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English Law  
in the Age of the  
Black Death,  
1348–1381

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A Transformation  
of Governance and Law

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## General Introduction

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After the Black Death and to preserve the status quo as far as possible, the upper orders of English society drew together into a more cohesive government to facilitate or coerce the members of the upper orders to stand to their obligations, at the same time they were coercing the lower orders more punitively to stand by theirs. State authority increased greatly, although significant powers were to be exercised by delegation to the local level. Authority throughout society came more thoroughly to be exercised not by virtue of innate individual power but by virtue of state mandate, and the government took responsibility for the regulation and direction of the whole of society: it became a government of inherent authority.<sup>1</sup> Vigorous action to preserve the status quo in fact transformed both governance and law.

The Black Death could plausibly have the effect argued here, because of the particular situation of England in 1348. Two centuries before, England had been a sparsely populated feudal monarchy, albeit governmentally advanced for the time. Feudal relations had been a primary method of social organization; state structures, while present, had left organization basically regional: county courts were the focal points of governmental activity. The only bureaucracy was the exchequer, and the action of the exchequer was not such as to impinge directly on any large segment of society. When, in 1176, Henry II initiated ongoing supervision of

1. The phrase "government of inherent authority" found its primary use in nineteenth-century America, to differentiate state authority from federal authority. See Robert C. Palmer, "Liberties as Constitutional Provisions, 1776-1791," in *Liberty and Community: Constitution and Rights in the Early American Republic*, by William E. Nelson and Robert C. Palmer (New York, 1987), pp. 55-148; Robert C. Palmer, "The Federal Common Law of Crime," *Law and History Review* 4 (1986): 267-323. The phrase finds an appropriate use here to differentiate between the de facto limited governmental concerns prior to the Black Death and the more aggressive and comprehensive concerns of government after the Black Death.

feudal decisions to prevent uprisings, the inadvertent result was the common law: law common throughout England and not variable from one county to another.<sup>2</sup> The bureaucracy that grew up in the administration of the law affected a large segment of the population, soon perhaps in excess of 30 percent of families, and provided a source of common concern for the English. That concern was separate from and at times militated against loyalty to the king, a phenomenon preeminently apparent in the confrontations leading up to Magna Carta in 1215.<sup>3</sup> The twelfth-century concentration of power in local organizations characteristic of a feudal monarchy had begun to give way to state authority and concern for the centralized organs of state power.

A century or so after Magna Carta, England, already overpopulated, could well be considered a "modern state."<sup>4</sup> Magnates remained powerful, as did relationships of loyalty that functioned outside state authority. The overarching concerns nevertheless revolved around the control of the bureaucratic centralized state structures. The centralization of concerns was reflected well in the fact that county courts had become inferior courts for relatively insignificant litigation.<sup>5</sup> The king's court now served as a major forum for litigation from every region of the country;<sup>6</sup> Parliament processed both local and national concerns by handling petitions, passing statutes, and granting taxation in ways that made national government coherent.<sup>7</sup> The emphasis in governance was on central control, even though locally important people functioned often by virtue of royal commissions and those same people still exercised little-regulated personal authority over their unfree tenants. Particularly important for the thesis of this book, the king's council, long an important but amorphous body vital to the running of the country, began to crystallize already prior to the Black Death into a much more professional institution involved in the day-to-day operations of running the country.<sup>8</sup> Fortuitously by 1348, then, the common law already regulated the lives and fortunes of all

substantial and many insignificant Englishmen; the centralized bureaucratic governmental structures existed that could utilize that law to respond to an extraordinary demographic crisis.

That demographic crisis was the death of upwards of a third of the population in the first outbreak of the Black Death in 1348-50. Beneficed clergy seem to have lost 40 percent of their numbers; tenants in chief, 27 percent.<sup>9</sup> A different index of mortality that has a similar countrywide basis is the level of litigation. Litigation is a more difficult index than reports of deaths, because litigation could diminish substantially for a complex of reasons. Still, the level of litigation in the court of common pleas, measured by the membranes of legal records in the plea rolls, confirms the drastic impact of the first occurrence of the Black Death. The rolls even between 1353 and 1356, after an immediate precipitous decline in 1349, remained less than 60 percent the size of the 1348 rolls. Litigation, hindered by successive recurrences of the plague, recovered to 1348 levels only by 1365, aided by the appearance of new methods of litigation.<sup>10</sup> The 1348-50 epidemic seems to have been quite as severe as

9. John Hatcher, *Plague, Population and the English Economy 1348-1530* (Basingstoke, 1977), pp. 21-22; see the accounts in W. M. Ormrod, *The Reign of Edward III: Crown and Political Society in England, 1327-1377* (New Haven, 1990), pp. 21-22 (the Black Death as "a welcome relief from the war," a quaint perspective), and Scott L. Waugh, *England in the Reign of Edward III* (Cambridge, 1991), pp. 85-89.

10. The membrane count (year and Michaelmas term) for this period:

Year	Membranes Year / Mich. Term	Percentage of 1348 Year / Mich. Term
1343	1,960 mm. / 663 mm.	100% / 100%
1344	1,818 mm. / 644 mm.	25% / 23%
1345	1,918 mm. / 635 mm.	37% / 37%
1346	1,705 mm. / 581 mm.	43% / 44%
1347	1,815 mm. / 630 mm.	47% / 48%
1348	1,765 mm. / 598 mm.	55% / 57%
1349	432 mm. / 139 mm.	56% / 54%
1350	652 mm. / 224 mm.	59% / 60%
1351	757 mm. / 265 mm.	55% / 52%
1352	837 mm. / 285 mm.	65% / 63%
1353	974 mm. / 340 mm.	71% / 70%
1354	985 mm. / 323 mm.	65% / 65%
1355	1,035 mm. / 357 mm.	73% / 75%
1356	953 mm. / 312 mm.	50% / 46%
1357	1,139 mm. / 377 mm.	47% / 63%
1358	1,245 mm. / 414 mm.	71% / 70%
1359	1,155 mm. / 387 mm.	65% / 65%
1360	1,284 mm. / 446 mm.	73% / 75%
1361	895 mm. / 275 mm.	50% / 46%
1362	833 mm. / 374 mm.	47% / 63%

2. Robert C. Palmer, "The Origins of Property in England," *Law and History Review* 3 (1985): 1-50; Paul A. Brand, "Multis Vigiliis Excogitatum et Inventum: Henry II and the Creation of the English Common Law," *Haskins Society Journal* 2 (1991): 197-222.

3. Robert C. Palmer, "The Economic and Cultural Impact of the Origins of Property, 1180-1220," *Law and History Review* 3 (1985): 375-96.

4. Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton, 1970), pp. 5-10, 34-48, 54-56.

5. Robert C. Palmer, *The County Courts of Medieval England, 1150-1350* (Princeton, 1982), pp. 220-96.

6. Robert C. Palmer, *The Whilston Dispute, 1264-1380* (Princeton, 1982), pp. 6-9.

7. G. O. Sayles, *The King's Parliament of England* (London, 1975), pp. 70-93; Michael Prestwich, *Edward I* (Berkeley, 1988), pp. 67-97.

8. A. L. Brown, *The Governance of Late Medieval England, 1272-1461* (London, 1989), pp. 30-35.

has been thought: it quite plausibly killed a third to a half of the population.<sup>11</sup>

The government clearly made a major effort to counteract the effects of the plague. Economic historians have been unable to see any kind of economic crisis until the 1370s; there had been sufficient overpopulation before 1348 that land was not standing vacant even in the 1350s.<sup>12</sup> Apparently, anything less than the death of half the population can be reconciled with the continued economic prosperity of the 1350s and 1360s.<sup>13</sup> Nevertheless, that reconciliation also requires governmental intervention: during the first two decades after the Black Death the

1363	— / 481 mm.	— / 80%
1364	— / 413 mm.	— / 69%
1365	— / 584 mm.	— / 98%
1366	— / 600 mm.	— / 100%
1367	1,860 mm. / 639 mm.	105% / 107%
1368	— / 570 mm.	— / 95%
1369	— / 595 mm.	— / 99%
1370	1,904 mm. / 644 mm.	108% / 108%
1371	2,059 mm. / 653 mm.	117% / 109%
1372	2,108 mm. / 646 mm.	120% / 108%
1373	1,894 mm. / 615 mm.	107% / 103%
1374	2,047 mm. / 632 mm.	115% / 106%
1375	1,844 mm. / 602 mm.	104% / 101%
1376	2,040 mm. / 648 mm.	116% / 108%
1377	1,025 mm. / 468 mm.	58% / 78%
1378	1,775 mm. / 558 mm.	100% / 93%
1379	2,037 mm. / 686 mm.	115% / 115%
1380	2,229 mm. / 637 mm.	126% / 107%
1381	1,535 mm. / 600 mm.	87% / 100%

I was unable to get good figures for most of the 1360s. Many of those years have a term in which the roll is unfit for production. In each of 1361, 1365, and 1368 a term was canceled. T 1377 was canceled because of the death of Edward III; the plea roll for that term is one membrane long. T 1381 was canceled because of the Peasants' Revolt. If one took the percentage of the average of the years 1343-48 instead of simply 1348, the percentages would be one to two points lower consistently.

11. For the sake of comparison, T 1377 was canceled because of the death of Edward III; CP40/467 (only one membrane). Litigation then recovered its normal pace in about a year and a half. The second major outbreak of the plague in 1361-62 affected litigation for about two years; the third outbreak in 1368, much less severely but again for about two years. The relatively rapid recovery rate for the second and third plagues may be accounted for by the lower mortality of later plagues, the sector of the population most affected by the later plagues, or by a greater competence to handle death on such a large scale.

12. J. L. Bolton, *The Medieval English Economy, 1150-1500* (London and Melbourne, 1980), pp. 208-14, finds the beginning of a labor shortage only after the 1360s; Hatcher, *Plague*, pp. 32-35, puts the lingering prosperity through to the end of the fourteenth century. Waugh, *England in the Reign of Edward III*, p. 7.

13. Hatcher, *Plague*, p. 25.

government exerted itself to retain the old structure of society, primarily through the enforcement of the Ordinance and Statute of Laborers. That enforcement was effective in the short run.<sup>14</sup>

The vigorous governmental response was indicative of the general change in governance and law as such. Governmental power prior to the Black Death was certainly not formally limited. Thirteenth-century English government handled social needs as they arose; the king's own authority was inherent. Nevertheless, prior to the Black Death the government in fact did not meddle in a wide range of matters at the local level. Moreover, the use of private law (as distinct from the king's own use of the courts for pursuing conflicts) was reactive in the sense that the government was content to resolve litigation without attempting to use law as an assertive instrument of extensive social control.<sup>15</sup> While resolving disputes could properly be seen as a method of social control, in this context mere resolution of disputes indicates a less aggressive approach to the formulation of law, an approach that is more content to let major areas of social need lie outside the purview of government.

Governance after the Black Death was qualitatively different, exhibiting a government intent on using the law to control society, to preserve as far as possible the status quo. Punitive remedies and occupational liabilities are prominent indications of the new attitude that would not find its completion until the sixteenth century with the statutes in the 1530s and the broad changes in the common law. A vital portion of the qualitative roots of Tudor governance, however, was the change in governmental approach and the great expansion of legal subject matter jurisdiction that began with the Black Death. After the Black Death the king's government became responsible for the running of the whole society. That fundamental assertion in action, rather than only in theory,<sup>16</sup> makes it

14. Bertha Haven Pannam, *The Enforcement of the Statute of Laborers, 1349-1359* (New York, 1908), pp. 149, 160, 221; Bolton, *Medieval English Economy*, pp. 212-13; Ormrod, *The Reign of Edward III*, p. 22; Waugh, *England in the Reign of Edward III*, p. 112.

15. I have argued before a political origin to the beginnings of the common law in 1176. That political origin was to regulate the magnates in their tenurial decision making so that they would not again revolt. Those decisions certainly had extensive repercussions down to a sector even of those holding relatively little land. Despite those effects, the intent was focused on the magnates: regulating the in-fighting among the elite of society is quite different from social control through the law. The latter focuses broadly on the totality of the society, including the everyday relationships of the lower classes.

16. The *quo warranto* campaign under Edward I might be seen as a similar exercise. Donald W. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I, 1278-1294* (Oxford, 1963). Asserting that all jurisdictions derive from royal grant did constitute the liberty holder as a delegate of royal authority, thus asserting royal authority over broad governmental matters. *Quo warranto* prosecutions, however vital they were for govern-

appropriate to label the English state after the Black Death as a government of inherent authority. The greater cohesiveness of the upper orders was a vital part of the general recognition of a great need to preserve traditional society, probably without any recognition that the vigorous attempt to preserve society would inevitably transform it. That transformation, producing a newly responsible and newly intrusive government, is intrinsic to the appreciation not only of the Black Death, but also of the Peasants' Revolt of 1381, long acknowledged to have been fueled by labor regulation, although precipitated by the poll tax.

In the very nature of this topic, the thesis cannot be proved with geometrical satisfaction. Many kinds of causation are at work—some very direct, others at a substantial remove both in terms of the kind of causation and in terms of chronology. Instead of absolute proof, however, the aim is to show that, given the needs for and the effects of the legal change, the hypothesis of a transformation of law and governance in the wake of the Black Death is much more cohesive and explanatory, more sensible than the fragmented, legally insular conceptualizations currently dominant that portray the change as gradual evolution with discrete, noninteractive legal categories. Readers nevertheless will rapidly note that the conclusions here are not stated tentatively, even in the chapters on the church and the chancery, in both of which extensive further research is clearly possible. More broadly, most of the individual developments here could be construed in different ways if considered in isolation. The strength of the assertions derives from the reinforcement that each development receives from other simultaneous changes, of which the reader at the beginning will necessarily be unaware.

This book falls into three parts, followed by lengthy appendixes. The first part is largely concerned with statutory provisions and their attendant circumstances that demonstrate the way in which the upper orders drew together to confront the demographic crisis. The second part analyzes changes in private law that coerced the upper orders to stand to their obligations. The third part, the focal point of the book, concentrates on tort law changes that put new pressures on the lower classes to perform adequately in occupations. Viewed as a whole, these changes represent a coherent although unenunciated general pattern of governmental responses to the demographic crisis, one that now utilized the law as an affirmative instrument to impose social policy.

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mental development before the Black Death, did not extend the subject matter concerns of government into areas that would involve the government in a practical assertion of societal regulation and control.

## The Upper Orders Drew Together into a More Cohesive Government . . .