almost a quarter of the cases. Of these, two-thirds were settled. Cases 2 and 3 are typical of those cases. More often, as in Case 1, nothing is recorded about settlement. One could therefore plausibly estimate that anywhere between sixteen and sixty-seven percent of cases settled. The low figure would assume that the only settled cases were those in which settlement was explicitly recorded, while the high figure extrapolates from the quarter of the cases in which the rolls record whether settlement occurred.<sup>55</sup> The true figure is probably close to forty percent. Settlement and recording whether the parties settled usually occurred in cases in which the appellor did not prosecute at the eyre. It is therefore reasonable to assume that a little more than two

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<sup>53</sup> *Pleas Before the King or His Justices, 1198-1212*, vol. 3, ed. Doris Mary Stenton (Selden Society, vol. 83, 1966), pls. 671, 746 (Shropshire 1203); *Rotuli Curiae Regis*, ed. Sir Francis Palgrave (1835), 1:164 (Hertfordshire 1198).

<sup>54</sup> CP 25(1)/212/6 no. 39. I am grateful to Paul Brand for finding this final concord and sharing his notes on it with me.

<sup>55</sup> Of the 1230 cases in the data set described in Section II.A, information on settlement is recorded for 300 or 24%. Of these, 201 (67%) settled. So at least 16% (201/1230) of all appeals settled.

thirds of all non-prosecuted appeals were settled, rather than two thirds of all appeals.

Since non-prosecuted appeals constituted fifty-four percent of all appeals, if two-thirds of all non-prosecuted appeals were settled, then thirty-six percent of all appeals would have settled.<sup>56</sup> To take into account the fact that about thirteen percent of settled cases cannot be classified as non-prosecuted cases,<sup>57</sup> it is appropriate to round up to about forty percent.

Appellees seem to have been sensible about which cases they settled. For about sixteen percent of cases, including Cases 2 and 3, the records indicate both whether the parties settled, and whether the jury thought the defendant was guilty. In these cases, guilty appellees settled eighty percent of the time, and innocent appellees settled only a quarter. This suggests that appellees could usually predict jury verdicts and settled when they thought they would be found guilty. High settlement rates for guilty appellees might also indicate social pressure to settle when the appellee was in the wrong. Of course, since data on both settlement and guilt is available only for a small fraction of the cases, these figures should be treated with caution.

The appellor's ability to extract a settlement from the appellee rested on the credibility of the appellor's threat to prosecute if no settlement was agreed upon, and on the credibility of the appellor's promise not to prosecute if settlement was successfully

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<sup>56</sup> There were 663 non-prosecuted cases in the data set described in Section II.A. If two thirds of the non-prosecuted cases settled, there would be 444 settled cases, which is 36% (444/1230) of all appeals. Here, as elsewhere, the count of non-prosecuted appeals include retracted ones. See *supra* p. 18 n. 38, *infra* pp. 51, 77, 79.

<sup>57</sup> Sometimes the appellor prosecuted in the eyre in spite of settlement, and for some settled cases it cannot be ascertained from the record whether the appellor prosecuted.

negotiated. If appellees did not believe these threats and promises, they would see little advantage in settling.

The appellor's threat to prosecute was clearly credible, because failure to prosecute after initiation of the case in county court resulted in the imposition of fines on the appellor. The appellor thus had a monetary incentive to go forward with the prosecution, if no settlement was negotiated. Of course, by this reasoning, the victim's threat was not credible in the up-to-four-week period between offense and the first county court, when the appellor was obliged to initiate her appeal. Nevertheless, as discussed in Section IV.C, it is unlikely that many cases were settled before initiation in county court.

The credibility of the appellor's promise not to prosecute (or, more precisely, not to continue to prosecute) if settlement were agreed upon is more problematic. Even during the periods when judges generally respected settlement by not sending non-prosecuted appellees to trial, there is no case which squarely holds that out-of-court settlement protected the appellee from further prosecution by an appellor who changed her mind.<sup>58</sup> While judges tolerated settlements, they may not have enforced them. As discussed in Section III.B, their tolerance for settlement probably reflected lack of reasonable alternatives rather than positive endorsement of settlement. Because there is

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<sup>58</sup> When the parties received formal judicial approval of their settlement, a "license to concord," which was rare, judges would quash later prosecutions. See *Pleas Before the King or His Justices, 1198-1212*, vol. 3, ed. Doris Mary Stenton (Selden Society, vol. 83, 1966), pl. 746 (Shropshire 1203). Informal settlements would appear on the records as non-prosecuted or retracted appeals. The fact of a prior non-prosecuted or retracted appeal was sometimes raised as a defense to a subsequent prosecution, and that defense seems to have been accepted. *Ibid.*, pl. 726; JUST 1 / 2 m. 14 (Bedfordshire 1227). Nevertheless, these cases do not prove the enforceability of out-of-court settlements, because they involve an appellor who brought a second appeal, rather than an appellor who decided simply to continue her original appeal. The former situation presented the judge with additional reasons to protect the appellee, because the second appeal was brought too late (not at the first county court) and because the resolution of the judgment on the first appeal was seen as barring subsequent appeals, not unlike modern *res judicata*.

little evidence of judicial enforcement, the credibility of the promise not to prosecute would have had to rely on the appellor's reputation, peer pressure, public opinion, possible threats of vengeance or self-help, and the intervention of third parties. There is some evidence that third parties assisted in the negotiation of settlements,<sup>59</sup> and it seems likely that these people would have helped enforce the settlement if the parties later reneged.

### **E. Social Context**

It is difficult to ascertain the social context of appeals. The plea rolls are the near exclusive source of evidence, and they are frustratingly laconic. Cases 1 and 3 are typical in this respect. Occasionally, however, the plea rolls provide more social context. Many of these cases conform to a common pattern. The appellor did something which violated what the appellee perceived to be his legal rights. The appellee then used self-help to enforce his rights. Often, the appellee seems to have been relatively powerful, with armed men at his command to assist him in using violence to enforce his claimed rights. The appellor, perhaps because he lacked the wealth and power to respond in kind, turned to the law for redress and brought an appeal. This appeal of a wounding is typical:

Case 4 (Shropshire 1203). Robert Trainel has appealed William the reeve of Hencott that with his accessories he took him and beat him and made him bloody and held him until he was delivered by the sheriff's clerk. And this he offers [to prove] etc. And William comes and denies the wounding and felony, but says that this is the truth, that Robert came into the fishpond of his lord the abbot, where he had no right of fishing, and fished there. And Robert says that he fished in that fishpond as in that in which he ought to have right of fishing. Afterwards Robert came and withdrew and put himself in [the king's] mercy. It is adjudged that for hunger and folly

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<sup>59</sup> See JUST 1/1043 m. 4d (Yorkshire 1231) (appellor's brother was present at making of settlement); *Pleas Before the King or His Justices, 1198-1212*, vol. 3, ed. Doris Mary Stenton (Selden Society, vol. 83, 1966), pl. 690 (Shropshire 1203) (compensation determined "by the view and judgment of lawful men.").

he fished in that pond and not for wickedness. Judgement is for the shire court, and Robert remits to the abbot his right of fishing.<sup>60</sup>

In this appeal, Robert and the abbot had a disagreement about fishing rights. William, the reeve of one of the abbot's villages, used force to prevent Robert from fishing. Robert, who is described as "hungry" and therefore probably poor, could not use force to defend his claim, but he could bring an appeal against the abbot's reeve. The appeal, however, was unsuccessful, and Robert renounced his claim to fish in the abbot's pond.

Other cases similarly reveal appeals against a lord who used violence to enter into land after the death of a tenant,<sup>61</sup> against a landowner who imprisoned and tortured a suspected thief,<sup>62</sup> and against a lord who ransacked a tenant's house in retaliation for the tenant's suit in royal court over customs and services.<sup>63</sup> In these cases, the appellor was clearly suing a person of much higher status.<sup>64</sup> In other cases, the appeal seems similarly to have arisen out of one party's attempt to enforce his rights with violence, although the relative status of appellor and appellee is less clear.<sup>65</sup> The right to impound animals seems

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<sup>60</sup> *Pleas Before the King or His Justices, 1198-1212*, vol. 3, ed. Doris Mary Stenton (Selden Society, vol. 83, 1966), pl. 743.

<sup>61</sup> *Crown Pleas of the Wiltshire Eyre, 1249*, ed. C. A. F. Meekings (Wiltshire Archaeological and Natural History Society, Records Branch, vol. 16, 1961), pls. 44-45.

<sup>62</sup> JUST 1/536 m. 8 (Middlesex 1235).

<sup>63</sup> JUST 1/565 m. 21 (Norfolk 1250).

<sup>64</sup> Milsom has also observed that "in many early appeals" the appellee was "a lord enforcing his rights." S.F.C. Milsom, *The Legal Framework of English Feudalism* (1972), 168.

<sup>65</sup> Case 2 may fit this pattern, although it is unclear whether Ivo Quarel thought he had any right to fish on Matthew of Leyham's land. The relative status of the parties is not mentioned, although both parties seem to have been of rather high status. Ivo was rich enough to pay a forty mark fine, and Matthew had his own fish pond. Both Ivo and Matthew seem to have had men at their command: John, Osbert and Henry.

frequently to have given rise to such appeals. One person would try to impound another's pigs or other animals, perhaps because they were trespassing or as security for some other dispute. The owner of the animals would try to retake the animals by force and a violent altercation would ensue. The party wounded in the fight would bring an appeal.<sup>66</sup>

Although the relative status of the parties in such cases is not clear, the appellee usually seems to have been at a least a modest property holder, who, for example, possessed land upon which another's animals could trespass. In some such cases, the party impounding the animals may have been a lord distraining his tenant to make him attend the lord's court.<sup>67</sup>

Of course, there were appeals which did not fit this pattern. Some appeals arose out of violent retaliation for insult,<sup>68</sup> and others involved simple theft.<sup>69</sup> In addition, few rape appeals fit this pattern. And in the vast majority of cases, there is no information on the causes of the dispute. Nevertheless, it is remarkable that when more information is available, the violence which gave rise to appeals seems usually to have been sparked by a prior dispute between the parties over land, chattels or rights, and that the appellee was often a person of at least modest wealth. These characteristics of appeals lend plausibility to the idea that many appeals were brought in order to be settled and were, in fact, settled. Many appellees seem to have had sufficient wealth to pay money or to convey land as

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<sup>66</sup> See, e.g., *Crown Pleas of the Wiltshire Eyre, 1249*, pl. 169; *The Roll of the Shropshire Eyre of 1256*, ed. Alan Harding (Selden Society, vol. 96, 1981), pl. 747.

<sup>67</sup> On distraint, see J. H. Baker, *An Introduction to English Legal History* (3rd ed. 1990), 271-72.

<sup>68</sup> JUST 1/361 m. 60d (Kent 1255).

<sup>69</sup> JUST 1/4 m. 34 (Bedfordshire 1247).

compensation, and the violence which underlay appeals was closely related to property disputes, which themselves were frequently the subject of settlement.

## Part II. Trends in the Rate of Appeals

Legal historians have long known that there were many appeals at the turn of the thirteenth century and very few in the sixteenth, but no attempt has been made to determine when this decline occurred. Maitland, the great turn-of-the-century legal historian, opined that the appeal was "but slowly supplanted by indictment,"<sup>70</sup> and later historians have either accepted this view with only slight modification or remained silent on the issue.<sup>71</sup> This section describes the trends in the number of appeals brought per year

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<sup>70</sup> Frederic William Maitland, *The Forms of Action at Common Law: A Course of Lectures*, ed. A. H. Chaytor and W. J. Whittaker (Cambridge: Cambridge University Press, 1909), 48-49.

<sup>71</sup> Sir William Holdsworth, *A History of English Law* (4th ed. 1936), 2:257 (In the thirteenth century, the appeal was "gradually decaying as a mode of criminal prosecution"). Holdsworth's view may diverge somewhat from Maitland's in that Maitland thought that the appeal was declining so gradually that it was still the dominant procedure in the early fourteenth century, while Holdsworth seemed to believe that the gradual decline was swift enough to be complete by the end of the thirteenth century, except perhaps for homicide cases. Contrast Frederick Pollock and Frederic William Maitland, *A History of English Law Before the Time of Edward I* (2<sup>nd</sup> ed. 1968), 2:485 to Holdsworth, *A History of English Law*, 2:256, 360-65. R.F. Hunnisett sided with Holdsworth that the thirteenth was the decisive century, although he opined that "the number of appeals *rapidly* declined." R.F. Hunnisett, *The Medieval Coroner* (1961), 55 (italics added). It is not clear whether Hunnisett believed the appeal declined any faster than Holdsworth believed it did, or whether they merely differed on whether to characterize decline over a single century as rapid or gradual. C. A. F. Meekings has noted "the very large number of appeals in the 1240s and 1250s," and has observed that "[t]he ordinary appeal was declining in importance throughout the latter half of the thirteenth century." *Crown Pleas of the Wiltshire Eyre, 1249* (1961), 35. Daniel Ernst opined decline from 1215 to 1500. Daniel R. Ernst, "The Moribund Appeal of Death: Compensating Survivors and Controlling Jurors in Early Modern England," *American Journal of Legal History* 28 (1984): 164, 165. Plucknett and Milsom pass over in silence the issue of when the appeal declined. Theodore Plucknett, *A Concise History of the Common Law* (5th ed. 1956), 428; S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981), 406-10. Successive editions of John Baker's, *Introduction to English Legal History*, have become progressively vaguer on when the appeal declined. Only Christopher Whittick seems to doubt whether the appeal declined at all in the middle ages. Whether he holds such doubts is unclear, and he is careful to note that more evidence is needed. Christopher Whittick, "The Role of the Criminal Appeal in the Fifteenth Century," in *Law and Social Change in British History: Papers Presented to the Bristol Legal History Conference, 14 - 17 July 1981*, ed. J. A. Guy and H. G. Beal (1984), 55, 56.

from the late twelfth century through the end of the thirteenth century. It shows that the appeal declined dramatically during that century, but that the decline was in no way gradual, and that periods of swift decline alternated with periods of increase and stasis.

### A. The data set

In order to chart the patterns in the frequency with which appeals were brought, I examined eyre records from twelve English counties from 1194 to 1294.<sup>72</sup> These records contain 1230 appeals.<sup>73</sup> The period 1194-1294 was examined, because before 1194, there are no records from which reliable figures can be drawn, and because after 1294, eyres were no longer a regular part of English justice,<sup>74</sup> and the organization of the courts

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<sup>72</sup> The sources used for this database are listed in Appendix C. The reliability of these records is discussed in Appendix D.

<sup>73</sup> While there is occasionally some ambiguity about whether a given plea roll entry is an appeal, appeals are generally easy to identify, because they either contain some form of the Latin verb *appellare* or the Latin noun *appellum*, or because they describe outlawry at the suit of (*per sectam*) a particular person. Appeals of offenses which do not seem to meet medieval definitions of felony are sometimes called “appeals of trespass.” See Alan Harding, *The Roll of the Shropshire Eyre of 1256*, (Selden Society, vol. 96, 1981), xxxvii. I have made no attempt to exclude such cases from the database, as the records do not regularly distinguish between appeals of felony and appeals of trespass. Although distinguishing appeals from non-appealed trespass cases in the rolls of the Bench and court *coram rege* can be difficult, see *infra* p. 60 n. 112, this is not a problem in eyre rolls, because trespass cases (other than “appeals of trespass”) are almost never recorded in the crown pleas section. On the criteria for identifying (non-appealed) trespass cases, see *infra* p. 60 n. 112. Richardson and Sayles have argued that both appeal and trespass “crystallis[ed]-out from a single undifferentiated action for all serious private secular wrongs.” H.G. Richardson and G.O. Sayles, *Select Cases of Procedure without Writ under Henry III* (Selden Society, vol. 60, 1941), cxxxiii. Nevertheless, by the time of the first surviving plea roll in 1194, appeals are easily identified, and there are very few cases plausibly classified as trespass (except those which Harding and others call “appeals of trespass” and which I have simply counted as appeals). As noted above, I have excluded approver appeals. See *supra* p. 6. I have also excluded complaints, which are usually identifiable by the use of a form of the Latin verb *queror*. Inclusion of complaints would not have substantially affected the trends identified in this section, because there were very few of them, usually less than one per county per year. I have counted all prosecutions for the same allegedly criminal incident as a single appeal, even though medieval clerks and modern editors sometimes recorded separately (a) multiple prosecutions against a single individual for the same allegedly criminal incident, and (b) the prosecutions of a single person against multiple offenders for the same incident.

<sup>74</sup> David Crook, “The Later Eyres,” *English Historical Review* 97 (1982): 241-68. Nevertheless, a few eyres in particular counties were held between 1299 and 1328, and there was an attempt to revive the general eyre in 1329-30. David Crook, *Records of the General Eyre* (1982), 178-79.

changed so drastically that figures derived from the records of the reorganized courts would not be comparable.<sup>75</sup> With the exception of Kent, the twelve counties were chosen, because they only ones for which eyre records have survived for both the periods 1194-1209 and 1218-52. Kent was examined because its surviving records are unusually ample for the period 1226-44. These twelve counties are thus the only counties that can shed significant light on changes in the rate of appeals in the early thirteenth century. While these counties were chosen based on the survival of their records, they are fairly representative of England as a whole, ranging from Kent and Wiltshire in the south, to Shropshire on the Welsh border, Norfolk and Essex in east, and Yorkshire in the north. The area closest to London, however, is over-represented. For these twelve counties, all surviving eyre records before 1265 were examined. For five counties, the records for the rest of the thirteenth century were also examined.

Most of the surviving records are damaged or incomplete. Fortunately, the records are organized by district. To ensure comparability over time, the database includes appeals only for those districts for which records are consistently available. Thus there were twenty-five districts in Essex. For only eleven, however, are the records complete for the 1198 eyre (the first with surviving records in Essex). Only these districts are included in the database, even though some later eyre records are more complete. The

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<sup>75</sup> The post-1294 period, however, is worth of study. While the thirteenth century was probably decisive for the decline of most types of appeals, there is some evidence that the number of theft appeals increased in the fifteenth century. Edward Powell, *Kingship, Law, and Society: Criminal Justice in the Reign of Henry V*, 71-72 (1989); Marguerite Gollancz, *The System of Gaol Delivery as Illustrated in the Extant Gaol Delivery Rolls of the Fifteenth Century* (MA Thesis, University of London 1936), 231. This increase may have been caused by the practice of allowing appellors to recover their goods if they successfully prosecuted the thief. The increase may also have resulted from a relaxation of the anti-settlement policy discussed below. See David Seipp, "The Distinction Between Crime And Tort In The Early Common Law," *Boston University Law Review* 76 (1996): 59, 78-79.

remaining fourteen districts were not examined. The districts included in the database are listed in Appendix B. The end of Appendix B describes the criteria for inclusion and exclusion of districts in greater detail.

### **B. Analysis without regression**

Table 2 shows the number of appeals per year for almost all districts in the database. Each cell of the table records the number of appeals per year for the relevant districts in a given county as reported in an eyre taking place in the time period indicated at the top of the column. The blank cells indicate the extent to which records have been lost.<sup>76</sup> Light shading indicates that no eyre was held in that county during the relevant

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<sup>76</sup> For some cells, some records survive, but they were not complete enough to allow extraction of reliable statistics. As explained *supra* p. 32 and in Appendix B, rates were calculated only if records for at least one presenting district survived undamaged. For this reason, although rolls survive, the cells for the following eyres are blank: Hertfordshire 1255 and 1262, Kent 1262-63, Northamptonshire 1232, Norfolk 1228, Shropshire 1248, and Yorkshire 1293-94. In addition, the 1276 Bedfordshire eyre was omitted from Table 2, because it followed the 1272 eyre, which was abandoned on Henry III's death. See Crook, *Records of the General Eyre* (1982), 134. Because it is unclear whether cases arising between 1262 and 1272 were consistently reported in the 1276 eyre, this eyre was excluded from the analysis.

Table 2. Rates of Appeal, County by County, 1194-1294

	1194-1195	1198-1199	1201-1203	1208-1209	1218-1222	1226-1229	1231-1233	1234-1238	1239-1244	1245	1246-1249	1250-1252	1252-1258	1261-1263	1268-1277	1278-1289	1292-1294
Bedfordshire			10.2			3.3					10.6					2.9	
Buckinghamshire	2.0					1.9	2.4		3.1		3.2			0.8	0.8	0.1	
Essex		1.5				1.2		1.9			2.5		3.7	1.0	0.6	0.6	
Hertfordshire		1.5									3.2						
Kent						7.1			7.6				5.2				
Middlesex		0.0						0.2									
Norfolk		5.2										6.6	7.3				
Northamptonshire			7.0								5.8		4.1				
Shropshire			6.7		1.9								3.0				
Staffordshire		3.8	4.0			2.5									2.0		1.3
Wiltshire	9.0										10.4						
Yorkshire				2.7	1.6		1.8						1.7		1.2	1.5	

	No eyre held
	Records survive, but not examined
	Records do not survive

period. Dark shading indicates records which were not examined, because, as noted above, the records of only five counties were examined after 1265.

The rows of Table 2 were carefully constructed to ensure that all numbers in a row are strictly comparable. If the row for a given county simply recorded all surviving information for that county, it would be impossible to tell whether an increase between two periods recorded a true increase in the number of appeals or simply the fact that the later figure was drawn from a less fragmentary source. Table 2 avoids that problem because all cells in a given row record information for the same set of districts. Thus, all Yorkshire cells exclude appeals from Harthill and Buckrose wapentakes (districts), because the 1208 eyre rolls are either damaged or missing for those districts. Even though the eyre rolls for 1218, 1231 and later eyres survive in reasonable shape for these wapentakes, the appeals for these districts in these eyres were not counted, because doing so would render meaningless any comparison to rates derived from the 1208 eyre. Appendix B lists the districts included in each row. Table 11 in Appendix A shows the number of appeals per year for a small number of additional districts with odd survival patterns, whose inclusion in Table 2 would clutter the table without altering the analysis.

It is important to recognize that, although the figures in the table appear small, the number of appeals examined (one thousand, two hundred and thirty) is reasonably large. The figures in the table appear small, because they are rates: the number of appeals divided by the number of years covered by a given eyre. Since an eyre heard cases initiated in county court over the previous several years, the number of appeals is much higher than the rate. For example, the rate of 3.3 in the 1228 Bedfordshire eyre reflects the fact that

judges in that eyre heard twenty-nine appeals, which had been initiated since the previous eyre had ended eight years, ten months, and one day earlier. Table 3 shows how the rates in the first row of Table 2 (Bedfordshire) were calculated.

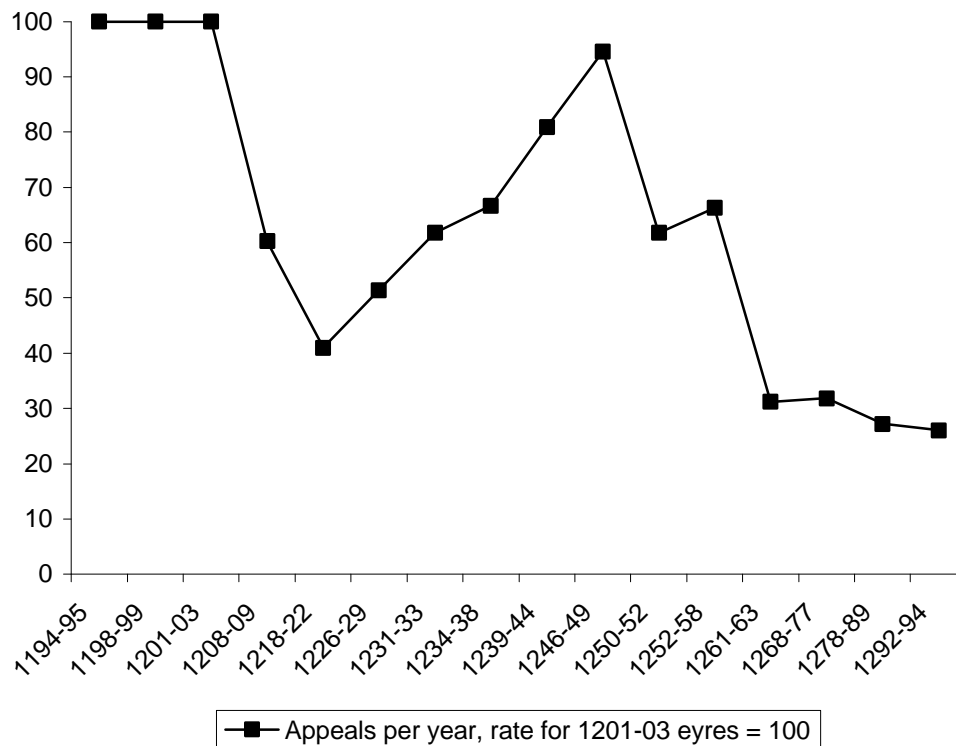
Table 3. Illustration of Rate Calculation in Table 2 (Bedfordshire)

Column 1: Date eyre ended	Column 2: Date previous eyre ended	Column 3: Years between ending of eyre and ending of previous eyre	Column 4: Number of appeals on eyre roll	Column 5: Rate of appeals (Column 4 divided by Column 3)
October 27, 1202	October 28, 1198	4.00	41	10.2
January 18, 1228	March 17, 1219	8.85	29	3.3
October 19, 1247	December 2, 1240	6.88	73	10.6
February 22, 1287	January 14, 1277	10.11	29	2.9

The dates in Columns 1 and 2 are from Crook, *Records of the General Eyre* (1982). Column 3 was calculated by having Microsoft Excel compute the number of days between the dates in Column 1 and Column 2 and then dividing by 365. Columns 1 and 2 use the dates on which the eyres ended, because crimes occurring while the eyre was in session were heard during that eyre. The results would be substantially the same if the opening dates of the eyres were used.

An additional reason the rates in Table 2 are relatively low is that, as noted above, for many counties the table counts appeals only from a few districts, because the records of the other districts have not survived intact. The records for Bedfordshire, Shropshire and Staffordshire, and Wiltshire are nearly complete, so their rates fairly represent the number of appeals per year for the entire county. The rates in the table for the other eight counties, however, significantly underestimate the rates for the whole counties, because complete records for many districts do not survive.

Inspection of the Table 2 shows that most counties conform to the pattern graphed below:

**Graph 1. Rate of Appeals, 1194-1294**

To facilitate comparison across counties, the y-axis has been numbered from zero to 100, rather than with the rates for any single county. The rate for the first decade of the thirteenth century was set arbitrarily at 100. The precise numbers on the y-axis are irrelevant, because the purpose of the graph is to illustrate relative increases and decreases in the rate of appeals over time. As will be explained *infra* p. 41, the graph plots regression coefficients with two modifications.

Bedfordshire conforms almost exactly to the pattern depicted in the graph. It shows a large decline from 1201-03 to 1226-29, a rebound to 1246-49, and then an even larger decline to the end of the century. The other eleven counties also show similar trends. All five counties with records in the periods 1194-1209 and 1218-1229—Bedfordshire, Buckinghamshire, Essex, Shropshire, and Staffordshire, and Yorkshire—show declines from between these two periods. Similarly, the five counties with records in the periods 1218-1229 and 1231-1249—Bedfordshire, Buckinghamshire, Essex, Kent, and Yorkshire—all show increases. Of the seven counties with surviving records between

1239 and 1249, five--Bedfordshire, Buckinghamshire, Herefordshire, Kent, and Wiltshire--reached their highest rates in this period, and the other two, Essex and Northamptonshire, reached their second highest rates. All counties for which data were gathered after 1260 show rates dramatically lower during the period 1261-94 than in 1194-1209 or 1231-52.

Of course, a few counties do not fit the pattern. For example, the rate of appeals continued to rise in Essex between 1246 and 1258, while the graph shows mostly decline. In addition, while Buckinghamshire and Essex show declines from 1194-1203 to 1226-1229, these declines are much smaller than those experienced in other counties. This difference almost certainly reflects bad record keeping before 1200.<sup>77</sup> Nevertheless, even taking into account these divergences, examination of the Table 2 shows that most counties fit the pattern rather well.

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<sup>77</sup> Appeals came to the attention of eyre justices when they were reported by the presenting jurors. The jurors, however, had considerable incentive to conceal appeals, because they nearly always resulted in the imposition of fines on their neighbors. The incentive to conceal was usually constrained by the coroner, who was present at the county court when appeals were initiated and who turned in rolls listing appeals (and other criminal matters) to the justices at the beginning of the eyre. If jurors failed to report an appeal mentioned in a coroner's roll, they were fined. Similarly, but much more rarely, if the coroner failed to report an appeal which the presenting jury mentioned, the coroner was fined. Through this mutual checking, one can be reasonably confident that most appeals were reported in the eyre. This mutual checking, however, was not effective in the 1194-99 eyres, because the office of coroner was only created in 1194. Although other officials, such as hundred and wapentake serjeants had had performed some of the coroners' functions even before 1194, their responsibilities did not include recording appeals at the county court, which was essential to the justices' ability to detect concealment of appeals by jurors. R. F. Hunnisett, *The Medieval Coroner* (1961), 2. Thus during nearly the entire period covered by the 1194-95 eyres, there was no coroner present at the county court to keep track of appeals initiated there. For the period 1194-99, the period covered by the 1198-99 eyres, coroners should have been appointed, but they were new to their jobs and it appears that they had not yet begun keeping the careful written records which were necessary to perform their checking function. It is only in the 1201-3 eyres that there is evidence that judges were checking the jurors' presentments against the coroner's rolls. M.T. Clanchy, *From Memory to Written Word: England 1066-1307* (2nd ed. 1993), 71.

### C. Regression analysis

The generally good fit withstands not only informal inspection, but also a more rigorous statistical analysis. Although computationally complicated, the idea of regression is simple. It is a mathematical tool for measuring the relationship between variables, in this section between eyre dates and rates of appeals.<sup>78</sup> Regression is helpful for three principal reasons. (1) It can take into account all of the data. The analysis in the previous section focused on the most salient eyres and counties, but failed to even mention numerous data points, including the three Norfolk eyres, both Middlesex eyres, and the 1256 Shropshire eyre, not to mention all the data in Appendix A, Table 11. With so many data points, informal analysis is inherently selective. Only regression analysis can synthesize and integrate the mass of data. (2) Regression analysis can produce numbers (such as the coefficients discussed below) which help to produce tables and graphs which summarize and communicate complex data. (3) Regression analysis can help distinguish patterns which reflect real change from those which are more likely to reflect mere chance. When used improperly, regression results can produce a false sense of precision, but regression analysis also produces statistics (such as confidence intervals and p-values, discussed below) which help to assess the appropriate degree of precision to be accorded the results and the confidence with which results can be relied upon.

A simple regression, which attempts to explain the rate of appeal by a variable representing eyre dates, controlling only for county, explains most of the variance and yields

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<sup>78</sup> For an introduction to regression analysis, see David Moore and George McCabe, *Introduction to the Practice of Statistics*, Chapter 10 (1989).

statistically significant results.<sup>79</sup> In such a regression each eyre visitation is assigned a variable (called a dummy variable) which is one if the data point is from that group of eyres and zero if it is not. Thus for each data point, there is one eyre-date dummy variable which is one, and the rest are zero. Similarly, each county is assigned a dummy variable.<sup>80</sup> Table 4 reports the most important results: the coefficients and associated statistics for the eyre-date dummy variables.

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<sup>79</sup> The regression uses the following model:

$$\log(\text{expected number of appeals per year}) = \text{constant} + (\text{eyre date effects}) + (\text{county effects})$$

or equivalently:

$$\log(\text{expected number of appeals recorded in a particular eyre}) = \text{constant} + \log(\text{number of years since the previous eyre}) + (\text{eyre date effects}) + (\text{county effects})$$

A log-linear model was chosen, because the most reasonable hypothesis is that the rates of appeal in various counties rose or fell by the same percentage rather than by the same absolute amount. Since the number of appeals recorded in a particular eyre is observed by counting the number of occurrences of a particular event (the bringing of an appeal), the appropriate type of regression is one which assumes that the underlying distribution of the data is poisson. To the extent that there is more variance in the data than predicted by the poisson distribution ("over-dispersion"), the p-values and confidence intervals have been adjusted accordingly. For a discussion of the various issues involved in this type of regression, see P. McCullagh and J.A. Nelder, *Generalized Linear Models* (2nd ed. 1989), 193-208. The regressions use the data both in Table 2 and in Appendix A

<sup>80</sup> In addition, each of the groups of districts with odd patterns of survival discussed in Appendix A is given a separate dummy variable.

Table 4. Regression Results (All Appeals)

Eyre Dates	Coefficient	P-values	95% confidence interval
1194-95	0.78	0.512	(0.37, 1.63)
1198-99	0.53	0.018	(0.32, 0.90)
1201-03	1.00	——*	-----
1208-09	0.60	0.201	(0.28, 1.31)
1218-22	0.41	0.001	(0.24, 0.71)
1226-29	0.51	0.001	(0.35, 0.76)
1231-33	0.62	0.161	(0.31, 1.21)
1234-38	0.67	0.280	(0.32, 1.39)
1239-44	0.81	0.457	(0.46, 1.42)
1246-49	0.95	0.760	(0.66, 1.35)
1250-52	0.62	0.171	(0.31, 1.23)
1252-58	0.66	0.035	(0.45, 0.97)
1261-63	0.31	0.007	(0.13, 0.73)
1268-77	0.32	0.000	(0.20, 0.51)
1278-89	0.27	0.000	(0.17, 0.43)
1292-94	0.26	0.000	(0.14, 0.49)

\* The dummy variable for the 1201-03 eyres was omitted from the regression. One dummy variable must always be omitted, and it becomes the baseline for the others. The choice of which variable to omit has no real effect on the regression.

The regression was run using Stata. Statistics for county dummies and the constant are not reported. Coefficients and 95% confidence intervals, reported by Stata as natural logarithms, have been made easier to interpret by taking the antilog.

Each row of Table 4 corresponds to a column in Table 2 and reports the statistics for the dummy variable for those eyres. The second column, labeled "Coefficient" reports the regression's estimate of the degree to which the rate of appeals differed from that in the 1201-03 eyres. Thus, the fact that the coefficient for the 1218-22 eyres is 0.41 indicates that the rate reported in those eyres was only forty-one percent of the rate reported in the 1202-03 eyres. Similarly, the fact that the coefficient for the 1246-49 eyres is 0.95 indicates that by that time the rate of appeals had rebounded almost to the levels

attained in the 1201-03 eyres. In the 1250's, however, the rate of appeals began to plummet, so that by the 1260's the rate of appeals has fallen to between a quarter and a third of the levels attained at the turn of the century.

Graph 1 essentially plots the regression coefficients, with two deviations. The scale on graph 1 multiplies the coefficients by 100 and thus ranges from zero to one hundred rather than from zero to one. In addition, Graph 1 plots a steady rate from 1194 to 1203, even though the coefficients for 1194-95 and 1198-99 are less than one. As explained above,<sup>81</sup> the figures for these years almost certainly under-report the true rate, and the graph has been adjusted to take into account that under-reporting.

The third column of Table 4, the p-values, measures the statistical significance of the results. P-values of less than 0.05 generally indicate statistically significant results, and p-values of between 0.05 and 0.10 are considered marginally significant. It is thus important to note that the p-values for the most important of the eyres are easily significant at even the 0.05 level. The p-values for the 1218-22, 1226-29, 1252-58, 1261-63, 1268-77, 1278-89, and 1292-94 eyres are all much below 0.05, and all but the 1252-58 eyres are below 0.01.<sup>82</sup> We can thus be confident (although, of course, not absolutely sure) that the declines from 1201-03 to 1218-29, and from 1246-49 to the end of the century were not merely the result of the lucky survival of records. The fact that the p-values for the 1231-33, 1234-48, and 1239-44 eyres are so high, however, means that we

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<sup>81</sup> See *supra* p. 37.

<sup>82</sup> It is notable that the p-values are so low even though adjustments have been made for over-dispersion. See *supra* p. 39 n. 79. Those adjustments double the standard errors and result in much higher p-values.

cannot be confident that the appeal had not already completely rebounded to turn-of-the-century levels by the 1230's.

The fact that the p-value for the 1246-49 eyres is almost one does not suggest that we cannot be confident that the rate of appeals had not fully rebounded by the late-1240's. P-values are useful only in testing the hypothesis of difference from the base (here the rate revealed by the 1201-03 eyres), not in testing the hypothesis of similarity. The next column, however, is helpful for that purpose. It gives the ninety-five percent confidence intervals for the coefficients, and indicates that we can be ninety-five percent confident that the rate of appeals for the mid-1240's was between sixty-six and one-hundred-and-thirty-five percent of 1201-03 rate. While this confidence interval allows for substantial deviation from the turn-of-the-century rate, even the lower bound is higher than the 1226-29 rate, which was fifty-one percent of turn of the century level. The significance of the rebound from 1226-1229 to 1246-1249 can also be measured by rerunning the regression using the 1226-29 eyres as the base instead of the 1201-03 eyres. By doing so, the p-values test the hypothesis of difference from 1226-1229 rather than 1201-03. If the regression is rerun in this way, the p-value for 1246-49 is 0.001, indicating that the rebound from 1226-29 to 1246-1249 is very statistically significant.

The previous subsection argued that, although Bedfordshire fit the pattern depicted in Graph 1 almost exactly, the other eleven counties also show similar trends. This conclusion is buttressed by regression analysis. If the regression described above is repeated excluding Bedfordshire, the results are nearly identical. Only three coefficients change by more than 0.05: the coefficient for the 1226-29 eyres increases from 0.51 to

0.66, the coefficient for the 1239-44 eyres increases from 0.81 to 0.91, and the coefficient for the 1246-49 eyres decreases from 0.95 to 0.89. These changes do not substantially change the overall trends.<sup>83</sup> In addition, the p-values generally increase, although only two cross the 0.05 significance threshold: the p-value for the 1226-29 eyres, which increases to 0.093, and the p-value from 1252-58, which increases to 0.104. Even these p-values, are marginally statistically significant. Taken together, the changes in the coefficient and p-value for 1226-29 suggest that without Bedfordshire, the rate of appeal in the 1226-1229 eyres might not have been much lower than in 1201-1203. On the other hand, by excluding Kent, the rate of appeal could be made to appear much lower and more statistically significant.<sup>84</sup> Nevertheless, since there is no more reason to drop Bedfordshire than to drop Kent, the regression results for the 1226-29 eyres reported in Table 4 (including all twelve counties in the data set) are the best guide to the overall trends in appeals.

Thus, while there is certainly some variation from county to county, the surviving evidence suggests that the number of appeals per year followed a similar pattern in most places. The rate fell about fifty percent in the first part of the thirteenth century, then rebounded to the previous level by the late 1240's, but then declined again by about two-thirds in the 1250's and remained at this reduced level through the early 1290's.

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<sup>83</sup> In fact, if the true coefficients for the 1239-44 and 1246-49 eyres were 0.91 and 0.89, that would lend further support to the hypothesis set out in Section III.B, because the rate of appeals would then peak in 1239-44 (rather than 1246-49), which is what the data on respect for settlement would predict. See *infra* p. 55 and the next footnote.

<sup>84</sup> If one excludes Kent, the coefficient for 1226-29 drops to 0.42 and the p-value drops to 0.000. Interestingly, the exclusion of Kent, like the exclusion of Bedfordshire, results in a peak in 1239-44 rather than 1246-49. See previous footnote.

#### **D. Analysis by crime**

The discussion in the previous section analyzed appeals for all crimes together. This section disaggregates those results. Table 5 shows regression coefficients for each crime category. These regressions are identical to that reported in Table 4, except the dependent variable is the number of appeals of a particular crime, rather than the total number of appeals. To save space, only the coefficients are reported. Statistical significance at the 0.05 level is indicated by an asterisk (\*). The last row of the table reproduces the coefficients from Table 4 for comparison.

Although there are some differences from crime to crime, the similarities are more pronounced. All crime categories, except rape and homicide, show large declines from 1201-03 to 1218-22 and 1226-29, and most are statistically significant. Similarly, with the exception of the miscellaneous “other” category, all crimes show 1246-49 rates near their 1201-03 levels. And finally, all crime categories show low rates (coefficients well below one) towards the end of the century. In fact, with the exception of homicide, the rate of appeals for all eyres after 1260 was less than fifty percent of the 1201-03 rate for all crimes and often statistically significant at the 0.05 level. Even the homicide rate was down more than a third, although its decline is not statistically significant. Thus, most crime categories, with the exception of homicide, show patterns similar to the overall trend. Section III.C provides some explanation for why homicide rates may have been different.

Table 5. Regression Results by Crime, 1194-1294

	1194- 1195	1198- 1199	1201- 1203	1208- 1209	1218- 1222	1226- 1229	1231- 1233	1234- 1238	1239- 1244	1246- 1249	1250- 1252	1252- 1258	1261- 1263	1268- 1277	1278- 1289	1292- 1294
Assault	0.23	0.24*	1.00	0.12*	0.07*	0.23*	1.00	0.52	1.12	1.33	0.95	0.88	0.58	0.30*	0.33*	0.23*
Homicide	1.34	0.57	1.00	0.70	0.90	0.77	0.99	0.30	0.68	0.93	0.32	0.74	0.26	0.55	0.49	0.57
Rape	0.00	0.67	1.00	0.23*	0.17*	1.03	0.47	1.48	0.80	1.20	0.23	0.52	0.00	0.43	0.24*	0.11*
Theft	2.11	0.56	1.00	0.19	0.17*	0.31*	0.17	1.36	0.91	0.82	1.00	0.60	0.00	0.18*	0.28*	0.05*
Other	0.72	1.11	1.00	0.27*	0.05	0.69	0.00	0.46*	0.46	0.26*	0.00*	0.23*	0.10	0.19	0.00	0.00
All appeals	0.78	0.53*	1.00	0.60	0.41*	0.51*	0.62	0.67	0.81	0.95	0.62	0.66*	0.31*	0.32*	0.27*	0.26*

An asterisk (\*) indicates that the P-value for this coefficient was less than 0.05. There were only three coefficient for which the P-value was between 0.05 and 0.10: homicide 1278-89 and rape 1252-58, 1268-77.

The “Other” category includes appeals classified as “Other crimes” and “Crime not specified” in Table 1.

### **Part III. Respect for Settlement and the Changing Rate of Appeals**

Knowledge of the changing rate of appeals is useful primarily because it helps explain why the appeal declined. This Part addresses that question. It first surveys the reasons others have put forward for the decline of the appeal and shows why they are unpersuasive. This Part then argues that changes in judicial attitudes toward settlement provide the best explanation of the changing rates of appeal.

#### **A. Previous explanations for the decline of the appeal**

Although the general decline of the appeal during the middle ages is well known,<sup>85</sup> relatively few historians have attempted to explain that decline.<sup>86</sup> Those historians who have ventured explanations have suggested four reasons: (1) the appeal's archaic nature, especially the use of trial by battle; (2) judicial hostility, which manifested itself in the ease with which appellees could exploit technical defects to nullify appeals; (3) the introduction of presentment, which meant that crimes might be prosecuted even if the victim did not appeal; and (4) the introduction of trespass actions, which were more attractive to victims because they provided money damages.<sup>87</sup>

The complex pattern of changing rates of appeals outlined in Part II shows that these explanations for the decline of the appeal are at best only partially correct. None of the four previously accepted reasons can explain why the number of appeals was

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<sup>85</sup> See *supra* pp. 29-30.

<sup>86</sup> For example, John Baker devotes two pages of his introductory text to the appeal, but provides no explanation for its decline. John Baker, *Introduction to English Legal History* (3rd ed. 1990), 574-76.

<sup>87</sup> Sir William Holdsworth, *A History of English Law* (4th ed. 1936), 2:360; R.F. Hunnisett, *The Medieval Coroner* (1961), 55.

increasing from 1226 to 1249. Nor can they explain why the number of appeals declined so rapidly in the 1210's and 1250's.

Fear of trial by battle and the ease with which appeals could be nullified cannot explain the changes in the rate of appeals. Battle and technicality had been part of the appeal procedure well before the declines observed in the thirteenth century. In fact, if fear of battle were a serious impediment to bringing appeals, the rate of appeals should have increased in the latter part of the thirteenth century, because in the second half of the century, an appellor could avoid battle while ensuring a jury verdict on the appellee by dropping or not prosecuting the case.<sup>88</sup> Similarly, if potential appellors were deterred from bringing appeals by the ease with which technical errors could be used to nullify appeals, they should have brought more appeals in the later part of the thirteenth century, because judges in that period forced appellees to submit to jury trial when appeals had been nullified.<sup>89</sup>

Nor can the introduction of presentment wholly explain the decline of the appeal. Presentment became a routine part of criminal procedure at latest under Henry II in the 1160's and 1170's,<sup>90</sup> far too early to have caused the precipitous declines in the 1210s and

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<sup>88</sup> See *infra* p. 52.

<sup>89</sup> As discussed *infra* p. 52, during certain periods non-prosecuted appeals were sent to jury trial. During those periods, nullified appeals were also sent to jury trial. See *infra* pp. 67, 69-70 (quotations from Bracton and Britton).

<sup>90</sup> See *supra* p. 9. Of course, presentment was not a static institution, and the roster of indictable offenses expanded rapidly in the thirteenth century. Nevertheless, with the exception of rape (see next footnote), none of the newly presentable offenses were previously routinely the subject of appeals. Typical newly presentable offenses included various kinds of misfeasance and extortion by bailiffs and other local officials, altering market days without royal permission, and creating warrens without royal permission. C. A. F. Meekings, *Crown Pleas of the Wiltshire Eyre, 1249* (1961), 29-33.

1250's. It is, of course, possible, even probable, that the introduction of presentment caused declines in the appeal in the period 1166-1194 or even earlier, but there is no data with which to test that theory. In addition, presentment of assaults and rapes were extremely rare, so the introduction of presentment cannot explain the thirteenth century declines in the number of these appeals.<sup>91</sup>

Similarly, the availability of trespass actions, which allowed victims of most assaults and property crimes to bring a civil tort action for damages, cannot explain the declines in the 1210's and 1250's. Trespass actions became common in the 1230's and 1240's,<sup>92</sup> which is too late to explain the decline in 1210's and too early to explain the decline in the 1250's. In fact, the introduction of trespass actions in the 1230's and 1240's coincided with a period when the number of appeals was increasing. In addition, if trespass had directly caused the decline of the appeal, the decline should have been confined only to offenses that could give rise to trespass actions. Trespass actions for rape did not exist until after the 1285 Statute of Westminster II, and yet the number of rape appeals fell well before that time.<sup>93</sup> Similarly, trespass was never available for homicide, yet the number of such appeals fell along with appeals of assaults and theft,

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<sup>91</sup> See Section II.C. Rape was probably not even presentable until the 1275 enactment of the first Statute of Westminster. See J.B. Post, "Ravishment of Women and the Statutes of Westminster, in John Baker, ed., *Legal Records and the Historian* (1978), 154-55; Henry Ansgar Kelly, "Statutes of Rapes and Alleged Ravishers of Wives: A Context for the Charges Against Thomas Malory, Knight," *Viator* 28 (1997), 364-66, 382-83, 387-88; Roger Groot, "The Crime of Rape *temp.* Richard I and John," *Journal of Legal History* 9: (1988) 325-26.

<sup>92</sup> See *infra* pp. 59-60.

<sup>93</sup> For a discussion of trends in rape appeals, see Section II.C. For a discussion of the Statute of Westminster II and trespass actions for rape, see J.B. Post, "Ravishment of Women and the Statutes of Westminster, in John Baker, ed., *Legal Records and the Historian* (1978), 158-59. In addition, such

albeit somewhat less dramatically.<sup>94</sup> Nevertheless, as will be discussed more fully below, the availability of trespass did play a role in the decline that occurred in the 1250s.

### **B. Changes in settlement policy and the changing rate of appeals**

The best explanation of the decline of the appeal lies in changing judicial policy towards the private settlement of appeals. In order to understand the importance of settlement policy, it is necessary to consider why people brought appeals in the first place. Some people clearly brought appeals because they wanted the appellee to be punished for harm done to the appellor or to a family member. One might characterize this motive as justice or revenge. Others brought appeals because they wanted compensation for harm done to them.<sup>95</sup> In the late twelfth and early thirteenth century there was no routine royal remedy by which victims could get damages for personal injury or property damage.<sup>96</sup> Nevertheless, depending on the judicial policy towards settlement, victims could use the appeal to induce a compensatory settlement. If the appellor was victorious at trial, she

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trespass actions were ordinarily brought for the ravishment of wives, not the rape of unmarried women, *ibid.*, while appeals of trespass almost always concerned unmarried women.

<sup>94</sup> For a discussion of trends in homicide appeals, see Section II.C.

<sup>95</sup> This motivation to appeal must usually be inferred, but is occasionally explicit. JUST 1/236B (Essex 1262) ("Rogerus malitiose appellavit eos eo quod voluit extorquere pecuniam ab eis"); JUST 1/802 m. 53d (Staffordshire 1272) (appeal brought "ut extorqueret ab eis pecuniam"). The settlement motivation has also been widely recognized in the historical literature. John Baker, *Introduction to English Legal History* (3rd ed. 1990), 575; Roger D. Groot, "The Jury in Private Criminal Prosecutions before 1215," *American Journal of Legal History* 27 (1983): 132-33; Doris M. Stenton, Introduction to *The Earliest Lincolnshire Assize Rolls, A.D. 1202-1209* (Lincoln Record Society, vol. 22, 1926), lx .

<sup>96</sup> Some remedies were available in local courts. Plaints might also be used to get redress, but, as noted *supra* p. 30 n. 73, the number of plaintiffs was small. Those who had influence with the king might pursue exceptional remedies. In the mid-thirteenth century, trespass began to provide a money damages for personal injury and property damage. See *infra* pp. 59-60.

would receive no compensation,<sup>97</sup> and the appellee would be punished either with death or a fine. Fear of hanging or fines, however, gave appellees powerful reasons to negotiate with their accusers, and money or other consideration might induce an appellor to drop the case. Case 3 is a particularly vivid illustration of the process. The appellor claimed she had been raped and brought an appeal. When the case came up for trial, however, she withdrew her appeal in exchange for two acres of land.

The appellor could use an appeal to procure a settlement, however, only if settlement protected the appellee from further prosecution. This was not always the case. Sometimes, judges disregarded settlements and tried the defendant “at the king’s suit.” Trial without the cooperation of the victim-prosecutor was possible, because the jurors were self-informing and did not need the victim’s testimony in order to convict.<sup>98</sup> Case 2 is illustrative of the many cases in which judges took a jury verdict and punished the appellee despite settlement. Such disregard of settlements, however, severely undercut the victim’s bargaining position. If settlement with the appellor did not protect the appellee from trial, why settle?<sup>99</sup> And if appellees would not settle, victims, to the extent they were motivated by the desire for compensation, might not bring appeals at all.

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<sup>97</sup> There were, however, exceptions. On rare occasions, judges would order the appellee to pay compensation. See e.g. JUST 1/359 m. 30 (Kent 1241); JUST 1/614B m. 47d (Northamptonshire 1247).

<sup>98</sup> See *supra* pp. 8, 21

<sup>99</sup> Roger Groot similarly argued that public prosecution of concorded appeals would discourage settlement. See Roger D. Groot, “The Jury in Private Criminal Prosecutions before 1215,” *American Journal of Legal History* 27 (1983): 133.

Table 6. Respect for Settlement, 1194-1294

	1194- 1195	1198- 1199	1201- 1203	1208- 1209	1218- 1222	1226- 1229	1231- 1233	1234- 1238	1239- 1244	1246- 1249	1250- 1252	1252- 1258	1261- 1263	1268- 1277	1278- 1289	1292- 1294
Number of non-prosecuted appeals in which appellee went free without trial	8	28	63	16	5	49	10	13	15	54	5	32	1	3	3	0
Number of non-prosecuted appeals	8	31	70	16	14	73	13	14	27	142	15	78	10	47	51	25
Percent of non-prosecuted appeals in which appellee went free without trial	100%	90%	90%	100%	36%	67%	77%	93%	56%	38%	33%	41%	10%	6%	6%	0%

This table is based on analysis of 634 cases from the data set described in Section II.A. 663 of the cases in the data set were non-prosecuted. Of those, twenty-nine were excluded, because the appellee was dead or had been tried at jail delivery or for some other reason could not be tried at the eyre. This table counts as "non-prosecuted," cases in which the appellant did not show up for trial and cases in which the appellant had retracted her appeal, as well as those in which the appellant is explicitly said not to have prosecuted. As Section III.G shows, the figures in this table would not be significantly different if it analyzed retracted appeals separately. On the grouping of non-prosecuted and retracted appeals, see *supra* pp. 18 n. 38, 24 n. 56, *infra* pp. 77, 79. Alternative ways of measuring respect for settlement are discussed in Section III.G.

Table 6 charts judicial respect for settlements by recording the percentage of non-prosecuted appeals in which judges let the appellee go free without trial.<sup>100</sup> Section III.G discusses some alternative ways of measuring respect for settlement. Table 6 shows that judicial respect for settlement varied considerably. In the late twelfth and early thirteenth centuries, settlements were almost always respected. In ninety percent or more of non-prosecuted appeals, the appellee went free without trial, as in Case 1. In the 1218-22 eyres, however, the judges began disregarding settlements, letting appellees go free without trial in barely a third of non-prosecuted appeals.<sup>101</sup> But this disrespect for settlement was short-lived, and in the late 1220's and 1230's the judges again let appellees go free without trial when the appellor had decided not to prosecute. Then, in the 1239-44 eyres, the judges began to return to the anti-settlement policy. By the 1260's, nearly all appellees in non-prosecuted appeals were required to submit to jury trial.

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<sup>100</sup> Case 1 is an example of a non-prosecuted case in which the appellee went free without trial. Case 2 is an example of a non-prosecuted case in which the appellor did *not* go free without trial. Ideally, one would like to know the percentage of all *settled* cases in which the defendant went free without trial. In most instances, however, the clerk did not record whether the cases had settled or not. Section III.G, however, does calculate respect for settlement for the 201 cases in which clerks recorded that there had been settlement, and finds similar trends and percentages. Non-prosecuted cases are a good proxy for settled cases. While some non-prosecuted cases were undoubtedly terminated for reasons other than settlement (weakness of the case, lack of interest, etc.), settlement was probably the main reason for failure to prosecute. See John Baker, *Introduction to English Legal History* (3rd ed. 1990), 575; Stenton, Introduction to *The Earliest Lincolnshire Assize Rolls*, li; Roger D. Groot, "The Jury in Private Criminal Prosecutions before 1215," *American Journal of Legal History* 27 (1983): 134-35 (arguing that retracted appeals, but not non-prosecuted appeals, were "probably.... unlicensed concords). Variations in application of the anti-settlement policy to different crimes are discussed in Section III.C. Section III.G discusses some alternative ways of measuring respect for settlement.

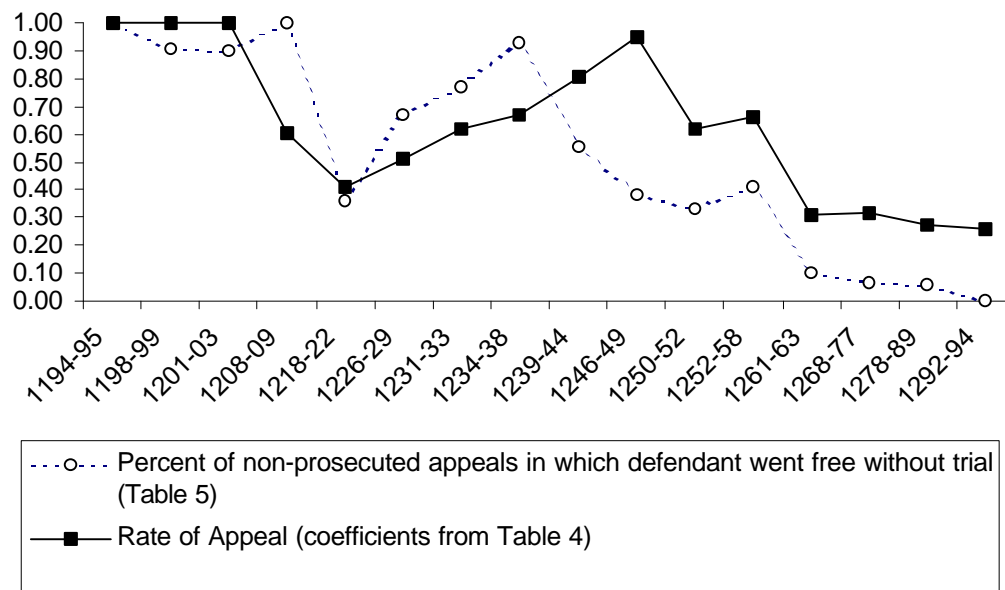
<sup>101</sup> This change has been noticed by several previous scholars. Margaret H. Kerr, "Angevin Reform of the Appeal of Felony," *Law and History Review* 13 (1995): 369-73; Roger D. Groot, "The Early Thirteenth-Century Criminal Jury" in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, ed. J.S. Cockburn and Thomas A. Green (1988) 12-13, 21-22.

The figures in Table 6 provide a powerful predictor of the number of appeals. When judges in one set of eyres respected settlements (i.e. when the percentage of non-prosecuted appeals in which the appellee went free without trial was high), the number of appeals recorded in the next eyres tended to be high. So, for example, the appellee went free without trial in at least ninety percent of non-prosecuted appeals in the 1198-99 and 1234-38 eyres, and the rate of appeals in the subsequent eyres (1202-09 and 1239-44) was relatively high (coefficients of 1 and 0.81 in Table 4). Conversely, when judges ignored settlement (i.e. when the percentage of non-prosecuted appeals in which the appellee went free without trial was below forty-percent), as in 1218-22 and 1268-77, the rate of appeals in the subsequent eyres (1226-29 and 1278-89) tended to be low (coefficients of 0.51 and 0.27 in Table 4). The relationship between respect for settlement and rates of appeal is easiest to see if the two are graphed together, as in Graph 2.<sup>102</sup>

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<sup>102</sup> This graph, like Graph 1, plots a steady rate from 1194 to 1209, even though the coefficients for 1194-95 and 1198-99 are less than one. As explained above, *supra* p. 37, the figures for these years almost certainly under-report the true rate, and the graph has been adjusted to take into account that under-reporting.

**Graph 2. Rate of Appeal and Respect for Settlement,  
1194-1294**



The graph shows that judicial respect for settlements is a very good predictor of the number of appeals brought. The percent of non-prosecuted appeals in which the appellee went free without a jury verdict and the number of appeals tend to go up and down together. Unlike the four previously-accepted explanations of the decline of the appeal, judicial policy towards settlement helps to explain both when the sharp declines occurred and the fact that the rate of appeals rose in the 1230's. The close relationship between respect for settlement and the number of appeals in the subsequent eyres is confirmed by regression analysis.<sup>103</sup>

<sup>103</sup> A simple linear regression of the form:

Lagged Table 4 coefficients =  $a + \beta$  (Percent of non-prosecuted appellees that went free without trial)

yields an  $r^2$  of 0.45. This  $r^2$  is heavily influenced by two outliers: the low rate of appeals in 1198-99 and 1218-22. As explained elsewhere, the 1198-1199 and 1208-9 eyre records are almost certainly unreliable, and the low rate in 1218-22 was probably caused by the civil war at the end of King John's reign. See

Of course, the correspondence between respect for settlement and the number of appeals is not perfect. There are two major divergences. First, the judges began to reverse their policy of respect for settlement in the 1239-44 eyres, yet the number of appeals did not start decreasing until the 1250-52 eyres. Some lag, however, is to be expected. Potential appellors would not have known about the change in settlement policy until the 1239-44 eyres, so the earliest the records could have reflected a decline in the number of appeals would have been the 1246-49 eyres, which heard appeals initiated in county court between 1239 and 1249. Thus, the anomaly is not that the decline was not simultaneous, but that it was delayed until 1250-52 rather than only until 1246-49. One possible explanation may be that people did not believe that the 1239-44 reversal would be lasting. Since the previous implementation of the anti-settlement policy (in the 1218-22 eyres) was swiftly reversed, people might have expected that the 1239-44 implementation would also have been merely temporary. When the justices continued their reversal in the 1246-49 eyres, potential appellors and appellees learned that the reversal was likely to be permanent and began to respond. By the next eyres, in 1250-52 and 1252-58, a decline was under way. Another possible explanation is that the 1239-44 change in policy was not very large. Judges still let more than half (fifty-six percent) of appellees go free without trial when appellors did not prosecute their appeals. Thus, potential appellors and appellees in the period between the 1239-44 and 1246-49 eyres might have thought that settlement would still probably be respected.

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*supra* p. 37, *infra* p. 56. When the 1198-99, 1208-9, and 1218-22 rates are excluded from the regression, the  $r^2$  increases to 0.67.

The second anomaly is that the rate of appeals was low in the 1208-09 and 1218-19 eyres, even though judges in the prior eyres (1201-03 and 1208-09) showed a high degree of respect for settlement. One would have expected that the rate of appeal would have been high in the period 1208-21, and would only have declined in 1226-29. This discrepancy does not, however, refute the relationship between respect for settlement and the number of appeals. The 1208-09 rate is unreliable, because it is based records from only five districts in a single county (Yorkshire). This unreliability is confirmed by the regression p-value, which, at 0.201, suggests that the apparent decline from 1201-03 to 1208-09 is not statistically significant. The fact that the rate for the 1218-22 eyres is unexpectedly low is best explained by the fact that it recorded cases initiated between 1208 and 1222 and thus covered the last part of King John's reign and the early part of Henry III's minority. This was a very turbulent period which included the interdict, civil war and other major disruptions of ordinary judicial processes.<sup>104</sup> The fact that there were relatively few appeals in the 1218-22 eyres almost certainly reflects the special circumstances of this period.

Of course using judicial respect for settlement to explain the rate of appeals only pushes the inquiry back one step. Why did judicial policy towards settlement change?

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<sup>104</sup> See C.A.F. Meekings, Introduction to *Crown Pleas of the Wiltshire Eyre, 1249* (Wiltshire Archaeological and Natural History Society, Records Branch, vol. 16, 1961), 4 (disruption of eyres); James Clarke Holt, *Magna Carta*, (2nd ed. 1992), 325 n. 135 (sheriffs heard criminal cases normally heard in eyre). The fact that assault shows one of the more dramatic drops (93% lower than 1201-03) while homicide is almost stable (only 10% lower than 1201-03), see Section II.C, might imply that litigants brought their cases elsewhere during this turbulent period. Litigants often had a choice of fora for assault cases (including county and manorial courts), whereas the royal monopoly on homicide cases was relatively strict.

Understanding the motives for changes in policy is extremely difficult, since no contemporary source addressed the issue.<sup>105</sup> The following story seems most plausible.

In the late twelfth and early thirteenth centuries, judges faced a tough choice. Crimes prosecuted by appeal were considered serious. They were offenses not only against the victim but also against the king's peace. As will be discussed below, out-of-court settlement was not officially condoned.<sup>106</sup> Yet the judges had no good way of determining guilt or innocence if the appellor refused to prosecute. Jury trial was not yet an accepted mode of trial in criminal cases, so if judges wanted to punish criminals in spite of settlement, they had to send appellees to the ordeal in order to determine whether the suspect was guilty. But this was an unacceptable option, because ordeals were becoming controversial. Some were skeptical about the accuracy of ordeals.<sup>107</sup> Others doubted whether there was adequate justification in the Bible and patristic sources for their use.<sup>108</sup> In 1215, at the Fourth Lateran Council, these doubts would lead the Catholic church to forbid clerics to participate in ordeals, but the council's decree reflected years of controversy stretching back at least to the late twelfth century. So, faced with the choice

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<sup>105</sup> As discussed in section III.D, most major thirteenth-century treatise writers noted that when an appeal was not prosecuted, the judges would put the appellee to jury trial, but they do not explain why this policy was not always enforced.

<sup>106</sup> See Section III.D.

<sup>107</sup> John W. Baldwin, "The Intellectual Preparation for the Canon of 1215 against Ordeals," *Speculum* 36 (1961): 615-36. See also Stenton, Introduction to *The Earliest Lincolnshire Assize Rolls*, lx (seeing judicial hostility to ordeals in early thirteenth-century cases). The fact that ordeals acquitted 85% may also have caused some skepticism. See *supra* p. 17 n. 36.

<sup>108</sup> Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (1986), 82-90.

between respecting settlements and putting appellees to ordeals, judges almost always respected settlement.

In a few cases, however the justices began to experiment with the anti-settlement policy. They asked the presenting jury whether it suspected the appellee, and in one of the two instances in which the jury responded that it did, the justices put the appellee to the ordeal.<sup>109</sup> As discussed more fully in the next section, most of these pre-1218 cases in which the justices asked the presenting jury its opinion of the defendant were homicide appeals. In the overwhelming majority of cases, however, when faced with the tough choice between respecting settlements and putting defendants to the ordeal, the justices respected settlement.

With the abolition of the ordeal in 1215, the use of juries in criminal cases became routine.<sup>110</sup> The judges no longer faced such a difficult choice. Now they could ascertain guilt or innocence in the absence of a prosecuting appellor by referring the question to the jury “at the king’s suit.” They did so in a majority of cases (64%) in the 1218-22 eyres, the first eyres after the abolition of the ordeal.

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<sup>109</sup> There are about a dozen pre-1218 cases in the data set in which the justices asked the jury its opinion of a non-prosecuted appellee. In all but two of these cases, the jurors did not suspect the appellee, and she went free. In two cases, they did suspect (*malecredunt*) her. In one of these cases, the defendant was sent to the ordeal, and in the other the appellee was taken into custody and no further proceedings are recorded. *Collections for a History of Staffordshire*, vol. 3 (1882), 91 (Staffordshire 1203); *Pleas Before the King or His Justices, 1198-1202*, vol. 2, ed. Doris Mary Stenton, Selden Society vol. 68 (1952), 9 pl. 44 (Norfolk 1198). It is possible that the presenting jury was asked to declare suspicion before the appellee was sent to the ordeal in order to implement the ancient rule that no person be put to defense of life or limb without an accuser. The paradigmatic accuser was a prosecuting appellor, but the presenting jury was an accepted substitute.

<sup>110</sup> Roger D. Groot, "The Early Thirteenth-Century Criminal Jury" in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, ed. J.S. Cockburn and Thomas A. Green (1988), 3.

Disrespect for settlements, however, caused people to bring fewer appeals. After the restoration of order and ordinary judicial processes in the 1220's, judges expected the number of appeals to return to turn-of-the-century levels, but the rates remained depressed at levels barely higher than the turbulent 1210's. The judges realized that their disrespect for settlement had taken away one of potential appellors' primary motives for bringing appeals. By punishing non-prosecuted appellees, they had discouraged potential appellors from bringing prosecutions. The judges thus faced another tough choice: either continue the anti-settlement policy and let much crime go unprosecuted, or tolerate settlements in order to induce more prosecution. The judges chose the latter alternative and again began routinely respecting settlements. In the 1226-29 eyres they let appellees go free without trial in sixty-seven percent of non-prosecuted appeals. By the 1234-38 eyres they had completely reversed the policy, and let appellees go free without trial in ninety-three percent of non-prosecuted appeals. The policy reversal had the desired effect, and the number of appeals increased by more than fifty-percent. In the 1226-29 eyres, appeals were brought at barely half (51%) the rate they had been brought at the turn of the century. By the 1239-44 eyres, the rate had rebounded to eighty-one percent of the turn-of-the-century rate, up fifty-nine percent in less than fifteen years.

In the 1230's, however, the royal courts began to develop an alternative to the appeal. This alternative would eventually be known as trespass, although it did not yet have that name in the 1230's.<sup>111</sup> This new action could be brought for most of the same

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<sup>111</sup> The early history of trespass remains somewhat unclear. Most historians agree that the first trespass writs issued in the 1220's. S.F.C. Milsom, "Trespass from Henry III to Edward III," *Law Quarterly Review* 74 (1958): 201; Alan Harding, *The Roll of the Shropshire Eyre of 1256*, (Selden Society, vol. 96, 1981), xxxv-vi. Trespass cases became common in the plea rolls of the Westminster

offenses as appeals, including assaults and thefts, but did not give the defendant the option of trial by battle or require formalities such as initiation in county court. Eventually, trespass would become a general tort action by which plaintiffs could garner monetary damages. Whether the cases from the 1230's can be classified as tort is open to debate. Nevertheless, by 1239, there was clearly something other than an appeal which the victim could bring.<sup>112</sup> Once this alternative was available, judges no longer feared that disrespect of settlements in appeal cases would let wrongdoers go unpunished. So they resumed their anti-settlement policy. Starting in 1239, they let fewer and fewer appellees go free without trial in non-prosecuted appeals. By the 1250's, this policy began showing its effect. The appeal was down more than thirty percent from its 1246-49 peak, and by the 1261-63 eyres appeals were being brought at only about a third of the rate they had been brought at the turn of the century or at their 1240's peak. The policy of disrespect for settlements did not, however, completely eliminate appeals. Some appeals had always

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courts in the mid-1230's, although many of these cases may have been initiated by plaint rather than writ, and many features of trespass cases had not yet been standardized. G. O. Sayles, Introduction to *Select Cases in the Court of King's Bench*, vol. 4 (Selden Society, vol. 74, 1955), xxxvi-vii; H.G. Richardson and G.O. Sayles, *Select Cases of Procedure without Writ under Henry III* (Selden Society, vol. 60, 1941), cviii-cxxxiv. The name "trespass," however, had not yet become firmly attached to these cases, and the form of the writ was still fluid. See Harding, *Roll of the Shropshire Eyre of 1256*, xxxvi ("The name [trespass] comes last of all"); G.D.G. Hall, "Some Early Writs of 'Trespass'," *Law Quarterly Review* 73 (1957): 65 (noting that trespass writs were not stereotyped during the reign of Henry III, and that appeals were still classified under the heading "trespass" in the 1260's and early 1270's).

<sup>112</sup> Trespass cases from the 1230's and early 1240's are sometimes difficult to distinguish from appeals, but generally differ in that (a) plaintiffs do not allege, and defendants do not deny "felony," (b) the plaintiff puts a monetary value on the harm with a phrase such as "whence he is injured in the amount of 100 s.," thus implicitly asking for damages, (c) neither plaintiff nor defendant suggests trial by battle, (d) the rolls sometimes mention that the plaintiff produced suit witnesses (*producit sectam*), and (e) the formalities of appeals, such as suit in county court, are not required. See *Curia Regis Rolls* vol. 15 cases 867, 960, vol. 16 cases 143, 1195. Contrast these cases to appeals, such as *Curia Regis Rolls* vol. 15 cases 1128, 1304, vol. 16 cases 1272, 1744. Even if one were to argue that these cases were not yet true trespass actions, it is clear that, by the late 1230's, something new was appearing in substantial numbers in the records which provided an alternative to appeals for many appealable offenses.

been brought in order to punish (or outlaw) the appellee, and such appeals were unaffected by the change in policy towards settled cases. In fact, the knowledge that even a non-prosecuted appeal would put the appellee to trial and possible punishment could have encouraged such appeals.

As noted above, the introduction of trespass actions plays a role in my explanation of the decline of the appeal, as in the previously-accepted explanations, but its role is different. In my explanation, the rise of trespass did not directly cause the decline of the appeal, but rather caused the judges to reassert their anti-settlement policy, and it was that policy which caused the decline. This explanation makes more sense of the timing evidence, because if the introduction of trespass had caused the decline in the appeal, the decline should have been apparent in the 1239-44 eyres. Instead, the number of appeals kept rising. If judges respected settlements in appeals, people preferred appeals to trespass actions, because they were cheaper and provided more bargaining leverage. Unlike trespass suits, appeals could be prosecuted locally, and so did not require a costly trip to Westminster. In addition, appellors may have been able to extract higher settlements when appellees feared the criminal sanctions imposed after successful appeals.<sup>113</sup>

In sum, change in judicial attitudes toward settlement of appeals is the best explanation for the changing frequency with which appeals were brought. Many appeals were motivated by the prospect of settlement, and judges could undermine the appellee's incentive to settle by subjecting appellees to trial regardless of the appellor's willingness to

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<sup>113</sup> John Baker, *Introduction to English Legal History* (3rd ed. 1990), 575.

prosecute. In the 1218-22 eyres, judges experimented with an anti-settlement policy, but relented when they realized that the policy would leave many crimes unpunished. When trespass became available for most offenses in the 1230's, the judges returned to their anti-settlement policy, and the number of appeals dropped by two-thirds.

### **C. Analysis by crime**

The discussion in Part III so far has analyzed respect for settlement for all crimes together. This section disaggregates those results by analyzing respect for settlement for each type of crime separately. It shows that judges' different treatment of homicide settlements can help to explain why, as discussed in Section II.C, rates of appeal of homicide rates did not follow the same pattern as appeals of other crimes.

Table 7 illustrates the application of the anti-settlement policy for each crime category. It was compiled in the same way as Table 6 above. Unfortunately, for some years and crimes, there were few non-prosecuted appeals so the numbers in the table may not be very reliable. Percentages based on more than five non-prosecuted appeals, which are more likely to be accurate, are marked in the table with an asterisk (\*).

Table 7 indicates that settlement policy was applied uniformly to all crime categories except homicide. Before 1218, nearly all non-prosecuted appellees went free without trial, except those accused of homicide. Similarly, nearly all non-prosecuted appellees underwent trial in 1218-22. The only exception was assault, and its unexpectedly high percentage (80%) is probably unreliable, because it is based on very few non-prosecuted assault appeals. All crime categories, except homicide, show a return to respect for settlement (high percentages) in the 1226-29 and 1231-31 eyres, and then all,

Table 7. Respect for Settlement by Crime, 1194-1294

	1194- 1195	1198- 1199	1201- 1203	1208- 1209	1218- 1222	1226- 1229	1231- 1233	1234- 1238	1239- 1244	1246- 1249	1250- 1252	1252- 1258	1261- 1263	1268- 1277	1278- 1289	1292- 1294
Assault	100%	100%*	96%*	100%	80%	73%*	100%	80%	60%*	36%*	30%*	43%*	13%*	10%*	12%*	0%*
Homicide		60%	38%*		0%	0%*	0%		100%	0%	0%	30%*	0%	6%*	0%*	0%*
Rape		100%	100%*		0%	69%*	100%		25%	57%*		63%*		0%	0%	
Theft	100%	80%	100%*	100%	33%	71%*	50%	100%	50%	38%*	50%	25%*		0%	0%*	0%
Other	100%	100%*	93%*	100%		88%*	100%	100%	67%	30%*		33%	0%	0%		
All appeals	100%*	90%*	90%*	100%*	36%*	67%*	77%*	93%*	56%*	38%*	33%*	41%*	10%*	6%*	6%*	0%*

An asterisk (\*) indicates that the percentage is based on more than five observations and is thus more reliable.

Blank cells indicate no non-prosecuted appeals in which it can be ascertained whether the appellee went free without trial.

The “Other” category includes appeals classified as “Other crimes” and “Crime not specified” in Table 1.

except homicide, show precipitous declines in respect for settlement for the rest of the century.

Appeals of homicide defy the patterns both in the rates of appeal and in respect for settlement. As discussed in Section II.C, rates of homicide appeals dipped only slightly in the period 1208-1229, and fell less dramatically in the late thirteenth century. In addition, judges implemented the anti-settlement policy against homicide in the 1201-03 eyres and then did not relax it in the late 1220's and 1230's.<sup>114</sup> The close relationship, discussed in Section III.B, between settlement policy and the number of appeals suggests that these two anomalies were related. The rate of homicide appeals did not fall after the 1218-22 eyres, because settlement policy had not dramatically changed. Similarly, there was no rebound in the 1230's, because the anti-settlement policy was not relaxed in the late 1220's and 1230's.

The fact that both the anti-settlement policy and the rate of appeals changed less dramatically for homicide than for other crimes supports the link between settlement policy and rates of appeal, but it also raises the issue of why homicide was treated differently. The seriousness of the crime probably explains why the anti-settlement policy was applied first to homicide. Before 1218, application of the anti-settlement policy risked sending non-prosecuted appellees to the ordeal, and the royal judges may have been willing to do that only for the most serious of offenses.<sup>115</sup> The coroners' duty to

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<sup>114</sup> The 100% figure for 1239-44 can be ignored. It is based on only a single appeal.

<sup>115</sup> In no pre-1218 case in the data set, however, did the judges actually send a non-prosecuted homicide appellee to the ordeal, because the presenting jury always gave a medial verdict of non-suspicion. Nevertheless, the judges were presumably prepared to send such appellees to ordeal if the presenting jury did suspect them. They did send one theft appellee to the ordeal. See *supra* p. 58 n. 109.

investigate suspicious deaths probably explains why the anti-settlement policy was not relaxed in homicide cases in the late 1220's. For other crimes, judges realized that if there was no appeal, presentment was unlikely and crimes were likely to go unprosecuted. But by cross-checking the coroners' rolls with eyre presentments, judges could be confident that most homicides would be prosecuted by presentment, even if the anti-settlement policy discouraged appeals. As a result, judges did not face the same dilemma regarding homicide as with other crimes and could keep the anti-settlement policy in place. The statistics presented in Section IV.A confirm the justices' reliance on presentment of homicide. Even as the number of homicide appeals declined, the number of homicide presentments rose more than enough to ensure that the total number of homicide prosecutions rose.

#### **D. Non-prosecuted and settled appeals in contemporary treatises**

The previous sections relied almost exclusively on plea roll evidence to ascertain judicial policy towards settled cases. Unfortunately, the plea rolls provide little insight into the rationale for judicial policy towards settlement and why policy changed. Contemporary treatises on English law provide some insight into these questions, although they too are frustratingly uninformative on motives and reasons. Although the treatises cast only a little light on judicial thinking, their statements of the law are largely consistent with the practice revealed in the plea rolls.

The *Leges Henrici Primi* (c. 1113-1118) forbade settlements unless approved by a judge:

If anyone, on the basis of an accusation which he has made before a justice, institutes a plea which is concerned with theft, robbery, or an offence

of this kind, he shall not enter into any secret or open settlement without the justice's consent (*sine licentia iustitie*).<sup>116</sup>

Although this passage forbids unlicensed settlements, it is silent on enforcement. How was a judge to know if there had been an unapproved settlement? What was to happen if the parties settled without judicial consent? Late twelfth and early thirteenth-century plea rolls occasionally record that the parties received permission to settle as required by the *Leges*.<sup>117</sup> Nevertheless, because there was no procedure for systematically determining whether the parties had settled, it is nearly certain that many parties settled without obtaining a license and without being punished for doing so.

The treatise attributed to Glanvill (c. 1187-1189) does not explicitly discuss the settlement of criminal cases, but it does analyze non-prosecuted cases. As discussed above,<sup>118</sup> such cases were often settled. After noting that in most cases, if a plaintiff defaults, he pays costs and the defendant goes free, Glanvill states that:

If, however, the case is not only his, but also the lord king's, as in a criminal case for breach of the lord king's peace [i.e. an appeal], then, since he [the appellor] must not prejudice anyone but himself by defaulting in the case and is indeed bound to prosecute it, he shall immediately be put in prison and kept in safe custody until he is willing to prosecute his appeal....<sup>119</sup>

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<sup>116</sup> *Leges Henrici Primi*, ed. and trans. L.J. Downer (1972), § 59,27

<sup>117</sup> See *supra* p. 23.

<sup>118</sup> See *supra* pp. 24, 52 n. 100.

<sup>119</sup> *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, ed. and trans. G.D.G. Hall (1965; repr. 1993), 21.

For Glanvill, the dual nature of the appeal as remedy both for private wrong and for breach of the king's peace justifies treating it differently from ordinary civil litigation.

Unlike the *Leges Henrici Primi*, this passage is quite clear on enforcement. A non-prosecuting appellor is to be put in jail to coerce him to prosecute. Nevertheless, by the 1190's, when the first plea rolls survive, this policy was clearly not being enforced.<sup>120</sup> It is possible, however, that Glanvill accurately described the practice of the 1180's when the treatise was written, although there is no evidence either way on this issue.

The treatise customarily attributed to Bracton was the first treatise written after 1218, when the judges first fully implemented the anti-settlement policy. Debates continue over its dating, although most recent scholarship points to composition in the late 1220's and early 1230's.<sup>121</sup> Bracton discusses the new policy relating to non-prosecuted cases in these words:

If he who has first appealed the principal dies or defaults, or being present retracts his appeal, or though he wishes to prosecute the appellee avoids the appeal by an exception, the felony may nonetheless exist, and if it is not convicted wicked deeds will thus remain unpunished, which ought not to

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<sup>120</sup> Non-prosecuting appellors were sometimes ordered to be taken into custody, but the purpose of custody seems to have been to extract fines, not to induce renewed prosecution. See, e.g., *Collections for a History of Staffordshire*, vol. 3 (1882), 91, 99 (1201 Staffordshire eyre, case of Hugo of Huntingdon). The plea rolls never indicate that a non-prosecuting appellor was sent to jail and then resumed prosecution. Similarly, in the one instance in which two consecutive pre-1220 plea rolls from the same county survive, no non-prosecuting appellor in the first eyre is mentioned in the subsequent eyre roll as having renewed his appeal. There were ten non-prosecuted appeals involving fourteen appellors in the 1199 Staffordshire eyre. None of these appellors reappeared as an appellor in the records of the 1203 Staffordshire eyre. *Collections for a History of Staffordshire*, vol. 3 (1882), 38-46, 91-98.

<sup>121</sup> Paul Brand, "The Age of Bracton," *Proceedings of the British Academy*, 89 (1996): 65-89. Barton, however, argues that the treatise was written in the 1250's. J.L. Barton, "The Mystery of Bracton," *Journal of Legal History* 14 (1993): 1-142. The debate between Brand and Barton echoes earlier positions taken by Thorne, Maitland and others. For a summary of the history of Bracton scholarship, see Frederick Bernays Wiener, "Bracton-- A Tangled Web of Legal Mysteries that Defied Solution for More than Seven Centuries," *George Mason University Law Review* 2 (1978): 129-65.

be .... and since a wrong is done not only to him who is slain,<sup>122</sup> but to the lord king whose peace is broken, therefore, lest evil deeds remain unpunished, let the king proceed to an inquest *ex officio* for the preservation of his peace because of the presumption raised by the appeal, as though the appellee had not been appealed but lawfully indicted.<sup>123</sup>

As was seen in the plea rolls from the 1218-22 eyres, when an appellor did not prosecute ("defaults, or being present retracts his appeal"), Bracton states that the judges would put the case to the jury ("inquest"), as though the appellee had been accused by the presenting jury ("not ... appealed but lawfully indicted"). Bracton justifies this policy by the dual nature of the appeal. As Glanvill had also noted, an appeal prosecutes not only a wrong to the victim, but also to the king. In addition, Bracton points to the undesirability of letting crime remain unpunished. Although Bracton's discussion is consistent with court practice around 1220 and after the mid-1240's, it is inconsistent with the practice of the late 1220's and early 1230's, when the treatise was probably written.<sup>124</sup>

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<sup>122</sup> Although this reference to the "slain" might suggest that the procedure discussed in this passage applied only to homicide cases, this is not correct. For example, when Bracton discusses rape appeals, it is clear that the same procedure applies. *Bracton on the Laws and Customs of England*, ed. George E. Woodbine, trans. Samuel. E. Thorne (1968-77), 2:403, f. 143. Thirteenth-century treatise writers tended to describe in detail the procedure for only a single crime, and then to discuss other crimes only cursorily, because they assumed the reader would understand that the procedures were the same unless differences were explicitly noted. The same issue arises in Britton. See *infra* p. 70 n. 129.

<sup>123</sup> *Bracton on the Laws and Customs of England*, ed. George E. Woodbine, trans. Samuel. E. Thorne (1968-77), 2:402, f. 142b.

<sup>124</sup> The disjunction between practice circa 1230 and that described by Bracton might lend support to those who believe that the treatise was not written until the 1250's. See *supra* p. 67 n. 121. Alternatively, *Bracton* may be describing what its author thought should be the law, rather than the actual practice of the courts.

The *Placita Corone*, a treatise most likely composed c. 1274-75,<sup>125</sup> does not discuss the consequences of a non-prosecuted appeal. There is one passage, however, in which the author suggests that the appellor could, by dropping the case, save the defendant from punishment. In discussing a rape appeal, the author notes that "if they find by inquest that he is guilty, *and the woman refuses to drop her suit*, he will suffer the judgment appropriate for such a case; that is to say he will be blinded or castrated or both, according to the justices' discretion."<sup>126</sup> The italicized words strongly suggest that the appellor had the power to drop her suit and thus prevent punishment. This power would be inconsistent with the evidence derived from plea rolls in the 1270's, when the treatise was probably written. Nevertheless, as others have observed, there are several respects in which the treatise reflects the law of a much earlier period.<sup>127</sup> In fact, the dissonance between the treatise and practice in the 1270's led J.B. Post to suggest that much of the treatise was written in the 1240s.<sup>128</sup> Since the anti-settlement policy was not enforced in the early 1240's, such a dating would make the treatise consistent with contemporary practice.

The treatise customarily attributed to Britton (c. 1290-95) accurately describes contemporary practice:

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<sup>125</sup> J. M. Kaye, Introduction to *Placita Corone or La Corone Pledde Devant Justices*, ed. and trans. J. M. Kaye (Selden Society Supplementary Series, vol. 4, 1966), xiv-xx. Post, however, has suggested that much of the treatise was written in the 1240's. J.B. Post, "*Placita Corone*," in *Legal Record and Historical Reality*, ed. Thomas G. Watkin (1989), 5.

<sup>126</sup> Ibid., 9 (italics added). As noted above, *supra* p. 18, blinding and castration were very rare.

<sup>127</sup> J.B. Post, "*Placita Corone*," in *Legal Record and Historical Reality* (1989), 2; *Placita Corone*, xvi-xvii.

<sup>128</sup> J.B. Post, "*Placita Corone*," in *Legal Record and Historical Reality* (1989), 5.

If he [the appellee] can by any exception abate the appeal, then our will is that he be acquitted as against the appellor.... and also where the appellor withdraws himself from his appeal before judgment.... But though it happens that the appellees are thus acquitted as against the plaintiff, it does not therefore follow that they are not guilty of what is laid to their charge; wherefore in such cases let it be immediately demanded of them on our behalf, how they will acquit themselves of such slander; and if they say, by the country, then .... according to the verdict of the country charged thereon, judgment shall be given.<sup>129</sup>

According to Britton, when the appellor did not prosecute ("withdrew"), the defendant was nevertheless put to jury trial (trial "by the country") and punished in accordance with the jury verdict.

In sum, the treatment of non-prosecuted appeals was discussed in all the major twelfth and thirteenth-century treatises that gave any attention to criminal cases. The twelfth-century treatises suggest some hostility to settlement of appeals, although neither presents a workable procedure for curbing settlements. The thirteenth-century treatises, with the exception of the *Placita Corone*, generally confirm the later practice of putting non-prosecuted appellees to jury trial "at the king's suit." Of all the treatises, only Bracton in any way justifies this policy. He explains that it reflects the dual (private/royal) nature of appeals and the necessity that criminals be punished. Unfortunately, none of the treatises acknowledges that the policy towards non-prosecuted appeals changed over the century, much less explains why the change occurred.

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<sup>129</sup> Britton, ed. and trans. Francis Morgan Nichols (1865; repr. 1983), 1:103-4. Although this paragraph occurs in the discussion of treason appeals, there is no indication that Britton thought that treason appeals were special in this regard. Indeed, it is implicit in his discussion of other crimes that the same procedure would apply. See *ibid.*, 1:118 ("And if the demandants bring their suit [against a thief] in the form of trespass, they shall be heard, if they have not before commenced their suit in form of felony [i.e. appeal], in which case they cannot, by withdrawing from their suit, deprive us of ours."). A similar issue arose in Bracton, see *supra* p. 67 n. 122. From this passage, one might infer that jury trial was optional. Nevertheless, Britton makes clear elsewhere that defendants were coerced to accept jury trial. *Ibid.*, 1:26-27.

### **E. Canon law influence**

English judges may have borrowed the idea of sending non-prosecuted appellees to trial from the canon law. As in secular law, the primary mode of prosecution in twelfth-century canon law was individual accusation, usually by fellow clerics. Like English appeals, ecclesiastical accusations were sometimes settled. The canon law on settlements, however, was ambivalent. On one hand, the canon law, as reflected in Gratian's *Decretum* encouraged settlement, because the litigious spirit was thought inappropriate for clerics.<sup>130</sup> On the other hand, Gratian also collected texts condemning settlement of criminal accusations.<sup>131</sup> Nevertheless, like contemporary English law, the *Decretum* contained no effective way of detecting or deterring settlements.

Because most ecclesiastical offenses were victimless crimes, settlement created serious problems for the administration of canon law. For example, suppose someone accused a priest of purchasing his ordination, and suppose the prosecutor and priest reached a settlement in which the priest paid the accuser ten pounds. This would hardly be a satisfactory resolution of the problem. When someone is accused of assault or theft, settlement can be justified as compensating the victim, but when the crime is victimless, settlement is more likely to aggravate the offense than compensate the victim.

Late twelfth-century canon lawyers found a solution to this problem in the life of Pope Gregory the Great. Having heard that certain grave accusations against a bishop had been settled, Pope Gregory instructed the bishops of Corinth to investigate the matter,

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<sup>130</sup> D.90 c.1,7.

<sup>131</sup> d. p. C.2. q.3. c.8.

notwithstanding the settlement.<sup>132</sup> Although Gratian and earlier canon law writers had not discussed or referred to this incident,<sup>133</sup> late twelfth-century collectors of papal letters (decretals) included two texts recounting this incident in their works.<sup>134</sup> In including these texts, decretal collectors transformed Pope Gregory's instructions for a particular controversy into a precedent of general applicability. Decretal collections were meant to be used by canon law judges, so the texts would have been interpreted as instructing the ecclesiastical judge to investigate crimes even when the parties had reached a settlement.<sup>135</sup> This instruction is very similar to the anti-settlement policy which English judges began experimenting with in the 1190's and made routine in 1218. In both, the judge inquired into the guilt or innocence of defendants, even when the accuser was no longer

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<sup>132</sup> John the Deacon, *Sancti Gregorii Magni Vita*, Patrologia Latina 75:195. I thank Charles Duggan for sharing his notes on X.5.22.1 & 2, in which he points out that both of the decretals come from a single paragraph of the *Vita*.

<sup>133</sup> For their absence from the collections compiled by Burchard of Worms and Ivo of Chartres, see Emil Friedberg, *Quinque Compilationes Antiquae*, (1882; repr. 1956), xxi (table showing canonical collections including the two relevant decretals, 1 Com 5.18.1 & 2).

<sup>134</sup> *Sacrorum Conciliorum*, ed. John Mansi (1778), 417-18 (*Appendix Concilii Lateranensis c. 2*); 1 Com 5.18.1,2; Emil Friedberg, *Die Canones-Sammlungen zwischen Gratian und Bernhard von Pavia* (1887; repr. 1958), 187 (table showing canonical collections including the two relevant decretals, 1 Com 5.18.1 & 2). These texts were also included in the Gregory IX's thirteenth-century collection. X.5.22.1 & 2.

<sup>135</sup> This interpretation is made explicit in the rubrics to the *Liber Extra*, which say that "when an accuser withdraws from an accusation, *the judge* can inquire *ex officio* concerning the crime," and that "when the accuser and the accused withdraw, *the judge* prosecutes." X.5.22.1 & 2 (emphasis added). These rubrics were not published until later, and thus are not direct evidence of the interpretation of the text around 1200, when English law may have begun to borrow the idea of judicial prosecution of non-prosecuted private prosecution. Nevertheless, this judge-centered interpretation of the texts is implicit in the inclusion of the text in decretal collections, which were intended for use by judges. The ordinary gloss also instructs the judge to inquire concerning the crime, if there has been a settlement. X 5.22.1 s.v. *gratiam* (Venice 1615). Earlier commentaries neither support nor undermine this interpretation. See, e.g., Bernardus Papiensis, *Summa Decretalium*, ed. Theodore Laspeyres (1860; repr. 1956), 243; Ricardus Anglicanus, *Casus ad Compilatio Prima*, s.v. *Scripta* and *Crimina* (Wurzburg Ms. Mp. th. f. 122, fol 15a, available on microfilm at the Robbins Collection, Boalt Hall.).

prosecuting. This similarity suggests that English judges might have borrowed the idea from the canon law.

Although this borrowing cannot be directly proven, its plausibility is enhanced by the fact that the canonical idea that judges should investigate non-prosecuted accusations was disseminated widely in the 1190's with the publication of the *Compilatio Prima*. This work was a systematic collection of decretals, which included the two relevant texts instructing the judge to continue the prosecution of accusations even when the accuser had withdrawn.<sup>136</sup> Other decretal collections, including the *Appendix Concilii Lateranensis*, which was probably written in England, also spread knowledge of the canonical approach to non-prosecuted accusations.<sup>137</sup> A prolific and learned group of canonists flourished in England in the late twelfth and early thirteenth centuries which would have been familiar with this new canon law approach to settlements.<sup>138</sup> Their knowledge could easily have spread to the shapers of the common law, because there was much interaction in this period between the canon law and the common law. Several royal judges active in the late twelfth and early thirteenth centuries had canon law training. Richard Barre studied at Bologna, where he was friends with the distinguished canonist Stephen of

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<sup>136</sup> 1 Com. 5.18.1 & 2.

<sup>137</sup> On the English origin of the *Appendix* and other important early decretal collections, see Charles Duggan, *Twelfth Century Decretal Collections and their importance in English history* (1963), 53, 66-117, 135-39; Stephan Kuttner and Eleanor Rathbone, "Anglo-Norman Canonists of the Twelfth Century," *Traditio* 7 (1951): 280-84.

<sup>138</sup> Stephan Kuttner and Eleanor Rathbone, "Anglo-Norman Canonists of the Twelfth Century," *Traditio* 7 (1951): 279; Ralph Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (1985), 36-37, 226.

Tournai.<sup>139</sup> Hubert Walter had been a papal judge delegate,<sup>140</sup> and there is some evidence that several other royal judges were familiar with the canon law.<sup>141</sup> In addition, a substantial number of royal judges were bishops or archdeacons, who might have acquired knowledge of the canon law through their judicial responsibilities within the church.<sup>142</sup> The idea that some people working in the royal courts had a thorough knowledge of canon law is also supported by the treatise attributed to Bracton, which is peppered with quotations from the canon law. One such quotation is found in the very passage quoted above describing the anti-settlement policy.<sup>143</sup>

Thus, the similarity between the canon law and English law treatments of non-prosecuted appeals, the absence of any earlier common law discussions of this treatment, and the close contacts between the two systems suggest that English royal justices may have borrowed the practice of sending non-prosecuted appeals to trial from the canon law.

#### **F. Legal knowledge of potential appellors and appellees**

The idea that changes in settlement policy can explain the number of appeals implicitly assumed that potential appellors and appellees knew about settlement policy. It

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<sup>139</sup> Ralph V. Turner, *The English Judiciary in the Age of Glanvill and Bracton* (1985), 95-96.

<sup>140</sup> Ibid., 97-98.

<sup>141</sup> Those likely to have learned canon law include Master Jocelin, archdeacon of Chichester, Richard fitz Neal, Godfrey de Lucy, Master Eustace of Fauconberg, and Master Godfrey de Insula. Ibid., 37-38, 95-99, 144, 150-51, 226, 232, 236.

<sup>142</sup> Ibid., 98. In the 1194-95 eyres, two of the judges were archdeacons, and four were bishops or archbishops. Two archdeacons and a bishop served as judges in the 1198-99 eyres. Only one archdeacon served in the 1201-03, 1208-9, or 1218-22 eyres, but six bishops did. David Crook, *Records of the General Eyre* (1982), 56, 57, 58, 59, 61, 62, 64, 69, 72, 73, 74, 75.

<sup>143</sup> *Bracton on the Laws and Customs of England*, ed. George E. Woodbine, trans. Samuel E. Thorne (1968-77), 2:402 n. 3. See *supra* pp. 67-68.

assumed that appellees knew whether judges at the last eyre respected settlements and used that knowledge to predict whether settlement of their own case was likely to protect them from further prosecution. Similarly, it assumed that potential appellors knew the settlement policy enforced at the previous eyre, and thus whether they (i.e. potential appellors) were likely to be able to extract a settlement. Such legal knowledge among non-lawyers might seem implausible, but given thirteenth-century institutional arrangements, it is not.

Numerous men from every village would have attended the eyre. Every village sent four men and its reeve to the eyre to assist the presenting and trial jurors.<sup>144</sup> In addition, anyone with a case at the eyre would have attended, as well as those summoned as jurors. Thus, at least five men from each village would have heard how judges decided criminal cases, and they could have reported back to their fellow villagers about judicial respect for settlement.

The previous paragraph assumed that villagers (like modern historians) would have had to infer settlement policy from decisions in individual cases. Even this might have been unnecessary. Judges might have explicitly announced or explained changes in policy to those attending the eyre.<sup>145</sup>

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<sup>144</sup> C.A.F. Meekings, *The 1235 Surrey Eyre*, vol. 1, *Introduction* (Surrey Record Society, vol. 31, 1979), 1:21, 97; *Rotuli Litterarum Clausarum*, ed. Thomas D. Hardy (1833), 1:403; *Bracton*, 2:405, f. 143b; *Britton*, 1:19; Paul Hyams, "What Did Edwardian Villagers Understand by 'Law,'" in *Medieval Society and the Manor Court*, ed. Zvi Razi and Richard Smith (1996), 76-77.

<sup>145</sup> Such an announcement might have come in the speeches which judges made at the beginning of each eyre. *Bracton*, 2:327, f. 115b; *Britton*, 1:20. It is also possible that judges explained changes in the treatment of non-prosecuted appeals during other parts of the eyre, such as the charge to the jurors before they delivered their *verdicta* or when asking jurors to give verdicts in non-prosecuted cases.

### **G. Measuring respect for settlement**

To measure respect for settlement, Section III.B analyzed the percentage of non-prosecuted appeals in which judges let the appellee go free without trial. This measure of respect for settlement, however, is somewhat problematic, because some non-prosecuted appeals were not settled, and because some settling parties were penalized without a trial which determined the guilt or innocence of the appellee. Despite these shortcomings, the measure used in Section III.B is probably the best. Nevertheless, in order to show that the conclusions of this article are not dependent on the way respect for settlement was measured, and in order to explain why the method used in Section III.B is the most plausible, this section examines three alternative measures of settlement policy.

In 201 cases in the data set, the eyre rolls record that the parties settled. For these cases, settlement policy can be measure directly by looking to whether the appellee was put to trial. The second row of Table 8 below, labeled "Measure 2," shows respect for settlement as measured by the percentage of settled cases in which the defendant went free without trial. For comparison, the first row ("Measure 1") re-displays the percentages used in Table 6 in Section III.B, that is, the percentage of non-prosecuted appeals in which judges let the appellee go free without trial.

Some historians, most notably Roger Groot, have suggested that settled cases were likely to have been formally retracted rather than simply non-prosecuted.<sup>146</sup> Measure 3 calculates respect for settlement by the percent of retracted appeals in which the

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<sup>146</sup> Roger Groot, "The Jury in Private Criminal Prosecutions before 1215," *American Journal of Legal History* 27 (1983): 135-36.

Table 8. Four Ways of Measuring Respect for Settlement

	1194- 1195	1198- 1199	1201- 1203	1208- 1209	1218- 1222	1226- 1229	1231- 1233	1234- 1238	1239- 1244	1246- 1249	1250- 1252	1252- 1258	1261- 1263	1268- 1277	1278- 1289	1292- 1294
Measure 1	100%*	90%*	90%*	100%*	36%*	67%*	77%*	93%*	56%*	38%*	33%*	41%*	10%*	6%*	6%*	0%*
Measure 2	100%		75%	100%	0%	81%*	100%	100%	47%*	53%*	45%*	59%*	50%	7%*	5%*	0%
Measure 3	100%*	92%*	71%*		60%	79%*	100%	100%	44%*	35%*	100%	54%*	0%	0%	40%	0%*
Measure 4	100%*	90%*	89%*	100%*	36%*	41%*	62%*	57%*	33%*	15%*	7%*	15%*	0%*	4%*	4%*	0%*

An asterisk (\*) indicates that the percentage is based on more than five observations and is thus more reliable.

Measure 1. Percentage of non-prosecuted appeals (including retracted appeals) in which judges let the appellee go free without trial. This is the measure recorded in Table 5 and analyzed in Section III.B.

Measure 2. Percentage of settled appeals in which the defendant went free without trial.

Measure 3. Percentage of retracted appeals in which judges let the appellee go free without trial.

Measure 4. Percentage of non-prosecuted appeals in which judges let the appellee go free with neither trial nor inquiry about settlement.

The cell for Measure 2 in 1198-99 is blank, because the none of cases in the data set are recorded to have settled. Similarly, the cell for Measure 4 in 1208-09 is blank, because there were no retracted appeals in the dataset.

defendant went free without trial. In Measure 1 (and hence in Section III.B), retracted appeals were counted as non-prosecuted. The difference between Measures 1 and 3 is that Measure 1 looks at both non-prosecuted and retracted appeals, whereas Measure 3 looks only at retracted appeals.

Sometimes judges, instead of or in addition to asking the jury about the guilt of a non-prosecuted appellee, also asked whether the parties had settled. Since the settlement question was usually asked in order to fine those who had settled, another way of measuring settlement policy is to ask how often judges let the appellee go with neither trial nor inquiry about settlement. The third row of Table 8 (labeled "Measure 3") measures settlement policy by recording the percentage of non-prosecuted appeals in which judges let the appellee go free without trial or inquiry into settlement.

Comparison of the three measures shows broad similarities. All show high respect for settlement before 1218. All show a drop in respect for settlement in the 1218-22 eyres, and then increasing respect from then until the 1234-38 eyres. Then respect begins to drop again, so that by the 1260's nearly all measures show less than 10% of settlements were respected. Of course, there are some differences. Measure 2 shows less respect for settlement in 1218-22 than Measure 1, while Measure 3 shows more, although both statistics are somewhat doubtful, since they are based on relatively few observations, as indicated by the fact that there is no asterisk ("\*") in these cells. The rebound in respect for settlement is larger in Measure 2 than Measure 1, but much more modest in Measure 4. On the other hand the drop in respect for settlement in the 1240's and 1250's is much smaller under Measure 2, but much sharper under Measure 4. A few cells (Measure 2 in

1261-63, Measure 3 in 1250-52 and 1278-89) defy the general trends, but these anomalies probably reflect the paucity of observations for these cells. Nevertheless, for explaining changes in rates of appeal, the similarities are much more important than differences. All show change in settlement policy during the same years: broad implementation of anti-settlement policy in 1218-22, relaxation starting in 1226-29, the beginning of a return to the anti-settlement policy in 1239-44, and an increasingly stringent anti-settlement policy for the rest of the century. As explained in Section III.B, these changes are the best predictors of changing rates of appeal.

Table 8 thus shows that the results presented in Part III are not dependent on a particular way of measuring respect for settlement. Nevertheless, Measure 1, the method used in Part III, is the most plausible way of gauging judicial attitude towards settlement. Measure 2 is less reliable, because in more than three-quarters of the cases the rolls do not record whether the parties settled. As a result, Measure 2 captures only part (and potentially an unrepresentative part) of the changes in settlement policy. In addition, the number of cases in the data set for which settlement is recorded is sometimes so small as to make inference unreliable, as indicated by the fact that most cells in this row lack an asterisk (“\*”). Measure 3 would only be a more accurate gauge of settlement policy, if retracted cases were more likely to have been settled than those which were simply non-prosecuted. This is not borne out by the data. When jurors reported on whether the parties had settled, they reported that exactly the same percentage (64%) of non-prosecuted and retracted cases had settled. In addition, like Measure 2, Measure 3 suffers from the fact that there are often few relevant cases. Measure 4 is less reliable, because inquiry into

settlement seldom led to more than minimal fines (half a mark) unless a trial was also held and the appellee was found guilty of the crime for which he was appealed. As a result, inquiry into settlement is not a good measure of a serious anti-settlement policy.

#### **IV. Alternative Explanations for the Changing Rate of Appeals**

Part III argued that changes in judicial treatment of settled cases were the best explanation for changes in the number of appeals brought. Other explanations are, of course, possible. Section III.A analyzed four other explanations in the previous literature for changes in the rate of appeals. This Part discusses three other explanations, which have not appeared in the literature, but which have been proposed to me orally and which, in my opinion, deserve careful analysis.

##### **A. Crime trends**

One potential explanation is changing crime rates. Perhaps fewer appeals were brought around 1220 or in the later thirteenth century because there were fewer crimes committed. Unfortunately, for most kinds of crime, there is simply no data on the incidence (as opposed to prosecution) of crime. For homicide, however, there are rough incidence figures, because the coroner was supposed to investigate every unnatural death, and because presenting jurors were fined for not reporting deaths mentioned in the coroners' rolls. Recent scholarship has shown that the coroners' rolls are themselves far from complete, and Appendix D of this article shows that eyre rolls often omit crimes mentioned on the coroners' rolls. Nevertheless, counting homicides on eyre rolls provides the best data on thirteenth-century crime rates.

James Given counted homicides (those presented as well as those appealed) from five counties and two cities for much of the thirteenth century.<sup>147</sup> Table 9 presents Given's data on the number of homicides (those presented and those appealed) per year per county or city.<sup>148</sup>

Table 9. Rates of Homicide, 1201-1277

	1201- 1203	1208- 1209	1218- 1222	1226- 1229	1231- 1233	1234- 1238	1239- 1244	1245	1246- 1249	1250- 1252	1252- 1258	1261- 1263	1268- 1277
Bedfordshire	5.5			6.6					10.0				11.7
Bristol			0.6						0.7				
Kent				20.8			21.8				29.9		
London							3.0						6.0
Norfolk										23.2	27.7		34.9
Oxfordshire							10.1		18.9			16.2	
Warwickshire			11.9		20.4				16.0				

Although Given examined fewer counties and did not cover as wide a time span, the trend in homicide rates is relatively clear. Bedfordshire, Bristol, Kent, London, and Norfolk all show consistently rising homicide rates. The other two counties, Oxfordshire and Warwickshire, show large increases and then smaller declines. These casual

<sup>147</sup> James Buchanan Given, *Society and Homicide in Thirteenth-Century England* (1977), 36.

<sup>148</sup> This table was compiled in much the same way as Table 2, with a few minor differences. Table 9 omits columns for the 1194-95, 1198-99, 1278-89, and 1292-94 eyres, because Given did not examine any records from the late twelfth or late thirteenth centuries. In addition, Given did not restrict his analysis to presenting districts for which the eyre rolls were complete in every year examined. For example, his analysis of Bedfordshire includes the liberty of Dunstable, even though the 1202 Bedfordshire eyre does not contain Dunstable presentments. In addition, Given used the 1276 Bedfordshire eyre, which was omitted from Table 2, because it followed the 1272 eyre, which was abandoned on Henry III's death. Because it is unclear whether cases arising between 1262 and 1272 were consistently reported in the 1276 eyre, this eyre was excluded from the analysis in the rest of this article. See *supra* p. 32 n. 76. In calculating homicide rates for the 1276 eyre in Table 9, I assumed that all homicides arising between 1262 and 1272 were reported in the 1276 eyre. If some were not, then the homicide rate reported in the 1276 eyre should have been even higher, which would further support the idea that homicide rates were increasing. In calculating the rates, I used the eyre dates in Crook, *Records of the General Eyre* (1982). These dates are slightly (but not importantly) different from those used by Given, *Society and Homicide*, 14. It should be noted that the Given's Table 2 incorrectly refers to the Bristol 1227 eyre, when (as noted on page 14) it should refer to the Bristol 1221 eyre.

observations are confirmed by regression analysis. Table 10 reports the results of a regression very similar to that reported in Table 4. As with Table 5, only the coefficients are reported, and statistical significance at the 0.05 level is indicated by an asterisk.

Table 10. Regression Results (Homicide Appeals and Presentments)

	1201- 1203	1208- 1209	1218- 1222	1226- 1229	1231- 1233	1234- 1238	1239- 1244	1245	1246- 1249	1250- 1252	1252- 1258	1261- 1263	1268- 1277
Coefficient	1.00		1.45	1.14	2.46		1.12		1.92	1.40	1.64	1.69	2.12

An asterisk (\*) indicates that the P-value for this coefficient was less than 0.05.

The coefficients show a moderate upward trend. All but one of the coefficients before 1245 is lower than 1.50, whereas all but one after 1245 is above 1.50. Even more clearly, the coefficients do not match the pattern described above for appeals. There is no decline from 1201-03 to 1218-1229, no steady increase from 1226-29 to 1246-49, and no decline from 1246-49 to the end of the century. Since the incidence of homicide bears almost no resemblance to the rate of appeal, changes in the homicide rate cannot explain the changes in the number of homicide appeals.

In modern times, homicide rates and rates of other crimes generally go up and down together.<sup>149</sup> There is some evidence that this correlation also held in the early fourteenth century.<sup>150</sup> If homicide rates and other crime rates were correlated in the

<sup>149</sup> John J. Donohue, "Understanding the Path of Crime," *Journal of Criminal Law and Criminology* 88 (1998): 1425-26.

<sup>150</sup> Barbara Hanawalt collected data on the indictments for crime in the early fourteenth century. Barbara Hanawalt, *Crime and Conflict in English Communities, 1300-1348* (1979), 237, 241 (Tables 9 and 10). Using her data, I calculated the number of indictments for each crime for each five year period between 1300 and 1348. I then calculated correlation coefficients between homicide and other crimes. The correlation between homicide and other crimes is uniformly positive and moderately strong. The coefficients are: 0.55 for homicide and larceny, 0.40 for homicide and burglary, 0.34 for homicide and robbery, 0.19 for homicide and receiving, and 0.30 for homicide and arson. Of course, these figures measure the correlation between indictments for various crimes, rather than between the incidence of

thirteenth century as well, then one could infer that the changes in appeals more generally were not caused by changes in the incidence of crime.

### **B. Presentment trends**

Another potential explanation for the fluctuating rate of appeals is that the rate of appeals simply mirrored more general trends in prosecution. Since presentment<sup>151</sup> was the principal alternative method of prosecution, to test this alternative hypothesis, one would need good data on rates of prosecution by presentment. Unfortunately, it is impossible to reliably measure the number of cases brought by presentment, because, as discussed in Appendix D, unlike appeals, a large proportion of presentments were heard in gaol (jail) delivery, and relatively few gaol delivery rolls have survived.<sup>152</sup> As a result, reliance on figures derived from the eyre rolls would almost certainly severely underestimate the number of presentments and generate unreliable trends.

Although the precise number of criminal cases brought by presentment cannot be calculated, it is possible to make some rough inferences about the relationship between appeals and presentments. Presentments of assault and rape were extremely rare,<sup>153</sup> so it

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various crimes, and Hanawalt's data set did not include significant numbers of assaults and rapes. Nevertheless, the positive correlation in indictments provides some support for the idea that the modern correlation of crime incidence also held in the thirteenth and fourteenth centuries.

<sup>151</sup> Presentment was accusation by a jury, which could be considered a form of public prosecution. See *supra* p. 8.

<sup>152</sup> See *infra* p. 98.

<sup>153</sup> Presentment of rape was probably not even possible until the 1275 enactment of the first Statute of Westminster. See *supra* p. 48 n. 91. It is possible that the Statute of Westminster I's introduction of presentments of rape caused the especially precipitous decline of the rape appeals from the 1268-77 eyre (regression coefficient of 0.43) to the 1278-89 and 1292-94 eyres (regression coefficients of 0.24 and 0.11). Additional investigation into the rate of late thirteenth-century rape presentments and appeals, however, would be necessary for any confidence on this point. Westminster II's provision for trespass writs for rape/ravishment almost certainly had no effect on rape appeals during the period studied, because

is safe to conclude that the rate of appeals of these crimes did not simply mirror trends in presentment. Appeals of theft were never very common and became very uncommon by the end of the thirteenth century,<sup>154</sup> while presentment of theft was extremely common, especially in the gaol delivery rolls of the late thirteenth century, so it is implausible to think that trends in the appeal of theft merely tracked more general trends in prosecution.

The data gathered by James Given and discussed in the previous section allow a somewhat more precise calculation of trends in presentment of homicide. Although the previous section analyzed Given's data as indicative of crime rates, the data is, nevertheless, prosecution data and could be used to estimate crime (incidence) rates only because coroners' inquests ensured that most homicides resulted in prosecution. Although some of the homicides counted by Given were prosecuted by appeal, the overwhelming majority<sup>155</sup> were prosecuted by presentment, so Given's data can be taken as a rough indicator of changing rates of presentment of homicide. As discussed in the previous section, there is practically no correlation between Given's rates and rates of appeal. For example, although the presentment data generally show an increase over the century, the appeal data generally show an overall decline.

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they were ordinarily used to punish "ravishment of wife," rather than rape of an unmarried women (as was typical in appeals). In addition, such trespass writs did not become common until the turn of the fourteenth century. See Post, 159.

<sup>154</sup> See Section II.C. As noted above, p. 6, this article's analysis of appeals does not include approver appeals. Approver appeals of theft were relatively common, and if they were counted with ordinary victim appeals, the proportion of theft appeals might be significant, although almost certainly much less than fifty percent.

<sup>155</sup> See *infra* p. 85.

Taken together, these rough analyses of assault, rape, theft and homicide suggest that trends in appeals did not track more general trends in the prosecution of crime. The fact that trends in appeals seem to have been independent of trends in prosecution more generally supports the idea that the explanation for changing rates of appeal lies in factors specific to the appeal, as argued in Part III.

The data presented in this section also permit some rough measurement of the relative importance of appeal and presentment. So far, this article has measured the prevalence of appeals by calculating the number of appeals per county per year. One might also want to measure the relative importance of the appeal by calculating the percentage of criminal accusations brought by appeal. The rarity of presentments of rape and assault suggests that the appeal was the dominant way in which these crimes were prosecuted, even at the end of the thirteenth century. Conversely, the fact that presentments of theft were extremely common, especially at gaol delivery, suggests that appeals of theft constituted a relatively small proportion of all prosecutions for theft. Since both Given and I analyzed the Bedfordshire 1202, 1227, and 1247 eyres, the percentage of homicide cases prosecuted by appeal can be calculated directly. Thirty-six percent (8/22) of the homicide cases reported in the 1202 eyre were brought by appeal, seventeen percent (10/58) in the 1227 eyre, and twenty-eight percent (19/69) in the 1247 eyre. For the later thirteenth century, no direct comparison can be made, because Given did not examine the 1287 Bedfordshire eyre, and I did not look at the 1276 Bedfordshire eyre.<sup>156</sup> Nevertheless, if one assumes that the rates of appeal of homicide were similar at the two eyres (as is

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<sup>156</sup> For the reason, see *supra* p. 32 n. 76.

suggested by the similar coefficients in Table 5), one could estimate that eleven percent of the homicide cases in the 1276 Bedfordshire eyre were brought by appeal.<sup>157</sup> These percentages suggest that trends in the rate of appeals (discussed in Part II) and trends in the percentage of appeals were similar. Both the rates and percentages were high in 1202 and in 1247, and low in 1227 and in the late thirteenth century. More generally, the fact that Given's data shows an overall upward trend in homicide prosecution, while the rate of appeals shows fluctuations but overall decline, suggests that the proportion of appeals also fluctuated but was significantly lower at the end of the thirteenth century than at the beginning.

### **C. Pre-appeal settlement**

Part III showed that when judges put non-prosecuted appellees to jury trial, the number of appeals declined, and the previous section suggested that this change reduced the relative importance of appeals, because the number of appeals declined while the number of presentments increased. It is possible, however, that although the number of appeals decreased, the appeal did not decline in importance, because crime victims did not need to initiate an appeal in order to settle. All they had to do was threaten to appeal. If such threats resulted in settlement before appeal was initiated at county court, the king's suit procedure would not be invoked, because it was only triggered if an appeal was actually initiated. In addition, such threats to appeal, even if followed by settlement,

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<sup>157</sup> The 1287 Bedfordshire eyre records that appeals were brought at a rate of 1.29 per year over the previous ten years. The 1276 Bedfordshire eyre records that homicides were prosecuted (by appeal and presentment) at a rate of 11.7 per year over the previous fifteen years. So if appeals were brought at the same rate in the 1276 eyre as in the 1287, then 11% (1.29/11.7) of homicides were prosecuted by appeal at the 1276 Bedfordshire eyre.

would not be mentioned in legal records. It is thus possible that although the number of recorded appeals dropped, the number of pre-appeal settlements rose, so that the overall social impact of appeals and settlements induced by the threat of appeals remained constant.

Of course, such pre-appeal settlements would have provided no protection against prosecution by presentment. The danger of presentment would have been quite high in homicide cases and for some kinds of theft, because these crimes were commonly presented. Presentment of homicide was especially likely, because dead bodies are hard to conceal, and it was one of the coroner's responsibilities to investigate suspicious deaths. But for the sixty percent of appeals that involved assault, rape, and other crimes, presentment was very infrequent, so a settlement which prevented an appeal would likely have protected the offender from all punishment. In fact, if the victim and offender were discrete, the presenting jury might never be aware that the crime had occurred.

Although it is possible that the number of pre-appeal settlements rose to offset the decline of actual appeals, this seems unlikely. Victims were required to initiate their cases in the first county court after the offense. Since the county court met every four weeks, victim and offender would have had only a few weeks, and possibly only a few days, in which to settle their cases. Given the serious nature of the offenses appealed, it seems unlikely that the parties could have come to an agreement so quickly. Physical assaults and rapes may have been caused by long-standing conflicts or quick tempers. But, whatever their cause, people probably required substantial time to put aside their

differences and anger in order to settle. The few weeks before the next county court probably did not allow sufficient time for the resolution of such serious matters.

The lack of threat credibility provides another reason why pre-appeal settlement was unlikely. As discussed in Section I.D, initiation of an appeal provided credibility to the appellor's threat to continue prosecuting the appeal, because the appellor was fined if she dropped her suit. On the other hand, before initiation of an appeal, the prospective appellor faced no penalty for failure to appeal, and thus may have lacked a credible threat to appeal.

## **V. Conclusion**

This article makes two contributions to legal history. The preceding sections have emphasized the substantive results. They chart the changing frequency with which appeals were brought, and try to show how the complex pattern can be explained as the result of changes in judicial policy towards settlement. The article also contributes through its method. Although legal historians frequently try to infer patterns from incomplete records, use of formal statistics is rare. It is hoped that this article shows that use of regression analysis can help historians gather new insights from fragmentary evidence.

**Appendix A. Rates of Appeal for Some Additional Districts**

As mentioned on page 34, to ensure comparability, Table 2 reports the rate of appeals only for those districts for which records are consistently available. Table 11 shows the rate of appeals for districts with odd patterns of survival. As can be seen, the rates are quite low and thus have little effect on the general analysis. To reduce clutter, they were excluded from Table 2, but for completeness they were included in the other tables and in the regressions. For the districts corresponding to each row, see Appendix B.

Table 11. Rates of Appeal for Some Additional Districts, 1194-1294

	1194-1195	1198-1199	1201-1203	1208-1209	1218-1222	1226-1229	1231-1233	1234-1238	1239-1244	1245	1246-1249	1250-1252	1252-1258	1261-1263	1268-1277	1278-1289	1292-1294
Bedfordshire Du											0.7					0.2	
Essex A		0.5				0.6		1.0			0.7		0.6		0.6	0.5	
Essex Ro		0.3						0.0			0.0		0.7			0.0	
Northamptonshire Hi			0.3								1.3						
Northamptonshire Wi			1.1				0.4				0.4		0.4				
Shropshire 48			0.5		0.5						0.1		1.2				
Shropshire Ch		0.0											0.3				
Shropshire SL											0.2		0.0				
Staffordshire A			0.0			0.7									0.1		0.1
Staffordshire B															0.2		0.1
Staffordshire Ec	0.0					0.0									0.1		0.2
Yorkshire Ha				0.8			1.1						1.2			0.8	

	No eyre held
	Records survive, but not examined
	Records do not survive

## Appendix B. Presenting Districts

Table 12 lists the districts corresponding to the rows of Tables 2 and 11. For some counties, it has been easier to list the presenting districts excluded rather than to enumerate all of those included. To construct the list of those included, one need only consult the tables in the back of David Crook, *Records of the General Eyre*.<sup>158</sup> As discussed below, the only reason for exclusion of some presenting districts is that the records are too fragmentary to permit any inferences about early thirteenth-century trends.

Table 12. Presenting Districts (continued on next page)

Row in Table 2 or Table 11	Districts
Bedfordshire	All presenting districts except Dunstable
Bedfordshire Du	Dunstable
Buckinghamshire	Ashendon, Cottesloe, Desborough, Mursley, Risborough, Stoke, Stone, Waddesdon, Yardley
Essex	Chelmsford, Dengie, Dunmow, Harlow, Lexden, Ongar, Thurstable
Essex A	Tendring, Waltham, Witham
Essex Ro	Rochford
Hertfordshire	Baldock, Braughing, Broadwater, Dacorum, Edwinstree, Hertford, Hitchin, Odsey, Bishop's Stortford
Kent	All presenting districts except : Aylesford Lathe: Chatham and Gillingham, Eyehorne, Maidstone, Twyford, Wrotham St. Augustine's Lathe: Downhamford, Righslow, Whitstable Scray Lathe: Calehill, Felborough, Milton, Teynham Shipway Lathe: Aloesridge, Street Sutton at Home Lathe: Bromley, Codsheath, Dartford, Ruxley Lowry of Tonbridge: Hildenborough, Tonbridge, Washlingstone
Middlesex	Edmonton, Isleworth
Norfolk	Clavering, Freebridge, Humbleyard, Launditch, Smithdon, Tunstead

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<sup>158</sup> Pp. 196-252.

Table 12. Presenting Districts (continued)

Row in Table 2 or Table 11	Districts
Northamptonshire	Brackley, Cleyley, Corby, Fawsley <sup>a</sup> , Hamfordshoe, Huxloe, Naveslund North & South, Nobottle Grove, Spelhoe, Stodford, Stoke, Towcester, Chipping Warden <sup>b</sup> , Wymersley
Northamptonshire Hi	Higham Ferrers
Northamptonshire Wi	Willybrook
Shropshire	All presenting districts except Bradford, Chibury, Church Stretton, Stanton Lacy, Worthen
Shropshire 48	Bradford, Church Stretton
Shropshire Ch	Chibury
Shropshire SL	Stanton Lacy
Staffordshire	All presenting districts except Burton on Trent, Eccleshall, Kingswinford, Newcastle under lime (borough and liberty), Sedgley, Tardebigge
Staffordshire A	Burton on Trent, Kingswinford, Newcastle under Lyme (borough only)
Staffordshire B	Newcastle under Lyme (liberty), Sedgley
Staffordshire Ec	Eccleshall
Wiltshire	All presenting districts except Corsham, Downton, Knoyle, Marlborough (borough), Ramsbury, Rowde, Old Sarum
Yorkshire	East Riding: Between Ouse and Derwent North Riding: Pickering (vill and wapentake <sup>c</sup> ),
Yorkshire Ha	North Riding: Hang, Richmond

a. In the printed edition, the presentments for this districts are incorrectly recorded as being made by the hundred of Mawesley. David Crook implicitly agrees that the printed edition is wrong by noting that presentments for Fawsley are recorded on m. 2. Crook, *Records*, p. 229.

b. Although the rubric for the cases numbered 77-85 in the printed edition is damaged beyond recognition, it is nearly certain that these cases were presented by Chipping Warden. Case 77 records a killing by unknown persons at Eydon. Such presentments are nearly always by the district including the place the killing took place. Since Eydon is in Chipping Warden, Chipping Warden is almost certainly the presenting district. The fact that other place names mentioned in cases 77-85 are nearly all from or near Chipping Warden supports this conclusion.

c. There is no rubric for Pickering wapentake in the 1208 Yorkshire eyre. Nevertheless, it is evident that cases 3475-3483 in the printed edition are the Pickering wapentake presentments. The rubric for these cases is no longer visible, because the top of the relevant membrane has been damaged. Nevertheless, two pieces of evidence conclusively establish these cases as being from Pickering wapentake. First, case 3484 is the presentment of Pickering vill. In every other surviving eyre, the presentments of Pickering vill follow immediately after the presentments of Pickering wapentake. Second, nearly all the place names mentioned in cases 3475-83 are from or near Pickering wapentake.

A district was included in the analysis (i.e. in either Table 2 or 11) if the earliest surviving eyre roll is complete (not lost or damaged) for that presenting district, and if records for that district are complete on some other eyre roll before 1252.<sup>159</sup> Thus,

<sup>159</sup> Using these criteria, districts in Bedfordshire Du, Shropshire SL, Staffordshire A and B should not have been included. However, data about these districts had already been collected before I realized that the earliest records from Bedfordshire, Shropshire, and Staffordshire did not include these

Edmonton and Isleworth in Middlesex were included, because records for them are complete for both the 1198 and the 1235 eyres, whereas Spelthorne was excluded because the relevant part of the 1198 eyre roll is damaged, and Uxbridge was excluded because no records survive for 1235.

There are a few districts in Bedfordshire, Shropshire, and Staffordshire which, on account of the spotty survival of their records, could have been excluded or considered separately in Tables 11 and 12, but which were not because no appeals were reported for them in any year for which records survive. In Bedfordshire, the only such district is Houghton Regis. In Shropshire, those districts are Alveley, Cheswardine, Clun, Corfham, Ellesmere, Great Ness, Newport, Nordley, Wenlock (borough and liberty), and Wrockwardine. In Staffordshire, these districts are Alrewas, Alton, Arley, Baswitch, Bradley, Brewood, King's Bromley, Cannock and Rugeley, Haywood, Kniver, Longdon, Longele, Maer, Penkhull, Rodbaston, Tettenhall, and Walsall. Most of these are individual manors, and it is probable that in years which they did not present separately, the hundred presented for them.

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districts. Since the data had already been collected, I included them in Table 11 and in the regression. Exclusion, which consistency might demand, would have no perceptible effect on the regression results.

**Appendix C. Sources Used in Database**

Bedfordshire 1202	JUST 1/1 mm. 5-6. "Roll of the Justices in Eyre at Bedford, 1202." Edited by G. Herbert Fowler. Publications of the Bedfordshire Historical Record Society, vol. 1. Aspley Guise: Bedfordshire Historical Record Society, 1913, 214-47.
Bedfordshire 1227-28	JUST 1/2 mm. 13-15d. <i>Roll of the Justices in Eyre at Bedford, 1227</i> . Edited by G. Herbert Fowler. Publications of the Bedfordshire Historical Record Society, vol. 1. Aspley Guise: Bedfordshire Historical Record Society, 1916, 141-74.
Bedfordshire 1247	JUST 1/4 mm. 26-34.
Bedfordshire 1287	JUST 1/13 mm. 19-30d.
Buckinghamshire 1195	KB 26/4 mm. 5-5d. <i>Three Rolls of the King's Court in the Reign of King Richard the First, A.D. 1194-1195</i> . Edited by Frederick William Maitland. Pipe Roll Society, vol. 14. London: Wyman and Sons, 1891, 137-48.
Buckinghamshire 1227	JUST 1/54 mm. 15-19d. <i>Calendar of the Roll of the Justices on Eyre, 1227</i> . Edited by J.G. Jenkins. Buckinghamshire Archaeological Society, Record Branch, vol. 6. Bedford: Buckinghamshire Archaeological Society, 1945, 46-64.
Buckinghamshire 1232	JUST 1/62 mm. 1-8d.
Buckinghamshire 1241	JUST 1/55 mm. 20-28d.
Buckinghamshire 1247	JUST 1/56 mm. 35-46d.
Buckinghamshire 1262	JUST 1/58 mm. 20-29.
Buckinghamshire 1272	JUST 1/60 mm. 22-32d.
Buckinghamshire 1286	JUST 1/66 mm. 1-13.
Essex 1198	KB 26/9 mm. 8-8d. <i>Rotuli Curia Regis</i> , vol. 1. Edited by Sir Francis Palgrave. London: G. Eyre and A. Spottiswoode, 1835, 202-11.
Essex 1227	JUST 1/229 mm. 14-18.
Essex 1235	JUST 1/230 mm. 1-10d.
Essex 1248	JUST 1/232.
Essex 1254	JUST 1/233 mm. 41-58d.
Essex 1262	JUST 1/236B.
Essex 1272	JUST 1/238 mm. 46-60d.
Essex 1285	JUST 1/247 mm. 1-40d.

- Hertfordshire 1198 KB26/9 mm. 1-1d.  
*Rotuli Curiae Regis*, vol. 1. Edited by Sir Francis Palgrave. London: G. Eyre and A. Spottiswoode, 1835, 159-65.
- Hertfordshire 1248 JUST 1/318 mm. 19-27.
- Kent 1227 JUST 1/358 mm. 16-27d.
- Kent 1241 JUST 1/359 mm. 27-37d.
- Kent 1255 JUST 1/361 mm. 35-62d.
- Middlesex 1198 KB26/9 mm9-9d.  
*Rotuli Curiae Regis*, vol. 1. Edited by Sir Francis Palgrave. London: G. Eyre and A. Spottiswoode, 1835, 214-18.
- Middlesex 1235 JUST 1/536 mm. 6-8d.
- Norfolk 1198 JUST 1/559 mm 1-1d.  
*Pleas Before the King or His Justices, 1198-1202*. Edited by Doris Mary Stenton. vol. 2. Selden Society, vol. 68. London: Bernard Quaritch, 1952, 1-15.
- Norfolk 1250 JUST 1/565 mm. 2-36d.
- Norfolk 1257 JUST 1/568.
- Northamptonshire 1202 JUST 1/613 mm. 1-3.  
*The Earliest Northamptonshire Assize Rolls: A.D. 1202 and 1203*. Edited by Doris Mary Stenton. Northamptonshire Record Society, vol. 5. London Northamptonshire Record Society, 1930, 1-18.
- Northamptonshire 1232 JUST 1/614A mm. 1-2d.
- Northamptonshire 1247 JUST 1/614B mm. 36-49.
- Northamptonshire 1253 JUST 1/615 mm. 1-14d.
- Shropshire 1203 JUST 1/732. mm. 2-3.  
*Pleas Before the King or His Justices, 1198-1212*. Edited by Doris Mary Stenton. vol. 3. Selden Society, vol. 83. London: Bernard Quaritch, 1966, 69-87.
- Shropshire 1221 JUST 1/733A mm. 9-11d.  
*Rolls of the Justices in Eyre Being the Rolls of Pleas and Assizes for Gloucestershire, Warwickshire and Staffordshire, 1221-1222*. Edited by Doris Mary Stenton. Selden Society, vol. 59. London: Bernard Quaritch, 1940, 533-68
- Shropshire 1248 JUST 1/733B mm. 2-5d.
- Shropshire 1256 JUST 1/734 mm. 21-32d.  
*The Roll of the Shropshire Eyre of 1256*. Edited by Alan Harding. Selden Society, vol. 96. London: Selden Society, 1981, 196-309.

- Staffordshire 1199 JUST 1/800 mm. 2-3.  
*Collections for a History of Staffordshire*, vol. 3. Edited by The William Salt Archaeological Society. London: Harrison and Sons, 1882, 38-46.
- Staffordshire 1203 JUST 1/799 mm. 2-3.  
*Collections for a History of Staffordshire*, vol. 3. Edited by The William Salt Archaeological Society. London: Harrison and Sons, 1882, 91-98.
- Staffordshire 1227 JUST 1/801 mm. 10-14d.
- Staffordshire 1272 JUST 1/802 mm. 41-58.  
 JUST 1/803 mm. 26-40.
- Staffordshire 1293 JUST 1/806 mm. 1-29.
- Wiltshire 1194 KB26/3 mm. 3-7d.  
*Three Rolls of the King's Court in the Reign of King Richard the First, A.D. 1194-1195*. Edited by Frederick William Maitland. Pipe Roll Society, vol. 14. London: Wyman and Sons, 1891, 77-115.
- Wiltshire 1249 JUST 1/996 mm. 23-40d.  
*Crown Pleas of the Wiltshire Eyre, 1249*. Edited by C. A. F. Meekings. Wiltshire Archaeological and Natural History Society, Records Branch, vol. 16. Devizes, England: Wiltshire Archaeological and Natural History Society, 1961, 152-258.
- Yorkshire 1208 JUST 1/1039 mm. 6-8.  
*Pleas Before the King or His Justices, 1198-1212*. Edited by Doris Mary Stenton. vol. 4. Selden Society, vol. 84. London: Bernard Quaritch, 1967, 94-117.
- Yorkshire 1218-19 JUST 1/1053.  
*Rolls of the Justices in Eyre Being Rolls of Pleas and Assizes for Yorkshire in 3 Henry III (1218-19)*. Edited by Doris Mary Stenton. Selden Society, vol. 56. London: Bernard Quaritch, 1937, 183-389.
- Yorkshire 1231 JUST 1/1043 mm. 1-24.
- Yorkshire 1257 JUST 1/1109 mm. 2-37d.
- Yorkshire 1268 JUST 1/1051 mm. 1-45d.
- Yorkshire 1279-81 JUST 1/1070 mm. 1-55d.

## Appendix D. Reliability of Eyre Records

Part II described the trends in the number of appeals by examining eyre records from twelve counties. This section justifies the reliance on eyre rolls by showing (1) that relatively few appeals were heard in other courts, (2) that the records for these other courts do not support the hypothesis that declines in the number of appeals heard in the eyre were offset by increases in the number of appeals heard elsewhere, and (3) that the clerks who wrote the eyre rolls recorded most appeals which had been initiated in county court. This analysis of sources other than eyre rolls is extremely important, because if most appeals were heard in other courts, or if decreases in the eyre were offset by increases elsewhere, or if enrollment by eyre clerks was spotty, then the trends identified in Part II would be almost meaningless.<sup>160</sup>

Other than the eyre, the principal places appeals could be tried were gaol (jail) delivery sessions, the court *coram rege* (later known as King's Bench<sup>161</sup>), and the Bench (later known as Common Pleas or Common Bench).<sup>162</sup> Gaol delivery rolls record cases

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<sup>160</sup> For a more thorough discussion of the issues discussed in this section, see Chapter 3 of my dissertation, *Private Prosecution of Crime in Thirteenth Century England* (Ph.D. thesis, University of Chicago, 1998. UMI # 9829461).

<sup>161</sup> The terms King's Bench and Common Bench were first used during the reign of Edward I, towards the end of the period studied here. Frederick Pollock and Frederic William Maitland, *History of English Law* (2nd ed. 1968), 1:199.

<sup>162</sup> Although these were the principal places other than the eyre where appeals could be tried, appeals were sometimes heard elsewhere. Theft appeals could be heard in non-royal courts which had the franchise of *infangthief*. In addition, in the late thirteenth century, commissions were sometimes issued to a particular group of justices to hear and determine a particular appeal. Perusal of the Calendars of Patent Rolls revealed no such commissions in 1245 or 1246, 3 in 1275, 16 in 1280 and 33 in 1285. Thus, although the number of such commissions was increasing, even in 1285 such commissions averaged less than one per county per year. In addition, the increase in the number of such commissions came too late to explain the decline of the appeal, which started in the 1250s. For appeals not heard in eyre, see also

heard by judges acting on commissions which empowered them to try only those persons being held in particular jails. Such judges may also have tried those released on bail. In contrast, eyre judges had commissions which empowered them to hear all sorts of matters, including trials of those not sufficiently dangerous to have been imprisoned or bailed and reports of felonies committed by those who had fled and could not be caught. By the fourteenth century, gaol delivery had become the most important forum for the trial of criminal cases. The relative importance of eyre and gaol delivery in the thirteenth century has not been systematically studied, but it is probable that by mid-century, if not earlier, more felons were tried in gaol delivery than on eyre. Unfortunately, only a handful of gaol delivery plea rolls survive from before 1270. The surviving evidence, however, is remarkably consistent. Gaol delivery rolls from the first part of the century record appeals at a rates of up to three per county per year,<sup>163</sup> while those from the latter part of the

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JUST 1/1179 m. 4 (appeal heard at 1252 assize at Greenwich, Kent); JUST 1/13 mm. 19, 21d (1287 Bedfordshire eyre roll mentions two cases heard before justices with oyer and terminer commissions).

<sup>163</sup> *The Earliest Northamptonshire Assize Rolls: A.D. 1202 and 1203*, ed. Doris M. Stenton (Northamptonshire Record Society, vol. 5, 1930), 99-131, 153-63 (Northamptonshire, two sessions in autumn and summer 1203, three appeals total, which is three per year); *ibid.*, 131-53 (Suffolk 1203, two sessions at St. Edmunds and Ipswich, two appeals total, which is two per year); *The Earliest Lincolnshire Assize Rolls, A.D. 1202-1209*, ed. Doris M. Stenton (Lincoln Record Society, vol. 22, 1926), 266-71 (Lincolnshire 1206, five appeals, which is two and a half per year). To calculate these rates, the number of appeals recorded in the gaol delivery rolls was divided by the time between the gaol delivery and the previous time the pipe rolls record that royal justices had heard criminal cases in the county. Other gaol delivery records from the early thirteenth century indicate similar or smaller numbers of appeals. *Pleas before the King or his Justices, 1198-1202*, vol. 2, ed. Doris M. Stenton (Selden Society, vol. 68, 1949), 178-80 (Cornwall 1201, two appeals); *Curia Regis Rolls*, 9:198-201 (Herefordshire 1220, two appeals); *Curia Regis Rolls*, 11:118 (Oxfordshire 1223, no appeals); *ibid.*, 381 (Herefordshire 1224, two appeals); *ibid.*, 382-83 (Worcestershire 1224, no appeals); JUST 1/36 mm. 2d-7 (Berkshire 1225, one appeal); *Somerset Pleas (Civil and Criminal) from the Rolls of the Itinerant Justices (Close of 12th Century-41 Henry III)*, vol. 1, ed. C. E. H. Chadwyck Healey (Somerset Record Society, vol. 11, 1897), 28-85 (Somerset 1225, four appeals); JUST 1/863 mm. 3d-5 (Surrey 1225, three appeals); JUST 1/1172 m. 5 (Shropshire 1226, one appeal); JUST 1/801 m. 10 (Staffordshire 1227, no appeals). It is important to specially note the small number of appeals heard in the 1225 sessions. In that year, most English counties were visited by royal judges who heard assizes and delivered jails. If they heard all of the appeals pending in the county, however, that could significantly undermine the figures presented in Part II for the 1227-29

century record only one or two per county per year.<sup>164</sup> The number of appeals heard at gaol delivery was thus relatively low in comparison to the number heard in the eyre. Since gaol delivery was restricted to persons jailed or bailed, while most appellees were simply attached to appear, the relatively small number of appeals heard in gaol delivery is not surprising. In addition, the fact that there were generally more appeals heard at gaol delivery in the early thirteenth century than later suggests that the dramatic declines in the number of appeals discussed above do not merely reflect a shift of cases from eyre to gaol delivery. Rather, both eyre and gaol delivery records show a decline over the thirteenth century.

The principal courts of the common law were the Bench and court *coram rege*. The former was generally held at Westminster, while the latter traveled with the king, wherever he was. In fourteenth century, their jurisdictions would be sharply distinguished, but this was not yet the case in the thirteenth.<sup>165</sup> Each heard about one appeal per county

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eyre, because they assumed that the 1227-29 eyre heard appeals initiated since the 1218-21 eyre. The small number of appeals heard in the 1225 sessions argues strongly that the 1225 sessions did not hear all appeals that had arisen since 1225, and thus that the figures presented in Part II are substantially accurate. This conclusion is reinforced by the fact that, even though royal justices did not visit Staffordshire in their 1225 sessions, see *Curia Regis Rolls*, 12:xi (Introduction by C.A.F. Meekings), the 1227 Staffordshire eyre reveals a substantially reduced rate of appeal. It is somewhat more difficult to identify appeals in gaol delivery records than in eyre records. See *supra* 30 n. 73. In this analysis, I have counted as appeals all cases which use the phrase “captured at the suit” (*captus ad sectam*) of an individual who is not an approver. This method of identifying appeals probably overestimates the number of appeals heard in gaol delivery, because this phrase could simply indicate physical pursuit by the victim rather than prosecution by appeal. By using this liberal method for counting appeals in gaol delivery, I have considered the strongest case against the reliability of figures derived from eyre rolls.

<sup>164</sup> Ralph B. Pugh, *Wiltshire Gaol Delivery and Trailbaston Trials, 1275-1306* (Wiltshire Record Society, vol. 33, 1978), 4, 7 (Wiltshire 1275-80, eleven appeals, which is two per year); JUST 3/18/1 mm. 6-9, 10-15 and JUST 3/18/2 (Essex 1280-85, six appeals, which is one per year.); JUST 1/1177A m. 4d and JUST 1/1179 mm. 14, 19, 25d (Suffolk 1250, 1254, 1258, 1259, two appeals, which is one per year); JUST 1/1179 mm. 25, 25d (Norfolk 1259, no appeals).

<sup>165</sup> Pollock and Maitland, *History of English Law*, 1:199; J. H. Baker, *An Introduction to English Legal History* (3rd ed. 1990), 45.

per year.<sup>166</sup> As with gaol delivery, this number is much lower than the number of appeals heard in the eyre. In addition, like gaol delivery, the number heard in the Bench and *coram rege* was not rising through the century (and may even have been falling), so the reduction in the number of appeals heard in eyre cannot be attributed to a shift in cases to these courts.

Coroners' rolls present another way of checking the accuracy of figures drawn from analysis of eyre records. Nearly all appeals were initiated in county court.<sup>167</sup> Since the coroner kept records of criminal matters raised in the county court, by comparing eyre and coroner records, one can calculate the completeness of the eyre records. Unfortunately, relatively few coroners' rolls survive from the relevant period, and all but one date from the late thirteenth century.<sup>168</sup> These rolls show that just over sixty percent of all

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<sup>166</sup> Since there was no reason to think that these courts heard significant numbers of appeals, I examined only a small fraction of the surviving records: the printed plea rolls for both courts for 1201, 1225, and 1242; Bedfordshire and Staffordshire cases from the unprinted plea rolls for both courts from Michaelmas term 1260; and the printed *coram rege* roll from Trinity term 1297. Maitland's analysis of Bench records from Easter term 1271 was also consulted. These records were chosen because they were approximately twenty years apart, and the surviving records were reasonably ample. The nine Bench terms examined recorded a total of seventy-three appeals from all counties, which works out to just under one appeal per county per year. Similarly, the five *coram rege* terms analyzed show forty-seven appeals, which works out to almost exactly one appeal per county per year. These low numbers hold true for individual counties analyzed in Part II as well. For example, the rates for Bedfordshire were less than one per year in the Bench and two per year *coram rege*, and the rates from Staffordshire were only one appeal per year for both courts combined. *Curia Regis Rolls*, vols. 1, 2, 12, 16, 17 (1201, 1225, 1242); KB 26/168 (Michaelmas 1260 *coram rege*); KB 26/169 (Michaelmas 1260 Bench); Pollock and Maitland, *The History of English Law* (2nd ed. 1968), 2:565, 567 (Easter 1271 Bench); *Placita Coram Domino Rege.... The Pleas of the Court of King's Bench, Trinity Term, 25 Edward I, 1297*, ed. W.P.W. Phillimore (1898).

<sup>167</sup> The ordinary procedure is described in Section I.C. Some appeals, however, were initiated by writ and would not appear on coroners' rolls. Appeals initiated by writ would most likely have been heard in the Bench or *coram rege*, although some were heard in the eyre. Some appeals may also have been initiated by plaint or bill.

<sup>168</sup> Crook, *Records of the General Eyre* (1982), 36-37.

appeals initiated in county court were recorded in eyre rolls.<sup>169</sup> This underreporting can be attributed to several causes. Some appeals initiated in county court were heard at gaol delivery, in the Bench, or *coram rege*. While the disposition of such cases was sometimes recorded in eyre rolls,<sup>170</sup> many were not. In addition, some cases recorded as appeals in the coroners' rolls were mentioned in the eyre rolls, but as simple presentments, without any mention of an appeal.<sup>171</sup> While these two reasons may account for all of the appeals missing from the eyre rolls, this cannot be proven because of incomplete record survival, especially the disappearance of all gaol delivery rolls for the counties and years corresponding to the surviving coroners' rolls. It is therefore possible that some appeals were, for reasons not now apparent, simply not recorded on eyre rolls. This would be somewhat surprising, because the coroners handed in their rolls at the beginning of each eyre and eyre justices consulted the coroners' rolls to ensure that presenting jurors did not conceal criminal cases. Since eyre rolls appear to be rather meticulous about financial matters, and

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<sup>169</sup> R.F. Hunnisett, "An Early Coroner's Roll," *Bulletin of the Institute of Historical Research* 30 (1957): 225-31 (1229 Devon coroners' roll, containing one appeal, which also appears in the 1238 eyre roll;); JUST 2/261 (1268-71 Oxfordshire coroners' roll, containing one appeal, which also appears in the 1285 Oxfordshire eyre roll, JUST 1/710); R.F. Hunnisett, *Bedfordshire Coroners' Rolls* (Publications of the Bedfordshire Historical Record Society, vol. 16, 1960) (1268-71 Bedfordshire coroners' rolls, containing eighteen appeals, of which nine appear in the 1276 eyre roll and one appears in the 1272 eyre roll, JUST 1/7 m. 39); JUST 2/263, 2/264, 2/266, 2/277 (1269-85 Norfolk coroners' rolls, containing two appeals, of which both appear in the 1286 Norfolk eyre roll, JUST 1/579); JUST 2/262, 2/278 (1272-74 Hampshire coroners' rolls containing five appeals, of which three appear in the 1280-81 Hampshire eyre roll, JUST 1/789); JUST 2/260 (1285-86 Hertfordshire coroners' roll, containing four appeals, of which two appear in the 1287 Hertfordshire eyre roll, JUST 1/328).

<sup>170</sup> See, e.g., *Pleas Before the King or His Justices, 1198-1212* (Selden Society, vol. 84, 1967), pl. 3509 (Yorkshire 1208 eyre roll mentions appeal of robbery removed to Westminster); *Crown Pleas of the Wiltshire Eyre, 1249*. pl. 312 (mentioning appeal of homicide which resulted in hanging at gaol delivery).

<sup>171</sup> R.F. Hunnisett, *Bedfordshire Coroners' Rolls* (Publications of the Bedfordshire Historical Record Society, vol. 16, 1960), pls. 69, 129.

since nearly every appeal would result in some sort of revenue,<sup>172</sup> one would think that almost all appeals would be recorded.<sup>173</sup> Nevertheless, because the possibility of significant underreporting of appeals in eyre rolls cannot be definitively refuted, it is important to consider whether the incomplete recording of appeals could render invalid the trends identified in Part II. There are several situations to consider.

First, suppose that eyre rolls from the early and mid-thirteenth century were about as complete as rolls from the later part of the century. That is, suppose each eyre roll compiled between 1194 and 1294 recorded roughly two-thirds of all appeals initiated in county court. That would suggest that all of the rates in Part II should be increased by about fifty-percent. Nevertheless, since all eyres would be equally affected, the trends identified in Part II would remain exactly the same.

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<sup>172</sup> Appeals which resulted in conviction or outlawry would produce forfeited chattels, if the appellee had any. Appeals which resulted in acquittal would produce amercement (fining) of appellors, as would non-prosecuted or nullified appeals. If the appellee did not show up, his sureties would be amerced. The only circumstances which would result in no revenue would be conviction of a chattel-less appellee, appeal of a cleric who claimed privilege, an appeal in which the appellee died before trial, or cases in which amercements were forgiven. Such cases surely occurred, but it is hard to believe that they account for all the unrecorded appeals. In addition, such appeals were often recorded. See *The Roll of the Shropshire Eyre of 1256* (Selden Society, vol. 96, 1981), pl. 792 (defendant acquitted, appellor's fine pardoned on account of poverty); *Pleas Before the King or His Justices, 1198-1212*, vol. 4, ed. Doris Mary Stenton (Selden Society, vol. 84, 1967), pl. 3500 (1208 Yorkshire, appellee dead); *Three Rolls of the King's Court in the Reign of King Richard the First, A.D. 1194-1195*, ed. Frederic William Maitland (Pipe Roll Society, vol. 14, 1891), 147 (Buckinghamshire 1195, appellee dead). In addition, the way the plea rolls were put together would have made it difficult to exclude non-revenue producing cases. It appears that the clerks wrote the first few lines of each enrollment by examining the coroners' rolls and jurors' written verdicts, and then filled in the rest later when the jurors presented the cases orally and responded to the judges questions. Thus, at the time the enrollments were started, the clerk would not have known whether the case would produce revenue. Since many cases were enrolled on a single piece of parchments, those not producing revenue could not have been excluded after the cases were heard.

<sup>173</sup> This argument for the completeness of the eyre rolls does not apply to the 1194-95 and 1198-99 eyres. As discussed in *supra* p. 37 n. 77, the system of checking jurors' answers against coroners' rolls does not yet seem to have been used during these eyres.

Next, suppose that reporting was getting better over time. In general, that would reinforce the trends identified in Part II. The sharp declines around 1220 and after 1250 would be even bigger, because the number of reported appeals would have been declining even though a greater fraction of all appeals was being reported. On the other hand, the rebound from the 1220's to the 1240's would not have been as large, and the rate of appeal might not have attained the same level in the 1240's as at the turn of the century. Nevertheless, it is nearly inconceivable that changes in the quality of reporting could completely eliminate the rebound. For example, if the 1247 Bedfordshire eyre roll recorded fifty percent of all appeals, then the 1227 eyre would have had to record less than sixteen percent of all appeals in order to erase the apparent increase from 1227 to 1247.

Next, consider the possibility that reporting was getting worse over the thirteenth century. This would suggest that the declines in the 1220's and late thirteenth century were not as large as supposed in Part II, but that the rebound in the 1230's and 1240's was bigger. It is important to note, however, that worsening of reporting could not eliminate entirely the declines in the 1220's and late thirteenth century. Even if reporting was perfect in the 1240's, and was about sixty percent complete in the late thirteenth century, that would only reduce the magnitude of the late thirteenth-century decline from about seventy-three percent to fifty-four. Even a fifty-four percent reduction is a large one. Similarly, no plausible worsening of reporting could erase the decline from the turn of the century to c. 1220.

Finally, consider the possibility that the quality of reporting remained the same during some periods, was getting worse during some periods, and was getting better in others. This would combine the effects of the previous three paragraphs. Nonetheless, as discussed above, no plausible change in reporting in any period could substantially undermine the trends outlined in Part II. The magnitude of the changes outlined in Part II is simply too large to be explicable by all but truly massive changes in reporting practice.

In sum, calculating the rate of appeal by counting appeals in eyre rolls, as was done in Part II, substantially underestimates the true rate at which appeals were brought. Some appeals were heard in gaol delivery. Others were heard in the Bench or *coram rege*. Some appeals initiated in county court and recorded in the coroners' rolls may simply not have been mentioned in eyre rolls for reasons that now elude us. Nevertheless, the undercounting attributable to each of these sources is, to the extent measurable by surviving records, too small to invalidate the trends identified in Part II.