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**Robert C. Palmer**. *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law.* Chapel Hill and London: University of North Carolina Press, 1993. xiv + 452 pp. $60.00 (cloth), ISBN 978-0-8078-2099-5.

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Deciding upon the goals of a legal history–which in turn determines who is competent to review the work–is a matter not without difficulty, a difficulty that is explicitly discussed by Robert C. Palmer in the preface to his *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law*, where he says: "This book serves various purposes. Primarily, it argues a thesis that the effects of the Black Death worked a transformation in English law and governance, that the changes in the law derived from a social trauma instead of from internal legal considerations whether of doctrine or of litigation strategy. At the same time, it is almost a survey of English law in the mid-fourteenth century, because the changes in the law at that time were comprehensive and are still little known. I also tried to make available materials for both legal and historical researchers. The mixture of theses, subtheses, and audiences certainly exceeded my capabilities…." Or at least they exceed the capacity of a single book and, I fear, my competency to do justice to them all.

I am a lawyer, not an historian, though the first book that I ever owned–long before I could read it to myself–was a history: Eleanor and Herbert Farjeon's *Kings and Queens*. I loved that book; but its reference to the period in question goes, in part, like this:

What! haven't you heard Of Edward the Third And his famous French battles? Don't be so absurd! . . . . Not heard of his son–I refer to the one Who was called the Black Prince And was second to none–. . . . Don't be so absurd! Of *course* you have heard–*So don't say you haven't*–Of Edward the Third!

And, of course, I hadn't; which was frustrating. I know little more about him today: reading Palmer's book has done nothing to alleviate the frustration, for Edward III never appears on stage, and the Black Prince is never mentioned. It is not the history of kings and queens and princes, or even bureaucrats; it is history without the stories, expressed in abstract and general, and anachronistic, terms. For one who has spent the major portion of his working life, both in practice and later as an academic, struggling to understand what the law is, not in general or in the abstract, but in particular cases, these generalities are distressing. (I simply can't comprehend how the "law" could be the sort of "thing" that can be understood in general.)

But the latter part of Palmer's book–especially the appendices–is a wonderful collection of particular law cases, some of which also contain the bare bones of what could be ripping good tales–or, at least, scenarios for a fourteenth-century version of "A Current Affair". Consider the case of Nicholas Trote v. Walter Lynet which is abstracted in Appendix 23d where the bill (i.e., the complaint) related that (in Palmer's translation): "Whereas P [the Plaintiff] had in the town of Exeter tenements to the value of 10 [pounds], there came D [the Defendant] on 9 June 1357 in Exeter scheming falsely to deceive and hurt P, to wit, to marry him to Alice sister of D, and there took P and deceitfully conducted him to Nether Exe and there placed him in a certain bed nude until P slept, and then D led the above said Alice his sister there and placed her in the said bed nude with P. And thereon he made to come two false witnesses, to wit, John Ganelok and John Rug and made them to understand that P affided the same Alice to marry her, asking them that they want to testify that they were thus lying together alone nude, and he made to affide him against his will, by which color he made the said Alice to prosecute against P in the consistory of Exeter to have him as her husband, and he produced the abovesaid witnesses to testify, who on this were examined, which plea still pends, and thus P is falsely prosecuted and gravely in deceit of P, wherefore he says that he is worse off and has damage to the value of 300 [pounds]." That same story could appear in any of today's tabloids and–more to the point–the words of that complaint can probably be found, with only a little modernization, in many of today's legal formbooks.

In his text Palmer pays scant attention to such slices of raw life among the litigating classes, though they appear in a fair number of his footnotes and appendices. Those concerned with everyday life in England in the age of the Black Death may find some treasures here, but if they do they are going to find them buried in the scholarly apparatus. On the other hand, those who prefer statistics to people are not going to find much of interest beyond an initial enumeration of the number of cases filed during each year of the period (which seems to show a negative correlation between the amount of litigation and the onset of the plague) and a quick survey of others' estimates of the mortality during the period and its economic consequences (from which it appears that the loss of up to half the population did not have a negative impact on the prosperity of the period). There is no doubt that Palmer's book is an important contribution to those, and I count myself among their number, who are concerned with the historical study that is probably best described as legal paleontology, the study of the evolution of the law. And this is so despite the book's distracting use of political-psuedo-scientific jargon and it's absurd MacGuffin: the thesis set out on the first page that, as a consequence of the Black Death, "[a]uthority 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," as if the politico-scientifical concepts of "state," "government," and "society" were somehow applicable to the Plantagenet kingdom of Edward III, or the phrase "government of inherent authority," which "found its primary use in nineteenth-century America, to differentiate state authority from federal authority," can reasonably be applied to the evolving tendency of the common law to give actions for damages for wrongs committed by individuals rather than merely for the restitution of rights, rights that for the most part were embodied in the traditional relations of the "feudal" system, as John Selden first called it in the seventeenth century.

I suspect that much of my difficulty with Palmer's thesis arises from the fact that I am trained as a lawyer, and that Palmer isn't. I imagine that soldiers have similar problems with military histories written by civilians. Stripped of its scholarly jargon, the thesis appears to be–at least in so far as it relates to private law cases, as opposed to legislation and litigation instituted by royal officials–that Milsom, who is second only to Maitland among English legal historians, was wrong when he attributed the development of the action on the case, which first became significant during the reign of Edward III, to the arguments and "litigation strategies" of private lawyers pursuing private ends, rather than to "governmental" policies implemented by the council, the chancellor, and the clerks in chancery in response to the demographic consequences of the Black Death. Now Milsom was trained as a lawyer, as earlier were Maitland in England and Ames in the United States, and like Maitland (and like Ames to a lesser extent), he has the ability–the negative capability–when he discusses the dry-as-dust record of a centuries-old case–to put himself in the shoes of the lawyers–now dust themselves–and follow their arguments just as he would were he dealing with the record of a case filed just a few years before. (It is, I imagine, rather like an old infantryman reading an ancient chronicler's account and almost instinctively appreciating the disposition of Edward's longbows before the battle of Crecy.) Thus for Milsom, and for me, what counts in the development of the law is the maneuvering and arguments of the lawyers, not the–to use the economists' term–"exogenous" commands of the bureaucracy, while, on the other hand, according to my thesis, Palmer, the non-lawyer, is predisposed to explain the same developments in terms of deliberate "governmental" policy. (Palmer's position according to this thesis is rather like that of those who believe that biological evolution must be directed toward a predetermined goal rather than being determined by unintended selective processes.)

This suggestion that Palmer just doesn't see the issues the way a lawyer would is perhaps unfair to him; after all, his *The County Courts of Medieval England, 1150-1350* does deal in comprehensible detail with the actions of real people–and real lawyers–rather than with the a historical abstractions of twentieth century political theory, while his *The Whilton Dispute, 1264-2380*, which is a wonderfully accessible account of an actual legal dispute that lasted more than a century, is an excellent introduction to legal forms and practices of the period that culminates with the time of the Black Death. In fact, the non-specialist would be well advised to read these two books before attempting *English Law in the Age of the Black Death.* So maybe the problems that I see are merely an artifact of trying to cram too much material on too many unrelated topics into a single book.

Palmer, moreover, may have a valid point when he accuses Milsom and his predecessors of paying too much attention to litigated issues, and too little to the writs issued by the clerks in the chancery, the writs that were the normal way of commencing a legal action. Palmer's insistence on the historical importance of the government's policies with respect to the Black Death in the evolution

of the common law may be misplaced, and yet he still may be right in insisting that many, and perhaps most, of the important decisions were made in the chancery rather than in the courts. In the Middle Ages the arguments before the judges were often recorded in the Year Books and the pleadings of the lawyers were preserved in the plea roles, just as today the opinions of the judges are recorded in the law reports and the pleadings and arguments of the lawyers are preserved in the written records of the courts. It should hardly be surprising that academics, both historians and legal scholars, tend to put their emphasis on the written records that exist, not those that don't. And yet, when I think of my actual years in practice, I realize that I–like most lawyers who are not specialized as litigators–spent far more time arguing with the clerks than I did trying to persuade judges. So I suspect that Palmer is right in suggesting that the unrecorded discussions in chancery as to whether a writ should be issued, and as to how it should be worded, were at least as important in the evolution of legal actions as were the recorded arguments that were later made in court about the validity and interpretation of the writ.

That last concession does not, however, support Palmer's contention that the new writs that developed during the period in question were primarily the result of new governmental policies. The fact remains, whether one puts the emphasis on the decisions of courts to uphold a writ or the decision of chancery to issue it, that someone had to request the writ in the first place. The clerks in chancery could assist a plaintiff in instituting an action by issuing a new writ, but first some plaintiff had to ask for it. While it may be true that the decision to create (or to deny) a new form of action–to issue a new form of writ–would usually have been made in chancery (and perhaps sometimes in the council as Palmer suggests), it is hard to imagine how this could happen except on the application of some suitor who, if he were well advised, would have been represented in his application by someone knowledgeable in the law.

What Palmer overlooks is the fact that it is very hard–that it is, in fact, impossible–to create any new legal tool except by modifying some pre-existing form, whether new forms of action for non-forcible wrongs or new forms of bond to secure the performance of an agreement or new forms of conveyance that separate the beneficial interest in land from the rightful possession of that land, to mention only developments that are actually discussed by Palmer. Law actions may today no longer be started by purchasing a writ, but today's lawyers still use form books as a starting point for their complaints, and much of the language in those form books can be traced back to the fourteenth century, and before. Even in the fourteenth century, as Palmer's own materials evidence, some actions, such as Trote v. Lynet, were started by a bill, i.e., a petition to the court, rather than a writ issued by the chancery. To a lawyer the important point is not what argument–or policy–persuaded the clerks in chancery to issue a new writ; it is the way that the language of those writs (or of the bills) shows the adaptation of earlier forms to new situations, taking a word from here, an allegation from there, until, over time, a new formula became fixed and recognized as a standard cause of action.

Still, whatever flaws there may be in the interpretation of his data, the data themselves–the collection of writs and other legal records issued during the period in question–are of extreme importance, of more importance in fact than Palmer seems to recognize. It was–as Palmer clearly knows, but fails clearly to say–around the time of the Black Death that most of the new writs–the new forms of action for damages, rather than restitution–were first developed that were to become the dominant forms in the common law system and that still form the basis for most private litigation in modern Anglo-American law. It is a discussion of the appearance of these new actions that occupies the latter and, to my mind, the more significant portion of Palmer's text. (Palmer also covers the beginning of state labor regulation; the regulation of the church–without ever mentioning religion–; the practice of using bonds to enforce agreements in the time before modern contract law developed; and the development of the "use"–the predecessor of the modern trust. I found the latter two subjects quite interesting, but the meat of the book is in the sections on the development of the new wrong-based actions.)

This development of the new forms of action is, moreover, not solely of interest to lawyers and legal historians: it is part of a remarkable feature of English intellectual history, a feature that does far more to separate English history and English culture from those of continental Europe than does the physical existence of the English channel. The common law of England–and now of North America–has somehow evolved without a decisive break from the common feudal law that prevailed throughout most of western Europe during the middle ages; on the other hand, the civil law system that is now dominant on the European continent, and in much of the rest of the world, is founded on the intentional, and relatively abrupt, reimposition of the law of the late Roman empire–which had been defunct for some six hundred years–upon feudal domains to which it was for the

most part not well suited. And this distinction is important. The constitutions, written and unwritten, of England and English-speaking North America, and the political systems that prevail in those countries, are dependent upon, and have evolved out of, the traditions of the English common law, traditions that are missing where the civil law prevails.

Nor is that all. I can't prove it, but I remain convinced that distinctive features of Anglo-American thought are closely connected to this survival of the common law tradition. England has long been called a kingdom of judges, while the civil law countries of the Continent tend to be kingdoms of law professors; the English-speaking countries have produced British empiricism and analytical philosophy, and–in North America–the pragmatists, while the Continent has produced Hegel and the existentialists and the structuralists and the post-structuralists and Derrida and Foucault. I find it hard not to see some sort of causal relation between these two sets of cultural differences.

The developments in the fourteenth century that Palmer describes mark a major transition in the evolution of the common law and English society. At the end of the twelfth century when the common law of England first took the distinctive form that has persisted to this day, during the latter part of the reign of Henry II when the Justicar Ranulf de Glanville gave his name to the first treatise on the English common law that is formally entitled "De Legibus et Consuetudinibus Regni Angliae"–"On the Laws and Customs of the Kingdom of England"–, that law–with the exception of the criminal law, which was not very important back then–was concerned almost entirely with the protection of traditional rights and relationships, most of which involved the holding of land. At that time the writs that commenced a legal action normally took the form of a direction from the chancellor, issued in the name of the king, ordering the local sheriff to command–in Latin the word for "command" is "praecipe"–the defendant to return something to the plaintiff that the plaintiff claimed was rightfully his, or to do something that the plaintiff claimed he had a right to have done, and only in the event that the defendant failed to obey that command was there to be a judicial determination as to whether the plaintiff indeed did have a right to what he claimed. What is most striking to a modern lawyer about these praecipe writs is that they did not contain any claim that the defendant had done something wrong, nor did they seek damages for a loss suffered by the plaintiff, they simply demanded the restitution of something that the plaintiff claimed was rightfully his. Today, on the other hand, legal actions are almost all–at least formally–actions to recover the damages that the plaintiff has suffered because the defendant did something wrong. Today the law is about wrongs, back then it was about rights, and it is the cases that Palmer discusses that mark this shift from actions based on rights to actions based on wrongs.

The first wrong-based actions for damages that were heard by the royal courts were started by writs that were not in praecipe form, but rather simply directed the sheriff to summon the defendant into court to answer why he had with force and arms interfered with the plaintiff's person (say, by assaulting him), or with his possession of land or chattels, against the king's peace. These "trespass" writs, which first appeared shortly after the start of the thirteenth century, shared elements with the pleadings in criminal cases and with the actions known as the possessory assizes, which were summary proceedings for the recovery of possession of land by one who had wrongfully been deprived of possession. We will probably never be sure exactly what models were used as the basis for these "trespass" writs, but we do know that they were well established by the reign of Edward III.

What Palmer discusses in the latter portion of his book is the creation of new writs–new legal liabilities–for cases like Trote v. Lynet, for example, where a wrong was alleged, but not one that would comfortably fit within the standardize allegations of the classic trespass writs, which tended to contain nothing but short and formal allegations, including that the wrong was done with force and arms and against the king's peace. On the other hand, these new writs–which came to be known as actions on the case (or as trespass on the case) and which dealt for the most parts with transgressions that were not done with force and arms–contained, initially at least, a detailed explanation of the wrong done by the defendant, though over time they too were reduced to standard formulas and were issued as a matter of course. In fact, in time variants of these actions on the case came to replace the old actions that were commenced with praecipe writs, so that today almost all legal actions, whether for personal injuries resulting from an automobile accident, for breach of contract, for the conversion of personal property to the defendant's own use, or for failure to maintain a party wall are, in form at least, descended from the early actions on the case.

What is striking to me about these early cases is the lack of any underlying theme. Each early action on the case seems indeed to be an action on its own peculiar facts, on its own unique case. (And I don't think that this

is simply an artifact of Palmer's classificatory scheme.) Palmer discusses actions involving carriers who lost or damaged the goods that they had undertaken to carry (some of which contain the magic word "assumpsit"–meaning "he undertook"–which in later times became the basis for actions for breach of contract), actions involving builders who built badly or not at all (these actions too are usually considered as ancestors of the modern action for breach of contract), actions involving doctors and horse doctors (which also are often considered ancestors of the action for breach of contract), actions against shepherds whose sheep died or strayed (and here, too, some of the writs alleged an assumpsit), actions against clothworkers who tore the cloth (again sometimes with assumpsit allegations), actions against agricultural and other laborers (including millers and bakers and persons involved in child care), actions against farriers who lamed the horses in their care, actions against people who knowingly kept vicious dogs, actions imposing strict liability on innkeepers when third parties stole their guests' goods, actions imposing liability on jailors whose prisoners escaped (if the jailor allowed an imprisoned debtor to escape, he became liable for the debt), actions for damages caused by straying cattle and straying fires, actions for fraud and deceit (that's where Trote v. Lynet is found), actions for forging the endorsements on bonds, actions for failure to maintain dikes, banks, and ditches (where Palmer at page 284 quotes from a writ in praecipe form that demands that defendant repair his banks and ditches, "which have been destroyed to the nuisance of the free tenement [of the plaintiff] ..., as he ought and is accustomed to repair them"), and actions for interfering with the plaintiff's market (where the wrong might consist of the defendant selling his own goods in his own house, rather than in the market) or with his right of way, or with some other advantageous relationship.

Today legal academics like myself like to pretend that cases like these–and every one of these actions, except perhaps the one against the jailer whose prisoner escaped, could be brought today–fit into certain broad categories like "tort" (which is just Law French for "wrong") or "breach of contract", each with its own unifying theory. But the practicing lawyers know better than that; if one's client has been bitten by a vicious dog, one doesn't worry about straying cows or clumsy farriers, one just wants to find a case where the successful plaintiff was bit by a vicious dog. There's nothing here that could be called a theory, there's just precedent. Of course, it's nice to find a precedent from this century, but if one can't find it, a decision from the fourteenth century that's squarely on point will certainly serve better than any theoretical claim.

And thus it seems that, at least from a lawyer's viewpoint, *English Law in the Age of the Black Death* is not about history at all; it is about the common law: ever changing, ever adapting to new circumstances, like the Black Death or the invention of the computer, and yet always remaining somehow the same.

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