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Law, Status, and the Lash: Judicial Whipping in Early Modern England

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Abstract This article focuses on the contested development of judicial whipping as a marker and maker of status in the particular social, cultural, and political context of England in the sixteenth and seventeenth centuries. In these years people disputed with special vigor who could be whipped and why, often in battles fought in and around parliaments and the Court of Star Chamber, and often invoking fears of "servility." Tracing the rise and spread of judicial whipping, its linking with the poor, and disputes over its use, this article demonstrates how whipping served as a distinctively and explicitly status-based disciplinary tool, embedding hierarchical values in the law not just in practice but also in prescript. Some authorities thought the whip appropriate only for the "servile" and, indeed, both valuable and dangerous for its ability to inculcate a "slavish disposition." After men of the gentry successfully asserted their freedom from the lash, so too did a somewhat expanded group of "free" and "sufficient" men. By the later seventeenth century, challenges over the uses of judicial whipping left it limited ever more firmly to people of low status, affixed by law to offenses typically associated with the insubordinate poor.

Whippings were common in early modern England. Children, students, servants, sailors, soldiers, and wives endured beatings of one or another degree of severity, as did people deemed vagrants, whores, and thieves. By the mid-seventeenth century, growing numbers of enslaved people in English colonies abroad suffered the lash too. And many more people witnessed floggings, even as the authorities deputized some others to do the whipping. In education, household and labor discipline, and the imposition of public order, people with the power to do so turned often to the birch, the rod, and the whip. They used the lash to teach and tame people, as well as their dogs and horses. As Lawrence Stone once suggested, given its ubiquity in day-to-day struggles for power, the whip might well serve as one of the better symbols of social relations in late sixteenth- and early seventeenth-century England.[1]

The use of the whip as a tool of correction had shifts in functions and meanings that warrant attention, however grim the subject. While flogging or birching in household discipline, education, and self-mortification have longer histories, judicial whipping in English legal practice had a beginning and an end. We might identify

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[1] Lawrence Stone, *The Crisis of the Aristocracy, 1558–1641* (Oxford, 1965), 34.

earlier roots, certainly, and state authorities continued to use the whip into the twentieth century, but its rise and spread were largely early modern phenomena. Judicial whipping also served as a distinctively status-based disciplinary tool, and explicitly so in its early modern years. The one group of people who should not suffer the lash, authorities generally agreed, was the aristocracy—the gentry and nobility—and particularly adult men of the elite.[2] In time, the groups protected from its use grew. In the nineteenth century, authorities barred judicial whipping of women; in the early modern era, however, distinctions derived mainly from social standing. Some authorities thought the whip appropriate only for the "servile" and, indeed, both valuable and dangerous for its ability to inculcate a "slavish disposition."[3]

One might ask any number of questions about judicial whipping in early modern England, but my focus in this article is on its contested development as a marker and maker of status. With particular attention to discussions in Parliament and the court of Star Chamber, I also explore what judicial whipping can tell us about the nature and limits of "the rule of law" in the sixteenth and seventeenth centuries. The rule of law is now understood to require that laws be "general, equal, and certain," but what exactly the second element is thought to consist of has changed over time.[4] Historians routinely assert that the rule of law was a broadly shared ideal in early modern England; while this is true, given the centrality of the equality provision in modern definitions, it is worth remembering that even at the level of the ideal, that rule of law did not yet enshrine a notion of equality before the law among its legitimizing claims—or at least did not yet purport to extend the same laws equally to all people.[5]

[2] On distinctively English definitions of aristocratic status, see M. L. Bush, *The English Aristocracy: A Comparative Synthesis* (Manchester, 1984). On the amorphous category of "gentlemen" and its expansion in these years, see also Felicity Heal and Clive Holmes, *The Gentry in England and Wales, 1500–1700* (Stanford, 1994).

[3] The phrases "servile disposition" and "slavish disposition" occur in a variety of early modern texts, but for uses specific to whipping's ability to change the self beyond those cited below, see, for example, Anita Traninger, "Whipping Boys: Erasmus' Rhetoric of Corporeal Punishment and Its Discontents," in *The Sense of Suffering: Constructions of Physical Pain in Early Modern Culture*, ed. Jan Frans van Dijkhiizen and Karl A. E. Enenkel (Leiden, 2009), 39–57, at 49. For a discussion of the varieties of unfreedom and the often classical connotations of references to slavery in the period in which the Atlantic system of racialized chattel slavery was just starting to develop, see Michael Guasco, *Slaves and Englishmen: Human Bondage in the Early Modern Atlantic World* (Philadelphia, 2014).

[4] For particularly useful discussions of "the rule of law" that are attentive to the history of the concept, see Tom Bingham, *The Rule of Law* (London, 2010); and Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, 2004).

[5] The classic exchange on the rule of law in sixteenth-century England focused on the degree to which Tudor monarchs acted within the constraints of the law and whether the rule of law did or did not preclude despotism or indicate "consent." See, in particular, Joel Hurstfield, "Was There a Tudor Despotism after All?," *Transactions of the Royal Historical Society*, 5th series, no. 17 (1967): 83–108; and G. R. Elton, "The Rule of Law in Sixteenth-Century England," in *Studies in Tudor and Stuart Politics and Government* (Cambridge, 1972), 260–84. For a more recent and expanded treatment of the subject, see John H. Baker, "Human Rights and the Rule of Law in Renaissance England," *Northwestern University Journal of International Human Rights* 2, no. 1 (2004): article 3, https://scholarlycommons.law.northwestern.edu/njihr/vol2/iss1/3. None of these works explicitly stated that the early modern "rule of law" incorporated a claim to equal treatment, but slippage sometimes occurs; see, for example, James S. Hart Jr., *The Rule of Law, 1603–1660: Crown, Courts and Judges* (Harlow, 2003), 1, which asserts an expansively defined rule of law. See also the important book by the late Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, 2008), 431, which argues that early modern law did not systematically express hierarchical values. Brooks imported into the prerevolutionary period E. P. Thompson's

Listening for the crack of the whip reminds us of one of the areas in which hierarchical values infused the law not just in practice but also in prescript and can help trace shifts over time in their texture and expression.

Perhaps because of the dark shadow of the gallows, whipping has received relatively little scholarly notice in comparison with other forms of judicial punishment, but it has had some. As previous studies show when taken together, whipping's use in criminal justice—as a penal option imposed formally by agents of the state and not by teachers, parents, or masters—had a rise and fall. A. L. Beier, Martin Ingram, and Paul Griffiths have dated the spread of judicial uses of the whip to the sixteenth century.[6] Yes, one finds penitential whipping imposed by church courts in earlier years, and occasional uses by borough courts when dealing with morals offenses. The medieval church had developed a rich (and contested) set of teachings around the flagellation of oneself or others, hearkening back to Christ's own scourging and to beliefs that the mortification of the flesh led to a spiritual discipline.[7] Judicial whipping drew on both biblical and classical antecedents, alongside long-standing habits of household correction and scholastic training. But while it had earlier roots, whipping as a disciplinary sanction imposed by secular courts seems to have been largely an early modern, not a medieval, phenomenon. How it developed in this particular context was shaped by contemporaneous social struggles over status and inflected by cultural understandings of other uses of the lash.

Previous studies have collectively established a chronology for judicial whipping and have also identified its rationales, noting justifications that included both punishment and penitence, deterrence and reform, pain and transformative shame. As Esther Cohen explains, premodern notions of pain understood it to work on the

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characterization of a post-1688 "rule of law," in which claims to equal treatment before the law did figure into the self-justifying rhetoric of authorities.

[6] A. L. Beier, *Masterless Men: The Vagrancy Problem in England, 1560–1640* (London, 1985), 158–59; Paul Griffiths, "Introduction: Punishing the English," in *Penal Practice and Culture, 1500–1900: Punishing the English*, ed. Simon Devereaux and Paul Griffiths (Basingstoke, 2004), 1–35; Paul Griffiths, "Bodies and Souls in Norwich: Punishing Petty Crime, 1540–1700," in Devereaux and Griffiths, *Penal Practice and Culture*, 85–120; Martin Ingram, "Shame and Pain: Themes and Variations in Tudor Punishments," in Devereaux and Griffiths, *Penal Practice and Culture*, 36–62; Martin Ingram, *Carnal Knowledge: Regulating Sex in England, 1470–1600* (Cambridge, 2017), e.g., 378. Guy Geltner, *Flogging Others: Corporal Punishment and Cultural Identity from Antiquity to the Present* (Amsterdam, 2014) also describes judicial whipping as primarily an early modern rather than medieval phenomenon. See also Dave Postles, "Penance and the Market Place: A Reformation Dialogue with the Medieval Church (c. 1250–c.1600)," *Journal of Ecclesiastical History* 54, no. 3 (2003): 441–68; and Stuart Minson, "Public Punishment and Urban Space in Early Tudor London," *London Topographical Record*, no. 30 (2010): 1–16. On the overlapping and mutually reinforcing links between the violence used in household discipline and the maintenance of public order, see Susan Amussen's classic essay, "Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England," *Journal of British Studies* 34, no. 1 (1995): 1–34. On the potential links between the turn to whipping, wounding, and so on in early modern punishment and its performance on the stage, see Sarah Covington, "Cutting, Branding, Whipping, Burning: The Performance of Judicial Wounding in Early Modern England," in *Staging Pain, 1580–1800: Violence and Trauma in British Theatre*, ed. James Robert Allard and Matthew R. Martin (Farnham, 2009), 93–110.

[7] This history is touched on in Robert Mills, *Suspended Animation: Pain, Pleasure and Punishment in Medieval Culture* (London, 2005). For biblical references to whipping, see, for example, Deuteronomy 25:2–3; 2 Samuel 7:14; Proverbs 19:29.

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mind through the body; the body served as the instrument of the soul.[8] Indeed, a flogging's purported ability to alter its recipient, to induce penitential reform, and to instill humility and obedience figured among the justifications for its rise and spread in the sixteenth century—and also among the stated reasons for discomfort with its use for gentlemen. Its low cost and ease of use probably also made it attractive to authorities. One might also note the context of lawmakers having deemed increasing numbers of behaviors criminal offenses over the sixteenth century; like occasional penal experiments with galley service and convict transportation and the heightened use of pardons and the benefit of clergy, whipping presumably appealed to authorities as a way to punish more people, more effectively, without overburdening the gallows. Like the contemporaneous emergence of "houses of correction," it partook of a reformative rhetoric around punishment.[9]

In this article, I observe judicial whipping directly and on its own, though not just as a bit player in the histories of imprisonment or capital punishment but as a part of the broader history of social and political relationships in the years between the Reformation and Civil Wars. In these years people challenged with special vigor who could be whipped and why, often in battles fought in and around parliaments and the court of Star Chamber, often invoking fears of "servility." Speaking before Parliament in 1641, John Pym denounced the whip and pillory as "servile engines" that could "embase" the spirits of the king's subjects and "set a stamp and character of servitude upon them."[10] People thought that the lash, like clothing, gesture, and the submissive disposition of the body, could shape "both self and social identity."[11] In years in which the social order was remade, therein lay both whipping's appeal and its threat.[12]

THE RISE AND SPREAD OF JUDICIAL WHIPPING

Whipping developed as a penal option that enshrined status distinctions in both prescript and practice over sixteenth century, becoming a standard punishment for various offenses associated mainly with the poor, including petty larceny. Studies of late seventeenth- and eighteenth-century court records show the significant numbers of people whipped for thefts of small value in later centuries.[13] But this

[8] Esther Cohen, "The Animated Pain of the Body," *American Historical Review* 105, no. 1 (2000): 36–68.

[9] See K. J. Kesselring, *Mercy and Authority in the Tudor State* (Cambridge, 2003).

[10] John Pym, *The Speech or Declaration of John Pym* (London, 1641), 7. John Lilburne would borrow this passage in his later *The Legal Fundamentall Liberties of the People of England* (London, 1649), 40.

[11] On the ways in which gesture and comportment were thought both to construct and communicate facts about self and identity, see, for example, John Walter, "Gesturing at Authority: Deciphering the Gestural Code of Early Modern England," *The Politics of Gesture: Historical Perspectives, Past and Present*, no. 203, issue supplement 4 (2009): 96–127, 125; and Michael Braddick, "Introduction: The Politics of Gesture," *The Politics of Gesture: Historical Perspectives, Past and Present*, no. 203, issue supplement 4 (2009): 9–35.

[12] On the reordering of early modern society, see, for example, Alexandra Shepard, *Accounting for Oneself: Worth, Status, and the Social Order in Early Modern England* (Oxford, 2015); Keith Wrightson, "'Sorts of People' in Tudor and Stuart England," in *The Middling Sort of People: Culture, Society and Politics in England, 1550–1800*, ed. Jonathan Barry and Christopher Brooks (Basingstoke, 1994), 28–51.

[13] On the later uses of penal whipping, see Gwenda Morgan and Peter Rushton, *Rogues, Thieves, and the Rule of Law: The Problem of Law Enforcement in North-East England, 1718–1800* (London, 1998), 73, 132–38; J. M. Beattie, *Policing and Punishment in London, 1660–1750: Urban Crime and the Limits*

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had not always been the case; it seems to have become so only over the sixteenth century and thus to have emerged in a particular social, cultural, and political context. By common law rather than statute, petty larceny—theft of goods valued at less than a shilling—had long been a felony, but not one that warranted death. Instead, judges punished it at their discretion, a discretion that in the Middle Ages seems to have leaned most heavily toward fines and the pillory.[14] The paucity of late fifteenth- and early sixteenth-century records for either the assizes or quarter sessions—the courts superintended by the central courts' justices traveling on circuits through the counties twice a year and the local courts held by justices of the peace, respectively—makes it impossible to trace with any precision when whipping first became the usual punishment for petty theft, but certainly it had become so by the late sixteenth century. Records from the Welsh Court of Great Sessions begin to survive from 1541, earlier than comparable English records, and shortly after English and Welsh criminal justice systems came largely into line with each other. The files from Montgomeryshire do not always note the punishments imposed but show whipping's use from at least 1546, in a few scattered cases.[15] It became

of Terror (Oxford, 2001), 286–87, 304–08, 446. See also Peter King, *Crime, Justice and Discretion in England, 1740–1820* (Oxford, 2000), 263, 267, 272–73; J. A. Sharpe, *Judicial Punishment in England* (London, 1990), 23–24, 76–77; Greg Smith, "'Civilized People Don't Want to See That Sort of Thing': The Decline of Physical Punishment in London, 1760–1840," in *Qualities of Mercy: Justice, Punishment, and Discretion*, ed. Carolyn Strange (Vancouver, 1996), 21–51; Robert Shoemaker, "Streets of Shame? The Crowd and Public Punishments in London, 1700–1820," in Devereaux and Griffiths, *Penal Practice and Culture*, 232–57; Tim Hitchcock and Robert Shoemaker, *London Lives: Poverty, Crime and the Making of a Modern City, 1690–1800* (Cambridge, 2015), 246–67, 363–64. For discussions leading to the final end of corporal punishment in the court system, see the precipitating "Cadogan Report": Committee on Corporal Punishment, The Report of the Departmental Committee on Corporal Punishment, 1938, Cmd. 5684.

For the links made in later years between sexual elements of whipping and corrective lashing in the home, public schools, courts, prisons, and the military, see Ian Gibson, *The English Vice: Beating, Sex and Shame in Victorian England and After* (London, 1978). George Ryley Scott's *The History of Corporal Punishment: A Survey of Flagellation in Its Historical, Anthropological and Sociological Aspects* (London, 1938), sometimes cited as an authority, was written as an intervention in early twentieth-century discussions about abolishing penal whipping, with arguments for its roots in the masochistic drives being promoted by civilization and for its effects in generating unhealthy sexual fixations.

[14] This conclusion is based largely on absence and implication, unfortunately. In their history of early English law, Frederick Pollock and F. W. Maitland do note whipping, in passing, as one possible punishment for petty larceny: *The History of English Law before the Time of Edward I*, 2 vols. (Cambridge, 1969), 2:497. Studies of court records rarely reveal its having been used, however. See, for example, Karen Jones, *Gender and Petty Crime in Late Medieval England: The Local Courts in Kent, 1460–1650* (Woodbridge, 2006), 47, where Jones notes that fines were the most common punishments for theft in her records; Helen Carrel, "The Ideology of Punishment in Late Medieval English Towns," *Social History* 34, no. 3 (2009): 301–20, which suggests that the pillory and stocks were the most frequently used form of corporal punishment; Marjorie Keniston MacIntosh, *Controlling Misbehaviour in England, 1370–1600* (Cambridge, 1998), 113–14, which notes only one pre-sixteenth century whipping, and that for adultery rather than theft, in what seems to have been more an ecclesiastical than a secular court (in Durham, where the lines between the two were more blurred than elsewhere). In *Crime and Conflict in English Communities, 1300–1348* (Cambridge, MA, 1979), 124, 150, 157, Barbara Hanawalt discusses conviction rates for larceny, but not the punishment, and only mentions whipping in the context of a mother fatally disciplining a child and for the belief that it could help restore sanity to the mad.

[15] Murray Chapman, ed., *Montgomeryshire Court of Great Sessions: Calendar of Criminal Proceedings, 1541–1570* (Aberystwyth, 2004), nos. 653, 658, 916, 928, etc.

increasingly frequent over the decades that followed. By the time that English assize records begin to survive in any quantity, from 1559, judges were ordering whippings for petty larceny. In Surrey, for example, from 1559 to 1603, assize judges ordered whippings for at least 147 of the 169 men and women found guilty of petty theft (or thefts downgraded to count as petty).[16]

Why whipping came to be more commonly imposed for petty larceny is unclear, but it may have arrived on the back of a decision to use the force of the lash against vagrants. That, in turn, likely drew upon the long-standing links between penitential whipping and vice. With a soaring population and a moralizing crusade against "idleness" as sin, early sixteenth-century authorities adopted new measures to reform or repress the wandering poor.[17] From the 1530s, statutes and proclamations signaled the turn to whipping. Some urban governments had ordered the occasional lashing for the masterless poor before, but in the early sixteenth century the crown extended such a policy throughout the realm. The 1531 act for the punishment of beggars and vagabonds issued the first national mandate for the whipping of people unwilling or unable to support themselves through labor of a sort deemed valuable to the commonwealth. To attack "idleness, mother and root of all vices," the act ordered that a person able to labor but found vagrant or begging "be tied to the end of a cart naked and beaten with whips through the same market town or other place till his body be bloody by reason of such whipping." Those people unable to work through debility needed license to beg; any impotent poor found begging without a permit were to be whipped too. The act also provided for the whipping and mutilation of people who engaged in "unlawful games and plays, and some other of them feigning themselves to have knowledge in physic, phisnomy, palmistry, or other crafty sciences whereby they bear the people in hand."[18]

Subsequent statutes offered a few variations. A 1536 act allowed that children without means of support could be apprenticed; if any such youths from the ages of twelve to sixteen refused to accept service, they ought to be "openly whipped with rods."[19] The infamous slavery act of 1547 affected the language of moderation in noting that while vagabonds could be whipped or killed, it was better to make them profitable and put them to forced labor. But while enslavement, like whipping, had a long intellectual heritage linking it with sin, this attempt to impose slavery on

[16] J. S. Cockburn, *Calendar of Assize Records: Surrey Indictments, Elizabeth I* (London: HMSO, 1980). Twenty-two of the cases had no notation of the punishment imposed. In these same records, forty-nine men and women were sentenced to be whipped for vagrancy.

[17] For context, see, for example, Margo Todd, *Christian Humanism and the Puritan Social Order* (Cambridge, 1987); Paul Slack, *The English Poor Law, 1531–1782* (Cambridge, 1995); and Marjorie Keniston McIntosh, *Poor Relief in England, 1350–1660* (Cambridge, 2012). For the linking of "sin" and "crime" in early modern England, see Cynthia Herrup's classic essay "Law and Morality in Seventeenth-Century England," *Past and Present*, no. 106, (1985): 102–23.

[18] 22 Henry VIII, c. 12 (1530–1). For early proclamations, see *Tudor Royal Proclamations*, vol. 1, *The Early Tudors (1485–1553)*, ed. Paul L. Hughes and James F. Larkin (New Haven, 1964), no. 128 (1530), no. 161 (1536), no. 204 (1541). An earlier proclamation against vagrants, in 1493–94, mandated time in jail and the stocks, not whipping (no. 30). The proclamation of 1536 might seem somewhat different in ordering whipping for pardoners, but it describes them as vagrants and beggars who take money deceitfully from the poor.

[19] 27 Henry VIII, c. 25 (1535–36).

the unruly poor did not last long.[20] Later measures restored whipping, along with ear boring and other corporal penalties, for rogues, vagabonds, and sturdy beggars of either sex, as well as for the impotent poor in receipt of relief who were found begging.[21] A Jacobean measure in 1610 signaled a bit of a change in allowing rogues to be put into houses of correction where they could be disciplined privately, by "moderate whipping."[22]

Concerns with poverty, vagrancy, and idleness also lay behind the first statutes that moved beyond rogues and beggars specifically. One Elizabethan measure included "bastard bearers" who produced children who needed support from parish funds.[23] Another imposed whipping on those "idle persons" who engaged in petty acts of appropriation that did not amount to felony, such as stealing food from orchards and gardens.[24] A statute that allowed such punishment for deceits by spinners and others working in the wool trade seems at first glance to be the first measure to impose whipping for an offense entirely unrelated to idleness and poverty; but the justification remained, just stretched more thinly, with a note that wool workers' purloining of scraps of yarn damaged a trade that set many poor people to work, and in so doing they increased idleness. And a different linking to poverty appeared: if people caught deceitfully keeping bits of wool for themselves could offer recompense or satisfaction, so be it, but if they could not afford to do so, then the justices of the peace could whip them instead.[25] A statute of 1624 against cursing allowed a fine of twelve pence to support the poor—a parish swear-jar of a sort—but noted that if the offender was under twelve years of age and unable to pay the fine, the constable, or the parent or master in the constable's presence, might whip them instead.[26] An act passed three years later mandated a fine of twenty shillings for the keepers of unlicensed alehouses, with a note that those unable to pay were to be whipped.[27]

Court records show such statutes and the impulses behind them in action. Local quarter sessions noted a commitment to public whipping for theft, vagrancy, and morals offenses that impinged upon the parish purse. In the North Riding of Yorkshire quarter sessions, for example, Mathilda Wilkinson was one of at least twenty people whipped for petty larceny between 1605 and 1612: for stealing stockings, a petticoat, and a neckerchief, she was whipped from the parish church to the door of her home after evening prayer. The same judges ordered that for bearing a bastard, Ann Laverack be whipped in "full market time . . . until her body be bloody." They also ordered six people whipped as vagrants.[28]

Similar uses of whipping happened within the walls of one of the other important and long-lasting penal innovations of the sixteenth century: the bridewells, or houses

[20] See C. S. L. Davies, "Slavery and Protector Somerset: The Vagrancy Act of 1547," *Economic History Review* 19, no. 3 (1966): 533–49.

[21] See, for example, 5 Elizabeth I, c. 4 (1562–63); 14 Elizabeth I, c. 5 (1572); 18 Elizabeth I, c. 3 (1575–6); 39 Elizabeth I, c. 4.

[22] 7 James I, c. 4 (1609–10).

[23] 18 Elizabeth I, c. 3 (1575–76).

[24] 43 Elizabeth I, c. 7 (1601).

[25] 7 James I, c. 7 (1609–10).

[26] 21 James I, c. 20 (1623–24).

[27] 3 Charles I, c. 4 (1627).

[28] *North Riding Quarter Sessions Records*, ed. J. C. Atkinson, vol. 1 (London, 1884), 26, 52, 101, 102, 185, 194–96, 235, 247–48.

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of correction. Espousing the putatively reformative benefits of labor, these institutions began with the London Bridewell in the 1550s, a former royal palace turned by the City of London into a reformatory to help discipline its idle but able-bodied poor. By the end of the sixteenth century and into the early seventeenth, similar institutions appeared across the country.[29] Wide-ranging in scope, these establishments came to house petty offenders of all sorts. Whipping served as a common supplement to the incarceration and forced labor for people sanctioned for vagrancy, sexual immorality, or failure to obey their masters. In 1559, for example, Thomas Dee, "a very vagabond," was taken with several women of ill repute and so whipped and committed. Dorothy Heborne, an eleven-year-old servant, was whipped for picking her mistress's purse and lying—that is, she refused to confess to the theft, insisting upon her innocence. Another woman found "to play the common harlot" was whipped and committed, as were many others.[30]

Privy councillors sometimes used the London house of correction as well, giving it a slightly broader remit than for petty thefts and offenses linked with poverty and labor discipline by treating its summary procedures as fitting for poor offenders more generally. Under King James, the privy council issued several warrants to the Bridewell governors to have them take on the summary punishments of disorderly or disrespectful miscreants. The councilors sent Matthew Mason to Bridewell for a good whipping after spreading "false and seditious" news about the king. Waterman Peter Fludd found himself in Bridewell for a whipping for his "foul and scandalous" words against King James. Poor Passwater Sexby, a tailor of St. Sepulcher's parish, had thrown his hat in the king's face in what everyone agreed to be a deeply drunken moment; the council sent him to the Bridewell governors to be whipped sharply and publicly in the streets of London and then incarcerated. King Charles's councilors deemed Thomas Coe "so base and contemptible as he is not worthy of a proceeding in the Star Chamber," and so ordered that he merely be whipped at Bridewell.[31]

Penal whipping, then, proliferated over the sixteenth and early seventeenth centuries for petty theft, vagrancy, and related offenses, transgressions thought to be rooted in the sin of idleness and tending to be associated most often—though not formally or exclusively—with the poor. Whipping also became linked with poverty through its use for offenders unable to pay fines, and through its close association with incarceration in the bridewells. The more frequent turn to the whip prompted some concern and opposition, as one might expect. While people in the streets

[29] These institutions formally merged with local goals in 1865. For their various permutations, see Joanna Innes, "Prisons for the Poor: English Bridewells, 1555–1800," in *Labour, Law and Crime: An Historical Perspective*, ed. Francis G. Snyder and Douglas Hay (London, 1987), 42–122. On the London Bridewell, see also Ian W. Archer, *The Pursuit of Stability: Social Relations in Elizabethan London* (Cambridge, 1991); Paul Griffiths, *Lost Londons: Change, Crime, and Control in the Capital City, 1550–1660* (Cambridge, 2008); and Faramerz Dabhoiwala, "Summary Justice in Early Modern London," *English Historical Review* 121, no. 492 (2006): 796–822.

[30] Bethlem Museum of the Mind, Beckenham, Bethlem Royal Hospital Archives, Court Books of the Governors of Bridewell and Bethlem Hospitals, BCB-01, Bridewell Minute Book, fols. 2, 6, 10, 10d, 12d, http://archives.museumofthemind.org.uk/BCB.htm.

[31] The National Archives, Kew (hereafter TNA), SP 14/108, fol. 58 (Mason); TNA, PC 2/29, fol. 393 (Sexby); TNA, PC 2/30, fols. 27 (Coe), 260 (Fludd).

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offered their own resistance, forceful expressions of concern also came from men of means and status, directed at ensuring that men of their sort not be degraded by the "servile" punishment of the lash. Though lawmakers might have thought that biblical and penitential precedents warranted the whip for the sins of the poor, they invoked classical allusions to the whip's degenerative effects on the free to protest its use against their own kind.

OPPOSITION

Court records indicate some local opposition to whipping, at least in some instances or by people called upon to inflict the punishment, though they give no direct evidence of the reasons for that resistance. According to a later relating of a Norfolk case, for example, a constable found himself in trouble for failing to whip a man properly. He had been told to whip the vagrant until blood ran. Perhaps thinking he had found a loophole in his orders, he smeared the whip with the blood of a rabbit and lightly struck the person before him. When the animal's blood dripped down the man's back, the constable deemed his orders sufficiently obeyed. An assize judge thought otherwise and had the constable fined.[32] In October 1608, the constable Ralph Cowley "obstinately" refused to whip rogues sent to him by another official. In the same month, justices meeting at Malton called to answer five men who had failed to whip a vagrant when told to do so by the local constable. The first two, Thomas Stowpe and William Fletcher, simply refused. The other three affected to comply, but when the constable turned his back, they apparently just struck their "rods against the posts in the street instead of the rogue, to give colour as though they had cruelly beaten him, whereas afterwards upon view there appeared no show of any stroke upon his back or shoulders."[33] It is noteworthy that none of these men had any formal office but were expected to comply with the constable, to be agents of the law not just as complainants, witnesses, or jurors but to wield the whip. It is also noteworthy that, in these cases, they refused.

While some evidently objected to at least some instances of the punishment's use or to orders that they themselves inflict it, more forcefully expressed and better recorded concerns came from men of the sort who sat in Parliament: they wanted to ensure that gentlemen not be at risk of whipping, a punishment they deemed "servile" or "slavish." After all, as the list of offenses for which whipping could be imposed grew longer, it risked encompassing some that might not be limited largely to the poor. The linking of status and liability to whipping emerged clearly in parliamentary debates in 1593, on a proposed measure to expand upon the statute that had allowed "bastard bearers" to be whipped with a statement that mandated the whipping of the "bastard getters" too. Much debate greeted a proposal that men who fathered but refused to support illegitimate children be subject to stocking, whipping, or imprisonment at the discretion of justices of the peace. Some members

[32] Durham University Library (hereafter DUL), Add. MS 329, fols. 127–31. This set of Star Chamber reports exists in multiple manuscript copies, with some variations, including, for example, DUL, MSP 65; Folger Shakespeare Library, Vb. 70; and British Library (hereafter BL), Lansdowne MS 620 and Add. MS 48057. Ian Williams is producing an edition for the Selden Society.

[33] *North Riding Quarter Sessions*, 1:133, 136.

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of Parliament objected that a malicious justice, or one acting upon the word of a malicious woman, might have an innocent man whipped. Reports of the debate are brief but convey echoes of the Roman law's status distinctions that reserved some punishments for the enslaved. According to the contemporary reporter, one of the "chief reasons" raised against the provision was that "the punishment [was] thought slavish and not to be inflicted upon a liberal man."[34] Even if a man did father and abandon a bastard, if he was a gentleman, he ought not to be subject to the lash. As one member of Parliament reportedly said, if the proviso stood, whipping "might chance upon gentlemen or men of quality, whom it were not fit to put to such a shame."[35] The proposed amendment did not pass.

All of these concerns came together in a set of dramatic episodes in the spring months of 1621. As the Spanish ambassador, the Count of Gondomar, traveled through London in a litter one day in April, an apprentice observed loudly, "There goes the devil in a dungcart."[36] Reproached by one of the Spanish party, the apprentice responded with blows. A tussle ensued. Gondomar appealed to the mayor of London, who ordered the apprentice and his two companions whipped through the streets. This taming did not go as planned, however: London crowds protested the whipping and rescued the young men. According to one reporter, a group of some three hundred of all sorts freed the men from the cart; the authorities acquiesced when rumors reached them of hundreds more protesters coming to join the crowd. Gondomar then appealed to King James, who appeared in person at the London Guildhall. His council had already written to demand a sharp whipping, "to the terror of such base and rascally lewd people as shall have the boldness hereafter to attempt the like." James now threatened both to revoke the City's charter and to garrison forces within its borders to impose order. The whipping resumed, and with vigor: one of the young men died.[37] True, some of the murmuring at the sentence and opposition of the crowd might have grown from a sense that Englishmen ought not to be whipped for insulting Spaniards rather than any discomfort with whipping itself, but London crowds objected to the punishment being used on other occasions too.[38]

Some members of Parliament may have had this episode in mind a few weeks later, when many in the Commons turned rabidly on Edward Floyd. An elder gentleman and justice of the peace, Floyd was also a Catholic, and he stood accused of insulting the king's daughter, Elizabeth, and her husband, the Elector Palatine. Floyd had injudiciously celebrated the overthrow of their Protestant forces at the Battle of White Mountain—a defeat that caused widespread dismay in England—with words deemed a grievous affront to the couple's status. Using terms of address that one might employ for people of middling means, he reportedly said that "Goodman Palsgrave and Goodwife Palsgrave were now turned out of doors." Members of the

[34] For such distinctions, see Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford, 1970), 139–47.

[35] T. E. Hartley, ed., *Proceedings in the Parliaments of Elizabeth I*, 3 vols. (Leicester, 1981–95), 3:150.

[36] BL, Harley MS 389, fols. 48d–49, 61.

[37] *Commons Debates, 1621*, ed. W. Notestein, R. H. Relf, and H. Simpson, 7 vols. (New Haven, 1935), 6:118–19. See also TNA, SP 14/120, fol. 111; TNA, SP 14/128, fol. 95; J. V. Lyle, ed. Acts of the Privy Council, vol. 37 (1619–21) (London, 1930), 373–74.

[38] See, for example, Archer, *Pursuit*, 4.

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House sought to make him suffer. Several called for Floyd to be whipped; one wanted him whipped while wearing all his Catholic beads; another wanted the whipping done in twelve stages and to have him fed a bead at each; some wanted him to have "as many stripes as beads." One suggested that Floyd be struck once for every year of the princess's life. Yet another urged that hot bacon fat be dripped on him during the whipping. One wanted him gagged through the flogging so he could not cry out for pity. Suggestions that Floyd be pilloried, imprisoned, bored through the tongue, and such also shot through the discussion.[39]

Some members objected. Some urged that they not bring Floyd's religion and rosary beads into any punishment for fear of making the man a martyr; they did not object to his Catholicism, they said, but to his intolerably insulting words. Some pointed out that they had no precedent to punish anyone who was not a member of the House. A few observed that they had no sworn evidence or a proper trial upon which to act. But others queried whether, as a gentleman, Floyd ought to be whipped at all. Again, some members echoed humanist and classical texts in their injunctions that the lash ought not to be used on the liberal or generous man, for fear of making him something other than he was. Whipping was "for slaves, not for gentlemen," Edward Alford interjected, "And let us take heed what precedents we make; we know not how far it may be extended against us and our posterity." Edwin Sandys concurred that it was "improper to whip a gentleman." Perhaps, then, the solution was to have Floyd first deprived of his status, one MP suggested.[40] Given the very valid concerns about jurisdiction in the Commons, the matter went to the House of Lords. There, too, members advocated whipping; there, too, some objected that while this man merited much punishment, gentlemen ought not to suffer such a degradation.[41] Fine him beyond his ability to pay, yes; declare him infamous, certainly; imprison him for life, indeed; but whip him, no. The Lords eventually did order Floyd whipped, but in the end the king seems to have remitted this part of the punishment, reportedly upon the petition of Prince Charles.[42]

Notably, even as the Lords discussed Floyd's punishment, they also turned to a measure to ensure that in future no gentleman would risk such a sanction for most any crime. The journal of the House of Lords records an order on 26 May that "hereafter no gentleman shall be whipped, but in case where he shall abuse the persons of the king, the queen, or their issue, with base or unfit terms." Two days later, the Lords read a bill "for the exempting the gentry of this realm from the servile punishment of whipping." Unusually, they did all three readings on the same day, approving the bill quickly and sending it to be engrossed for discussion in the Commons.[43]

No copy of this bill seems to survive, unfortunately. Save for the tax bills, nothing from the 1621 Parliament ultimately received the royal assent and passed into law. Discussions of the 1621 Parliament have understandably focused on the high political narrative of its revival of parliamentary judicature and its culmination with the

[39] *Commons Debates, 1621*, 5:128, 360, 369; quotations from *Commons Debates, 1621*, 6:120–21; *Journal of the House of Commons*, vol. 1 (1547–1629) (London, 1802), 601–2.

[40] *Commons Debates, 1621*, vol. 5, 129.

[41] *Journal of the House of Lords*, vol. 3 (1620–1628) (London, 1767–1830), 119, 124, 134.

[42] Chamberlain's letters suggest that Floyd was whipped after a delay, but another newsletter writer indicated otherwise: TNA, SP 14/121, fol. 150; BL, Harley MS 389, fols. 88d, 92.

[43] *Journal of the House of Lords*, 3:135, 137 (26, 28, 30 May).

Commons' formal protestation of their right to free speech, all debated with the sounds of continental war drums drawing nearer. But one might pause to consider its "law and order" agenda, too, and what members' discussions of more mundane criminal matters say of the rule of law at this juncture. This Parliament met in the context of severe economic depression, a "decay of trade" marked by a perplexing and dangerous scarcity of coinage that resulted in widespread unemployment in the cloth industry and that would be accompanied by harvest failure too.[44] Its members discussed reform of the Fleet Prison and how best to protect subjects from wrongful imprisonment—alongside measures to allow rogues more easily and speedily to be sent to bridewells by one justice of the peace rather than waiting for two to concur. Another bill also discussed whipping; asserting that petty larceny was "for the most part committed by poor, needy, and distressed persons" who could not pay fines or cover the costs of imprisonment, it sought to mandate corporal punishment such as whipping or stocking instead, upon summary conviction by justices of the peace rather than awaiting jury trials.[45] Another bill sought to allow women convicted of small thefts and other petty felonies to be whipped instead of executed, on a par with the way men could claim benefit of clergy.[46] Members evidently saw uses for the lash, just not for their own kind. Concerns about status also arose elsewhere in the session, with the judges providing the Lords a clear affirmation of peers' exemption from regular common law criminal trials—"in all cases, the lords are to be tried by their peers"—there was also an intense revival of debates over precedence between English peers and their Irish and Scottish counterparts.[47]

But while these measures reveal contemporary concerns, they did not become law. The bill for "exempting the gentry of this realm from the servile punishment of whipping" died along with most bills discussed in this parliamentary session, set aside in the king's haste to bring the fractious meeting to an end. Debates over the proper uses of the lash would be heard instead in the other "great and high court," the court of Star Chamber.[48] The judges in Star Chamber included the whip among the panoply of their instruments of discipline but also set themselves the task of policing its use by others. Typically, they agreed that that lash ought not to be used on people of high status, and only with care more generally; yet they themselves wielded it in some cases in ways that a later Parliament would deem wholly unacceptable.

[44] On the 1621 Parliament and its context, see Conrad Russell, *Parliaments and English Politics, 1621–1629* (Oxford, 1979), at 85.

[45] Parliamentary Archives, HL/PO/JO/1/17A, draft of "An Act Concerning Petit Larceny and the Manner of Punishment of the Offenders Therein." Note, too, that someone had prepared a draft bill to have people convicted of petty larceny sentenced to serve as slaves on public works, though it was probably not put before the House. TNA, SP 49/119, fols. 132, 131; *Commons Debates, 1621*, vol. 7, 54–55; see also K. J. Kesselring, "A Proposal to Enslave Petty Offenders (1621)," Legal History Miscellany, January 10, 2017, https://legalhistorymiscellany.com/2017/01/10/a-proposal-to-enslave-petty-offenders-1621/.

[46] A similar measure did pass in the 1623–24 Parliament: 21 James I c. 6.

[47] TNA, SP 14/119 fol. 263; Elizabeth Read Foster, *The House of Lords, 1603–1649* (Chapel Hill, 1983), quotation at 73; Brendan Kane, *The Politics and Culture of Honour in Britain and Ireland, 1541–1641* (Cambridge, 2010), 210–12.

[48] For the quotation and background on the court, see William Hudson, "A Treatise of the Court of Star Chamber," in *Collectanea Juridica*, ed. Francis Hargrave (London, 1792), 2.

STAR CHAMBER

Star Chamber came to order whipping for an amorphous array of offenses and a wider social range of offenders than did other courts, even while endeavoring to set limits on its use by other authorities. We might plausibly see Star Chamber as another sixteenth-century innovation alongside whipping and the bridewells, though one with a shorter lifespan. It had medieval roots in the judicial activity of the king's council, but its development as a criminal court with a distinct identity dates from the reformist innovations of Cardinal Wolsey as lord chancellor in the early 1500s and then the development of distinct registers and agendas for a remodeled executive privy council and conciliar court from 1540.[49] Star Chamber's judges included both the privy councilors and the professional justices of the central common law courts. Together, they determined cases without juries. They could more readily call the great and the mighty to account than could common law courts; most notably, the immunities of peers to regular common law criminal trials did not extend to Star Chamber. The privy councilors and justices used their time in this court to sanction elite offenders as well as the low. They heard complaints about misdeeds that had no firm definition at common law. Unusually for a court with criminal jurisdiction, they could award compensation for damage done to a plaintiff. Infamously, they also had the freedom to craft any sentences short of death that they deemed best suited to the offenses and offenders before them—a freedom that eventually contributed to the court's demise.

The order and decree books for Star Chamber disappeared after the court's abolition in 1641, meaning that we have far too little information on the punishments it imposed, but we can find instances described in contemporary reports on cases or notes from its now missing registers. Some such cases show a sense that whipping was suitable for the poor, if not directly and explicitly because of their status, then indirectly, because they could not afford to pay fines. When fiddlers from Ware and Staines found themselves in trouble for singing rude songs that mocked the Duke of Buckingham, the court fined each of the offenders the impossible sum of £500 as an example to others, "not that it was expected that they, being poor people, could pay any of it." In practice, according to the contemporary trial reporter, "corporal punishment was more fitting" for men of their means, so the judges ordered the fiddlers to be pilloried and whipped in Cheapside and again in their home villages.[50] In discussions after another case early in 1628, Lord Keeper Coventry observed that if a plaintiff proved too poor to pay costs taxed against him, he would not be discharged unless first whipped.[51] Whipping may have been thought especially appropriate not just for poor women but also for married women who could not pay a fine without tapping into their husbands' assets. In a

[49] John Guy, *The Cardinal's Court: The Impact of Thomas Wolsey in Star Chamber* (Hassocks, 1977) and John Guy, *The Court of Star Chamber and Its Records to the Reign of Elizabeth I* (London, 1985). See also works by T. G. Barnes, including "A Cheshire Seductress, Precedent, and a 'Sore Blow' to Star Chamber," in *On the Laws and Customs of England*, ed. Morris S. Arnold et al. (Chapel Hill, 1981), esp. 361–62 for a note on damages.

[50] DUL, Add. MS 329, fols. 158–89. For this case, see also Alastair Bellany, "Singing Libel in Early Stuart England: The Case of the Staines Fiddlers, 1627," *Huntington Library Quarterly* 69, no. 1 (2006): 177–93.

[51] DUL, Add. MS 329, fol. 198.

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1628 case, the judges sentenced Joan Faulk to pay a fine, but observing that she had married since her offense and thus no longer had money of her own, they stipulated that the fine only be levied against her upon her husband's death. In the meantime, she could be whipped.[52]

Yet the reports and case notes also show Star Chamber using whipping for a wider variety of misdeeds than those typically confined to the poor. Under Queen Mary, the court sentenced two men to be scourged for criticizing justices of the peace while sitting in court.[53] Conspiracy to kill was not yet a common-law crime, so the men who plotted to murder Baptist Bassano, an Italian musician in Queen Elizabeth's court, found themselves before Star Chamber. Their punishments included being whipped at a cart's tail from the scene of the intended murder to the doors of Bridewell, where they were to be kept for life; one of the men was to be whipped again four times a year so long as he lived.[54] In a 1594 case that led to a particularly creative bit of sentencing, the privy councilors and judges sitting in Star Chamber deemed Edward Owen responsible for the death of his eighty-four-year-old grandfather; Owen had beaten him brutally with a crab-tree cudgel but could not be found guilty of criminal homicide as the death happened too long after the beating to count. They ordered Owen fined and imprisoned but also that he be whipped publicly at an upcoming fair; they wanted him stripped naked and flogged before a portrait of his dead grandfather, "which must be as like him as may be." (Ultimately, this latter part of the punishment was pardoned, deemed inappropriate for a man of Owen's gentle status.[55])

Another set of reports relates a case in which the court fined the plaintiff £20 "for the better government of his wife," a woman the judges deemed "clamorous and impudent." For good measure, they ordered that she be whipped, "if the precedent of the Court would warrant this"—the hesitation arising as she had not actually been a party to the suit.[56] Judges imposed whippings in several cases of libel against high officers of state. Both Robert King, a solicitor, and one Smith, "a peasant and a boy," were to be whipped for spreading false news about the lord admiral, for example.[57] The judges sentenced one Pemlie, a minister in Kent, to a whipping for libelous words against the bishops, a punishment to be imposed only after he had been degraded from the ministry.[58] In another libel case, nine men were charged with dispersing a libel against aldermen of Gloucester and their wives, persons of "honest

[52] *Historical Collections of Private Passages of State*, ed. John Rushworth, 8 vols. (London, 1721), 3: appendix, 18–19.

[53] *Star Chamber Reports: Harley MS 2143*, ed. K. J. Kesselring (Kew, 2018), no. 60.

[54] Kesselring, *Star Chamber Reports*, no. 342.

[55] Kesselring, no. 905. For details of this case, see the pleadings and proofs in TNA, STAC 5/A45/14 and TNA, STAC 5/A21/40. For subsequent moderation of the punishment, see C66/1458, mm. 36–37; and *Calendar of the Manuscripts of the Most Hon. the Marquis of Salisbury* [. . .], vol. 5, ed. R. A. Roberts (London, 1883–), 521; and *Calendar of State Papers, Domestic Series, of the Reigns of Edward VI, Mary, Elizabeth and James I. 1547–[1625]* [. . .], vol. 4 (1595–1597), ed. M. A. E. Green (London, 1867), 439. According to a later accusation against the clerk of the court, it would seem, too, that Owen bribed the clerk £5 to stay the attachment against him, to give him time to get away and to petition for the pardon. See BL, Lansdowne 86, no. 42.

[56] John Hawarde and W. Paley Baildon, *Les reportes del cases in Camera Stellata, 1593 to 1609: From the Original Ms. of John Hawarde* [. . .] ([London, 1894).

[57] Hawarde and Baildon, *Les reportes*, 39–40 and 44; see also 147.

[58] Hawarde and Baildon, 341, 343.

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reputation, good fame and credit, and great value." Star Chamber's judges found all the libelers guilty and gave them sentences that included whipping, though they excused from the corporal punishment two of the defendants, both young and gentlemen "born and bred."[59] In this batch of reports on late Elizabethan and early Jacobean cases, the court sentenced a few other defendants to whippings for assault, forged bonds, and extortion as well, along with two men who had tricked young gentlemen to sign over much of their net worth; they were "to be whipped all through the city in the four terms of the year."[60] The judges in Star Chamber, then, used whipping for a range of misdeeds less explicitly linked to poverty than the cases before common law courts but in their own way also concerned with issues of hierarchy and privilege.

Star Chamber judges also policed others' use of the whip. Under its remit to ensure the just enforcement of law, the court heard complaints such as that of Mary Corie, who petitioned for protection from Hugh Ackland, a local justice. She accused him of having abused his office to compel her to abandon her assertions that she was married to James Sparrow, a man whom Ackland wanted to marry a pregnant housemaid in his employ. When Corie refused to drop her claims on Sparrow, Ackland had her thrown in the local prison, then ordered the gaoler to whip her naked body. According to Corie's petition, the gaoler used a whip with "26 or 25 thongs at the least, with knots in the ends," and beat her in such a "barbarous, savage, and exorbitant manner" that her body "was not only altogether gored and embrued with blood but all the chamber wherein their tyranny was exercised ran mainly and most piteously with your subject's blood." Her complaint noted that the treatment, for a time, "took away and bereaved your said subject of all her senses and memory, at which time nothing was to be seen in your subject's body but furrows of stripes and blood falling from her body like showers of rain." It left her "ghostlike, ghastly, and *plurima mortis imago*" (in many ways the image of death).[61] We have no record of the judges' decision in this case, but in others, they did side with complainants and order agents of the law to be punished for abusing their office and sometimes also to pay compensation for the damage inflicted.

In one notorious case, the court punished John Catcher and Thomas Skinner, aldermen and former sheriffs of London, along with a Bridewell official, for having had two women whipped upon slender evidence without a trial. On 18 March 1588, the sheriffs went to Jane Newman's home, which they said was reported to be a brothel, and there arrested both Newman and Jane Neville. They took the women to the house of correction, stripped them to the waist, and had them soundly whipped. Catcher, reportedly, observed the proceedings with a smile on his face. Whipping women of "lewd conversation" would not have been the least bit unusual, but these women had gentle status and good connections, whatever misdeeds they may have done. A note came from the lieutenant of the Tower to inform the sheriffs that Jane Neville was married to one Edmund, a claimant to the Latimer barony (though then incarcerated in the Tower for his recusancy), but the note arrived either too late or simply to no avail. Neville's maid, Jane Hales,

[59] Hawarde and Baildon, 372–73.
[60] Hawarde and Baildon, 55, 104, 124, 195, 258.
[61] TNA, STAC 8/103/1.

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had to watch the whipping and was told that she could expect the same unless she testified against her mistress. Upon the women's complaint against Catcher and Skinner, the attorney general brought their case to Star Chamber. As the court record observed, the two women were descended of good houses and married to men who were esquires or better, and yet they had been taken to "a prison ordained for persons of most vile conversation and base condition" and there beaten with whips made of four knotted whipcords. Quite side from the indignity to women of their station and the injustice of whipping without proof of misbehavior, Neville had been pregnant; she went into early delivery, and the infant died shortly after birth. The judges decided that Skinner and Catcher had acted unjustly and from malice. In making their decision, the judges and privy councilors referred to Magna Carta, opining that it protected individuals from being punished without due process.[62] Any such whipping ought to happen after a trial, they said. They ordered the aldermen to be imprisoned, to pay substantial fines, and to ask forgiveness from Neville and Newman publicly on three occasions, in three different locations. As a later report noted, the women were persons of "quality and birth . . . so not worthy of punishment." Even though Neville and Newman were not formally parties to the suit, the judges also ordered the aldermen to pay the women £600 to compensate for the damage done.[63]

Some other victims also managed to get a modicum of justice and reparation through Star Chamber. One widely circulated set of reports described eighty-six cases in the court, from 1625 to 1627, several dealing with disputes over the propriety of whipping.[64] The anonymous reporter's unusually fulsome notes of the judges' deliberations speak to concerns about due process, a process inflected by status—but they perhaps also reflect a somewhat broadened or broadening sense of the status of people who ought not to be subject to the whip, given the ways in which a whipping could degrade and damage the recipient.

In a case heard in the summer of 1627, one Faucett complained that Grice, a justice of the peace, had sent him to a house of correction and had him whipped without cause. Grice had issued a warrant for Faucett's wife to appear before him, but Faucett refused to let her go. He went instead and behaved "saucily," in both word and deed: he put on his hat in the justice's presence and argued that Grice issued warrants not for love of justice but simply to make money. At that, Grice sent him to the local house of correction with an order that the governor whip him soundly. And he did: Faucett suffered twenty strong lashes for his temerity. According to the report of the case as heard in Star Chamber, Lord Keeper Coventry allowed that Faucett was a "common drunkard and sabbath breaker" but said that his sauciness was no grounds for the whipping. With perhaps a misguided sense of his court's history, he noted that while Star Chamber had a higher power than any justice of the peace, it had never upon so slight a cause as this had a person whipped. Thomas Richardson, chief justice of the Common Pleas, castigated Grice for his act of oppression, "which is

[62] See BL, Harley MS 358, fol. 201v, discussed and cited by John Baker in *The Reinvention of Magna Carta, 1216–1616* (Cambridge, 2017), 266–69.

[63] TNA, STAC 5/N15/10; BL, Add MS 48064, fols. 207–8v, which seems to be a full transcript from the lost Star Chamber order and decree books; also Harley 2143, fol. 44r, a summary of the decree. For the later report referencing the case, see DUL, Add. MS 329, fols. 148–53.

[64] DUL, Add. MS 329.

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when wrong is done to a man under colour of authority and yet against the laws." Significantly, he cited Magna Carta's famous chapter 29, noting that no freeman shall be condemned but by the lawful judgment of his peers or by the law of the land. Though this plaintiff was a poor man, Richardson said, he was free, and "whipping is for a slave." Nor was the punishment simply unfit for a free man: Richardson suggested that the whipping made Faucett less than he had been—"he thereby is destroyed," not physically but socially. Richardson acknowledged that some statutes gave justices of the peace discretion to whip on their own judgment for some matters but said that this was not one of those cases; Grice's deed showed merely "spleen and malice," and for that reason ought to be punished. They ordered Grice to pay a fine of 200 marks to the king, as well as £40 damages to Faucett, "the poor man."[65]

Another complaint heard later the same year touched on similar issues and also hearkened back to the Catcher and Skinner case. Sir Thomas Jenkinson, a Suffolk justice of the peace, ordered Susan Boyes and Grace Tubby whipped without cause. Two people who bore the women malice had brought them before Jenkinson, accusing them of being of "ill life and quality"; according to the story told about the women, they had jeered and made faces at their minister during church services. Jenkinson and his partner on the bench summarily sent the women to the house of correction for a whipping. Both became ill from the beating but when they complained locally, Jenkinson sent them back to the house of correction. It seems that they then made a complaint to Star Chamber, where the attorney general picked it up and prosecuted Jenkinson and his partner on the bench on behalf of the crown. Regarding the substance of the case, the anonymous reporter noted simply that "much was spoken of whipping, which you may find in effect set down before in Grice's case." The reporter focused on the discussion about whether or not the women could be paid compensation for the harm done to them: "It was said that the women had nothing but money and reputation wherewithal to preserve themselves, that they being poor had lost their credit and reputation by this whipping, and there was nothing left to preserve them but money, therefore damages were prayed." The judges all seemed to agree that the whipping had degraded the women such that compensation was owed, but technically they were not parties to the suit, which had been launched by the attorney general. In the end, though, the judges removed Jenkinson (although not the other justice) from office and fined him £200 and also ordered him to pay £50 damages to each of the women.[66]

However, even as the privy councilors and justices sitting in Star Chamber passed judgment on how others wielded the whip, their own use of it prompted some qualms. Indeed, they came to order the lash often enough that William Hudson, the court's chronicler and defender, worried in 1621 that "the slavish speech of whipping," not voiced in the nobler spirit of earlier times, had come to be too frequently heard in his own day.[67] In the 1630s, Star Chamber judges used the whip in ways that

[65] DUL, Add. MS 329, fols. 127–31.

[66] DUL, Add. MS 329, fols. 189–91; and Rushworth, *Historical Collections*, 3:11. See TNA, STAC 8/79/1 for the case file. For other cases, see DUL, Add. MS 329, fols. 148–53 (matching TNA, STAC 8/161/10); and Rushworth, *Historical Collections*, 3:19.

[67] Hudson, "Treatise," 36, refers to the "slavish speech of whispering," but this seems to be a transcription error on Hargrave's part. Manuscript versions (e.g., BL, Harley MS 1226) refer to whipping. See Guy,

would come back to haunt them, and that would help provoke expressions of an expanded notion of the rule of law and to whom it applied.

Alexander Leighton, a Scottish physician and cleric, found himself before the court after publishing in the Netherlands *Zion's Plea against Prelacy* (1628), an attack upon the English church hierarchy, accompanied by praise for the Duke of Buckingham's assassination and by invective against the Catholic queen. Shortly after his return to London, in 1630, Leighton faced trials in both the court of High Commission and Star Chamber. The latter sentenced him to be degraded from his status as a clergyman and then to have his ears severed, his nose slit, and his face branded with SS (for "sower of sedition"), as well as to be pilloried and whipped at both Westminster and Cheapside, and then imprisoned for life. One report of the trial indicated that the whipping was to be done only if he could not "prove himself to be a gentleman."[68] Evidently, he could not. Of his whipping, Leighton later recalled that the "censure was executed in every particular in a most cruel manner and measure." Plied with drink the night before and drunk on the day, the executioner reportedly had orders to wield the whip "with all rigour." And so he did, Leighton insisted: each of his thirty-six lashes with the triple cord "brought away the flesh, which I shall feel to my dying day."[69]

Leighton later complained of his treatment to the deeply sympathetic Long Parliament that began sitting in November 1640. He and several other men who had suffered Star Chamber punishments during the 1630s secured from Parliament reversals of their judgments and orders that the judges pay for the damage done to them. Along with some others, Henry Burton, John Bastwick, and William Prynne, three Puritans punished for their forays into oppositional print, had suffered extreme sanctions and now found themselves vindicated. So, too, did John Lilburne. The parliamentary discussions and publications about "Freeborn John" Lilburne's case reiterated the link between status and the lash but also asserted a somewhat broadened notion of the people to whom whipping ought not to apply.

As a young apprentice, Lilburne had witnessed the sufferings of Bastwick and Prynne in 1637, then helped with the printing and smuggling into England of one of Bastwick's anti-episcopal works. Arrested in turn, in 1638 he faced the Star Chamber judges on charges related to his importing of scandalous texts. For his obstreperous refusal to submit to the court's procedures, he was also accused of "insufferable disobedience." Not a man of means nor evidently of gentlemanly carriage (though he had gentry roots), Lilburne was sentenced to the full panoply of Star Chamber punishments, including a whipping at the "cart's arse" through the streets from the Fleet prison to Westminster. Unrepentant, he scattered critical pamphlets to the crowd gathered at the pillory. In *A Worke of the Beast*, a diatribe quickly sent to the press and later reissued as *A Christian Mans Triall*, he compared himself to Christ in his patient suffering of the lash while also arguing forcefully against both the cruelty and injustice of his treatment.[70]

Court of Star Chamber, 79. For another reference to the relative novelty of whipping among the court's sanctions, see Hudson, "Treatise," 224.

[68] Folger Shakespeare Library, MS X.d. 337, fol. 4d.

[69] Alexander Leighton, *An Epitome* [. . .] *of the Many and Great Troubles that Dr. Leighton Suffered* (London, 1646), 85.

[70] John Lilburne, *A Worke of the Beast* (Amsterdam, 1638); John Lilburne, *The Christian Mans Triall* (London, 1641). On Lilburne, see Michael Braddick, *The Common Freedom of the People: John Lilburne and the English Revolution* (Oxford, 2018); Pauline Gregg, *Free-Born John* (London, 2000); and works

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Late in 1640, when the Long Parliament began to sit, Lilburne and others—or their wives on their behalf—submitted petitions for redress. Star Chamber's association with the much-detested Archbishop Laud and his zealous defense of episcopacy, as well as the court's efforts to tame lawyers and to compel sheriffs to collect ship money, primed some members of Parliament for action against it.[71] They now established a special committee to investigate Star Chamber abuses. In May 1641, the Commons resolved that the sentence given against Lilburne, like the others against Leighton, Burton, Bastwick, and Prynne, had been "illegal and against the liberty of the subject, and also bloody, wicked, cruel, barbarous, and tyrannical."[72] In the meantime, bills had been introduced for "reforming of the unlawful proceedings" of Star Chamber. At the end of May, however, the committee recommended a bill to abolish the court altogether.[73] An embattled King Charles reluctantly acceded early in July to a measure that closed the court and condemned its judges for having "undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted."[74]

Historians at pains to defend the court from the admittedly caricatured charges of absolute tyranny leveled against it in intervening years have argued that the act's critiques of the court were unfounded. In response to the accusation that Star Chamber imposed cruel and excessive punishments, for example, one has noted that the court only ordered physical sanctions in a minority of the cases it heard and that other courts used similar penalties.[75] True, but other courts tended not to impose such punishments for the sorts of offenses for which men of means might find themselves called to account or on the bodies of respectable men of some status. As Prynne had warned from his pillory, "You see they spare none of what society or calling soever, none are exempted . . . Gentlemen, look to yourselves."[76]

Certainly, the whipping of men such as Leighton and Lilburne prompted much opprobrium. When Lilburne returned to Parliament in 1645 and 1646 to pursue his case for damages, he brought with him two lawyers, John Cook and John

by Rachel Foxley, for example, *The Levellers: Radical Political Thought in the English Revolution* (Manchester, 2013).

[71] Henry E. I. Phillips, "The Last Years of the Court of Star Chamber," *Transactions of the Royal Historical Society*, 4th series, no. 21 (1939): 101–31. See also W. J. Jones, *Politics and the Bench: The Judges and the Origins of the English Civil War* (London, 1971), 104–6. In his discussion of Star Chamber's demise, Ryan Patrick Alford in "The Star Chamber and the Regulation of the Legal Profession, 1570–1640," *American Journal of Legal History* 51, no. 4 (2011): 639–726, emphasizes resistance to the court's expanding, expansive jurisdiction over the legal profession.

[72] *Journal of the House of Commons*, vol. 2 (1640–1643) (London, 1802), 134.

[73] *Journal of the House of Commons*, 2:113, 115, 162.

[74] 16 Charles I, c. 10.

[75] Daniel L. Vande Zande, "Coercive Power and the Demise of the Star Chamber," *American Journal of Legal History* 50, no. 3 (2010): 340–41, citing Phillips, "The Last Years of the Court of Star Chamber," 118, which notes that of 236 cases heard in the court's latter years, only nineteen involved corporal punishment. See also Thomas G. Barnes, "Star Chamber Mythology," *American Journal of Legal History* 5, no. 1 (1961): 1–11.

[76] *A Briefe Relation of Certain Speciall and Most Materiall Passages and Speeches in the Starre-Chamber* [. . .] *at the Censure of Those Three Worthy Gentlemen, Dr Bastwicke, Mr Burton, and Mr Prynne* (Amsterdam, 1637), 21. On this point, see also J. P. Kenyon, *The Stuart Constitution, 1603–1688: Documents and Commentary*, 2nd ed. (Cambridge, 1986), 118.

Bradshaw—men who went on to become, respectively, the solicitor general and the president of the high court that tried King Charles in 1649. Cook argued that as "a most painful and shameful punishment, flagellations and scourgings [were] for slaves and incorrigible rogues." He raised then, too, the subsequently famous (if elusive) case of 1569, in which a merchant called Cartwright was reportedly tried for scourging a Russian he claimed as his slave, only to have the judges admonish that England's air was too pure to admit slavery. Whipping was fit only for slaves, and England had no slaves, Cook maintained. He argued that Star Chamber itself had often resolved that gentlemen, at least, were not to be whipped for any offense, and that Lilburne's ancestors had been of this status. Cook critiqued the excessiveness of Lilburne's whipping, noting that the Romans never ordered more than forty stripes, a limit seen in Scripture too. Whipping of the sort suffered by Lilburne "was never read of amongst the Assyrians, Persians, Grecians, or Romans." Furthermore, he noted, the problems with whipping went beyond the pain to include its threat to degrade and diminish the person suffering that pain. The pillory was "most terrible to a generous nature." The gagging was "unmanly and barbarous . . . to be exercised on beasts, not men." And "by whipping, they endeavoured to make him a rogue, or a slave." The Lords agreed. Although Lilburne would have difficulty collecting the funds, they ordered £2,000 in reparations to be paid to him from the estates of his judges. They denounced the punishment as "illegal and most unjust, against the liberty of the subject and law of the land, and Magna Carta."[77]

CONCLUSION

Whipping reveals with particular clarity the hierarchical values that shaped early modern English law and hints at their contestation. In practice, of course, in an intensely hierarchical age, we expect to see unequal treatment. But even at the level of theory and legislation, whipping manifested hierarchical assumptions about what was or was not just for people of differing status. The law's privileging of status emerged not from a simple failure of justice, a disjunction between rhetoric and reality, but from a different notion of how justice applied to individuals. Or, to put it another way, while justice consisted of "giving to each his due," in a society premised on hierarchies of difference, different people had different dues. The late sixteenth- and early seventeenth-century English did recognize a "rule of law," but one that did not yet enshrine equal treatment of all among its legitimizing claims. As E. P. Thompson observed, the notion of a rule of law that embraced equal

[77] Lilburne, *A True Relation of* [. . .] *Lilburnes Sufferings* (London, 1646), 6–11. (A summary account of this presentation appears in John Rushworth, *Historical Collections*, 2:468–69, but misdates it to 1640); see Edward Vallance, "Corrigendum," *History Workshop Journal*, no. 75 (2013): 306. Cook's invocation of Cartwright's Case came up in Somerset's Case (1772), as evidence that English common law did not allow slavery on English soil; see John Cook, *Vindication of the Professors and Profession of Law* (London, 1646), 7. Subsequent commentators on this 1646 invocation of Cartwright have often been mistaken on a number of points—misdating it or misstating the venue—and have suggested that it was only used then to speak to the injustice of whipping. That was true in this particular instance, but Cook did raise the case in another discussion, as a precedent for personal freedom more generally. John Cook, *Vindication of the Professors and Profession of Law* (London, 1646), 71. For discussion of this point, see K. J. Kesselring, "Slavery and Cartwright's Case before Somerset," Legal History Miscellany, October 10, 2018, https://legalhistorymiscellany.com/2018/10/10/slavery-and-cartwrights-case-before-somerset/.

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treatment of all as a defining element of its self-justifying rhetoric—however tenuous its practice—emerged ascendant only after the revolutions of the seventeenth century.[78]

We can find earlier roots, of course. We do see earlier invocations of equal treatment before the law. Lilburne and his fellow Levellers, for example, gave voice to some of these expectations, though often with a focus on holding the highborn to the same laws as applied to the low. In the *Agreement of the People*, for example, first issued in 1647 as a proposed constitution for the troubled country, they asked "that in all laws made or to be made, every person may be found alike; and that no tenure, estate, charter, degree, birth or place do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected."[79]

With judicial whipping, we see something a little different unfold. The aristocratic elite would not be made subject to its pains, but a slightly larger group would lay claim to similar protections. Judicial whipping had become common in early modern England, but as it spread, so too did complaints about its use. Some of these complaints sought to make it a touch less "common." Members of Parliament and judges insisted that gentlemen could not be whipped. They may well have drawn upon their classical learning to insist that corporal punishments ought not to apply to men of their status, but early Roman distinctions had drawn the line between freemen and slaves, not between aristocrats and commoners.[80] The notion that whipping was "slavish" and a means of inculcating servility had ancient intellectual roots but must have taken on a special resonance in an age when some English people were being enslaved in the Mediterranean or forced into bonded servitude across the Atlantic, even while others were busy enslaving North Americans and growing numbers of Africans in an increasingly racialized system.[81] In mid-seventeenth-century England, at least, more people claimed the privileges of freemen. Whipping continued to be used by the courts for many years after the demise of Star Chamber and Lilburne's vindication, but with a somewhat expanded notion of those to whom it should not typically apply.

Quakers and others of the religious dissenters who emerged in the revolutionary years helped press the point. In 1659, for example, Samuel Curtis lamented the sufferings unjustly inflicted upon people of God, whipped as vagabonds despite being "sufficient men."[82] In the same year, Edward Burrough echoed his complaint, noting that some of his fellow Quakers had been cruelly whipped like vagrants,

[78] E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London, 1975), 258–69. For responses to Thompson, see the discussion and citations in Daniel H. Cole, "'An Unqualified Human Good': E. P. Thompson and the Rule of Law," *Journal of Law and Society* 28, no. 2 (2001): 177–203.

[79] *An Agreement of the People of England* (London, 1649), n.p.

[80] Geltner, *Flogging*, 42–43; Garnsey, *Social Status*, 136–47. In later years, *humiliores* did become subject to whipping, but the close association with slave status seems to have persisted.

[81] See, for example, Susan Dwyer Amussen, *Caribbean Exchanges: Slavery and the Transformation of English Society, 1640–1700* (Chapel Hill, 2008), which offers an insightful discussion of the ways that English slaveholding abroad became a source of social and cultural change within England, even by the mid-seventeenth century. See also Guasco, *Slaves and Englishmen*; Linda Colley, *Captives: Britain, Empire, and the World, 1600–1850* (London, 2002); John Donoghue, *Fire under the Ashes: An Atlantic History of the English Revolution* (Chicago, 2013).

[82] Samuel Curtis, *The Lamentable Sufferings of the Church of God in Dorset-shire and the persecution there, whopping sufficient men of their own county as vagabonds* (London, 1659), title page and 2.

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despite "many of them being sufficient and considerable men and women." They suffered "shameful whippings" even though sometimes "men of considerable estates."[83] George Fox, too, included in his litany of injustices committed by unchristian magistrates that they "whip men of three or fourscore pounds a year as vagrants."[84] The same early modern demographic and economic upheavals that led to so much vagrancy, and to legal innovations to suppress it, led as well to more of the middling sort distancing themselves from their poorer neighbors and laying claim to the privileges of their betters, in law as in other areas. The religious and political revolutions of the seventeenth century played their parts here too.

Chief Justice Jeffreys's "bloody assizes" in the aftermath of Monmouth's failed rebellion in 1685 became notorious not just for the speed and number of the many hangings but also for the whipping of "good, honest, and sufficient persons."[85] Jeffreys also secured some sympathy for the widely despised perjurer and clergyman Titus Oates when he sentenced Oates to be degraded from his status and then repeatedly whipped. Oates's lies about a "popish plot" had contributed to the judicial murders of some nineteen Catholics, but he remained unrepentant. Although Parliament did not accede to Oates's request in the midst of the Revolution of 1688 to have his sentence overturned, some members dissented: "It was illegal, cruel, and of dangerous example that a freeman should be whipped in such a barbarous manner." And they did reverse a similar judgment against the Reverend Samuel Johnson, also subjected to an "illegal and cruel" set of punishments that included defrocking and whipping for seditious libel, a punishment thought to be inappropriate for a man of his status and also not authorized by statute. It seems that Jeffreys's actions prompted members of Parliament to enshrine the famous declaration against "cruel and unusual" punishments in the Bill of Rights.[86] Whipping, like other punishments, was to be fixed to particular crimes as set down by law.

Even thereafter, the occasional "good, honest, and sufficient person" sometimes faced the lash, but the sense does seem to have taken firmer hold that judicial whipping was only for people of low status—or at least to be limited by law to offenses typically associated with the insubordinate poor. For seditious libel, for example, fines and imprisonment became the standard punishments rather than the lash.[87] But for petty theft and vagrancy, judicial whipping continued. While the

[83] Edward Burrough, *A Declaration of the Present Sufferings of Above 140 persons of the People of God* (London, 1659), 17, 24.

[84] George Fox, *To the Councill of Officers of the Armie and the Heads of the Nation* (London, 1659), 4.

[85] James Bent, *The Bloody Assizes* (London, 1689), 50.

[86] *Journal of the House of Commons*, vol. 10 (1688–1693) (London, 1802), 247; *The Tryals, Convictions and Sentence of Titus Oates* (London, 1685). See Anthony Granucci, "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning," *California Law Review* 57, no. 4 (1969): 852–60; and Lois Schwoerer, *The Declaration of Rights, 1689* (Baltimore, 1981), 92–94. See also *A Letter to a Gentleman at Brussels* (Windsor, 1688), 7, which noted that the whipping of clergymen, "who can never be deemed vagabonds and slaves in a nation where they have a liberal education while young and reverence and maintenance afterwards . . . stirred the blood of all English hearts" and prompted fears that "the best commoner in England" might also thus fall under the lash.

[87] See David Cressy, *Dangerous Talk: Scandalous, Seditious, and Treasonable Speech in Pre-Modern England* (Oxford, 2010), chapter 11; and Philip Harling, "The Law of Libel and the Limits of Repression, 1790–1832," *Historical Journal* 44, no. 1 (2001): 107–34. In one of the more famous cases of the post-1790 crackdown, William Cobbett was punished with fines and imprisonment for a critique of flogging in the military that authorities deemed an incitement to mutiny (127).

discretionary justice of Star Chamber had ended, that of justices of the peace in the localities survived. When John Locke argued against use of the lash in educating sons of the elite, he echoed a widespread belief, also with roots in classical learning, with his warning that a "slavish discipline makes a slavish temper."[88] Given the rhetoric with which judicial whipping was so widely denounced and yet its widespread use for the poor even after, one suspects that for some people, in some contexts, that was precisely the point.

[88] John Locke, *Some Thoughts Concerning Education* (1693), ed. J. W. Yolton and J. S. Yolton (Oxford, 1989), 113. My thanks to Brennan Dempsey for bringing to my attention this passage and other discussions of whipping's contested role in education. See, in particular, Traninger, "Whipping Boys"; Rebecca W. Bushnell, *A Culture of Teaching: Early Modern Humanism in Theory and Practice* (Ithaca, 1996), and Ben Parsons, "The Way of the Rod: The Functions of Beating in Medieval Pedagogy," *Modern Philology* 113 (2015): 1–26.