# THE UNEXPECTED BENEFIT OF HINDSIGHT: REASSESSING THE LEGAL IMPORTANCE OF THE BLACK DEATH FROM THE VANTAGE POINT OF THE COVID PANDEMIC

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*Historians are usually critical of hindsight but this article suggests that sometimes it can have an unexpected benefit. Sharing a similar experience faced in the past can afford a greater appreciation of that experience, especially if subsequent historians did not have that experience. This article suggests that our experiences of the Covid pandemic can enrich our appreciation of the legal significance of the Black Death in the fourteenth century. It revisits work on the main legal effects of the Black Death – and the thesis put forward by Robert Palmer that stresses it transformational impact upon law and governance – in light of the experiences of the Covid pandemic (so far). It asks what can be learnt from this comparison in terms of understanding legal change in both the fourteenth and twenty-first centuries.*

## INTRODUCTION

For legal historians, hindsight is dangerous if seductive. Knowing how the story ends (or at least how it continues) colours how the beginnings of that story are seen. Developments and opportunities that were likely the result of happenstance are afforded greater importance because they are seen as foreshadowing later developments and so must have been important. This happens to an extent with our individual lives: days and events which were not particularly significant at the time are later seen as pivotal moments because of our knowledge of what actually happened next. Lines of cause and effect are invariably simplified in order topresent a clear story. It is no wonder, then, that legal historians have lamented the dangers of hindsight. They have spoken of the risks of 'presentism'; the seeing of the past solely through the lens of the present.[1]And Maitland's suggestion that legal practitioners were suitably placed to do legal historical research by working backwards from the current law has been chastised on the basis that 'it can harden the teleological attitudes and manners of reflection habitual with lawyers.' [2]

[1] J Clark, *Our Shadowed Present* (Atlantic Books, 2003) 2, 7.
[2] G R Elton, *F W Maitland* (George Weidenfeld and Nicolson 1985) 22, commenting on FW Maitland, 'Why the History of English Law has not been Written' in H A.L Fisher (ed), *Collected Papers of Frederic William Maitland, Downing Professor of the Laws ofEngland* (Cambridge University Press, 1911) Vol. 1, 480.

Yet, this article contends that - contrary to these often repeated and well-made warnings - sometimes there is benefit to hindsight. On occasion, hindsight is useful in that subsequent experience enriches the appreciation of what the past was like. Encountering a similar experience to the period studied – and an experience that previous historians have not experienced – is likely to shed new light.In short, this article contends that the experience of living through the Covid pandemic and seeing its effect upon law and society has created a new awareness of the social and legal impact and importance of the Black Death. The experiences during the Covid pandemic in the twenty-first century have meant that we can now see the Black Death of the fourteenth century in a different light. It is now easier to appreciate how earth-shattering the Black Death was because we have seen how the Covid pandemic has affected virtually everything. The twenty-first century pandemic has shown us how new ways of working and living have quickly become normalised and how significant changes have occurred at pace or have been speeded up. Moreover, crucially, the experiences of covid have shown how a public health crisis has not only economic, political and social effects but significant legal ramifications too. Of course, the full legal and social effects of the Covid pandemic cannot yet be fully appreciated. Yet, it is uncontroversial to state that it has affected most, if not all, aspects of our lives and has had a number of extraordinary effects upon law and governance. The initial response to the public health crisis saw emergency laws passed in extraordinary ways that dealt with aspects of our lives which had previously not been subject to State regulation. It saw the curtailment of personal freedoms, a constant fusion and confusion of law and guidance as well as a greater awareness of the powers and significance of the devolved administrations.

This is not to equate the two pandemics. The Black Death (also known as the Pestilence, the Great Mortality or the Plague)[3] killed a third of the English population in the first outbreak in 1348-1350 alone.[4]One of the distinctive features of that disease was that 'it preferentially targeted men and women in the prime of life'.[5] The effect of Covid has been very different to its fourteenth century counterpart. This article simply suggests that our experience of the

[3] The term 'Black Death' was not applied to the outbreak until two hundred years later and became applied to the first outbreak of the plague and not to the subsequent epidemics of the same disease: SPorter, *Black Death: A New History of the Bubonic Plagues of London* (Amberley Publishing, 2018) 21, 22.
[4] R C Palmer, *English Law in the Age of the Black Death 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993) 3. Although the bubonic plague first arrived in the fourteenth century, outbreaks were to sporadically occur in the centuries that followed, being responsible also for the Great Plague of 1665, for instance.
[5] F M Snowden, Epidemics *and Society: From the Black Death to the Present* (Yale University Press, 2019) 29.

transformative legal consequences of Covid in the twenty-first century can aid our understanding of the importance of the Black Death in fourteenth century. The benefit of hindsight allows us now to appreciate implications and to make connections that would have been more difficult for historians who have not lived through a pandemic to reach.

The legal ramifications of the Black Death have often been underplayed or even ignored by legal historians. Indeed, legal historians have paid less attention to the late Plantagenet era with John Baker noting that much of what had happened after the death of Edward II (1307-1327) 'has been seriously neglected byhistorians of the law'.[6] As ever, this follows the example of Maitland. 'Pollock and Maitland' stopped before the time of Edward I and his lectures on constitutional history were structured to avoid the fourteenth century, with his first period being up to the death of Edward I 1307 and his second period being the position at the death of Henry VII in 1509.[7]As Maitland saw it, much of the common law had already become settled before the fourteenth century.[8]Indeed, his fleeting mentions of the Black Death related to its economic and social effects, rather than to its legal effects. Its only mention in his constitutional history was to remind his student audience that it was 'one of the greatest economic catastrophes in all history' that 'utterly unsettled the medieval system of agriculture and industry'. [9] Similarly, elsewhere Maitland briefly referred to the Black Death as one of a list of 'great social catastrophes' alongside the Tudor dissolution of the monasteries.[10] No attention was given to the legal significance of the Black Death.
Yet, in recent years, some historians have begun to reassess the legal importance of the fourteenth century[11] and of the Black Death in particular. This includes the work of Bertha Haven Putnam,[12] Michael Bennett, [13] Mark Bailey[14] and most notably Robert Palmer.[15]

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[6] JH Baker, 'The Dark Age of English Legal History 1500–1700' in D Jenkins (ed) *Legal History Studies 1972* (Cardiff, 1975) 1–27, reprinted in JH Baker, *Collected Papers on English Legal History* (Cambridge University Press, 2013) 1446. Baker's own work has subsequently shed much light on the Tudor period.
[7]F Pollock and F W Maitland, *TheHistory of English Law* (2nd ed, Cambridge University Press, 1968 [1898]); F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1941 [1908]).
[8] W M Ormrod, 'The Politics of Pestilence: Government in England after the Black Death' in M Ormrod and P Lindley, *The Black Death in England* (Stamford, 1996) 147.
[9]F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1941 [1908]) 207-208.
[10] F W Maitland, 'The Materials for English Legal History' in F W Maitland, *The Collected Papers of Frederic William Maitland* (Volume 2, Cambridge University Press, 1911)1, 56.
[11]See, e.g., M Ormrod and P Lindley, (eds) *The Black Death in England* (Stamford, 1996), which includes a chapter on government; A Musson and M Ormod, The *Evolution of English Justice: Law, Politics and Society in the Fourteenth Century* (Palgrave, 1998); A Musson, *Medieval Law in Context* (Manchester University Press, 2001)
[12] B Haven Putnam, *The Enforcement of the Statute of Labourers, 1349-1359* (Columbia University, 1908); B Haven Putnam, 'The Transformation of the Keepers of the Peace into the Justices of the Peace, 1327-1380' (1929) 12 *Transactions of the Royal Historical Society* 41.

This complements the work of economic, social, religious and cultural historians who often view the Black Death as a major turning point.[16] Palmer's thesis is that a whole host of legal changes that occurred in the fourteenth centuries can sensibly be understood as part of 'a transformation of law and governance in the wake of the Black Death'.[17] This contrasts with the conventional approach that regarded each of these changes separately as isolated examples of the common law reforming itself and working out existing inadequacies. Palmer denounced 'the fragmented, legally insular conceptualizations currently dominant that portray the change as gradual evolution with discrete non-interactive legal categories'. However, the counter- risk that the importance of the Black Death can be over-played is as dangerous as the risk that it can be ignored or underplayed. As ever, the picture is one of both change and continuity, of the common law struggling to adapt pragmatically to a new social and economic world.

This article draws upon this literature to outline four major legal effects of the Black Death. The objective is to use the new and unexpected benefit of hindsight not only to revisit and reassess the legal importance of the Black Death but also perhaps to develop an appreciation of how significant the legal effect of the Covid pandemic may be. When living through a period of extraordinary change it is often difficult to appreciate the scale, pace and import of such change and it is hoped that this brief historical review may provide some assistance in understanding the present and future as well as the past. After all, that is the role of history and of legal history: not to stabilise the present but to challenge our assumptions and to subvert them.[18]

## (1) LABOUR LAW LEGISLATION

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[13]M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191.
[14]MBailey, *After the Black Death: Economy, Society and the Law in Fourteenth Century England* (Oxford University Press, 2021).
[15] R C Palmer, *English Law in the Age of the Black Death 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993).
[16] M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 191-192.Mark Bailey has referred to the 'recent, extraordinary surge of interdisciplinary research' into the Black Death:MBailey, *After the Black Death: Economy, Society and the Law in Fourteenth Century England* (Oxford University Press, 2021) 6.
[17] R C Palmer, *English Law in the Age of the Black Death 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993) 6.
[18] See, further, R Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021).

The most direct legal effect of the Black Death and the one that is most often discussed in the conventional accounts is the development of labour law. The scarcity of labour benefitted those at the bottom rung of the feudal ladder provided that they remained fit and well. The villeins – those at the bottom of the feudal system and outside of the freehold legal bargain – could now demand higher wages for their labour with the threat that they could easily go elsewhere. Maitland noted that 'an increased demand for hired labour and a consequent rise of wages may have been the forces which drove the peasantry to desert their holdings'.[19] This undermined the feudal system, which had rested on the labours of the villeins. Moreover, reversing this trend proved difficult. Villeins were understandably reluctant to return to their previous position. In his constitutional history, Maitland noted that the effect of the Black Death was that wages 'rose enormously' and this led Parliament to endeavour 'by statute after statute to keep them down, to fix a legal rate of wages'.[20] This legal change was of significant importance. It was one of the major causes of rebellions from the lower classes, which led to the Peasants' Revolt of 1381.The Palmer thesis presents the labour legislationas part of'vigorous action to preserve the status quo in fact transformed both governance and law'.[21]Law was now used to attempt to reinstate the previous status quo and to put a lid upon class war. His thesis can be summed up as follows:

> 'After the Black Death and to preserve the status quo as far as possible, the upper orders of English society drew together into a 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 to be 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'.

Palmer's thesis was that as a result of the Black Death, government became more comprehensive and aggressive. He noted that while the ability for government to be far

[19] FW Maitland, 'History of a Cambridgeshire Manor' in Frederic W Maitland, *The Collected Papers of Frederic William Maitland* (Volume 2, Cambridge University Press, 1911) 366, 379.
[20]F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1941 [1908]) 207-208.
[21] R C Palmer, *English Law in the Age of the Black Death 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993) 1.

reaching existed prior to the plague, this was un-used.[22] The labour crisis caused by the Black Death led to an increase in the scope of government activity and also meant that 'Crown and Commons began to settle old disputes in a spirit of cooperation'.[23] For Palmer, the fact that there was no evidence of any form of economic crisis until the 1370s showed that the government had 'clearly made a major effort to counteract the plague'.[24] In the two decades following the Black Death 'the government exerted itself to retain the old structure of society' and sought to achieve this through labour law legislation. The Ordinance of Labourers and Servants of June 1349 and the Statute of Labourers of 1351[25] were drawn up in response to the shortages of labour caused by the plague.[26] Bennett described this legislation as 'epoch-making both in the scope of its ambition and the manner of its enforcement.[27]Prior to this legislation, the common law did not regulate labour relations.[28] Instead, the matter was dealt with by feudalism. The legal response to the Black Death changed this. As Palmer noted, labour becamedictated not by personal status but by contract compulsory for all those not otherwise occupied' and 'provision of a sufficient work force at acceptable wages became a matter of great concern to central government'.[29]

This legislation represented 'a newly responsible and newly intrusive' form of government.[30] Now, the king's government 'became responsible for the running of the whole society'.[31] As Mark Bailey put it, there was a 'transformation of England from a "demesne" state, where the Crown was largely dependent upon its own financial resources, to a "fiscal" state in which the resources of the realm were mobilized through regular indirect and direct taxation'. [32]There are clear parallels with the Covid legislation: law used to control aspects of life that

[22] Ibid 2-3.
[23] W M Ormrod, 'The English Government and the Black Death in the Fourteenth Century' in W M Ormrod (ed), *England in the Fourteenth Century* (Boydell Press, 1986) 175, 187.
[24] Ibid 4. For a differing interpretation see M Bailey, *After the Black Death: Economy, Society and the Law in Fourteenth Century England* (Oxford University Press, 2021) chapter 4.
[25] Though referred to as a statute it was not formally enacted as such until later: M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 196.
[26] On which see the essays in J Bothwell, P J P Golderber and W M Ormrod (eds), *The Problem of Labour in Fourteenth Century England* (York Medieval Press, 2000).
[27]M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 202. On its enforcement, see BHaven Putnam, *The Enforcement of the Statute of Labourers, 1349-1359* (Columbia University, 1908)
[28] RC Palmer, *English Law in the Age of the Black Death 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993) 14.
[29] Ibid14-15.
[30] Ibid 6.
[31] Ibid 5.
[32]M Bailey, *After the Black Death: Economy, Society and the Law in Fourteenth Century England* (Oxford University Press, 2021) 218.

were previously unregulated, the State taking on a hitherto unthinkable role in relation to employment through the furlough scheme and delaying (and increasing) the economic costs. The details differ, of course. However, having lived through the Covid pandemic, it is now easier to appreciate how seismic the Black Death was and how it would have led to previously unthinkable legislation which saw the power of the State increase in order to manage the situation.

A slightly different perspective can be found in the work of Mark Bailey, however. Bailey argued that the 'orthodox narrative ... imposes far too neat a pattern upon the events of the third quarter of the fourteenth century, when in reality this was a highly complex and contradictory period'. [33] For Bailey, common law developments had already diluted feudal ties before the Black Death.[34] He rejected 'the notion that the lords had exercised considerable control over peasant labour' and argued instead that 'the pre-plague labour market was open, sizeable, and scarcely regulated by either manorial lordship or government'. For Bailey, 'the government's rapid intervention in the labour market in 1349 was a desperate and tardy attempt to exert some form of control, which heightened resentment'. Bailey's 'alternative framework' therefore arrives at the same position as the Palmer thesis (and the work of Bennett) but presents the legislation as an excuse to 'catch up' with developments that were already under way. It may be similarly questioned whether the some of the measures brought in directly to deal with the effect of Covid also indirectly helped or at least took attention away from inequalities caused by a decade of austerityand Brexit. The Black Death experience underscores how legislative response to a public health crisis reveals much about the tensions and problems that underline governance at the time but which rarely rise to the surface.

## (2) THE TRANSFORMATION OF JUSTICES OF THE PEACE

A second and related legal effect of the Black Death, as stressed by Palmer, is that the role of local justice was transformed by giving local figures power that was no longer based on status relationships but on delegated central authority. This increased delegation of State power to local officials came about through the enforcement of the Ordinance and Statute. The Crown had previously been reluctant to make the keepers of the peace (the knights and other local dignities appointed to maintain order and record pleas of the Crown) justices

[33] Ibid 13.
[34] Ibid14.

capable of hearing felonies and trespass claims.[35] However, once these keepers of justice were given the powers to deal with offences under the Ordinance and Statute, then the door was opened to more general judicial powers. There was a period of experimentation with separate commissions of justices of labourers trailed but by the 1360s, the re-emergence of plague caused these to be merged and the institution of Justice of the Peace acquired statutory definition by the Justices of the Peace Act 1361-1362.

For Bennett, the Black Death can therefore be seen as 'as a catalyst for the redefinition of feudal power'.[36]Coercive power that had previously rested on personal status and enforced through local courts now 'increasingly began to operate through the agencies of the centralised state and the common law of the land'. A parallel to the transformation of local justice in the fourteenth century might be drawn with the very public and noticeable assertion of the power of the devolved institutionsduring the Covid pandemic. This was particularly true in relation to the Welsh Government.[37] When the history of the early twenty-first century comes to be written, the Covid pandemic will loom larger in the discussion of the growth of Welsh devolution than the countless Government of Wales Acts. The increased assertion of the devolved institutions was shown not only in the actions of the devolved institutions themselves but also in the eventual acceptance that statements made by the Prime Minister in relation to measures imposed or lifted applied only to England as well as in the criticismmade by members of the UK Government of the divergent approaches taken in the devolved nations. The Covid pandemic provided a long overdue recognition of the shift in power that had taken place over the last two decadesand shows how pandemics are likely to results in shifts of power and the need for more localised approaches.

## (3) LEGAL INSTITUTIONS AND LEGAL EDUCATION

Palmer and Bennett suggested that the pandemic had a much wider effect upon the law and legal institutions. As Palmer noted, it 'temporarily disrupted the institutions of central government'.[38] The Parliament summoned for early in 1349 was cancelled; the courts were

[35] Ibid 23. See BHaven Putnam, 'The Transformation of the Keepers of the Peace into the Justices of the Peace, 1327-1380' (1929) 12 *Transactions of the Royal Historical Society* 41.
[36]M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 200.
[37] For further reflection on this see R Sandberg, *Religion in Schools: Learning Lessons from Wales* (Anthem Press, 2022).
[38] Ibid17.

adjourned for a time duringTrinity term 1349.[39] However, the Black Death also had a longer-term impact, speeding up changes that were already underway. For instance, as Palmer noted, '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'.[40] In terms of litigation, the picture is mixed: the number of criminal cases increased (possibly due to the conflict and the effect of the labour legislation) while civil litigation declined and recovered to 1348 levels only by 1365, though this may reflect the decline in population as a whole.[41] However, here too, the powers of the King's Court grew through the development of the bill procedure.[42]

The Black Death had a significant impact upon the legal profession, not least since a number were killed by the pandemic.[43]It led to the consolidation of the legal profession as 'an even more tightly organised and privileged corporation'.[44] The roots of the modern division between barristers and solicitors can be found in the late thirteenth century when the Sergeants-at -law secured the exclusive right to represent at the Court of Common Pleas.[45] Bennett noted that, while it might have been expected that the crisis caused by the Black Death would have led to the fusion of lawyers, such fusion actually 'occurred at a different level' in that the leading barristers took on judicial work. This period therefore saw the fusion between the bar and the bench with a convention developing that only Sergeants-at -lawcould be appointed as judges. The fourteenth century also saw the transformation of legal education. While informality still characterised the position by the beginning of the century, by the 1380s entry to the upper level of the legal profession was 'largely controlled by colleges of senior barristers, which became known as the Inns of Court.[46]

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[39] M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 192.
[40] R C Palmer, *English Law in the Age of the Black Death 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993) 2.
[41] Ibid 3; M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 192.
[42] See J H Baker, *An Introduction to English Legal History* (5thed, Oxford University Press, 2019) 48-50.
[43] M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 193.
[44]Ibid 193-194. See also JH Baker, *The Order of Serjeants at Law. A Chronicle of Creations, with related Texts and aHistorical Introduction* (Selden Society, 1984); J H Baker, *The Legal Profession and theCommon Law. Historical Essays* (Hambledon, 1986); and PBrand, *The Origins of the English Legal Profession* (Wiley Blackwell, 1992).
[45] M Bennett, 'The Impact of the Black Death on English Legal History' (1995) 11 *Australian Journal of Law and Society* 191, 195-196.
[46]Ibid 194.

Bennett commented that the connection between these developments and the Black Death is open to question.[47] This underscores that the impact of the Black Death may have been felt in ways that are not straightforward. It is difficult to assess whether developments in the legal profession would have happened anyway and at the same pace had the plague not paralysed the country. These points equally apply to changes to the legal profession in the context of Covid. Although there were some limited Covid innovations such as the so-called Nightingale courts, by large the pandemic has simply underlined structural problems in the legal justice system that were pre-existing such as the reduction of legal aid and lengthy delays. The impact upon legal education has included speeding up a new appreciation of electronic forms of learning and training; though the major change – the controversial introduction of the Solicitors Qualifying Exam with its electronic multiple choice test assessments – was in the pipeline before the outbreak of the pandemic. These experiences show that effects of the Black Death upon the legal system were more likely to be indirect and it is difficult to determine the precise role of the Black Death since that requires a counterfactual analysis. [48]

## (4) COMMON LAW DEVELOPMENTS: THE ACTION ON THE CASE

While there is some consensus that the labour law legislation and its effects were caused by the Black Death, it is more problematic to assert that other significant legal changes of the age were also attributable at least in part to the pestilence. This is where the Palmer thesis more sharply departs from conventional legal history accounts. Conventional accounts attribute late fourteenth century changes in the common law largely to the working out of frustrations within the system; examples of the common law cleansing and improving itself in an evolutionary model of adaptation. Palmer, by contrast, sees the hurricane of the Black Death as challenging and uprooting everything and being a major cause of substantive legal changes. Regardless of which view is taken (or if a compromise between the two is preferred), there is agreement that the mid and late fourteenth century saw significant development in the substantive common law. As Palmer put it, 'the common law was

[47] Ibid 194-195.
[48] On which see R Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021) chapter 6.

entering an innovative and creative period'. [49] This can be seen in the law of obligations through the introduction of the action on the case as an off-shoot from the writ of trespass.

By the fourteenth century, the writ of trespass had become increasingly popular with its accusation that a wrong had been committed with force and arms and against the King's peace now being typically fictional.[50]However, an important shift occurred during the reign of Edward III (1327-1377). Trespass writs now begun to regularly omit some or all of the standard allegations and instead laid out the facts of their case. Over time, it became accepted that this was a new form of action, known as the action on the case for trespass or just the action on the case or case.[51] The reason why this happened – the debate as to the origin of the action on the case – has provoked a lively debate amongst legal historians. By the early twentieth century, Landon identified three schools of thought amongst legal historians on the origin of the action on the case: the Modernist, Revolutionary and Traditionalist schools.[52] The debate revolved around the role of chapter 24 of the Statute of Westminster II in 1285. This followed the bar on the creation of new writs under the Provisions of Oxford 1258. Chapter 24 now allowed writs to be created that were very similar to existing writs. The Modernist School comprised of the older generation of legal historians such as James Barr Ames,[53], Edward Jenks,[54] and Ralph Sutton[55] saw the action on the case as originating from this provision. The Revolutionary School, by contrast, 'would have nothing to do with the statute'. [56] Writers in this school, such as Theodore Plucknett[57] and Elizabeth Jean Dix,[58]argued that the action on the case had nothing to do with the Statute of Westminster II 1285 and instead emphasised the role of the judges in the 1360s and 1370s. The Traditionalist School provided a compromise between the two extremes of the Modernist and

[49] R C Palmer, *English Law in the Age of the Black Death 1348-1381: A Transformation of Governance and Law* (University of North Carolina Press, 1993) 27.
[50]S F C Milsom, 'Trespass From Henry III to Edward III: Part 1: General Writs' (1958) 74 *Law Quarterly Review*195; 'Part 2: Special Writs' (1958) 74 *Law Quarterly Review* 407; 'Part 3: More Special Writs and Conclusions' (1958) 74 *Law Quarterly Review* 561.
[51]F W Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1965 [1909]) 66; C H S Fifoot, *History and Sources of the Common Law*(Stevens & Sons, 1949) 75. The work of Milsom has stressed 'they were all just actions in tort': 'Trespass meant wrong, and trespass on the case meant the action on the case for a wrong': S F C Milsom, 'Not Doing is No Trespass: A View of the Boundaries of Case [1954] *Cambridge Law Journal* 105, 107
[52] P A Landon, 'Action on the Case and the Statute of Westminster III' (1936) 52 *Law Quarterly Review* 68. See also C H S Fifoot, *History and Sources of the Common Law*(Stevens & Sons, 1949) 66 *et seq.*
[53] J B Ames, *Lectures on Legal Historyand Miscellaneous Legal Essays* (Harvard University Press, 1913) 442
[54]EJenks, *A Short History of the English Law* (Little, Brown and Company, 1912) 137.
[55] R Sutton, *Personal Actions at Common Law* (Butterworths, 1929) 24.
[56]C H S Fifoot, *History and Sources of the Common Law* (Stevens & Sons, 1949) 66.
[57] T F T Plucknett, 'Case and Statute of Westminster II' (1931) 31 (5) *Columbia Law Review* 778.
[58] E J Dix, 'The Origins of the Action of Trespass on the Case' (1937) 46 Yale Law Journal 1142.

Revolutionary Schools.[59] Led by Langdon himself,[60] this perspective maintained that actions on the case predated Statute of Westminster II but that its development could not have taken place without it. As Watkin argued, the 1285 statute provided the possibility for a new way of thinking which would only fully develop once there was a generation of law personnel in positions of authority who had been educated after the 1285 statute and so had not been brought up under the previous system.[61]

A chief criticism of the Revolutionary School has been that it failed to provide an answer as to 'why the judiciary changed its mind in the mid-fourteenth century concerning the admission of trespass actions without a royal interest'.[62] However, the Palmer thesis provides such an explanation. [63] Palmer developed the arguments of Plucknett and Dix to contend that was 'a social rather than legal origin' to the remedy. For Palmer, the Statute of Westminster II 1285 should 'play no further role in the historical discussion of Case'. He regarded the changes in the third quarter of the fourteenth century as being brought about as a deliberate response to the economic and social upheaval caused by the Black Death. It was a further example of 'overtly using the law as a means of social control'. [64] For Palmer, 'the changes did not proceed from legal thought but were decisions by officials made in accordance with governmental policy in direct response to social factors'.[65]The Covid experience renders Palmer's argument more plausible. It shows how common procedural relaxations are in response to a public health crisis. This is not to deny the approach of the Traditionalist School as convincingly made by Watkin but it is to push for an explanation that has room for both causes rather than the overtly legal approach that has previously characterised the debate.

## CONCLUSION

As Robert Palmer has noted, 'the decades after the Black Death were remarkably fertile in innovative legal activity in every area of the law and in institutions'. [66]The question has been the extent to which the Black Death was a cause of such innovation. While legal historians of the period such as Musson and Ormrod concede that war and plague were the 'two overriding

[59]C H S Fifoot, *History and Sources of the Common Law* (Stevens & Sons, 1949) 66.
[60] P A Landon, 'Action on the Case and the Statute of Westminster III' (1936) 52 *Law Quarterly Review* 68,
[61]T G Watkin, 'The Significance of "In Consimili Casu" (1979) 23 *American Journal of Legal History* 283.
[62] Ibid 286.
[63]RC Palmer, *English Law in the Age of the Black Death 1348-1381* (University of North Carolina Press, 1993) 147.
[64] Ibid 141.
[65] Ibid 141-142.
[66] Ibid 59.

influences at work upon English justice in the fourteenth century', the conventional approach favoursseeing the period within what they refer to as an evolutionary framework of 'punctuated equilibrium' whereby the long term gradual process of change was occasionally punctured by events which caused the system to adapted but only to restore balance and order.[67]The reference to equilibrium underscores that this is a functionalist approach which sees law and other social institutions as adapting and improving over time. Robert Gordon described this understanding as 'evolutionary functionalism'.[68] This stance shows the danger of hindsight: the temptation is to paint the past as barbaric and to describe how the law has improved itself over time.

This article, however, has sought to demonstrate an unexpected benefit of hindsight. By having experiences that are similar (but not identical) to those that existed in the past, we are able to appreciate more fully the significance of those experiences than previous generations of legal historians who did not have such experiences. The experiences of the Covid pandemic (so far) underscores how transformative the Black Death was likely to have been and that legal changes were likely knee-jerk reactions with no overall design other than to maintain order and to try to secure the status quo. They therefore show that legal change is not so much characterised by 'evolutionary functionalism' but rather what I have referred to elsewhere as 'entropic complexity'.[69] While the benefit of hindsight often causes us to simplify the past, sometimes the benefit of similar experiences can have the opposite effect and the benefit of hindsight can insist that the experiences of the past are likely to have been as complex and multifaceted as those of today.

[67]AMusson and M Ormod, The *Evolution of English Justice: Law, Politics and Society in the Fourteenth Century* (Palgrave, 1998) 3, 4.
[68]R W Gordon, 'Critical Legal Histories' (1984) *Stanford Law Review* 57, reprinted as chapter 11 of R W Gordon, *Taming the Past: Essays on Law in History and History in Law* (Cambridge University Press, 2017).
[69] R Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021) 123 et seq.