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VII. Legal History

***1768** ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348 -1381: A TRANSFORMATION OF GOVERNANCE AND LAW. BY ROBERT C. PALMER. CHAPEL HILL: UNIVERSITY OF NORTH CAROLINA PRESS. 1993. PP. XIV, 452. \$49.95.

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LIT - Literature Reviews & Analyses

The Black Death wrought a terrible toll on England. Approximately one-third of the country's population was lost to the bubonic plague between the years 1348 and 1350. [FN1] While the Plague killed indiscriminately, it hit the members of the lower social orders the hardest. The glut in the English labor market that existed at the time was thus eliminated, giving the surviving members of the lower orders more bargaining power in their dealings with the landholding classes than they had ever previously enjoyed.

In his book, *English Law in the Age of the Black Death, 1348 -1381*, Robert Palmer [FN2] contends that the Plague gave impetus to changes in the essential nature of English governance. He claims that in an effort to preserve the existing distribution of powers within society in the face of the Black Death, the upper orders formed a cohesive government in order to hold the upper and lower orders to their respective obligations (p. 1). To that end, the English government used the law as a means of controlling class structure and interclass interaction (p. 5). These changes thereby qualitatively transformed the English government into a government of "inherent authority," meaning that the newly intrusive government "took responsibility for the regulation and direction of the whole of society" (p. 1).

Palmer's major thesis runs counter to traditional views of English governance following the Black Death. According to traditional historiography, the English government's steady increase in power was caused in large part by the skillful administration of a single man, King Edward III (pp. 9 -10 & n.1). Edward consolidated and expanded his power by successfully waging war abroad and using his war profits as patronage to pacify the domestic elites. Such patronage allegedly fostered a spirit of trust and cooperation among Edward, the nobility, and the clergy. This increased cooperation allowed the newly centralized government effectively to expand its power and extend its influence. Despite this increased cooperation, however, the period found increased power struggles among the upper classes (p. 11). Traditional historiography thus contends that the Black Death presented Edward's administration ***1769** with a crisis to overcome but that the plague did not provoke a qualitative change in the relations between English government and English society (p. 11).

Similarly, conventional history traces the expansion in fourteenth century English theories of liability not to a change in the style of governance but to the ability of skillful lawyers. Talented lawyers were able to manipu-

late standard writ forms in order to increase potential bases of liability. Contemporary justices, using only the internal logic of the law as their guide, then supposedly incorporated these theories of liability into the existing common law (pp. 61, 296, 299).

Against this general background, Palmer contends that the demographic changes resulting from the Black Death constituted the chief catalyst in bringing about fundamental changes in medieval England's social order. The threat to the social order that the Black Death posed was not translated directly into economic upheaval; there is no evidence to suggest that any economic crisis occurred in England prior to the 1370s (p. 4). In fact, because overpopulation was severe prior to the Black Death, there was no threat to the kingdom's labor supply even after the Plague struck, as indicated by the absence of vacant arable land in England during the 1350s. [FN3] Palmer contends that the threat to economic organization was indirect: the increased ability of the laboring classes to bargain due to the decreased labor pool impacted the power structure of traditional feudal society (pp. 15 -17).

Palmer maintains that the upper orders drew together into a cohesive government to consolidate and enhance governmental power. This increase in power was utilized to preserve the social status quo by coercing each Englishman, whether he belonged to the upper or lower orders, to carry out his traditional obligations. In forming a cohesive government, a new class -- the gentry -- was created. Additionally, increased powers were given to local authorities to create a more congenial governing apparatus.

In an effort to preserve the social hierarchy, the Crown attempted to regulate the whole of English society through legislative acts, such as the Statute of Labourers. [FN4] To enforce these kingdom-wide regulations in the various localities, the central government granted local peace officers broad powers of inquiry. They were also granted the ability to rule on felonies and trespasses according to the common law (p. 23). Palmer claims that the empowerment of local officials was largely responsible for the creation of the gentry, who were "substantial local people whose position is strongly *1770 related to the exercise of state authority" (p. 24). While this change took place over a number of years, Palmer places the "transition point" fifteen years after the Black Death (p. 294). The gentry replaced the "knightly classes" as the lowest classification among the upper orders (p. 294). Unlike the Christian warring elite, the gentry did not base their power on their personal authority or class status but on their function as agents of the central government.

In addition to creating a new class within the upper orders, the Crown made efforts to reconcile its differences with the rest of England's elite. As a means of ensuring the peaceful transition from knight to gentry, the gentry were granted more rights in relation to the Crown at criminal law. For instance, the Statute of Treasons [FN5] limited the scope of treason. Riding armed or covertly with the intent to murder or kidnap became a mere felony or a trespass, the latter of which was not even punishable by forfeiture of land. Previously, such actions were regarded as treasonous offenses, punishable by death. With the Statute of Treasons, even judgments that resulted in the forfeiture of land now reserved the right of escheat for whoever would have rightfully had it otherwise. Therefore, Palmer contends, the statute greatly benefited landholders. Furthermore, limits were placed on the royal range of action in purveyance -- the forced sale of private property to satisfy royal needs. [FN6]

In the same vein, the government of Edward III pursued a policy of inclusion and cooperation with the Church. Instead of feuding with bishoprics and dioceses as he did in the 1340s by applying pressure through litigation, Edward granted the clergy more legal freedom from royal authority in the 1350s. [FN7] The new spirit of compromise was exemplified in the elevation of William Bateman, Bishop of Norwich, to the King's Council in 1351. Palmer notes that the change in attitude toward the clergy did not come with the English victory at the

Battle of Crecy in 1346, but only occurred in the aftermath of the Black Death.

In the second part of his book, Palmer contends that one of the twin purposes of the newly cohesive government was to coerce the upper orders to stand by their obligations as a means of preserving the social order. The Black Death produced a credit crisis, as a high mortality rate among debtors, creditors, and contractual partners^{*1771} enticed people to renege on their commercial obligations. Penal bonds, punitive remedies under detinue of charters, [FN8] and uses [FN9] all came into vogue because their utilization encouraged more members of the upper orders to stand by their commercial obligations. Under traditional covenant law, if one broke a contract, the plaintiff could be awarded damages in compensation for the period of nonperformance, but not in place of future performance. The primary concern was fairness between the parties, not deterring future nonperformance (pp. 71-72). Penal bonds were enforced prior to the Black Death. Before the Plague, however, they could be enforced for default in performance of agreements but not for default in debt payment. Two years after the calamitous outbreak of the Black Death subsided (in 1352), the use of penal bonds increased dramatically, and they were also used to enforce debts. [FN10] Similarly, after the Plague, English courts reversed their position on remedies for detinue of charters when they instituted the harsher penalty of valuing the instrument by the interest it protected without requiring any showing of actual loss (p. 102). Finally, the frequency with which uses were employed increased dramatically after the Black Death. The development of the use allowed members of the upper landholding orders to pay debts off posthumously from their land holdings, which had previously gone to heirs who were not held responsible for debt repayment (p. 121).

The second and primary objective of the central authority was to prevent the lower orders from gaining power or status in relation to the upper orders. The government attempted to force the lower orders to stand up to their traditional obligations in the face of economic reality. As the glut in the labor pool gave way to a relative shortage, laborers gained an increase in bargaining power for their services. In order to ensure the production of food and services, the government enacted the Ordinance of Labourers [FN11] in 1349 and the Statute of Labourers [FN12] in 1351 (pp. 17, 21). These legislative acts represented the most comprehensive governmental regulation of English society in the era. Palmer contends that they were enacted to preserve the status quo between the laboring and nonlaboring feudal classes in the social hierarchy. With this legislation, the central^{*1772} government made obtaining a sufficient work force at reasonable wages a kingdomwide concern. Previously, such matters were handled through either local regulation or the common law (p. 15).

The Ordinance of Labourers required that all healthy non- self-sufficient people under sixty years of age work at reasonable wages until the end of their agreed term. The ordinance forbade charitable gifts for those who were able to work. The Statute of Labourers explicitly specified the wage levels for a number of occupations (p. 21). In 1364, Parliament also mandated that merchants deal in only one kind of merchandise while artisans were limited to one kind of craft (p. 22). Further, sumptuary legislation stipulated the appropriate dress and diet for certain types of laborers. [FN13]

With the Ordinance and Statute of Labourers regulating the structure of the workforce, workers had less incentive to work well. Forced work and wage restrictions meant that they would not be compensated for doing superior work. It then became incumbent on the government to regulate the quality of the work. To that end, government, through chancery, expanded the scope of liability for workers for negligent performance or nonperformance by issuing new writs of assumpsit and trespass on the case. [FN14] Assumpsit involved nonwritten agreements and trespass on the case pertained to harms that were inflicted indirectly by the defendant's actions. These writs were the primary source of law and justices had no authority to go beyond the four corners of the document. Assumpsits originally grew out of detinue, as bailment. After the Black Death, they became based on

covenant, where nonfeasance as well as misfeasance became sanctionable as the scope of the government's legal coercion expanded. Unlike the old trespass *vi et armis*, no force was required for liability to be found under a writ of *assumpsit*. Palmer alleges that the variability in writ forms in *assumpsit* and the growth in the number of writs predicated on trespass on the case indicated that these remedies were implementations of the government's social policy rather than any conceptual breakthrough in the law (p. 143). Palmer places the true origins of these writs after the Black Death in 1352, with the introduction of a number of new writs.

Beyond the simple introduction of new writs, the concept of *scienter* came to provide a basis for case liability for people who knowingly kept animals that subsequently caused damage. This legal theory expanded upon incitement claims and further ensured *1773 that people would live up to their obligations (p. 250). The narrow circumstances under which *scienter* liability arose also supposedly indicated tight chancery control. Also, strict liability was imposed on jailers and innkeepers where damage was either done by escaped prisoners or done to the goods held by people staying at the inn.

Palmer contends that the vast scope of the legal initiatives after the Black Death, both in centrally exercised and in delegated authority, is an index of the sudden and great expansion of state power. Such an enormous increase in state power, in turn, is indicative of the shift of the English government to a government of inherent authority, a government responsible for the regulation and direction of the whole of English society.

* * *

Robert Palmer's aims are grand and his argument is simple. He explains virtually all of the actions taken by an increasingly active English government in the mid-to-late fourteenth century as motivated by the pursuit of a single goal: to force everyone in the kingdom to live up to the obligations that traditionally attached to their respective positions in the social hierarchy. Palmer's theory is commendable because it provides an easily understood structure for comprehending the wide variety of changes in English law and governance in the aftermath of the Black Death. His theory compares favorably with a number of traditional historical accounts of the era, which usually categorize the changes as *ad hoc*, fragmented, and unrelated events that came about due to the impressive efforts of a single man, King Edward III, and his government.

Palmer, however, understands that his thesis -- that English government underwent an essential transformation due to the intentional attempt to use the law to control society -- is intrinsically difficult to prove (p. 6). He further admits that he is unable to locate a "smoking gun" causally linking legal innovations to the Black Death (p. 61). Although Palmer acknowledges the difficulty of demonstrating a direct connection between the recognized social effects of the Black Death and governmental policy, he contends that it does not detract from the overall quality of the book (pp. 6, 103). This is not entirely accurate because providing an evidentiary link would certainly strengthen his case. Of greater importance, however, is Palmer's failure to provide stronger evidentiary support for his theory that the government was acting with the intention of preserving England's social order. Because Palmer makes the actual intent behind the general governmental policy an important element of his thesis, his failure to provide stronger support is a significant flaw.

*1774 It must be noted that Palmer makes a good effort at supporting his theory with the evidence at hand. He submits some interesting circumstantial evidence in support of the notion that a grand governmental plan motivated the numerous legal innovations of the era. Palmer notes that there was no separation of powers in the medieval English scheme of governance (p. 298). As a result, the courts and the exchequer were in constant contact with each other (p. 10) and could formulate and impose broad government initiatives. This structural argu-

ment is supported by Palmer's emphasis on the timing of the actual legal innovations that came out of chancery. He invariably places their adoption as following on the heels of the Black Death, although he recognizes their roots in the period preceding the Plague (p. 103). Thus, Palmer initially shows how the government was capable of acting in concert to implement a plan, and then he demonstrates how governmental actors acted again in concert in response to the Black Death.

Palmer could have bolstered his theory that the government was acting according to a grand plan if he had been able to provide some contemporary sources indicating how legal innovations, such as the Statute of Labourers, were viewed by the Englishmen of that era. Readers are presented with no evidence as to whether these innovations were viewed in conjunction with a more comprehensive social engineering policy, or whether they were seen as individual ad hoc responses to specific problems. In all fairness to the author and other medieval historians, there may be no extant sources on this topic. Given the impressive nature of Palmer's appendices, it is possible that no surviving personal correspondence, church records, popular literature, or similar records shed light on this subject. Without such information, though, it is difficult to determine whether English elites actually perceived the labor shortage as a threat to their economic bargaining power. Palmer seems to infer this state of mind by the very existence of the Statute of Labourers itself. This sort of bootstrap argument does not provide any real support for his theory.

Perhaps Palmer inferred the mindset of the English upper orders not from the historical period, but from a book known to all medieval-Renaissance historians, Jacob Burckhardt's *The Civilisation of the Renaissance in Italy*. [FN15] In his seminal work, Burckhardt contends that the increased social mobility that resulted from the Black Death led Italians -- especially lower-born Italians -- to recognize that they possessed the ability to change the circumstances of their lives. In short, they came upon the notion of free will. Burckhardt attributes the rise of the Renaissance in Italy to this *1775 fundamental change in the medieval mindset. It seems unlikely, however, that the English upper orders Palmer discusses actually anticipated this monumental change.

Having made the government's intent to expand its powers a major part of his grand theory, Palmer goes to great lengths to fit every single social and legal innovation into this scheme. Occasionally Palmer goes too far. The most glaring example of Palmer fitting square pegs into round holes occurs when he does not adequately explain how the upper orders' failure to carry out their commercial obligations actually presented a threat to the English social order. Such debts appear to have remained among the elites; these debts do not seem to have presented an opportunity for socioeconomic mobility amongst the lower orders. Furthermore, Palmer contends elsewhere in the book that England did not suffer from an economic crisis until decades after the 1348-1350 onset of the Plague. Perhaps the threat was not economic but social, because the widespread failure to carry out commercial obligations might have created strife among the ruling elite. The nature of the threat is never made clear. The indefinite nature of the threat posed by unreliable commercial relations undermines Palmer's theory that the changes in English law in this period were more than mere expressions of the growth in landowners' rights in relation to the Crown.

The strongest part of Palmer's argument is his theory that governmental policy generated the new theories of liability that were derived from writs. Palmer maintains that the new writ forms were not created by innovative lawyers and justices in accordance with the internal logic of the law, as traditional commentators suggest. The author further submits that the justices were in constant close contact with the King and the Chancellor (pp. 297-98). Because the writs were issued by chancery and justices had no authority to go beyond the four corners of the document (p. 297), Palmer effectively persuades the reader that these new writs could not have been derived from a universal understanding of the common law among the English justices. It seems far more likely that

they were promulgated from a single source.

Palmer also contends that the variability in writ forms indicates tight chancery control over legal innovations, and that each writ was carefully crafted in response to particular social problems (p. 143). Unfortunately Palmer is still unable to tie chancery control over the new theories of liability to the overall goal of preserving the feudal system. Even if the general policy underlying the new theories of liability was the same, writ variability might only indicate that the government was responding on a consistent -- albeit an ad hoc -- basis to similar problems over a significant period of *1776 time. This policy could have been as unformed and intuitive as simply increasing the scope of existing liability in response to the prevalence of shoddy work and the inconsistency of commercial relationships. Palmer strains to argue that creating strict liability for innkeepers was somehow related to the goal of keeping the upper and lower orders separate and distinct in the social hierarchy.

Although the Black Death may have created a variety of problems to which English government responded in a consistent fashion, attributing intention without evidence is akin to positing a conspiracy theory of history. Palmer would do well to dispense with his claim that the English government had a grand plan and spent decades "coercing" an entire society to follow it. Although all law may be read to be coercive, it is unclear whether English law of the era was aimed at "preserving" society or merely responding to limited policy needs created by the Black Death. Responding to similar problems in a similar manner only indicates a consistency in reasoning or a familiarity with recently made decisions or precedent; it does not necessarily indicate a single motivating force.

Although Palmer ultimately fails to prove that the English government acted with the intent of preserving the social order, future research may bolster his position. This notwithstanding, if Palmer were to remove claims of intentionality from his thesis and make his book a more purely descriptive account of how the English government responded to the Black Death with a number of legal innovations, and was in turn transformed by those innovations, his book would lose little if anything in the process. The intentionality claim is in no way central to the originality or importance of his major thesis. Palmer's central claim -- that the English government was transformed into a government of inherent authority -- can stand on its own. The circumstances that Palmer contends bound future governments to the new nature of governance seem equally applicable to the regimes that originally devised the legal initiatives. The broad scope of the legal initiatives that came into being in the aftermath of the Black Death required a significant expansion of centrally exercised and delegated power in order to support and enforce the new initiatives. Because the legal innovations remained good law in England, the expansion of governmental authority into every corner of English life became permanent (p. 306).

Palmer presents a strong, if circumstantial, case for his theory that numerous legal initiatives were instigated as a result of the Black Death and that the authority of the central government increased substantially because of these initiatives. Whether the extent of the increase in authority transformed the essential nature of English governance is an intrinsically difficult question to answer. *1777 There is no bright line a government must cross before it becomes a government of inherent authority. Semantics aside, English Law in the Age of the Black Death, 1348 -1381, represents a unique and worthwhile effort. Even if Palmer occasionally overextends himself in an effort to explain the transformation of English governance in simple terms, his book is an extraordinarily cohesive and logical account that enables readers to come to grips with fundamental changes in English law and governance with little difficulty. Readers, especially those with an interest in medieval history, should thoroughly enjoy the fruits of Palmer's labors.

[FN1]. John Hatcher, *Plague, Population and the English Economy, 1348 -1530* at 21-22 (1977).

[FN2]. Cullen Professor of History and Law, University of Houston.

[FN3]. P. 4 (citing J.L. Bolton, *The Medieval English Economy, 1150 -1500* at 208 -14 (1980)). According to Palmer, Bolton found no labor shortage until after the 1360s.

[FN4]. Statute of Labourers, 1351, 25 Edw. 3, chs. 1-7 (Eng.).

[FN5]. Statute of Treasons, 1351, 25 Edw. 3, ch. 2 (Eng.).

[FN6]. P. 25. Purveyors were forbidden from engaging in a variety of actions: valuing property lower than the market rate, taking trees near houses, taking more sheep than were necessary, keeping the sheep's wool for themselves, and so on.

[FN7]. For example, The Ordinance for the Clergy (1352) reserved for ecclesiastical courts the right to determine when a benefice was open, required that indictments of clergymen specify the particular crime, and held that a bishop's temporalities could not be seized for contempt under *quare non admisit*. P. 52 (citing Ordinance for the Clergy, 1351, 25 Edw. 3, chs. 1- 9 (Eng.)).

[FN8]. Detinue had previously required only that the borrower of a legal instrument return it to its rightful owner. P. 92.

[FN9]. Uses were the forerunners of the modern trust in which one or more individuals held legal title for the benefit of another, who held the equitable interest. P. 111.

[FN10]. According to Palmer, the new legal theory embracing the use of penal bonds in the context of debts based on a condition precedent was enunciated in *Executors of Moigne v. Haunsard*, Y.B. 26 Edw. 3, fol. 17, pl. 9 (1352). Englishmen were thereafter subject to penalty for nonpayment of debts without running afoul of the usury laws. P. 81.

[FN11]. Ordinance Concerning Labourers and Servants, 1349, 23 Edw. 3, chs. 1-7 (Eng.).

[FN12]. Statute of Labourers, 1351, 25 Edw. 3, chs. 1-7 (Eng.).

[FN13]. The appropriate dress for servants, “craftsmen and yeoman, esquires and gentlemen, merchants, knights, clergy, and plowmen” was prescribed. P. 22.

[FN14]. According to Palmer, *assumpsit* covered negligent carriers, builders, doctors, shepherds, clothworkers, and assorted artisans and laborers (pp. 171-210), while the remedy of trespass on the case was available for use against farriers and innkeepers (p. 217).

[FN15]. Jacob Burckhardt, *The Civilisation of the Renaissance in Italy* (S.G.C. Middlemore trans., 1904).

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