

**SOCIAL EXCLUSIVITY OR JUSTICE FOR ALL?  
ACCESS TO JUSTICE IN FOURTEENTH- CENTURY ENGLAND**

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For this reason, I will keep myself within the woods, in the beautiful shade;  
There is no deceit there, nor any bad law,  
In the wood of Belregard, where the jay flies  
And the nightingale sings every day without ceasing.

The outlaw, residing in the idyllic ‘wood of Belregard’, is a powerful and evocative image in medieval literature.<sup>1</sup> Embodying a strong sense of social justice and imbued with utopian qualities, both the outlaw figure and the greenwood can be taken to symbolise the aspirations, or perhaps more appropriately the plight, of those who had no apparent prospect of ‘justice’, either through lack of access to the legal system or on account of their treatment within it. The apparent difficulties faced in trying to clear one’s name are portrayed as stemming from endemic social prejudice and corruption within the legal system. As such, and in what is a recurring theme during the fourteenth century, the outlaw figure presents a picture of social exclusion amounting to a serious indictment of royal justice in late-medieval England.<sup>2</sup>

This paper seeks to mitigate the stark ‘outlaw’s view’ outlined above (itself a metaphor for the excluded, both literally and psychologically) through an examination of attitudes towards the disadvantaged and by highlighting the structural and administrative factors ameliorating their experience of royal justice in the fourteenth century. The word ‘justice’ itself has an inherent duality, referring both to the system of rules and procedures within which the law operates and to notions of fairness and procedural propriety. In order to penetrate the aura of social exclusivity supposedly existing around the judicial system, this paper tests ‘accessibility’ with regard to *both* the meanings of ‘justice’. It examines, initially, the extent to which the royal courts themselves could be inclusive and, more particularly, whether those with the disadvantages of lowly status, lack of wealth and little education were afforded access to legal services. Access to justice in this sense should be regarded as incorporating three main considerations. First, it involves the opportunity to gain legal advice and (if

necessary) representation and the ability physically to initiate private actions in the full hierarchy of royal courts. Secondly, it includes having the funding to obtain the services of a lawyer and to finance all stages of the litigation process. Thirdly, it means the capacity intellectually to understand the basic legal problem and comprehend something of the court proceedings. The paper then goes on to consider the other meaning of 'justice' and tries to ascertain whether, once within the system, a litigant from a humble background was overwhelmingly disadvantaged by his lack of status or if in fact the system (or its guardians) enabled him to avoid undue prejudice. In other words, to what extent did the system work against you if you were poor? Was it possible to obtain a fair hearing? What could a litigant do if he or she felt let down or betrayed by the system?

In responding to these questions, this paper strikes at the heart of the traditional picture of medieval justice and suggests that there *was* an understanding of the problems faced by the less prosperous would-be litigant and that there *were* definite attempts to ensure that justice was not as socially exclusive and divisive as it has been characterised. While it is recognised as an unfortunate reality of research into medieval history that most judicial, political and literary evidence is inevitably skewed towards the lives and attitudes of the elite, leaving the experiences and responses of the peasantry and townspeople fairly obscure, it will be argued on the evidence of the plea rolls and law reports that the lower echelons of society could in fact be the beneficiaries of royal justice as well as its victims. This contribution highlights the move towards greater accessibility in royal justice during the course of the late thirteenth and fourteenth centuries and examines the background theological and moral justifications underlying judicial and governmental attitudes towards access to justice. It also redresses the notion (favoured by some historians) that the supposed new cultural and political values of the post-plague era necessarily brought restriction to the legal system and oppression in the administration of justice.<sup>3</sup> Indeed, far from bringing alienation from the king's courts, the widening scope of royal justice observable over the course of the thirteenth and fourteenth centuries (in terms of opportunities for redress and in the range of legal remedies available) not only provided greater access at the local level, but also catered for the litigious tendencies of at least some sections of the peasant and urban communities.

The availability of judicial sessions in the localities (thus avoiding a journey to the central courts at Westminster) was a necessary prerequisite for accessibility. The general eyre's disappearance from the system of judicial administration following its suspension in 1294 is often regarded as a factor inhibiting access to justice for the lower orders during the fourteenth century. By the later thirteenth century the eyre, however, was hardly a model of availability: its pace had slowed to such an extent that it visited each shire on average only once every seven years. Its responsibility for hearing assizes and delivering gaols had already been superseded by the countryside circuits of the assize justices, who became an established feature of royal justice. From the early

fourteenth century, justices with wide powers to hear and determine offences were periodically to be found operating on circuits covering all the counties in England, while the court of king's bench visited the shires empowered to hear bills and act as an itinerant court of first instance from about the 1320s. The visitations of the latter two agencies dwindled towards the mid-fourteenth century when 'trailbaston' commissions ceased to be a politically viable option and provincial visits of king's bench were curtailed. The apparent reduction in judicial outlets may have had little significant impact on the initiating of actions, however, since the justices of the peace could accept private suits and they, together with the assize justices, were able to provide sessions on a predictable and regular basis.<sup>4</sup>

The range of business entertained by the royal courts made them an attractive forum to which to bring disputes. The crown was increasingly offering remedies for new situations and expanded the type of writs available from chancery (large numbers were added to the registers during the reigns of Edward III and Richard II in particular).<sup>5</sup> Some writs arose as a result of statute legislation, but also through the appropriation of remedies previously available in the customary courts.<sup>6</sup> These remedies were designed to appeal to and benefit people across the social spectrum. Indeed, Chief Justice Bereford commented on the advantages of replevin over the cumbersome proprietary action *ne injuste vexes*, 'For twenty years past there has not come to England so good a law for poor folk'.<sup>7</sup> A hearing before the king's justices could also be obtained by procedural means: cases could be transferred from a lord's court to the county court using a procedure known as *tolt*; from the county court to one of the royal courts through the writ *pone*; and any case could be reviewed in the court of king's bench following a writ of *certiorari*.<sup>8</sup>

Even with the manifest availability of judicial arenas and legal remedies there were other hurdles to surmount in the pursuit of private litigation, notably the financial expense. Affordability was obviously an important consideration for any potential litigant, let alone the less well-off. In the normal course of events the poor plaintiff might find it difficult to afford the writs necessary to bring an action, or might be unable to meet the fees expected for legal advice and assistance (let alone representation in court). Costs could escalate if a suit was unnecessarily protracted. Moreover, if the plaintiff was unsuccessful or failed to turn up, he might be liable to pay a fine to the crown for a false claim. There is nevertheless clear evidence that considerable allowance was made for the fact that the cost of litigation (with its attendant expenses) might prejudice potential suits from the lower orders. Indeed, various forms of 'legal aid' existed and efforts were made by parliament and the judiciary to ensure that people were not denied an opportunity for justice purely on economic grounds.

By the fourteenth century, obtaining the services of a lawyer was a vital factor when pursuing court action. In order to have a chance of success the plaintiff needed to be appraised of the legal position, had to obtain the correct writ and follow the necessary procedures. A defendant also required expert assistance and had to

traverse the charges made against him without omitting a denial or making a verbal error. Finding an attorney was therefore a necessary first step. Legal advice did not usually come cheap. How were the less well-off able to cope? In the thirteenth century *ad hoc* advice and assistance could often be obtained from the clerks of royal justices travelling in the provinces.<sup>9</sup> By the early fourteenth century, men of law whose work lay predominantly in the localities were increasingly available for advice or representation and, judging by the number of suits brought in the court of king's bench by peasants using an attorney (see below), the fees they charged cannot have been unduly exorbitant or prohibitive.<sup>10</sup> Although it is difficult to be sure of the prevailing standard fee (if indeed there was such a thing), it has been suggested on the basis of a city of London ordinance of 1356, that 3s 4d was a 'reasonable fee' and probably near enough the amount charged by a late medieval attorney operating in the provinces.<sup>11</sup> Payment did not have to be wholly in cash: some attorneys accepted payment in kind (for example in cheese and butter).<sup>12</sup>

For the majority of litigants, the services of a pleader (arranged by their attorney) might also be required. In comparison with attorneys, the fee-scale for serjeants was generally higher, but they were not all the grasping fee-earners the poet Langland would have us believe:

Seriantz it semede that serveth at pe Barre  
Plededen for penys and poundes pe lawe  
And nat for love of Oure Lord vnlose here lypes ones.  
Thow myghtest betre meten myst on Malverne Hulle  
Than gete a mum of here mouth at moneye be shewed.

(Prologue to *Piers Plowman*).<sup>13</sup>

Modest remuneration was levied from some litigants and it was not unknown for serjeants to undertake work *pro bono*. In Edward I's reign, for instance, the sum of 3s 4d is known to have been paid to some serjeants operating in the royal courts - a similar sum was payable to serjeants practising in the city of London courts about half a century later. Clients too poor to pay the required amount for legal representation were sometimes assigned a pleader by the justices free of charge. There were several requests in the eyres of the early 1290s.<sup>14</sup> Alan son of Alan Plotman, for example, on behalf of himself and his mother claimed that they were poor folk and asked the justices 'so that they lose not their right' to grant them a serjeant.<sup>15</sup>

Once the attorney had advised on court action, the economically disadvantaged plaintiff faced further financial barriers. To bring litigation at the assizes or in the court of common pleas a plaintiff required an 'original' writ to initiate proceedings and, once the writ had been returned to court, a series of 'judicial' writs to control later stages. The prospective litigant could qualify for help with these charges if he or she were poor since, in spite of a reputation for overcharging, chancery clerks waived the fee of 6d for an originating writ if the

applicant could swear to poverty.<sup>16</sup> In the thirteenth century and into the early fourteenth century no major outlay was usually required for judicial writs. At least prior to 1285 they were probably issued free of charge and even after the second Statute of Westminster of that year they only cost one penny.<sup>17</sup> By Edward III's reign, however, the fee for a judicial writ had outstripped the cost of an original writ, having risen to 7d; and a further increase of 3d occurred by 1350.<sup>18</sup> Although this inflated price would appear to endorse claims that justice was becoming more exclusive, the cost of litigation did not go uncriticised. The parliamentary commons petitioned for a reduction in the price of original writs to 3d and for a withdrawal of extra charges (often included for land litigation) which were considered to be unreasonable.<sup>19</sup> The commons were unsuccessful in reducing the cost of an original writ, but they managed to secure some concessions, including the proviso that any extra costs would not be levied if the writ were granted as an act of charity or by favour of the court.<sup>20</sup>

Suits could also be brought by purchasing from chancery a special commission of oyer and terminer. Issued under letters patent, they were eagerly sought by litigants of various backgrounds from the late thirteenth century and reached a peak of popularity during the early fourteenth century.<sup>21</sup> The fee paid to chancery was normally £1. Though it represented a one-off payment (and attracted none of the hidden extras characteristic of judicial writs), such a sizeable sum, considerably in excess of the cost of a writ, would appear to have placed the purchase of such commissions beyond the reach of poorer litigants. Interestingly, however, a variable fee scale appears to have operated, (possibly) controlled by the ability to pay. Charges towards the upper end of the spectrum graduated from 2 marks (equivalent to 26s 8d) through to £2 and could even reach 5 marks (£3 6s 8d), levels which at times may have scorched the pockets of some gentry families. Towards the lower end applicants were allowed to pay reduced rates, ranging from one mark (13s 4d) to as little as half a mark. While even these lesser sums may have been difficult for members of the peasantry to raise, it is nevertheless clear that the relative poverty of some of those applying for commissions was taken into consideration. Indeed, it is apparent that not infrequently special oyer and terminer commissions were issued 'for God' as an act of Christian charity and accordingly the requirement for payment was dropped altogether.<sup>22</sup>

The cheapest method of bringing an action was to go before the justices with an oral complaint (*querela*) or present a written bill outlining the injury suffered. It would appear that no charge was payable for this facility and it enabled ordinary people to bring with relative ease their cases before the particular group of royal justices visiting their county.<sup>23</sup> The practice was initiated during the mid-thirteenth century when the crown encouraged complaints to be brought before the justices in eyre. It proved a popular form of achieving redress in that the general eyre was flooded with business in the form of private suits brought by peasants.<sup>24</sup>

The suspension of the eyre in 1294 did not end the opportunity for cheap and easy access to the courts. Jurisdiction over oral complaints and bills passed initially to justices holding general commissions of oyer and

terminer and the itinerant king's bench. Despite the latter's pre-eminent position in the hierarchy of courts, peasants were not inhibited from initiating proceedings in king's bench, as a social analysis of lawsuits coming before the court when sitting in Lincolnshire (1291-1339) has indicated.<sup>25</sup> New cases brought by 'villagers' never accounted for less than 70 per cent of the total business generated in the shire, while the average for the period was an impressive 81 per cent. The comparative frequency with which the court of king's bench visited Lincolnshire (once every eighteen months on average during the sixteen years 1323-39) may have been a relevant factor not only in encouraging this group to use the court, but to continue using it after its departure.<sup>26</sup>

Litigants could also bring bills before the justices of the peace. Though a number of historians have commented that the justices of the peace were forbidden to accept private suits for common law wrongs after 1332, in actual fact the peace commissioners appointed in 1338 were allowed to do so. Surviving enrolments indicate that they continued to entertain such bills even when (after 1350) the requisite authority ceased to be included in their commissions. Significantly, after 1350 justices of the peace were empowered to receive bills relating to the labour legislation and other statutory offences. This provided another encouragement for the lower class litigant and as the evidence of the surviving session rolls shows, the hearing of bills relating to these areas comprised a significant part of the business at the quarter sessions held in the late fourteenth and fifteenth centuries.<sup>27</sup>

In addition to fees for the services of a lawyer and payments to get the case off the ground there were other expenses attendant on private litigation. A person who initiated an action had to be able at the outset to satisfy the court that he would turn up and prosecute the case. A claim, therefore, had to be supported by two people who were duly required to ensure the plaintiff's presence in court and who were liable to imprisonment or to pay a fine if he defaulted. Here, again, special consideration was given to those who lacked the necessary economic wherewithal. If the complainant was poor and unable to find anyone to back his claim he could take an oath and pledge his faith instead. Suitors who could not find personal pledges were also allowed to substitute items of clothing or property, such as a cloak or a horse.<sup>28</sup> If, at some later date, the claim was not pursued and the plaintiff withdrew his suit (perhaps because the case had been settled out of court) or he failed to substantiate the whole claim, he might then find himself liable for further expenditure: suffering an amercement for a false claim or having to pay for a licence to come to an agreement. Accepting the financial hardship that would be incurred by a person of slender means, the court might remit the fine where the litigant was poor.<sup>29</sup>

If the outcome of litigation was favourable, some (or all) of the expense involved in bringing the action might be recouped in the damages awarded. Although the justices and their clerks were usually entitled to a share of the sum recovered, the proportion was not fixed. In any case the assignment of a fraction of the award was probably not obligatory for poorer plaintiffs nor necessary when the sum itself was insignificant.<sup>30</sup> Generally

defendants were kept in custody until they satisfied the required sum, although in 1300 a losing litigant who had been committed to prison was released when the justices found out that he was penniless.<sup>31</sup> The justices obviously had some sympathy for, or were realistic about the chances of satisfaction from, a defendant with little or no income as there is evidence that the impoverished were excused payment altogether.<sup>32</sup>

When the parties finally arrived in court, how intelligible were events there? Given the somewhat arcane and technical language, court proceedings inevitably took on an air of mystery and exclusivity and litigants faced potential barriers in comprehension, both cognitively and linguistically. The legal records appear to reinforce this: the plea rolls of royal (and even manorial) courts are in Latin; the legal treatise known as *Bracton* employs Latin dialogue in its examples, as does the earliest report of a cross-examination by a judge,<sup>33</sup> while the Year Books, which often seem to be convincing reports of actual proceedings in the eyre and Westminster courts, are in French.<sup>34</sup> Could the informed layman understand what was going on? Was the poor litigant able to grasp anything of what was occurring?

To answer this we need to consider both the nature and content of trials. The question of comprehension can be broached initially by querying whether it was necessary for a litigant to be fully conversant with the pleadings and procedures. The extent of any personal involvement would have depended upon whether professional representation was appropriate or available, upon the judicial forum and the nature and complexity of the particular case. Suits which revolved around difficult points of law would necessarily require expert presentation and certainly after 1259 obtaining the services of a serjeant was compulsory in pleas of land and of replevin in the city of London courts.<sup>35</sup>

In order to appreciate the extent to which the system possessed (or acquired) an element of 'user-friendliness' we must first distinguish between the language(s) used to record details of the court proceedings and the language(s) actually spoken in court. A further distinction should then be made between the language of the formal pleadings and that used in the later proceedings. Surviving lawyers' manuals show that the rehearsal of issues before the court was carried out in French, rather than in Latin, certainly from the mid-thirteenth century.<sup>36</sup> This linguistic preference probably continued for at least another hundred years, until it was decreed by the city of London in 1356 that pleadings should be in English,<sup>37</sup> a move that was extended to all courts of law by royal statute six years later.<sup>38</sup> Such a change did not, of course produce instant transparency, or remove the opportunity for confusion arising out of the complexity of legal language. Nonetheless a measure of accessibility was achieved through the introduction of the vernacular in that it enabled those who were unrepresented and had little or no knowledge of law French to put (as effectively as they could) their claims before the justices.

Focus on the language of pleadings inevitably obscures the extent of language exchange that took place.<sup>39</sup> Jurors presenting their responses to the 'articles of the eyre' at the Kent eyre of 1313-14, for instance,

were apparently required to submit orally in English (through their foreman) answers which, before their acceptance by the court and subsequent enrolment in Latin, had to correspond exactly with the same words previously recited in French by the court clerk. The oral use of vernacular was not limited to simple statements. Where the mother tongue of court participants was English (and as early as Henry III's reign the judges were native Englishmen) it would be reasonable to suppose, indeed common sense in the case of a poor villager, that the vernacular was used as a means of enabling a meaningful and effective exchange to take place between the bench and parties or witnesses. There is evidence of French and English being used in cross-examinations in the church courts in 1271 and it is unlikely that the royal courts (even the central courts) differed in this respect.<sup>40</sup>

While the full implications of proceedings may have eluded many litigants, their general understanding of events was undoubtedly enhanced during the later fourteenth century by the use of English in spite of the illusion provided by the surviving records. The opportunity to employ a local man expert in the law to manage the complexities of litigation and steer the case through court was also a powerful means of overcoming both the technical and psychological barriers to bringing litigation in the royal courts. The ability of the lower orders to obtain legal advice and use the judicial system to their advantage has long been underestimated. Indeed, some peasants can be shown to have been experienced litigators, at times bringing cases in the royal courts, at other times pursuing (often lengthy) disputes in the manorial courts.<sup>41</sup> Even the unfree (who technically had no rights to sue in the royal courts) appear to have employed lawyers and achieved a measure of access, particularly during the later fourteenth century.<sup>42</sup> The fact that the system was so obviously stacked against the unfree does not mean that justice was perceived as a closed shop: access to the royal courts was clearly regarded as an important advantage to be preserved or acquired.<sup>43</sup>

Entrance to the legal system was obviously one thing, but were poorer litigants treated differently once they were inside? To what extent was the system open to abuse in the form of class prejudice, bias and impropriety? Could justice in its moral sense be achieved? Was the system, as the author of *An Outlaw's Song of Trailbaston* suggested, riddled with 'deceit' and 'bad law'? In the final analysis, can we reconcile the contradictory image of outlawry? Was it as fearsome, or conversely, as desirable as was claimed?

Although Magna Carta did not herald a 'judicial Utopia' its provisions set a benchmark against which the operation of the legal system in the fourteenth century was increasingly measured. The twenty-ninth chapter of the 1225 version proclaimed 'to no one will we sell, to no one will we deny or delay right or justice'. Although this was initially directed at a specific group, the tenants in chief, it was arguably interpreted later to have more general application.<sup>44</sup> By Edward III's reign the Great Charter was regularly confirmed in statute legislation and



there were additional guarantees that, irrespective of his estate, no man would be condemned or made to answer accusations without the correct procedures being followed.<sup>45</sup> Emphasis was also placed at a judicial level on the fair treatment of everyone regardless of their status. The oath taken by a royal justice (from at least the mid-thirteenth century) affirmed that when acting in a judicial capacity he would ‘do justice to the best of his ability to all as well poor as rich...[would not] disturb or respite justice against right or against the law of the land either for the great or the rich...[and] loyally do right to all according to law and custom’.<sup>46</sup> The crown’s continuing desire that justice should be inclusive and benefit equally persons of high and low status was enshrined in the Ordinance of Justices of 1346.<sup>47</sup>

The justices’ oath placed on them an onus to intervene and use their discretion where it mattered. A practical manifestation of the judges’ role in this respect might be using their discretion to assign counsel to poor litigants and thus counteract any advantage which a litigant of higher status might wield.<sup>48</sup> This might be particularly pertinent in the case of a poor litigant unable to provide the customary gifts for judges and jurors. The capacity to look at an individual’s situation and go behind the strict letter of the law to the underlying morality characterised the term in office of several judges of the period and was a vital factor in the beginnings of ‘equity’ and the chancellor’s ‘court of conscience’. Towards the end of Edward I’s reign, for example, royal judges Staunton, Hengham and Howard were quite prepared to override a statute where hardship might result.<sup>49</sup> A couple of years later, Bereford was willing to act likewise ‘in the present case, because of the hardship that will ensue’.<sup>50</sup> Staunton refused to let a woman lose her dower through a tenant’s deviousness and by distinguishing between the heir’s inheritance and his purchase achieved ‘justice’ for her.<sup>51</sup> Bereford enunciated a similar concern that a plaintiff should bring a case in good faith. He also once urged that there was a moral dimension to law.<sup>52</sup> Although the judges just mentioned were predominantly men of the late thirteenth and early fourteenth centuries, there were others in the mid-to late fourteenth century who carried this spirit forward. Mowbray, for instance, believed the law (judicial decisions) needed to be in accord with reason and to remedy ‘mischief’ (injustice),<sup>53</sup> while Shareshull felt the intellectual tendency towards following ‘precedent’ (though a concept itself used to ensure uniformity and fairness) should not be allowed to override ‘right’.<sup>54</sup>

The crown was not satisfied with the theoretical impartiality and integrity of its officials. An important feature of royal justice was the provision of the opportunity to complain about the workings of justice (including personnel and the courts) and of mechanisms to take action against those who failed to uphold its standards. This was not a purely philanthropic gesture on the part of the government. It was beneficial to the crown that the activities of its officials could be scrutinised by those on the ground. Punishment of the guilty by fines or removal from office both enhanced the effectiveness of the crown’s operations and brought in revenue for its coffers.

While a side effect of this initiative may have been the generation of malicious complaints, many of them were probably perfectly genuine and contributed significantly to reducing the amount of corruption or self-seeking that was alleged to have flourished. The eyre, of course, had pioneered the crown's acceptance of such complaints. Its judicial successors (as outlined above) continued to investigate the misdeeds of officials involved in the administration of justice and in particular were concerned to root out concerted abuse of the legal system. The specific crimes of conspiracy, champerty and maintenance were tackled by judges in the courts and through parliamentary legislation.<sup>55</sup> The problem of jury corruption was arguably eased by a series of special provisions which tightened up on procedures relating to jury trials and brought in safeguards on the composition and conduct of jury panels.<sup>56</sup> The procedure of attain where by a jury decision could be overturned if there was sufficient evidence of perjury was extended to the poor (for pleas of land) in 1361.<sup>57</sup>

From the late thirteenth century the poor, humble and weak had also recognised the potential of submitting a petition to the king in parliament. Sometimes (as in 1330 and 1341) encouragement came directly from the crown and was clearly politically motivated.<sup>58</sup> Nevertheless, even in the mid-fourteenth century (by which time the private petition had to a large extent given way to the 'common' petition and had ceased to be enrolled on the parliament rolls) petitioning in parliament remained a potent method of achieving a hearing for judicial problems. Indeed, most of the extant petitions concern matters arising from legal cases.<sup>59</sup> Given all the other means of taking action within the judicial system, it is significant that this method of achieving redress remained alive.

A system for dealing with complaints against royal judges (to be proclaimed in all public places) was instituted by Edward III in the Ordinance of Justices. There is no evidence as to the effectiveness of this system, but the proclamation may have been listened to, assimilated and discussed among local people. Certainly it represents an approach by the crown towards identifying with the needs of its subjects and attempting to remedy them. Nevertheless, if there is some justifiable criticism of restricted access to justice in the later fourteenth century, then it is possibly in the area of complaint mechanisms. It was a problem probably founded on people's perceptions: despite governmental initiatives, people may have believed there were far fewer opportunities to appeal against the misdoings of officials than was in fact the case because the traditional mechanisms were no longer in evidence. Alternatively, their expectations of justice may have grown commensurately with the developing system resulting in a dissatisfaction with the new legal world - a dissatisfaction that the royal government was forced to acknowledge during the Peasants' Revolt.

Having demonstrated the relative accessibility of the judicial system and its attempts to avoid social exclusivity we need to ascertain the thinking behind the moves. Was there a distinct attitude or even a policy

towards the less well-off and impotent? Who were the poor who came to seek 'legal aid' and on what basis might they have qualified for and received it?

The thinking within government and judicial circles concerning treatment of the indigent at law may have arisen from a heightened consciousness about the poor combined with new attitudes towards the moral character of poverty. From at least the twelfth century there was much debate amongst jurists and theologians (and particularly between the church and the mendicant orders) on the nature of poverty and how relief might best be given to the poor. This involved identifying what have subsequently been called the 'deserving poor' - those whom it was felt could be distinguished from the general mass of poor folk for the receipt of charity because they were not capable of working (possibly through sickness or injury or other weakness) or had been respectable but were now experiencing difficult times. Donors were advised to avoid giving charity to those likely to resort to crime or sin, or to able-bodied idlers or mere vagrants - an attitude that was echoed in the labour legislation of the mid-fourteenth century. The *pauperes verecundi* or shame-faced poor, however, those who had been used to a measure of comfort but through circumstances were now reduced to poverty, did merit charity. Indeed, they were regarded as doubly needy since they had not only suffered physically through shortage and need, but also mentally through social dislocation and the associated shame.<sup>60</sup>

Some examples of bills presented to the justices in eyre seem to bear this out. John Feyrewin told how he had been forced to become a pauper begging his bread 'for God's sake' and ended up by saying 'I have not a halfpenny to spend on a pleader'. William son of Hugh of Smethumilne's request places emphasis on the personal spiritual benefits of allowing aid: 'And I pray you, for your soul's sake, that you will give me remedy for this, for I am so poor that I can pay for no counter'. Edith, widow of Richard Darlaston makes similar claims, praying 'remedy for your charity and for God's sake, for she is poor'. She may in fact have fitted into the category of shame-faced poor and thus regarded as truly deserving of help since she claims that 'by these things [the legal misfortunes she relates] she has been brought to beggary'.<sup>61</sup>

While there appears to have been no clearly defined or articulated 'policy' as such, there was definitely a feeling within government and judicial circles and amongst the more privileged members of society that royal justice was an area in which charitable discretion should operate. The parliamentary commons persistently argued throughout the fourteenth century that the royal courts should be equally accessible to the less well off (if not to the genuinely poor). As we have seen, litigants frequently requested help in purchasing writs or special commissions of oyer and terminer and in obtaining legal representation and were duly awarded them in terms that describe it as an act of charity. Even if by the end of the fourteenth century the emphasis had changed as to who was truly deserving of charity, some bills from Lincolnshire peace sessions in the 1390s demonstrate (though the

wording was probably standard form) there were still requests for remedy ‘for the love of God and by way of charity’ (*amore dei intuitu caritatis*).<sup>62</sup>

In comparison to most charitable gifts, legal aid (in terms of the money saved in legal fees) would have amounted to a substantial donation. The minimum given in charity seems to have been 1/4d, while inmates of almshouses probably received about 1d per day.<sup>63</sup> If the price of an original writ (6d) or a specialoyer and terminer commission (3s 4d) were waived, together with legal fees of at least 3s 4d and any other additional charges, the litigant was remarkably fortunate. Indeed, someone who regained a piece of land or a disputed inheritance or who obtained at least a proportion of the damages claimed, would have gained considerably in both financial and (more significantly) social terms.

The very fact that poor people were granted this legal aid must say something about the approachability of the judicial system, but we can only speculate about how they came to seek it in the first place. How did they know that they could receive help to bring a suit unless it was by some means communicated to the lower classes? Perhaps the poor who were given help to settle their problems in the royal courts received information from persons to whom they were connected in some way either through kinship or friendship or to whom they were linked through clientage, as tenants or servants.

The practice of aiding the litigation of poor persons was not confined to the royal courts, but was mirrored in the ecclesiastical courts. Indeed, from the late thirteenth century it was regarded as the ethical professional duty of canon lawyers to act without remuneration for impoverished clients.<sup>64</sup> The first official indication of the English church’s practice appears in a statute of Archbishop Winchelsey of 1295, which provided that it was the duty of the judge presiding in the Court of Arches to grant advocates and proctors to clients who claimed poverty.<sup>65</sup> This was also the tenor of regulations promulgated by the bishop of Durham in 1312.<sup>66</sup> The phenomenon of legal aid, however, was not limited to the English court system, as legislation from northern Italy demonstrates. What is interesting from this point of view is, firstly, the capacity for such provision to transcend national and jurisdictional boundaries. Secondly and more significantly, whilst the general duty to aid the poor may have derived from canonist doctrine, the initiative and responsibility did not remain purely with the church. Statutes from Modena, Bologna and Ferrara indicate a willingness on the part of civic authorities to provide public lawyers for the poor financed out of tax revenues.<sup>67</sup> Although the English state issued no formal, all-encompassing legislation on this issue during this period, it is clear that its more piecemeal and *ad hoc* discretionary measures nevertheless pre-empted considerably the *in forma pauperis* provisions of Henry VII’s reign.<sup>68</sup>

In the *Outlaw's Song*, the system of outlawry is paradoxically blamed for putting people outside the law, but revered as enabling its victims to live in an ideal state, unencumbered by legal institutions and traditional concepts of law. The reality was somewhat different. Viewed in its legal context, the onus was clearly on the individual to respond to the accusation against him (either civil or criminal) within the required time period. There was not necessarily anything sinister about it, it was purely the wheels of bureaucracy: the status of outlaw was proclaimed in default of an answer. The outlaw's view also takes no account of the fact that once outlawry had been pronounced there were in fact many ways of reversing it, not least by having a reasonable excuse for not being able to turn up on the final occasion.<sup>69</sup> Moreover, at the time the poem was written (in the first decade of the fourteenth century) the system of outlawry, like the contemporary legal institutions themselves, was in a state of flux. From the government's point of view, up to the late thirteenth century, outlawry was a useful process whereby criminals were identified and information about them communicated. Its effectiveness derived from its use of the sanction of exclusion as a means of preventing crime. By the fourteenth century, however, partly as a result of demographic changes, exclusion from the community had become less meaningful to the individual and more difficult to enforce. Consequently outlawry no longer possessed much bite.<sup>70</sup> Alterations in the rules and practices surrounding it over the course of the century also ameliorated its direct effect.<sup>71</sup>

The outlaw's identification with the disadvantaged person who has experienced harsh treatment *within* the legal system, as well as the person who has been placed *outside* it, in fact conflates two separate problems. If the person refuses to answer the sheriff's writ because he fears or knows he will not be treated fairly, then he may feel forced to 'opt out', but in fact is not doing himself any favours by doing so. The medieval judicial system, as we have seen, did not operate deliberately to the exclusion of the disadvantaged in society, provided they remained within the boundaries of the legal world. In many ways it went out of its way to make its services available for those with little money or influence and waived fees or abrogated strict rules of procedure when approached. It was keen to make it known that it followed the ideal that justice should be equally favourable to the poor and to the rich and that its officers were bound to uphold this maxim. Although we should not idealise the medieval world, in order for the poor to use and *reuse* the legal system they must have had some confidence in royal justice and in its capacity to embrace all estates. The greenwood may have seemed idyllic, but there was no chance of achieving redress through 'opting out' or betterment by remaining outside the system.

Medieval justice was clearly flexible and accommodating, but did its apparent benevolence rely wholly or in part on the discretion of the personnel involved in its administration, notably the royal justices and other lawyers? Two of the justices named in the *Outlaw's Song* appear to have been respected. They are described in terms of their piety and concern for the poor. They are clearly contrasted with two of their colleagues, whose discretion, it is implied, is unlikely to be exercised in the litigant's favour.<sup>72</sup> Although to some extent benevolence

to the poor became insitutionalised over the period (because on proof of status benefits were routinely given), there was still a place for judicial discretion. Sometimes it could be exercised favourably towards the less well-off at other times it might fall more harshly. Justice itself, however, is an ideal, for variance in temperament and in execution of the law are characteristic of judges down the ages and not confined to the medieval period.

- <sup>1</sup> R. B. Dobson and J. Taylor, *Rymes of Robin Hood: An Introduction to the English Outlaw* rev. edn (Stroud, 1997), p. 252 (An Outlaw's Song of Trailbaston, c. 1305).
- <sup>2</sup> Outlawry was an administrative process which occurred automatically if an individual failed to answer a writ of summons or attachment (which was normally followed by a writ of arrest) by the time his or her name had been proclaimed at five meetings of the county court (in other words, after at least five months): M. Hastings, *the Court of Common Pleas in Fifteenth Century England* (Hamden, Connecticut, 1971), pp. 174-9.
- <sup>3</sup> See for example: G. L. Harriss, *King, Parliament and Public Finance in Medieval England* (Oxford, 1975), pp. 354-5; R. W. Kaeuper, *War, Justice and Public Order* (Oxford, 1988), pp. 386-7; R. H. Hilton, *Class Conflict and the Crisis of Feudalism*, rev. edn (London, 1990), pp. 49-65, 173-9; R. C. Palmer, *English Law in the Age of the Black Death, 1348-1381. A Transformation of Governance and Law* (Chapel Hill, NC, 1993).
- <sup>4</sup> D. Crook, 'The Later Eyres', *EHR*, 97 (1982), 241-6; A. Musson and W. M. Ormrod, *The Evolution of English Justice: Law, Politics and Society in the Fourteenth Century* (Basingstoke, 1998), pp. 43-54.
- <sup>5</sup> F. W. Maitland, *Collected Papers* 3 vols. (Cambridge, 1911), vol. II, pp. 110-73; E. De Haas and G. D. G. Hall (eds), *Early Registers of Writs*, Selden Society, 87 (1970), p. cxxii: about fifty actions were in use in the early thirteenth century; the figure had risen to nearly 900 a century later.
- <sup>6</sup> P. R. Hyams, 'What did Edwardian villagers mean by "law"?', in Z. Razi and R. M. Smith (eds), *Medieval Society and the Manor Court* (Oxford, 1996), pp. 80-2; A. Musson, 'New labour laws, new remedies? Legal reaction to the Black Death "crisis"', in N. Saul (ed.), *Fourteenth Century Studies* (Woodbridge, forthcoming).
- <sup>7</sup> *YB 3 & 4 Edward II*, p. 162.
- <sup>8</sup> P. Brand, *The Making of the Common Law* (London, 1992), pp. 98-101; J. H. Baker, *An Introduction to English Legal History*, 3rd edn (London, 1990), pp. 170-1.
- <sup>9</sup> Brand, *Common Law*, p. 184.
- <sup>10</sup> P. Brand, *The Origins of the English Legal Profession* (Oxford, 1992), pp. 91-4; B. W. McLane, 'Changes in the court of king's bench, 1291-1340: the preliminary view from Lincolnshire', in W. M. Ormrod (ed.), *England in the Fourteenth Century: Proceedings of the 1985 Harlaxton Symposium* (Woodbridge, 1986), pp. 159-60.
- <sup>11</sup> *Calendar of Letter Books of the City of London: Letter Book G*, ed. R. R. Sharpe (London, 1905), p. 74; P. Tucker, 'London's courts of law in the fifteenth century', in C. W. Brooks and M. Lobban (eds), *Communities and Courts in Britain, 1150-1900* (London, 1997), p. 33.
- <sup>12</sup> *Select Bills in Eyre, 1292-1333*, ed. W. C. Bolland, Selden Society, 30 (London, 1914), p. 119.
- <sup>13</sup> William Langland, *Piers Plowman*, ed. A. V. J. Schmidt (London and New York, 1995), p. 19, C text, lines 160-4.
- <sup>14</sup> Brand, *Legal Profession*, pp. 104-5.
- <sup>15</sup> ed. Bolland, *Select Bills in Eyre*, p. 21.

<sup>16</sup> J. C. Davies, 'Common law writs and returns, Richard I to Richard II', *BIHR*, 26 (1953), 139-42; B. Wilkinson, *The Chancery under Edward III* (Manchester, 1929), pp. 60-2.

<sup>17</sup> 13 Edward I (Statute of Westminster) c. 44 (*SR* vol. 1, p. 93); Brand, *Common Law*, p. 183 and n81: Dr. Brand points out that the sum of 7d per writ was paid by the prior of Norwich in 1283, hence the 'rise' may in some cases have been illusory.

<sup>18</sup> Wilkinson, *Chancery under Edward III*, p. 60.

<sup>19</sup> *RP* vol. II, pp. 170, 229-30, 241, 261, 305; A. J. Verduyn, 'The Attitude of the Parliamentary Commons to Law and Order under Edward III', D.Phil thesis, University of Oxford, 1991, pp. 133-4.

<sup>20</sup> *RP* vol. 1, p. 376; *CCR 1341-3*, p. 633; Wilkinson, *Chancery under Edward III*, pp. 61-2.

<sup>21</sup> R. W. Kaeuper, 'Law and order in fourteenth-century England: the evidence of special commissions of oyer and terminer', *Speculum*, 54 (1979), 734-84.

<sup>22</sup> Based on an analysis of *Calendars of Patent Rolls 1377-99*.

<sup>23</sup> The common form and language of some bills suggests that some legally skilled person drafted them: payment might then have been required, but the evidence is lacking.

<sup>24</sup> *The Roll of the Shropshire Eyre of 1256*, ed. A. Harding, Selden Society, 96 (1980), pp. xix-xxv.

<sup>25</sup> McLane, 'Court of king's bench', pp. 158-9.

<sup>26</sup> The unusually high frequency of visitations may have created special conditions in Lincolnshire which means these findings are not necessarily applicable to the other counties.

<sup>27</sup> Musson and Ormrod, *English Justice*, pp. 130-1.

<sup>28</sup> *Rolls of the Chester City Courts*, ed. Hopkins, pp. lv, 41, 54; A. Harding, 'Plaints and bills in the history of English law', in D. Jenkins (ed.), *Legal History Studies 1972* (Cardiff, 1975), p. 70.

<sup>29</sup> PRO, Court of King's Bench, KB 27/272 Rex m21 (Northamptonshire - Emma Watecok).

<sup>30</sup> Kaeuper, 'Special commissions', 757; Brand, *Common Law*, p. 184.

<sup>31</sup> S. Sheridan Walker, 'Wrongdoing and compensation: the pleas of wardship in thirteenth and fourteenth century England', *Journal of Legal History*, 9 (1988), 289

<sup>32</sup> For example: PRO, Justices Itinerant, JUST 1/1395 m10: John Whyshele of Abingdon, found to have assaulted Walter Godusglade, was liable to pay one shilling in damages until he was excused.

<sup>33</sup> *Bracton on the Laws and Customs of England*, ed. S. E. Thorne (4 vols; Cambridge, Mass., 1968-77); *The London Eyre of 1244*, ed. H. Cam, London Record Society, 6 (1970), p. 134, no 345.

<sup>34</sup> Published in the Rolls Series and Selden Society volumes. Some of the early law reports may not in fact have been based on discussions in the courtroom: P. Brand, 'The beginnings of English law reporting', in C. Stebbings (ed.), *Law Reporting in Britain* (London, 1995), pp. 1-14.

<sup>35</sup> Brand, *Legal Profession*, p. 67.



<sup>36</sup> *Brevia Placitata*, ed. G. J. Turner, *Selden Society*, 66 (1947), p. 153; *Four Thirteenth-Century Law Tracts*, ed. G. E. Woodbine (1910), p. 162.

<sup>37</sup> *Calendar of Letter Books of the City of London: Letter book G*, p. 73.

<sup>38</sup> 36 Edward III st. 1, c. 15 (*SR* vol. II, pp. 375-6).

<sup>39</sup> For what follows see M. T. Clanchy, *From Memory to Written Record: England 1066-1307*, 2nd edn (Oxford, 1996), pp. 206-9.

<sup>40</sup> e.g.: *YB 2 Edward II*, pp. 11, 36; *YB 12 & 13 Edward III*, p. 274. We should, however, be wary of reading too much into the law reports since some early ones ascribe dialogue to the parties rather than to the serjeants who must have spoken for them: Brand, 'English law reporting', p. 4.

<sup>41</sup> P. R. Schofield, 'Peasants and the manor court: gossip and litigation in a Suffolk village at the close of the thirteenth century', *Past & Present*, 159 (1998), 1-42.

<sup>42</sup> Keauper, 'Special Commissions', 752; R. Faith, 'The "Great Rumour" of 1377 and Peasant Ideology', in R. H. Hilton and T. H. Aston (eds), *The English Rising of 1381* (Cambridge, 1981), pp. 43-73.

<sup>43</sup> M. K. McIntosh, 'The privileged villeins of the English ancient demesne', *Viator*, 7 (1976), 325-6.

<sup>44</sup> J. C. Holt, *Magna Carta* 2nd edn (Cambridge, 1992), pp. 1, 149-3, 327.

<sup>45</sup> 25 Edward III c. 4, 28 Edward III c. 3, 42 Edward III c. 3 (*SR* vol. I, pp. 321, 345, 388).

<sup>46</sup> Brand, *Common Law*, p. 150.

<sup>47</sup> 20 Edward III (*SR* vol I, pp. 303-6).

<sup>48</sup> J. A. Brundage, 'Legal aid for the poor and the professionalization of law in the Middle Ages', *Journal of Legal History*, 9 (1988), 173.

<sup>49</sup> *YB 33 & 35 Edward I*, p. 380.

<sup>50</sup> *YB 1 & 2 Edward II*, p. 33.

<sup>51</sup> *YB 4 Edward II*, pp. 25-6.

<sup>52</sup> *YB 1 & 2 Edward II*, p. xix.

<sup>53</sup> *YB 15 Edward III*, p. 126.

<sup>54</sup> B. H. Putnam, *The Place in Legal History of Sir William Shareshull* (Cambridge, 1950), pp. 115-18.

<sup>55</sup> For example in the trailbaston enquiries of 1305-7 and 1341-4 and in the Statute of Northampton (1328) and the Ordinance of Justices (1346).

<sup>56</sup> 25 Edward III st. 5, c. 3; 34 Edward III c. 8; 38 Edward III st. 1, c. 12 (*SR* vol. I, pp. 320, 366, 384-5).

<sup>57</sup> 34 Edward III c. 7 (*SR* vol. I, p. 366).

<sup>58</sup> *CCR 1330-3*, pp. 161-2; *RP* vol. II, p. 127 (5).

<sup>59</sup> I am grateful to Dr. Gwylim Dodd for this communication.

- <sup>60</sup> B. Tierney, 'The Decretists and the "deserving poor"', *Comparative Studies in Society and History*, 1 (1958-9), 360-73; M. Rubin, *Charity and Community in Medieval Cambridge* (Cambridge, 1987), pp. 68-74; C. Dyer, *Standards of Living in the Later Middle Ages* (Cambridge, 1989), pp. 236-40.
- <sup>61</sup> ed. Bolland, *Select Bills*, pp. 6, 44, 47.
- <sup>62</sup> *Some Sessions of the Peace in Lincolnshire, 1381-1396*, ed. E. G. Kimball, Lincoln Record Society, 49 (Hereford, 1955), pp. 65, 74.
- <sup>63</sup> Dyer, *Standards of Living*, p. 253.
- <sup>64</sup> Brand, *Legal Profession*, pp. 153-4; Brundage, 'Legal Aid', 174-5.
- <sup>65</sup> D. Wilkins, *Concilia Magnae Britanniae et Hiberniae* (4 vols; Brussels, 1964), vol. II, p. 206.
- <sup>66</sup> *Ibid.*, p. 418.
- <sup>67</sup> Brundage, 'Legal Aid', 174-5.
- <sup>68</sup> J. M. Maguire, 'Poverty and civil litigation', *Harvard Law Review*, 36 (1923), 361-404.
- <sup>69</sup> Hastings, *Common Pleas*, pp. 180-3.
- <sup>70</sup> H. Summerson, 'The structure of law enforcement in thirteenth century England', *American Journal of Legal History*, 23 (1979), 313-27.
- <sup>71</sup> 18 Edward III st. 2, c. 5 (no exigent to go out unless felony or trespass against the peace); 25 Edward III st. 5, c. 17 (process of exigent in debt detainee and replevin); 37 Edward III c. 2 (indemnity for injustices and mistakes because of outlawry) (*SR* vol. I, pp. 301, 322, 378).
- <sup>72</sup> Dobson and Taylor, *Rymes of Robin Hood*, p. 253.