

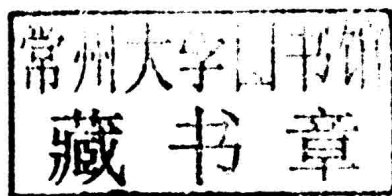
AMERICAN UNIVERSITY STUDIES

Outlawry, Governance,
and Law in Medieval England

MELISSA SARTORE

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Outlawry, Governance, and Law in Medieval England



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SERIES IX
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Vol. 206



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Chapter 1: Outlaws, outlawry, and the complexities of language and practice

According to the tenth-century laws of King Edmund (939-946 AD), “if any one shed a Christian man’s blood, let him not come into the king’s presence...ere he go to penance.” Failure of the *manslaga* (or “man-slayer”) to atone and make amends could result not only in exclusion from the presence of the king, but perhaps even in exile and outlawry, or pilgrimage and excommunication, thus making the act of homicide an event that resulted in exclusion from one’s relationship with King and God alike.¹ Centuries later, during the judicial eyre of 1286, a suspected killer was brought before royal justices at Cambridgeshire and refused to place himself upon the country for judgment. As a result, he was thrown into prison, forced to endure the harsh prison *forte et dure* until pleading to the charges against him. Prison *forte et dure*, or “hard and strong imprisonment” was a form of imprisonment in which wrong-doers were physically laden with heavy fetters and given few provisions to survive.² Coercive imprisonment was made possible by the widespread expansion of prisons and gaols since the earlier reforms of Henry II, indicative of the trend by which legal processes geared toward exclusion and exile had given way to processes geared toward incarceration, coercion, and containment.

How did actions against wrongdoers in Anglo-Saxon England such as exile, banishment, and outlawry, transition to the widespread use of gaols and prisons in the administration of the English common law in the late thirteenth century? The processes of exclusion, namely outlawry, defined as the action of declaring a person to be outside the protection of the law; exile and banishment, or enforced removal from the land according to an edict or sentence; and abjuration

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- 1 I Edmund 3, II Edmund 4, 6; *Die Gesetze der Angelsachsen*, ed. F. Liebermann, vols 1-3, Halle, 1903-1916, vol. 1: 184-190; P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century, Volume I: Legislation and its Limits* (Oxford, UK: Blackwell Publishers Ltd., 1999), 312, 324-325.
 - 2 London, The National Archives, JUST 1/92, m. 12 (1286); H.R.T. Summerson, “The Early Development of *Peine Forte et Dure*,” *Law, Litigants, and the Legal Profession: Papers Presented to the Fourth British Legal History Conference at the University of Birmingham 10-13 July 1979*, eds E. W. Ives & A. H. Manchester. Royal Historical Society Studies in History series vol. 36, (London, UK: Humanities Press, 1983), 116-125; T.F.T. Plucknett, *Concise History of the Common Law*, 2nd edn. (Rochester, NY: Lawyers Cooperative Publishing Co., 1936), 118-119.

of the realm (or a town), an oath to leave an area forever, were soon supplanted and supplemented with various forms of imprisonment, the condition of being kept in captivity or confinement and forcible deprived of personal liberty. This work explores the movement from outlawry, exile, and banishment to the emergent use of imprisonment in medieval England.

From the late tenth through the thirteenth centuries outlawry held an essential place within political and legal practices in medieval England. Contrary to the dominant narrative which sees the rise of imprisonment as a progressive response to the older modes of outlawry and exile, this project argues that the older exclusionary processes actually facilitated the transition to systems of authority, law, and order grounded in the use of imprisonment. Outlawry and exile were such strong, effective processes resistant to control by royal authority that the Crown was forced to adapt and innovate in response, specifically with the use of imprisonment.

Problems and Perspectives of Outlawry

Outlawry, exile, and banishment have long histories dating back to ancient times, and vary in duration and social context.³ Outlawry, banishment, and exile were methods of controlling order and governance exercised in England from the Anglo-Saxon period to the eighteenth century. These mechanisms were used by judicial authorities as tools of legal and social regulation as well as instruments of political control.

Outlawry in England has been considered the alternative judicial procedure for systems lacking a centralized police force and imprisonment facilities and is identified as weak, a representation of legal and governmental failure unable to control society and bring about justice. T.F.T. Plucknett states “the dreadful penalty of outlawry was originally the last resort of criminal law.”⁴ According to Pollock and Maitland, outlawry was “the last weapon of ancient law” and a sign of weak law. Pollock and Maitland argue that the earliest form or the “old law”

3 Laura Narpran, “Introduction,” *Exile in the Middle Ages, Selected Proceedings from the International Medieval Congress, University of Leeds, 8-11 July 2002*, eds L. Narpran and E. van Houts. (International Medieval Research, Vol. 13). Turnhout: Brepols, 2002: 1-9. Asceticism, a self-imposed form of religious exile, was important with respect to the development of monasticism, and excommunication, a denunciation by the Church, are two forms of exclusion which will not be discussed in-depth here.

4 T.F.T. Plucknett, *A Concise History of the Common Law*. 5th edn. (London, UK: Butterworth & Co. (Publishers) Ltd., 1956), 385.

of outlawry (that was based in community involvement) was characterized by arbitrariness, but the practice as a whole was the root of many “pure” and “afflictive” punishments, such as the death penalty, and imprisonment, (which has been argued were emendations of elements of outlawry.)⁵ An outlaw forfeited all life, limb, lands, and goods, but as law and kingship grew stronger, the fate of many criminals fell under the king’s discretion and they were subjected to banishment, abjuration, or forfeiture.⁶ Maurice Keen echoes this sentiment, stating that the sentence of outlawry “implied an admission of weakness on the part of the law itself. You have defied us, the Law said to Outlawry, therefore we will disown you.”⁷

Outlawry existed alongside other methods of punishment, namely, banishment, exile, abjuration, and imprisonment. Outlawry, banishment and exile were consistently used, although their forms varied and transitioned, and collectively they represent the political and judicial methods of exclusion. There is, however, great difficulty in definition and dissemination of the individual practices. Pollock and Maitland argue that true exile was not known in medieval English law. Rather, a criminal could flee to a church and plead sanctuary and was then allowed to abjure the realm. Other criminals were allowed to abjure the realm without the sanctuary element, and there are also some accounts of a man abjuring a town. When an individual pled sanctuary, he or she was given the option to go to trial or abjure. If he abjured, he “hurried dressed in pilgrim’s guise to the port that was assigned to him, and left England, being bound by his oath never to return. His lands escheated; his chattels were forfeited, and if he came back his fate was that of an outlaw.”⁸

Scholarship on the history of exile, however limited, offers many of the insights into the politics of exclusion and the social, judicial, and cultural role of exiles. Events of exile and ostracism as an institution in Ancient Greece reveal how ancient Greeks perceived their historical past as well as their relationship to their present and future:

Through the institution of ostracism, not only did the Athenians define themselves in relation to the past history of exile by linking political power with control over deci-

5 F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I.* vols 1-2. 2nd edn (Washington D.C.: Lawyers’ Literary Club, 1959), vol. 2: 461.

6 Pollock and Maitland, *History of English Law*, vol. 2: 451; 461; 464-467.

7 Pollock and Maitland, *History of English Law*, vol. 1: 49; M.H. Keen, *The Outlaws of Medieval Legend* (London, UK: Routledge and Kegan Paul, Ltd., 1987), 9-10.

8 Pollock and Maitland, *History of English Law*, vol. 2: 518 and 590.

sions of exile, but they also marked themselves off from that prior history in both ideology and practice by using the power of expulsion with moderation.⁹

The conceptual boundaries created by exile and ostracism helped to create and reinforce culture and identity within Ancient Greek society, an idea applicable to the role of exile and outlawry in England in the Middle Ages. Similarly,

...decisions about who is included or excluded from a community are always bound up with political power and that, in some sense, political power is the power to determine who shall and shall not be a member of a community.¹⁰

The struggle to control society in terms of law and politics from the tenth through the thirteenth century in England is a key component to the overall concept of authority explored here. In *The Politics of Exile in Renaissance Italy*, Catherine Shaw surveys the role of exiles within and among the political communities and regional states of fifteenth century Italy, revealing the “persistent political fragmentation...survival of local particularism...and the disunity of political elites” that characterized a society in which political exiles were common.¹¹ Exiles played an important role in politics and society and were of great concern to both the governments that banished them and the leaders of the lands to which they fled, demonstrated by efforts by the former to control where an exile was allowed to flee and active use of exiles against their regional rivals by the latter. The emphasis on the existence and importance of exiles in society as demonstrations of political efficacy and local strength found here are again pertinent to investigations of exclusionary practices in England.

Outlawry in Medieval England: Origins, Terminology, and Application

The origins of outlawry as a practice in England are unknown but it has been argued that the practice was introduced by the Danes who invaded northern England in the ninth and tenth centuries. According to Scandinavian and Icelandic

9 S. Forsdyke, *Exile, Ostracism, and Democracy: The Politics of Expulsion in Ancient Greece*. (Princeton, NJ and Oxford, UK: Princeton UP, 2005), 5.

10 Forsdyke, 8.

11 Catherine Shaw, *Politics of Exile in Renaissance Italy* (Cambridge, UK: Cambridge UP, 2000), 238. Her assertion that the number of political exiles was on the rise in Italy during the second half of the fifteenth century counters the notion that the emerging balance of power among Italian states resulted in a decline in exiles proposed by Randolph Starn in *Contrary Commonwealth: The Theme of Exile in Medieval and Renaissance Italy* (Berkeley and Los Angeles, CA: University of California Press, 1982).

sagas, outlawry provided a means to justifiably kill an offender while remaining within the confines of customary law. Obtaining a proclamation of outlawry was one way by which the revenge impulses of a feuding culture found validation in law and society.¹² Outlawry could be punishment in and of itself, specifically in instances that involved “public and serious harm.”¹³

In pre-Conquest England, outlawry was often indistinguishable from exile and banishment. Their respective uses often depended on the context and form of any particular historical texts. Outlawry has been described as a more local, smaller scale equivalent to the banishments performed by royal authorities.¹⁴ Outlawry required forfeiture of goods to the king and liability to be killed with impunity. An outlaw was stripped of any property and was essentially a “friendless” and “lawless” man. He had no more rights than a hunted animal and was said, in a colorful turn of phrase, to wear the “wolf’s head,” supposedly because the original price for the life of an outlaw was identical to that of a wolf.¹⁵

With increased use and royal interest, outlawry became more administrative in nature. By the thirteenth century, the distinctions between outlawry, exile, and banishment were clear in matters of law and politics. Outlawry as a legal process was used to compel people to stand trial and as an alternative to pecuniary payment as well as in response to serious crime and wrongdoing. If an outlaw

- 12 W.I. Miller, “In Defense of Revenge” in *Medieval Crime and Social Control*, eds B.A. Hanawalt and D. Wallace. *Medieval Cultures* vol. 16. (Minneapolis, MN: University of Minnesota Press, 1999): 70-89, at 79; See also W.I. Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland* (Chicago, IL: University of Chicago Press, 1990), 238-239.
- 13 C. Calisse, *A History of Italian Criminal Law*, Continental Legal History Series, vol. 8, (1928), 301.
- 14 E. van Houts, “L’Exile dans l’Espace Anglo-Normand,” in *La Normandie et l’Angleterre au Moyen Age, 4-7 Octobre 2001 Colloque Cerisy-la Salle*, ed. V. Gazeau (Turnhout, Belgium: Brepols, 2003): 116-127. In her discussion of Anglo-Norman exile, Van Houts claims that eleventh and twelfth century exile in the Anglo-Norman realm was used to provide time and space and allow for the parties to calm down and reconsider the matter. E. van Houts, “The Vocabulary of Exile and Outlawry in the North Sea Area around the First Millenium,” in *Exile in the Middle Ages*, eds. L. Napran and E. van Houts (Turnhout, Brepols, 2004): 13-28. Van Houts discusses the similarities between Scandinavian, Norman and Anglo-Saxon terminology for exile and outlawry. To illustrate the complexities of terminology, see T.S. Jones, “The Outlawry of Earl Godwin” in *Medieval Outlaws: Ten Tales in Modern English*, ed. T.H. Ohlgren. (Stroud, Gloucestershire, UK: Sutton Publishing, 1998): 1-11 at 3 where Jones does not even attempt to distinguish between outlawry, exile, and banishment as they appear in Bede and the Anglo-Saxon Chronicles.
- 15 Keen, *Medieval Outlaws*, 9.