The Common Law and Civil War in Fourteenth-Century England:
The Prosecution of Treason and Rebellion under Edward II, 1322-1326

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What did it mean for poor and middling men and women to take up arms against their government? How did they negotiate competing claims for their participation in civil war and what consequences confronted them? This article analyses the crown’s investigation of its opponents following the 1321-22 civil war, comparing its predecessor of the Montfortian civil war (1263-67), to examine how the king, justices and juries tackled these questions. It demonstrates how the crown rooted the summary conviction and execution of Thomas of Lancaster and other noble insurgents in common law procedure; then, at the King’s Bench and a special inquiry in the Welsh Marches, re-framed treasonous offences to tackle non-noble insurgents; then, fearing a new uprising, instrumentalised the common law’s machinery to gather military intelligence. The crown recognised the agency of subjects across society in civil war and juries were ideally placed to investigate it; they also weighed subjects’ culpability, balancing obligation to the king against the mitigating realities of coerced participation in war. Thus, juries and the communities who informed their verdict were invited to engage with the ethical and legal dilemmas of civil war. This article thus presents a people’s history of treason.

**Keywords:** medieval, common law, martial law, canon law, treason, rebellion, civil war, post-conflict justice, peasantry, gentry, nobility, trial by jury

I. Introduction

What did it mean for ordinary men and women – including the poorest in society – to take up arms against their government? From the succession of King John to the death of Edward II, England saw more than a century packed with attempts to restrain the king, overthrow him and alter the system of government: from Magna Carta 1215 and the civil war that followed to Richard Marshal’s insurrection (1234) and the ‘Paper Constitution’ (1244); from the Provisions of Oxford (1258) and the First English Revolution (1263-67) to the Articles on the Charters (1297) and the 1311 Ordinances; through to 1321-22, when Thomas earl of Lancaster and his allies warred against
Edward II, and Edward’s deposition (1327). These episodes have drawn attention from historians focused on how elite insurgents pursued their ends through politics, law and violence.¹ But given that in England all owed allegiance to their king,² how did lower status subjects negotiate the competing claims of the political-military elite for their support in armed insurrection, what pressures did they face, and what consequences confronted them in the aftermath of civil war?

This article draws from the first extensive analysis of the archival judicial records produced by the crown’s investigation of its opponents of the civil war of 1321-22, and comparable material produced following the Montfortian civil war of 1263-67,


₂ ‘Rebel’ and ‘rebellion’ are fraught terms in both medieval and modern usage. ‘Rebellion’ could connote a state of war between barons and king, which might or might not follow *diffidatio*, and the legal status of rebellion was contested (see Matthew Strickland, ‘*In coronam regiam commiserunt injuriam*: The Barons’ War and the Legal Status of Rebellion, 1264-1266’, in P. Anderson et al. eds., *Law and Power in the Middle Ages: Proceedings of the Fourth Carlsberg Academy Conference on Medieval Legal History*, Copenhagen, 2008, 171-198, at 192-194). The term is also used generically by scholars for armed movements of varying scales and goals (from protest to the transformation of government). Here, I attend to the use of ‘rebel’ in original texts but avoid it myself, preferring ‘insurgent’ (and ‘uprising’, ‘insurrection’ or ‘insurgency’), meaning one who rises up against a government or opposes in arms the customarily constituted and legitimate ruling authority.

to examine how the king, his justices and juries tackled these questions. It demonstrates how the common law was employed to uncover and assess armed opposition to the king. Part one untangles the treatment of twenty-seven noble insurgents, including Thomas of Lancaster, convicted without trial and executed in 1322, correcting assumptions that this era birthed a new ‘law of arms’: the antecedent of martial law, which in later centuries delivered the crown the means to summarily convict and execute opponents and undesirables. The 1322 process stemmed from a common law procedure employed for ‘notorious’ offences; comparisons with the canon law equivalent reveal how it was clarified in 1322. Without need for a new species of law, the common law was dexterous in tackling armed opposition to the king. The crown self-consciously worked within its framework, albeit to sinister effect in this case.

This has implications for how we understand crown-subject relations in pre-modern England. It challenges the fossilized historiographical line, established by J.G. Bellamy, that kings from Edward I onwards chose to see ‘rebellion’ as ‘treason’, an increasingly hardline attitude against crown opposition apparently sealed in 1352, when an English king first legislated against treason. Historians from David Carpenter to John Gillingham, Matthew Strickland and Nicholas Vincent have already pointed to evidence in the three centuries before 1352 that kings could deem armed opposition illicit and treasonous, potentially punishable by life and limb.\(^3\) Accepting this correction, part two of this article goes further, first by warning that previous scholarship has focused...
exclusively on noble actors and thus omitted most evidence for the crown’s judicial response to armed insurgency. For the period 1322-27, prosecutions of noble insurgents constitute under five percent of the documentary record. In 1323 the crown opened a second-stage process, demanding the identification of Thomas’s followers in Lancashire, Derbyshire and Staffordshire, producing trials of knightly, gentry and some peasant insurgents at the King’s Bench. A third stage brought a special inquiry in the marches, targeting peasantry and minor gentry, with outstanding cases pursued at the King’s Bench. Here the crown reframed treasonous offences to encourage jury investigation of low-status offenders, avoiding capital punishment. The crown thus adopted a holistic approach in its judicial response to armed opposition across society.

This response should be viewed in the round and alongside its precursor, initiated after the Montfortian civil war. Whilst aspects of Edward’s programme were comparatively harsh, these were moved by instrumental reasoning rather than a shift in values. Fundamentally, the ascent of the crown’s pernicious attitude towards recalcitrant subjects in the following centuries, and the concomitant development of aggressive legal systems to tackle them, was not inevitable. There had always been an alternative.

More broadly, in pushing beyond the dynamic between nobility and crown, this article demonstrates how the crown itself recognised the agency of subjects across

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4 As discussed below, the offences of 583 people were presented in the 1324 inquiry into marcher insurgents (TNA JUST1/1388), compared with twenty-seven noble insurgents whose legal fate in 1322 is cited consistently; this is before the insurgents in Lancashire, Derbyshire and Staffordshire investigated at the King’s Bench in phase two of Edward’s legal campaign (discussed below) are added. All archival references in what follows belong to The National Archives (TNA); records were consulted at TNA but image numbers from the Anglo American Legal Tradition (AALT) website have been added here for reference.
society in civil war. This was implicit in the essential tenet that all, including the poorest, owed allegiance to the king. What changed was the crown’s means to put principle into practice, thanks to the ascent of trial by jury, a system ideally placed to investigate low-status participation in civil war. Thus, following the civil wars of the 1260s and 1320s, the crown put its greatest efforts into tackling opponents amongst the peasantry and gentry, who populated baronial armies; provided men, arms, money or logistical support; gave shelter to combatants; or spoke out in favour of their cause. This has been, hitherto, the hidden history of treason. Furthermore, broader trends in jury behaviour were woven into this system of post-conflict justice, notably consideration of mens rea, the guilty mind. Juries were responsible for not only identifying insurgents and their supporters but weighing their culpability, balancing the obligation of all subjects to the king against the mitigating realities of coerced participation in war. In excavating the processes of post-conflict justice employed following civil war in thirteenth- and fourteenth-century England, then, this article draws attention to the complex engagement of a broad constituency: for the crown co-opted subjects in the investigation of civil war activity, inviting juries and the communities who informed their verdict to engage with the ethical and legal dilemmas with which we began. Whilst the crown directed the system at work, this phenomenon can be framed as a people’s history of treason.

II. Noble insurgents and ‘notorious’ treason

The plight of noble insurgents in 1322 is captured in Thomas of Lancaster’s conviction at Pontefract, recounted in the Vita Edwardi Secundi. Thomas was:

led into the hall before the justices assigned for the purpose, and charged one by one with his crimes, and for each charge a particular penalty was awarded, namely, the first he should be drawn, then hanged, and finally beheaded ... Now the earl,
wishing to speak in mitigation of his crimes, immediately tried to make some
points; but the judges refused to hear him, because the words of the condemned
neither harm nor can be of any advantage.⁵

Thomas and other noble insurgents were thus denied trial by their peers, the ordinary
due process of the common law, set out in chapter 29 of Magna Carta 1225 and
employed previously for tenants-in-chief suspected of offences against the king.⁶ The
process employed in 1322 was not intended to determine guilt but to announce it. Andy
King has shown how chroniclers of Edward II’s reign conceived of treason and
disapproved of Thomas’s execution, disagreeing with Edward’s view that Thomas’s
campaign was treasonous – views that potentially reflect opinion amongst the broader
populace.⁷ Our concern, however, is the crown’s perspective, as revealed in the judicial
process it employed.

Maurice Keen’s interpretation has dominated understanding of this process.
Keen asserted that acts of war in civil conflict – whether armed insurgency, impeding
the king’s cause or promoting that of his opponents – did not fall under the common
law. He read backwards from the remit of the Court of Chivalry, established under
Edward III and employing civil law to address offences falling within the ‘law of arms’,
to argue that the reigns of Edward I and II saw ‘summary trials of traitors taken in arms
in times of civil war … tried according to a law valid in military cases’. Thus the
summary procedure employed in 1322 sat within an emerging ‘law of arms’ – that is,

⁶ For discussion of the trial of barons, see Ambler, Song of Simon de Montfort, 116-119.
⁷ For what was considered treasonable by chroniclers, see: Andy King, ‘False Traitors or Worth
Knights? Treason and Rebellion against Edward II in the Scalacronica and the Anglo-
Norman Prose Brut Chronicles’, 88 Historical Research (2014), 34, at 35-6, 41-44.
the antecedent of martial law. Seymour Phillips cites Keen in stating that ‘the procedures used against Lancaster and the other contrariants could be justified under the law of arms covering acts of war which were not judiciable under the common law and under the developing law of treason’. At the same time, Phillips styles the process as extra-judicial and wrathful, a tit-for-tat response to Thomas’s execution of Piers Gaviston in 1312. This interpretation echoes Natalie Fryde, who has characterised Edward’s reign after 1322 as one of ‘tyranny’. Edward’s response to the insurrection of 1321-22 has thus been painted simultaneously as lawful (but outside the common law) and unlawful.

Both interpretations need revision. The classic definition of tyranny is rule according to the king’s will rather than the law, yet judicial records were generally excluded from Fryde’s study. ‘Terrifying’ Edward’s later government may have been, but unengaged with or disregarding of the law of the land it was not. Keen and his followers have ignored the weight of evidence (discussed in parts two and three)

10 Phillips, Edward II, 412.
12 Fryde, Tyranny and Fall, 2: ‘ten years of terror for the aristocracy [c.1320-1330]’.
revealing how the common law could and did cope with acts of civil war, that the crown did not necessarily circumscribe a ‘time of war’ in which a distinct legal system could have applied, and that there was no discrete ‘law of arms’ to apply in any case. Indeed, inventing a new species of law imposes delineations that would have made little sense to contemporaries. Moreover, Keen’s followers have not heeded J.G. Bellamy, who pointed to the origins of the 1322 procedure in the common law (a similar point was made in 1942 by T.F.T. Plucknett).  

Fundamentally, concern that the 1322 process ran contrary to the common law and the entitlement of subjects to access it enshrined in Magna Carta rests on the erroneous assumption that trial by peers was the only way to appraise guilt and convict the guilty. Chapter 29 of Magna Carta 1225 did not guarantee subjects – whether earl or free peasant – the right to trial by peers. Indeed, it explicitly permitted alternatives with the catch-all phrase, ‘or the law of the land’. The law of the land made some allowance for the conviction without trial of manifest and notorious criminals. Chapter twelve of the Assize of Clarendon (1166) proclaimed that anyone apprehended in possession of stolen goods ‘if he is infamous (defamatus) and has evil testimony by communal repute (malum testimonium de publicamento) … shall not have the law’. Bellamy argued that Edward I and Edward II labelled the offences of leading insurgents ‘notorious’ and ‘manifest’, and such labelling permitted their summary conviction. Thus, in 1292, Rhys ap Maredudd ‘was called a manifest rebel and enemy of the king ... [whereby] the crown was groping its way towards judgement by notoriety ... Common or ill fame, a popular notion under the common law, was being carried into the political arena’.

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Bellamy pointed to the same approach in the treatment of Scots captured at the Battle of Methven in 1306, and again in Edward II’s conviction of noble insurgents in 1322. So, it has long been recognised that the summary conviction of noble insurgents in 1322 neither belonged to a separate ‘law of arms’ nor was extra-judicial, but sprung from a common law procedure, one utilised to tackle notable insurgents since the reign of Edward I.

The underpinnings of this procedure need clarification, however. From the conviction of Rhys ap Maredudd to that of noble insurgents in 1322, Bellamy elided two categories of offender: the manifest (a criminal caught red-handed) and notorious (he whose guilt was widely reputed). These designations were, properly speaking, distinct. Thus, the Assize of Clarendon prescribed summary conviction for a thief who was both manifest and notorious; one found with stolen goods but whose guilt was not widely reputed was permitted to go to ordeal. However, by the later thirteenth century, the terms could be confused. Local communities justified the summary execution, by beheading, of a known criminal by describing him as either a *manifestus* or a *notorius latro*, intending to show that his guilt was widely known or otherwise indisputable (rather than that he was a manifest thief, caught in possession of stolen goods without

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warrant). The crown was inconsistent in preserving the distinction in condemning the king’s enemies. At the Winchester parliament of September 1265, following the downfall of the Montfortian regime, the king took possession of lands seized from ‘adversaries and rebels, who were manifestly against us in the disturbance and war’ and from those ‘manifestly adhering to them’. The offences of Rhys ap Maredudd were (contra Bellamy) labelled ‘manifest’ but not ‘notorious’. In contrast, the judgment pronounced upon supporters of Robert I of Scotland, captured in 1306, declared the offences of each to be ‘notorious and sufficiently manifest’ to warrant hanging. This phrase may have been intended to catch both those offences known by repute (for instance, John de Seton was charged with aiding Robert in killing John Comyn in the Franciscan church of Dumfries) and red-handed offences (John had been captured holding the castle of Tibbers against England’s king). Yet the phrase was perhaps chosen for its rhetorical rather than legal force. Such usage had a long history. In late August or early September 1215, King John had branded Stephen Langton, archbishop

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18 For instance, TNA JUST 1/1109 m.13, JUST 1/741 m.15d, JUST 1/1098 m.36d and JUST 1/1578 m.1. I am extremely grateful to Henry Summerson for sharing his thoughts on this point and these examples.


21 JUST 1/1108 mm.26 [AALT images 8673, 8674], 26d [AALT image 8729].
of Canterbury, a ‘notorious and manifest traitor’ (*proditor nostri notorius est et manifestus*). The archbishop had twice refused royal requests to deliver Rochester castle and had ignored repeated royal summons for the military service owed for his temporalities.\(^{22}\) Both offences were irrefutable, since he had disregarded multiple royal mandates, but were neither widely reputed nor red-handed offences sufficient to justify the labels ‘notorious and manifest’ in the strict sense.

The careless deployment of these categories was potentially problematic given the possibility of summary punishment in either case. The entitlement of communities to behead summarily red-handed thieves who resisted arrest was widespread, while the right to behead summarily widely acknowledged and indisputable thieves was apparently confined to communities north of the Trent. Meanwhile, all communities were expected to behead captured outlaws immediately (associating the penalty with men whose offences had been widely proclaimed and so ought to be public knowledge).\(^{22}\) Summary punishment may have been enacted with more enthusiasm in the north than the south, however: at the Lancashire eyre of 1292, fifty-seven people


were said to have been beheaded for one or other of these reasons, while in
Northumberland in 1256 the sheriff and coroner were told by Alnwick locals that ‘such
is the custom of the county, that as soon as anyone is taken with stolen goods, they are
immediately beheaded’. If the prevalence of summary execution was patchy, by the
end of the thirteenth century its application may have come under stricter controls.
Local communities apprehending outlaws absent the presence of an authority figure
became increasingly hesitant of visiting capital punishment, lest they be later
challenged, preferring to hand over the malefactor to royal authorities for summary
conviction and execution. Thus, by Edward II’s reign, the point that summary
execution should be visited upon certain categories of offenders was recognised but not
clear cut and so royal oversight of the process may have been considered desirable. It
appears that, in 1322, Edward II’s advisors deemed it prudent to proceed with clarity in
justifying the summary conviction and execution of noble insurgents. Bellamy stated
that Edward II designated the offences of Thomas and his noble and knightly comrades
‘notorious and manifest’ in the statement of conviction. However, this is only true of
Thomas’ conviction (given in Latin), used on 22 March 1322, and that drawn up at the

24 Crown Pleas of the Lancashire Eyre, vol. 1, 17; Three Early Assize Rolls for the County of
Northumberland, ed. William Page (Surtees Society, 88, 1891), 70. I am grateful to
Kenneth Duggan for sharing the latter reference and to Alice Taylor for drawing it to my
attention.

25 I am grateful to Kenneth Duggan for sharing his findings on this point. For speculation on the
retreat of summary execution by communities in the later fourteenth century, see: W.S.
Post, ‘Criminals and the Law in the Reign of Richard II’, thesis submitted for the degree of

same time for Warin de Lisle, William Tochet, Thomas Mauduyt, Henry de Bradeburn, William fitz William and William Cheyny.\textsuperscript{27} It is untrue of the statements of conviction used for other noble traitors. A form of words was drawn up, in French, and issued to judges presiding in the cases of Roger d’Amory, Henry of Willington, Henry de Montfort, Bartholomew of Ashburnham, Henry Tyes, and Bartholomew de Badlesmere. The first evidence of this form’s distribution comes on 23 March 1322,\textsuperscript{28} but it was first used for Roger d’Amory’s conviction on 13 March.\textsuperscript{29} The king soon afterwards instructed the judges to send the ‘record and process’ they had used to Chancery; in January 1325 he had these entered onto the rolls of the King’s Bench.\textsuperscript{30} The statements are virtually identical, and identical (albeit in French) to that used for Thomas, except where the summation states that ‘these treasons, arsons, murders, robberies, and raids with banners displayed, are notorious to the earls, barons and other greater and lesser men of the realm.’ These offences were not, then, categorised as ‘manifest’ but ‘notorious’. It thus appears that ‘manifest’ was removed from the summation before the


\textsuperscript{29} The statement was tailored to note Roger d’Amory’s Welsh raid and capture at Tutbury (George Sayles, ‘The Formal Judgments on the Traitors of 1322’, \textit{16 Speculum} (1941), 57, at 58).

\textsuperscript{30} KB 27/259 Rex mm.34-35d. [AALT images 0450, 0451, 0452, 0453, 0416, 0417, 0418, 0419]. The process of recording the documents is described by Sayles, ‘Formal Judgments’, 58-61.
production of multiple copies in French for distribution and use: a deliberate act of editing.

This change was small but significant, for ‘notoriety’ was the designation key to convicting these noble insurgents, both in the form of evidence needed and in the procedure used. This becomes clear in Edward’s clarified statement of conviction:

For that you … falsely and traitorously took his castle of Gloucester, and burnt his city of Bridgenorth; and there you slew his people … you besieged the castle [of Tickhill] with banners displayed as enemies of the king and of the realm, and wounded and slew the liegemen of our lord the king; and you went … to Burton-upon-Trent; and there you impeded the king’s men that they might not cross the bridge, armed and with banners displayed as traitors and enemies against your liege lord the king, your faith, your homage, and allegiance, and wounded and slew his people there … [after fleeing Burton] you arrived at Boroughbridge … And you and the other traitors and enemies assembled there, with banners displayed, and slew some of the king’s men, and wounded others; and there you and the other traitors … were defeated [and] … taken ... And these treasons, arsons, murders, robberies, and raids with banners displayed, are notorious to the earls, barons and other greater and lesser men of the realm. And our lord the king by his royal power records it.31

Notably, every treasonous act attributed to noble insurgents from the siege of Tickhill (10 January 1322) to the Battle of Boroughbridge (16 March 1322) is partnered by the phrase ‘with banners displayed’. The phrase thus comes four times attached to charges, and a fifth in the summation.

Keen believed that the unfurling of banners was legally significant because the act was tantamount to a declaration of war; in turn, this supported his argument (followed by subsequent historians) for a circumscribed ‘time of war’ in which the ‘laws of war’ applied.32 Meanwhile, scholars of martial law in later periods have drawn from Bellamy to aver that, from 1322, ‘when the King’s army was in the field and his banner unfurled, signifying tempus belli, then … the jurisdiction of martial law over rebels and traitors [was given full force]’, tracing a line hence to the application of (summary) martial law against recalcitrant subjects in the sixteenth and seventeenth centuries.33 Recently, John Collins has been more cautious, noting that the 1322 process did not constitute ‘proto-martial law’ but suggesting our era saw the application of ‘many laws related to war’ that informed the development of martial law. Still, he

32 Keen ‘Law of Arms’, 93-96, 102 n.4; King, ‘Political Taxonomy’, 115, 120. Keen pointed to the annulment of the process employed against Thomas in 1327, when Thomas’s brother and heir, Henry, argued that Thomas should have benefitted from trial by his peers (Rotuli Parliamentorum, vol. 2, 3-5; Keen, ‘Treason trials’, 88-89, 102-03; Matthew Raven, ‘The English Parliament and the Trial of the “Peers of the Land” in Henry of Lancaster’s Revolt (1328-29): The Origins of a Privilege’, in James Bothwell and J.S. Hamilton, eds., Fourteenth Century England XII, Woodbridge, 2022, 79, at 82-83 and 95). Keen inferred that the ‘law of arms’ would have permitted Thomas’s summary conviction in time of war, but that technically the conviction had occurred in a time of peace (because the king had not raised his banners), so Magna Carta chapter 29 ought to have entitled Thomas to trial by peers. In reality, Henry’s complaint is a red herring. It was not legally watertight, and its acceptance by the new regime in 1327 does not make it so: it only had to be sufficiently plausible for the new regime, inclined to treat Henry sympathetically, to accept it.

quotes Bellamy’s assertion that the process employed in 1322 ‘connected conviction on the royal record with trial for treason under the law of arms’; this, Collins suggests, created a jurisdictional boundary along a demarcated time of war that was ‘now mandated’.34 This is potentially significant because temporal jurisdiction would be key in early modern debates about the application of martial law.35 The origins of martial law and its temporal jurisdiction should, however, be sought elsewhere. True, the king could demarcate a ‘time of war’. In 1267, legislation drawn up at Marlborough following the Montfortian civil war (and issued to Henry III’s justices in February 1268) stated that those accused of offences in ‘time of war’ were not to lose life or limb, noting that ‘the time of war began on 4 April [1264] when [the king] left Oxford for Northampton with his army with banners displayed’ and ended when peace was declared on 16 September 1265. Similarly, the king’s opponents who had committed offences ‘with banners displayed’ from 4 June 1263 until the king’s departure from Oxford in 1264 were not to lose life or limb, while those who committed offences in the same period but not ‘in the form of war’ should be treated as normal in time of peace. This is, however, the only medieval legislation to circumscribe a ‘time of war’.36 It belongs to the process of post-conflict justice born of the Dictum of Kenilworth, the peace settlement (discussed below) engineered to restore Henry III’s authority and

36 I am grateful to Paul Brand for this point, and for sharing his draft edition of the legislation drawn up at Marlborough in 1267 (issued early in 1268), collated from JUST 1/1050 m.8d (Yorkshire eyre 1268) [AALT image 2394], JUST 1/998A (1268 Wiltshire eyre) mm.18 [AALT image 0343], 41d [AALT image 0473]. See too: P.A. Brand, ‘Lawyers’ Time in England in the Later Middle Ages’, in C. Humphrey and W.M. Ormrod, eds., Time in the Medieval World, York, 2001, 73, at 92-96.
reintegrate former insurgents into the regnal community.\(^\text{37}\) It thus enabled Montfortians hitherto facing disinherition and, potentially, death to redeem their lands. The Marlborough legislation did not, then, demarcate a ‘time of war’ to enable the use of summary martial law or otherwise to prepare the ground for executions. Quite the opposite. It envisaged the courtroom of the common law as the forum for calling insurgents to account and ensured that the ultimate penalty was not prescribed.

Absent such impetus, it is far from clear that a demarcated ‘time of war’, initiated by the raising of banners, was applied by the crown for Thomas of Lancaster’s uprising either on the ground or post facto. Unlike the insurgents, the king chose not to raise his own banners,\(^\text{38}\) and in January 1322 his proclamations avoided describing the situation as a state of war.\(^\text{39}\) Yet, without a declaration from either side, extensive martial activity since March 1321 – including the ostentatiously hostile marcher expedition to London in July 1321 – led contemporaries to recognise that a state of war existed.\(^\text{40}\) Nor did the raising of banners by either side determine which offences could later be prosecuted. As in the Marlborough legislation of 1267, such decisions were a matter of royal will. They were not determined by any pre-existing legal constraint upon the crown’s ability to prosecute. Edward II’s phase three inquiry, as we shall see, treated

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\(^{39}\) King, ‘Political Taxonomy’, 116.

the marcher expedition as a martial episode in one broad campaign of the king’s enemies, as the phase two inquiry treated those engaged at Burton and Boroughbridge, with no mention of banners. Moreover, if Edward’s intention in the judicial condemnation of March 1322 had been to call attention to a baronial declaration of war, or to demarcate a time of war, the display of banners need only be mentioned once.

As Bellamy noted, raised banners were a ‘sign of waging war’, but were included in charges particularly ‘because there would be many witnesses and therefore little subsequent argument’.41 The point at stake was rather more significant, in fact. A banner bore its owner’s unique heraldic emblem and so parading it unfurled proclaimed the offender’s presence for all to see. The display of a banner visibly and irrefutably attached the owner’s celebrity to any act. The armed activity of noble insurgents at Tickhill, Burton and Boroughbridge was thus beyond contestation. The attachment of the phrase ‘with banners displayed’ to an offence thus presented a legally charged fact: the act’s description was not quotidian but shaped by ‘strong normative underpinning’, in terms that satisfied the criteria for a legal categorisation of an offence.42 In demonstrating that an offence was ‘notorious’, irrefutable and widely acknowledged proof was necessary to charge the fact in legal terms. Thus, Edward’s statement showed how the offender had besieged a castle or taken the field in a manner permitting the act to be categorised as ‘notorious’.

The onus of satisfying the criteria for notoriety becomes clearer in the context of, and by comparison with, developments regarding forms of proof in canon law. For

41 Bellamy, Law of Treason, 37. Bellamy did not, however, recognise the significance of the charge in relation to demonstrating notoriety.
instance, the concept of *fama* – the knowledge of a community that a fact was public and notorious – as proof was significant in canonisation inquiries. Thus commissioners investigating the putative cult of Thomas de Cantilupe of Hereford in 1307 asked witnesses not only whether there was widespread public knowledge that William Cragh had been revived from death through miraculous intervention but also how they would define public knowledge. Answers included ‘what is said in many places publicly and is publicized commonly among everyone’, and ‘something … so true that people commonly assert publicly that it is so and no one says the opposite, nor does it appear to be otherwise.’

Meanwhile, *fama* was key in in the church courts, as Sarah White has demonstrated. Across the thirteenth century, roughly a third of depositions at the court of Canterbury saw *fama* invoked as the principal form of proof, and in forty per cent of cases *fama* was brought in to support eye-witness testimony or hearsay, forming an impression of community knowledge akin to jury verdicts in secular courts. The role of widespread public knowledge as a form of proof thus belonged to a ready conceptual toolkit.

Moreover, this form of proof and its testing were critical in the development of the summary procedure *per notorium* in criminal cases in canon law. As Innocent III explained, this procedure applied where ‘a crime is public, so that it ought deservedly to be called notorious’ and ‘which cannot be concealed by tergiversation’.

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Durantis clarified this definition: a notorious crime was one receiving public outcry, where there was overwhelming circumstantial evidence so that the truth could not be hidden, and of which there was public notice amongst most of the population. In the procedure *per notorium*, popular knowledge that thoroughly established a defendant’s guilt, so that the truth was patent and irrefutable, meant that, by definition, the judge did not need eye-witness testimony and could proceed *ex officio* to conviction in summary manner.

The difficulty was how to establish notoriety sufficiently for conviction, since the procedure *per notorium* appeared to forget the high standards of proof normally required, making both civilians and canonists queasy. As Richard Fraher has discussed, commentators dedicated much energy to this problem. Surely notoriety could not really substitute for eye-witness testimony; surely the court of public opinion was not omniscient; surely only permanent facts, not transient, could properly be classed as ‘notorious’? Yet, even those hesitant about ‘notorious’ facts sufficient to convict could

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admit that some offences lacking normal standards of proof were beyond contestation. For instance, if a cleric lived with a woman as his wife in his house and flaunted her publicly, their romantic relationship would be patent and thus notorious, even if the couple were not caught in flagrante delicto. This definition of notoriety was incorporated by Bernard of Parma into his *Glossa ordinaria* on the *Liber Extra*, and so became embedded in the canon law curriculum in the thirteenth century.\(^49\) Consideration of what constituted a truly ‘notorious’ offence, sufficient to justify summary conviction, was thus well advanced in canon law by the early fourteenth century.

We cannot know whether the development in England of conviction by notoriety in high-profile cases, and its clarification in 1322, was coincidental to the sharpening of the equivalent procedure in canon law, or something more. There had long been procedural similarities in the prosecution of crime and overlap in the experience of personnel in the practice of common and canon law.\(^50\) Paul Brand and Ryan Rowberry have demonstrated that, under Edward I and Edward II, various serjeants and Common Bench justices had some grounding in canon law, acquired through formal education (Oxford offered education in Roman and canon law to those going on to learn their trade at the Bench) or everyday experience in the church courts. They were thus able to capitalise on procedural coincidences by applying canon law principles and practice in


the secular courts. John Gillingham has suggested that the professional cohort of justices emerging by the late thirteenth century (identified by Brand) may have been partially responsible for the introduction of newly harsh punishments for noble insurgents under Edward II. It is thus plausible that justices or learned churchmen at the royal court, drawing from canon law, helped to forge and hone the use of conviction by notoriety in high-profile cases. This would not, however, be possible to prove.

More important is how the development of canon law procedure *per notorium* offers a comparator for the summary conviction of noble insurgents. Canon law’s clarity of procedure and onus on standards of proof highlight how, in England, a principle known in common law – that a criminal whose guilt was widely known and beyond contestation could be summarily convicted and executed – needed new teeth when its application was extended to tackle serious political threats to the crown. The device of the ‘king’s record’, which placed the responsibility for conviction on the king, was, in effect, another form of *ex officio* procedure: as in the canon law equivalent, it was the evidentiary burden required to justify the use of such procedure that was contentious. In 1322, it was especially important that the procedure adopted be cognisant of the problems surrounding standards of proof, because the stakes were so high: the

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conviction and execution of high-status celebrities – including an English earl, no less – on the public stage.  

At the same time, the situation of noble insurgency lent itself to the use of *per notorium* procedure, especially when noblemen obligingly carried their banners while besieging a castle or fighting a battle, because a celebrity actor was committing his offence publicly while parading his identity in front of large numbers of people. The evidence for his offence was thus of the highest possible standard, and beyond contestation, meaning that his crime was genuinely, and by any gauge, notorious. The insurgency of a banner-carrying nobleman was thus the notorious crime par excellence. Edward’s statement of conviction for noble insurgents in 1322 made these points with pristine clarity. Far from reflecting royal tyranny, therefore, it was the apogee of the English crown’s legal ingenuity, albeit applied to sinister effect.

### III. Reframing treason to prosecute peasant and gentry insurgents

Following the summary conviction of noblemen, Edward addressed knightly, gentry and peasant participants in the uprising. The records of these inquiries are extensive, but found no place in the works of Keen, Bellamy, Fryde and Phillips,  

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53 Hence the omission of Thomas of Lancaster’s more egregious offences – from the killing of Piers Gaviston to conspiring with the Scots – from the judicial conviction. They did not fit the criteria for notoriety and so were, instead, tacked onto the end of the statement of condemnation, after the summation (*Foedera*, vol. 2, part 2, 478-479).

54 Fryde and Phillips err in citing KB 27/262 mm.13 [AALT images 0500, 0501], 13d [AALT images 1090, 1091], 14 [AALT images 0502, 0503] as a list of suspects produced in response to orders issued shortly after Boroughbridge to capture suspected insurgents (*Fryde, Tyranny and Fall*, 70; Phillips, *Edward II*, 413 n.28). In fact, KB27/262 mm. 13 and 13d are examples of the many lists of those men presented before Hervey de Stanton’s inquiry (JUST 1/1388) in 1324 who failed to appear and so were summoned to appear at the King’s Bench (discussed below); an entry on m.14 for Derbyshire lists men accused of taking goods and chattels of the king’s enemies and rebels.
history of the crown’s response to armed uprising. In 1977, Scott Waugh used the phase three inquiry to investigate the civil war activity of minor gentry in Gloucestershire and Herefordshire, focusing on patterns of violence rather than the legal processes at work.\(^{55}\) Clare Valente sampled the records of phases two and three to estimate the insurrection’s social composition (pointing to notable participation amongst the peasantry and lesser gentry) but likewise was not concerned with the crown’s judicial treatment of insurgents.\(^{56}\) Similarly, the inquiries that followed the Montfortian civil war (and which, tackling the activity of insurgents across society, offer the closest comparator to phases two and three of Edward II’s legal campaign) have been utilised as evidence for wartime activity, with David Carpenter showing how the peasantry took up arms for the Montfortian regime.\(^{57}\) Still, like Waugh and Valente, his goal was not to examine the law in action.

Examining the crown’s investigation of non-noble insurgents allows us, first, to establish the relationship between ‘treason’, acts of war against the king, and the capacity of the common law. While ‘treason’ was relatively easy to define in the twelfth, thirteenth and fourteenth centuries, its application by the crown was selective.\(^{58}\) The Roman law definition of *lèse-majesté*, repeated by John of Salisbury in his *Policraticus*, included arranging the death of the ruler, bearing arms against the kingdom, abandoning the ruler in war, inciting rebellion, and supplying arms or money

\(\text{\textsuperscript{56}}\) Valente, *Theory and Practice of Revolt*, 141-147.
to the enemy. Bracton adopted a similar line: lèse-majesté included compassing the king’s death; betraying the king or his army either directly or by arrangement, aid, counsel or consent; and failing to inform the king immediately of a plot against him. Those convicted of lèse-majesté were to suffer death and perpetual disinherittance.

Edward III’s treason legislation of 1352 similarly included compassing the death of the king, queen or their heir; levying war against the king in his kingdom; and adhering to the king’s enemies in his kingdom or giving them aid or comfort.

The application of this (relatively consistent) definition can be seen in Edward II’s judicial conviction of noble insurgents in 1322. They ‘falsely and traitorously (fausement e treiturousement)’ took Gloucester castle, burned Bridgenorth and besieged Tickhill, and at Burton-on-Trent ‘impeded the king’s men that they might not cross the bridge [to pursue the king’s enemies] … as traitors and enemies (treitours e enemis)’ of the king. At Boroughbridge, as ‘traitors and enemies [they] assembled … and slew some of the king’s men’. However, in launching phase two of his legal campaign, in October 1323, Edward instructed his justices to inquire in Lancashire, Derbyshire and Staffordshire concerning the offences, committed on account of civil unrest, of his

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62 KB 27/259 Rex mm.34-35d (see nn. 30 and 31, above)
‘enemies (inimicos), rebels (rebelles) and contrariants (contrariantes)’. The attached articles demanded the identification of ‘those who have been against the king and have sent from their people to aid the king’s enemies at Burton or elsewhere’, and ‘those people who were at Boroughbridge in the earl of Lancaster’s company’. Here, then, those taking the field against royal forces at Burton or Boroughbridge, or aiding those who did, were not labelled traitors, but enemies, rebels and contrariants.

The prosecutions that followed at the King’s Bench tackled offences readily categorizable as treason. These included sending men and victuals to aid Thomas, preaching in support of his cause, and impeding the king’s cause, for instance by obstructing supply lines. But these offences were not labelled as treason, and those found guilty did not face punishment of life or limb, nor disinheritance, but fines.

64 KB 27/254 Rex m.40 [AALT images 0326, 0327], printed in Sayles, Select Cases. Edward II, 133-135.
65 For instance, Richard de Holand de Sutton and Thurstan de Northlegh (West Derby, Lancashire) were convicted of mustering an armed force for Thomas, and committed to gaol, with Richard afterwards making fine at £20 (KB 27/254 Rex m.59d [AALT image 0344]); Gilbert de Sutheworth (West Derby, Lancashire) was accused of providing two armed men for Thomas and found not guilty (KB 27/254 Rex m.59 [AALT image 0361]); Ralph Sheil of Tutbury (Derbyshire and Staffordshire) was accused of providing victuals to Thomas and his men as well as breaking the bridge of Wychnor (KB 27/264 Rex m.6d [AALT image 3066]); Robert of Clitheroe (West Derby, Lancashire) was found guilty of preaching in aid of Thomas and of providing soldiers – his fine was particularly severe, at £200, perhaps partly due to his offence and partly because he had been a chancery clerk for thirty years and escheator north of the Trent (KB 27/254 Rex m.59 [AALT image 0361]); William atte Barre of Derby (Derbyshire) was accused of providing victuals and giving shelter to men who fought against the king at Burton; his case was continually delayed until he was found not guilty in Easter term 1326 (KB 27/254 Rex m.84 [AALT image 0412]; KB 27/259 Rex m.2 [AALT image 0386]; KB 27/260 Rex m.10d [AALT
More striking still are the cases of men accused of fighting at Burton and breaking the Trent bridges of Wychnor, Ridware, Salter’s Bridge and Barton to stop the king crossing the river in pursuit of his enemies, in early March 1322. This is the same offence attributed to noble insurgents in Edward’s statement of conviction, where it is labelled treason. Again, those convicted at the King’s Bench were not marked as traitors and faced only fines, which fell into bands including twenty shillings, forty shillings, half a mark, and one mark, depending on the convict’s standing.66 In the same vein, when Edward launched phase three of his legal campaign, in December 1323, the same sort of offences were listed, with no mention of treason: Edward’s targets were ‘enemies’ and ‘rebels’ who had joined the marcher army that moved on London in July 1321 and ‘elsewhere gave aid in mounted men and footmen and in money and goods, 

image 1591]; KB 27/262 Rex m.14d [AALT image 1093]); Richard of Elmhurst (Staffordshire), vicar of the church of Lichfield, was accused of shooting and throwing stones at royal ministers to prevent them conveying victuals to the royal army at Burton, so that ale and others of the king’s victuals were lost; he made fine for his offence in Trinity 1325 (KB 27/254 Rex m.94 [AALT image 0432]).

66 For instance Richard de Holand de Barton made fine for 40s. in Michaelmas 1323 for breaking the Trent bridges and fighting at Burton (KB 27/254 Rex mm.82d [AALT image 0383], 89 [AALT image 0422]), and William Burdet for fighting for Thomas at Burton (KB 27/254 Rex m.82d [AALT image 0383]); Thomas de Odyam, Adam de Odiham, Richard de Lyndebey and William de Carleton made fine for fighting at Burton in Trinity 1326 (KB 27/254 Rex m.82d [AALT image 0383]); convicted of fighting at Burton, Ralph le Walker made fine for 20s., William Malveysin for 20s., and William de Duffeld for half a mark (KB 27/254 Rex m.89 [AALT image 0422]); similarly, further men guilty of breaking the Trent bridges and/or fighting at Burton made fine for one mark, half a mark, or 20s. (KB 27/254 Rex m.89d [AALT image 0396]). For the engagement at Burton, see: Philip Morgan, ‘The Rising of the Mercian Earls, 1322’, unpublished paper delivered at IMC Leeds 2006, available at https://www.academia.edu/15074967/The_Rising_of_the_Mercian_Earls_1322 (accessed 4 April 2023).
and adhered to [the king’s enemies and rebels] in many ways’. 67 Again, those convicted faced fines. Now, when their fines were recorded in the Pipe Rolls, each convict was said to owe or pay his fine ‘for saving his life and retaining his lands’, suggesting that the fine was made to avoid the fate attached to a treason conviction. 68 Thus, the offence

67 JUST 1/1388 m.7 [AALT image 4180], discussed below. For the marchers’ expedition to London in July 1321, see: Maddicott, Thomas of Lancaster, 279; Dryburgh, ‘Career of Roger Mortimer’, 77.

68 For instance, Thomas Butler (200 marks), Richard brother of Thomas Waryn (5 marks), John de Wilton of Dymock (5 marks), William fitz John Marky (40s.), Thomas of Amersham (10 marks), Robert Billyng (40s.), William Marky Senior (40s.), and many more, convicted JUST 1/1388 m.10 [AALT image 4187], appear E372/169 r.30 owing fines ‘pro vita sua salvanda et terris suis non dum captis in manum regis retinendis’; John de Wauton (10 marks) (presented in Gloucestershire: JUST 1/1388 m.9d [AALT image 4209]) is listed E 372/169 r.34 under Herefordshire along with Andrew (fitz Richard) de Baskerville (100s.) (presented JUST 1/1388 mm.4d [AALT image 4198], 5 [AALT image 4177]) and Baldwin de Fruvill (presented JUST 1/1388 mm.1c [AALT image 4169], 5 [AALT image 4177], 5d [AALT image 4198], the latter recording that he had already made fine for 100 marks, of which he owed £57 and half a mark), ‘pro vita sua salvanda et terris suis rehabendis’; John de Budenwey (100s.), Peter Hakelut (£20), William de Staunton de Hamenash (10 marks), Roger de Solers (100s.) and many more, convicted JUST 1/1388 m.4 [AALT image 4174], are listed E372/169 r.34d fining ‘pro vita sua salvanda et terris suis retinendis’. Edmund Hakelut (presented JUST 1/1388 m.4d [AALT image 4199] for adhering to Roger Mortimer of Wigmore and riding armed to London and m.1c [AALT image 4169] for adhering to the earl of Hereford too) had made fine in Chancery for £100 and was restored to his lands in December 1322 (Calendar of Close Rolls Preserved in the Public Record Office, 1272-1509, 47 volumes, London, 1896-1963 [hereafter CCR], 1318-23, 518, 573); whence KB 27/262 m.15d [AALT image 1094] and KB 27/264 m.10d [AALT image 3073], which records Edmund appearing in court to present a royal writ (entered on the roll) noting that he had recently adhered to the king’s enemies, contrariant and rebels and had fined for 100 marks ‘pro vita sua salvanda et terris et tenementis suis habendis’, dated 3 June 1324 (for record of which fine in 1322 see: Calendar of Fine Rolls Preserved in the Public Record Office, 1272-1509, 22 volumes, London, 1911-62 [hereafter CFR], 1319-27, 167-168, 170-171). E 372/170 r.23d
was thought to warrant categorisation as treason but a decision was made not to apply that label.

Here we can see that an act of war against the king – whether taking the field against him, impeding his cause, or supplying aid to his enemies – could be labelled treason or not, at the king’s discretion and according to a legal rationale. Labelling an offence treasonous implied that the convict would lose his life and face disinheritance, but it was not desirable that a vast group across society face this fate. Nor practically could the label be applied when suspected offenders had to be identified by jury presentment and their defences tested by jury verdict. Presenting juries were unlikely to draw attention to culprits if they expected them to be executed, and nor would trial juries – generally reluctant to deliver men to their death – be likely to convict those so accused, all things being equal.\footnote{Summerson, ‘Attitudes to Capital Punishment’, 125-126.}

Credit for the approach taken here could be granted to justice Hervey de Stanton. This long-standing royal officer began his career as a clerk of the Common Bench in the 1290s and served as a justice-in-eyre, a justice of the Common Bench, and then an Exchequer baron; he acted temporarily as chief justice of the King’s Bench in 1323-24.\footnote{P.A. Brand, ‘Stanton [Staunton], Hervey (c. 1260-1327), justice and administrator’, \textit{ODNB}, 60 vols., Oxford, 2004, vol. 52, 265-266 <https://doi.org/10.1093/ref:odnb/26326>;} He thus presided at the phase two inquiry and was then commissioned, in December 1323, to preside at the special inquiry in the marches, as discussed in part three. While a newly professional cohort of justices may have

records Edmund’s debt ‘\textit{pro vita sua salvanda et terris suis rehабendis}’, noting that it was cancelled in parliament in August 1321, whence Edmund was quit (see: \textit{CPR, 1321-24}, 17; \textit{CFR 1319-27}, 170-171). For Edmund’s rehabilitation, see: Dryburgh, ‘Career of Roger Mortimer’, 166-167.
encouraged harsh treatment of noble insurgents, at least one of their number may have calibrated (non-lethal) legal responses to insurgents beyond the nobility.

Casting our view across the crown’s treatment of knightly, gentry and peasant insurgents allows us to see the proficiency of the common-law machinery in addressing acts of war against the king. The crown’s problem was that, in civil war, the enemy looks and sounds like oneself and is thus hard to distinguish. Moreover, unlike noble insurgents, peasants and gentry might or might not advertise their allegiance via heraldic emblems. As we shall see, one man came forward in phase three of Edward II’s legal campaign admitting to the justices that he had been in Roger Mortimer of Chirk’s retinue and in his robes. His attire distinguished him as an insurgent and so, in delivering himself to justice, he was probably pre-empting a presentment he considered inevitable. But most insurgents, especially amongst the peasantry, might not even be distinguishable as combatants, because they were lightly armoured and armed and could easily cast aside their wartime apparel. Unless they were caught red-handed, they could hope to melt away and escape the crown’s notice. So much is revealed in the cases that followed the Montfortian civil war, concerning the siege of Northampton in April 1264. Several men who had defended Northampton against the king ditched their arms and armour when the royal army broke into the town, seeking to pass themselves off as innocent non-combatants (one man was said to have thrown his hauberk down a sewer). In such cases, as the Montfortian inquiry proved, the crown’s best hope of digging out former insurgents was jury presentment and investigation, because it was

72 JUST 1/1388 m.3d [AALT image 4196].
73 For instance, JUST 1/618 mm.4 (Baldwin of Drayton; Peter of Harpole) [AALT image 1252]; JUST 1/59 m.18 (Robert of Doddington Junior) [AALT image 1506].
self-informing juries of local men who were best placed to discover culprits, and to establish the evidence against them. Thus, the ordinary mechanisms of the common law presented the best possible means for the crown to track down former insurgents of middling and, especially, low status.

IV. The phase three inquiry and coerced participation in insurgency

This was the logic at work when Edward initiated phase three of his legal campaign, focusing on lesser gentry and peasant insurgents in the Welsh marches. The leading marcher barons, having surrendered in January 1322, had been dealt with. Many insurgents of knightly or equivalent status surrendered in 1322 or, anticipating that their involvement was known to the king, came forward to make fine. This left men of lesser gentry and low status who, as we have seen, may have hoped to evade notice. The immediate spur for the inquiry, as Scott Waugh has noted, was Roger Mortimer of Wigmore’s escape from the Tower of London, in August 1323. Roger fled to France and the king’s (justified) concern was that, should Roger return to lead an armed assault on the king, he could draw military resources from his marcher homelands. This concern shaped the inquiry in significant ways.

74 Maddicott, Thomas of Lancaster, 305-06; Dryburgh, ‘Career of Roger Mortimer’, 82-86; Phillips, Edward II, 403-404.
75 Fryde, Tyranny and Fall, 70-72 and 75-76; C 60/122 mm.25-24, 20, 22d. Several men whose offences were presented before Hervey de Stanton in 1324 had made fine in February 1322 and throughout that year, some paying their fines into the wardrobe (for instance: JUST 1/1388 mm.3 [AALT images 4172, 4173], 7 [AALT image 4182], 7d [AALT image 4204]).
The inquiry, to be led by Hervey de Stanton, was commissioned by a series of three royal mandates, issued between December 1323 and January 1324 and copied onto Hervey’s roll, JUST 1/1388. The first set out the justices’ principal remit:

Since we have learned that many people of Gloucestershire, Shropshire, Worcestershire and Herefordshire were our enemies and rebels, acting against us, and coming in hostile fashion recently to London [for the parliament of July 1321] … and elsewhere gave aid to our enemies in terms of mounted men and footmen and in money and goods, and adhered to them … We have assigned you to inquire by the oath of good and law-worthy men of those counties … which people of whatever status, dignity or condition are our enemies and rebels, and who gave aid in mounted men or footmen or money or any other way to our enemies and rebels in their coming to London and Kingston or elsewhere.

In his second mandate, issued in French under the privy seal, Edward instructed the justices to receive a ‘reasonable fine’ from all ‘contrariants and rebels’ appearing before them who ‘wish to make fine for their adherences’. In the third (a letter patent providing the justices full warrant, after what might have been an administrative mix up), Edward extended the inquiry to include Staffordshire and empowered the justices to receive ‘fines or redemptions’ from those who ‘freely on this occasion wish to make fines or redemptions’ and to send ‘the names of each and every person who makes fines or redemptions of this sort’ to Chancery.

Four points emerge from Edward’s mandates. First, the prescriptive clarity of the two offences Hervey and colleagues should uncover: who from the marcher counties had joined the armed following of the insurgent marcher lords and who offered that contingent military aid in men or money ‘or any other way’. As the inquiry unfurled, ‘any other way’ was interpreted as the provision of victuals, although there was only

77 JUST 1/1388 m.7 [AALT image 4180].
one prosecution for this offence, and one for levying money for the marchers. The great majority of prosecutions were for joining the armed contingent that rode on London in July 1321. This narrowness of remit contrasts with the inquiries of 1267-72, which followed the Dictum of Kenilworth in their categorisation of offences: from plundering, killing and committing arson as an ‘officer’ of Simon de Montfort, to bearing arms for the Montfortians at a battle or siege, and from sending men to serve with Montfortian forces, to soliciting support for them. Henry III’s justices did not interpret the Dictum’s categories as definitive, however, but used their discretion to prosecute further offences according to the spirit of the Dictum. These included giving refuge to Montfortian combatants (an offence treated as being of similar seriousness to soliciting support). Similarly, as we have seen, phase two of Edward’s legal campaign addressed various offences falling under the manifold forms of lèse-majesté, including preaching on behalf of Thomas of Lancaster, giving shelter to those who fought at Burton, and obstructing supply lines. That the third phase inquiry should have a sharper focus was apparently clear to Hervey and his colleagues, who pursued suspects under the two headline offences set out in their instructions, and ignored other offences.

78 JUST 1/1388 mm.7 (Robert Syward) [AALT image 4182], 11 (Walter de Home and Walter fitz Stephen de Nasse, discussed below) [AALT image 4189].
80 For instance, JUST 1/83 m.29 [AALT image 0647], in which Margaret widow of Humphrey Hundeman, of Ashley with Silverley in Cambridgeshire, was convicted of harbouring the Montfortian Nicholas de Arssik, her daughter’s boyfriend; the justices prescribed a redemption at a little less than twice her annual income, putting her roughly on a par with those condemned in the Dictum of soliciting support for Simon de Montfort (DBM, ch.26).
Two, the levying of fines, or the reconciliation their payment could bring, were not Edward’s chief concern. He was enjoying the profits from a huge haul of the lands of noble insurgents (amounting to £12,643), with additional income accumulating from fines made in 1322 (totalling £15,000), as well as funds produced by taxation; by January 1324, royal revenue stood at £60,549. Whilst the need to revise the justices’ instructions was probably the result of confusion, it is perhaps telling that instructions on fines were an afterthought. The levying of fines, as in phase two, provided a non-violent means of punishment. It also created a list of names, and bound convicts for good behaviour. Third, the justices received no instructions on correlating the size of a convict’s fine to their wealth but were told only to determine a ‘reasonable fine’. Thus, the payment really was a ‘fine’ rather than a ‘redemption’, a term offered as a synonym in Edward’s third mandate but not used in recording proffers either in Hervey’s roll or in the Pipe Rolls. As we have seen, the payment was acknowledged to be for ‘saving the life and retaining the lands’ of the offender, but ‘redemption’ would imply that the payment should correlate to land value. This was so in the inquiries that followed the Dictum of Kenilworth, which prescribed that convicts must pay one, two, five or seven times the value of their lands, depending on their offence. In contrast, the sum of a punitive fine was determined by the king. Thus Hervey and his colleagues followed the approach taken by Hervey at the King’s Bench in phase two, establishing bands of fine, such as twenty marks, four marks, one mark, half a mark, and forty pence for those men categorised as ‘poor’. No provision was made for defendants too poor to pay a fine.

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82 *DBM*, chs.12, 14, 17 and 26-29.
83 Nine men whose offences were presented but who failed to appear before Hervey were deemed to fall within the forty pence band when their cases were transferred to the King’s
‘reasonable’ sum. This contrasted with crown instructions concerning poor combatants captured in 1322, who were to be bound by oath if they could not afford a fine.

Fourth, and crucially, the justices were given no remit to assess a defendant’s level of culpability, whether by grading offences according to their severity or by ascertaining whether an offender had acted of their own free will. The offences of 583 people were presented at the marcher inquiry. Of those, forty-seven had already been pardoned by the king, leaving the cases of 536 to be determined. Of these, 141 came before the justices to enter a plea, meaning that twenty-six per cent had their cases

Bench and they appeared to respond (no man appearing before Hervey fell into this category): John de Daune/de Aun/Aune presented JUST 1/1388 m.11 [AALT image 4190], John de Brome and Adam Motoun (JUST 1/1388 m.11d [AALT image 4212]), Philip Bright, Roger le Taillour de Westwood, Ralph Creye and William fitz Brewer (JUST 1/1388 m.1c [AALT image 4169]), Richard le Ferour/Ferroure de Swanle (JUST 1/1388 m.10d [AALT 4211]) (KB 27/264 Fines mm.1d [AALT images 3051, 3052], 2 [AALT image 2667]) – the fines of John de Brome and Adam Motoun on m.1d are prefaced by ‘quia pauper’; William de Wynnewod, chaplain, presented JUST 1/1388 m.1c fined 40 pence at Trinity 1326 (KB 27/265 m.Fines 1 [AALT image 3023]). Two Worcestershire men (Richard Hamund under Wyre a.k.a. Richard Hamund of Kinlet (presented JUST 1/1388 m.1) and David of Overton) were apportioned fines of twenty pence ‘quia pauper’ (KB 27/265 m.Fines 1 [AALT image 3023]; Stephen Treweloue was apparently fined twice, before Harvey de Stanton and his colleagues (JUST 1/1388 mm.1 (presented) [AALT image 4169], 4 (presented and fined) [AALT image 4175]) and KB 27/265 m.Fines 1 [AALT image 3023]. Two men presented before Hervey received exceptionally large fines: Thomas Butler (200 marks) and Thomas Berkeley of Cubberley (JUST 1/1388 m.10 [AALT image 4187].

84 However, Hugh le Daunsare and John Caldefer (presented JUST 1/1388 m.1c [AALT image 4169]) were both pardoned their fines when they appeared at the King’s Bench ‘quia pauper’ (KB 27/262 Rex m.13d [AALT image 1091]); these were the only men presented before Hervey excused their fine on account of poverty.

85 Fryde, Tyranny and Fall, 70-71, and see C 60/122 m.21d for a list of men categorised as ‘pauperes iurarunt de bene se portando et recesserunt quieti pro deo.’
addressed at the inquiry. Of these, 114 pled or were found guilty, that is, eighty-one per cent. This appears to be a very high return of guilty verdicts. However, the headline figure conceals that forty-eight, or forty-two per cent of guilty defendants, were proved to have acted under compulsion. They were forced to join or aid the insurgents, but were still adjudged to be guilty and liable to fine.

One man appeared freely before Hervey to admit participation in the uprising but to claim that it was compelled, as we have seen. John of Marston (Herefordshire) said that he had been in Roger Mortimer of Chirk’s retinue and in his robes. Roger had compelled John to ride in his company to London, ostensibly for the parliament of July 1321, but when John realised the reality of the situation he immediately escaped. The jury’s verdict was that ‘John was never the king’s contrariant or rebel nor did he adhere to any rebel of the king, except only in the very way that John himself recognised above’. But the verdict of compulsion was ignored, and John ‘freely made fine with the king for the aforesaid transgression for five marks’. 86 Nobody else appeared unsummoned before the justices to try this defence. 87 In other instances, presentment juries stated that men had been compelled to participate. A jury of various Herefordshire hundreds presented that Roger of Radnor and twelve other men ‘compelled and against their will were adherents of the earl of Hereford and Roger Mortimer … riding armed at Gloucester and elsewhere against the king’. Roger of Radnor and the others came ‘and were not able to deny the preliminary statement’, so

86 JUST 1/1388 m.3d [AALT image 4196].
87 Ralph of Knill did present himself to acknowledge that he had been in Roger de Mortimer of Wigmore’s company but denied riding armed against the king, but was still fined (JUST 1/1388 m.3d [AALT image 4197]).
were committed to prison, afterwards making fine. Similarly, across two cases, a jury of various Herefordshire hundreds presented that Edmund of Cornwall, John of Pembridge and forty-three other men were adherents of Roger Mortimer of Wigmore in his mounted expedition to London ‘against their will and not otherwise’. Thirty-one of them appeared before Hervey ‘and were not able to deny the preliminary statement’ and so ‘freely made fine’ for their ‘transgression’. Similar cases are recorded for Gloucestershire.

The delivery of guilty judgments in cases of verified compulsion contrasts sharply with the approach taken in the Montfortian inquiries of 1267-72. In many cases there, defences of compulsion were entered, and investigated by juries, who often provided evidence to support their verdicts. Juries exculpated some defendants on the grounds that they had been compelled to participate in the insurrection, and rejected the claims of compulsion made by others, pointing to the defendant’s willing participation. These included cases addressing arms-bearing offences, such as defending Northampton against the king in April 1264 and garrisoning the castles of Odiham, Wallingford and Windsor. Moreover, justices took pains to consider whether the criteria for compulsion

88 JUST 1/1388 m.4 [AALT image 4175].
89 JUST 1/1388 mm.6 [AALT images 4178, 4179]-6d [AALT image 4202].
90 Robert Syward (JUST 1/1388 m.7 [AALT image 4182]) and William of Somerville parson of the church of Aston Somerville (JUST 1/1388 m.8d [AALT image 4206]).
91 For instance, for Northampton: not guilty on grounds of compulsion: Richard de Flore (JUST 1/618 m.2 [AALT image 1249]); compulsion defence rejected: William of Polebrook (JUST 1/618 m.2d [AALT image 1306]); Baldwin of Drayton (JUST 1/618 m.2) [AALT image 1252]; Peter de Horpol (JUST 1/618 m.4) [AALT image 1252]. Wallingford: not guilty on grounds of compulsion: John de Erringg (JUST 1/42 m.6) [AALT image 1183]; compulsion defence rejected: John Musson (JUST 1/42 m.1d.) [AALT image 1212]. Windsor: compulsion defence rejected: Richard Banastr (JUST 1/42 m.5) [AALT image
had been met. For instance, Stephen de la Haye had been travelling to collect rent, intending to pass through Northampton on his journey southward. Once inside, he was detained by the Montfortians. When the king arrived to take the town, Stephen escaped via a postern gate and swam the river. There was no doubt that Stephen had been compelled to defend Northampton (and his daring escape counted in his favour). Drawing from the jury’s findings, however, the justices pointed out that ‘Stephen knew the enemies of the king were in the vill of Northampton so never should have come to the vill and entered the vill unconcernedly’. His redemption was set at one year’s value of his lands ‘according to the form of the Dictum’. Here emerges an important point of interpretation by the justices in the Montfortian inquiries. The Dictum set the one-year redemption for those ‘coerced or driven by fear to battle but who neither fought nor did evil [and] weaklings (impotentes) who because of force or fear sent their military following against the king’. The Dictum itself recognised, therefore, that those forced into bearing arms for, or supporting, the Montfortians were not fully culpable. However, in practice, the justices went further by delivering judgments of ‘not guilty’ where verdicts pointed to compulsion and where the criteria for compulsion were satisfied, only applying the one year’s redemption in marginal cases.

That compulsion could either mitigate an offence or exculpate a culprit was not an innovation of the Dictum or its inquiries but a reflection of existing practice. As Elizabeth Papp Kamali has shown, thirteenth-century juries were intensely concerned

1181]. Odiham: not guilty on grounds of compulsion: Richard of Wallingtons (Kintbury) (JUST 1/42 m.3) [AALT image 1177].

92 JUST 1/59 m.3 [AALT image 1478]. See too the case of William Bandewyn (JUST 1/59 m.18d [AALT image 1538]).

93 DBM, ch.27.
with *mens rea*, the concept of the guilty mind, for ‘the culture of the period was steeped in an understanding of guilt based on intentionality’. The system of jury investigations emerged in the age of the Fourth Lateran Council, in which vernacular theology ‘encouraged deep reflection on the nature of sin and the manifold factors that intensified or diminished a person’s culpability’.\(^94\) Critical here was the concept of consent and free will. A person could only be deemed guilty if they had committed an offence by their own volition. Juries would thus acquit those who had been forced to commit a felony.\(^95\)

The same value and practice applied in the post-Dictum inquiries. That the defence of compulsion was rejected by the justices in 1324 cannot be attributed to a seismic shift in thinking. Indeed, in those forty-two per cent of guilty verdicts where compulsion was proved, either the jury or defendant or both had expected the defence to be accepted. Moreover, two exceptional cases demonstrate that Hervey and his colleagues could recognise the defence of compulsion as mitigation or grounds for acquittal if they wished. It was presented that Roger Chandos, sheriff of Herefordshire, joined the mounted expedition to London and Kingston in 1321, because a gang of marcher barons led by Roger Mortimer of Wigmore had put him in fear of his life and threatened to burn down his manors. Roger Chandos was present in court and gave his account. Around Easter 1321, Hugh Audley junior, John Giffard, Henry Tyeys and John Maltravers had come by night to his castle of Snodhill, crept in by fraudulently getting past his gatekeeper, and spent the night at Snodhill against his will. In the morning Roger Mortimer arrived. The gang told Roger Chandos that he should ready himself to ride armed with them to the parliament at London ‘in aid of their


\(^{95}\) Kamali, *Guilty Mind*, 60-70, 86.
complaint which they had begun’. Roger Chandos responded that he was the liegeman of the king and not able to go with them in their aid, nor did he wish to. Roger Mortimer and the others immediately threatened both his life and the burning of his castle and other manors, causing him to ride with them to London and Kingston against his will and ‘as if attached’. Roger Chandos escaped as soon as possible and returned to Hereford to hold the castle and city for the king. The jury’s verdict broadly agreed with his account, adding that Roger Mortimer had previously tried to win Roger Chandos to his cause by offering a cash retainer for life. The jury concluded that Roger ‘was never by his free will nor in any other way’ a contrariant or adherent of contrariants. No judgment was given and the case was passed to the King’s Bench.96 Only in one case did Hervey and his colleagues deem a verdict of compulsion grounds for acquittal. It was presented that Walter de Home and Walter fitz Stephen de Nasse of Lydney in Gloucestershire adhered to the rebel Maurice Berkeley and raised sixty shillings for Maurice’s aid from their vill. Both men pleaded not guilty. The jury’s verdict was that Maurice had enjoined the people of Lydney to pay him sixty shillings, threatening to burn the vill if they did not comply, and had enjoined the two Walters to levy the sum and pay it to him; they had done so ‘on account of the fear of death and by the assent of the whole vill and against their will’, never having adhered to Maurice. They were found not guilty.97

There are two potential explanations for the justices allowing the defence of compulsion in these cases alone. The first is that they believed most defendants were ‘trying it on’ and that only in these cases had coercion really been applied. However,

96 JUST 1/1388 m.6d [AALT image 4203]. Roger was given a day at the King’s Bench in Easter term but no record of the case appears in KB 27/256, as discussed below.
97 JUST 1/1388 m.11 [AALT image 4189].
this explanation ignores the essential function of the jury verdict: to inform the justices of the facts of the case. Indeed, the justices challenged no verdict. Nor would they have grounds to do so. The mechanisms of compulsion described here – the marcher barons threatening to kill and burn – are probably typical. That many men had only borne arms for the insurgent barons in 1321-22 because they had been coerced is not in doubt. As Scott Waugh and Paul Dryburgh have noted, the marcher barons did struggle to raise troops. All things being equal, men would normally hesitate to go against their king, and 1321 saw a poor harvest and widespread hardship, so men were especially reluctant to take up arms for the baronial cause. The explanation lies instead in the exceptional nature of the two cases. The first concerned a royal officer responsible for his county’s defence and the levying of royal troops. The continuing loyal service of Roger Chandos was essential should Roger Mortimer of Wigmore return to cause renewed trouble; his conviction would thus be inexpedient. There is no record of his case being followed up at the King’s Bench and he continued to serve as sheriff of Herefordshire until 1325, and was still in royal service the following year. The matter seems, then, to have been quietly dropped. The second case, tellingly, did not involve the bearing of arms or the provision of armed men; the jury’s verdict also implicated the entire vill. Both factors lessened the significance of the case for the successful fulfilment of the justice’s instructions.

Indeed, that the compulsion defence was set aside as a matter of general policy points to the essential purpose of this inquiry: the gathering of military intelligence. The

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99 Dryburgh, ‘Career of Roger Mortimer’, 166.
goal was not to determine which people were legally or morally guilty, but to identify which men were capable of carrying arms against the king if Roger Mortimer returned, and to send their names to Chancery. With this in mind, the justices deprioritised investigations that would not help to uncover potential arms-bearers and, crucially, deemed the defence of compulsion irrelevant. Thus, in phase three of Edward’s legal campaign, a fundamental value upon which procedure should have been founded was jettisoned for the sake of expediency, and the machinery of the law was made to serve an alternative goal. This was the instrumentalization of the law, in a manner that was both ingenious and sinister.

The marcher inquiry was effective in that it provided a list of potential insurgents and bound them for good behaviour by the levying of fines. However, this approach brought consequences that hit the poorest hardest. Those men identified by presentment juries who did not appear immediately before the inquiry realised that they had little hope of acquittal if they responded to their summons. Even if they had been forced to take up arms in 1321 – a likely scenario given that year’s economic hardship, felt especially by the poor – they would be convicted and bound to pay a fine of forty pence, an incredibly burdensome sum for those struggling to make ends meet. Their only alternative was to ignore their summons and be consigned to outlawry. We can follow the cases of all alleged Gloucestershire insurgents through the King’s Bench from term to term until the end of Edward’s reign, by which time the sheriff was able to account for his entire list. Of the 199 people whose names were passed by Hervey and colleagues to the sheriff of Gloucester, ninety-two ignored their summons and were outlawed.\textsuperscript{100} Of those Worcestershire men whose names were passed to their sheriff,\textsuperscript{100} KB 27/265 Rex m.6d [AALT image 3476].
twenty-nine presented themselves at the King’s Bench (almost all in Easter or Trinity term 1326, having waited it out through multiple exactions before finally deciding to appear), while some fifty-four were outlawed.\(^{101}\) They were exiled from the law-abiding and ‘reduced to the status of hunted vermin, liable to arrest when seen and execution when arrested.’\(^{102}\) Perhaps this consequence was unintended, a failure to think through the implications of removing a feasible route for the poorest insurgents to be reconciled. Yet it is possible that this result was happily accepted: in dispersing a number of potential armed insurgents, mass outlawry helped to achieve the crown’s primary goal of strangling the military resources of Roger Mortimer of Wigmore and his allies.

V. Conclusion

The way in which the crown investigated low-status insurgents in the 1260s and 1320s, and justices and juries considered defendants’ culpability, opens a path for a new history of treason. It is well-recognised that the English political community of this era was conceived as comprising not only a handful of noble actors, but the gentry and peasantry too. This was true in ordinary circumstances, and when politics was continued by means of war. This has long been shown by the likes of David Carpenter, John Maddicott and Mark Ormrod, as it has for the fifteenth century by John Watts.\(^{103}\)

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\(^{101}\) KB 27/265 Rex m.14 [AALT image 3053]. This outlawry count excludes men outlawed at the same time in Gloucestershire, and more than a dozen men presented before Hervey and colleagues for Herefordshire, Shropshire and Derbyshire listed here as outlawed in Worcestershire.


\(^{103}\) For instance: Carpenter, ‘Peasants in Politics’; David Carpenter, ‘A Peasant in Politics During the Montfortian Regime of 1264-1265: The Wodard of Kibworth Case’, Fine of the Month, Henry III Fine Rolls Project (September, 2010), available at...
parallel trend in socio-economic scholarship over recent decades has also taught us ‘not to regard peasants as appendages of the seigneurial regime … but as players in their own right’. 104 The historiographical emphasis on the strife of Edward II’s reign as an aristocratic affair is a historiographical anomaly. The same is true for the scholarship of treason in this era. Crown investigations of lower-status insurgents show how the king, and his advisors and justices, recognised the agency of all subjects, including the poorest, in participating in ‘baronial’ uprisings, deeming all potentially accountable.

The concept that even the lowliest subjects were potential agents in uprisings was not new to the crown. In 1209, King John had instituted a kingdom-wide oath swearing, in which all free men (and possibly also unfree) swore fealty to the king and performed homage. As John Maddicott has suggested, this massive effort to secure the loyalty of the peasantry was intended to ensure that, if the barons rose against him, subjects would answer the king’s demand for military service rather than that of their


immediate lords. Implicit here was the recognition that the peasantry had a choice. The seeds of this recognition were contained in the principle that, in England, all subjects owed allegiance directly to the king, above that owed to their immediate lords. This meant that a baron was not entitled to demand that anyone join their armed following against the king. The reality was far more complicated, whether lesser subjects were compelled to follow insurgent nobles or did so willingly, as the cases of the 1260s and 1320s show. These realities were apparently on John’s mind as early as 1209. Amidst civil war in the spring of 1216, he sought to identify knights and sergeants fighting against him or supplying arms to his enemies by instituting an inquiry shire by shire, to be conducted by the sheriffs. Remnants of the returns survive to suggest some success in providing names. This was valuable military intelligence rather than an attempt to hold subjects to account judicially. When the war ended, in 1217, the regime of John’s young son, Henry III, opted for a policy of reconciliation and brought notable former insurgents into the new king’s allegiance, albeit threatening perpetual disinheritance should they abandon that allegiance. The new regime had neither the will nor the means to pursue subjects further.

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105 Maddicott, ‘Oath of Marlborough’, 308-312.
The difference fifty years later, and again after 1322, lay not only in the king’s relative strength but also in the crown’s increased ability to put principle into practice by holding individual subjects to account for their participation in uprisings – and not only barons, knights and sergeants but the peasantry too. This came with the ascendance of trial juries after the end of trial by ordeal in 1215. As we have seen, self-informing juries offered an ideal means of identifying non-noble insurgents. That the kingdom suffered two civil wars in this era meant that the crown’s motive, means and opportunity to investigate insurgents coincided, thus generating the huge documentary footprint drawn upon in this article. These records demonstrate not only the interest of the crown, but also its legal agility in tackling ‘treason’ – whether in assessing degrees of guilt, sharpening categorisations of treasonous offences and the legal mechanisms by which they could be tackled, adapting categorisations when shifting between noble and non-noble actors to determine non-lethal punishments and ensure effective investigation, or instrumentalising the law for the king’s military ends. When the crown’s treatment of lower status ‘traitors’ is considered, the legal rationale of its response to treason can be identified, and its approach noticed as far richer and less pernicious (even in Edward II’s case) than hitherto appreciated. Moreover, the investigative system employed by the crown engaged another extensive constituency: beyond the king’s officers, the ‘good and law-worthy men’ of the jury, and the local communities whose evidence informed the jury’s verdict. Swathes of the population thus participated not only in civil wars but also in their investigation, through which they were drawn to contemplate the legal and ethical dilemmas of civil war and post-conflict justice. The history of treason in the thirteenth and fourteenth centuries can be reframed, then, as a people’s history.
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