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Towards an Ideology of the Early English Law of Obligations

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Morris S. Arnold

So portentous a title as I have contrived for tonight's lecture ought to come furnished with an appropriately bombastic beginning. In fact, it does not. Instead of concentrating on a beginning, I thought that we might more profitably focus our attention on the beginning, that is, on a time long before the sophisticated legal/administrative system of England's high middle ages had evolved. It will be interesting to get what peeks we can at the jurisprudential assumptions of, say, preconquest Englishmen. As Tom Green has recently demonstrated in his book on the criminal jury, these assumptions could exhibit a durability that had functional consequences for many centuries. If through the jury they could prevail against contrary official versions of what the substantive law was, as Green has shown, how much more potent could they be when the government was not inclined to oppose their effectuation?

The sources for the very early law of England have about them many of the characteristics of 'op art'—perspectives change wildly, dimensions expand and contract, foundations shift or disappear. Take, for instance, what may be the most interesting, and certainly the oldest, of these ancient sources—namely, the Laws of Aethelbert. From one point of view, they appear to be, like modern workers' compensation statutes, a tariff or a menu: body parts, personal property, and insults are arranged opposite their prices to tort-feasors. On this view of their nature, it is easy to envision an irritated Kentishman perusing them like a catalogue, as it were, à la Gary Becker, in search of an injury that he could afford to inflict on his enemy.

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2. The best available English translation is to be found in F. Attenborough, ed., The Laws of the Earliest English Kings (Cambridge, 1963) 4.
Such a one Mr. Justice Holmes might have scolded for looking at the law as a bad man would.

Brian Simpson, however, has recently provided a less fantastic and more likely perspective from which to view Aethelbert's laws. For him, they are intended not at all for the person who inflicts the injury, but rather for the injured party; and they tell him how much he can expect to receive if he forgoes his right to revenge. If it is a tariff at all, then, it is one presented to the perpetrator by the victim, and at the victim's option, outlining what it will take to buy off the victim's right to retaliate. What lay behind the laws, the argument runs, was a Christian attempt to sell the idea that it was not shameful or cowardly for a victim to accept money for forbearance.4

There are yet other points of view from which to regard these laws. But they have, in any case and in common with almost all of the Anglo-Saxon codes, an interesting feature that seems to transcend the original reason for their promulgation: They proceed on the assumption that there are pre-existing rights to be free from bodily assault, theft, and insults. There is not much attempt to define what we should call the gravamen of an offense, and certainly there is no effort to create the rights offended against. Either these were more or less well known, generally or by what we may call experts; or they were vague to the point of non-existence so that, in effect, every man or family was his or its own law in a truly Lockean state of nature. As between these two distinct visions of sixth century English society I do not know enough to choose; I suspect, moreover, that no one else does either.

It is well to remember that substantive customary law can be extremely precise and in this respect can be indistinguishable from that produced by imperial or other positivistic power. A glance at any of the continental coutumiers, or for that matter the records of the English boroughs, is sufficient to demonstrate the truth of this assertion. As a concrete example, let me cite you to a common-law case of 1387, which, as it happens, arose in Kent, and in which the plaintiff complained of the killing of his pregnant sow. The defendant justified by alleging a custom of Canterbury having to do with the disposition of pigs found straying in the streets of the city. The first time that happens, he said, the court of Canterbury held before the bailiffs of the city would levy against the animal's owner an amercement of four pence for each pig or sow so offending. A second offense earned a similar amercement. A third time resulted in the donation of the pigs to the residents of the local poor house.5 This custom, with graduated penalties for recidivist behavior and a kind of ultimate mulct for the habitual offender, has about it a precise legislative quality; yet it was presumably created by the avulsion and accretion of daily urban experience. We are lucky enough to see this custom because it was pleaded. We are entitled to wonder, first, how


old it is, and second, and more important, if there could not have been others that we never see directly.

Sometimes our best hope of seeing these customs lies in examining the complaints that plaintiffs made in what was called their counts, though extreme caution must be used here. These counts were the stories, the tales, the narratives, that plaintiffs related to commence their lawsuits. I want to relate an early example of such a tale, the earliest of which I am aware, though I lay claim to no expertise at all in these early periods. This tale comes from the tenth or eleventh century and was used in an action by a buyer against a seller for defective goods on an express warranty. The Anglo-Saxon word that the plaintiff chooses to capture the idea of warranty is translated in the twelfth-century Latin treatise *Quadripartitus* as ‘promisisti’—‘you promised’\(^6\), and it looks as though we have here a prototype of the warranty action that would not surface in common-law courts for four hundred years. This ancient claim is suggestive in a number of ways. First, it may be that some at least of the counts that are familiar to those who study the medieval central courts, the ones that created our common law, have very ancient roots indeed, roots in the folkmoots of pre-conquest Englishmen. Perhaps more interesting, if this is true, it necessarily follows that some common law writs, to which the counts were required mercilessly to conform, were themselves shaped on oral models provided by local courts. But the point of the most general and transcendant importance is that this claim provides further evidence of the durability of custom—or at least of the words required to initiate litigation.

The words of the claim may reveal the durability of custom but what do they tell us about the substantive law of sales? At the very least, they suggest that a buyer’s action would lie on an express warranty. This unremarkable proposition, unfortunately, may also be the most these words can tell us. What the modern mind wants to know, I think, is whether the express promise was necessary for recovery, whether, in other words, an action would lie on an implied warranty. It is tempting to say that since no writ or count has survived based on any other than an express warranty, there was no action without one. This might well be true, and we would not be entitled to be surprised if it were. But a little thought, and a friendly nudge from Professor Milsom’s work, will require us to be extremely nervous about the reliability of such a conclusion based on this evidence. Suppose a plaintiff wishing to rely on what we would call an implied warranty, that is someone who believed that he was entitled to non-defective goods simply because that is what consumers expected from sellers, and despite the seller’s expectations. Perhaps such a person would simply be relying on the buyer-seller relationship as a status that generated this obligation. It really does not matter what the plaintiff’s theory was, or, indeed, whether he even had a theory. He was angry, felt cheated, and

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brought the action. He used the customary words that most closely fitted his situation, for apparently one was not allowed simply to say anything one wanted, so he used the express warranty story. This got him going, but someone might trip him up at a later stage by showing that there was, in fact, no express warranty. Whether that was the case depends on whether there was any opportunity for such a showing. Suppose that all a defendant could do was plead what we call a general denial and put the matter to proof? If that proof was the oath of the plaintiff's oath-helpers or one or another of the ordeals, then the legal question of the sufficiency of the plaintiff's facts never gets raised—and thus it never gets answered.

If this were the shape of the legal world of, say, the tenth century, it follows that we must ask it questions that are slightly more oblique than the modern one we just asked. Suppose, for instance, we ask instead whether a plaintiff without an express warranty could sometimes win his lawsuit? The answer to this question is obviously 'yes'; all he has to do is get the proof to come out right by passing the ordeal or getting oath helpers to swear. The dispute is then over, the plaintiff has won, but what is the law? One answer may be that there isn't any: A lawsuit is simply a matter of risk management, and the relative merits of *caveat emptor* and *caveat venditor* cannot be argued to a legal professional nor urged on a sentient trial mechanism. The legal system is the ultimate, impervious black box, generating random and unreviewable results. It cannot answer our questions, for those questions are future-bound and hopelessly out of date.

Another answer, however, is that there can be commonly held social assumptions about the way a moral world is ordered, founded on logic and experience, that people accept in their daily dealings with each other, and this entirely apart from whether there are places to resort to for their systematic and dependable vindication. This natural law, as we may call it, counts, it seems to me and despite Austin, as much for law as the product of the most sovereign decree ever could. Others will not see it that way, but if for our black box we are able to substitute not only a sentient but as well an intelligent trial device capable of appreciating, responding to, transmitting, and applying these social norms, then it seems to me that we have law in the fullest and most modern sense: Rules to which resort is consistently had for the settlement of disputes. Certainly the jury was a trial device that possessed all the attributes necessary for the fulfillment of these conditions: Drawn from the knowledgeable classes of the community and having a stake in the outcome if for no other reason than the possibility of liability for a wrong answer, and apparently untrammeled by the duty to heed official legal pronouncements from the bench, it was ideally suited to a legal system based on custom. Indeed, it was ideally adaptable to that kind of end. We need to wonder whether it was in fact so adapted and whether the assumptions on which the jury relied, if any, are recoverable from this distance. Let us now turn our attention to a consideration of the law of obligations in the high middle ages with these questions in mind.
For us the first category to come to mind will have to be covenant, a high-sounding word for promise. It will assume a prominence, indeed a primacy, in our minds because the idea of promise has been allowed to swallow almost our entire law of contract. It is not altogether clear why we should have become so anxiety-ridden as to refer every result attributable to the law of obligations outside tort to the idea of promise, but we have. Our first inclination, absent an express promise, is to imply a promise in fact if at all plausible; if not, imply one in law. The masquerade must be maintained at all cost, even in situations that cannot even colorably be classified as consensual. As for that embarrassing little corner of the law known as real covenants, the convention is to relegate them to the property course as though they had no relation to the law of obligations at all, where they cause all manner of confusion because judges and professors have forgotten that they do not create in rem rights but only in personam obligations.

In the common-law courts of the middle ages, however, the idea of promise played a much more modest role. The requirement that a covenant had to be in a sealed writing in order to be actionable created for the central courts a law of contracts with a peculiarly tortious cast. I shall not pause here to recount the familiar story, first told by Professor Milsom, of how broken promises were distorted into torts to give rise to assumpsit, the warranty actions, deceit, and other actions on the case. What I wish instead to emphasize is the fact that the social assumption upon which these grotesques were constructed seems to have been one of utter simplicity. That assumption was that promises ought to be kept. How do we know that?

First, whenever one encounters a definition of covenant in the sources, which unhappily is not very frequently, it runs in the broadest possible terms. So, for instance, in 1320, Justice Herle remarked that a covenant was 'nothing more nor less than an agreement between the parties'. This wide, unqualified language went unchallenged, and we probably do not hear it very often because it was so well accepted that it went unsaid.

Second, every imaginable kind of promise was said to be actionable in Year Book discussions or was actually sued on as the plea rolls reveal. Allow me to give you a tedious list just to make a point. Agreements about the sale of land were of course common, and so one might make, or be asked to keep, a covenant to levy a fine, to enfeoff, to put someone in seisin, or to make a mortgage. Likewise, a buyer of land will want some title assurance, so a promise to acquit, the forerunner of the modern covenant

7. A useful summation of this story, with citations to previous work, can be found in S. F. C. Milsom, 'An Old Play in Modern Dress', 84 Yale Law Journal 1585 (1975).
against encumbrances, might be exacted, or a promise to be free of suit might be sought. A grantee of a wardship might well demand a warranty, actionable by writ of covenant. Business deals and compromises may be conceived of as covenants: Two ecclesiastical institutions may have a dispute over which of them is entitled to the tithes of a certain territory and will make a composition, actionable by writ of covenant, setting out a compromise; or two towns may wish to grant each other immunity from tolls, pontage, murage, and passage—to form a kind of common market in miniature. These were nothing but covenants. Personal relationships might also be guided by covenants: One may promise another to feed and clothe him, to find her a suitable husband, or, in a prenuptial arrangement, not to alienate certain lands. One may also undertake to receive another's nominees into religious houses, or to be his apprentice or servant. A covenant might be made to stand to arbitration, to be a surety, to build a sea wall, or to pay a debt. An easement in gross was said to be enforceable by way of covenant. And here we enter that twilight zone, already alluded to, between rights in rem and in personam: Some thought that the burden or benefit of a covenant might become attached to land in some mysterious fashion. But there was no general theory about how and when that could happen; and even Coke's prodigious analytical abilities were not up to producing a believable synthesis. The precedents are paltry and such discussions as are reported are amateurish and tentative.

A third reason for believing that the idea embodied in the word covenant had no limitation is that no one ever raised the point that the promise was made without consideration. This may have been because the rules of pleading forbade it, not because there was no such doctrine. On balance, this seems extremely unlikely, mainly because the general issue seems a logically untidy place to conceal such an idea. The general issue was 'no covenant broken', and the absence of consideration seems more like a justification than a denial of the act of breaking a covenant.

The striking thing that emerges from these considerations is that we seem to be dealing with a juridical world in which the idea that promises must be kept is a bedrock assumption. The writ speaks in terms of literal performance: ‘Command the defendant that he keep the covenant.’ If it cannot be kept, then the only alternative that occurs to anyone is that the cost of performance be demanded. Such an action is obviously useless in the event that nonperformance has caused consequential damages and no doubt this contributed to the disuse of actions on promises. But the point that must remain is that we seem to have been able to divine from all of this an elementary legal proposition that promises were generally inviolable. I do not mean that some promises did not obligate. There was, for instance, at least a nascent notion of duress that the cases show could provide a defense. 10 This was not, in other words, a Hobbesian world in which one

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10. For the possibility that there was a trespassory action for effecting the cancellation of documents executed under duress, see Morris S. Arnold, ed., Select Cases of Trespass in the King's Courts, 1307–1399, supra note 5 at i: xxxiv.
could proclaim with a straight face that covenants made on account of fear were no different from those made on account of avarice.

Nor am I suggesting that the high medieval regard for promises translated into a general economic liberalism. The fourteenth century produced a lot of law capable of setting Adam Smith’s teeth on edge, including even rent control legislation for the benefit of foreign merchants,\(^{11}\) not to mention the Statute of Laborers,\(^{12}\) which fixed wages and made what we would call ‘quitting your job’ a criminal offense. The law of landlord and tenant and of master and servant had at bottom nothing at all to do with promise: These were hierarchical relationships and they gave rise to obligations based on status, not on what we would call contract. Fourteenth-century Englishmen, in short, were not eighteenth-century laissez-faire contractarians.

My point about promises is simply this: In those situations in which they furnished the primary basis for liability, literal performance was what people expected and what the law demanded. This expectation was so much a part of the promissory idea that covenants were sometimes referred to as ‘private laws’,\(^{13}\) an extremely suggestive phrase that often is used as a shorthand for the idea that the province of promises was to make exceptions to the usual order of things, that being to do what was regarded as ‘common right’. And frequently, of course, what was common right, the usual course, the natural law, was in fact simply status.

Let me give you an example of what I am talking about, for I think that this is an extremely interesting point. In 1366, an action of covenant was brought on a tenant’s promise to leave the leased premises in as good a condition as he found them. The tenant claimed that the dilapidation complained of was caused by acts of God, and pinned his hopes for non-liability on the proposition that he was ‘not bound to do anything but what common right placed on’ him. He was liable, he said, only for something that ‘happened through his fault’, by which he meant, incidentally, something he did. The Year Book report, typically, is inconclusive; but the justices who spoke were clearly inclined to the view that the general covenant to repair would bind the defendant to do even what common right would not, and that the tenants here should have made an express exception in their covenant for sudden happenings.\(^{14}\) But regardless of who prevailed, the interesting point is the characterization of the role of promise on which the discussion proceeded: Its office was to chip away at commonly shared assumptions about how the world was ordinarily ordered. It was a private law and you owed it specific obedience.

11. 27 Edw. III, stat. 2, c. 15 (1353).
14. Y. B. 40 Edw. 3, f. 5, pl. 11 (1366).
The same case contains as well a colloquy the upshot of which is that an action would not lie on a similar covenant for trees blown down. The reason? Because, as Justice Finchdean put it, the defendant 'cannot make the trees grow back the way they were before!' This is a focus on performance with a vengeance. There is also discussion here to the effect that promises impossible to perform did not obligate, but compared to this last the rectitude of that proposition seems obvious. The reason, of course, was tautological: You can not perform what can not be performed and covenant contemplated a specific performance remedy.

It is well now to consider the idea of debt, where, interestingly, further evidence of the primacy of the performance ethic is observable. The penal bond, a ubiquitous medieval device for securing the performance of any and all undertakings, seems to have accounted for upwards of fifty percent of all debt actions in the central courts in the late fourteenth century. A bond could be extremely simple: If I lent you money, for instance, say ten pounds, then I would require from you a written instrument to the effect that you were debtor to me in the amount of twenty pounds unless you paid me the original ten pounds on a day certain. Or if I wanted you to build a house, I could require you to execute a bond in some large amount defeasible in the event of performance by a certain day. Had anyone raised the modern objection to this arrangement, namely that it was penal and involved a forfeiture, the objection would have fallen not merely on deaf but on incredulous ears as well. The very point of the bond was that it was penal, for that was the best mode of insuring performance. And performance was what was valued.

A very interesting characteristic of this device, and one I think not previously remarked on, or at least not sufficiently so, is that it seems to have created a status by the mutual acts of will of the parties. A bond was simply an I.O.U. and it gave rise to the same obligation to pay that a master had to a servant or a tenant had to a landlord. These people were reachable in debt and were thus called debtors. A debtor simply owed; and not, as we would immediately say, because he impliedly promised to pay, but because of a duty that inhered in the relationship. Indeed, the law French word 'duty' is often used as a substitute for the English word 'debt' thus exposing to view the essentially relational character of the obligation. Though one hears of 'death duties' in England, and of 'import duties' in both England and America, it is suggestive that the word duty is most comfortable today in the law of torts, not contracts. Promise has taken over in the latter category. The word 'duty' embodied an idea for which we really don't have a good single-word equivalent: The sense is something like 'the state of being owed', or, rather awkwardly, 'owedness'.


Promises were obviously not factually irrelevant to bonds; indeed, they often lay behind them. But the theory of the obligation was not in the least promissory: The bond itself created the obligation. In our period, the other common so-called *causes de dutie*—the law French phrase occasionally encountered (apparently a translation of the Latin *causae debendi*)—were all also obligations that arose evidently from status: Debt on a so-called ‘contract’ of sale, debt for services rendered, and debt for rent. In the fifteenth century we begin to hear about *quid pro quo* as a basis for debt on a ‘contract’, but I have not seen this idea broached in the fourteenth century.\(^\text{17}\) Either these obligations were based on relational status in the minds of those who thought of such matters, or they arose simply because it was obvious to everybody that the situation raised a duty to pay. Perhaps this latter could be called situational liability.

Though debt and promise were entirely distinct juridical entities, the preeminence of penal bonds meant that the value placed by the legal system on actual performance was, to a modern mind, quite extraordinary. The device of the penalty was adaptable enough, moreover, that it could find a home in other places than the ordinary penal bond. For instance, a late fourteenth-century lease contained a provision that if the rent was more than a certain number of days late, a debt in the amount of twice the original rent would be due.\(^\text{18}\)

Specific performance of contracts by courts in the fourteenth century seems to have been a very inefficient affair, no doubt for the same reasons for which modern equity courts can sometimes be persuaded to eschew this remedy. Many of these inefficiencies would have been exacerbated by communication and travel difficulties in the middle ages. We know that the common law abandoned specific relief in tort cases in the early fourteenth century, and this is evidence that the king’s courts were becoming generally skeptical about this kind of remedy. Can it be that the difficulty of the remedy that seemingly inhered in the idea of covenant contributed to the common-law decision to require a writing before promises were actionable? However that may be, it seems to be the fact that the desire for performance survived the court’s willingness to decree it, and that greater private incentives to perform were resorted to in order to vindicate the performance value. These were provided, as we saw, by penal bonds and penal provisions in contracts.

Since these remarks are being delivered at the University of Chicago, I cannot let the occasion pass without some notice being taken of a criticism often levied at specific performance, namely that is inefficient, and not simply because of transactions costs. What I mean is that sometimes the cost of performance to the promisor exceeds the benefit conferred on the promisee; in other words, rigid insistence on living up to one’s word leaves


18. Y. B. 45 Edw. 3, f. 11, pl. 17 (1372) (per Kirton).
no room for the operation of an efficient breach doctrine. No doubt this is generally true, but before we conclude that bonds were therefore inefficient in the middle ages we need to know a lot more than we do about the transactions costs of bringing law suits in those times, about who paid these costs, the kinds of transactions the bonds were employed in, the places they were used, attorneys’ fees, expenses, and probably some other things that I cannot think of at the moment. I doubt that we shall ever know much about some of the items on this list. Until and unless we do, however, I am quite content to believe that the emphasis on performance simply reflected a deep-seated social assumption that promises ought to be kept and not some concession to the need to maximize. It was all well and good for Mr. Justice Holmes to say that a person had alternative rights to perform or pay damages, but I simply do not believe that a ringing declaration of that principle would have caused many people, if any, to resonate in the fourteenth century.

II

I shall now turn from contract to tort, or as Professor Milsom has taught us to say, from covenant to trespass. It happens that we are able to say a good deal more about the law of torts, mainly because a lot more serious research has been done here. And it turns out that what we can say is a great deal richer in detail and more solidly grounded than anyone could have guessed thirty years ago.

Trespass writs came essentially in two varieties: One alleging *vi et armis* and *contra pacem regis*—that is ‘with force and arms’ and ‘against the king’s peace’—and one without such allegations. Both counted equally as writs of trespass.19 Some of these writs told a story that revealed some of the underlying facts of the case, and they were therefore called writs ‘on the case’. Usually, these stories appeared in writs without the *vi et armis* and *contra pacem* allegations, but not always. So a writ could still have those allegations and nevertheless be on the case.

It does not follow, however, that these writs did not have some different functional effects. The *vi et armis* and *contra pacem* writs, I believe, had a criminal hue that caused the judges of the common-law courts, on occasion at least, to inquire into the facts to determine whether imprisonment and fine ought to be imposed on defendants who had been found guilty. A finding that a defendant had acted against the king’s peace carried a liability for imprisonment and fine with it in addition to an obligation to pay whatever money judgment was awarded to the plaintiff. In other words, these writs were designed not just to vindicate the plaintiff’s private interests; they

looked after the interests of the king as well.\textsuperscript{20} A plaintiff in trespass therefore was, as it were, a private prosecutor for the crown. It is not surprising that this was true, for we are all familiar with the fact that appeals of felony were initiated by private parties; and the plea rolls also contain a considerable number of so called \textit{qui tam} actions by parties who sue not only ('\textit{qui tam}') for themselves, but also to redress a contempt to the king. The king's interest in trespass is presumably what made trespass writs returnable in the King's Bench, and the dual character of the writ helps explain why it could be brought in either the King's Bench or the Court of Common Pleas.

This matter is important enough for us to take a look at specific cases that make this dual character clear. In 1311, a very interesting writ on the case, which recited a sale of trees in place by the defendant to the plaintiff, was brought alleging that the defendant after the sale had \textit{vi et armis} cut the trees. On the general issue being pleaded, the jury brought in a general verdict, but added that the cutting had not been with force and arms. They do not say why. The plaintiff's interest was merely a \textit{profit a prendre} in the nature of an easement and the jury's conclusion aroused the curiosity of the court trying the case, for it put a special interrogatory to the jurors. 'How did the defendant cause the trees to be cut', the court asked, 'and what manner of impediment did he impose on the plaintiff's access to them'? The aim of this question, presumably, was to discover if any breach of the king's peace had occurred. The jury responded that the defendant had simply locked his gates so that the plaintiff and his men could not enter to cut the trees. The court, now satisfied of the correctness of the jury's conclusion that there was no force and arms involved in the incident, gave judgment for the plaintiff, but only amerced the defendant a small amount. No imprisonment and fine was imposed.\textsuperscript{21}

In 1320, a defendant was alleged in a \textit{vi et armis} writ to have submerged the plaintiff's goods in water after they had been consigned to him for carriage. The jury, in an interesting special verdict, indicated that, due to the inexperience and negligence of the crew, the ship had run aground and that the crew had taken some of the goods and sold them; the ship's owner, it was said, had later ratified (\textit{acceptavit}) the crew's acts. On these facts, the court gave judgment for the plaintiff for the value of the goods. The court noted in its judgment, however, that the defendant would be amerced only, and not imprisoned and fined, 'because the said trespass was not committed against the peace'. The act was not against the peace apparently because possession originally had been obtained by the plaintiff's delivery and not by a trespassory taking.\textsuperscript{22}

\begin{footnotes}
\begin{enumerate}
\item De Banco Roll no. 189, m. 190(1311) (Case no. 30.1 in Morris S. Arnold, \textit{Select Cases of the Trespass in the King's Courts}, 1307–1399, supra note 5 at ii: 325–26).
\item Coram Rege Roll no. 240, m. 34(1320) (Case no. 39.1 in Morris S. Arnold, \textit{Select Cases of Trespass in the King's Courts}, 1307–1399, supra note 5 at ii: 416).
\end{enumerate}
\end{footnotes}
In 1322, a writ for taking goods was brought against defendants who, according to the jury's special verdict, had purchased the goods from persons unknown who had stolen them. The court probed the jury with special interrogatories. Had the defendants been acting in concert with the thieves? Had they known that the goods belonged to the plaintiffs? The jury said that the defendants had in no way been connected with the original theft and had not known at the time they bought the goods that the plaintiff owned them, but the jury volunteered the information that the defendants had learned the truth immediately after the purchase. On these facts, the court gave judgment for the plaintiff, but no judgment was given for imprisonment and fine.\footnote{It is probably right to guess that the civil liability was clear from the beginning and that the purpose of the interrogatories was to discover whether the defendant was also, as we would say, guilty of a misdemeanor—receiving stolen goods.}

A fourth example will suffice to make the association of the contra pacem allegation with criminal liability quite clear. The first common-law innkeeper's liability case actually brought to a conclusion occurred in 1368. The plaintiff claimed that his goods had been stolen while he was lodged with the defendant; the defendant replied that he had given the plaintiff a secure room, that the inn itself was well built, and that the things had disappeared without his fault. To this plea the plaintiff demurred. The court sustained the demurrer, but in doing so refused the plaintiff's prayer for a capias—an order to arrest and imprison the defendant. He was liable to compensate the plaintiff, but, the court explained, because he was without fault, imprisonment and fine were not available. 'It would not be reason', the Chief Justice noted, 'for [the defendant] to be put in prison when there is no manner of fault [culpe] in him'; he was simply 'charged by the law' with the duty to pay the value of the goods.\footnote{In other words, the civil liability was strict, but the criminal liability was not. The king's interest in maintaining peace and order was thus very much in issue in an ordinary writ of trespass; indeed, this was the office of the phrases contra pacem and vi et armis.}

Perhaps the most intriguing aspect of the criminal side of trespass was the impact of mistake on liability. This difficulty arose most often in the context of a distress when a lord, accused of taking animals vi et armis, would allege a 'cause' of rent in arrears by way of defense. In the Eyre of London, an interesting colloquy between Herle, J., and the jury reveals that 'cause' meant motive and that if the lord's motive for taking the beasts had been rent enforcement, he would not be liable to imprisonment and fine, even if, on the facts, he actually had no reason (ratio) to distrain for the rent. Herle explained that 'one who thinks he has a right and makes a distraint for his rent . . . does not act against the peace'; he distinguished between 'cause' and 'reason'—the first meant the subjective motive of the defendant, the

\footnote{Coram Rege Roll no. 249, m. 5d (1332) (Case no. 13.14 in Morris S. Arnold, Select Cases of Trespass in King's Courts, 1307–1399, supra note 5 at 1:140).}
\footnote{Y. B. 42 Edw. 3, f. 11, pl. 13; 42 Liber Assisarum, f. 260, pl. 17 (1368).}
second meant the objective reality of the situation. There was much
discussion in the numerous cases of this kind about whether the whole writ
should abate if the cause were found true, but no one ever contradicted the
underlying assumption that imprisonment and fine were inappropriate in
cases of this sort. Stanton, J., opined that if *vi et armis* lay in such a case,
then so would an appeal of robbery, and that, he said, 'could not be'.
The allusion to the appeal here is significant, for it is further evidence that the
essence of the *vi et armis* and *contra pacem* allegations was wrongful
intention, some element of *mens rea*.

The idea of *causa*, of motive that is, played an interesting role on what we
may call the civil side of trespass as well. During the course of the
fourteenth century the courts more and more required defendants in tort
cases either to deny the physical acts alleged against them in the writ or
plead a justification. This justification had to include a *causa*, an exculpa-
tory motive for doing the act. Self defense was the most pleaded justification
(though, curiously, in form it did not look like one on the plea rolls);
inflicting punishment on one’s servant or pupil was another one. There were
a large number of these justifications, but if that was not your case, if you
had no *causa*, you had, generally speaking, to plead the general issue. What
if your case was that you had not done the injury with a good motive but you
also had not done it with a bad motive? What, in other words, if the injury
had occurred accidentally but on account of your act? A lack of bad
intention, we have seen, would exonerate you from a liability to imprison-
ment and fine. But how would it affect your duty to compensate? In other
words, could you get off the hook by showing that you did not inflict the
injury on purpose?

We know part of the answer to that question and I will suggest to you that
we can deduce the other part. The part we know, and it would be astonishing
if it were otherwise, is that you surely were liable for injuries caused by your
unintentional but negligent conduct. There are special verdicts, for instance,
rendered in writs complaining of intentional burnings, to the effect that the
defendant had been negligent, on which judgment is given for the plaintiff.

Negligence, moreover, is sometimes laid in special writs as the gravamen of
the offense. The reason for doing this, it seems to me, varies with the case.
On occasion, it is done in order to connect the defendant with an injury to
which he would otherwise be a causal stranger. Such a motive, I believe,
lies behind a case of 1398 for negligently driving a horse over the plaintiff
causing him severe injury. It developed in the course of the pleading that the
plaintiff’s case was that the defendant knew that the horse had bad habits,
and that among them was running away with riders. Without that link,

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25. H. M. Cam, ed., *Eyre of London*, supra note 8 at 133.
26. This principle is essential to a proper understanding of Y. B. 48 Edw. 3, f. 25, pl. 8
(1374).
27. De Banco Roll no. 548, m. 221(1398) and De Banco Roll no. 551, m. 119(1398)
without the negligence of mounting a horse with bad habits, the defendant had not done the act at all: The horse had. Plaintiff's counsel, before he purchased his writ, had no doubt discovered that the horse had bolted, and had therefore thought it risky to get an ordinary writ claiming simply that the defendant had beat and wounded the plaintiff. A jury might well have said that in a very obvious way the defendant had not done that, though he had clearly by his negligence caused the horse to do it. This is the explanation of the case that I had intended to convey some years ago when I opined that in some instances plaintiffs may have 'alleged negligence simply to establish that defendants were the "cause" of the injury'. No doubt that was too truncated a way in which to express these ideas and I regret any confusion.

Sometimes it seems that negligence is alleged simply to increase damages on the assumption that the liability will be established on a no-fault basis. In 1401 the famous fire case of *Beaulieu v. Finglam* occurred. It was commenced by a writ which was probably invented for the case, though it later became common form; and since the writ has caused some confusion it probably would be well to view it here in some detail. It begins with a recitation that the common custom of the realm is that everyone is bound to keep his fire so that no harm comes to his neighbor; but then it goes on to say that the defendant so negligently kept his fire that the plaintiff suffered damage. This seems a jarring and inexplicable incongruity, not to say contradiction, until one realizes that the first part of the writ is a statement of law to the effect that strict liability for fire obtains in the realm; and the second part is a statement of fact to the effect that the defendant was negligent. Since strict liability is, as it were, a lesser included offense within negligence, the plaintiff does himself no harm in alleging negligence. Indeed, he alerts the jury to the real theory of his case, and it is possible that jurors might actually award more damages in case negligence was proved than they would if the principle of strict liability was all that was available to them. An earlier case, one of 1395, also alleges the negligent keeping of a fire as a grounds for recovery. There, too, the assumption seems to be that the liability would be strict, for the preamble to the writ says that the plaintiff several times warned the defendant to 'take care of his fire lest any harm befall [the plaintiff's] house'.

Thus, it is abundantly clear that negligent unintentional behavior on the part of the defendant results in liability for any injuries occasioned by it. What about non-negligent unintentional behavior? Was liability strict? This is the harder part of the question that I asked, you will recall, a few minutes

(Cases no. 38.1a and 38.1b in Morris S. Arnold, *Select Cases of Trespass in the King's Courts, 1307–1399*, supra note 5 at ii: 412–14).


29. Y. B. 2 Hen. 4, f. 18, pl. 6 (1401).

I believe that liability was strict and I want briefly to outline my reasons for that conclusion.

First, no one ever pleaded lack of negligence in bar. That may have been because, as we saw, this plea is not a justification in the technical sense. If it is anything, it is an excuse, and as such might logically fit under the general issue, as consent of the plaintiff seems usually to have done. An early waste case does suggest that accident can be given in evidence under the general issue, but waste cases do not raise issues of nonrelationship negligence. The duties of life tenants and tenants for years to their reversioners were well worked out and specific, and the report of the case makes it clear that the kind of accident that would exonerate was one attributable to an act of God or some responsible third party. The law could and did not tolerate much ambiguity in the law of waste since it was so central to the law of real property. It seems likely, moreover, that the defendant's case was that the fire complained of was an accident in the sense that it resulted from an act of God or a responsible third party. This obviously, as a logical matter, fits under the general issue because the defendant's case is that he did not do it: He did not cause the injury; God, or a responsible third party, did. Such also, it seems to me, is the purport of Gibbons v. Pepper, a late seventeenth-century case, in which it was said that the defendant could have given under the general issue evidence that the horse on which he was riding had run away with him and over the plaintiff. This, again, is evidence that the defendant did not do it, that the horse (an irresponsible third party) did it. In other words, the defendant's case is not that he did not injure the plaintiff negligently, but that he did not run down the plaintiff at all. He was just along for the ride. And there is no more to it than that.

Second, if non-negligent unintentionality was good evidence under the general issue in the middle ages, we surely would have heard about it. Of course, evidence could not be pleaded, but serjeants nevertheless spent a lot of their time trying their best to do so. The year books are full of reports of this kind; the efforts are largely unsuccessful, but the point is that the evidence which the serjeant is pressing, though it does not get on the plea roll, is recited in the year book. No one is reported trying to do this in the entire year-book period with respect to nonnegligent, unintentional behavior.

Third, it is well to recall that evidence does sometimes make its way onto the roll. Usually, this is evidence to support some allowable special plea, like self-defense, or to bolster a special traverse. But these are not the only

33. Gibbons v. Pepper, 1 Ld. Raym. 38; 2 Salkeld 637; 4 Mod. 405 (1696).
34. See Morris S. Arnold, Select Cases of Trespass in the King's Courts, 1307–1399, supra
examples; and lack of negligence did not once appear in the plea roll in a trespass case in the common-law courts in the whole of the fourteenth century. This is especially suggestive when one recalls that contributory negligence occasionally appears as a special plea,\textsuperscript{35} though it is arguable that that defense is not properly subsumed under the general issue.

Finally, the fact that duress was not a good plea in bar to an action of trespass seems to rule out any likelihood that the notion of negligence as a limit on liability had any currency at all. We can conclude that duress was not a defense for two reasons. First, there is no attempt to plead it, though in form, were it a good defense as a substantive matter, it would seem an obvious candidate for a plea of justification. Second, if duress had been a good plea in bar to an action in tort, the statute of Richard II’s reign allowing that defense for trespasses committed by the compulsion of the rebels of 1381 would not have been necessary.\textsuperscript{36} If duress was not a defense, then we can presume a regime of strict liability because the operative principle would seem to be that you must pay for your acts no matter how costly the alternative may have been for you. In other words, the claim that a reasonable person would have succumbed to the pressure exerted and committed the act that the defendant did, did not lie in the defendant’s mouth. Perhaps one could say theoretically that a reasonable person would (or should?) prefer injury to himself than to another, but then it would be difficult to justify self-defense as a defense. The absence of pleas of private necessity and insanity seem to argue with equal force for the existence of a regime of strict liability in the middle ages.\textsuperscript{37} There are other reasons for believing that tort liability was strict, but I shall subside here since this lecture is meant principally as a sketch.

III

Our findings concerning the law of obligations in the fourteenth century seem to reduce to this: On the contract side, if you promised to do it, you had to do it, unless you could not; and if you owed it, you had to pay it. On the tort side, if you did it, you had to pay for it; and if you did it with a wicked motive, you had to pay the king. In other words, keep your promises and pay your way seem to have been the moral imperatives that shaped the

\textsuperscript{35} See Morris S. Arnold, supra note 20 at 362–63, for a discussion of such cases.

\textsuperscript{36} Stat. 6 Richard II, stat. 2, c. 5 (1381).

medieval law of obligations. I hope that these ideas form the beginnings of an ideology, else my portentous title has after all come to naught.

I would suggest to you that these principles were old, perhaps pre-conquest, and were transmitted through the generations by judges, jurors, and oath-helpers alike. Perhaps they are as old as Aethelbert; I am not the one to say. But whatever their age, they will remind us of Aethelbert’s day, for his code, as we saw, presumed the existence of substantive legal rights. These principles come to us from a time that we can only with difficulty understand, a time when right and wrong were not made by positive pronouncement but were discoverable by observation and deduction. These rights and duties preexisted the state, even the medieval state; and they speak to us of and from an age when custom, or a logical extension of custom only dimly, if at all, perceived as different from a concrete, natural, and inevitable fact, bottomed on the bedrock of universal acceptance, could supply the answer to almost any substantive legal question. The jury, I think, was charged with keeping the custom steady. We have all grown up in a tradition that regards the jury as a tool of a legal system external to it. The modern legal profession, consisting of both lawyers and judges, has so cartelized justice, its administration, and its execution, that we can no longer recall the day when law belonged in a much less restrictive sense to us all. For us, the jury, far from being a local agency of self-government, applying organic and internal law, is simply a passive instrumentality of an external, distant, and impersonal sovereign. And here I shall stop.

If in straining to see in the half light I have spied phantoms or made out shapes that were not there, I shall find it difficult to apologize, for I have peered as keenly and as honestly at the clues as I knew how. On the other hand, if in fumbling about in the dark I have rudely bumped against any of my fellow investigators, I trust that they will allow me to tender amends on the ground that the causa that drove me on was entirely pure.