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# AN UPBEAT VIEW OF ENGLISH JUSTICE IN THE FOURTEENTH CENTURY

*Charles Donahue, Jr.\**

THE EVOLUTION OF ENGLISH JUSTICE: LAW, POLITICS AND SOCIETY IN THE FOURTEENTH CENTURY. By *Anthony Musson & W.M. Ormrod*. Houndmills (Basingstoke, Hants.) and New York: Macmillan Press and St. Martin's Press. 1999. Pp. x, 249. Cloth, \$59.95; paper, \$24.50.

## THE BACKGROUND

The late Middle Ages are history's stepchild. Traditionally, medievalists are not interested in them. The earlier centuries, culminating in the twelfth and thirteenth, are much more typically "medieval." Traditionally too, early modern historians are interested in the late Middle Ages only for what they see as origins of the Reformation, or for decay of feudal structures out of which the national monarchies of the sixteenth century arose, or for Italian humanism, which they call "the Renaissance."<sup>1</sup> Legal historians, on the other hand, are stuck with the late Middle Ages. With a few exceptions (including, most notably, the great run of central royal court records from thirteenth-century England), the fourteenth is the first century in which we can first see what is really going on in the courts. Legal sources multiply, and much of the material was printed in the sixteenth century, so it is possible to make some progress without painstakingly going through manuscripts.

Recently, there has been an increased interest among historians in the later Middle Ages, particularly in the fourteenth century.<sup>2</sup> The fourteenth century was not unlike the twentieth, a period of uncertainty and contradictions. In philosophy, it was the century of William of Ockham, as the thirteenth had been the century of Thomas

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1. The great book is JOHAN HUIZINGA, *HERFSTIJ DER MIDDELEEUWEN: STUDIE OVER LEVENS- EN GEDACHTENVORMEN DER VEERTIENDE EN VIJFTIENDE EEUW IN FRANKRIJK EN DE NEDERLANDEN* (1919), trans. Frederik J. Hopman, as *THE WANING OF THE MIDDLE AGES* (1924), and many times reprinted. The book conveys much in its title and is a brilliant, though one-sided, depiction of a not particularly attractive culture.

2. The book under review contains a good starter bibliography (pp. 239-41).

Aquinas.<sup>3</sup> Ockham's thought may not be much like what is reported under his name in Umberto Eco's *The Name of the Rose*,<sup>4</sup> but it is close enough that an imaginative author can suggest a connection between Ockham and modern deconstructionists.

The fourteenth century was a century of heresy, or, at least, of radical confrontation with the practices of the organized church.<sup>5</sup> The doctrines of John Wyclif (c. 1330-84) were condemned in England in 1382 and again at the Council of Constance in 1415. That council also condemned and executed Jan Hus (c. 1373-1415), a Bohemian follower of Wyclif's. But the fourteenth century was also a century of great personal piety. Juliana of Norwich (c. 1342 – after 1413) wrote a remarkable treatise on her mystical experiences.<sup>6</sup> Devotional books, like the *Luttrell Psalter*,<sup>7</sup> were produced in quantity for wealthy laity. The organized clerical church no longer contained religiosity. The fourteenth was a century of lay men and women, if not of laicization.<sup>8</sup>

Legal thought in the fourteenth century was a mixed bag. For English law, it is not generally regarded as a great period on the intellectual level — a century of pleaders, far from learned sweep of some of the passages of *Bracton* in the previous century.<sup>9</sup> For canon law it is a period of encyclopedists, summarizers of the great achievements of the twelfth and thirteenth centuries, until the end of the century and the rise of the conciliar movement.<sup>10</sup> For Roman law, on the other hand, it is the century of Bartolus and Baldus and so must rank high.<sup>11</sup>

Two events profoundly affected the social and economic history of the fourteenth century: The Black Death of 1347-50 was a Europe-wide phenomenon, during which an estimated one-third of the popula-

3. For a general introduction, see THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY (Normann Kretzmann et al. eds., 1982). For England, see WILLIAM J. COURTENAY, *SCHOOLS & SCHOLARS IN FOURTEENTH-CENTURY ENGLAND* (1987).

4. UMBERTO ECO, *THE NAME OF THE ROSE* (William Weaver trans., 1983).

5. For a readable introduction to what follows, see MALCOLM LAMBERT, *MEDIEVAL HERESY: POPULAR MOVEMENTS FROM THE GREGORIAN REFORM TO THE REFORMATION 225-326* (2d ed. 1992).

6. JULIAN OF NORWICH, *A REVELATION OF LOVE* (Marion Glasscoe, rev. ed., 1993).

7. See MICHAEL CAMILLE, *MIRROR IN PARCHMENT: THE LUTTRELL PSALTER AND THE MAKING OF MEDIEVAL ENGLAND* (1998).

8. See 1-6 GEORGES DE LAGARDE, *LA NAISSANCE DE L'ESPRIT LAÏQUE, AU DÉCLIN DU MOYEN ÂGE* (1942-48).

9. For the traditional view, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW 266-73* (5th ed. 1956).

10. See K.W. Nörr, *Die kanonistische Literatur*, in 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE* 365, 376 (Helmut Coing ed., 1973) [hereinafter *HANDBUCH*]. For the conciliar movement, see BRIAN TIERNEY, *FOUNDATIONS OF THE CONCILIAR THEORY* (rev. ed. 1998).

11. See Norbert Horn, *Die legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts*, in *HANDBUCH*, *supra* note 10, at 261-364.

tion died in the span of less than three years.<sup>12</sup> Once the plague came, it stayed, reducing population levels for the rest of the century and well into the next. The Peasants' Revolt of 1381 in England was also not an isolated phenomenon. Indeed, the years 1378-1382 have been described as years of Europe-wide revolution.<sup>13</sup>

In England, the fourteenth was a century of war.<sup>14</sup> Intermittent war in Scotland and along the northern border of England characterized the first half of the century.<sup>15</sup> War with France occupied a considerable portion of the reign of Edward III (reigned 1327-1377).<sup>16</sup> It was also a century of kings who met disastrous ends. Edward II was deposed by his wife and her paramour and probably disemboweled.<sup>17</sup> Edward III, dominated by his mistress, died foolish — a victim of Alzheimer's disease before anyone knew the term.<sup>18</sup> Richard II, perhaps the most complicated and most tragic of them all, was deposed and probably starved to death.<sup>19</sup>

But the fourteenth century in England is also the century of Chaucer, Langland, and Gower.<sup>20</sup> Most of York Minster was built in the fourteenth century, as was that jewel of decorated Gothic sculpture, the Percy tomb in Beverley Minster.<sup>21</sup>

Fourteenth-century English governance is an elaborate mosaic of interconnected persons, institutions, ideas and events.<sup>22</sup> We can talk of kings, administrators, barons, knights and burgesses, or crown (note how the person is becoming an institution through the use of that

12. The plague was preceded in many places by a series of bad harvests, which substantially reduced and weakened the population. See W. Blockmans & H. Dubois, *Le temps des crises (xiv<sup>e</sup> et xv<sup>e</sup> siècles)*, in 1 HISTOIRE DES POPULATIONS DE L'EUROPE 185-217 (Jean-Pierre Bardet & Jacques Dupâquier eds., 1997) (with references).

13. See MICHEL MOLLAT & PHILIPPE WOLFF, *ONGLES BLEUS JACQUES ET CIOMPI: LES RÉVOLUTIONS POPULAIRES EN EUROPE AUX XIV<sup>e</sup> ET XV<sup>e</sup> SIÈCLES 139-212* (1970).

14. Still the best introduction to fourteenth-century England is MAY MCKISACK, *THE FOURTEENTH CENTURY: 1307-1399* (The Oxford History of England, 1959) (repr. 1976). The following update McKisack for particular periods: MICHAEL PRESTWICH, *THE THREE EDWARDS: WAR AND STATE IN ENGLAND, 1272-1377* (1980); W.M. ORMROD, *THE REIGN OF EDWARD III: CROWN AND POLITICAL SOCIETY IN ENGLAND, 1327-1377* (1990); NIGEL SAUL, *RICHARD II* (1997).

15. MCKISACK, *supra* note 14, at xviii-xix, 3-4, 11-12, 32-41, 56-58, 75-76, 98-100.

16. *Id.* at 105-51.

17. *Id.* at 81-96.

18. *Id.* at 384; ORMROD, *supra* note 14, at 34, 38.

19. MCKISACK, *supra* note 14, at 491-98; SAUL, *supra* note 14, at 405-26.

20. MCKISACK, *supra* note 14, at 524-32.

21. See, most recently, NICOLA COLDSTREAM, *THE DECORATED STYLE: ARCHITECTURE AND ORNAMENT 1240-1360*, at frontispiece, 36 illus. 20 (1994).

22. See generally MCKISACK, *supra* note 14, at 182-209; A.L. BROWN, *THE GOVERNANCE OF LATE MEDIEVAL ENGLAND, 1272-1461* (1989); 1-6 T.F. TOUT, *CHAPTERS IN THE ADMINISTRATIVE HISTORY OF MEDIEVAL ENGLAND: THE WARDROBE, THE CHAMBER AND THE SMALL SEALS (1920-1933)*.

word), household departments and departments of state, council, parliament, and the picture that emerges will be at once static and fundamentally deficient because it will not show us how changes occurred in response to events and what ideas informed those changes. It is really the latter that makes the fourteenth century different from the thirteenth. The cast of characters was there before and so were most of the institutions, but the ideas had changed, perhaps because of the unsatisfactory results of the thirteenth century. Society too changed, becoming less like what we normally associate with the term "feudal."<sup>23</sup> New ideas worked on a changed society to produce a different set of institutional solutions to the problem of governance.

Crises are dramatic. They focus the picture for us. It is altogether too easy to get the impression that governance lurches from crisis to crisis and that changes happen only as the result of crises. The fourteenth century certainly had its share of crises. But life is not lived on such peaks. If ten years of the century were years of major crisis in England,<sup>24</sup> ninety were not. And it may well be that the real changes in institutions are hidden in those valleys that separate the nine peaks.

### THE BOOK

Musson and Ormrod,<sup>25</sup> with appropriate qualifications, explore the changes hidden in the valleys. They seek to summarize the developments that occurred in English justice over the course of the fourteenth century by emphasizing the incremental, the evolutionary, the endogenous forces that made English justice a very different phenomenon at the deposition of Richard II in 1399 from what it had been at the death of Edward I in 1307.

This is not an easy book to read. It is very tightly written. The publishers apparently allowed the authors only 250 pages, of which only 193 are text.<sup>26</sup> The result is compression that borders, in a few in-

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23. The resulting social arrangements are frequently called "bastard feudalism," a theme to which our authors turn on a number of occasions. *E.g.*, pp. 37-38, 109-10, 181-82, 188-89.

24. My candidates for the ten are: (1) 1311 — the Ordinances and the Lords' Ordainers; (2) 1322 — the Statute of York; (3) 1327 — the deposition of Edward II; (4) 1341 — the Stratford crisis; (5) 1348-49 — the Black Death; (6) 1376 — the Good Parliament; (7) 1381 — the Peasants' Revolt; (8) 1386-87 — the Crisis of 1386-87; (9) 1388 — the Merciless Parliament; and (10) 1399 — the Deposition of Richard II. Discussions of all these, with references, will be found in MCKISACK, *supra* note 14.

25. Anthony Musson is Research Associate at the Centre for Medieval Studies, University of York, and a barrister of the Middle Temple; W.M. Ormrod is Professor of Medieval History and Director of the Centre for Medieval Studies, University of York.

26. Useful as the table of sittings of Parliament and of King's Bench is (pp. 194-205), one wonders whether it was wise to devote twelve pages to it when there were so few pages to devote to the argument.

stances, on the incomprehensible.<sup>27</sup> The authors also assume that the reader is familiar with the history outlined above. Most of the events and movements described there are referred to in the book, as the authors seek to explain what happened to English justice over the course of the century, but they are referred to in a way that makes prior knowledge of them useful, if not essential.

The reader is, however, not assumed to know much, if anything, about law. Chapter Two, "Royal Justice at the Centre," contains an elementary account of the institutions of central royal justice in the fourteenth century. Although marred somewhat by compression,<sup>28</sup> it responds to the need that the authors perceived in the preface "to provide an accessible description of the structure of the royal courts in the later Middle Ages" (p. viii).

The next chapter (Chapter Three, "Royal Justice in the Provinces"), however, is not at all elementary. It seeks to tell the tangled story of the multiplicity of commissions and officers that came to replace the general eyre, an institution for bringing central justice to the provinces that declined dramatically and eventually ceased in the fourteenth century. The pioneering work on the commissions was done by Bertha Putnam in the first half of the last century, and her focus was on the emergence of the justices of the peace. Putnam saw in the multiple rearrangements that occurred in the composition of the sessions of the peace over the course of the century a struggle between the forces of royal centralization and those who favored more local autonomy. In her view the local forces ultimately prevailed, and although she was too good an historian to engage in a simplistic characterization of the phenomenon, she probably saw the development as, on balance, a positive one.<sup>29</sup> More recently historians have accepted

27. For example, on p. 137 we learn that "a fifth of all convictions in early fourteenth century Norfolk were a result of the approver system." A paragraph later we are told that "convictions solely on approvers' appeal were rare, amounting to 4 percent of all convictions in Norfolk." The difference between the two statements is apparently in the "solely," but the whole passage cries out for further explanation. Similarly, the carry-over paragraph from pp. 158-59 closes with a paradox that requires further explanation. On p. 183, we are told that "in practice, enforcement [presumably of a statute of 1275] was left to the judges who, through their presidency of the courts, elaborated on the statutory terms to provide norms of professional behaviour equating to an ethical standard." I am not sure I know what that means.

28. For example, the account of the fictional uses of the trespass writ does not take into account the recent work of Robert Palmer on the topic (p. 16). See ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381*, at 159-63 (1993). The account of the "court of the verge" on the same page would have been clearer if the authors had specified that they are talking about the court of the steward and marshal of the household. Page 18 fails to mention escheat for felony and has a confusing reference to "appeals," when proceedings in error are probably meant.

29. See Bertha Haven Putnam, *The Transformation of the Keepers of the Peace into the Justices of the Peace, 1327-1380*, 12 *TRANSACTIONS OF THE ROYAL HISTORICAL SOC'Y* 19, 48 (4th ser. 1929).

Putnam's account of what happened, but have been considerably less positive in their characterization of it. Local control, in their view, means that local elites can oppress those below them without much countervailing pressure from above.<sup>30</sup>

The authors argue, convincingly in my view, that the various experiments with the composition of panels of local justices should not be seen as exclusively, or even primarily, the product of a struggle between local and central forces. Particularly if one examines the entire range of commissions, commissions of assize, oyer and terminer, trail-baston (in some periods), and gaol delivery, as well as those of the peace, it is remarkable how the same mix of people, indeed, frequently the same people, continually reappear. Central royal court justices and (somewhat later in the century) serjeants will be represented in these commissions, as will local lawyers (some professional, some knowledgeable amateurs), as well as local magnates (occasionally), local knights, and what we may begin to call gentry (pp. 54-73). Though the authors do not suggest this, there are probably more mundane explanations for the experimentation that is characteristic of the century. Central royal court justices and serjeants had to be back at Westminster in time for the law term. Travel in medieval England was difficult. Local justices (who, by and large, were unpaid) had to be given jobs that had some prestige, so that they would continue to serve competently.

The end result, in the authors' view, was a much more nationalized system of justice. Central royal court justice reached more people more often at the end of the fourteenth century than it did at the beginning (pp. 157-60, 177-81). High politics sometimes played a role in making this happen (Chapter Four). The introduction of local men of law into the quorum of the peace commissions in 1394, a move that allowed these commissions to try felonies in the absence of central royal court justices or serjeants, was probably the result of Richard II's desire to consolidate his power in this period at the expense of appellants of 1388 (pp. 109-11). Clearly, too, the disruption of war contributed to the perception that more law enforcement was needed (pp. 78-85). Finally, Putnam was certainly right in seeing that the role of justices of laborers, an institution that was brought about by the Black Death and the subsequent attempt to control the price of labor by

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30. See p. 176 and works cited there. My disagreement with Musson and Ormrod, which is not major, is in their seeming placement of Putnam with more recent authors' assessment of the consequences of "devolution." Though Putnam shows an awareness that the justices of laborers were not unbiased in the struggle between employers and laborers that followed the Black Death (see BERTHA HAVEN PUTNAM, ENFORCEMENT OF THE STATUTES OF LABOURERS DURING THE FIRST DECADE AFTER THE BLACK DEATH, 1349-1359 (1908)), her overall assessment of the rise of the justices of the peace smacks more of a theme common in her day, "the rise of the commons." See Putnam, *supra* note 29, at 48.

statute contributed to making local justices a permanent institution of English justice (p. 96, with slightly different emphasis).

Ultimately, however, in the authors' view, "endogenous" factors were at least as important as "exogenous" ones in explaining the nationalization of the system of justice that occurred in this period. While the authors' division of these factors into "consumer demand," "the judicial profession," and "legislation" may not quite capture the cross-cutting complexities of the forces at stake, they make a good case for the proposition that incremental internal change in the system accounts for a larger share of the change that occurred over the course of the century than do the more spectacular external forces (Chapter Five). This internal change was prompted not only by the professionals who were seeking to make the system better, but also by litigants who were seeking better remedies, and by parliamentary representatives, who launched petitions that were turned by the professionals into statutes (pp. 115-57).

The last chapter, Chapter Six, seeks an assessment. The assessment has to come to grips with the fact that fourteenth-century Englishmen were not shy about criticizing their legal system. Not only do criticisms of the legal system abound, they become more common as the century goes on, a fact that suggests that the quality of justice was declining. The authors are inclined to discount these criticisms. They point out, in the first place, that a number of these criticisms can be attributed to literary convention. Satire is not a genre in which one expects to find balanced assessments of social achievement, nor, to take examples more strictly legal, does one expect to find balanced assessments in petitions for redress or preambles to statutes (pp. 163-70). So far as the greater frequency of the criticisms is concerned, we should remember that almost all documentation increases greatly over the course of the fourteenth century, and written literature, particularly in the vernacular, is hardly to be found at the beginning of the century and is plentiful at the end (p. 190).

So far as the particular contemporary criticisms are concerned, it is unclear whether we should be more impressed with the accusations of corruption or the fact that when it was found, or even suspected, it was punished (pp. 38-40). A body of ethical rules was developed for the legal profession at the end of the thirteenth century. These rules were enforced in the fourteenth century (pp. 181-89). The Achilles' heel of the English system of justice was probably not the professional judges, lawyers, and clerks, or even the amateurs or semi-amateurs who performed these functions in the provinces; it was the jury. That juries could be intimidated and corrupted was often said, and efforts, par-

ticularly in the council and chancery, were being made to avoid some of the worst features of the jury system.<sup>31</sup>

Ultimately, however, the authors conclude, the system proved remarkably resilient in the face of some extraordinary external pressures, war and plague, a major social upheaval, and a whole series of constitutional crises (pp. 158-60). That the system disappointed some people may, in a way, be a tribute to its ambition, and to the ambition of the society that produced it.

### EVALUATION

The summary of the book that has preceded hardly does justice to it. In brief compass the authors have covered a large number of issues. Their remarks are always interesting and frequently insightful.<sup>32</sup> This is a book to which all who are concerned with the legal history of the fourteenth century will have to return.

Granted that fact, what I am about to say is going to seem like carping; for my principal criticism of the book is not about what it says but about what it does not say. In my view, by choosing to focus on the central royal courts and the delivery of justice from the center to the provinces, the authors have given a distorted picture of the English system of justice in the fourteenth century. The English system of justice was more nationalized at the end of the fourteenth century than it was at the beginning, but it was not as nationalized as it was to become. The central royal courts and their satellites in the provinces were not the only effective courts in fourteenth-century England; yet we hear practically nothing about other courts. Further, enforcement of the criminal law and keeping the peace were important functions of justice in the fourteenth century, as they were before and have been ever since, but they were not the only functions of justice. Dispute-resolution in a civil context is also an important function of justice, and about this function the book tells us relatively little. The two deficiencies are related and must be treated together.

At the beginning of the book, the authors offer a brief section on "A Palimpsest of Jurisdictions" (pp. 8-10). The central royal courts and their satellites in the provinces, we are told, briefly, were not the only courts in operation in fourteenth-century England; there were

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31. The authors focus on the efforts that were made to ensure unbiased juries, within the context of the regular system (pp. 186-88). At the beginning of the fifteenth century, the power of one's adversary (and hence his ability to intimidate or corrupt a jury) was a standard allegation used to get the chancery to hear one's case. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 120 (3d ed. 1990).

32. E.g., pp. 93-96 (a remarkably well-balanced account in short compass of the plague and its demographic, economic, and regulatory aftermath); 191-92 (the relationship between the serjeant-at-law and the franklin in the *Prologue* to the *Canterbury Tales* as symbolizing the legal and institutional relationship between the center and the provinces).

also ecclesiastical courts and “customary courts,” a catch-all phrase designed to encompass the ancient local royal courts of county and hundred, the seigneurial courts of honor and manor, and the borough courts. The *quo warranto* inquiries of Edward I, we are then told, put a stop to the proliferation of these courts, and gradually over the course of the later Middle Ages and Tudor periods much of their jurisdiction was absorbed into that of the central courts and their offshoots (principally the justices of the peace) in the provinces.

That something like this happened over the course of several centuries is certainly true, but this is a book about the fourteenth century, and the authors are trying to assess the evolution of justice over the course of that century. They owe it to us to tell us what the situation was both at the beginning and at the end of the century.

These situations are complicated and not completely known. Indeed, granted the state of the records, the full story may never be known. Nonetheless, the present state of our knowledge suggests that the following developments are certain or probable. Effective honor court jurisdiction probably ceased to exist over the course of the thirteenth century (with the notable exception of the franchisal courts of the great liberties, Chester, Durham, and Lancaster).<sup>33</sup> County court and probably most hundred court jurisdiction ceased to be effective over the course of the fourteenth century, though the details remain unclear.<sup>34</sup> That leaves the ecclesiastical, manor, and borough courts. While there is evidence of decline in specific courts and specific types of jurisdiction (and also of expansion), there is no evidence that I know of that there was any general decline in these institutions over the course of the fourteenth century.<sup>35</sup>

Particularly surprising is the authors’ dismissal of the ecclesiastical courts:

The ecclesiastical courts are fairly easily distinguished from royal tribunals and may be treated succinctly: they operated under a different legal tradition (canon law); they dealt with a specific range of business relating to a particular group (the clergy); and they took cognisance of a limited range of cases involving the laity (such as matrimonial or testamentary disputes and sexual offenses). [p. 8]

Over twenty-five years ago I published in this journal an analysis of the surviving records of cases heard in the consistory court of the

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33. See BAKER, *supra* note 31, at 32, 264-71. For Durham, Lancaster, and Chester, see 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 21\*-22\*, 109-22 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956).

34. See ROBERT C. PALMER, *THE COUNTY COURTS OF MEDIEVAL ENGLAND, 1150-1350*, at 297-306 (1982).

35. See BAKER, *supra* note 31, at 31-33, 146-50.

archbishop of York over the course of the fourteenth century.<sup>36</sup> About forty percent of the total were matrimonial cases (all involving lay men and women), thirty percent involved ecclesiastical finances (including tithes, many such cases involving lay people as at least one of the parties), nine percent were testamentary cases (most involving lay people), six percent defamation cases (most involving lay people), five percent breach of faith cases (ordinary contract litigation, with, again, most involving lay people), and the remaining ten percent were miscellaneous matters or cases the underlying substance of which was unclear.<sup>37</sup> This is clearly a much broader jurisdiction than our authors would have us believe, and the involvement of lay people was more extensive than they suggest. (The York cause papers do not record criminal cases heard at first instance, but there were a large number of lay people involved in such cases as well.) More recent research has tended to confirm the findings of this article.<sup>38</sup>

There is, admittedly, no way to be sure how important this jurisdiction was as a quantitative matter granted how many records have been lost. The York court itself probably heard between fifty and a hundred cases a year, perhaps more, whereas the central royal courts of common law heard cases in a quantity between one and two orders of magnitude higher.<sup>39</sup> But there was only one court of Common Bench, and there were seventeen diocesan consistory courts, perhaps as many as forty archidiaconal (or commissary) courts, and an uncounted number of lesser ecclesiastical jurisdictions. All of the diocesan courts regularly heard instance (i.e., civil) matters; some of the archidiaconal and lesser courts did as well.<sup>40</sup> Clearly, and at a minimum, for some people in some situations the ecclesiastical courts were an alternative way to obtain English justice.

Borough and fair court jurisdiction has recently been surveyed.<sup>41</sup> Again, the records are spotty, but they show no overall decline over the course of the century.<sup>42</sup> The jurisdiction was particularly important

36. Charles Donahue, Jr., *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 658-60 (1974).

37. *Id.* at 659 tbl. 1.

38. See generally THE RECORDS OF THE MEDIEVAL ECCLESIASTICAL COURTS. II: ENGLAND (Charles Donahue, Jr. ed., Comparative Studies in Continental and Anglo-American Legal History No. 7, 1994) (citing studies).

39. See p. 118 (statistics of central royal courts); Donahue, *supra* note 36, at 658, app. A.

40. For specifics, see THE RECORDS, *supra* note 38.

41. LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (Mary Elizabeth Basile et al. eds., Ames Foundation, 1998).

42. See, for example, the splendid run of mayor's court rolls from Exeter. See *id.* at 14 n.3. Except for the calendars of the London records, however, these records are largely unprinted. See 1-6 CALENDAR OF PLEA AND MEMORANDA ROLLS PRESERVED AMONG THE

for those borough residents who had the privilege of not being impleaded outside of their boroughs.<sup>43</sup>

Manor court jurisdiction is the subject of two important recent studies.<sup>44</sup> Again, there is little evidence of decline over the course of the fourteenth century, though there is evidence that these courts became more like the common-law courts during this period.<sup>45</sup>

The importance of these courts lies, in my view, in the fact that they gave many English men and women an experience of justice that was not that of the central royal courts and its satellites. None of these courts (except a few of the borough courts) dealt with freehold land; none of them (except for a few franchisal courts) dealt with pleas of the crown (including the major felonies). The central royal courts effectively monopolized certain kinds of justice, but certainly not all justice, and, particularly, not all personal actions.

There were important moves in the fourteenth century that brought more personal actions into the central royal courts. The authors treat these developments relatively cursorily, probably because they have recently been given a quite full treatment by another author.<sup>46</sup> The central royal courts, however, though they provided a forum for many litigants, were slow and expensive. Systematic analysis of the social status of the litigants in these courts has, so far as I know, not been undertaken.<sup>47</sup> Anecdotal evidence from the records of these courts suggests that a remarkable number of the litigants also appear in other royal records.<sup>48</sup> That, in turn, suggests that they were of relatively high status.

The authors seem to recognize the difficulties that a person of ordinary means would have litigating in the central royal courts (pp. 14-16, 181). They also seem to argue, however, that the development of the commission system in the fourteenth century made the justice system of the central royal courts available to many ordinary people.<sup>49</sup>

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ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON AT THE GUILD-HALL (A.H. Thomas & Philip E. Jones eds., 1926-1961).

43. *LEX MERCATORIA*, *supra* note 41, at 40-41 & n.35.

44. *SELECT CASES IN MANORIAL COURTS, 1250-1550* (L.R. Poos & Lloyd Bonfield eds., Selden Society No. 114, 1998); John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 *L. & HIST. REV.* 197 (1992).

45. For the former point, see *SELECT CASES*, *supra* note 44, at xi-xiv; for the latter, see Beckerman, *supra* note 44.

46. See PALMER, *supra* note 28.

47. *Cf.* p. 128.

48. See, e.g., *YEAR BOOKS OF RICHARD II: 6 RICHARD II, 1382-1383* (Samuel E. Thorne, et al. eds., Ames Foundation Year Books Series No. 2, 1996).

49. See pp. 177-81. On these pages, however, the authors' principal focus is on rebutting the argument that central royal justice was more closed to those of modest means at the end of the fourteenth century than it was at the beginning. Accepting the proposition that there was not much change in the participation of ordinary people in central royal justice over the

That proposition should be scanned. The expansion of the reach of the assize of novel disseisin, for example, probably did make it possible for more people of ordinary means to litigate a case involving freehold (pp. 122-25). The writ was cheap; essoins were not possible; it could be heard before a regular commission to take the petty assizes. The pleading, however, even at assizes, could end up in a snarl, and one would certainly need expert professional help to avoid the potential pitfalls.<sup>50</sup>

What I fail to see is how the expansion of commissions of the peace and the ultimate development of justices of the peace is likely to have made the central royal courts attractive to those who had ordinary disputes that could not be turned into a criminal complaint. The authors' assertion that in the second half of the fourteenth century the justices of the peace continued to be willing to receive bills of trespass is true, but misleading.<sup>51</sup> The justices of the peace did not regularly entertain civil trespass actions. The overwhelming majority of records from the sessions of the peace deal exclusively with criminal matters.<sup>52</sup> It is possible that the authors have been misled by the multiple uses of the word *transgresssio* (trespass) in the fourteenth century. In the context of the records of the justices of the peace, the word is frequently found in opposition to felony (*felonia*) and should be translated, admittedly with some anachronism, as "misdemeanor."<sup>53</sup>

The theme of nationalization is an important one, and there is no doubt that significant steps in this direction were taken in the fourteenth century. There is no question, too, that the crown had at the end of the fourteenth century more effective ways of exercising criminal jurisdiction in the provinces than it had at the beginning of the century. More civil litigation, principally, though not exclusively, in personal actions, could take place in the central royal courts. Whether

course of the century does not entail accepting the proposition that it was at a high level at any time during the century.

50. See, e.g., *Charles v. Antoigne*, Y.B. Mich. 6 Ric. 2, pl. 15 (C.P. 1382), Y.B. Hil. 6 Ric. 2, pl. 2 (C.P. 1383), in 6 RICHARD II, *supra* note 48, at 80-91, 144-47.

51. P. 178; *cf.* pp. 130-31.

52. *But cf.* *Derby v. Benaventure* (Peace Sess., Norhants., 1314), in ROLLS OF NORTHAMPTONSHIRE SESSIONS OF THE PEACE 44, 54-55 (Marguerite Gollancz ed., 1940). This case is a possible early exception, but even here, when it became apparent that the complainant had been injured as the result of the carelessness of two teenagers who were playing frisbee with a cartwheel on a village street at dusk, the court refused to render judgment, but set the case down for discussion in King's Bench. I am grateful to Ken Halpern for calling this case to my attention.

53. See Bertha Haven Putnam, *Introduction to PROCEEDINGS BEFORE THE JUSTICES OF THE PEACE: EDWARD III TO RICHARD III cxiii-cxiv, cxvii-cxviii* (Annes Foundation, 1938) (and cases cited); F.T.P. Plucknett, *Commentary*, in *id.*, at cliv-clix. The latter makes clear (as does Putnam at cv-cvi) that the justices of the peace had no power to award damages in civil trespass actions. The wrong complained of must amount to an indictable crime, and a fine is the appropriate remedy.

this adds up to an effective system of central royal justice for a large proportion of the population is a matter about which we may have more doubt.