

# LAW, LANGUAGE AND CRIME IN DENMARK AND ENGLAND: A COMPARATIVE APPROACH

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## 1. Introduction\*

Significant amounts of ink have over the years been spilt by historians investigating the laws of England and Scandinavia in the period of the Viking invasions and settlement in England. For the 12<sup>th</sup> and early 13<sup>th</sup> centuries, however, much less attention has been paid to the comparative legal history of these geographical entities, with those scholars researching English law and practice, in particular, focusing more on developments and influence from the Continent and Rome than on comparisons with Scandinavia, deeming it peripheral after the events of 1066. Furthermore, historians have tended to pay most attention to inheritance and property while much less has been written about crime. This paper is an attempt to redress some of this balance by looking at crime and language in the laws of England and Denmark in a comparative context and to consider some of the problems and possibilities of such an approach.

One of the first things to note is that it is not always easy to define crime in the laws of the 12<sup>th</sup> or early 13<sup>th</sup> centuries. In the modern world criminal law defines social conduct and bans and punishes threatening, harming, or otherwise endangering the health, safety, and moral welfare of people. It differs, at least in the UK, from civil law, which is more focused on dispute resolution and on the compensation of victims than on punishment. Charles Donahue Jr. has further commented that ‘the distinction between crime and tort, and between criminal and civil procedure, are subdivisions of a wider

distinction between public law and private law.’<sup>1</sup> In modern times, crime is thus a matter of public law – an offence against the state or the public generally – it is usually pursued by a public official and if convicted it leads to a state-imposed punishment. Tort, or civil procedure, is an offense against a private individual, it is frequently pursued by the victim, and a judgment favourable to the plaintiff in such a case usually results only in compensation being paid to the victim.<sup>2</sup> For most of the 12<sup>th</sup> century, ‘crime’ was not usually grouped under a single term, and offences like killing, rape, theft, and so on, which we think of as crimes today, were often not distinct from civil law.

John Hudson has commented ‘the word *crimen* was familiar in the Anglo-Norman period, but its meaning was more flexible, often more extensive, than the modern notion of crime... Nor were the other words used to describe offences which we would call crime solely applicable to a clearly defined category of acts’.<sup>3</sup> At the beginning of the 12<sup>th</sup> century, the *Leges Henrici Primi*, composed at some point in the second decade of the 12<sup>th</sup> century, contained some clauses relating to ‘criminal causes’ and lists these as theft, murder, betrayal of one’s lord, robbery, offences punishable with outlawry, *husbreche* (lit. ‘house breaking’), arson and counterfeiting.<sup>4</sup> At this point, the author does not specifically state if these were offences that were punished or paid for but an earlier chapter stated that some pleas could not be compensated for with money and these are then listed as: *husbreche*, arson, open theft, palpable murder, treachery towards one’s lord, and violation of the peace of the church or the protection of the king through the commission of homicide.<sup>5</sup> One interesting thing about these two lists is that robbery, like theft, was a crime, but unlike theft it was not listed as being unemendable, despite the fact that the author himself thought that both offences could occasionally be amended with a payment, and the chronicler John of Worcester noted for the year 1108 that Henry I ‘constituted ... such a law

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1. Ch. Donahue Jr., ‘The Emergence of the Crime-Tort Distinction in England’, in W. Brown & P. Górecki (ed.), *Conflict in Medieval Europe: Changing Perspectives on Society and Culture* (Aldershot: 2003), 220.
2. Donahue, ‘The Emergence of the Crime-Tort Distinction’, 220.
3. J. Hudson, *The Formation of the English Common Law. Law and Society in England from the Norman Conquest to Magna Carta* (London: 1996), 56.
4. L.J. Downer (ed.), *Leges Henrici Primi* (Oxford: 1972), c. 47.1.
5. Downer, *Leges*, c. 12.1a.

that if anyone was caught in theft or robbery, they were hanged'.<sup>6</sup> The *Leges* also listed some offences, which we would think of as crimes, such as wounding or *hamsoen* (the offence of one assaulting another in his own home), by setting out a system of fixed levels of compensation – much like earlier Anglo-Saxon laws.<sup>7</sup> Evidently, there is plenty that is ambivalent in the *Leges* about whether crimes should be punished or paid for. In addition to the various lists of pleas, the author seems to have considered that if a person unintentionally committed a crime, such as killing, one should make amends but preferably through a reconciliatory settlement.<sup>8</sup> Furthermore, there were also some pleas that placed a man in the king's mercy, and here we find some further inconsistencies. For instance, coiners of false money would lose a hand and could not redeem it in any way and anyone who fought in the king's dwelling would forfeit his life, while the outcome for violence done to a virgin or a widow is not specified.<sup>9</sup> What is clear from this is that some offences were regarded as more serious than others, but how they were dealt with was seemingly not applied with absolute consistency.

## 2. Formalizing distinctions

The more formal distinction between civil and criminal pleas began to enter into English law in the late 12<sup>th</sup> century, under the influence of Roman and canon law.<sup>10</sup> The *Dialogue of the Exchequer* of the late 12<sup>th</sup> century noted that 'the greatest or heinous offences' were paid for in the guilty person's life or limbs. These were pleas that could only be heard before the king or his justices and they became known as the pleas of the crown. The *Assize of Clarendon* of 1166 named these serious crimes as robbery, murder, theft, or a receiver of a person who had committed such a crime.<sup>11</sup> Ten years later, in 1176, the *Assize of Northampton* further added arson and forgery to the list of such crimes, making it fairly similar to that in the *Leges Henrici Primi*.<sup>12</sup>

6. Downer, *Leges*, c. 12.3; R.R. Darlington & P. McGurk (ed.), *The Chronicle of John of Worcester*, 3 vols. (Oxford: 1995-1998), iii, 112.

7. Downer, *Leges*, c. 93.1-36.

8. Downer, *Leges*, c. 5.28b, 70.12b, 90.11-11a.

9. Downer, *Leges*, c. 13.3, 13.6-7.

10. Hudson, *The Formation of the English Common Law*, 56; Donahue, 'The Emergence of the Crime-Tort Distinction', 220-02.

11. N. Vincent (ed.), *Assize of Clarendon*, Early English Laws project: <http://www.earlyenglishlaws.ac.uk/laws/texts/ass-clar/view/#edition/apparatus>, c. 1 (Accessed 15.12.2013).

12. N. Vincent (ed.), *Assize of Northampton*, Early English Laws project:

From the *Assize of Clarendon* we know that twelve law-abiding men ('legaliores homines') from each hundred should swear whether any man in the hundred was accused or publicly suspected of one of the more serious crimes.<sup>13</sup> This panel was then expected to present any suspects for trial and those who could not be arrested were condemned to outlawry.<sup>14</sup> The assizes of Clarendon and Northampton seem to relate instructions to justices travelling through the country, so-called justices of the eyre, and they created a more centralised system for the whole of the English kingdom.<sup>15</sup> Another legal text from the late 12<sup>th</sup> century is the treatise commonly known as *Glanvill*. It is often referred to as a legal manual and attributed to Ranulph Glanville, chief justiciar of England during Henry II's reign, even though it is uncertain whether he actually wrote it, and it is dated to the late 1180s.<sup>16</sup> *Glanvill* contains fourteen chapters, thirteen of which are concerned with the common pleas and only the 14<sup>th</sup> and shortest chapter relates to crime. From *Glanvill* it is clear that any accused was to appear at court, where he would either confess or provide proof of his innocence. If he confessed, he was adjudged to have 'no law', although exactly what this meant is not specified: it could refer to death or to outlawry or to something else entirely. I hesitate to interpret it as outlawry primarily because usually outlawry is stated very clearly. If the accused denied the offence, he would have to provide proof. According to the assizes, this was done by the ordeal of water. However, we know from court records and from *Glanvill* that proof was commonly provided through an offer of battle. Curiously enough, neither the *Assize of Clarendon* nor *Glanvill* is particularly specific about what pun-

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<http://www.earlyenglishlaws.ac.uk/laws/texts/ass-nor/view/#edition/hv-image>, c. 1. (Accessed 28.11.2013).

13. *Assize of Clarendon*, c. 1.
14. *Assize of Clarendon*, cc. 2–14, 19; W. L. Warren, *The Governance of Norman and Angevin England 1086–1272* (London: Edward Arnold, 1987), 109.
15. J. Hudson, 'Kings and Crime: Ideology and Practice in the Tenth and Twelfth Centuries', in Ph. Chassaing & J.-Ph. Genet (eds.), *Droit et Société en France et en Grande-Bretagne (XIIe–XXe siècles)* (Paris: 2003), 17; R.C. Van Caenegem, 'Criminal Law in England and Flanders under King Henry II and Count Philip of Alsace', in R.C. Van Caenegem, *Legal History: A European Perspective* (London: 1991), 40. Both *The Laws of Edward the Confessor* and the *Leges Henrici Primi* emphasize that in the early 12th century there were still significant regional differences in the law, in particular between the Danelaw area and that area covered by English (that is, West Saxon) law. Downer, *Leges*, c. 6.2; B. O'Brien (ed.), *The Laws of Edward the Confessor*, Early English Laws project: <http://www.earlyenglishlaws.ac.uk/laws/texts/ECf2/>, c. 10.1, 12.4–5, 18.4, 20. (Accessed 31.12.2013).
16. G.D.G. Hall (ed.), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford: 1993), i–xxv.

ishment was meted out if the accused was found guilty.<sup>17</sup> The *Assize of Northampton*, on the other hand, states that anyone found guilty of the serious crimes would lose a foot and his right hand and abjure the realm, that is, he would leave the kingdom within forty days through a specified port.<sup>18</sup>

Despite the fact that the assizes and *Glanvill* differentiated between crimes and other pleas, the exact distinction was not absolute. For instance, beating someone was not considered among the criminal pleas but instead among the common or civil pleas and it was usually paid for with compensation. However, if a man beat another so that it led to a wound, then it would be considered a criminal plea. This distinction with regard to wounding we know of not from the laws but from the court records made by the king's justices. With the court records of the early 13<sup>th</sup> century, the historian is fortunate to have access to a plethora of evidence about crime in England. There are a number of different rolls containing legal matters dating from this period, but here I shall primarily deal with material from the eyre rolls, cases heard before the itinerant justices of the eyre. The eyre heard all pleas; both pleas of the crown, matters of crime and administration and finances which concerned the king; and common pleas, referring to disputes concerning land, money, personal injury and inheritance.<sup>19</sup> The rolls are problematic when it comes to crime, however. For example, from the rolls it would be easy to assume that the only outcome for someone who had committed a serious crime was outlawry, primarily because the accused had fled. However, one of the biggest problems with the rolls is that it is not a record of all cases that came to court but rather of those cases that involved or could involve a financial transaction in which the king was the main beneficiary. Outlawry was of course followed by the confiscation of the accused's property, which the king would retain and reap all rewards from for a year. If an accused was propertyless and had no chattels, this is also recorded in the rolls because to reverse outlawry one had to pay a fine to the king.<sup>20</sup> A very small number of cases in the rolls, mainly robbery and wounding, show that one could pay a fine and thereby avoid both any punishment and outlawry. In one case from Yorkshire of 1218, a certain Adam de Mora was accused of wounding Swan of Upton in his head. The case was initially dismissed be-

17. For a discussion of some of the punishments in the early 12th century, see J. Hudson (ed.) *The Oxford History of the Laws of England, volume II: 871-1216* (Oxford: 2012), 399-415.

18. *Assize of Northampton*, c. 1.

19. S. Stewart, 'Outlawry as an Instrument of Justice in the Thirteenth Century', in J.C. Appleby & P. Dalton (eds.), *Outlaws in Medieval and Early Modern England: Crime, Government and Society c. 1066-c. 1600* (Farnham: 2009), 39.

20. Hudson, *The Oxford History of the Laws of England*, 724-27; Stewart, 'Outlawry as an Instrument of Justice', 40, 48, 51.

cause the correct procedure had not been followed, but once the case had been renewed, Adam was taken into custody and eventually paid a fine of ten shillings for his act.<sup>21</sup> In another case, from Gloucestershire, Baldwin de Blechesdune killed John Hurt and was captured and imprisoned at Gloucester. He had chattels worth four shillings, for which the sheriff had to answer. No mention is actually made of what happened to Baldwin, apart from the fact that he seemingly forfeited his chattels.<sup>22</sup> The rolls are full of little inconsistencies like these and in addition we know that some settlements were made with the permission of the justices. Barbara Hanawalt, having investigated criminal prosecutions based on the assize roll for Lincolnshire of 1202, concluded that cases were rarely prosecuted according to the letter of the law.<sup>23</sup> Be that as it may, what seems clear is that despite attempts to distinguish between criminal and civil cases, there were small but significant ambiguities in practice, and only a small proportion of accusations reached conviction and execution.<sup>24</sup>

The blurring between criminal law and civil law is perhaps more noticeable in the Danish laws than in the English. The laws mention a number of offences, which we would consider to be crimes in the modern world, most of which are not punished but paid for with compensation. To take one example, the first clause of King Cnut VI's ordinance of homicide, issued in 1200, states: 'If it happens that someone commits homicide, he shall not receive the kinsmen's part ('etheboth') from them [referring to the kin], until he has paid one instalment ('sal') of the wergeld himself, and that is one third. After that he shall convoke the paternal kinsmen and with them find out how much each of them shall pay together with him.'<sup>25</sup> Parts of this ordinance also made it into the *Law of Scania* (*Skånske Lov*), which was compiled shortly after 1200 and at least before 1218, and this particular clause is repeated almost word for word in there.<sup>26</sup> The ordinance mentions other serious crimes including wounding and gang crime (*hærwirki*), e.g. a man goes to another man's house with intent and removes goods or he beats the

21. D.M. Stenton (ed.), *Rolls of the Justices in Eyre for Yorkshire in the Year 3 Hen. III (1218–19)*, Selden Society, 56 (London: 1937), no. 553.

22. F.W. Maitland (ed.), *Pleas of the Crown for the County of Gloucester before the Abbot of Reading, 1221* (London: 1884), no. 327.

23. B. Hanawalt, 'Justice without Judgement: Criminal Prosecution before Magna Carta', in J.S. Loengard (ed.), *Magna Carta and the England of King John* (Woodbridge: 2010), 120.

24. Hudson, *The Oxford History of the Laws of England*, 740.

25. C.A. Christensen et al. (ed.), *Cnut VI's Ordinance on Homicide*, in *Diplomatarium Danicum. 1. række*, 7 vols. (Copenhagen: 1957-1990), iv, no. 24, c. 1.

26. J. Brøndum-Nielsen & P.J. Jørgensen (eds.), *Skånske Lov*, in *Danmarks gamle landskabslove*, vol. 1 (Copenhagen: 1933), c. 85.

householder or his wife while he is in the house.<sup>27</sup> For killing a man one would pay a full man's worth in compensation, although it is not specified exactly how much this was. For gang crime, a fine of forty marks was paid to the king by the leader of the gang, a further forty marks was paid to the kinsmen, and those who were with him in the gang paid three marks each to the king and another three marks to the kinsmen.<sup>28</sup> There are a number of forty-mark cases mentioned in the various laws, which were clearly regarded as the most serious crimes, and they include willingly setting fire to another's house, fighting at the assembly, taking a woman or maiden by force and breaching the peace at the market place.<sup>29</sup>

However, clearly some offences were punished, that is, they were what we would regard as crimes. For instance both the ordinance and the *Law of Scania* mention that if a man seizes something surreptitiously, that is not openly, he would be hanged at the law assembly just as if he had committed theft.<sup>30</sup> A number of the laws record how hanging was the punishment meted out to thieves who had stolen goods worth half a mark or more.<sup>31</sup> If the stolen goods were worth less, the thief would be whipped or lose a limb.<sup>32</sup> The *Law of Jutland (Jyske Lov)*, decreed by King Valdemar II in 1241, sets down that regardless of how little was stolen, the culprit would receive a 'thief's mark' (*thiwfs mærk*) – be branded or have his ears or nose cut off – and would also pay a fine and compensate the householder.<sup>33</sup> This particular law further details that a second offence, regardless of value, resulted in hanging, as well as compensation and forfeiture of land.<sup>34</sup> Another offence that was so serious that it was punished is murderous arson, for which a guilty person was 'burned or broken on the wheel', according to *Erik's Law of Zealand (Eriks Sjællandske Lov)*.<sup>35</sup> Note, however, that in the *Law of Jutland*, the guilty not only forfeited his life but also had to pay compensa-

27. *Cnut VI's Ordinance on Homicide*, cc. 6-7; *Skånske Lov*, c. 87. Note that in the *Law of Scania* an additional offence, also regarded as gang crime, is the taking by force of a virgin or wife in a field or at home in a house, for which see *Skånske Lov*, c. 218.

28. *Cnut VI's Ordinance on Homicide*, cc. 4, 6-7; *Skånske Lov*, c. 87-8.

29. J. Brøndum-Nielsen (ed.), *Valdemars Sjællandske Lov. Danmarks gamle landskabslove* 8 (Copenhagen: 1941), cc. 57, 63; E. Kroman (ed.), *Eriks Sjællandske Lov. Danmarks gamle landskabslove* 8 (Copenhagen: 1941), Bk. II, cc. 14, 17, 20, 22; P. Skautrup (ed.), *Jyske lov. Danmarks gamle landskabslove* 2 (Copenhagen: 1933), Bk. III, c. 22.

30. *Cnut VI's Ordinance on Homicide*, c. 2; *Skånske Lov*, c. 85.

31. *Skånske Lov*, c. 151; *Jyske Lov*, Bk. II, c. 87

32. *Skånske Lov*, c. 151; *Valdemars Sjællandske Lov*, c. 87.

33. *Jyske Lov*, Bk. II, c. 89.

34. *Jyske Lov*, Bk. II, c. 89.

35. *Eriks Sjællandske Lov*, Bk. II, c. 15.

tion.<sup>36</sup> Both arson and theft are listed among those offences that were unemendable in English laws, and although this must have been the case also in Denmark, judging by the punishments, they are not specifically referred to as such. Here we are hindered by language and terminology, as well as the problem of criminal-civil distinction. The Danish laws were set down in the vernacular, while in England the laws were increasingly being translated into and set down in Latin, although certain terms were retained in the vernacular. There is no specific word for crime or criminal law in the Danish laws and the only offence that is specifically set out as being different from those for which compensation was paid is the so-called *Orbotæ mal*; often translated as ‘heinous’ or ‘unemendable crimes’ but where the second part of the phrase, *mal*, is perhaps better reflected in English as ‘case’ or ‘plea’ rather than ‘crime’.<sup>37</sup> These cases are listed as killing a man in his own home, shed, stable, barn, churchyard, or at the assembly (the OE equivalent of *hamsocn*), and killing a man after compensation has been paid. All of these instances are indeed heinous but from the laws it is much less certain if they were unemendable. The laws relating to *Orbotæ mal* were originally set down in the late 12<sup>th</sup> century but later became incorporated into first *Valdemar’s Law of Zealand* (*Valdemars Sjællandske Lov*), compiled around 1222, and then *Erik’s Law of Zealand*, compiled at some point after 1241.<sup>38</sup> The first of these laws relates the matter in the following way: ‘they [referring back to the list] are *orbotæ mál* and [in such cases] the king will take all of their capital lots and all the valuables that they own, except their land, because they are the leaders in those deeds. The king cannot receive the peace buy from the men and cannot rightfully give them their peace, unless he receives the consent of those who are the closest relatives of the killed [man] and [they] are of full age and can rightfully receive promise of compensation’.<sup>39</sup> Judging by this, then, the punishment was a partial forfeiture of chattels and, crucially, if the kin gave their consent, compensation and a payment for the guilty man to be brought back into the king’s peace. Furthermore this particular law claims that a man who had killed another would pay three marks to the king to buy his peace and would then put the case before three successive provincial assemblies. If the killed man’s family did not by the third assembly declare the case unemendable, then he would pay

36. *Jyske Lov*, Bk. III, c. 66.

37. H. Vogt, *The Function of Kinship in Medieval Nordic Legislation* (Leiden: 2010), 127-30; P. Andersen, *Legal Procedure and Practice in Medieval Denmark* (Leiden: 2011), 71-2.

38. On the dates of *Valdemar’s Law of Zealand* and *Erik’s Law of Zealand*, see discussions in Vogt, *The Function of Kinship*, 64-71; Andersen, *Legal Procedure*, 77-8.

39. *Valdemars Sjællandske Lov*, c. 53.

compensation for the killing.<sup>40</sup> The assembly (*thing*) and kinsmen seem to have had significant sway over how an offender was dealt with also in other cases. For instance, *Valdemar's Law of Zealand* stipulates that if a man 'catches a thief with half a mark or more, then he should bring him to the assembly and the men of the assembly can either order him to hang or to the king's estate (i.e. to enslavement) or to have his hide whipped, and it shall be [done] with the consent of the one from whom he stole'.<sup>41</sup> The *Law of Jutland* further stipulates that those who heard a criminal case, such as homicide, could decide if the guilty should pay compensation or be declared an outlaw.<sup>42</sup> With regard to the *orbotæ mál*, it is clear that the consequences of being found guilty shifted slightly over time. In *Erik's Law of Zealand*, the statement about what happened to a person found guilty had been amended somewhat from the earlier law: 'And everything except land which belongs to the one who has killed is in the king's power, and he himself flees as a *frithløs* man'.<sup>43</sup> This seems closer to being 'unmendable' in that there is no mention here of the guilty being able to compensate for his crime or pay a fine to be received back into the king's protection. What is evident from all of this is that just like in England in the early 12<sup>th</sup> century the evidence from the Danish laws indicate that there were more serious offences, but in Denmark most were paid for rather than punished, and even those that were punished frequently included also the payment of a fine and compensation to the victim. The kind of attempted division between criminal and civil pleas that we find in the assizes, *Glanvill*, and the court records in England are not, according to Helle Vogt, apparent in Denmark until the late 13<sup>th</sup> century with the abolishment of collective payment of compensation from both the guilty person and his kin.<sup>44</sup>

Something can perhaps be said here about outlawry, which features strongly in the court records and in the laws of both Denmark and England. Outlawry, or *utlaga*, is, of course, a word of Norse origin, which quickly came to mean a person 'outside the law' in Old English.<sup>45</sup> That is how it is used in late Anglo-Saxon texts and also in texts from the early 12<sup>th</sup> century.

40. *Valdemars Sjællandske Lov*, c. 50. This role of the assembly and kin was later given to the king, for which see *Eriks Sjællandske Lov*, Bk. II, c. 9.

41. *Valdemars Sjællandske Lov*, c. 87.

42. *Jyske Lov*, Bk. II, c. 12.

43. *Eriks Sjællandske Lov*, Bk. II, c. 5. On the word *frithløs*, see below.

44. H. Vogt, 'Nye perspektiver på familierettens historie. Nordisk middelalder – Individ, familie, slægt', in M.J. Jareborg & M. Kumlien (eds.), *De lege: årsbok 2011 från juridiska fakulteten i Uppsala: Rätten och rättsfamiljer i ett föränderligt samhälle – rättshistoriskt och komparativt: Vänbok till Rolf Nygren* (Uppsala: 2011), 259-261.

45. S.M. Pons-Sanz, *Norse-derived Vocabulary in Late Old English Texts. Wulfstan's Works, a Case Study* (Odense: 2007), 80, 122.

Once the laws came to be written in Latin, from the early 12<sup>th</sup> century onwards, the word *utlaga* was still usually retained in its Old English forms (or Latinised versions) and on those rare occasions that it is translated, it appears as ‘ex lege’ (outside the law). The word seems to have referred to someone who had been expelled from the community and therefore had forfeited his possessions and his right to protection.<sup>46</sup> As noted, outlawry is also a feature in the Danish laws but despite *utlaga* being a word of Norse origin, the word in the Danish laws, as also in the Swedish laws, is *frithløs*, which literally translated means ‘peaceless’ or ‘without peace/protection’ and not ‘outside the law’. It might be significant that the word used in England is *utlaga* even though the Old English *friðleas*, a loan translation from Old Norse *friðlauss*, did exist in earlier Anglo-Saxon laws. Scholars have usually translated both *utlaga* and *friðleas* as outlaw/outlawry in modern English, and Sara Pons-Sanz is the latest to do so, justifying this decision on the fact that *friðleas* occurs in one manuscript of the Wulfstan corpus together with the word *flyman* (fugitive) and the fact that in the *Instituta Cnuti*, of the early 12<sup>th</sup> century, it is translated as ‘expulsus’ (‘expelled’).<sup>47</sup> As noted above *utlaga* is usually translated into Latin as ‘ex lege’ not ‘expulsus’, but apart from this, it is possible that 12<sup>th</sup>-century usage of *utlaga* and *frithløs* reflected a small difference in concept and practice of what outlawry actually meant in the two kingdoms.

In the second quarter of the 13<sup>th</sup> century, Bracton wrote in his *On the Laws and Customs of England* that after a proclamation of outlawry ‘henceforth they bear the wolf’s head and in consequence perish without judicial inquiry; they carry their judgment with them and they deservedly perish without law who have refused to live according to law. This is so if they take to flight or resist when they are to be arrested; if they are arrested alive or give themselves up, their life and death will be in the hands of the lord king’.<sup>48</sup> This is clearly referring back to the *Laws of Edward the Confessor*, in which an outlaw was also said to bear a wolf’s head and would be surrendered to the king and placed in his mercy, if he was caught, or killed, if

46. Pons-Sanz, *Norse-derived Vocabulary*, 80.

47. Pons-Sanz, *Norse-derived Vocabulary*, 130. Some of this had already been noted by Steenstrup at the end of the 19th century. J.C.H.R. Steenstrup, *Normannerne*, 4 vols. (Copenhagen: 1876-1882; repr. 1972), iv, 252.

48. G.E. Woodbine (ed.), *Bracton On the Laws and Customs of England*, 4 vols., trans. with revisions and notes by S.E. Thorne (Cambridge, MA: 1968-1977), ii, 354. The alliteration ‘they deservedly perish without law who have refused to live according to law’ has a curious similarity with reference to a *frithløs* man in *Erik’s Law of Zealand*: ‘then he shall always be without peace [*frithløs*] until he has redeemed his peace’. *Eriks Sjællandske Lov*, Bk. III, c. 46.

defending himself.<sup>49</sup> The *Leges Henrici Primi* had, furthermore, set out that anyone who suffered outlawry would forfeit his bocland to the king.<sup>50</sup> What is clear from these texts and also from the assizes and the court records is that outlawry was pronounced once someone had fled, and it was not a punishment for being caught or found guilty of committing a crime.<sup>51</sup> It would also seem that although an outlaw was outside the law, he was in certain circumstances, such as travelling to and from the king's court to pay the fine to revoke the outlawry, allowed the king's peace.<sup>52</sup> Thus one could seemingly be outside the law but this did not necessarily mean that one was completely outside the peace and protection of the king.

In Denmark it is not clear if being a *frithløs* man always indicated outlawry in the way we think of it in England in the same period, i.e. as a pronouncement made because a person had fled and refused to answer an accusation of a serious crime. *Valdemar's Law of Zealand* certainly seems to anticipate that this was the case. It states that if a man had been accused of theft and failed to appear at successive assemblies, then his personal peace (*man hælæct*) would be taken and thereafter he would be 'a cowardly and *frithløs* man'.<sup>53</sup> However, two of the provincial laws, the *Law of Scania* and the *Law of Jutland*, set out different provisions. According to the *Law of Scania* 'if a man kills another man after compensation has been paid, he shall go *frithløs* and never gain his peace, and the king shall take all that he has except his land'.<sup>54</sup> Some forty years later, the *Law of Jutland* detailed that if a man had killed another man and was sworn *frithløs* and the person who made the accusation did not want to accept compensation, 'then he [the accused] will flee the province before a day and a month. If he does not flee, the king can seize his goods and the king should not receive peace buy (*frith køp*) from him until he is reconciled with the kin of the dead man'.<sup>55</sup> The

49. O'Brien, *The Laws of Edward the Confessor*, c. 13.1. Steenstrup noted that the expression probably derives from Salic law, for which see Steenstrup, *Normannerne*, iv, 252-54.

50. Downer, *Leges*, c. 13.1.

51. There is one exception in the *Leges Henrici Primi* under the ecclesiastical pleas belonging to the king, where if a man kills another 'he shall be outlawed'. Downer, *Leges*, c. 11.11b. Despite this some historians have considered outlawry a punishment for crimes. For one example, see C. Saunders, 'The Medieval Law of Rape', *The King's College Law Journal* (2001), 28.

52. For some examples of how certain individuals revoked outlawry, see Stewart, 'Outlawry as an Instrument of Justice', 42-53.

53. *Valdemars Sjællandske Lov*, c. 87. The Law of Scania also has an example of this, for which see *Skånske Lov*, c. 145.

54. *Skånske Lov*, c. 90.

55. *Jyske Lov*, Bk. II, c. 22.

same law also sets out that a board of ‘truth men’ had the option of swearing that an accused had committed an offence ‘without cause’ (*sakløøs*), for which he should then be declared *frithløs*.<sup>56</sup> In these examples, becoming *frithløs* was not an effect of fleeing an accusation, but a punishment of being found guilty. Furthermore, a *frithløs* man seemingly always had the option of buying back his peace (*frith*), the so-called ‘peace buy’ (*frithkøp*).<sup>57</sup> *Erik’s Law of Zealand* explains that whoever kills a man must pay six marks for the peace buy in addition to a fine to the king and compensation. It continues, that if a guilty man cannot afford to pay for all of these, ‘then he shall always be *frithløs* until he has redeemed his peace’.<sup>58</sup> This is significant, I think, because while the *frithløs* person was without peace, he was seemingly not outside the law, because the law stated that he could always buy his peace back. In England this is not explicitly stated in the law texts, merely that the person fell under the king’s mercy if captured, although it is clear from the court records that an acceptable way to be brought back inside the community was to pay a fine to the king. In any case, what seems evident is that if we apply the modern English word outlaw/outlawry to both *utlaga* and *frithløs*, we miss some of the subtle differences between the laws in Denmark and England.

### 3. Crime in warfare as an example

Most of what I have outlined so far is well-known and has been better said, and also in more detail, by historians such as John Hudson concerning England and Helle Vogt and Per Andersen concerning Denmark. However, one aspect that has perhaps attracted less attention among both scholars interested in English law and those researching Danish law is law and crime in the king’s troops. As both the Danish and English kings were involved in a significant amount of warfare in the 12<sup>th</sup> and early 13<sup>th</sup> centuries, it seems likely that there were measures in place for dealing with crimes, such as theft or killings, committed while in the king’s service. The *Law of Jutland*, for instance, contains two small paragraphs relating to this particular aspect of crime and punishment. The first one states that if a man kills another while in military service, he should always pay forty marks to the kin and also to the king, in addition to paying the appropriate man worth.<sup>59</sup> Another paragraph details that if a man in the military service is accused of theft by a steersman or anyone else from among the ship’s crew, then he shall defend

56. *Jyske Lov*, Bk. II, cc. 12, 14, 16.

57. On the peace buy, see Vogt, *The Function of Kinship*, 130-31.

58. *Eriks Sjællandske Lov*, Bk. III, c. 46.

59. *Jyske lov*, Bk. III, c. 22.

himself with the two men who are closest to him on the thwart – that is, those who sit next to him at the oars – and six others of the ship’s crew. If he is found guilty, ‘then fare with him as with other thieves and he has forsaken both the goods he has there and the capital lot at home’.<sup>60</sup> Among the English laws there are some similarities to the first of these paragraphs. The *Leges Henrici Primi* states that ‘if anyone commits homicide in the house or court or fortress or castle or army or personal troop of the king, he shall be in the king’s mercy with respect to his property or his limbs’.<sup>61</sup> It also sets down that ‘anyone who breaks the peace in the king’s troop (*hostico*) shall lose his life or pay compensation in the amount of his wergeld’.<sup>62</sup> It is curious that the provisions in Denmark (or at least Jutland) were more specific than those found in the *Leges Henrici Primi*, although both laws clearly encouraged payment of compensation as the main form of punishment for homicide. It is also curious that only the Danish laws make provisions for theft in military service even though this offence must surely have been more common than homicide.

Nevertheless, what is evident from the Danish provisions is that matters in military service were expected to be resolved in a similar way to when a man was not in military service, with some slight variations in the number of witnesses; that is, if found guilty one’s fate would be decided by a board who could either swear you to compensation or to something infinitely more horrible. By contrast, on the one occasion when we have a more specific ordinance about crime in military service from England, it is very different to what usually happened. In a short law issued by Richard I, possibly in June 1190, to those of his subjects who were about to accompany him on the Third Crusade Richard stated that: ‘Whoever slays a man onboard a ship shall be bound to the dead man and thrown into the sea. But if he shall slay him on land, he shall be bound to the dead man and buried in the earth. If anyone, moreover, shall be convicted through lawful witnesses of having drawn a knife to strike another, or of having struck him so as to draw blood, he shall lose his hand. But if he shall strike him with his fist without drawing blood, he shall be dipped three times in the sea. But if any one shall taunt or insult a fellow man or charge him with hatred of God: as many times as he shall have insulted him, so many ounces of silver shall he pay. A robber, moreover, convicted of theft, shall be shorn like a hired fighter, and boiling tar shall be poured over his head, and feathers from a cushion shall

60. *Jyske lov*, Bk. II, c. 114.

61. Downer, *Leges*, c. 80.1.

62. Downer, *Leges*, c. 13.8.

be shaken out over his head, so that he may be publicly known; and at the first land where the ships put in he shall be cast on shore'.<sup>63</sup>

None of these provisions bear similarities to provisions in the English laws for dealing with killings, wounding or robbery. The text is interesting at a number of levels, not least the curious mention of tarring and feathering. Scholars think that this is the first appearance in history of this peculiar punishment, which of course is more commonly known from the early history of North America or at least forever more given to posterity in comics series such as Lucky Luke, who was said to be able to draw his pistol faster than his own shadow and whose opponents frequently ended up tarred and feathered.<sup>64</sup> On a more serious note, there might of course be very good reasons why Richard's short law on criminal crusaders looks very different from other laws. Lots of rowdy men in confined space for a longer period of time may have required some specific measures. Richard's law on criminal crusaders later became incorporated into the laws of Oléron and subsequently into the Admiralty Black Book, both of which were collections of statutes dealing specifically with matters related to the sea, navigation and maritime trade rather than crimes and warfare.<sup>65</sup> Nevertheless, it is curious that there are very few other provisions for military service in the English laws, and it may be that this points to some fundamental differences in how society was organized but also in the nature of warfare. One such example is that the Danish fleet was still supposed to gather every spring, and there are plenty

63. W. Stubbs (ed.), *Chronica magistri Rogeri de Hovedene*, 4 vols., Rolls Series, 51 (London: 1868-1871), iii, 36.

64. E.F. Henderson, *Select Historical Documents of the Middle Ages* (London: 1896), 4, 135; W. Sayers et al., 'The Early Symbolism of Tarring and Feathering', *Mariner's Mirror* 96:3 (2010), 317-36. For some of the historiography surrounding tarring and feathering in North America, see B. Levy, 'Tar and Feathers', *The Journal of the Historical Society* 11 (2011), 85-110; D. Grimsted, 'Rioting in Its Jacksonian Setting', *American Historical Review* 77 (1972); C.E. Prince, 'The Great "Riot Year": Jacksonian Democracy and Patterns of Violence in 1834', *Journal of the Early Republic* 5 (1985), 1-19; A.E. Young, 'English Plebeian Culture and Eighteenth-Century American Radicalism', in J.R. Jacob & M.C. Jacob (eds.), *The Origins of Anglo-American Radicalism* (London: 1991), 184-212. For an example from Lucky Luke, see R. Goscinnny, *La Ville fantôme* (Marcinelle: 1965).

65. On the origin of the laws of Oléron and the Admiralty Black Book, see T. Twiss (ed.), *The Black Book of the Admiralty*, 4 vols., Rolls Series 55 (London: 1871-1876), i, lvi-lxxi; P. Studer, trans., *Oak Book of Southampton*, 2 vols. (Southampton: 1910-1911), ii, xxxv; T.J. Runyan, 'The Rolls of Oleron and the Admiralty Court in Fourteenth-Century England', *American Journal of Legal History* 19 (1975), 96-99; E. Frankot, 'Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea', in J. Pan-Montojo & F. Pedersen (eds.), *Communities in European History: Representations, Jurisdictions, Conflicts* (Pisa: 2007), 159.

of examples in the work of the Danish late 12<sup>th</sup>-century historian, Saxo Grammaticus, of naval warfare, neither of which is seen very often in England in the 12<sup>th</sup> and early 13<sup>th</sup> centuries.<sup>66</sup>

## Concluding remarks

In a collection of essays derived from a conference where the theme was to ask how Nordic the Nordic medieval laws were, it is imperative, I think, to compare some of the ~~mentioned~~ laws mentioned above, not just to other laws in Scandinavia or to developments of Roman and canon law, but also to those of the other polities of the medieval West. England and Denmark provide a particularly good basis for making such comparisons. For instance, the two kingdoms shared a common cultural background and, of course, a similarity in language. We know, furthermore, that in this period England was divided into two legal areas, one under English, that is West Saxon law, and another under Danish law. Although some of Henry II's legal reforms of the late 12<sup>th</sup> century were intended to eradicate some of these differences, it is clear that customary law continued to play a large role in English legal culture, and there are also significant regional differences to be found in the court records.<sup>67</sup> In addition, the 12<sup>th</sup> century in England and the late 12<sup>th</sup> and early 13<sup>th</sup> centuries in Denmark saw not only much law-making but also changes in legal procedure and in language. There are significant commonalities in the laws of both kingdoms, in particular relating to language and procedure, but most of these have not received widespread attention, especially among Anglophone scholars unfamiliar with Old Danish, and hence the new translations of the medieval Danish laws into English by Ditlev Tamm and his team will be invaluable. Of course, there are differences too. For instance, crime is not necessarily defined in the same way in the laws of both kingdoms, and some crimes, such as the gang crime that we find in the provincial laws of Denmark, do not exist in England.<sup>68</sup> Furthermore, the seeming departure from the system of compensation in England and the separation of civil and criminal pleas and the fact that Eng-

66. For just a few examples of naval warfare during the Danish conquest of the Slavs in the late 12th century, see E. Christiansen (ed.), *Saxo Grammaticus, Danorum Regum Heroumque Historia. Books X-XVI: the Text of the First Edition with Translation and Commentary*, 3 vols. (Oxford: 1980-1981), ii, 616-21.

67. For one example, see J. Benham, 'Wounding in the High Middle Ages: Law and Practice', in C. Warr & A. Kirkham (ed.), *Wounds in the Middle Ages* (Farnham: 2014), 241.

68. Vogt makes the point that even across the Scandinavian laws, the heinous crimes are often different. Vogt, *The Function of Kinship*, 129-130.

land had a very bureaucratic system with a king and an administration well able to enforce the laws are significant differences. Thus comparing the two kingdoms is never going to be a comparison of like for like. However, this does not for that reason render the whole exercise useless. Indeed, one would face a similar array of obstacles if comparing English law and legal practice to that of any of the other medieval kingdoms of this period.

How Nordic were the Nordic medieval laws? In attempting to answer this overarching question, it is perhaps not possible to provide a wholly satisfactory answer. Judging by the approach taken in this paper, one could conclude that the Danish laws, at least, may well have been Nordic but had significant commonalities with the English laws of the same period. However, the comparative basis provided here is on a very small aspect of the law codes, namely crime, and it is not one that is commonly studied by scholars, who are mostly interested in property and inheritance. Despite this, a thorough investigation of the laws of England and Denmark in the 12<sup>th</sup> and 13<sup>th</sup> centuries could yield some interesting results and provide us with some further pointers for future research. In particular, the language of the laws contains peculiar similarities, for instance in the alliterations about living within or without law and peace, and undoubtedly a wider investigation could provide others. It is hence fortunate that on both sides of the North Sea there are ongoing projects to edit, translate and comment, upon, ~~concerning~~ both the Nordic medieval laws and the early English laws, providing scholars and students alike with the tools to make further comparative studies.<sup>69</sup>

69. For instance, the recent work by Alice Taylor on Scotland shows that there are some interesting comparisons to be drawn on law and crime with this kingdom too. See A. Taylor, 'Crime without Punishment: Medieval Scottish Law in Comparative Perspective', *Anglo-Norman Studies* 35 (2013).