What Happened in the English Legal System in the Fourteenth Century and Why Would Anyone Want to Know

Charles Jr. Donahue

Follow this and additional works at: http://scholar.smu.edu/smulr

Recommended Citation
http://scholar.smu.edu/smulr/vol63/iss3/8

This Essay is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
What Happened in the English Legal System in the Fourteenth Century and Why Would Anyone Want to Know?

Charles Donahue, Jr.*

I have been commissioned by the Oxford University Press to write the fourteenth-century volume of the new Oxford History of the Laws of England. It is going to be a big book—six to seven hundred pages. It is already overdue at the press, and I'm not nearly done even with the first draft. I have done enough, however, that it is time to ask a rather fundamental question: What am I saying? What does the mass of quite technical detail all add up to? I therefore welcomed the opportunity to give the Roy Ray Lecture so that I could step back and see if I could sketch out a big picture for people whom I will assume know nothing about fourteenth-century England and its legal system.

So what happened in the fourteenth century in England—never mind its legal system? Here, I must apologize to those who do know something about it because nothing in the next couple of pages is new. Rather, it is a selection of well-known facts that may (or may not) help to explain why the fourteenth-century English legal system was the way it was and why it developed in the way it did.

If you know anything about the fourteenth century, you probably know that it was the century of the Black Death. In the years 1348 and 1349, between a third and a half of the population of England died of a disease, the precise nature of which is still debated but which was probably bubonic or pneumonic plague, and perhaps both. Having once arrived, the plague did not go away, though it never again caused the countrywide devastation that it caused in the years 1348 to 1349. It was prevalent enough, however, that the population did not replenish itself rapidly, as

---


Professor Donahue notes: "This is the text, largely unchanged and preserving the informal language, of the Roy Ray Lecture given at the Dedman School of Law on November 12, 2009. I have added some material that I could not fit in the lecture. The references are mostly 'suggestions for further reading', not to the primary sources but to secondary works that explore what I offer here in more detail."

1. The plague was preceded in many places by a series of bad harvests, which substantially reduced and weakened the population. See Histoire des populations de l'Europe 185–217 (Jean-Pierre Bardet & Jacques Dupâquier eds., 1997) and accompanying notes.
normally happens after one-time disasters. Indeed, the population seems to have continued to decline over the course of the second half of the century and does not seem to have begun to grow again until the early years of the fifteenth century. Numbers are hard to come by for this period but, in all probability, a country of perhaps as much as six million people in 1300 became a country of approximately two and a half million people in 1400.

Traditional history also tells us that the fourteenth century in England was the century of the first half of the Hundred Years War, traditionally dated from 1337 to 1389. Modern historians regard that description as too monochromatic, but they would emphasize that for roughly the first three-quarters of the century, the English were almost constantly engaged in foreign wars or preparing for those wars. If the war was not with the French, it was with the Scots or the Welsh, or even with the inhabitants of what are now Spain and Portugal. The last quarter of the century was a time of relative peace abroad, but the fighting men who had been developed over the course of the century did not take well to the ways of peace and turned to fighting each other.

Edward I, one of the most successful of the medieval English kings, died peacefully in 1307. His son, grandson, and great-great grandson all met bad ends. Edward II, probably a homosexual, was deposed by his wife and her paramour and disemboweled in 1327. Edward III, a popular warrior king, who reigned for fifty years, died foolish—a victim of Alzheimer’s disease before anyone knew the term. Richard II, perhaps the most complicated and the most tragic of them all, was deposed in 1399 and probably was deliberately starved to death.

In 1381, there was a major peasants’ revolt. It was suppressed, brutally in some places, but it is certainly an indication of considerable social unrest. The fourteenth century saw the first native heresy in England, begun by an unlikely heresiarch named John Wycliff, who died in 1384. If it was a century of heresy, the fourteenth was also a century of great personal piety. Julian of Norwich, who wrote of her mystical experiences, is notable but certainly not alone. Many wealthy—and not so wealthy—lay people had books of hours (prayer books based on the psalms) made


for them. The organized clerical church no longer contained religiosity. The fourteenth was a century of laymen and laywomen if not of laicization.

The cultural achievements of the English fourteenth century were substantial. At the beginning of the century there was virtually no literature written in the language we call Middle English, the language that had developed after the Conquest of England by French speakers in 1066. By the end of the century we have the works of Geoffrey Chaucer, whom many consider the greatest English poet after Shakespeare; an extraordinary poem called *Piers Ploughman* by a man who may have been named William Langland; several massive works, only one of which admittedly is in English, by the poet John Gower; the anonymous *Sir Gawain and the Green Knight*; and a host of smaller works.

Gothic architecture continues in England in the fourteenth century in a style known as Decorated, which succeeded the Early English style of the thirteenth century. Decorated buildings were less dependent on French models than were the Gothic buildings of the thirteenth century. Most of York Minster was built in the fourteenth century as was that jewel of Decorated sculpture, the Percy tomb in Beverley Minster. By the end of the fourteenth century we see the beginnings of the Perpendicular style of English Gothic architecture, a style that is native to England and that replaces the sculptural decoration with dramatic glass walls or tracery with cleaner lines. A representative of an extraordinary school of manuscript painters of East Anglia produced a masterpiece known as the Luttrell Psalter, which has recently been given a splendid online edition by the British Library.

The most important European philosopher and theologian of the fourteenth century, William of Ockham, was an Englishman, and his early works were all written in England, though it is a bit unclear where they were written. Ockham’s thought may not be much like what is reported

---

under his name in Umberto Eco's *The Name of the Rose*, but it is close enough that an imaginative author can see the connection between Ockham and modern deconstructionists. Ockham's political thought is closely related to that of Marsilius of Padua, with whom Ockham was associated in the last twenty years of his life. Marsilius is known as the first political thinker since the ancient world to espouse the theory that political power comes from the consent of the governed rather than by a direct grant from God to the ruler.

English legal thought in the fourteenth century is generally regarded as less distinguished. This is the high period of the Year Books—detailed, very detailed, reports of arguments that took place before the central royal courts of common law, particularly the Common Bench. The century is an important one in legal thought on the Continent. In Roman law, it is dominated by Bartolus and Baldus, Italian commentators who sought, with some success, to integrate Roman law with the local law of the Italian city-states. In canon law, the century is less distinguished until the end, when the schism in the papacy produced the beginnings of the conciliarist theory. The works of the commentators and the conciliarists were known in England, but no Englishman made an important contribution to those bodies of literature.

There are those who might react to a list like the one I just recited by saying: "I'm interested in the legal history of England in the fourteenth century, and nothing that you have told me, with the possible exception of what you said about the Year Books, seems to me to have anything to do with the legal history of England." I think that view is wrong. Indeed, I'm going to try to show you how most of the things that I just said help us to understand the legal history of fourteenth-century England, though I have to admit that in some cases the relationship is more speculative than it is in others. Before I get to that, however, I need to describe the English legal system in the fourteenth century and outline what I am coming to think are the most important things that happened to the English legal system over the course of that century.

It might be better to speak of the English legal systems of the four-
teenth century rather than of the English legal system.\textsuperscript{17} Our own view of the medieval English legal system, particularly that espoused in law schools, tends to focus on the central royal courts of common law. There were three of them at the beginning of the fourteenth century, and there were three of them at the end—the Common Bench, later called Common Pleas; the court Coram Rege (Before the King), later called King's Bench; and the Exchequer of Pleas, later called simply the Court of the Exchequer. As the result of a clause in Magna Carta, the Common Bench had a monopoly of those civil actions that were in existence in 1215.\textsuperscript{18} This included all the real actions—a complicated collection of actions that concerned land, of which perhaps the best known are novel disseisin and the writ of right—and the personal actions of debt, detinue, covenant, and account. The court Coram Rege, which in this period ceased to travel with the king and became as stationary as Common Bench, heard largely criminal cases, though it could also hear civil trespass actions because the civil writ of trespass did not exist in 1215. The Exchequer heard cases that, for the most part, we would describe today as tax cases—cases involving the king's revenue.

Now, let me try to give some sense of the dynamics.\textsuperscript{19} The serjeants of the Common Bench, professional pleaders who had an exclusive right to plead in that court, were a small group at the beginning of the fourteenth century—perhaps thirty-five to forty men. By the end of the century, they were even smaller—perhaps eight to ten at any one time. At the beginning of the century, many of the justices of the Common Bench and the court Coram Rege were former serjeants; by the end of the century, all of them were. In short, the serjeants of the Common Bench acquired a de facto monopoly of positions as royal justices of these two courts. One might think that the decline in the number of serjeants over the course of the century is related to the decline in the population. Perhaps it is in some way but not in any direct way. Rates of litigation in the central royal courts not only did not decline as a result of the decline in population; they went up.\textsuperscript{20} At the beginning of the century, a few of the justices of the central royal courts were clerics; by the end of the century, none of them were.

An important change occurred in the jurisdiction in two of the central royal courts probably about the middle of the century or shortly thereaf-


\textsuperscript{18} Magna Carta c. 17 (1215), c. 11 (1225).

\textsuperscript{19} This paragraph is based on original research, the details of which will appear in the book.

\textsuperscript{20} See infra note 24 and accompanying text.
The writ of trespass, which was at least facially confined pretty much to acts that breached the king's peace and that were done with force and arms, was expanded by a companion writ in which one stated a special case for intervention by the court. These actions of trespass on the case could, and did, include cases in which the defendant had damaged the plaintiff not by acting with force or against the peace but by botching a job that he had undertaken to do. In a few cases, the gist of the complaint could be that the defendant failed to act at all where he had a duty to act. These actions on the case expanded the jurisdiction of both Common Bench and the court Coram Rege.

At the end of the fourteenth century (it had certainly happened by the 1390s and probably happened slightly earlier), we learn of a regularly sitting court in the Chancery that was hearing cases brought by petition to the chancellor—cases that for one reason or another could not be handled by the common law courts. This is, of course, the origin of the court of equity, but the surviving records do not allow us to determine the precise scope of its jurisdiction in the fourteenth century.

Pleading in the central royal courts took place for the most part in Westminster Hall. The case would also return to the court that had heard the pleading for entry of judgment. Most of what we would understand as the trial of common law cases (the word "trial" requires some translation when we deal with the fourteenth century) took place in the county from which the case came and before justices who had been commissioned to go out and hear cases. Increasingly over the course of the fourteenth century, various types of commissions to hear cases were combined in what came to be called the "assizes," which were held once or twice a year in each county. Justices of assize would be, indifferently, justices of either bench, serjeants of the Common Bench, and/or local notables. They heard criminal cases as well as civil. Indeed, their principal job seems to have been to hear criminal cases.

The central royal courts and the assizes might be thought of as all being part of one legal system, but that was not the only legal system that existed in the fourteenth century. Every diocese in England, of which there were seventeen, had a consistory court of the bishop. Each diocese was divided into archdeaconries, the number of which varied from one to five depending on the size of the diocese. The archdeacons also had courts. The episcopal courts had a rather wide jurisdiction; it included cases involving church property and revenues, criminal offenses of the clergy, marriage, testaments, defamation, and, sometimes, contract disputes. The archidiaconal courts tended to have a more restricted jurisdiction in fact if not in law and seem to have dealt largely with morals offenses of the lesser clergy and the laity, of which sexual offenses formed by far the

22. For two different accounts on the origin of the chancellor's court, see BAKER, supra note 17, at 97–116, and PALMER, supra note 21, at 104–35.
largest part.\(^{23}\)

The ecclesiastical courts applied canon law, not the common law of England. Their personnel, all of whom were clerics, had, at least at the higher levels, university degrees in law and had thus studied both Roman and canon law. An appellate system ran from the episcopal courts to the provincial courts at Canterbury and York and from there to the pope, who for most of the century was resident at Avignon in what is now France.

The central royal courts are very visible in the surviving records. Not only is there a vast quantity of surviving Year Book cases (13,258 cases in a recent count) but virtually every term of both courts is backed up by a parchment record of pleas made in the term. The size of the Common Bench rolls is staggering—roughly five hundred full sheepskins a term, written front and back, and there were four terms in each year. Counting cases on the plea rolls is difficult, but a recent attempt to do so came up with the following quite amazing statistics: In Trinity term of 1305, 4,505 cases were brought in the Common Bench; in Trinity of 1336, it was 5,463; in Trinity of 1370 it was 9,154; and in Hilary of 1398 (the Trinity roll was unavailable when the count was done), it was 8,465.\(^{24}\)

The ecclesiastical legal system is less well represented in the surviving records. Counting cases here is even more difficult than it is for the central royal courts. Suffice it to say here that there is evidence that the number of cases heard in the second half of the century by all the diocesan courts in England was almost certainly an order of magnitude fewer than the number of cases heard in the central royal courts, but we have some evidence that these seventeen courts combined probably heard more than a 1000 cases a year, and the number could well be double or triple that amount.\(^{25}\)

There was, moreover, a third legal system operating in England in the fourteenth century, and that system we will call, for lack of a better term, for a comprehensive introduction, see R.H. Helmholz, The Oxford History of the Laws of England: Volume 1: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s (2004).

24. These numbers are derived, with the kind permission of the author, from an unpublished paper entitled “The Conceptualization of Change in English Legal History: Evolution, Transformation, Revolution, 1300–1700,” given by Professor Robert C. Palmer of the University of Houston at the annual meeting of the American Society for Legal History in San Diego, November 9, 2002. Counting cases on the plea rolls is difficult. Not the least of the problems is what constitutes a “case.” Nonetheless, these differences are so dramatic that their magnitude is unlikely to be affected by different definitions of what is a “case.” More fully, here are Professor Palmer’s numbers: T1305: 4,505; T1325: 6,002; T1336: 5,463; T1347: 6,789; T1370: 9,154; T1380: 8,979; T1386: 7,184; and H1398: 8,465.

25. My own work with the records of the consistory court of York in the fourteenth and fifteenth centuries and of Ely in years 1374–1382 suggests that we should be thinking of a modal figure of 100 cases per year. See Charles Donahue, Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts, Texts & Commentary no. 150, 698 & n.2 (2007), available at http://www.cambridge.org/resources/0521877288/5363_9780521877282te_p673-976.pdf; see also id. at 218–25 and accompanying tables.
"local." The system was a secular one subject, on occasion and in some of its aspects, to review by the central royal courts, but it did not operate in the same way as did the central royal courts. There is evidence that professionals and semi-professionals who had some knowledge of what was happening in the central royal courts also participated in the running of the local system so that there was a tendency for ideas from the common law to penetrate into that system. But, these were not courts of common law in any normal sense of that term. They also differed considerably among themselves.

The standard story about these courts is that the ancient royal jurisdiction of the county and hundred was in decline in the fourteenth century, and that story is probably correct as a generalization. There is, however, little evidence that the manor courts were in decline, particularly with regard to their jurisdiction over those who held land by unfree tenure. Courts of the boroughs, sometimes with attendant jurisdiction over fairs and markets, also do not seem, as a general matter, to have been in decline. Most of these courts (the county courts are something of an exception) did not proceed by writ, and they developed a procedure that sometimes makes more sense if compared to other local courts than it does if compared to the central royal courts. Survival of the records of the local courts is spotty. If we insist on numbers, getting a sense of their overall impact is probably impossible. Where the records of a given jurisdiction have survived over time, however, as they have for some manors, we have the impression that a substantial portion of the population of the manor came before these courts. Indeed, some of these records have been used to estimate changes in the population of given manors.

Within this framework, what happened in the fourteenth century that was important—whether we take "important" as contemporaries would have perceived it or as a later age looking back perceived it? Traditional English legal history would probably point to three things, two of which I have already mentioned: first, the rise of the action on the case in the central royal courts of common law; second, the increasing employment of feoffments to uses in transactions involving land; and third, the beginnings of the equity jurisdiction of the chancellor. In all three cases the traditional history worked back from later developments to find their origins.

There is no question that the chancellor's jurisdiction became a significant element in the English legal system in the fifteenth century, though

26. The most comprehensive introduction to this topic is still 1 William S. Holdsworth, A History of English Law (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1966), though few would organize the discussion today in quite the way that Holdsworth did.

27. See generally Robert L. Henry, Contracts in the Local Courts of Medieval England (1926). John Beckerman would emphasize the influence of the common law on these courts, and he is right. John S. Beckerman, Procedural Innovation and Institutional Change in Medieval English Manorial Courts, 10 Law & Hist. Rev. 197, 197-252 (1992). That does not, however, make them part of the same system.

the surviving records make it difficult to figure out just how that happened. It was even more significant in the sixteenth and seventeenth centuries when the records are better. I am not at all sure that it was a significant element in the fourteenth century, even in the last decade of the century, and the evidence of it before that is quite spotty. The beginnings of the chancellor's equity jurisdiction may belong on a list of the most important things that happened in English law in the fourteenth century, but if we are to understand why it happened, then we must remember that we are seeking to understand why an institution was begun that had at its beginnings a quite modest impact.

The most important thing that happened in the fourteenth century with regard to the land law was the development of the feoffment to uses, the ancestor of the modern trust. The origins of the use lie before the fourteenth century, but there is little doubt that the practice of making feoffments to uses increased substantially in the fourteenth century. Just how substantially is difficult to determine. At the beginning of the sixteenth century, it was estimated that half the freeholds in England were held by feoffees to uses, and the incorporation of uses into the common law, first by the Statute of Uses of 1536 and then by the recognition of executory interests created by feoffments to uses or by devises under the Statute of Wills of 1540, is familiar to those who study future interests today. Once more, however, these are sixteenth- and seventeenth-century developments. The story of the use in fourteenth century is buried in thousands of conveyances, hundreds of which have survived, but which are difficult to survey.

The rise of the action on the case is also a major development from the point of view of hindsight. Varieties of the action on the case were eventually to become the following: the action on the case for assumpsit, which became the action of contract in the nineteenth century; the action on the case for negligence, a major source, though not the only source, of the tort law of the nineteenth century; and the action on the case for ejectment, our basic action even today for the possession and ownership of land. But these developments cannot be seen until the sixteenth century, and we are concerned with the fourteenth. While we cannot say, in the state of our current knowledge, that the rise of the action on the case did not have an impact in the fourteenth century, it seems to have been dwarfed by a dramatic decline in the number of real actions brought in the Common Bench and an equally dramatic increase in the number of actions of debt. Indeed by 1398, the actions of debt, trespass (including the action on the case), account, and the action on the Statute of Labor-
ers account for approximately 90% of the actions in the Common Bench.\textsuperscript{33} Something clearly happened, but the rise of the action on the case may not be the right thing to focus on.

Traditional English constitutional history, which at this point departs from English legal history, would focus on different things.\textsuperscript{34} As I have already hinted in describing the deaths of the kings, the fourteenth century had more than its share of what used to be called "constitutional crises".

In 1311 a group of barons led by Thomas duke of Lancaster took over the government and promulgated a series of ordinances about royal administration.\textsuperscript{35} The revolt was brought about by the barons' dislike of Edward II's favorite, Piers Gaveston, and constituted an attempt to implement the governmental reform program of the Barons' Wars of the mid-thirteenth century. It is hard to know what would have happened if Thomas of Lancaster had been more interested in the details of government; perhaps it was no longer possible to keep a significant local presence and run the country.

Edward II regained control when Thomas of Lancaster was executed after he was defeated in battle; the Statute of York of 1322 is the theory of Edward's triumph, but it is different from what went before.\textsuperscript{36} To put it bluntly but not inaccurately, settlements of the thirteenth century spoke of the king, a living, breathing person to whom loyalty was owed. The Statute of York speaks of an abstraction—"the estate of the crown."

In 1327, Edward II was deposed in a putsch conducted by his wife Isabella and her paramour Mortimer; Parliament was involved, but how it was involved is difficult to figure out.\textsuperscript{37} We lack any official legal documents that describe what happened. They may never have existed, or they may have been destroyed.

Edward III became king at the age of fourteen. He quickly ridded himself of Isabella and Mortimer and for a while a baronial faction represented by John Stratford, the archbishop of Canterbury, ruled.\textsuperscript{38} In 1341, Edward dismissed Stratford and brought proceedings against him, which

\textsuperscript{33} Id.
\textsuperscript{34} A very traditional account of these events may be found in THOMAS PITT TASSWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 155–83, 487–95 (Theodore F.T. Plucknett ed., 11th ed. 1960). I confine myself in the following notes to but one reference for each paragraph to give some indication of how our views of these events have changed.
the lords insisted be conducted in Parliament. The same Parliament tried to audit the king's accounts before voting to support him with taxes and to control the appointment of his ministers. The latter two issues were to remain constant battle grounds. Trial of peers by peers in Parliament remained into the twentieth century.

The Black Death of 1348 to 1349 can hardly be regarded as a constitutional crisis, but it led to quite remarkable constitutional developments: the Statute of Laborers of 1351 represents the first attempt since the Roman emperor Diocletian in the late third century to control wages and prices comprehensively by law, and the system installed to implement the statute ultimately led to the creation of the justices of the peace as a permanent English institution.

When Edward III became senile, his sons struggled for power. In the so-called Good Parliament of 1376, his eldest son Edward the Black Prince, though mortally ill, took over power from his younger brother John of Gaunt by having the ministers of the king that John had appointed impeached. The Black Prince then died and Edward III died, leaving the Black Prince's ten-year-old son, Richard, nominally the new king.

The Peasants' Revolt of 1381 perhaps cannot be called a constitutional crisis, but it is symptomatic, if not the cause, of a major change in the law applying to peasants that occurred in the second half of the century. Suffice it to say here that after the Revolt and probably before, no serious effort was made to organize the economy around the traditional unpaid labor services of serfs. Agricultural production, which was still the basis of the economy, turned to the wage labor of those who did not have enough land to support themselves. Rural society became increasingly vertically stratified. The manor, though it remained important, was probably a less important social unit than it had been in the thirteenth century.

The king's uncles managed to run the government for almost ten years, but Richard II bridled under their control and found a champion in Michael de la Pole, the duke of Suffolk, whom he named his chancellor. The baronial party had Pole impeached in Parliament in 1386. In 1387, Richard obtained the opinion of the justices that the impeachment was illegal, indeed, treasonable.

The baronial party reacted by making use of a different procedure, appeal of treason, rather than impeachment. In the so-called Merciless

---

43. See Alan Rogers, Parliamentary Appeals of Treason in the Reign of Richard II, 8 Am. J. Legal Hist. 95, 95-124 (1964).
Parliament of 1388, almost all of the justices of England were proceeded against. One was executed; the rest went into exile. The Year Book of the next year, I might add, reads exactly the same as that for the preceding. Only the names have changed.

Richard II was finally deposed, as his great-grandfather had been, in a process the record of which makes a considerable attempt to follow legal forms. John of Gaunt’s son, Henry Bolingbroke, became King Henry IV.

All of these things happened, and if we look at them carefully, we can perhaps see law emerging out of them. Certainly the Ordinances of 1311 were an attempt at law; the Statute of York of 1322 was quite emphatically law, as was the Statute of Laborers of 1351, the Statute of Treasons of 1353, and the Statutes of Provisors and Praemunire of 1351 and 1353 (both of which deal with ecclesiastical jurisdiction and, particularly, appeals to the papacy). Whether the impeachments of the Good Parliament and the Parliament of 1386, the appeals of treason of the Merciless Parliament, and the Record and Process of the Deposition of Richard II are law or simply attempts to give legal dressing to raw shifts of political power is a question that we may debate, but perhaps the fact that attempts were made to give these moves legal dressing is itself significant.

Perhaps too, however, we are looking at the wrong place when we look to the crises. If ten years of the fourteenth century were years of crisis, ninety were not. Perhaps, it is in those valleys that we should look to see what really happened. Let me take the example of Parliament. I cannot tell you when it became established that extraordinary taxation must take place in Parliament. It was not the rule at the beginning of the fourteenth century; it was the rule at the end. Thirteen hundred thirty-seven seems to have been the last year in which county-by-county negotiations for taxation were conducted outside Parliament. I cannot tell you when it first became clear that for a piece of legislation to be called a statute, it must be passed in Parliament. If I had to pick a year, I would say 1351—when the Ordinance of Laborers that the council adopted in 1349 when Parliament could not meet became the Statute of Laborers when Parliament did meet. I cannot tell you when certain magnates became entitled by hereditary right to a personal summons to attend Parliament. It probably happened during the reign of Edward II. In the thirteenth century

44. The proceedings against Robert Tresilian, chief justice of the court Coram Rege, the only one who was executed, were by way of appeal; those against the rest of the justices seem to have been by way of impeachment. 3 Rotuli Parliamentorum [Rolls of Parliament] 229, 238 (1766–67).
46. For the Ordinances, see 1 Statutes of the Realm 157–68 (5 Edw. 2) (reprint 1810). The statutes, in order, are: York (Revocatio novarum Ordinationum), 15 Edw. 2 (1322); Laborers, 25 Edw. 3; stat. 2 (1351); Provisors, 25 Edw. 3; stat. 4 (1351); Treasons, 25 Edw. 3, stat. 5, c. 2 (1351); and Praemunire, 27 Edw. 3, stat. 1, c. 1 (1353).
and the first thirty-seven years of the fourteenth, the lesser clergy sent representatives to Parliament, particularly if taxation of the clergy was to be sought. They did not do so in the second half of the fourteenth century. The lesser clergy continued to meet to consent to taxation, but they met in convocation outside of Parliament rather than in Parliament.

The great legal work of the thirteenth century was the creation of the scheme of actions that were used in what we would call private litigation in the central royal courts. The fourteenth century sees nothing like the statutes of Edward I about private law. The making of such statutes may not have been necessary. What we do see in the fourteenth century is a turn to what we would call public law. Not all of it was successful; very little of it worked in quite the way that it seems to have been intended to work. That the attempt was made was, however, important, for it brought within the realm of law many topics that had previously been outside of the realm of law.

The same, I think, can be said about the developments in private law, though here we have to be careful. At least in some cases what we are looking at may not be something that was brought within the realm of law for the first time, but something that was previously within the realm of another part of the legal system and that came within the purview of the central royal courts and, hence, became more visible to us.

Let us return for a moment to the development of the action on the case. It is striking how many of the early writs on the case allege that someone who has undertaken a traditional function in the society has done a bad job to the plaintiff's damage. The blacksmith—to take a well-known early case—while he was shoeing the plaintiff's horse, drove the nail into the quick of the horse's foot rather than his hoof, and the horse became lame and could not work for a long time. The surgeon, in another case, undertook to cure a woman's hand and, in fact, made it worse. These writs are found quite shortly after the Black Death, and some have suggested that they were a response to it. The chaos of the plague had produced a situation in which many traditional functions were being performed by people who were unqualified. The smith of the town had died, and someone who had watched the smith do his work thought that he could do it too; the result was a lame horse. The suggestion, then, is that the action on the case is part and parcel of the legislative move that produced the Statute of Laborers—laborers should charge what they charged before the plague, and workers should work to the standard to which they worked before the plague. It is possible that these standards

51. This is the major argument in Palmer, supra note 21.
were enforced in local courts prior to the Black Death, though relatively little of what survives from the local courts suggests that. It is also possible that the standards of care were enforced more informally by the collective pressure of cohesive communities and by the market.

But, I think that we can go further and in a somewhat different direction. Prior to the Black Death, the central royal courts were courts for the elite. They were expensive (and remained so), and private litigation in them was principally concerned with land. We know that the plague impacted the elite less severely than it did the poor, so it is perhaps not surprising that the Black Death did not cause any change in the litigation rates in those courts. What is hard to explain are why the litigation rate went up and why the focus changed from real actions to personal actions. It would seem that these courts were reaching a larger swath of the society in the second half of the fourteenth century than they were in the first. More informal methods of dispute resolution, be they local courts or outside of courts, ceased to work well in a society that was disrupted and on the move. The men, and to some extent the women, of late fourteenth century England went to central royal courts to get their problems solved. They also, I might add, went to the church courts. The second half of the fourteenth century sees the beginnings of litigation about contracts in the church courts—litigation which those courts should not have been hearing but which nobody bothered to prohibit.52

I may even be able to tie my theme into the development of the chancellor’s jurisdiction. As I mentioned before, the most important thing that happened in the fourteenth century with regard to land law was the development of the feoffment to uses. After some hesitancy, the central royal courts decided that they would not recognize the use, and for some period, the enforcement of uses seems to have depended on the good will of the feoffees to uses. Disputes arose, however, because some feoffees proved unfaithful but also because issues arose in which there were genuine disputes about what the feoffees were supposed to do. Uses are not the sole topic of the early Chancery petitions, but they are among them.53

I promised to tie all of this into my breathtaking account of the major events of the fourteenth century with which I began this lecture. Some of this I have already done. The death of a third to a half of the population of a country is so disruptive that it cannot fail to have an effect on the legal system, and I think that I have given some indication of the multiple ways in which it probably did. I have said little about the effects of wars and a society organized for war, and I would like to turn to that briefly now.

Part of the connection has already been intimated but not spelled out. Had Edward II been a great warrior like his son, had he won the battle of Bannockburn rather than having been ignominiously defeated, then it

52. See Helmholz, supra note 23, at 231–34.
seems highly unlikely that he would have been deposed thirteen years after the battle. The connection is, I think, even more apparent in the case of Richard II. It is not only that the peace that Richard wanted with France gave his uncles, cousins, and the traditional nobility an opportunity to become dissatisfied with his rule; the very method that the opposition used to get around the ruling that parliamentary impeachment of the king's ministers was treasonable had a decidedly military cast. They challenged the king's ministers to a duel in the military court of the constable.\textsuperscript{54} It is as if Congress, dissatisfied with a ruling of the Supreme Court, rather than using impeachment, had the justices tried by one of former President Bush's military commissions.

At a more mundane level, the effect of war and of a society organized for war had its greatest impact on the criminal law.\textsuperscript{55} The English kings, beginning with Henry II in the latter part of the twelfth century, had made a commitment to the people in general to keep order—"security," to use the word that we now apply to Iraq and Afghanistan and sometimes to the homeland. The problem was that having made the commitment and having devised what was, for its age, a quite elaborate system to make it happen, the system fell rather badly short of achieving that goal. One of the principal reasons why it fell short was that fourteenth-century England maintained a system of fighting men whose values ultimately proved incompatible with the maintenance of public order. The relative peace of the last third of the century did not change the character of these fighting men. Indeed, as I have said, they turned to fighting each other. A large literature of complaint developed.\textsuperscript{56} With regard to what we would call criminal law, the criticism is quite inconsistent. The enforcement of the criminal law is said to be ineffective; far too many criminals are going unpunished. But the enforcement of the criminal law may also be criticized as too effective. That, in turn, leads to the suggestion that the author's contemporaries should, like Robin Hood or Gamelyn, flee to the forest and live as outlaws.

The response of the legal system was largely to ignore the strand in the criticism that said that the criminal law was too effective, though some of the more extreme methods of enforcement, such as the eyre and commissions of trailbaston, declined. The commissions of the peace that were increasingly institutionalized in the latter part of the century were the principal response. Over time, they probably were effective. It is not clear that they were in the fourteenth century.

\textsuperscript{54} There are those who doubt the connection between the parliamentary appeals of treason and the court of the constable. See Rogers, supra note 43. Be that as it may be, at the root of a criminal appeal, which was certainly one of the models for the parliamentary proceeding, is a challenge to do battle on the charge.


\textsuperscript{56} See Richard Firth Green, A Crisis of Truth: Literature and Law in Ricardoian England (1999).
One of the effects of the endemic violence of the English countryside of the fourteenth century can be seen on what we would call the civil side. In the second half of the fourteenth century, the king's council received an increasing number of complaints from litigants that they could not obtain justice because their adversaries had bought or intimidated all the jurors in the county. Some of these complaints were probably exaggerated, but there are so many of them that there is probably some truth to some of them. What is clear is that the council took them seriously, and when there came to be so many of them by the end of the century that the council could not handle them all, it turned them over to the chancellor. We have already seen that there were other reasons for the development of the chancellor's jurisdiction, but judging by the types of the petitions that the chancellor received in the early years of his special court, this was the principal one.

I have so far said little about the connection between what happened to English law in the fourteenth century and the general religious, intellectual, and cultural developments of the century. We do not have the space to deal with them in detail. The relations can be quite complex. Let us close with a few relatively simple examples of connection.

When England broke with Rome in the time of Henry VIII, the Statutes of Provisors and Praemunire, John Wycliffe and his Lollard followers, and the writings of Marsilius of Padua were all seen as precedents. This fact makes it difficult to reconstruct what these developments meant in the fourteenth century—much less what their relationship was to law. The beginning of wisdom may be to separate them. The statutes were certainly law and related to the painful process by which lines were drawn between ecclesiastical and secular jurisdiction throughout the Middle Ages. In this regard the statutes dealt with just one aspect of that jurisdictional divide, that between the pope and the courts in England, both ecclesiastical and secular, in cases involving appointment to ecclesiastical offices. Wycliffe was a reformer, and his ideas certainly appealed to those lay people who objected both to the wealth and power of the clerical church and to its claim that it provided the sole means for achieving holiness. His ideas, however, were condemned as heretical by an English ecclesiastical tribunal, and at the beginning of the fifteenth century, the royal government lent its substantial authority to the prosecution of the Lollards. Tracing the influence of Marsilius in England in the fourteenth century is difficult. With the advantage of hindsight we can see possible influences of Marsilius's Erastian ideas in the Statutes of Provisors and Praemunire, their renewal in the 1390s, and even in the ideas expressed in Piers Ploughman, but that influence—so far as I am aware—has not been proven. It was not until well after the fourteenth

57. See Select Cases in Chancery A.D. 1364 to 1471, supra note 53.
century that Marsilius's ascending theory of political power can be seen at all clearly in England.

The relation of the philosophical nominalism of Ockham to legal developments in England in the fourteenth century is even more complicated. The idea that gained favor in the last century that nominalism is responsible for the western development of the notion of individual rights seems to be a non-starter, both because the relationship between the two ideas is quite difficult to spell out and because the notion of individual rights seems, as an historical matter, clearly to antedate nominalism. The fact that very few of those who were responsible for the secular side of the law in fourteenth-century England had university training also makes any kind of direct influence from nominalist ideas on legal thought problematical. Perhaps, however, we should not abandon the search for a connection too quickly. There is much about the English legal system, particularly the secular system, as it had developed in the thirteenth century and as it continued to develop in the fourteenth, that is more comfortably discussed in a nominalist than in a realist framework. Here, the connection may be that philosophical nominalism made it easier for the system to continue in the directions in which it had already been heading.

We said that the intellectual development of Roman law in the fourteenth century was substantial, and that, by and large, England did not participate in it. The influence of Roman and canon law on the development of the common law in the twelfth and thirteenth centuries was—we now know—substantial, and we are beginning to trace a somewhat different kind of influence in the sixteenth and seventeenth centuries. I think, however, that it is fair to say that if Bartolus had walked into the Common Bench in the late fourteenth century, even if he could have understood the French that was being spoken there (which he might well have), he would not have had the slightest idea of what was going on. The same can be said of most of the serjeants of the Common Bench if they had walked into one of Bartolus's lectures, even if they could understand the Latin (which they probably could have). That the development of the common law in the later Middle Ages was largely independent of direct influence from the learning in Roman and canon law may well account for the fact that English law, even today, is a cousin rather than a sibling of the laws of the nations of Continental Europe.

The connections of the law to literature in the fourteenth century are substantial. I have already mentioned the complaint literature. Almost a quarter of Piers Ploughman is devoted to a blistering attack on the legal

system, both secular and ecclesiastical. But let us take a less obvious example. One of the characters in Chaucer's *Canterbury Tales* is a man of law, who is probably modeled on a not-particularly-distinguished serjeant of the Common Bench named Thomas Pinchbeck. Chaucer pokes some quite gentle fun at him, as he does at most of his characters. My favorite lines are:

Nowher so bisy a man as he ther nas,
And yet he semed bisier than he was.
We all know lawyers (and law professors) who are like that.

My final example is one that I have never been able to persuade my students is valid, but I offer it for what it is. The Year Books of the late thirteenth century are concerned with basics; the structural members of the system are relatively obvious. The style of argument is like the Early English style of Gothic architecture. The Year Books of the fourteenth century are elaborate and detailed. The structural basics are almost lost in the proliferation of decoration. They are like the Decorated style of English Gothic architecture. The Year Books of the fifteenth century return to the basics, but they are basics of a different sort—substantive rules rather than points of pleading. They do to the building of the law what the Perpendicular style of Gothic architecture does to physical buildings.

So finally for the bottom line: Why should anyone care? My argument throughout this lecture is not that one should care about what happened in English legal history in the fourteenth century because of institutions that we have today that, in some sense, began in the fourteenth century. There are plenty of them about which one can make that argument: the modern law of contract, tort, and trusts; modern equity; modern legislative power over appropriations; legislative impeachment power—all of these, in some sense, began in fourteenth-century English law. My argument has been, rather, that we cannot understand the origins of these things unless we understand the broader context within which they happened. Contexts change; they are never the same. As contexts change, legal institutions change even if they retain some of the clothing that they had on when they began. What we learn from the fourteenth century, I would argue, is what we learn from any legal history well done—how context shapes the law but also how the law, sometimes, shapes the context. Any lawyer who can get a firm understanding of how that interactive process works has learned something far more valuable than the factoid that the English law of trusts began in the fourteenth century.

---

Articles