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THROUGH THE TELESCOPIC LENS OF LITERATURE:
SOCIAL LIFE AND THE REFORM OF ENGLISH QUARANTINE LAW,
1665 - 1722

By

JOSEPH LOGAN ATKINSON

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

CARLETON UNIVERSITY
Ottawa, Ontario

8 September 1997

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**Through the Telescopic Lens of Literature: Social Life and the Reform of English
Quarantine Law, 1665-1722**

submitted by Joseph Logan Atkinson, B.A., LL.B., M.Phil

in partial fulfilment of the requirements for
the degree of Master of Arts

A handwritten signature in black ink, appearing to read 'J. Logan Atkinson', is written over a horizontal line.

Thesis Supervisor

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September 8, 1997

ABSTRACT

It has been suggested that certain “law and literature” scholarship suffers because of the small number of literary works that consider legal doctrine and procedure in any depth. This thesis attempts to overcome that limitation through an inquiry in legal history, borrowing ideas from law, legal studies, literature and the “new historicism.” Focusing on the reform of English quarantine law from 1665 to 1722, and relying on the concept of law current in legal studies (by which “law” is constituted as much by administrative processes and the social experience of law as it is by rules and regulations), the thesis describes the law through a review of literature published during and shortly after the Great Plague of 1665, and literature published concurrently with reform of the law in 1721-1722. The conclusion is that “law and literature” scholarship need not be limited if the theoretical and methodological boundaries between disciplines are overcome.

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TABLE OF CONTENTS

<u>CHAPTER NUMBER</u>	<u>ITEM</u>	<u>PAGE NUMBER</u>
	ACCEPTANCE FORM	ii
	ABSTRACT	iii
	ACKNOWLEDGEMENTS	iv
	TABLE OF CONTENTS	v
	INTRODUCTION	1
	Preliminary Theoretical Considerations	8
ONE	LAW, LITERATURE AND THE NEW HISTORICISM	22
	Principles of the New Historicism	27
	The “Democratization” of Legal History	38
TWO	THE POLITICAL CLIMATE, 1665 - 1722	44
	The Restoration Period	46
	The Post-Restoration Period - 1689-1714	53
	The Early Years of George I - 1715-1722	62
THREE	THE LAW OF QUARANTINE PRIOR TO THE REIGN OF KING GEORGE I	69
	King James’s Act and Relief of the Poor	70
	King James’s Act and Domestic Quarantine	75
	Orders Issued under King James’s Act	79
	Continuation of King James’s Act, and the Passage of Queen Anne’s Act	97

TABLE OF CONTENTS (cont'd)

<u>CHAPTER NUMBER</u>	<u>ITEM</u>	<u>PAGE NUMBER</u>
FOUR	THE LAW OF QUARANTINE AND THE LITERATURE OF c.1665	100
	Support for, or Indifference to, the Law	105
	Criticism of the Law	121
	Summary	134
FIVE	DEFOE AND WALPOLE'S REFORMS OF 1721-1722	136
	Defoe's Writings on Plague and Quarantine Law - 1711-1722	138
	Walpole's Reforms of 1721-1722	155
SIX	LAW REFORM AND THE LITERATURE OF 1722	166
	The Importation of Goods	173
	The Shutting Up of Houses (and other Domestic Regulations)	180
	The Encirclement of Towns	194
	CONCLUSION	204
	BIBLIOGRAPHY	212
	SUPPLEMENTARY BIBLIOGRAPHY: LITERATURE OF c.1665 REVIEWED BUT NOT REFERENCED	219

THROUGH THE TELESCOPIC LENS OF LITERATURE:

Social Life and the Reform of English Quarantine Law,
1665 - 1722

INTRODUCTION

The relationship between law and literature is one that has received very little scholarly attention over the course of centuries of academic inquiry. Why this is so, one can only speculate. Perhaps it is the fault of traditional professional legal scholarship, with its emphasis on great jurists, influential legislators, and more or less narrow doctrinal concerns. Perhaps we might blame literary scholars for being preoccupied with private, existential struggles, struggles that tend to separate the major characters in fiction from events in the world. Through fiction, a reader expects to encounter what Georg Lukács has called “the affirmation of a dissonance between the immanence of being and empirical life,”¹ an acknowledgement of the distance between an inherited, instinctive self and the self as a product of its experience. The law, at least in any recognizable empirical form and at least from the perspective of all but the most stubborn natural law disciples, occupies but one side of this divide, the side devoted to events in the world, such as social regulation and dispute resolution. Of course, this is the side furthest removed from the imaginative and existential dramas so central to many canonical works of literature. Perhaps the relationship between law and literature remains largely

¹Quoted and then discussed by John J. Richetti, in the context of certain of the works of Daniel Defoe, at p. 10 and p. 236 of Defoe's Narratives: Situations and Structures (Oxford: Clarendon Press, 1975).

unexplored because of this very removal, because of the realization that the relationship is at best vague, most certainly tenuous, and possibly non-existent.

Recently, Richard Posner² made an attempt to consolidate in one volume a description of various ways of thinking about the relationship between law and literature. While it is unclear whether or not Posner's reference to a "law and literature movement"³ has real merit, his work does represent a convenient point from which to begin further inquiry. He identified three basic themes for exploration. First, literature at times *comments* on the law, through identifying and condemning specific legal injustices, for example,⁴ or through appropriating a theme, like "revenge," common to both disciplines.⁵ Posner reminds us of Dostoevsky's Crime and Punishment and Melville's Billy Budd, among others, novels that explore questions of existential angst through particularly *legal* confrontations. Secondly, Posner inquires into statutes⁶ and judicial opinions⁷ as if *they* were literature, taking techniques of literary criticism to an assessment of the American constitution, for example, and to the judgments of Oliver Wendell Holmes and Learned Hand, to name but two. Thirdly, a review of the laws of defamation, obscenity and

²Richard Posner, Law and Literature: A Misunderstood Relation (Cambridge, MA.: Harvard University Press, 1988).

³Ibid., p. x.

⁴Ibid., pp. 132-175.

⁵Ibid., pp. 25-70.

⁶Ibid., pp. 209-268.

⁷Ibid., pp. 269-318.

copyright⁸ leads to a consideration of the ways in which law attempts to control literature by insisting on due responsibility for the external effects, the effects “in the world,” of what superficially appear to be largely private explorations. Through these three categories of inquiry, Posner leaves us with a solid start toward a comprehensive understanding of a neglected field.

But Posner’s work is only a beginning. It leaves unexplored other aspects of the relationship that, perhaps even more than the three aspects explored by Posner, serve to span the conceptual gulf between literature and law. First, while I acknowledge that it may not be fashionable in postmodern literary circles to inquire into an author’s state of mind for assistance in interpretation, there can be little doubt that law and the prospect of law reform have played a significant role in motivating the production of at least some texts now positioned firmly in the literary canon. It is difficult to imagine a novel like Émile Zola’s Germinal, for instance, appearing at all had the labour laws of nineteenth century France not been as Draconian as they were, and had the author not identified and acted on an urgent need for reform. Certainly it is at least arguable that, in some cases, there is a primary and direct causal link between the state of law and law reform and the appearance of significant works of literature. Secondly, and perhaps more importantly, literature has demonstrated over the course of history that it has the potential to act as a medium between law and the legislative process on the one hand, and the social impact of law on the other. For a legal historian, especially one interested not so much in narrow

⁸Ibid., pp. 319-352.

doctrinal concerns but rather more with law in its social context, literature can serve as a window to both the social historical effects of law and to the motives surrounding law's conception, enactment and implementation. Literature is largely unique in offering to legal historians, at times, an understanding of both social process and legal process. The work of Charles Dickens, in Bleak House, Oliver Twist and others, stands out in this respect.

To appreciate the potential contribution that the study of literature can make to an understanding of the historical relationship between law and the social impact of law, and between the social impetus for law reform and legislative change, I want to inquire into certain developments in the history of English law in the early eighteenth century. At that time, the novel was in its infancy as a distinct literary form in English, and the period gave rise to several enduring authors, like Jonathan Swift, Alexander Pope and Daniel Defoe, who, through the popular press, exploited the possibilities offered by that form. At the same time, there was significant political change in England, beginning with the Glorious Revolution of 1688, followed by the Act of Settlement of 1701, the succession of the Hanoverian, George I, in 1714, and the beginning of a long Whig rise to power in Parliament in 1715. Though not alone among writers in his political involvement, Daniel Defoe produced a number of significant literary works, especially in the 1720's, employing political and, it will be argued, legal themes. Two of his works, A Journal of

the Plague Year⁹ and Due Preparations for the Plague, as Well for Soul as Body,¹⁰ both first published in 1722, are especially interesting in this regard; their publication occurred virtually simultaneously with the political controversy over the attempts of the Whigs to reform England's law of quarantine during 1721 and 1722.¹¹ It will be my argument that the production of both the Journal and Preparations was motivated in large measure by the contemporary state of quarantine law and the attempts at its reform, and that, despite the ultimate classification of at least the Journal as a work of fiction, each of the books offers the legal historian an invaluable glimpse into both the social impact of law in the late seventeenth and early eighteenth centuries, and the social impetus for the reform of quarantine law during that period.

In addition, I want to consider a work published by Richard Mead, called A Discourse on the Plague,¹² first published in 1722 on commission from the Whig

⁹The edition of A Journal of the Plague Year used for this thesis was edited by John Man and published in London by J.M. Dent / Everyman in 1994. References in the body of this thesis, and in footnotes, to "Journal" will be to this edition, unless otherwise indicated.

¹⁰The edition of Due Preparations for the Plague, as Well for Soul as Body used for this thesis was edited by George A. Aitken and published in London by J.M. Dent in 1895. References in the body of this thesis, and in footnotes, to "Preparations" will be to this edition.

¹¹There are several statutes of significance to be considered, including 7 Geo. I c.3, 8 Geo. I c.10, and 8 Geo. I c.18, all introduced during 1721 and 1722. In addition, extended reference will be made to 1 Jac. I c.31, enacted in 1603, and 9 Ann. c.2, passed in 1711.

¹²Richard Mead, A Discourse on the Plague (London: A. Millar and J. Brindley, 1744).

government of Robert Walpole.¹³ Mead was “physician to His Majesty,” and his perspective on the steps most appropriate for the government to take will serve as contrast to the perspective revealed through Defoe’s work. The contrast between the literatures of Defoe and Mead will function as an illustration of the way in which our historical understanding can be broadened by widening the scope of our inquiry beyond the conventional sources available to legal historians. It will be seen that Mead’s work offers a more conventional understanding of the reform of quarantine law, written as it was from the perspective of a political figure responding to a specific request for information from the ruling Whigs. To some extent, Defoe’s Preparations, and to a greater extent, his Journal, provide broader insight into the social issues that influenced the process of law reform, distanced as they were from the demands of personal political expediency.

But the thesis is not simply about the literature of Richard Mead and Daniel Defoe. Rather, it is about the understanding of the legislative process and social experience of quarantine law to be gained through the use of the period literature in a legal-historical inquiry. In this context, we must understand “literature” to mean, in the broadest possible sense, any textual sources arising outside of the privileged circles of politicians, lawyers and judges. Of course, this gives the term a definition wider than might be anticipated, yet it avoids the limitations that could arise if we were to restrict our inquiry to works of fiction, autobiography and drama. The proposed definition allows us to begin our inquiry with the traditional sources (the statutes themselves) and then build

¹³Alfred James Henderson, London and the National Government, 1721-1742 (Durham: Duke University Press, 1945), p. 38.

on the information gained from those sources through the study of “literature,” in its broad sense. A more narrow understanding of the nature of literature would tend to isolate the inquiry at some distance from a more conventional history, and prevent the historian from seeing the possibility of a more complete, less fragmented picture.

Certainly, Mead’s A Discourse on the Plague and the very practical Preparations would not be captured by a definition of literature restricted to fiction and related genres, yet neither is it likely that they would serve the purpose of a traditional legal-historical inquiry. Whatever contribution such works can make to our understanding, then, might be lost unless our definition of literature is broad enough to capture literary efforts that both lie beyond the purview of traditional legal-historical inquiry and are not easily categorized with fiction and its relatives. In addition, a wide definition of literature allows us to review a large number of treatises that appeared during and shortly after 1665 (the year of the last great plague in London) produced, in the main, by medical professionals and clergy. Many of these works offered comment on the legal regime in place in 1665, and, conveniently for our purposes, that legal regime remained unamended in any material respect until the passage of 9 Ann. c.2 in 1711 and the reforms of 1721-1722.

The thesis will begin, in chapter one, with a consideration of the nature of interdisciplinarity in legal history and the applicability of the “new historicism” to the arguments to be advanced in the thesis. In chapter two, I will summarize the political temper of the period so as to frame later discussion. Chapters three and four will focus on the law as it existed prior to Walpole’s reforms, first by a review of statutes and certain

local orders, and second by a review of the literature produced in and shortly after 1665. Defoe's preoccupation with the plague during the period 1710-1722, and the reform of the statute law in 1721-1722, will be the focus of chapter five. In the final chapter, I will review the Journal, Preparations and Mead's work in detail.

Preliminary Theoretical Considerations

Before beginning, however, I want to consider certain theoretical issues that have impact on the way in which this inquiry is to proceed. Some of these will be elaborated in chapter one; some demand more immediate attention here. If we are to argue that specified great works of literature, like Defoe's Journal and Preparations, offer special insight into the motivations for and the social impact of law reform, then we must be prepared to answer certain theoretical difficulties that might be less significant were we to inquire into the more narrow arena of parliamentary debates, enactments and judicial decisions. After all, if we are to abandon a purely doctrinal inquiry for one designed to give us a broader understanding of the reason why particular laws are passed, of the social forces that are brought to bear on the legislative process and of how people experience the law, all of which is to be gained by widening our range of acceptable historical evidence to include arguably fictional sources like Defoe's Journal, then theoretical objections are bound to arise.

The first challenge we might anticipate comes from relying too completely on "voices" that are, in their own way, just as privileged as the "voices" of judges and parliamentarians. Traditional legal history concentrates on voices heard through a review of case law and legislation, and perhaps through an exploration of parliamentary debate,

and in doing so limits its scope to the perspectives revealed through those few sources. So as to paint a more complete picture of the purpose and effect of the reform of quarantine law, it is arguable that it is not enough to rely on the voices of those, like Robert Walpole and other parliamentarians, who rose in debate over the issue and were privileged, along with judges, to have their comments recorded in the journals of the day. But reliance on the voice of Daniel Defoe (or other literary figures) to generate a more complete picture may suffer from the same weakness, as they too were favoured, whether by position, special talent or intellect.

Of course, there is a degree of merit to this first challenge, perhaps especially in the case of Defoe. Defoe *was* privileged, through his skill as a writer and through his many political contacts, and exercised that privilege over the course of a writing career that lasted more than thirty years.¹⁴ But this admission does not make Defoe's voice less valuable. Rather, it simply acknowledges that a plurality of voices, all more or less privileged, function together to offer us a more balanced and complete view of the historical period in question. Defoe's voice is not to *replace* the others; rather, it is offered as supplementary, to remedy some deficiencies or to fill in some gaps. If we are truly interested in even approaching a more complete understanding of the impact of quarantine law reform in the 1720's, and in the way in which the law of quarantine was

¹⁴Biographical information on Defoe in this Introduction is taken from Volume I of William Lee's three volume work Daniel Defoe: His Life and Recently Discovered Writings (Hildesheim: Georg Olms Verlagsbuchhandlung, 1968), first published in 1869, and from Paula Backscheider, Daniel Defoe: His Life (Baltimore: The Johns Hopkins University Press, 1989).

experienced by ordinary people, then we cannot help but benefit by widening our range of sources to include those that, despite their being a product of privilege of a sort, offer an interpretation inaccessible through conventional legal-historical inquiry.

However, one must be extremely careful with Defoe, as with other prominent writers of the day, to determine the extent to which his writings expressed his own opinion as opposed to the extent to which they simply promoted the position of the government of the day, as an instrument of propaganda. For years, of course, Defoe worked as a propagandist for Robert Harley, a prominent Tory and minister of the Crown until Queen Anne's death in 1714.¹⁵ And then, from 1715 to about 1721, Defoe wrote for the Whigs, publishing government propaganda and, at times, arguably subverting the Tory opposition by writing criticism of the Whigs in tones softer and gentler than that in Tory journals.¹⁶ Even more than his contemporaries Swift and Pope, both of whom raised their voices insistently and consistently against the reforms of the Whigs,¹⁷ Defoe must be read with a fair degree of scepticism, with the knowledge that, in large measure, he must be seen as simply a mouthpiece for the dominant historical voices whose record we are trying to enlarge.

It is true that, in the case of Defoe, scepticism can be nothing but healthy; his political and legal entanglements over the course of his career speak volumes about the

¹⁵Backscheider, Daniel Defoe: His Life, pp. 323-328.

¹⁶Henderson, London and the National Government, 1721-1742, pp. 43-44.

¹⁷J.A. Downie, "Walpole, 'the Poet's Foe,'" in Jeremy Black (ed.), Britain in the Age of Walpole (London: MacMillan Publishers Ltd., 1984), pp. 171-188.

political motives and private needs that served as impetus for much of his work. Yet, especially in the case of his work on plague, Defoe left us with evidence that the position he ultimately assumed in the Journal and Preparations, relative to the reform of quarantine law, was truly his own position, uninfluenced (or, at least, relatively so) by his acknowledged allegiance to the Whig regime of the day. There are three separate sources of such evidence.

First, Defoe was himself sceptical of authors with political bias, and expressed concern about the possibility that specious histories would be all that remain of a period so dominated by political partisanship in the press. The following is from his letter to Applebee's Weekly Journal of 18 August 1722:

How shall Posterity receive these Things? How shall they form just Ideas of them, unless some impartial Historian should rise up whom no Man would contradict? And who should write with such unprejudic'd Faithfulness, as that all Party Scribblers, who now write under the Bribery of their own Passions, should give place to, and acquiesce with.¹⁸

Defoe is clear here in lamenting the failure of writers to allow "their own Passions" to break free of party loyalties and briberies, to write with a faithfulness to their own voices, independent of influence. This position is consistent with that argued by Defoe in his earlier short work A Vindication of the Press: or, an Essay on the Usefulness of Writing, of Criticism, and the Qualifications of Authors, first published in 1716:

...it is impossible for a Man to acquire a universal Character in Writing, as it is inconsistent for him to engage in Writings for both Parties at one and the same Time ... and these contending Parties

¹⁸Lee, Daniel Defoe: His Life and Recently Discovered Writings, Volume III, p. 39.

carry Things to that Extremity, that they'll by no means allow the least merit in the most perfect Author, who adheres to the opposite Side; his performances will be generally unheeded, if not blasted, and frequently damn'd ...

The Question first ask'd is, whether an author is a Whig or a Tory; if he be a Whig, or that Party which is in Power, his Praise is resounded, he's presently cried up for an excellent Writer; if not he's mark'd as a Scoundrel, a perpetual Gloom hangs over his Head ... ¹⁹

Here, Defoe is struggling to assert the value of his own opinions, and is clearly frustrated by an apparent lack of credibility based not on the weakness of his position objectively considered, but rather on a perceived unpopular political bias. So, while it is admitted that Defoe spent a good part of his career producing propaganda for the regime of the day, this admission is tempered by considering the fact that he recognized the need for writers to express themselves free of political influence and free of prejudgment based on the apprehension of political bias.

The second source of evidence to the effect that Defoe's voice, heard in the Journal and Preparations, was truly his own, is found in the extent to which he expresses the uncertainty and doubt so characteristic of intellectual thought in the seventeenth and early eighteenth centuries. In the period between the Renaissance and the Enlightenment, epistemological crises ranged from the metaphysical and religious to the more mundane

¹⁹Daniel Defoe, A Vindication of the Press; or, an Essay on the Usefulness of Writing, of Criticism, and the Qualifications of Authors (New York: Garland Publishing Inc., 1972), pp.17-18.

problems of the law of evidence.²⁰ However, this was decreasingly the case in the world of politics, where Walpole's first administration of the early 1720's quickly gained a reputation for tough, incisive action, especially with respect to controversy over the most appropriate response to the continuing Jacobite threat and the persistently critical problems of the "South Sea Bubble" affair.²¹ Despite the political upheaval of the previous fifty years alluded to above, Walpole is credited by some with initiating "a period of maximum political stability,"²² using his "political genius" to create at least the appearance of control that "... had eluded kings and ministers since the days of Elizabeth I."²³ It is highly unlikely that, given the need for a steady political presence, a paid propagandist like Defoe could be seen to be less than firm in his convictions, yet in both the Journal and Preparations we find telling evidence of the crisis of intellectual certainty so characteristic of the age. The following passage occurs at the end of a long section of the Journal in which Defoe has summarized some of the ways people found to circumvent regulations concerning the "shutting-up" of houses:

I could give a great many stories such as these, diverting enough, which in the long course of that dismal year I met with - that is, heard of - and which are very certain to be true, or very near the

²⁰For a thorough discussion of the epistemological upheaval in the natural sciences, religion, history, law and literature of the day, see Barbara J. Shapiro, Probability and Certainty in Seventeenth-Century England (Princeton: Princeton University Press, 1983).

²¹Robert Coxe, Memoirs of the Life and Administration of Sir Robert Walpole, Earl of Orford - Volume I (London: T.Cadwell, Jun. and W. Davies, 1798), pp. 126-158.

²²J.H. Plumb, The Growth of Political Stability in England 1675-1725 (London: MacMillan Publishing, 1967), p. 105.

²³Ibid., p. 158.

truth; that is to say, true in the general, for no man could at such a time learn all the particulars.²⁴

The narrator's confusion is clear, and is representative of a pervasive tone of anxiety in the Journal. Perhaps nowhere is it more clear than in the extended struggle Defoe's narrator, H.F., undergoes in trying to decide whether to flee the plague or remain in London.²⁵ He decides to stay, of course, but his private debate on the matter highlights the dilemmas of the time. On the religious side, if the plague is the judgment of God, is it foolhardy, even sinful, to run from that judgment? Or does God "help those who help themselves?" In matters of economics, if H.F. leaves he will likely survive but his business will fail, though if he stays to ensure the survival of his business, the likelihood is that he will succumb to the disease. Social relationships, too, are disrupted. Though H.F. is unmarried, his brother, sister-in-law and their children decide to leave and beg H.F. to join them, even though H.F. feels a deep loyalty to and responsibility for the various servants and clerks who inhabit his home and serve in his business, and who depend on him for their survival. The enormity of the decision makes resolving the debate impossible for H.F. The disorder imposed by the plague on conventional decision-making criteria renders H.F. impotent in the face of his own imminent annihilation, and it takes a series of minor events, interpreted by H.F. as interventions from God, to make the decision for him. So, rather than presenting his reading public with confirmation of Walpole's steady political hand, confirmation that would be

²⁴Defoe, Journal, p. 46.

²⁵Defoe, Journal, pp. 9-13.

consistent with the argument that Defoe's voice really adds little to the dominant voices of the politicians, we find Defoe projecting a voice that demonstrates quite unequivocally the prevailing uncertainty and doubt.

Even in the much more pragmatic Preparations, a book apparently intended to function as a manual for self-protection and community control in the face of the plague, we find that the prevailing uncertainty frustrates Defoe to the point where he condemns writers and physicians for failing to properly educate the confused and frightened citizens:

I must confess, I think the publishing such a vast variety of opinions in this case as we see every day brought to light, is like publishing the cavils and opinions of divines in the great dispute about the Trinity, dangerous instead of directing to the readers; amusing the people so that (though in the most important article of religion) they know not what to conclude, or which opinion to accept.

In like manner here, in the most important article of our health we are so perplexed with the opinions of the physicians; some declaring the plague not dangerous in one way, and some that it is most dangerous in other ways; while by common experience we find it dangerous every way; and this carried up to such a degree as it is, that we know not whom to follow, or whom to give credit to.²⁶

It is unlikely that such a passage could be written and published during the months of debate over reform of the quarantine law, if the author were simply giving voice to the politicians who were attempting to tighten restrictions on an already nervous public. It is more likely, of course, that the voice we hear through Preparations, and through the

²⁶Defoe, Preparations, p. 82.

Journal as well, is Defoe's, largely uninfluenced by the political allegiances he certainly felt.

The third source of evidence to support the argument that Defoe's voice adds to our understanding of the social response to the reform of quarantine law is found in a review of Defoe's earlier writings on plague, his writings prior to the emergence of Walpole's Whigs as a power in 1715, and then prior to Walpole's ascendancy in 1721. These writings will be referred to in more detail in chapter five below; for present purposes it is enough to say that, during the period from September 1711 to August 1712, while Robert Harley's Tories continued in power, Defoe published no fewer than three significant essays on the dangers of plague arriving from the continent.²⁷ Later, during the reign of the Whigs but for the most part before the political debate on the reform of quarantine legislation took place, Defoe published not less than sixteen lengthy letters, in the Daily Post, Applebee's Weekly Journal and Mist's Journal, on the threat of infection from the continent and the means to be exerted against it.²⁸ It seems clear that Defoe was obsessed with the danger, not so much to advance the cause of his political employers of 1722, but rather out of a longstanding and apparently sincere social concern with the protection of the defenceless.

²⁷Michael F. Shugrue (ed.), Selected Poetry and Prose of Daniel Defoe (New York: Holt, Rinehart and Winston, 1968), pp. 145-151; William L. Payne (ed.), The Best of Defoe's Review (New York: Columbia University Press, 1951), pp. 218-222.

²⁸All of these letters, covering the period 22 August 1719 to 28 April 1722, are reproduced in Volume II of William Lee, Daniel Defoe: His Life and Recently Discovered Writings, at pp. 142, 265, 277-78, 281, 284-85, 291-92, 378-79, 399-401, 407-10, 427-30, 436-38, 449-51, 453-55, 464-65 and 514-16.

To summarize, this first theoretical challenge to our approach, the challenge that Defoe's work represents simply another privileged voice, one not dissimilar to those of the politicians, parliamentarians and judges we would like to place in broader perspective, is answered by pointing out that reliance on Defoe merely serves to widen, not expropriate, the field of acceptable historical sources. Despite Defoe's privileged position, his comments on the law give the historian a perspective that, arguably at least, is quite different from the perspective to be encountered through more conventional legal-historical sources. Further, his concern with the biases of "Party Scribblers," his demonstration of the uncertainties characteristic of the age but unlikely to be admitted in political circles, and the social conscience he demonstrated over at least a ten year history of writing on the plague, all serve to underscore the suggestion that the voice we hear in the Journal and Preparations really is the voice of Defoe, and is not simply an echo of the Whig chorus heard in political debate.

The answer to this first challenge, however, gives rise to a second. If we acknowledge the warnings of historical relativists like Charles Beard²⁹ and Carl Becker,³⁰ then we must be mindful of two separate challenges to our aspirations for a more complete account that aims for greater historical objectivity. First, historians must be

²⁹See, for example, Beard's article "Written History as an Act of Faith," in The American Historical Review, Volume 39 Number 2 (January 1934), pp. 219-29, and his follow-up essay "That Noble Dream," in The American Historical Review, Volume 41 (1935-36), pp. 74-87, for an outline of his approach.

³⁰Becker's relativism is detailed in his book Everyman His Own Historian (New York: Appleton-Century-Crofts, Inc., 1935).

selective in their use of sources, out of the impossibility of including everything in an historical account, if for no other reason. This first test of objectivity, however, need not paralyse the project. The response to the suggestion that this account is seriously limited by an unjustifiably narrow selection of material from Defoe's legacy, or from the period literature generally, is that we are trying to expand on the existing approach of traditional legal scholarship, and not create a fully autonomous history based on a discretionary use of material. Our goal is to add to existing knowledge, not to compete for attention.

However, the second threat to objectivity arises through a challenge to the comparative reliability of sources and, in the case of Defoe at least, this threat is more serious. There is little doubt, of course, that the parliamentary journals describing the debates over reform of the quarantine legislation reflect a reasonably accurate summary, at least by contemporary standards, of the positions advanced by Walpole's Whigs and the various opposition factions.³¹ There is no obvious and compelling reason to suspect the general reliability of that source, to argue that it is somehow less objective than other sources of the day, to suppose that the journals were somehow concocted or the speeches of Walpole were made with ulterior motives. But with Defoe, and especially in the case of the Journal, comparable objectivity is simply unavailable. It is fairly certain that Defoe wrote and released the Journal intending it to be read as a memoir of the Great Plague of 1665. The subtitle of the Journal, as first published, reads as follows: "...containing

³¹See Henderson, London and the National Government, 1721-1742, at pp. 33-53 for a summary of parts of the debate. And see also William Cobbett, Parliamentary History of England: From the Norman Conquest, in 1066, to the Year 1803, in 36 Volumes (London, 1806-1820), at Volume VII, Columns 928-930.

Observations and Memorials of the most remarkable Occurrences, both Publick and Private, that happened during that dreadful Period. By a Citizen, who lived the whole Time in London.”³² Obviously, the Journal was a hoax; Defoe was a child of but four or five in 1665, and could not possibly have kept his own diary. To some extent this explains why Defoe published the Journal anonymously, so as to increase its appearance of truth. The debate over the historical reliability of the Journal, over its accuracy as a record of the Great Plague of 1665, has preoccupied and divided Defoe scholars since at least 1841, when Thomas De Quincey complained of Defoe’s books that “... he makes them so amusing that girls read them for novels; and he gives them such an air of verisimilitude that men read them for histories.”³³

It would be necessary to join this debate were we to make inquiry into the political and social consequences of the Great Plague of 1665. It is true, for example, that some of the bills of mortality quoted by Defoe in the Journal were actually issued by the authorities in 1646, almost twenty years before the Plague to which Defoe was referring,³⁴ and revelations like these make it difficult to place too much reliance on the Journal as a conventional history of events. But it must be remembered that, in terms of that debate, we are prepared to accept that the Journal is a work of fiction. We rely on it, not for its

³²The title page from an early edition of the Journal, including the full subtitle, is reproduced at p.1 of the Everyman edition referred to at note 9 above.

³³Thomas De Quincey, “Homer and the Homeridae,” in Pat Rogers (ed.), Defoe: The Critical Heritage (London: Routledge and Kegan Paul, 1972), pp. 117-118.

³⁴Louis Landa, “Introduction,” to Daniel Defoe, A Journal of the Plague Year, Louis Landa (ed.), (London: Oxford University Press, 1972), pp. ix-xxxix, at p. xxxviii.

accuracy as a reflection of the events of 1665, but rather for the way it highlights the anticipated social response to quarantine law reforms of the 1720's. As will be seen in chapter six below, Defoe used the Great Plague as an historical backdrop to a larger purpose, that of demonstrating what might result were the law not reformed or were it reformed in a particular way, and, especially in the case of domestic quarantine, offered arguably direct challenges to the reforms of the Whigs that were, at the time of the book's publication, a matter of some controversy. For that reason the Journal's irreconcilability with the actual events of 1665 is largely irrelevant in our context.

It must be noted, however, that the Journal's "air of verisimilitude" of which De Quincey complained was so complete that some of the most eminent contemporary experts on plague were absolutely convinced of its authenticity. For example, Richard Mead, whose commissioned work A Discourse on the Plague will be referred to in detail in chapter six below, actually cited the Journal as an authoritative source in the revision of his study published in 1744. It is interesting, for our purposes, that the Journal is mentioned by Mead in the context of his discussion of regulations like the "shutting up of houses" and the response that the citizens used to either avoid or accommodate themselves to such measures,³⁵ lending further credence to our suggestion that the Journal, as an historical source, offers perhaps special insight into the way in which common people experienced the law in times of plague. This is so, despite the likely validity of the argument that the Journal's value as an accurate historical record of the

³⁵Mead, A Discourse on the Plague, p. 106.

events of 1665 is suspect. For if the Journal were read at the time by Dr. Mead, and so probably by others, as a useful description of the contemporary social response to the regulation of activity during times of plague, it seems likely that our purposes can only be advanced by offering the Journal a similar reading.

In general, then, we can anticipate two principal theoretical challenges to our attempt to rely on the Journal and Preparations as works that offer additional insight into the relationship between early quarantine law and social life in the late seventeenth and early eighteenth centuries. But both the suggestion that Defoe's voice (and, too, the voices of other literary figures) is simply another privileged voice, largely reflective of the dominant political regime, and the argument that the Journal, if not Preparations, was written by Defoe to dupe his readership, can be answered by remembering our broader historical purpose in making this inquiry. Neither challenge poses a serious threat to an inquiry into the law's role in motivating production of the two works, nor do they impugn the idea that our understanding of the impact of quarantine law on social life can be enhanced through reading works of literature.

CHAPTER ONE

LAW, LITERATURE AND THE NEW HISTORICISM

One of the great advantages of academic work in an interdisciplinary context is that it allows the student the freedom to escape from what sometimes appear to be conceptual and practical constraints imposed on scholarship in the “traditional” disciplines. By definition, interdisciplinarity contemplates the input of more than one disciplinary perspective on both theory and method, at least as a specific project may require, and this in turn allows the student to bring fresh approaches to issues that otherwise might be seen narrowly within particular disciplinary confines. In the case of legal studies, the student is required to keep in mind an approach to problems that accommodates the theories and methods of disciplines other than the law in its purely professional sense, primarily so as to contribute to an understanding of the law that is wider, less doctrinal, more encompassing of processes and experiences than what may be considered relevant from the perspective of those inside the traditional legal professions. This is the purpose, after all, of non-professional, interdisciplinary legal studies, to expand our understanding of the nature of law, to overcome the notion that the law is largely technical and administered without social influence. Legal studies assists us in thinking about law as something other than a relatively static, sterile thing, remote from people’s lives, and encourages us to reflect on the idea that the social experience of the law (in its doctrinal form) is actually partly constitutive of law in its more complete sense. Theory and method imported from disciplines outside of the professional study of law, then, from disciplines like sociology and history and psychology and others, allow

the student to overcome the barriers that are sometimes erected between the disciplines, and so give the student the freedom to contribute to the wider understanding of law that is central to the legal studies project.

In a remarkable short essay called “The Persistence of Dread in Law and Literature,” Gretchen Craft complains that the interdisciplinary study of law and literature is limited by the narrow focus brought to the study by those who persist in simply looking for reflections of doctrinal law in literary texts, the “law in literature” pieces, according to Craft. In her view,

[l]aw-in-literature explores the use of legal procedures or concepts in literature. A limitation, however, is the scarcity of suitable subjects. The same authors appear repeatedly ... and their works have grown limp and shopworn under the examination of too many academics. Discussions that focus on the minutiae of legal procedure amidst the complexity of an entire work often seem reductive and hollow.¹

The difficulty, of course, is with the constraints imposed on the scholar by a professionally limited and narrow definition of law, by the failure to recognize that the law, from the perspective of legal studies at least, encompasses more than a set of rules, a sovereign lord, and “the minutiae of legal procedure.” The objective of the professional study of law is rather different from most scholarly inquiry. It is designed to illuminate and apply legal doctrine through expositional reasoning. Narrowly drawn and technically defined sources are deemed necessary for the orderly negotiation and litigation of disputes and effective functioning of the courts. As Craft suggests, an inquiry into the

¹Gretchen Craft, “The Persistence of Dread in Law and Literature,” in The Yale Law Journal, Volume 102 (1992), pp. 521-546, at p. 523, note 6.

reflection of law in literature, at least in the case where the law is given such a narrow and unimaginative definition, is necessarily limited to a few well-known authors and a few more or less well-known works. In such a situation, the advantages of interdisciplinary study are lost because of the tendency to look for overlap between the disciplines, rather than to allow for the migration of ideas from one discipline to another. It is through this process of the migration of ideas that the possibilities attendant on interdisciplinary inquiry can be most fully realized, rather than through the confining process of describing in ever more exacting detail the areas in which two disciplines might intersect.

Legal history has a great deal to gain by reflecting on the nature and possibilities of interdisciplinarity in legal studies. If we confine ourselves to a notion of law that stops at statutes, case reports and learned comment by the great jurists of history, then legal-historical inquiry becomes a finite task of marshalling information from predictable sources, and reporting the results. From this perspective, the law is as it is written in conventional legal texts, and, in the context of legal history, evidence of the law is found simply in statute books, case reports and treatises authored by legal professionals. However, if we allow ourselves to import from legal studies the idea of law constituted as much by administrative processes and the social experience of rules and regulations as it is by the rules and regulations themselves, then continued reliance on such a narrow idea of legal-historical evidence functions to confine the researcher to a study of simply a particular aspect of the law, rather than the law as more widely understood.

The question remains, of course, as to the types of alternative evidence that might be considered weighty enough to be included in a search for such broadly defined law in

history. While conventional textual evidence about doctrinal law remains authoritative as far as it goes, on what sort of texts might we rely to expand our historical understanding of the law in the way that thinking in legal studies might suggest? The answer, of course, is that any textual evidence outside of the traditional sources, to the extent that it offers some contemporary perspective on the nature of law and the experience of law, is of assistance in broadening our historical understanding and in working toward a more complete picture of the law as the object of historical inquiry. Fiction, autobiography, poetry, social commentary, polemical tracts, satire - all perform some function in conveying to the historian a more full understanding of the nature of contemporary law. This is so, arguably at least, even where texts ignore the law in commentary where one might expect it to be found, or where authors express indifference to the law or the experience of the law.

It is the recognition of the possibility of the expansion of acceptable sources of evidence in legal history, dependent in turn on the use of a broad definition of law imported from legal studies, that allows us to overcome the monotony in law-in-literature scholarship that formed the focus of Gretchen Craft's complaint. By recognizing the impact of law on people's lives as partly constitutive of law itself, we widen the range of texts offering comment on the law, and we also widen the range of material available to support inquiry in legal history.

The question of the value of literature as evidence of historical fact is a difficult one, but assistance in responding is provided, in part at least, by principles of the school of historical literary study known as the "new historicism." The insights and arguments

of the new historicism (to be outlined in the next section of this chapter), whether they are accepted by a literary historian as fully valid or not, arguably function as justification and explanation for a project concerned with the broadening of our understanding of historical evidence in general, and, for our specific purposes, legal-historical evidence in particular. As will be seen, the result is what may be referred to as the “democratization” of legal history,² a result obtained through widening the range of voices from history that are considered relevant, and through widening the range of what is considered to be weighty textual evidence of historical truth.

An interdisciplinary approach to a legal-historical inquiry into seventeenth and eighteenth century quarantine law in England, then, is assisted through seeking theoretical and methodological input from a variety of sources outside of those that might be relied upon in a more conventional legal-historical inquiry. First, we can rely on an idea from legal studies to the effect that the social experience of statutes and orders has as much to say about the historical character of law as the statutes and orders themselves. This widens our understanding of law, and opens up new avenues for historical inquiry. Secondly, we can look beyond the statutes, orders and proclamations to gain an understanding of the law in history. We can look to literature to assist us in explaining the law, mindful, however, of the problems that may be associated with reliance on texts that may focus on issues only tangential to our principal purpose. Finally, in an attempt to overcome these problems, we can rely on certain ideas from the new historicism to

²The term is borrowed from Joan Wallach Scott, “History in Crisis? The Others’ Side of the Story,” in American Historical Review, Volume 94 (Winter 1989), pp. 680-692.

justify a reliance on literature as credible historical evidence, and it is this point that provides the focus for the balance of this chapter.

Principles of the New Historicism

Much of the debate about “historicism,” old and new, centres on the relationship between the writing of history and the writing of literature, between the task of investigating the past and reconstructing a narrative about it on the strength of available evidence on the one hand, and the creation of an imaginative, more or less historically representational, work of fiction on the other. The attempt to draw parallels between the two activities, coupled with the “new historicist’s” insistence on the unknowability of the past (to be referred to in more detail below), inevitably collapses into the relativism of Charles Beard and Carl Becker referred to above in the Introduction, into a trend toward the dangerous wholesale rejection of anything like a rigorous methodology as constitutive of historical scholarship at all. Historical relativism, as a reaction to nineteenth century positivism, had a serious philosophical point to make about the vanity of the approach that, hope against hope, felt the truths of history would be revealed if only more evidence, or the right kind of evidence, could be discovered, organized and reported in the right kind of way.

Historicism, as it is called in this context, refers simply to the idea that what appear to be fundamental truths about human beliefs and values are actually merely historically conditioned perspectives, relativistic views on continuing dilemmas.³ This

³Georg G. Iggers, “Historicism: The History and Meaning of the Term,” in Journal of the History of Ideas, Volume 56 Number 1 (1995), pp. 129-152, at p. 133.

idea has impact on the way in which we consider the textual evidence we encounter in an historical inquiry, leading to the conclusion that it too is determined by its historical circumstances, and that, as a consequence, there is little to be learned from that evidence about the perpetual questions of metaphysics, or the enduring problems of the human condition. In connection with literary history, and according to Laurence Lerner, “historicism is the view that literature is not for all time, but of an age.”⁴ Literary history, from an historicist’s perspective, then, would attempt to generate new historical understanding of literature through an inquiry into the historical circumstances out of which that literature emerged, rather than through the attempt to establish a work’s greatness on the strength of its contribution to something like enduring truth. In a sense, the historicist enterprise in literary history suggests parallels with those historians sceptical of theoretical speculation, and manifests itself as an inquiry into the facts of historical circumstance so as to more fully understand the principal object of historical interest, the literary text. The “old historicists” (in James A. Winn’s words),

represent a group less frequently heard from in discussions of method: those literary scholars who were sufficiently skeptical of theory to spend the decades of its dominance engaged in more traditional kinds of scholarly work, including biography, editing, theatre history, publishing history, studies of literature and the other arts, and so forth. Since most of these activities require research into primary materials, we old historians now have more in common with our colleagues in history than with our colleagues

⁴Laurence Lerner, “Against Historicism,” in New Literary History, Volume 24 (1993), pp. 273-292, at p. 273.

in departments of English or comparative literature.⁵

Be that as it may, the fundamental idea in historicism provided a starting point for a new approach to literary history in the 1980's, initiated, it seems, by the work of Stephen Greenblatt.⁶ From Greenblatt's perspective, the new historicism is a practice that attempts to identify the relationship between, first, literary and other artistic discourses in history, and secondly, other contemporary, surrounding discourses.⁷ Such an attempt is fuelled by a number of quite specific assumptions about the nature of literary discourse and its position in history. These assumptions are described by H. Aram Veeseer in the

⁵James A. Winn, "An Old Historian Looks at the New Historicism," in Comparative Studies in Society and History, Volume 35, Number 4 (1993), pp. 859-870, at p. 861.

⁶It is not clear that Greenblatt would take credit for promoting the new historicism, but it is certainly clear that he would not take credit for naming it. In his essay "Towards a Poetics of Culture," Greenblatt expresses some incredulity about the popularity of his off-hand phrase, the "new historicism," and tries to belittle its significance as a coherent body of thought at all.

I collected a bunch of essays and then, out of a kind of desperation to get the introduction done, I wrote that the essays represented something I called a 'new historicism.' I've never been very good at making up advertising phrases of this kind; for reasons that I would be quite interested in exploring at some point, the name stuck much more than other names I'd very carefully tried to invent over the years...[T]here are articles about it, attacks on it, references to it in dissertations: the whole thing makes me quite giddy with amazement...[I]t is a practice rather than a doctrine, since as far as I can tell (and I should be the one to know) it's no doctrine at all.

Stephen Greenblatt, "Towards a Poetics of Culture," in H. Aram Veeseer (ed.) The New Historicism (New York: Routledge Press, 1989), pp. 1-14, at p. 1.

⁷*Ibid.*, *passim*.

following terms:

1. That every expressive act is embedded in a network of material practices;
2. That every act of unmasking, critique, and opposition uses the tools it condemns and risks falling prey to the practice it exposes;
3. That literary and non-literary 'texts' circulate inseparably;
4. That no discourse, imaginative or archival, gives access to unchanging truths nor expresses inalterable human nature;
5. Finally, ... that a critical method and a language adequate to describe culture under capitalism participate in the economy they describe.⁸

For our purposes, the important assumptions in Veese's list are the first, third and fourth. The assumption that neither literary nor non-literary texts, neither "imaginative" nor "archival" discourses, allow access by the historian to some realm independent of historical circumstance, demands an understanding of literature that is quite different from the more conventional belief in the possibility of realizing eternal truth through art. According to the assumptions put forward by the new historicists, there is no independent aesthetic realm; all texts that survive can be understood principally as historical artifacts, with no necessary ahistorical implications.

If we cannot look to literature for insight into eternal human truths, then, apart from whatever fresh aesthetic impact a new reader may experience in a particular work, literature can only function as an expression of the historical circumstances out of which it emerged. The denial of an aesthetic realm independent of the more comprehensive realm of history inevitably leads us to view literature simply as a product of history,

⁸H. Aram Veese, "Introduction," in H. Aram Veese (ed.) The New Historicism (New York: Routledge Press, 1989), pp. ix-xvi, at p. xi.

dependent for its existence on an “expressive act ... embedded in a network of material practices.” But for the material practices current at the time of the appearance of the text, the work could not exist in the form in which it is encountered by the historian. This is not to suggest that a work of literature cannot have an aesthetic impact on its reader today, but that impact has no necessary connection to the impact made by the work on other readers at other moments in history, nor does it have any essential similarity to the position the work occupies as an artifact of the particular historical moment of its production. As a product of the human imagination and as the result of human creativity, the literary work is necessarily embedded in the historical circumstances of its author and the material practices of the day.

An understanding of literature in the way commanded by the assumptions of the new historicism leads the historian to confront the possibility of a fresh assessment of the historical evidentiary weight of literature. If we understand the work of art to be embedded in its historical circumstances in the way the assumptions of the new historicism suggest, then we must also recognize that “... the work of art is the product of a negotiation between a creator or class of creators, equipped with a complex, communally shared repertoire of conventions, and the institutions and practices of society.”⁹ According to Greenblatt, artistic discourse, represented (though not exclusively) in literary texts, engages in a process of exchange with other discourses prevalent at the time, appropriating ideas from otherwise alien discourses and offering up

⁹Greenblatt, “Towards a Poetics of Culture,” p. 12.

for appropriation ideas current in aesthetics.¹⁰ Through this process, recorded (perhaps quite by accident) in the text, the fact of the historical positioning of the text is revealed, and so too are we allowed glimpses into the extra-literary discourses that function contemporaneously with the creation of the work under review.

This is an important insight for our inquiry into the nature of quarantine law (in its broad, social context) in the seventeenth and eighteenth centuries. If we are to allow ourselves to define quarantine law, not simply through the statutes and orders that were developed during the historical period under review, but also through including the perspectives of those whose lives were affected by the actual experience of the law in its implementation and in its symbolic strength, then we must come to terms with the question of the sources of evidence of those perspectives. Relying on the argument from the new historicism, it is possible to suggest that contemporary extra-legal textual evidence, in both literary and non-literary (social) form, is partly constituted by influences from outside the relatively pure aesthetic discourse that gives rise to those texts in the first instance. In a sense, the consideration of literature from the perspective of the new historicism allows us to expand the range of historical voices we hear in reading a text, making us sensitive to the influences of a variety of contemporary discourses on the text under review.

This is not to suggest that the approach of the new historicist would conclude that the past can be fully known and reconstructed, if only the researcher were cognizant of

¹⁰Ibid.

the influences of various discourses on the evidence available from history. In fact, there is nothing in the new historicism to indicate that possibility at all. The value of the new historicism, at least for historical inquiry generally (and for our particular inquiry in legal history), is in the recognition that evidence of historical truth can be found in unconventional places, and that the assembly of these bits of evidence from various sources brings us closer to a complete picture of the past, as admittedly unattainable as that goal may be. At the same time, however, the new historicism does not necessarily deteriorate into historical relativism, despite appearances. It does challenge the idea that access to immutable truth can be gained through literature, but does not deny the possibility that absolute truths exist at all. It does challenge the idea that history can ever be known perfectly, but does not necessarily support the notion that historical fact is merely a matter of subjective whim. When compared to much postmodern thought on the relativity of truth, historical and otherwise, the new historicism is much less doctrinaire, embracing the possibility of an objective reality while humbly acknowledging its own limitations in ever discovering that reality in any absolute sense.

Because of the insights of the new historicism on the relationship between texts and the historical circumstances of their production, the use of extra-legal textual evidence in a legal-historical inquiry can be understood as an attempt to tease out of the period literature a particular type of connection between that literature and contemporary social, political and cultural conditions. That connection is provided by the law, not necessarily as a subject of contemporary comment in its own right, but rather as a concurrent discourse that influences and in turn is influenced by the aesthetic (or other)

discourse represented in the text. These reciprocal influences function as evidence of the immersion of the literature in its historical circumstances. Given the wide definition of law with which we are working, the bits of evidence emerging from a review of literary and social texts is actually partly constitutive of the law, and therefore our historical understanding of the law is enhanced by that review.

Of course, the new historicism is largely a project of literary history. Its focus is a greater understanding of the historical literary text as the primary object of historical inquiry. But the assumptions of the new historicism compel the researcher to widen the field of inquiry through the recognition that a study of the literary text cannot be separated from a study of the circumstances out of which it emerged. In the words of Louis Montrose:

[T]he newer historical criticism is *new* in its refusal of unproblematic distinctions between 'literature' and 'history,' between 'text' and 'context'; new in resisting a prevalent tendency to posit and privilege a unified and autonomous individual - whether an Author or a Work - to be set against a social or literary background. ... [I]ts collective project is to resituate canonical literary texts among the multiple forms of writing, and in relation to the non-discursive practices and institutions, of the social formation in which those texts have been produced ...[emphasis in original]¹¹

The study of literature, then, *is* the study of history; the review of the text, therefore, *is* the review of the context of its production. Both the author and the text merge with that context and serve to erase the distinction between background and principal focus in

¹¹Louis Montrose, "Renaissance Literary Studies and the Subject of History," in English Literary Renaissance, Volume 16 (1986), pp. 5-12, at p. 6.

historical inquiry. In that event, the text tells us as much about its historical circumstances as those circumstances tell us about the text. And, as Montrose suggests, such an approach applies not just to literary texts, but to social texts and political texts and religious texts. The new historicism, he argues, is unique in its “acknowledgement of the *historicity of texts*: the cultural specificity, the social embedment, of all modes of writing” [emphasis in original].¹²

Literature thus performs a dual function. First, as a product of a discourse that both absorbs from and contributes to other discourses contemporary with its production, it actually takes part in the construction of the circumstances of its own creation. Literature is dynamic in its social situation. Secondly, literature functions as a telescope for the historian, transmitting to the historian evidence both of the specific discourse out of which it emerged, and of those other discourses operative in contemporary society and contributing, like literature, to the shape of the historical period in question. Literature is at once a participant in the making of history and an historian’s tool for the discovery of history; it is both an historical actor and an historical trace, both character and evidence. It is important to keep in mind, too, that such an understanding need not be confined to “literary texts” in the aesthetic sense. Texts produced outside the aesthetic realm take part in the same process of absorption and contribution, meaning that the definition of “literature” put forward in the Introduction above, a definition broad enough to include any textual evidence (literary and non-literary alike) found outside of conventional legal-

¹²Ibid., p. 8.

historical sources, retains relevance in the context of the new historicism. One of the leading theorists of the new historicism, Jean Howard, says on this issue that “it seems necessary that some of the critical skills literary critics have brought to the study of literary texts be applied both to aspects of the social text and to what we designate as non-literary forms of writing.”¹³ In other words, the possibilities offered up by the new historicism are available not just in purely literary historical study, but in any text-based historical inquiry, and, in Howard’s view at least, are *necessary* if we are to attempt a more complete understanding of the object of our historical questioning.

It is in the denial of a separate aesthetic realm inhabited by great literature that the new historicists attract the strongest criticism from sceptics. This is not surprising, of course, because it is in this claim that the new historicism makes its most fundamental break with more conventional studies of literature. Much of historical inquiry, including literary historical inquiry, is founded on the very notion that there are patterns in history, generalizations that hold in various historical circumstances and across time, patterns that can be revealed through more careful and thorough questioning of the available textual traces of history. From such a perspective, so the argument goes, the new historicism can make no real contribution to the project of history itself:

Is it possible to study the past in any but the most pedestrian way if you look only at the particular social situation, without going on to look for patterns, epistemes, dialectical conflicts, and other resemblances between one situation and another - and our own? There is nothing conservative in finding such links and

¹³Jean E. Howard, “The New Historicism in Renaissance Studies,” in English Literary Renaissance, Volume 16 (1986), pp. 13-43, at p. 42.

resemblances ...¹⁴

While this attack appears to be a serious one, it may be that Lerner is criticizing the new historicism for failing to accomplish a goal that is imposed on the inquiry from without, a goal more suited to other forms of historical inquiry, or historical speculation. The new historicism is founded on the notion that evidence of and from history must be understood first in its complete historical setting, to the extent that setting can be reconstructed. As a result, apart from giving us insight into history in its own right, the new historicist's enterprise tells us, too, that the current work of the historian and critic are likewise and inevitably to be understood first in the context of their own cultural historical circumstances, in the same way that work from history is to be understood. This is a lesson that, it would appear, is as timelessly true for the new historicist as it is for anyone else. Therefore, despite Lerner's scepticism, the new historicism does have something to say about cross-cultural, extra-temporal truth; it is simply not the sort of truth one might hope to discover in credible, valuable historiography.

But in any event, is it ultimately necessary, for the purposes of an historical inquiry, to resolve the tension between those who assert the independence of the aesthetic realm and the timeless quality of the truths perhaps revealed in great works of literature, and those who would consign literature, more or less absolutely, to its historical moment of production? Is it not more reasonable to suggest that literature may inhabit both possibilities, and that it is highly unlikely (and probably not conducive to the widest

¹⁴Lerner, "Against Historicism," p. 280.

possible understanding) that it should be stuffed exclusively into one slot or the other?

From the perspective of the new historicism, is there anything really to be lost by acknowledging that especially accomplished works may emerge from genius that transcends its historical positioning? Does that admission detract in any material way from the idea that literature is at least in part a product of its age, and as a result has a great deal to say about the social and material conditions surrounding its emergence?

And, from the viewpoint of the more conventional scholarship, is there not a great deal to gain by looking for historical evidence in texts previously neglected in the study and writing of history? Is not the first project of any recognizable historiography an inquiry into the means for the establishment of historical fact? As H. Aram Veenser puts it:

By discarding what they view as monologic and myopic historiography, by demonstrating that social and cultural events commingle messily, by rigorously exposing the innumerable trade-offs, the competing bids and exchanges of culture, New Historicists can make a valid claim to have established new ways of studying history and a new awareness of how history and culture define each other.¹⁵

The “Democratization” of Legal History

Before moving on, in chapter two, to survey some of the important legal and political developments of the years from 1665 to 1722, I want to further consider the implications for a project in legal history arising through the migration of ideas into that project from law, legal studies, literature and the new historicism. From law, of course, we inherit the focus on doctrine, and from legal studies comes the awareness that doctrine

¹⁵Veenser, “Introduction,” p. xiii.

may not be enough. From literature we gather new sources of historical evidence, and from the new historicism we are provided with a justification for the historiographical use of literature, and with a fresh approach to reading and studying the texts we encounter. Because of the contributions made to our project from a variety of different disciplines, we can expect that the product of our efforts may, in some respects at least, be quite different from the result of an inquiry more loyal to one disciplinary perspective or another.

The “democratization” of history is a term used by Joan Wallach Scott to describe the process by which an orthodox approach to the writing of history, represented in the main by “a very particular monolithic, unitary, and universal view that [conservatives] equate with ‘History,’”¹⁶ is overcome through recognizing the historical validity of a multitude of voices from the past. The challenge is to overturn the assumption that history, properly understood, reveals a set of universal truths to which only certain groups have access, and which are proven through listening to only privileged voices and relying on only particular types of evidence. To democratize history is to allow the participation of previously silenced voices and acknowledge the credibility of previously disregarded sources. From Scott’s perspective, there is no “hegemonic definition of history,”¹⁷ no one certain method and no one sure theoretical approach that, above all others, can claim to have special access and insight when the problems of the past are considered. Rather, she

¹⁶Scott, “History in Crisis?” p. 682.

¹⁷Ibid., p. 681.

argues, we must acknowledge fundamental disagreement about the boundaries of historical inquiry, and recognize that those boundaries and the rules by which they are established are neither “permanent” nor “unquestionable.”¹⁸

It is the influence of a variety of different disciplines that allows the present project to participate in the democratization of legal history. If conventional legal history is driven more or less exclusively by the search for legal doctrine, then it runs the risk of relying over and over again on standard sources of legal doctrine, and the risk of listening over and over again to the same group of privileged voices from history. Those voices, of course, are those of the men who contributed to the creation of legal doctrine throughout British (and other western) history, the jurists, the parliamentarians and the occasional legal academic who had direct, or at least discernible, input into the formulation, enactment and enforcement of the law.

But the wide concept of law borrowed for this thesis from legal studies compels the re-negotiation of the boundaries of legal history, forces a re-definition of that otherwise certain line between the history of the law as conventionally understood and the history of the law as partly shaped by the ordinary experience of law in everyday life. To attempt an understanding of law in this broader context necessarily results in a widening of acceptable historical voices. Now this is not to say that the new voices heard in an investigation of legal history informed by legal studies are the voices of oppressed groups from the past, or marginalized groups, or groups who have been neglected by

¹⁸Ibid., p. 682.

historians for who they are. In this sense, the present project differs from black history and feminist history and the history of working class peoples. Rather, the voices to be collected in this thesis are the sort that are neglected in legal history because of what they say, or for what they fail to say, and not for who they are. Historical actors outside of the world of parliamentarians and jurists simply have little or nothing to say about the letter of the law, about its political origins and enactment.

But, as will be seen in chapters four, five and six below, these actors have a great deal to say about the law in its wider context, about its relationship to divine approbation, for example, or its subordination in the minds of many to the imperatives of morality. Some express a great deal of sympathy for those whose lives were disrupted by a combination of the impact of epidemic disease and the strict enforcement of a harsh law, and describe their plight in the most poetic and mournful tones. Others, however, are not so sympathetic, describing the law as but part of the merciful judgment of God which, in combination with the plague, is brought to punish the citizens for their sins. In every case, though, they widen our understanding of the ways in which the law was understood in contemporary terms, not simply as it was considered as a matter of political expediency by those vested with the requisite authority. And in every case, they allow us to participate in the democratization of legal history by questioning the permanence of the boundaries of traditional scholarship.

There is a second sense, too, in which the various disciplinary perspectives at work in this thesis allow us to expand the idea of legal history. Through our reliance on literature as a source of historical knowledge, a reliance justified in part at least by the

new historicism, we are extending the boundaries of what is recognized as credible evidence in legal history. In turn, this extension assists in the overturning of conventions in historical writing that stultify and repress innovative approaches to the discipline. “[Written history’s] standards of inclusion and exclusion, measures of importance, and rules of evaluation are not objective criteria but politically produced conventions,” argues Scott,¹⁹ meaning that the writing of history (properly understood) is an arena reserved for those who pass muster by effectively conforming in their politics. If, as Scott suggests, the standards of historical method are not necessarily objectively valid, then it behooves everyone involved in the writing of history to keep up the search for that objectivity, or at least to attempt to overcome the conventions that continue to confine history to its politically designed locale.

Much (though not all) of what follows in this thesis is descriptive, that is, descriptive of the political climate of the late seventeenth and early eighteenth centuries, descriptive of the law of quarantine as it developed up to 1722, descriptive of the attitudes of clerics, medical professionals and writers toward the law and its enforcement. In the result, then, there is very little search for explanation, for the link between cause and effect that is considered (in some circles, at least) to be fundamental to the understanding of the significance of history. But, relying on Allan Megill’s assertion that “there is no warrant for assuming that ‘description’ is a lesser historiographical aim than

¹⁹Ibid., 681.

explanation,”²⁰ and given our attempt to weave a variety of disciplinary influences into a passably coherent whole, perhaps a “recounting”²¹ of the law of quarantine (in its most broad definition, of course) is the best that we can hope to accomplish. As Megill suggested:

We should strive to be constrained neither by the particular ‘craft’ exemplars that we admire (whose very merit threatens to imprison us), nor by unexamined assumptions in our milieu, nor by restrictive philosophies of science, but only by the limits of inquiry itself.²²

In other words, there is nothing inherently wrong with “mere description,” if we accept that it is possible. To the contrary, both in the way it can function as an answer to a myriad of historical questions and in the way it can serve as the first step on the way to valued explanation, there may be a great deal about the description of the past that is inherently right.

²⁰Allan Megill, “Recounting the Past: ‘Description,’ Explanation, and Narrative in Historiography,” in American Historical Review, Volume 94 (Winter 1989), pp. 627-653, at p. 627.

²¹The term is borrowed from Megill, “Recounting the Past,” *passim*.

²²*Ibid.*, p. 628.

CHAPTER TWO

THE POLITICAL CLIMATE, 1665 - 1722

As we saw in chapter one, the argument from the new historicism suggests that literature can best be understood in the broad context of the historical period out of which that literature emerged. As was contemplated by chapter one, it is arguable that the literature of a given period, embedded as it is in its historical circumstances, can give the reader a supplemental understanding of those circumstances that is perhaps complementary or even alternative to that which might be had through more conventional historical inquiry. To understand that literature, it is helpful to review, in at least basic terms, the political and legal climate of the time. Certainly, political developments after the Restoration and up to Walpole's ascendancy had a great deal to do with the way in which the law developed generally. There were important procedural advances in the law during the period, and, in certain respects, the law of quarantine is part of that general development. However, in other important respects, the law of quarantine developed in ways at odds with the general libertarian direction of the procedural reforms. To understand the contribution that literature can make to an historical understanding of the law, then, we must have at least a basic familiarity with contemporary political events and legal reforms that form the context of our focus. Therefore, we begin with a brief survey of political and legal developments, and then inquire into the expansion of our historical perspective through a reading of the period literature. The latter will be done in chapters four, five and six below.

It must be remembered, however, that this thesis is not primarily, or even

secondarily, concerned with the political and constitutional developments of the late seventeenth and early eighteenth centuries as subjects of historical inquiry in their own right. We are interested, first, in the value of period literature in a legal-historical inquiry, and secondly, in the history of quarantine law as reflected in that literature. The enormous range of political and constitutional developments of this period will be described in the broadest brushstrokes to provide a backdrop to the principal considerations. The time period under review will be divided into three parts. First, developments in the Restoration period, up to 1688, will be considered, followed by the post-Revolution period of 1689-1714 that ended with the death of Queen Anne and the fall of Robert Harley's government. Finally, the period from 1715 to 1722 will be reviewed for its contribution to the political stability of the eighteenth century.

The overall tone of the years following the Restoration through to the early years of the reign of King George I, as will be seen, was one of uncertainty and instability. The division of political power between the Court and Parliament; the problems associated with succession to the throne, represented first in the person of the Duke of Monmouth and then, much more seriously, in the Pretender; questions of religious toleration for both Catholics and Dissenters; struggles in the emergence of identifiable Tory and Whig parties; difficulties inherited from the Interregnum - all of these problems, together with what must have seemed like an interminable succession of continental wars, made for an uncertain, insecure temper in the English population, a temper that, to a certain extent, we will find reflected in the literature of the time. In this chapter, I want to touch briefly on certain of these issues before moving on to consider specifically the law of quarantine and

its portrayal in the period literature.

The Restoration Period¹

The restoration of Charles II to the throne in 1660 must have been an event of remarkable complexity. Those who had engineered the downfall of Charles I and his execution in 1649 feared for their lives, of course, and there remained a large number of republicans who, while of lesser significance in the civil wars of the 1640's and in Cromwell's regime, remained a threat to the cause of a secure monarchy. The execution of Charles I has been called Europe's "most shocking event" of the seventeenth century,² and the Restoration can be seen as the attempt to recover a sense of normalcy, to erase some of the repercussions of that shock, to re-establish the traditional order and obscure the impact of upheaval. For that reason, it is perhaps not surprising that only nine of those implicated in the death of Charles I were actually executed for regicide, the rest either escaping "beyond the seas" or spared through the provisions of the Act of Indemnity issued by Charles II just prior to his return to England from the continent.³

¹Much of the information in this section of this chapter is taken from five sources. They are: G. E. Aylmer (ed.), The Interregnum: the Quest for Settlement, 1646-1660 (London: MacMillan Education Ltd., 1972); Jennifer Carter, "Law, Courts and Constitution," in J. R. Jones (ed.), The Restored Monarchy 1660-1688 (London: The MacMillan Press Ltd., 1979), pp. 71-93; Christopher Hill, The Century of Revolution: 1603-1714 (New York: W. W. Norton & Company, 1982); J. R. Jones, "Main Trends in Restoration England," in J. R. Jones (ed.), The Restored Monarchy 1660-1688 (London: The MacMillan Press Ltd., 1979), pp. 1-29; and J. H. Plumb, The Growth of Political Stability in England 1675-1725, referred to above in the Introduction, p. 13, note 22.

²Jones, "Main Trends in Restoration England," p. 3.

³David Hume, The History of England, Volume VI (New York: Liberty Classics, 1983), pp. 158-162.

The most immediate difficulty facing the restored monarchy was the re-definition of the relationship between Crown and Parliament. To a large degree, the Restoration period can best be described by reference to this problem, with first Charles II and then James II resisting and plotting against threats to their independence and absolute authority. It is virtually certain that the Restoration was assisted in large measure by Charles II's apparent commitment to a role for the monarch that was less than the absolutism in place in France, for example. The King was to be sovereign, and was to have supreme authority, especially in emergency situations. At the same time, however, the King and his ministers were to act within the law's parameters, attaching a fallibility to the King's rule and making him deferential to the law. Obviously, the pre-eminence of the law was to extend as well to the various office-holders under the King, from his Privy Council of the most senior and responsible officials to the lesser appointees in remote localities. An attempt was also made to secure the independence of the judiciary, their appointments initially made to continue "during good behaviour" (meaning judges were insulated from arbitrary dismissal), although this advance was temporarily reversed during the reign of King James II.

Another difficult problem for the restored monarchy was the question of a standing army or professional militia. Despite the almost continual involvement during this period in continental wars, the English continued to debate the wisdom of a standing army, many arguing that such a force in the hands of the King could only be a tool for absolutism in the style of Louis XIV of France. At the same time, Charles II was largely dependent on Parliament for the funds necessary to finance his militia, meaning that this

contentious subject remained a matter of virulent public discussion for most of the 1660's and 1670's. From 1660 to 1679, a professional army of varying size was permitted, but not without the objections of those suspicious of the King's absolutist intentions.

The Restoration brought with it the re-establishment of a powerful Church of England, and the tensions among Anglicans, Catholics and Dissenters were to colour many decades following 1660. The intent was to impose religious unity on the country as an adjunct to the King's authority; bishops were appointed by the King and resumed their pre-Cromwellian role in the House of Lords, acting there as servants of the monarch. At the same time, however, the commitment of the Anglican Church to the theory of the divine right of kings conflicted with Charles's apparent support for his obligation to rule within the limits of the law. Consistent with this seeming incongruity, the Church successfully resisted the attempt to extend toleration to Catholics and Dissenters in 1662, and the official influence of the Church establishment remained intact despite repeated Declarations of Indulgence by both Charles and James II.

The major impediment to a more absolutist regime under both Charles II and James II lay in the monarch's inability to raise taxes to finance their reigns independent of the support of Parliament. The army so necessary to an absolute ruler's success, both domestically and in foreign wars, had to be financed through internal revenues, and these could be levied only through enactments of the Commons. For this reason primarily, Charles II called a session of Parliament virtually every year until 1681, even though there was no constitutional requirement in that regard. It has been suggested, too, that the frequency of Parliamentary sessions brought Charles's ministers under more careful and

continuous opposition scrutiny, making it less likely that complete ministerial submission to the King, an easily recognized symptom of growing absolutist tendencies, could escape detection.⁴ In any event, and despite Charles's expansion of the army without declaring war (and, therefore, without Parliamentary backing) in both 1672 and 1678, the first time ostensibly to invade the Dutch coast and the second apparently to defend the Dutch against the French, there was little movement toward absolutism until the 1680's.⁵

During the latter years of Charles's reign an attempt was made, largely successfully, to remodel the charters of London and the boroughs to give more control to the King in assembling electors and juries, and this led to a Parliament summoned in 1685 that was more supportive of the monarchy than any since the Restoration, according to Christopher Hill.⁶ Given Charles's deathbed declaration of support for Roman Catholicism, James II's moderately more stable and self-reliant financial position, and a new Parliament sympathetic to the Court, the stage was set for a three-year drift toward apparent absolutism that alarmed those influential Parliamentarians insistent on the King's dependence on the people for his authority to rule. In the summer of 1685, Charles's illegitimate son, the Duke of Monmouth, made a rebellious attempt to seize the throne from his uncle James, and though James defeated Monmouth relatively easily, the event gave James the excuse he needed to expand the army and argue for its permanent

⁴Jones, "Main Trends in Restoration England," pp. 16-17.

⁵*Ibid.*, pp. 17-19.

⁶Hill, The Century of Revolution, p. 169.

establishment. At the same time, James insisted on repeal of the legislation that kept Catholics from serving in key positions in the army and elsewhere. When Parliament, despite its royalist leanings, appeared ready to challenge James's intent to maintain a powerful standing army, James dissolved Parliament and, in what must have been a remarkably bold initiative, affirmed his personal right to suspend operation of the offensive legislation, and confirmed that right in an action before the sympathetic Courts.⁷ James immediately began inserting Catholics in key positions in the army, navy, and ministries formerly held by Anglicans, allowed the establishment of a variety of prominent Catholic religious houses in London, and forced the replacement of several leading Anglican administrators at Oxford and Cambridge with sympathetic Catholics. Separate Declarations of Indulgence were issued in 1687 and 1688, by which the legislation was formally suspended and toleration for Catholics and Dissenters was finally extended. To ensure that Parliament would support his Declarations when it was recalled, James continued the reform of the electoral system to give him even more influence in the outcome of elections.

At this point, James II was without a Catholic heir, his daughters Mary and Anne being committed relatively unequivocally to the official Anglican Church, but when James Edward was born to the second wife of James II, the Catholic Mary of Modena, in the summer of 1688, many Parliamentarians and influential Anglicans became seriously alarmed. William of Orange, a Protestant nephew of James II and husband of James's

⁷*Ibid.*, p. 170.

daughter Mary, was invited by several prominent Englishmen to invade and overthrow James. The revolution was successful and William III and Mary II succeeded jointly to the throne in early 1689. James II and his family fled to France.⁸

While the political tone of the Restoration period was one of uncertainty and instability, punctuated as it was by rebellion and war, and struggling as it did with a re-definition of the relationship among Court, Parliament and Church, the Restoration provided the opportunity for the law to acquire a degree of consistency that had not prevailed in England for some time. Principal among the sources of this consistency was the emergence of a dominant common law and a powerful common law court. The jurisdiction of various rival courts, including those of Star Chamber, martial law, ecclesiastical matters and admiralty, were either eliminated or reduced to status subordinate to that of the King's Bench, meaning that one system of arguably predictable precedent began to acquire superior persuasive force in courts of law. According to Christopher Hill, the contemporary recognition of Coke's Reports and Institutes as authoritative legal sources facilitated the elimination of archaic medieval rules and traditions, allowing for perhaps greater comprehensibility of and accessibility to the law than had ever been enjoyed before. During the same period, courts of equity, until this time mysterious and unpredictable in their operation, began to develop a recognizable bank of precedents that introduced some stability and certainty in the outcome of equitable matters, aided no doubt by the practice of appointing a common lawyer as Lord

⁸These events are summarized at *ibid.*, pp. 168-171, and at Edward Gregg, Queen Anne (London: ARK Paperbacks, 1980), pp. 32-74.

Chancellor, the chief judge of the Chancery Court with full responsibility for matters of equity.⁹ It was in this context, then, that the various laws of quarantine in effect in 1665 (referred to in detail below in chapter three) were received and enforced by contemporary agencies during the Great Plague.

In addition, there were a variety of important reforms to the law during the period. Of great importance, especially given England's emerging status as a powerful trading nation and domestic economy, were changes in land law, mortgages and trusts. Feudal tenures were abolished at the Restoration, and advances were made in the law of intestacy through the Statute of Distribution and in the protection against fraud in the Statute of Frauds. As well, and perhaps of equal significance, was the development and refinement of special remedies for use by common subjects against officials acting for or on behalf of the Crown. The writs of *certiorari* (to quash the inappropriate act of an official) and *mandamus* (to compel the performance of official duty) were refined during this period.

Perhaps most importantly, during the time from 1668 to 1677 the Commons repeatedly debated proposed legislation on the writ of *habeas corpus*, before finally passing legislation to reform procedures for use of the writ in 1679. Essentially, this statute clarified the conditions under which a subject might resort to this writ to defend against arbitrary arrest in criminal matters. At common law, a person might rely on this writ to challenge the legality of arrest and detention on the grounds of "mere suspicion,"

⁹Hill, *The Century of Revolution*, pp. 193-194. Hill's opinion on the growing stability of English common law during the Reformation period is not without its detractors. See, for example, Jennifer Carter, "Law, Courts and Constitution," pp. 81-89, for a review of other historical opinion on the state of the law during this period.

or in the event that the crime alleged did not carry a jail penalty. To the extent that detained persons had a right to bail and a speedy trial, then the writ of *habeas corpus* was the method used to enforce those rights. By the 1670's, however, the availability of the writ had been reduced by a number of procedural entanglements, such as the refusal of judges to grant the writ in vacation and the practice of jail keepers to hide prisoners from authorities. The *Habeas Corpus* Act of 1679 was intended to address these irregularities in procedure, and, while it apparently did not address all of the weaknesses in the use of this remedy, the advances made in this regard were significant, despite the other procedural abuses that followed in the wake of Monmouth's rebellion in 1685.¹⁰

The Post-Restoration Period - 1689-1714¹¹

For the second time in only forty-five years, forces disenchanted with the rule of a reigning monarch had forced the removal of the King. The Glorious Revolution of 1688 differed markedly from the events of the 1640's, however, most clearly because those

¹⁰See F. Murray Greenwood and Barry Wright, "Introduction: State Trials, the Rule of Law, and Executive Powers in Early Canada," in F. Murray Greenwood and Barry Wright (eds.) Canadian State Trials: Law, Politics and Security Measures, 1608-1837 (Toronto: University of Toronto Press, 1996), pp. 3-39, at pp. 31-33; and Carter, "Law, Courts and Constitution," pp. 83-84.

¹¹Much of the information in this section of this chapter is taken from the following sources: Hill, The Century of Revolution, referred to above at chapter two, p. 46, note 1; Gregg, Queen Anne, referred to above at chapter two, p. 51, note 8; Plumb, The Growth of Political Stability, referred to above in the Introduction, p. 13, note 22; and six essays from Geoffrey Holmes (ed.), Britain after the Glorious Revolution, 1689-1714 (London: St. Martin's Press). Those six essays are: Jennifer Carter, "The Revolution and the Constitution," pp. 39-58; Angus McInnes, "The Revolution and the People," pp. 59-79; Henry Horwitz, "The Structure of Parliamentary Politics," pp. 96-114; E.L. Ellis, "William III and the Politicians," pp. 115-134; W.A. Speck, "Conflict in Society," pp. 135-154; and T.C. Smout, "The Road to Union," pp. 176-196.

who designed the downfall of James II were not committed to an elimination of the monarchy altogether, as had been the case with Cromwell and his followers. Rather, in the late 1680's the motivation in overthrowing King James was more personal, a reaction to certain of the policies that emerged during James's reign, and a deep suspicion of the growing influence of Catholics in affairs of state. Together, these trends seriously threatened the positions of Anglicans, privileged landowners and influential aristocrats, and the invitation to William of Orange was viewed as the chance to deliver freedom and liberty from challenges to the status quo.

Prior to the acceptance of the Crown by William III and Mary II in February 1689, one of the first orders of business was yet another attempt to re-define and cement the relationship between Court and Parliament, in manner not dissimilar to that which occurred following the Restoration. In 1689, however, the attempt took the form of a Bill of Rights, a document that made a fresh effort at outlining the division of powers between the government on the one hand, and Parliament on the other. Even if Christopher Hill is correct in suggesting that "nothing could be less satisfactory [than the Bill of Rights] as a statement of political principles,"¹² the enactment must be seen as a significant recognition of the need to establish some constitutional stability to avoid the upheavals of the previous fifty years. In essence, the Bill of Rights imposed limits on the powers of William III and Mary II, and it was under these limitations that they assumed the throne. Several of these limitations deserve mention. First, it was stated that "the raising or

¹²Hill, The Century of Revolution, p. 236.

keeping of a standing army within this kingdom in time of peace unless it be with consent of Parliament is against the law,”¹³ a clear attempt to prevent the troubling practice in years leading up to 1688 of maintaining an army without Parliamentary approval. Members of Parliament continued to fear a permanent army under the direction of the Court as a symbol of potential absolute rule. Secondly, the monarch’s taxing powers were specifically curtailed, especially in the areas of tunnage and poundage, further limiting the Court’s ability to raise funds independent of the approval of Parliament. Thirdly, the freedom of the sovereign to exercise the power of suspension of the application of statutes in particular cases, and the related power of dispensation, were eliminated. Fourthly, certain rules of Parliamentary protocol were enacted, including the freedom of speech in Parliament, freedom of elections to Parliament, and the right of subjects to have Parliament sit on a frequent basis. This last provision was given clear definition by the Triennial Act of 1694, by which it was provided that Parliaments must meet at least once every three years, and that no Parliament could last longer than three years. Further constraints over the exercise of royal prerogatives were exerted to limit, for example, public prosecutions in criminal matters. The use of politically controversial *ex officio* informations (where the Crown was deemed to be represented by the attorney general *ex officio*) and *nolle prosequi* (the stay of private prosecutions with potential for embarrassing the state), were to be used with much more circumspection than before. Christopher Hill argues that enactments such as these finally established the

¹³Quoted by Carter, “The Revolution and the Constitution,” p. 43.

independence of Parliament from the control of the Court, and “henceforth Parliament was a necessary and continuous part of the constitution, in closer dependence on the electorate.”¹⁴ They also represented significant advances in securing individual rights against the powers of the state, notably in the area of criminal law.

Despite these advances, it is difficult to disagree with Jennifer Carter’s assertion that the significance of the Glorious Revolution lies not in the formulation of the mechanics of a constitutional monarchy *per se*, but rather in its implications for the hereditary monarchy. There was little doubt, in accordance with the rules by which the Crown was passed historically, and in accordance with the belief in the divine approbation of the sovereign rule of the monarch, that James Edward, son of James II and the Catholic Mary of Modena, was the rightful claimant to the throne on the death of James II. Overcoming this argument, based as it was on logic and tradition, was a difficult task for Parliamentarians immediately following the Revolution. As Carter suggests, the only solution was to insist that James II had abdicated, leaving the throne vacant. In any event, it is inescapable that William and Mary succeeded to the throne only because they were requested to do so by Parliament, and this fact finally underscores the emergence of the rule of temporal law. As Carter suggests: “The only implication that ultimately could be drawn from this was that England had a monarch depending on a

¹⁴Hill, The Century of Revolution, p. 237. Hill summarizes the provisions of the Bill of Rights at pp. 235-237.

parliamentary title, and a constitution based on law.”¹⁵

Constitutional reform continued with the Act of Settlement of 1701, an enactment with far-reaching implications both for the right of succession and for the division of powers between Court and Parliament. Queen Mary had died in 1694, leaving no issue, and it was important to ensure that the Crown would not pass into non-Protestant hands after the death of William III. Princess Anne, a Protestant and Mary’s sister, was to succeed William, but concerns about a Catholic succession were intensified when Anne’s only surviving child, the Duke of Gloucester, died in 1700. Despite concerns that Anne might be sympathetic to the Jacobite cause,¹⁶ there was no interference with her assuming the throne when William died in 1702. In the meantime, the Act of Settlement had been passed, by which it was enacted that, should Anne and her husband George of Denmark not produce an heir that could succeed to the throne on Anne’s death, then the Crown was to pass to the next entitled Protestant, being Sophia of Hanover (a granddaughter of James I), or her heir. Ultimately, of course, because Sophia pre-deceased Queen Anne by about two months in 1714, the throne passed to Sophia’s son, George I.

There were other provisions of significance in the Act of Settlement, too.¹⁷ One

¹⁵Carter, “The Revolution and the Constitution,” p. 40. Carter’s argument on the significance of the Revolution as an interference in the divine right of succession is at pp. 40-43.

¹⁶See Gregg, Queen Anne, pp. 122-124, for a summary of the suspicions about Anne’s loyalty to the Protestant cause during the late 1690’s.

¹⁷These provisions are summarized in Gregg, Queen Anne, p. 123; Carter, “The Revolution and the Constitution,” pp. 44-47; and Hill, The Century of Revolution, pp. 240-241.

of the most important legal developments was the attention paid to the question of judicial tenure. The movement toward judicial tenure on the basis of good behaviour, rather than during royal pleasure, first raised in the conflicts between Coke and Bacon, advanced during the reign of Charles I and then reversed during the reign of James II, was finally given effect. From the perspective of constitutional reform, the statute can be read as a further attempt to limit the powers of the monarch, to ensure that the independence and authority of Parliament could not be interfered with by an over-zealous King or Queen. It was intended as well to curb executive abuses in the courts of law, although the other “formal guarantee” of judicial independence, the removal of senior judges from executive councils, was not achieved until the early nineteenth century. Restrictions were also placed on the ability of other than native Englishmen to serve as officers of the Court, and it was provided that the monarch could not leave the kingdom without the permission of Parliament. Both of these provisions were seen as direct rebukes of William’s rule; he had continued to rely on the advice of trusted Dutchmen during his tenure, and had absented himself from England often and for long periods to engage in continental wars. Despite the strong likelihood that the Crown would ultimately pass to the Hanoverians on the death of Anne, the Act of Settlement provided that England could not be compelled to fight on behalf of Hanoverian interests. Again, this appeared to be a slight to William, who had engaged English troops continually to defend the Dutch. Significantly, the Act set forth that any future monarch must be a communicant of the Church of England, further distancing the Pretender from the possibility of assuming the throne, and further emphasizing the Parliamentary source of the monarch’s authority to

rule. Finally, it was provided that, upon the death of Anne, persons holding royal office (“placemen,” in contemporary terms) would be barred from sitting as members of the House of Commons, virtually guaranteeing the reduction, if not the complete elimination, of the monarch’s influence in the deliberations of the lower house.

A further attempt was made to overcome the influence of the Court in Parliamentary elections through manipulation of the boroughs. It will be remembered that, especially during the reign of James II, the boroughs were re-constituted so as to allow more royal influence in the way in which Parliamentary representation was gained, but after the Glorious Revolution an effort was made to distance the boroughs from interference by the Crown. So much tinkering with the constitution of the boroughs had taken place that, by the late 1690's, it was not known with certainty whether certain districts were incorporated or not!¹⁸ In any event, the 1690's saw a further separation of the Crown from influence in local affairs, reinforcing the power of the local aristocracy and landed gentry.

Concerns with the Jacobite threat led to other developments, too, perhaps just as remarkable as the abandonment of the traditional divine right of succession. For example, the Pretender’s claim was a principal motivating factor in the parliamentary union of England and Scotland in 1707. Ever since the accession of James I (James VI of Scotland) to the throne of England in 1603, the crowns of the two kingdoms had been united in one monarch. But, after the death of William III in 1702, there was nothing to

¹⁸Carter, “The Revolution and the Constitution,” p. 53.

prevent the people of Scotland from declaring the Pretender to be James VIII, relying on the traditional argument from heredity. This was the case, even though the Scottish Parliament convened immediately following the Glorious Revolution had confirmed William III as their king. English nervousness at the prospect of a Scottish appeal to the Pretender following the death of James II in 1701 and then William III in 1702 was borne out by the Jacobite rebellion in 1715, fostered and prosecuted by Scottish sympathizers of James Edward. In the first decade of the 1700's, such a possibility was too much for proponents of the Protestant cause in England, and, as T. C. Smout suggests, in 1701 “[t]he English Parliament was content to choose the Hanoverian Elector; Anne’s advisers thought it unlikely that the Scots would tamely follow suit without making some bid to loosen English control over Scottish affairs...”¹⁹ While it is true, as Smout argues, that there were other significant motivating factors, for both the English and the Scots, in seeing the negotiations for union successfully concluded in 1707, there can be little doubt that the question of succession to the throne of Scotland played a leading role, at least in the minds of English Parliamentarians and officials.²⁰

As had been the case during the Restoration period, the post-Revolution era saw a number of important legal reforms in addition to those, like restraints on public prosecutions and the securing of judicial tenure, already mentioned. The influence of the

¹⁹Smout, “The Road to Union,” p. 180.

²⁰Smout cites economic factors as perhaps the most significant motivator in the success of the negotiations. The Act of Union created a common market of some seven million persons, “much the largest free-trade area in contemporary Europe.” See *ibid.*, p. 176.

propertied classes was particularly strong in the promulgation of various statutes in defence of private property. In a trend that would continue throughout the eighteenth century, many relatively minor offenses against property were made felonies, punishable by transportation to the colonies or, with increasing frequency, by death. Pickpocketing, shoplifting, the theft of furniture by lodgers - all of these were capital offences. Oddly enough, however, the punishment for some other types of offences was softened. For example, a clause in the Bill of Rights was intended to prevent "cruel and unusual punishments," and this had the effect, for example, of preventing the punishment of flogging from proceeding to the point where the convict died. The practice of burning women alive for political crimes was discontinued after the Revolution, despite the fact that the statutory authority for the practice remained on the books. And toleration was extended to Quakers so as to allow them to give evidence simply on a statutory declaration, rather than on the conventional judicial oath. Reforms such as these, and others, continued throughout the period, and marked improvements to legal procedure made litigation simpler and more readily available as a means by which disputes might be resolved.²¹

One additional legal reform in this period that deserves special mention is the Treason Act of 1696, as amended by a statute of 1708, which reformed the procedures under which those accused of treason were to be tried. The accused was provided with a number of vital procedural protections, including the rights to receive a list of prosecution

²¹The law reforms referred to in this paragraph are summarized by Hill, The Century of Revolution, pp. 246-248.

witnesses in advance of the trial, to subpoena witnesses, to make full defence through counsel, and to review the list of potential jurors. In addition, the Treason Act provided that acts of treason could not be proven except on the evidence of at least two witnesses, meaning that conviction on the uncorroborated evidence of a single witness was prohibited. The Act's libertarian procedural reforms in cases of treason became a model for reform calls in the treatment of the accused in more routine criminal cases in the eighteenth century.²²

The Early Years of George I - 1715-1722²³

Although the death of Queen Anne in 1714 was the source of some unease among those who insisted on the Hanoverian succession, George I arrived from Europe and assumed the throne with relatively little difficulty. Despite the Jacobite rebellion in Scotland in 1715, which understandably made those loyal to the Hanoverians nervous and cautious throughout the early years of George's rule, enough strength was consolidated around George and his Court to allow the business of governing to carry on with some authority.

Perhaps the most noticeable consequence of Queen Anne's death was the fall of

²²Greenwood and Wright, "Introduction," p. 27; A. H. Shapiro, "Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696," in Law and History Review, Volume 11 (1993), pp. 215-255; J. M. Beattie, "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries," in Law and History Review, Volume 9 (1991), pp. 221-267.

²³Much of the information in this section of this chapter is taken from Plumb, The Growth of Political Stability, referred to above in the Introduction, p. 13, note 22; and from J. H. Plumb, The First Four Georges (London: The Fontana Library, 1956).

the government of Robert Harley. Throughout Anne's reign, Harley had maintained a position of some influence, and that influence had grown to the point where he successfully manœuvred the ouster of a particularly powerful Whig ministry in 1710 and 1711. But Harley was known as a man of some duplicity, and forceful former allies like the Duke of Marlborough and the Earl of Godolphin had grown exasperated with his undependability as early as 1708. A short four days before the Queen's death in August 1714, Harley was compelled to visit her to resign as Lord Treasurer, although he held the position officially after her death until a successor in that office was named.

The fall of Harley's government was significant because it signalled the failure of the last serious attempt to govern irrespective of party divisions. Harley's ministry was intended to be a moderate compromise between Tory and Whig extremes, and, in his tenure as Anne's chief minister, he had made appeals to leading members of both camps. There was some logic to this attempt; over the course of the years following the Glorious Revolution, party divisions had been blurred to the point where the outcome of votes in the Commons was never certain, even on issues where ideological distinctions between Whig and Tory appeared to guarantee the result. Henry Horwitz argues that, during the reigns of William and Anne, party divisions in the Commons were more evident than cursory historical examination might suggest, and he provides a comprehensive analysis of voting patterns to support his position.²⁴ While it is difficult to disagree with Horwitz's conclusions, it is nevertheless true that both Whig and Tory parties were split

²⁴Horwitz, "The Structure of Parliamentary Politics," pp. 103-111.

into a number of factions, with both Country Tories and Court Tories, Country Whigs and Court Whigs, and so on. It was Harley's mission to overcome these distinctions, and this was the attempt he made in assembling the administration in 1710 and 1711.

According to J. H. Plumb, it was in the two decades following the Glorious Revolution that identifiable party ideologies began to emerge, vague and tenuous though they might be, and this despite what may appear to be confusing irregularities in voting patterns. These emerging, relatively distinctive characteristics of party policy were the legacy left to the early years of the reign of George I, and, in Plumb's view, contributed to a growing sense of political stability and allowed a persuasive politician like Robert Walpole to fashion a secure administration after 1720. If Plumb is right, then it is not surprising that Harley had such difficulty in maintaining a ministry with the necessary solidarity. In any event, Plumb suggests that early eighteenth century Toryism can be identified with the call for free and frequent elections, the insistence on the exclusion of all placemen from the Commons, the demand that a firm land qualification be maintained for members of Parliament, a hesitancy about continental wars, and a continued dispute with the idea of toleration for Dissenters. From the Tory perspective, Anne's Hanoverian successor was to be "the prisoner of the Commons,"²⁵ and this explains the firm Tory support for the Act of Settlement. On the other hand, Plumb suggests that Whigs of the period were committed to the aristocracy and a strong central government, insistent on continued war on the continent and the necessary supply of public funds for its pursuit,

²⁵Plumb, The Growth of Political Stability, p. 151.

focused on the maintenance of the system of patronage and manipulation of the boroughs, and, because of their relatively small numbers, intent on a fusion of power between the Court and the Treasury so as to maintain administrative strength.²⁶

Following Harley's resignation, the Tories stumbled forward during the rest of the decade, sharing power with the Whigs off and on until Walpole finally achieved control for the Whigs in 1720. One of the principal factors contributing to Walpole's ultimate achievement was the South Sea Bubble affair, a very difficult financial and political problem that threatened the country's position as a leading trading nation and jeopardized England's national credit. The South Sea Company performed principally as a means by which a portion of the national debt was financed, and the directors over-sold stock in the company recklessly and with little concern or understanding of the consequences. Many of the influential families in England bought large blocks of stock, including the King, the Prince of Wales and others closely associated with the royal family. Eventually, of course, the company collapsed, sending many speculators to their ruin. In an atmosphere of panic and confusion, Walpole emerged as a steady, competent leader. He diffused the crisis, not through brilliant financial reforms, but simply by rallying to the defence of the Court and re-establishing confidence in the administration. By early 1722 (the year, incidentally, in which reform of the law of quarantine was completed), Walpole's position as leader of the government was secure.²⁷

²⁶Ibid., p. 152.

²⁷These events are described by Plumb, The First Four Georges, pp. 62-65.

The early years of King George's reign saw the final withdrawal of the monarch from a role in the day-to-day management of government, establishing firmly the pre-eminent role of the leading ministers of the administration and the independence of Parliament. During the reigns of William III and Anne, the royal veto of legislation had been exercised only sparingly, with Anne using that power but once in her twelve year rule. But both of those monarchs had regularly attended meetings of leading ministers, with Anne, even in failing health, chairing cabinet meetings and offering advice on administrative matters throughout. Early in his reign, George I continued this practice, relying on his son the Prince of Wales to assist him with his halting English so as to make the meetings comprehensible. But when George and the Prince had a serious falling out in 1718, the Prince failed to attend meetings to assist his father, with the result that George too began to allow the meetings to carry on without him. Apart from private meetings with his ministers and the occasional attendance at group meetings for formal purposes, George largely withdrew from administrative responsibility, and this was a development that would have a lasting impact on the constitutional relationship between Crown and Parliament.²⁸

It was during this final period that arguments began to be made that the earlier procedural reforms realized in the Treason Act of 1696 might properly be extended to trials for criminal offences other than treason. Arguments advanced by Sollom Emlyn, libertarian editor of the second series of English State Trials, for example, insisted that

²⁸Ibid., pp. 58-59.

the procedural protections of the accused in treason proceedings were especially important in all cases of criminal law, where the impartiality of the judge, as between the state and the accused, was always a matter of concern. According to Greenwood and Wright, the editors of collections of English state trials, among them Thomas Salmon, Sollom Emlyn, and, at the end of the eighteenth and into the nineteenth centuries, Francis Hargrave, William Cobbett and Thomas Bayly Howell, began these collections thinking that sustained retrospective study of state repression through the courts would be salutary, an important contribution to contemporary political debate among libertarians, Court Whigs and Tories over the practical implications of the constitutional advances of the Glorious Revolution and the Act of Settlement periods.²⁹

During the course of some sixty years, beginning with the Restoration and concluding with the early years of Robert Walpole's administration, the shape of English politics had been re-cast virtually completely. Gone were the threats of absolutism that had characterized the later years of the reign of Charles II and the short tenure of James II. Gone were the tensions characteristic of the struggle to re-define the roles of monarch, Court and Parliament, the issues being virtually resolved with the Act of Settlement. Religious toleration, such a difficult issue during the Restoration period, was widely extended during William's years on the throne, and was generally accepted by the 1720's. Political strife between parties and between factions within those parties, strife that had caused such turmoil, especially during the reign of Queen Anne, was largely put aside at

²⁹Greenwood and Wright, "Introduction," pp. 3-7.

Walpole's ascendancy, the result of a strong and convincing political personality at the helm of the administration.

Finally, significant reforms in the law signalled an emerging concern with the rights of the individual subject, a concern that would gain momentum as the eighteenth century progressed. Libertarian advances in reform of the law during this time, particularly in connection with the procedural rights of detained and accused persons, were remarkable in their statement about the growing recognition of the freedom of the individual relative to the machinery of the state. Arguments that found their inspiration in reforms such as the *Habeas Corpus* Act of 1679 and the Treason Act of 1696 continued to be made throughout the eighteenth and into the nineteenth centuries, testament to the far-reaching implications of changes to the law in the period under review.

In a general sense, then, this was the political and legal climate in which the law of quarantine was reformed during the years from 1665, the year of the Great Plague, to 1722, the year in which Walpole's initiatives in this regard were completed. As well, it was the political climate that contributed to the character of the literature of the Great Plague, the essays and letters of Defoe and others during the years leading up to 1722, and the significant works of literature that emerged coincidentally with the reform of the law. Before considering this literature in detail in chapters four, five and six below, it is necessary to canvass the law of quarantine as it stood in 1665, and that canvass is the subject to which we now turn.

CHAPTER THREE

THE LAW OF QUARANTINE PRIOR TO THE REIGN OF KING GEORGE I

Despite the fact that, during the period of some 375 years from the reign of King Henry III to the beginning of the seventeenth century, the plague had periodically devastated the population of London and the English countryside,¹ Parliament failed to pass anything like a law of quarantine until 1604, the first year of the reign of King James I. The plagues of 1563, 1578 and 1592 had been devastating enough, with 17,404, 3568 and 11,503 deaths attributed to the disease in those years respectively.² But the plague of 1603 was the most crippling yet seen by the people of England and, during the months from March to December, at least 30,561 citizens of London and neighbouring communities died from the disease.³ The impact of the epidemic was so complete that, in his “Proclamation” establishing the first Parliament of his reign, King James actually cited the plague as the cause for his delay in calling the session to Westminster.⁴

The severity of the plague of 1603 led to at least two reforms, one in record-keeping and the other in the law. First, the “bills of mortality,” by which statistics on the number and causes of death in London were reported to the citizenry, had been published

¹Paul Slack, The Impact of Plague in Tudor and Stuart England (London: Routledge and Kegan Paul, 1985), pp. 61-62.

²Ibid., p. 151; John Graunt, Reflections on the Weekly Bills of Mortality (London: Samuel Speed, 1665), p. 1.

³Graunt, Reflections on the Weekly Bills of Mortality, pp. 1-3.

⁴Cobbett, Parliamentary History of England, Volume I, column 957.

regularly since the latter years of the reign of Queen Elizabeth I, probably as early as 1592,⁵ and had first appeared in 1532, during the reign of King Henry VIII.⁶ But during 1603 the authorities began to publish the bills on a weekly basis, in an obvious attempt to keep pace with the record number of deaths. As Graunt reports,⁷ the weekly proportion of deaths attributed to the plague swelled to about four out of five during the summer of 1603, and the publishers of the bills of mortality were hard-pressed to maintain accurate and comprehensive statistics during such calamity. It was only by publishing weekly bills that the numbers and the information could be managed sensibly.

Secondly, and for the first time in English legislative history, a statute was passed during the first session of the first Parliament of King James I's reign by which some provision was made for dealing with the consequences of epidemic disease. This legislation, 1 Jac. I, c. 31 ("King James's Act"), had two principal thrusts. It established a regime by which local authorities might raise revenues for the relief of the poor from the effects of the epidemic. And, secondly, it enacted a series of measures by which domestic quarantine might be instituted in given conditions. King James's Act was unique in both of these respects.

King James's Act and Relief of the Poor

The regime established for relief of the poor in King James's Act actually served

⁵Graunt, Reflections on the Weekly Bills of Mortality, p. 3.

⁶Walter George Bell, The Great Plague in London in 1665 (London: William Clowes and Sons, Limited, 1951), p. 5.

⁷Graunt, Reflections on the Weekly Bills of Mortality, p. 2.

two separate functions. The recitals to the Act stated clearly that, as certain local authorities experienced difficulty in arranging funds sufficient to attend to the poor, it recognized an obligation to assist those in need for their own sakes. But it was also acknowledged in the recitals that the failure of the authorities to accommodate the needy forced the infected people into the streets in search of help, thereby increasing the danger of infecting others. Because the measures provided in King James's Act were primarily a means for raising revenues from the landed and merchant classes, it seemed politically expedient to frame the tax as serving to protect the healthy members of the middle and upper classes from exposure to the plague, and not just provision of comfort for the diseased and impoverished. The intent was relatively clear, that humanitarian assistance, probably in the form of medical attention and the other necessities of life, must be taken to the infected homes at the cost of the local authority, both out of a sense of altruism and out of a concern for the healthy members of the community.

The taxing powers of King James's Act had the potential to reach very deeply into the lives of the propertied class especially, and the grant of this potential attests strongly to the enormity of the problem authorities faced in dealing with the epidemic. It appears from Section II of King James's Act that the tax to be imposed was to be both a poll tax and a property tax. First, the local official was given the power to tax every "Inhabitant" of the official's jurisdiction, apparently irrespective of the inhabitant's ownership of property. Secondly, "all Houses of Habitation, Lands, Tenements and Hereditaments" were liable to be taxed. Because the poll tax and the property tax were listed conjunctively rather than disjunctively, property owners faced the prospect of being taxed

twice, once as an inhabitant and once as the owner of property. It should also be noted that no distinction is made in Section II between corporeal and incorporeal hereditaments, meaning that any property, real or personal, tangible or intangible, vested or contingent, was liable to be taxed, so long as it was property of a sort that could be inherited by virtue of the laws of testate or intestate succession.

Wide discretionary authority was given to local officials. “[T]he Mayor, Bailiffs, Head Officers and Justices of Peace of every City, Borough, Town Corporate and Places privileged,” were vested with the levy and administration of these new taxes as a discretionary power emanating directly from Parliament. By Section V, if no such officials were resident in an infected locality, then the taxing power would fall to any two justices of the peace in the county in which the locality was situated, and they were free, in like manner as the local officials, to tax the residents of the county anywhere within five miles of the infected location. The only restrictions on the discretion of the officials (local or county) were that the assessment was to be “at such *reasonable* Taxes and Payments as they shall think fit,” and that its purpose was to be the “*reasonable* Relief of such Persons infected” (emphases added), introducing a measure of objectivity as the standard against which the tax and its design were to be gauged. There was no requirement to refer the question to town, borough or city councils, and no requirement for further parliamentary sanction.

The portion of Section II by which this discretionary power was granted is ambiguous, certainly by today’s standards of statutory interpretation. The power appears to be vested in any one of the named officials, “or any two of them,” raising the question

as to whether or not one justice of the peace, say, in a borough where other named officials were employed, could act singly in imposing the tax, or instead whether the first justice were required to refer to another official for confirmation before proceeding. Despite this ambiguity, Parliament did see fit to empower an individual official, or perhaps two of them, instead of the local Council. Again, it is likely that, given the overall tone of urgency in King James's Act, the taxing power was seen as an exceptional emergency measure for responding to the exigencies raised by the plague, saving the local official the time it would take to refer the matter to a larger administrative body.

Confirmation of this interpretation of the taxing power as an emergency measure is suggested in subsections VI (1), (2) and (3) of King James's Act, where it is allowed that the taxes imposed by virtue of the powers granted by Section II were to be certified at the next quarter-session of justices of the peace held in the locality concerned. The requirement for certification was not merely permissive; the Justices at quarter-sessions actually were directed by the statute to certify the discretionary actions of the local official in imposing the tax. In other words, Parliament granted an immediate, discretionary taxing power in a local official, the exercise of which was to be confirmed retroactively at the first opportunity, thereby providing a means by which local authorities might take action in pressing conditions, with little concern for possible repercussions. The Justices at quarter-sessions, by virtue of a majority vote, were given the further power to extend, enlarge and increase the local tax, or determine it if appropriate, in any manner thought by the majority to be "fit and convenient." In this series of subsections, then, the local officials appear to be relieved of the ultimate responsibility for imposing

the tax in the first instance, despite the requirement in Section II that, objectively considered, the tax be “reasonably” imposed.

Exceptional powers were granted to compel compliance. By subsection II (2) of King James’s Act, the tax established earlier in Section II might be enforced by warrant directed against the goods of any delinquent taxpayer. Again, the same local officials were empowered to issue the warrants, but, interestingly, the warrants might be directed to “any Person or Persons for the Execution thereof,” meaning that any inhabitant of the locality might be conscripted by the taxing official to attend at the delinquent taxpayer’s place of residence and to search for goods against which the tax might be levied. This role was important, of course, both because of the function it served in collecting revenues, and because of the impact it had on the lives of delinquent taxpayers. If there were no goods found against which the conscripted constable might levy the tax, and if the party taxed continued to refuse to pay, then the constable was required to return the warrant to the issuing official, endorsed *nulla bona*, or “no goods.” By Section III, the local official was required, in such a case, to arrest the delinquent taxpayer and commit them to jail, to be held without bail until such time as the tax was paid.

These provisions of the statute were mandatory, not discretionary or permissive, leaving us with the picture of an apparently arbitrarily conscripted citizen being responsible for, or at least the instrument in aid of, the imprisonment of another citizen, perhaps a neighbour, who, through either impecuniosity or intransigence, had failed to pay the tax. The failure to perform the levy by the person required to do so by virtue of the duties described in the warrant had personal consequences too; by subsection VI (4), a

fine of ten shillings was provided for every such failure, meaning that the choice, in certain circumstances at least, was between sending a neighbouring citizen to jail and suffering the payment of a fine.

Parliament granted the local authority the freedom to request assistance of the neighbouring county in addition to the purely local taxing power, implicitly at least granting extra-jurisdictional taxing authority to the local officials. Parliament recognized, therefore, that particular parishes, boroughs or other localities might not be capable of generating the financial strength necessary to deal with the plague's demands. Actually, a request for assistance might be rejected by the neighbouring county, it being a question of the county official's discretion as to whether or not the tax might be imposed outside of the particular town or borough. Section IV of King James's Act is clear in making the extra-jurisdictional application of the tax, and its amount, discretionary in the hands of the county administration, and is equally clear in limiting the possible extension of the tax to a five mile radius of the infected locality. In all other respects, however, including the method of enforcement, the administration of the tax both inside and outside the town or borough was identical.

King James's Act and Domestic Quarantine

The second major thrust of King James's Act was in the establishment of the first system of domestic quarantine in English legislative history. Again, the power to establish and enforce the quarantine was vested personally in the "Mayor, Bailiffs, Constable or other Head Officer of any City, Borough, Town Corporate, privileged Place or Market-Town" where the plague was found, and likewise in the head officer of any

infected county (Section VII). It is in the powers granted to these officials that we find the first legislative endorsement of what would become the notorious practice of the “shutting-up of houses,” to be referred to in detail later in this chapter and below in chapters four and six. Any person either infected with the plague, residing in a dwelling which was infected (presumably by virtue of another inhabitant’s sickness) or merely “being in” an infected dwelling (irrespective, apparently, of the person’s actual place of residence or the length of time spent in the condemned house) might be ordered by the local official to remain in the infected dwelling for the purpose of preventing the spread of infection. There is nothing in King James’s Act to provide for exceptions, nothing to limit the length of time within which the quarantine might continue, nothing to direct that the certificate of a physician would be enough to allow the quarantine of a particular person to be lifted. In effect, Section VII established a system of discretionary house arrest, with no possibility of appeal for either the healthy or the infected. As a result, the plague raised the prospect of the complete loss of individual liberty at the whim of a local official.

To assist in the enforcement of quarantine, the power was granted to the local official by Section IX to appoint “Searchers, Watchmen, Examiners, Keepers, and Buriers,” all of whom were to be employed in establishing the need for quarantine and in protecting against its violation. The powers of such appointees were provided in Section VII. First, they were to ensure that those ordered to remain inside an infected house actually complied with that order. And second, they were empowered to use force (“violence,” according to Section VII) in the event that attempts were made to break the

quarantine. Section VII is not perfectly clear as to the conditions under which watchmen might use force against a quarantined person; there is a suggestion in that Section that the official's quarantine order is breached, and therefore the watchmen's powers arise, only when the disobedience occurs "wilfully and contemptuously." But in any event, the watchmen and others appointed by the local official were given absolute immunity from both prosecution and civil liability for injuries arising through the exercise of their duties, at least where those injuries occurred to "such disobedient Persons." If the statute can be interpreted reasonably to mean that disobedience arose only where the quarantine was breached "wilfully and contemptuously," then the watchmen's immunity arose only in those circumstances too. On this reading, however, an infected person who violated quarantine without the requisite intent, perhaps out of delirium, perhaps through being ejected from the house by healthy inhabitants, could not be compelled to return through the use of force by the watchmen.

It is relatively clear that this interpretation runs contrary to the overall intent of King James's Act to protect the healthy, and contrary to the specific intent of Section VII to enforce the quarantine irrespective of the attempts to circumvent it. It is likely, then, that despite the apparent concession to the need for "will" and "contempt" in establishing an offence under Section VII, the watchmen's only choice was to use force in the event of any *apparent* breach of quarantine, whether or not the requisite intent were first established. In practice, the presence or absence of intent on the part of the quarantined person must have been irrelevant in the deliberations of the watchmen as to whether force was appropriate or not.

The offence of breaching quarantine and escaping the efforts of the watchmen was a felony, and penalty in such a case was death. The severity of this measure was tempered, however, by subsection VII (2), where it was provided that the felony would arise and the death penalty apply only where the escapee “shall converse in Company, having any infectious Sore upon him uncured.” Sick persons at large but not in communication with others, then, were spared conviction for the felony, as were healthy escapees and those who might have recovered from their illness prior to their recapture and examination. The penalty for these offenders was to be “punished as a Vagabond,” and “to be bound by his or their good Behaviour for one whole Year” [subsection VII (3)].

This, then, is the essence of King James’s Act, the first legislation of its kind in England.⁸ As has been seen, it established a number of measures that are best explained in the context of emergency powers, in the context of a plague the severity of which had

⁸It should be noted that, as early as 1518, attempts had been made by Royal Proclamation to regulate activity during times of plague, and that local councils and justices often used their powers in an attempt to control the disease. See Slack, The Impact of Plague in Tudor and Stuart England, pp. 44–47. But King James’s Act was certainly the first legislative attempt, the first systematic, comprehensive initiative, to deal with the plague. Considering that the statute was passed during the year of the most devastating plague to that point in English history, Slack is obviously in error when, writing on the prospect of legal reforms in the years prior to 1665, he said the following at p. 200:

Most obviously, none of them coincided with major epidemics of plague, either in London or in the country as a whole. In the immediate crisis caused by a great epidemic like that of 1563 or 1603, there was little opportunity to develop new policies. Rather, innovation occurred when relatively minor outbreaks of plague seemed to aggravate other pressing social problems, especially in London. [Footnote omitted]

never been experienced before. This response to the statute is confirmed by subsection IX (2), where it was provided that the statute would continue only “until the End of the first Session of the next Parliament.” King James’s Act, therefore, was intended to be temporary, a special creation and extension of legal powers, an exceptional imposition on citizens, both in the taxing powers and the quarantine sections, in circumstances of particular threat and anxiety. But probably because the plague continued to threaten the English during the first five decades of the seventeenth century,⁹ King James’s Act remained in force, first temporarily by virtue of 3 Car. I, c. 4 (passed in 1628), and then perpetually by virtue of 16 Car. I, c. 4 (passed in 1641).

Orders Issued under King James’s Act

While Paul Slack expresses some doubt as to the continued applicability of King James’s Act beyond 1641,¹⁰ there is little doubt that local authorities relied on its provisions well into the 1640's, 1650's and 1660's. For example, during the plague of 1644 the Lords and Commissioners of Oxford University and the City of Oxford recited King James’s Act as the authority under which they issued “An Order for the Observance and Execution of the Statute made for the Reliefe and Ordering of Persons infected with the Plague” (the “Oxford Order”).¹¹ By Section X of the statute, the University of

⁹See Slack, The Impact of Plague in Tudor and Stuart England, at p. 62 for a tabulation of plague years in fourteen English towns between 1581 and 1666.

¹⁰*Ibid.*, p. 211.

¹¹“An Order for the Observance and Execution of the Statute made for the Reliefe and Ordering of Persons infected with the Plague,” (Oxford: Leonard Lichfield, 1644).

Cambridge and Oxford University were specially provided for, the powers otherwise vested by the statute in the head local official being devolved on the Vice-Chancellor of the respective universities. It is not clear why the Oxford Order was issued by “the Lords and others His Majesties Commissioners,” and not by the Vice-Chancellor of the university, the only reference in the Oxford Order itself being to the effect that the Lords and others had been “intrusted and authorized by His Majesty ... for, and concerning, the safety, preservation, and well Ordering of this University ... in His Majesties absence.” The Lords then went on to instruct the Vice-Chancellor to execute the statute, despite the discretionary powers vested in the Vice-Chancellor by the statute in the first instance. In any event, however, through the issuance of the Oxford Order the Lords recognized the continued validity of King James’s Act.

The Oxford Order is interesting in other respects, too. First, there was at least tacit recognition by the Lords that King James’s Act was not customarily observed, at least in Oxford, although the Lords are not specific as to whether the non-observance arose on the part of the responsible administrator of the University, or whether it was minor officials (like watchmen and examiners) and quarantined persons who ignored the provisions of the statute. Because the Lords appear to have been entrusted by King Charles to see to the safety of the people of Oxford, despite the clear statement in King James’s Act that the Vice-Chancellor had responsibility for the administration of the statute in his discretion, it seems likely that the Lords were referring to administrative neglect when they recited that “the neglect of the same Law, hath been, and may be, in probability, an occasion of the increase of [the present infection].” Secondly, the Lords

implored all those who were unfortunate enough to have been infected with the plague to obey the law and any orders issued pursuant to the statute, and reminded those tempted to disobey of the severity of the penalty and the swiftness of its execution. In both of these aspects of the Oxford Order, it is relatively clear that the law, as it stood in 1644, remained as it was in 1603, and that there were important difficulties in ensuring both administrative reliance on the law and in compelling social conformity to its provisions.

Local officials continued to refer to King James's Act as authoritative when the Great Plague of 1665 began to force them to make further orders in an attempt to control the spread of the disease. If the plague of 1603 had necessitated the imposition of emergency measures because of its unparalleled severity, then it is remarkable that the plague of 1665 did not lead to even further legal innovations. Estimates of the extent of the devastation caused by the disease vary from source to source. The official bills of mortality, consolidated for the entire year, show some 68,000 deaths attributed to the disease,¹² but, at least according to David Hume, the bills of mortality were notorious for under-estimating the actual numbers of dead, especially in times of epidemic. According to Hume, not less than 90,000 residents of London were taken during 1665,¹³ and in the Journal Defoe suggested that :

A dreadful plague in London was
in the year sixty-five,
which swept an hundred thousand souls

¹²Graunt, Reflections on the Weekly Bills of Mortality, p. 2.

¹³Hume, The History of England, Volume VI, p. 200.

away; yet I alive!¹⁴

Whatever the actual death toll, it is clear that the plague took at least twice as many, and perhaps more than three times the number, as had the epidemic of 1603. Instead of simply delaying the opening of Parliament in the manner of King James in 1603, King Charles II actually moved his Court to Oxford, away from the most severe outbreak, and summoned Parliament there.¹⁵

The Order issued by the Council at London (the “London Order”) is a detailed, comprehensive example of the type of order that might be issued by a local authority pursuant to the provisions of King James’s Act.¹⁶ Despite the fact that the statute apparently vested the required responsibility in the head local official (or perhaps in two such officials, given the ambiguity referred to above), the London Order of 1665 was issued jointly by the “Lord Major” [sic] and Aldermen, perhaps in an attempt to distribute responsibility, perhaps in an attempt to underscore the urgency of the situation and the need for what would prove to be severe legal measures. King James’s Act is recited specifically as the authority under which the London Order was issued, further testament to the continued reliance on the legislation by local officials. The first purpose of King James’s Act, the raising of revenue for relief of the poor through the taxation system, was

¹⁴Defoe, Journal, p. 211.

¹⁵Hume, The History of England, Volume VI, p. 200.

¹⁶“Orders Conceived and published by the Lord Major and Aldermen of the City of London, concerning the infection of the Plague,” (London: James Flesher, Printer to the Honourable City of London, 1665). The London Order is reproduced, as well, at pp. 33-41 of Defoe, Journal.

not mentioned directly by the Mayor and Aldermen in their order, suggesting only that the responsible officials of the City of London probably felt that they had sufficient means to deliver appropriate services to the infected poor and to enforce the more restrictive and punitive aspects of the London Order without the need for a special tax.

However, the second function of King James's Act, the establishment of a system of domestic quarantine, was covered in detail in the London Order, and it is to that detail that we now turn. It is important that we consider these provisions carefully; they form the focus of comment for both the literature arising from the plague year itself, to be reviewed in chapter four, and for Defoe's Journal, to be reviewed in chapter six. In addition, it is in the context of the legal regime of 1665 that the reforms of 1721-1722 were measured, primarily by Mead in his A Discourse on the Plague, but also by Defoe, at least implicitly, in Preparations. Therefore, to appreciate the perspective offered by the various literatures to be reviewed in later chapters, we must consider the London Order with some care.

The London Order is divided into four main sections. First, the officials provided "Orders for Health," by which various subordinate offices were established and the duties of those offices outlined. Secondly, there were "Orders concerning infected Houses, and Persons sick of the Plague," and it is here that we find provisions for quarantine and burial of the dead. Thirdly, the officials made "Orders for cleansing and keeping of the Streets sweet," a series of regulations designed to contribute to the maintenance of public areas. And fourthly, the officials made an attempt to deal with vagrancy through "Orders concerning loose Persons and idle Assemblies." Each of these types of order will be

considered in turn.

In the first part of the London Order, the officials made provision for the appointment by the Alderman or his deputy of persons to act as “examiners” in every parish in London. It was intended that the office of examiner would rotate among deserving residents of the parish, on the basis of the resident’s character and credit. The appointment was to last not less than two months, after which the examiner would be replaced. It was likely that certain residents expressed reluctance to serve; the London Order provided that those who refused would be committed to prison until they agreed to assume their duties. It is not surprising that the aldermen encountered difficulty in recruiting examiners, for the examiner functioned as the first line of official inquiry into the health of parishioners. It was the examiner’s responsibility to stay abreast of developments in every house in the examiner’s district, including the names of infected persons and the nature of their infection. If the examiner were unsure of the cause of illness in any particular case, then the examiner had the authority to restrict access to the house in question until the evidence were clearer. The examiner also had the responsibility to order a house shut up if it were found to be infected with the plague, and to report to the Alderman if the constable in the area refused or neglected assistance. To the extent, then, that the quarantine measures were viewed as overly restrictive or invasive by the ordinary residents of the parish, it was the examiner who had the unpleasant task of deciding the applicability of those measures and assuming responsibility for their enforcement. As we shall see when we consider the Journal in detail below in chapter six, the office of examiner carried with it significant personal

pressure, often tearing the appointee between his official responsibility for the apparent public good and his sympathy for the individual predicaments of those who suffered through confinement.

The London Order also provided for the appointment of watchmen to assist in policing those houses that were shut up on order of the examiner. Each house was to have a night-watchman and a day-watchman, and their primary responsibility was to ensure that there was no traffic in or out of the condemned house during their watch. While the London Order does not specify the punishment to be suffered by a watchman who neglected his duty in this regard, it does say that it would be “severe.” Again, as we shall see to some extent in chapter four, and to a greater extent in chapter six, the watchmen suffered greatly at the hands of those they were directed to guard, both through the punishment the watchmen endured for allowing the sick to escape quarantine (wilfully or not), and through direct attacks in which they were beaten and overcome by those desperate to escape their confinement. This is so, despite the fact that the watchmen were often the only contact with the outside world for those restricted to the house; it was part of the watchmen’s duties to see to every need of those inside, including the delivery of messages and the provision of food and other necessities. In Preparations, Defoe goes to some length to describe the relationship that sometimes developed between a watchman and his charges, and we will consider that relationship in some detail in chapter six. But in any event, the watchmen struggled, as did the examiners, with the dual character of their position, sworn as they were to uphold the commands and orders of the local authority, but sympathetic to the sufferings of the unfortunate wards inside.

There were a number of medical or quasi-medical officials established or referred to in the London Order as well, referred to as “searchers,” “chirurgions” and “nurse-keepers.” Searchers, women in each case, were responsible to examine the bodies of the deceased to determine, as best as they could, whether death had resulted from the plague or not. It appears from the London Order that the searchers were to report to responsible physicians, although the London Order does not make provision for the official appointment of the superiors. The physicians had ultimate authority for appointing, disciplining and dismissing the searchers, and were vested with the responsibility for ensuring that each searcher was of “honest reputation” and “fitly qualified for that employment.” The office of searcher carried with it rather severe restrictions on other activities, too, the searcher being barred completely during the course of the plague from using public facilities, from working in the market areas, from employment as a laundress, and from engaging in any other “common imployment whatsoever.” Appointment as a searcher, it appears, carried with it a sentence of its own, a supposed special exposure to the disease coupled with limitations on normal life over and above what might be anticipated for ordinary women, even in such times of epidemic.

Oddly enough, the London Order goes on to allow for the appointment of surgeons to oversee the duties of the searchers, it being made clear in the London Order that the searchers were not to be trusted to make accurate and honest reports of the epidemic. Surgeons were to take office “for the better assistance of the Searchers, for as much as there hath been heretofore great abuse in misreporting the Disease, to the further spreading of the Infection,” a relatively direct official statement of the unreliability of the

searchers in their position. At the inspection of each body, both a searcher and a surgeon were to be present, leading to the obvious question of the need for the searcher at all when the information they provided was apparently unreliable, at least on occasions frequent enough to make their lot suspect in the way in which the London Order implies. Perhaps, of course, the Mayor and aldermen felt the need for two officials at the inspection of every body simply for the purposes of verification and corroboration, surgeons being no more trustworthy than searchers in their reporting, but the London Order is fairly clear in establishing that it was the surgeons who were to act as the official eyes in determining the cause of death.

The London Order specifically provides for payment of the surgeons, at the rate of twelve pence for each body searched. It is plainly stated that the fee is to be paid out of the estate of the body searched, or, if necessary, by the Parish, and it was intended to compensate the surgeons for their being compelled to devote themselves to working on plague victims at the expense of their work with other, more usual, medical problems. There is no like provision for the searchers, appointees who were likewise forced to work towards control of the epidemic at the cost of other means of employment and at the expense of various of their liberties enjoyed in less urgent times. It is true that the surgeons were likely accustomed to carrying on something like a professional medical practice, and that conscription in aid of plague resistance interfered with their ability to pursue that vocation in the ordinary course. But it is likewise true that the lives of the searchers were similarly disrupted, and it appears that they were not compensated for that disruption in a comparable way.

Apart from the abuse suffered by the watchmen at the hands of their charges, the minor officials appointed pursuant to the London Order were singled out for special identification and, because of their duties, were prevented from engaging in otherwise ordinary activities. The London Order provides:

That precise order be taken that the Searchers, Chirurgions, Keepers and Buriers are not to pass the streets without holding a red Rod or Wand of three foot in length in their hands, open and evident to be seen, and are not to goe into any other house then [sic] into their own, or into that whereunto they are directed or sent for, but to forbear and abstain from company, especially when they have been lately used in any such business or attendance.

Clearly, then, employment as a minor official during the Great Plague carried with it certain restrictions on one's liberties, and set those appointed apart from their fellow citizens in obvious and unmistakeable ways. The burden of their responsibility, the fear of infection, the isolation from their friends and neighbours - all must have contributed to a lonely and horrible existence during the months after issuance of the London Order.

This first section of the London Order closed with a reference to "Nurse-keepers," although there is no indication whether or not these attendants were official appointees. The London Order was intended to keep the nurses in an infected house for a period of twenty-eight days after the death of the plague victim under the nurses's charge, and this result was ensured by ordering the quarantine of any house to which the nurse removed before the expiration of that period.

While King James's Act ostensibly was to provide some means for the "charitable relief of the poor," it is noteworthy that, in London at least, the minor officials appointed by virtue of the statute and pursuant to the London Order were simply to

control the movement of the population and to isolate from contact with the healthy both the sick and those who communicated with the sick. Unless the “nurse-keepers” were official appointees (and there is nothing in the London Order to suggest that they were), then the examiners, watchmen, searchers and surgeons were simply to assist the local authority in the enforcement of quarantine, and not to attend to the comfort and treatment of those stricken with the disease. The watchmen, of course, were to “do such further Offices as the sick House shall need and require,” but this can hardly be interpreted as ministering to the sick in a time of such horrible, widespread disease. As we shall see in chapter four, some physicians and clergy did do what they could to attend to those stricken with the plague, but the official response to the crisis, at least as the London Order reveals it through a description of the duties of minor officials, seems to have focused on the sequestration in their homes of infected families, with little attention to the relief of their sufferings.

Details of the quarantine itself are described in the second part of the London Order, titled “Orders concerning infected Houses, and Persons sick of the Plague,” and this part confirms that the official position was to attempt to control the disease through isolating, rather than treating, those families and others who suffered from the disease. Primary responsibility for reporting the disease lay with the master of the house, it being incumbent on the head of the household to report any sickness to the examiner within two hours of his becoming aware of it. The consequences of such a report were immediate. The family could expect a quick visit from an examiner, searcher or surgeon, and if the diagnosis were plague, then all inhabitants of the house, the healthy and the sick, were

ordered to remain in the house for a full month. The quarantine remained in effect whether the sick died or recovered, and would only be lifted after the survivors underwent a programme of the administration of “due Preservatives.”

The house, too, as well as its inhabitants, was marked for special treatment. As soon as it was shut up, the house was marked with a foot-long red cross, in the middle of the door, above which were to be painted the words “Lord have Mercy upon us.” Outside the door sat the watchman, invested with the responsibility and authority described earlier in the London Order. In this second part, there is a clearer statement of the watchman’s duties in attending to the infected house, it being made clear that he was to ensure that the inhabitants were supplied with necessities during their quarantine. The cost of such necessities was to be borne by the residents, but the London Order does allow that, in the case of impecuniosity, the watchman might appeal to the parish, the “common charge,” for assistance. This is one of only two references in the London Order¹⁷ to the possibility that the aspects of King James’s Act designed to relieve the poor from their predicament actually had real potential during the Great Plague of 1665. Because all inhabitants of the house were shut up for the total period of the quarantine, a full one month after every person in the house were demonstrated to be free of the infection, it is likely that funds necessary for the purchase of provisions ran very low, such that even those families who, prior to the quarantine, held employment sufficient to supply their needs, must have found it difficult to purchase the food, fuel and “preservatives” required for the

¹⁷The second reference is mentioned below at page 93.

establishment and maintenance of good health. The London Order seemed to contemplate this likelihood in providing for the purchase of necessities out of the public purse.

Even though King James's Act did not specifically provide for exceptions to the isolation imposed through quarantine, the London Order did raise the possibility that, in extremely limited circumstances, at least the healthy members of a quarantined family might be excused from the full, month-long restrictions. But this exception was only available to those families who were well-off enough to own more than one house, in which event they were free to choose to separate the family, moving either the sick or the healthy members to the alternate location. In that event, the healthy need only remain quarantined for a period of one week, rather than four, and after that were free to come and go as they pleased, though not to visit their sick family members at the other location. There was a clear legal advantage, then, in possessing the wealth required to maintain two houses, though why it was felt by the Mayor and aldermen that a lesser quarantine was appropriate for those removed to the alternate location remains unclear.

There were other important legal measures provided in this second part of the London Order. Two separate clauses directed the way in which linens and bedding and clothing were to be controlled, once it was found that the plague had visited a house. The examiner was responsible for "airing with fire and such perfumes as are requisite" all linens used in the infected house, presumably (though not clearly) after the quarantine had run its course. And shopkeepers were prevented from trading in "infected stuff," the penalty for breach of which was imprisonment. This ban on domestic trade in linens

from any particular house continued for two months after the quarantine on that house was lifted, and, in addition to imprisonment, traders who violated the ban were liable to have their houses shut up and quarantined for a minimum of twenty days.

The London Order directed strict measures, too, for the burial of the dead. Primarily, these provisions amounted to a suspension of ordinary burial practices. No neighbours or friends were allowed to attend, or to visit the family. The corpse was not permitted at or in any Church during ordinary services, like times of “Common-Prayer, Sermon, or Lecture,” and children were barred from the burial ceremony absolutely. Burials took place exclusively at night. As a result, quarantined families were not simply isolated in fact from ordinary discourse, but were isolated too in their grief, even to the point where customs and practices that undoubtedly gave comfort to grieving survivors in ordinary times were prohibited in the very circumstances when they might have served the greatest purpose.

The third and fourth parts of the London Order were designed, for the most part, to control activity outside of quarantined houses. In the third part, householders were made responsible for cleaning the street in front of their house on a daily basis, and “rakers,” who announced their approach by the blowing of a horn, were dispatched to collect “the sweeping and filth of houses” every day. There were provisions against the sale of “stinking Fish, or unwholesome Flesh, or musty Corn, or other corrupt fruits,” and public houses were to be regularly inspected for “musty and unwholesome Cask.” A prohibition was made against stray animals of every kind, from tame pigeons to hogs, and the London Order actually made reference to the official appointment of “Dog-killers” to

do away with impounded animals.

The final part of the London Order provided regulations concerning vagrancy, public gatherings and drunkenness. Constables were empowered to keep the streets of the city free of “Rogues and wandering Beggars that swarm in every place,” and to quickly administer the penalty for vagrancy provided by law. That penalty, by virtue of the statute 39 Eliz. I, c. 4, was a public whipping and expulsion from the city. Any activity that resulted in the assembly of a crowd was prohibited too, including probably all forms of public entertainment. Mentioned specifically were “Playes, Bear-baitings, Games, Singing of Ballads, Buckler-play;” of particular concern were “publick feasting ... and Dinners at Taverns, Alehouses, and other places of common entertainment.” The promoters of these festivities were directed to re-assign their funds “for the benefit and relief of the poor visited with the infection,” and this is the second and final reference in the London Order to the charitable purposes of King James’s Act, the act under which the Mayor and aldermen derived the authority to issue the London Order in the first instance. Finally, “disorderly Tipling” was to be “severely looked unto, as the common Sin of this time, and greatest occasion of dispersing the Plague.” Public houses were directed to close at nine o’clock in the evening, the penalty for breach of which was to be established and administered “according to the ancient Law and custome of this City.”

By virtue of the London Order, then, ordinary social intercourse was at an end. Burial ceremonies, church gatherings, neighbourly visits, musical performances, animal husbandry, street games - all were either prohibited or altered and strictly controlled under the auspices of the London Order. While it is obvious that the plague itself must

have caused incalculable suffering in London, the strict application of the law as it stood in 1665 could only have increased that suffering through the disruption of virtually every remaining aspect of a semblance of ordinary life. Whatever value Londoners placed on the ability to live their ordinary lives, their day-to-day family and social lives, free of interference from without, must have been severely tested by the London Order, a regulation likely made by the responsible officials with the best of intentions, but a regulation made as well with little concern for the relief of suffering and grieving citizens. This tension, between the supposed public good to be achieved through a strict law of quarantine on the one hand, and the inevitable interference in the private lives of ordinary people on the other, occupied a good deal of Daniel Defoe's attention at least, as we shall see below in chapters five and six.

Of course, the breadth of the London Order was not unique to the City. As Defoe tells us,¹⁸ the same method of social control was employed in neighbouring parishes and hamlets too, by justices of the peace and other responsible officials. Feasting, carnivals and other occasions for public gatherings in outlying districts were singled out for special proclamations by the King; in the period from 14 June 1665 to 6 August 1666, Royal Proclamations were issued to prohibit Barnwell-Fair near Cambridge (14 June 1665),¹⁹

¹⁸Defoe, Journal, p. 41.

¹⁹"Proclamation by the King Prohibiting the keeping of Barnwell-Fair near Cambridge," issued 14 June 1665, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1665).

St. James Fair at Bristol (23 June 1665),²⁰ Bartholomew Fair and Sturbridge Fair, near Smithfield and Cambridge respectively (7 August 1665),²¹ Holden Fair in the County of York (27 August 1665),²² the Fair of Wanting in the County of Berks (21 September 1665),²³ St. Paul's Fair at Bristol (21 December 1665),²⁴ Barnwell-Fair again (25 May 1666),²⁵ and Bartholomew Fair and Sturbridge Fair (6 August 1666).²⁶ The force of legal authority was used to re-arrange life in the country as well as in the city, and even in

²⁰"Proclamation by the King Prohibiting the keeping of St. James Fair at Bristol," issued 23 June 1665, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1665).

²¹"Proclamation by the King Prohibiting the keeping of Bartholomew Fair and Sturbridge Fair," issued 7 August 1665, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1665).

²²"Proclamation by the King Prohibiting the keeping of Holden Fair in the County of York," issued 27 August 1665, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1665).

²³"Proclamation by the King Prohibiting the keeping of the Fair of Wanting in the County of Berks," issued 21 September 1665, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1665).

²⁴"Proclamation by the King Prohibiting the keeping of St. Paul's Fair at Bristol," issued 21 December 1665, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1665).

²⁵"Proclamation by the King Prohibiting the keeping of Barnwell-Fair near Cambridge," issued 25 May 1666, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1666).

²⁶"Proclamation by the King Prohibiting the keeping of Bartholomew Fair and Sturbridge Fair," issued 6 August 1666, (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1666).

towns, like Cambridge, where the plague had not yet arrived.²⁷

Responsible officials continued to feel threatened by the plague in the spring of 1666, as can be seen by the Proclamations of the King to which reference has just been made, and as can be seen by orders issued by the Privy Council in May of 1666 (the “Privy Council Order”).²⁸ In large measure, the Privy Council Order repeated the commands of the London Order, but directed all local officials to adopt and promulgate these provisions in their separate jurisdictions. There is little doubt, then, that had the plague returned in the years following 1665, the severity of the measures represented in the London Order would have been repeated across England, at the special command of Charles II.

The Privy Council Order did make two noteworthy changes to the London Order, however. First, it directed the local establishment of pest-houses, places to which those diagnosed with the plague could be moved so as to spare other family members from exposure to the infection. The family’s house would still be shut up in manner similar to that directed by the London Order, but at least some official recognition had been made of the dangers and inhumanity of confining the healthy and the sick in the same location. Secondly, the Privy Council Order made specific reference to the special taxing

²⁷In the Proclamation referred to above at chapter 3, p. 94, note 19, the King made it clear that the prohibition of the Barnwell-Fair was a preventive measure, to preserve the town and University of Cambridge “which by Gods mercy are now clear and free.”

²⁸“Privy Council Rules and Orders to be observed by all Justices of the Peace, Mayors, Bayliffs, and other officers, for the prevention of the spreading of the infection of the Plague,” issued in May 1666 (London: John Bill and Christopher Barker, Printers to the Kings most Excellent Majesty, 1666).

provisions of King James's Act, underscoring the assumption that the statute remained in force, and emphasizing the responsibility that neighbouring parishes were to assume in contributing to the relief of the infected poor in towns where revenues were not sufficient to manage without help. In fact, the Privy Council Order appears to remove the discretion in this regard that was vested in county officials by King James's Act; section 14 of the Privy Council Order is mandatory in its terms, a recognition that the plague was not simply a local, private and particular concern but one which affected everyone. The relief of the "Visited Poor" was acknowledged as a communal responsibility, "want and nastiness being great occasions of the Infection," and the community was extended beyond the boundaries of any particular town.

Continuation of King James's Act, and the Passage of Queen Anne's Act

King James's Act, then, as it was acted on from time to time through measures like the Oxford Order, the London Order and the Privy Council Order, remained the law of quarantine in England from 1603 to 1666 at least, there being no legislative amendment, and there being plenty of evidence to suggest that the Privy Council and local officials alike considered the statute extant and authoritative during the Great Plague of 1665 and after. In fact, the law of quarantine, as represented through King James's Act, remained complete and unaltered until at least 1711, when, with the passage of 9 Ann., c. 2 ("Queen Anne's Act"), Parliament again directed its attention to measures designed to prevent the spread of plague. Strictly speaking, Queen Anne's Act did not amend King James's Act; questions of domestic quarantine and the special taxing powers were not mentioned in the new statute. Rather, Queen Anne's Act introduced another

important aspect of the law of quarantine, that is, the quarantine of ships arriving in England, having sailed from foreign ports infected with the plague.

According to recitals in Queen Anne's Act, the Queen had been issuing orders on a random basis for about two years, requiring this ship or that to perform quarantine before off-loading cargo or crew. Apparently, however, it was felt that an act of Parliament would make administration of the law more expeditious. There were three broad aspects to the new statute. First, and most obviously, ships arriving from infected ports were to perform quarantine at the direction of the Queen. The place and duration of the quarantine, it appears, were to be left to the Queen's discretion. Secondly, movement of people back and forth between ship and shore was prohibited; anyone leaving the ship would be compelled to return, and anyone visiting the ship was required to stay. The responsibility for policing this part of Queen Anne's Act was left to the Master of the vessel, and the failure to carry out these duties properly meant forfeiture of the ship to the Queen. Officials on shore were directed to seize any small boats belonging to the ship, ensuring that the ship would remain isolated during the period of quarantine. Thirdly, Queen Anne's Act required that, after completion of quarantine, the ship's cargo was to be "open'd and air'd," although the statute does not specify the site or duration.

Over the course of just more than one hundred years, the English Parliament developed a relatively comprehensive law of quarantine designed to address what must have been one of the most serious social issues of the seventeenth century. It is not clear why, prior to 1603, officials had responded to the continual threat of plague in an apparently *ad hoc*, unsystematic way, but it seems relatively certain that, after that date,

Parliament and local authorities began to employ their law-making powers with a view toward the collective good in preventing the spread of epidemic disease, with a view toward social control and public responsibility. Viewed retrospectively, it seems that law-makers had little choice but to enact a series of harsh, restrictive measures, especially given what we now know to be the errors in contemporary medical opinions on the cause, diagnosis and treatment of the plague. But viewed from the perspective of writers, clergy and medical professionals of 1665, the choices exercised in making law were not so easily supported, and it is to the literature left by these authors that we now turn.

CHAPTER FOUR

THE LAW OF QUARANTINE AND THE LITERATURE OF c.1665

The Great Plague of 1665 produced an abundance of literature, written primarily by clerics and medical professionals interested in investigating the sources and symptoms of, and the treatments and preventions for the plague. Some thirty-two works (thirty-three, if we include John Graunt's Reflections on the Weekly Bills of Mortality¹) have been reviewed for this chapter, all produced in or shortly after 1665, and sixteen of those (or seventeen, including Graunt's work) offer some comment on the legal regime in place to deal with the epidemic, as described above in chapter three.² It is not surprising that none of the works reviewed is fictional, and none seem to have been written by people whose principal occupation was writing. Fiction, of course, though available to writers in the 1660's and 1670's through drama, historical epics and heroic poetry, was only just beginning to be shaped into what we now recognize as the modern novel, and for authors who wrote under the urgency of the plague and with other preoccupations, like preaching

¹Referred to above, chapter three, p. 69, note 2.

²Sixteen of the works reviewed for this chapter of the thesis offer no comment on the law, and they will not be referred to in the text. These works are listed separately in the Supplementary Bibliography below at pp. 219-220. There is passing reference to the law in Volumes IV and V of The Diary of Samuel Pepys, Henry B. Wheatley (ed.), (London: George Bell & Sons, 1897), but the references are inconsequential and of little interest. See, for example, pp. 44 and 65 of Volume V. Pepys's work is included with the rest in the Supplementary Bibliography, and will not be referred to again. Works other than those listed in the Supplementary Bibliography will be referred to in this chapter, and are listed in the Bibliography in the ordinary course.

or ministering to the sick, simple and direct appeals seemed the popular option.³

But a reference to these various treatises, to help us identify the extent to which literature might assist in defining the relationship between the law of quarantine and the social experience of the law, is consistent with the definition of literature provided in the Introduction to this thesis, and offers us an expanded understanding of the law, one not available simply by reviewing the various statutes, orders and proclamations referred to above in chapter three. These works offer us a particular type of historical evidence about the social impact of the law, a particular perspective from the intellectuals of the period who, despite their distance from the actual law-making process, had firm opinions on the effectiveness of the law and first-hand experience with the ordinary people whose lives were affected most directly during the plague.

It is admitted, of course, that the voices we hear in the literature emerging from the Great Plague were privileged voices. Like Defoe, the authors of this literature were well-educated, intelligent and successful by contemporary standards. None, it appears, struggled with the poverty that made the experience of the epidemic particularly difficult for large numbers of the London population, and none, predictably enough, are women. But their voices are quite distinct from the official voices belonging to those responsible for the design, passage and enforcement of the law, and that fact makes their record valuable in our attempt to expand on the history of the law that emerges through a review

³See Michael McKeon, The Origins of the English Novel 1600-1740 (Baltimore: The Johns Hopkins University Press, 1987) for a discussion of the emergence of the novel during this period.

of doctrine. Even though the literature of the 1660's concerning the plague emerged almost thirty years prior to the relaxation of the laws of censorship with the passage of the Licensing Act of 1695, in some respects, especially where authors criticize the terms of the law and the manner of its enforcement, it stands as an early example of the development of the "literary public sphere" referred to by Jürgen Habermas, though perhaps without the direct political implications he describes.⁴

In fact, reliance on the clerics and medical professionals, whose work was reviewed for this chapter, is less dangerous than reliance on the work of Defoe, primarily because, with one exception, the authors do not appear to have had particular political affiliation, and do not seem to express anything like a personal stake in the way in which the law developed. The opinions they expressed, therefore, are not subject to the criticism that they simply mirror the dominant political attitudes, although some of the authors reviewed are sympathetic to the prevailing legal regime. Rather, there is no apparent reason to doubt the sincerity of appeals made in this literature for relief of the poor, for example, or to doubt the genuineness of complaints about the inhumanity of the shutting-up of houses.

The one exception may be George Wither's book-length poem, A Memorandum to London, published in 1665.⁵ Wither wrote his work while confined in the Tower of

⁴Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Cambridge, MA.: The MIT Press, 1989). See especially pp. 57-67 for Habermas's discussion of the political use of the press in the 1690's.

⁵George Wither, A Memorandum to London (London: 1665). Printed privately by the author.

London, and implored the responsible officials to ensure that they enforced the law with circumspection during times of plague, primarily, so he suggested, to guarantee that those who contemplated breaking the law in serious ways might remember that the law's severity was reserved especially for them.

To that intent, (so far forth as it shall
Concern this City) speedily let all
Who are in power, with prudence and in love
The strength of their Authority improve
Them to indulge and keep from violence,
Whose conversations are without offence;
And, by their executing of the Law
In purity, strive to keep those in awe
Who either shall maliciously transgress
(By an infringement of the publick peace)
Or wilfully commit, abet or teach
What, of the Moral Law may be a breach.⁶

Though not apparently politically aligned, Wither did have some special reason to comment unfavourably on the indiscriminate way in which he considered the law to be enforced, primarily, it is safe to assume, because of his own confinement. His plea is nonetheless interesting despite this personal experience, because it highlights the way in which the authority of the law can be undermined through its very enforcement, especially where that enforcement is strict and uncompromising as among offenders of various degree. But this is where Wither's comment on the law ends, suggesting that, despite the author's personal predicament, his poem poses little threat to the argument that the body of literature produced during and shortly after 1665 is relatively non-partisan.

⁶Ibid., pp. 10-11.

This does not mean, however, that the literature of the Great Plague is free of bias. Each of the authors brought to their writing an ideological or professional predisposition, whether that be the inflexibility of seventeenth century theology or the emerging professionalism of medicine and the related “arts.” It was in the service of their particular intellectual affiliation that the authors advanced their arguments for or against the design and implementation of the prevailing law which, from the perspectives of both theology and medicine, could only have been seen as the weak human response to a powerful metaphysical or natural force. Despite its weakness in dealing with the plague as either a divinely ordained or incomparable natural phenomenon, the law was found deserving of comment, primarily because its application did result in profound implications for ordinary life. The bias demonstrated in this body of literature, then, is quite different from the bias which we might suspect of Defoe, arising not from particular political sympathies or legal entanglements, but rather from competing, or ostensibly unrelated, intellectual commitments. As a result, it is more certain that reliance on the voices of the authors of 1665 and shortly after expands the range of historical voices we might encounter in a purely conventional legal-historical account of the period.

The literature produced around the time of the Great Plague can conveniently be divided into two smaller groups. One consisted of those either supportive of the system of legal regulation or indifferent as to its effects. The other was comprised of those who insisted that for one reason or another the legal regime was misguided. The two groups are not evenly balanced; ten authors are either supportive of or indifferent to the law, and only five authors, with more or less vehemence, are critical. As will be seen, clerics

tended to be indifferent to the law, arguing in some cases that a “higher law” actually controlled the plague and life with the plague, rendering legislative and regulatory attempts at control impotent, or at least superfluous. In some examples, this indifference to the temporal actually resulted in *de facto* support for the law, especially when clerics considered the Christian basis for charitable inter-personal relationships, love for one’s fellow human beings, and so on. At the same time, however, medical practitioners tended to be more critical of the legal regime, arguing from their experience with the sick that various of the legal measures in place either were ineffective and irrelevant, and therefore constituted an unnecessary interference in the lives of the sick, or were actually a contributing factor in the severity of the disease, an exacerbation of an already critical and dangerous situation.

Support for, or Indifference to, the Law

Of those authors indifferent to or supportive of the law, I want to begin with William Austin, “of Grayes-Inne,”⁷ apparently the only lawyer among our group of thirty-two writers. Austin’s poem “An Anatomy of the Pestilence” was published in 1666, and, while not commenting directly on the law of quarantine, it did give some indication of the extent to which ordinary legal processes and practices were disrupted by the epidemic.

The Law dispersed sundry wayes, invites,
As did the Infant Gospel, Proselytes.
Each Inns of Court, shut fast up, seems to you

⁷William Austin, The Anatomy of the Pestilence (London: Nath. Brooke, 1666). Austin is identified as a lawyer on the title page.

Mysterious as Synagogue of Jew.

...

If any quarrels betwixt neighbours breed,
Lawyer no more then Conjuror he'l need:
For in a short time he may lay his life,
One or both parties die, so end the strife.

...

The Court disbands, as if the rule of State
Were like some long worn fashion, out of date.⁸

As Austin tells us, during the depths of the plague the Courts were moved to remote locations, and this aspect of the law lost much of its presence in ordinary life. Scenes that must have been familiar to Londoners, like busy courtrooms and law chambers, symbols of the law's presence and authority, were now quiet and mysterious. Lawyers were no more relevant to ordinary citizens than conjurers, witch-doctors, the "mountebanks" held up to such ridicule by Defoe in the Journal.⁹ People turned their attention, suggests Austin, to matters of more urgency than the law, matters of immediate life and death, and the manifestation of state rule represented through the institutions of the law was cast aside, so he reports, like a discarded fad.

⁸Ibid., p. 13.

⁹At p. 27 of the Journal, Defoe said that the people were so desperate for advice and assistance that:

...they ran to conjurers and witches, and all sorts of deceivers, to know what should become of them (who fed their fears, and kept them always alarmed and awake on purpose to delude them and pick their pockets), so they were as mad upon their running after quacks and mountebanks, and every practising old woman, for medicines and remedies...

Despite Austin's tone of regret that the authority of the law was supplanted by the compelling force of the plague, it is nevertheless true that the law of quarantine provided a convincing model of regulatory intervention for those authors with particular sympathies for the rule of law in general. Such was the case with Richard Kephale, a theologian who published his Medela Pestilentiae in 1665.¹⁰ Kephale's book was arranged in dialogic style, a series of supposed common and spontaneous questions about the plague, followed in each case by Kephale's response. In the very way in which Kephale frames certain of his questions, it is evident that his theology suggested a direct connection between legitimate temporal law and God's intervention in human affairs:

Quest.: What good orders God hath been pleased to blesse, either for the preventing, or, allaying of the Plague, in the fatal years, 1603, 1609, 1625, 1636, and are fit to bee observed by all good people at this time[?]¹¹

There is nothing in Kephale's work to suggest that the "Orders" to which he refers are "good" and "are fit to bee observed by all good people at this time" except by virtue of their connection to God's blessing. He mentions nothing about their effectiveness in dealing with the plague, in the question mentioning only that they were designed to prevent or allay the disease. While, as we shall see, there was plenty of opinion, among medical practitioners at least, that the law's effectiveness was at minimum suspect, or perhaps even harmful, Kephale seems free to endorse the law simply because of its connection to God, irrespective of its impact. He follows the question quoted above with

¹⁰Richard Kephale, Medela Pestilentiae (London: Samuel Speed, 1665).

¹¹Ibid., p. 8.

an endorsement of every aspect of the London Order, even in the most minute detail,¹² like the length of the term of office of examiners and the times of day at which watchmen's shifts would end. Kephale's response to the question, meanwhile, was framed in the context of historical precedent, appealing to his readers' combined faith in God and tradition to rally support for the law. His prose reads as if he were describing a successful legal intervention of years past, an intervention to be supported both for that apparent success and because of its divine ordination. The success of the historical legal orders, however, is merely implicit in Medela Pestilentiae, arising out of the assumptions underlying the very way in which Kephale posed his question. He offered no evidence of *actual* success or failure.

Kephale continued this rhetorical technique later in the book when he considered the advisability of fleeing into the country to escape the disease. Kephale's basic position was that escape from London was acceptable so long as honour and a lack of commitment to others permitted it,¹³ but this position ran afoul of the opinions of other contemporary theologians who argued that, because our fates are pre-determined by an interventionist God, the question of running away or remaining in London was quite irrelevant. To answer this counter-argument, Kephale simply recited the law,¹⁴ an order of James I by which those who preached the counter-argument were to be punished by

¹²Ibid., pp. 8-11.

¹³Ibid., pp. 26-27.

¹⁴Ibid., pp. 35-36.

their ecclesiastical superiors, or, in the case of lay preachers, through imprisonment. For Kephale at least, this historical legal precedent was enough to overcome his detractors. Simply by virtue of the fact that his argument was supported by historical legal precedent which, after all, had been “blessed by God,” was enough to convince Kephale of the truth of his own position without the necessity of further demonstration and proof.

So while Austin may have worried that the rule of the state through law was in jeopardy during the epidemic, the law continued to carry persuasive force, especially through references to the law of quarantine in works like Medela Pestilentiae. And Kephale was not alone in looking to the law as authority for the way to behave during the plague. Though not as detailed as Kephale in his endorsement of specific provisions of the law, William Kemp provided a stern rebuke to those who would dare defy the law of quarantine, appealing to their character as English citizens in arguing for compliance.

But would one think there should be any such in England, that in opposition to the good Orders of the Magistrates, and without any regard to their own safety, or the lives of their Families, their Children, Neighbours, Friends and Acquaintance, and all with whom they have to do or come a-near, should not refrain the conversation of the Sick, and coming into infected places, when they have no necessary occasion, that calls them thereunto.¹⁵

To behave in opposition to the law is not consistent with being English, according to Kemp, such behaviour representing not just unlawfulness, but disregard for the commitment to family and friends that helps to define good citizenship. Kemp’s ridicule of the law-breaker extended, perhaps with more vehemence, to those who disputed the

¹⁵William Kemp, A Brief Treatise of the Nature, Causes, Signes, Preservation From, and Cure of the Pestilence (London: D. Kemp, 1665), pp. 15-16.

law's effectiveness simply by arguing against it from experience. Whereas the law of quarantine was designed on the basis that the plague was infectious, and so spread from person to person, many physicians, as we shall see, argued that the assumption of communicability was in error, proven to be so by virtue of the fact that many healthy physicians and others working with the sick never actually contracted the disease themselves. Of course, this argument challenged the very efficacy of the law, and, by extension, its authority. For Kemp, such an argument defied all that it meant to be English, and was worthy of nothing but contempt and the harshest possible response. Those who advanced the position

... [were] middle-witted persons and diseased in the pate, and [were] as fit for a Pest-House as a mad man is for Bethlem; and the proper way to confute them is not with discourse or reason, but with a Padlock and a Watch-man.¹⁶

From the treatises left by Kephale and Kemp, then, a picture of the law of quarantine starts to emerge that positions commitment to the law alongside commitment to both God and country. Arguments supporting challenges to the law were overcome simply by reference to the law's tradition or its divine approbation; threats to the force of law were usurped by appeals to the ideals of citizenship, family and responsibility. For these authors at least, the effectiveness of the law seemed to carry little if any persuasive force in the argument.

It is important to note, however, that, especially in the case of Kemp, the endorsement of the legal regime was not tied to the autonomy of the law as an inherently

¹⁶Ibid., pp. 16-17.

just institution, and therefore an institution deserving of individual submission. Perhaps paradoxically, given his contempt for those who would challenge the foundations of the law, Kemp insisted that whatever suffering might result from strict obedience to the law was nothing as compared to the tortures to be experienced by those who would defy God.

What is a burning Fever to the Flames of Hell Fire? To be shut up for a Moneth in your own Habitation, or a Pest-House, and there to be vexed with the Impertinencies of Nurses, the Directions of Doctors, and Operation of Chirurgeons, for a few dayes, in comparison of being imprisoned and tormented with the Devil and his angels in the Lake of Fire and Brimstone for evermore? Is not the loss of Gods Favour more than the lack of Trade, or separation of Friends? . . . Why doth the living man complain that suffereth for his sin? Any thing on this side Hell is mercy.¹⁷

Despite the vitriolic tone of this piece, there is at least tacit acknowledgment in this quotation that aspects of the law of quarantine led to suffering of a sort among the people. But, perhaps in an appeal to Londoners' "stiff upper lip," Kemp reminded his readership that earthly torment, no matter how severe, and no matter that it arose through the application of a harsh law, could not compare to the torment that each of them deserved for their sins. The law, as such, was but part of a merciful judgment.

Kemp's insistence that the grief associated with the law of quarantine was nothing compared to the grief of eternal damnation was echoed by another preacher, Matthew Mead, in a short work published in 1667. Solomon's Prescription for the Removal of the

¹⁷Ibid., p. 5.

Pestilence¹⁸ was “humbly tendred to publick consideration”¹⁹ by Mead, and reads like the classic “hell-fire and brimstone” sermon. Even in historical perspective, Matthew Mead’s prose is stunning in its lack of compassion, perhaps the most insistent ministerial harangue of any of those works reviewed for this chapter. The red cross marked on the doors of shut-up houses, and the words “Lord have Mercy upon us” painted above the cross, for example, both directed to be placed by the London Order and both symbols of the horror and suffering endured by the residents within, were belittled by Mead as nothing compared to the actual torment to be suffered for the sins of this world.

Poor stupid sinner, then thou wast stabbing and destroying thy self,
 then thou wast seiz’d with the most deadly infection. Then had it
 been no uncharitableness nor absurdity, to have set a *Lord have
 Mercy upon me*, in Capital Letters, on thy forehead; yea, wise and
 holy men saw it there in that wickedness that broke out in thy life,
 and look’t upon thee as fitter for a Pesthouse, than converse...
 [emphasis in original]²⁰

Mead is berating those who would complain about the severity of the law in confining them in their misery, when by the sinful actions through which they contracted the disease that led to their confinement they incurred the sanction of a higher and more awful law. How is it that sinners can complain about the “uncharitableness” and “absurdity” of temporal law, when those same sinners voluntarily acted in ways that brought the full force of divine law upon them? For Mead, the sick were architects of

¹⁸Matthew Mead, Solomon’s Prescription for the Removal of the Pestilence (London, 1667). Printed privately by the author.

¹⁹Ibid., title page.

²⁰Ibid., p. 6.

their own misfortune, and were themselves absurd to complain.

Then thou wilt confess, that to be shut up from the society of men, hath nothing of dolefulness in it, compar'd to thy being shut up under the burning wrath of an unreconciled God. Then at length, whether thou wilt or no, thou shalt see sin, and cry out of sin, and acknowledge 'tis thy sin that hath ruin'd thee.²¹

Certainly for Matthew Mead, and to a lesser extent for Kemp (given his argument for a connection between Christian values like devotion to family on the one hand, and the observance of temporal law on the other), the law as represented in the London Order and other aspects of quarantine was irrelevant to the larger questions of the role of sin in bringing forth the plague and the need for reconciliation with God as the path leading to release from the suffering of which everyone complained. The indifference to the law expressed by these writers is understandable, given their perspective. They wrote from a higher moral ground than that apparently occupied by their readership, and at that higher level temporal concerns had relevance only to the extent they contributed to or detracted from the possibility of eternal salvation. As Kemp wrote, "Any thing on this side [of] Hell is mercy," meaning that nothing experienced in this life, including the force of an arguably harsh law of confinement, is worthy of complaint. Rather, even the misery of the plague and the disruptions to ordinary life imposed by the law and its consequences, were to be understood as an expression of God's mercy.

The only preacher who seemed to express sympathy for the plight of the diseased

²¹Ibid., p. 7.

was John Tabor, who published his “Reflections on the Pestilence” in 1667.²² Tabor’s theme is consistent with that of his fellow preachers to some extent, especially when he attributes the arrival of the plague to the sinful behaviour of Londoners. He compared the duty of the watchmen to the duty everyone owes to watch over their own lives.

When the just God did visit London first,
Our danger less, our fears were at the worst:
In every place men stood upon their guard,
And against Citizens kept Watch, and Ward:
Had we done so against our sins before,
Less had our danger been, our safety more.²³

It is noteworthy that Tabor believes that the plague is a visitation from a *just* God, meaning that those who suffer somehow *deserve* their plight. But it is also noteworthy that Tabor believes that the use of watchmen to try to control the disease is a weak response to the judgment of God, a remedy too late in its design and implementation. Again, the indifference to the law is significant, the author writing from an intellectual perspective that renders the intrusiveness of the law irrelevant to the larger questions to which every citizen should direct their attention.

Tabor’s poetry, however, has a sympathetic tone that distinguishes it from the work of Kemp and Matthew Mead. Despite his lofty perspective, Tabor was not beyond recognizing that aspects of the London Order and other regulation made for real suffering among the populace. He comments with compassion about the attempts to flee into the

²²John Tabor, “Reflections on the Pestilence,” in his Seasonable Thoughts in Sad Times (London: Anne Seil, 1667), pp. 11-18.

²³*Ibid.*, p. 11.

country to escape the disease, only to be turned back for failing to produce to inspectors the “certificate of health” required for travel;²⁴ he paints a grim picture of the role of the watchmen, saying “The Wardsman standing, as if he were sent / Deaths Bayliffe to arrest the house for Rent;”²⁵ he sympathises with those who, because of the law, are unable to give their loved ones a proper burial, instead compelled to allow their bodies to be “...thrown into a pit, / No Priest to say, Earth to Earth I commit.”²⁶ He recognizes that, even though the plague is God’s merciful judgment (according to his theology at least), and even though the citizens can only blame themselves for their suffering under the law imposed as a response to that judgment, their suffering is nevertheless real, causing real pain and real grief. His sanctimony is tempered by an understanding of the impact of tough legal restrictions arising in the time of the epidemic, and he seems to share in the suffering of his readers.

This is our woe, this is our great distress,
The more’s our sorrow, Is our sin the less?
‘Twere well if so, our loss would be our gain,
Nor would I doubt to see good days remain:
But this I cannot see.²⁷

If God’s judgment, even in such a horrible manifestation as the plague, must be understood as merciful, such that the suffering resulting from the legal response to the plague can only be seen as an aspect of that merciful judgment, then the indifference to

²⁴Ibid., p. 12.

²⁵Ibid., p. 14.

²⁶Ibid.

²⁷Ibid., p. 18.

the law and its consequences reflected in the works of certain of the clerics writing to the population of London is understandable. Tabor is alone in showing any real sympathy for the plight of his readers, and even that sympathy seemed to surface only in spite of the author's overriding concern about sinfulness as the source of the plague. Even William Kemp, whose appeal to his readers' ideas of what it meant to be English was an attempt to compel observance of apparently unpopular law, showed no sympathy for the suffering endured by those shut up with the sick or those who watched the bodies of their loved ones carried off on a dead-cart to a communal burial pit.

Some writers, however, were unequivocal in their endorsement of the law, at least in certain isolated aspects. It is significant that these authors were not clergy, and did not write from a perspective that demanded devotion to a moral or divine law perceived to be higher than that of Parliament and the Lord Mayor. Thomas Willis, for example, wrote clearly in support of those aspects of the London Order directed towards street-cleaning and the bans on the sale of dangerous foodstuffs.²⁸ Willis was a physician, and it is relatively clear from his book that he believed that the intervention of legal regulation could only help in preventing the spread of the disease, and possibly could assist in preventing its recurrence. Similarly, Roger Dixon, whose occupation is not disclosed in his work, argues forcefully in favour of the use of the law to prevent the inconsiderate actions of those who would spread the disease by wandering about in public. After

²⁸Thomas Willis, A Plain and Easie Method (London: W. Crook, 1691), p. 3. According to the title page, Willis's book was written in 1666 and published by W. Crook only after the death of the author.

describing to his readers how behaviour in the markets contributes to the spread of the plague, Dixon wrote the following:

It were therefore heartily to be wished, that the Right Honourable the Lord Major and the rest of the Magistrates were well informed hereof, that by their pious care the Lawes made against these Pestilent Offenders were duly put in execution, which would conduce much to the health and safety of the people, which God preserve.²⁹

It is in Dixon's work, alone among those treatises supportive of the law, that we find unequivocal endorsement of the law for its effectiveness, for the results to be obtained by a strict enforcement of the law, at least as it related to the control of trade and commerce. There is no reference, as there was in the work of Richard Kephale, to the observance of the law because of its divine ordination, or due to its connection to the traditional. For Dixon, the law was to be observed because of its results.

Another physician, Francis Herring, wrote a sweeping endorsement of the law in his Preservatives Against the Plague.³⁰ Herring offered support for the special provisions of the London Order related to burying and burial sites,³¹ and agreed with those aspects of the law that prohibited certain activities in the market.³² He insisted that the sections of the London Order related to the prohibition of "Stage-playes, Wakes or Feasts, and May-

²⁹Roger Dixon, Advice for the Poor by way of Cure (London, 1665), p. 8. Printed privately by the author.

³⁰Francis Herring, Preservatives Against the Plague (London: Thomas Pierrepont, 1665).

³¹Ibid., section B, paragraph 2. The pages of Herring's book are unnumbered, but it is divided into sections, with numbered paragraphs in section B. Paragraphs in sections A and C are not numbered.

³²Ibid., section B, paragraph 4.

pole dauncings” must be strictly observed,³³ and implored his readers to be mindful of the law with respect to the cleaning of homes and public areas.³⁴ But in an odd twist to the argument from the connection between the law and divine ordination advanced by Kephale, Herring actually suggested that it is God’s will “that there should be poore among us, that the richer sort might have fit object whereupon to exercise their mercy and compassion,”³⁵ such that provision for the poor in time of great need was simply fulfilling the obligation imposed by one’s station in life, as scripturally prescribed. According to Herring, this duty extended to the magistrates and other law-makers, all of whom were responsible to enact those measures that would most certainly see to the needs of the poor.

I would intreate the Governours of the Citie of London, and all others in the Country, with all richmen, to take speciall notice of their poore brethren, being bone of their bone, and flesh of their flesh, and, as to restraîne the idle Vagabonds, by whose wandring up and downe, the infection may well be spread and increased, so to provide for the true and honest poore miserable people, that they may be supplied with food, and convenient Physicke if they fall into sicknesse.³⁶

Despite Herring’s interesting suggestion that poor people exist so as to satisfy the need of the rich to be compassionate, a suggestion that associates him with the classic aristocratic stance on the benevolence of social superiors, it does appear that he believed in the use of

³³Ibid., section C.

³⁴Ibid., section B, paragraph 4.

³⁵Ibid., section C.

³⁶Ibid.

the law to ensure that the needs of the poor received the proper attention. It may be, of course, given that the special taxing provisions of King James's Act were not provided for in the London Order, Herring was simply imploring responsible officials to use whatever means they had at their disposal to see to their divinely ordained responsibility, but that does not detract from the observation that, in his writing at least, he believed that the law was the instrument by which that duty might be fulfilled.

Before moving on to consider those authors who were most critical of the law of quarantine, I want to mention briefly the disagreement expressed by several authors over the legal implications of fleeing the plague, especially flight by those who had some official commitment to the people. It will be remembered that, in the Journal,³⁷ Defoe expressed through his narrator considerable distress at the struggle to be suffered in deciding whether to remain in London or not. This struggle merited comment by several of the authors just mentioned, but more for the lawfulness of fleeing than for any other reason. William Kemp, for example, despite believing in the plague as the wrath of God, counselled his readers to "flee quickly, Go far, and Return slowly," and not to "pretend any scruple of conscience about the lawfulness of this Remedy."³⁸ According to Kemp, flying from the plague is no different than shutting a window against the rain, and those who would argue against such flight should be left "as diseases'd in the Pate."³⁹ Kemp's

³⁷See above, Introduction, p. 14.

³⁸Kemp, A Brief Treatise, p. 36.

³⁹*Ibid.*, p. 36.

recommendation in favour of self-preservation was echoed by other writers, like Paul Barbette, who suggested to his readers that:

Flight is very allowable to Christians, if it be consistent with their quality and condition of life; but let those that make use of this, not depend too much upon it, but remember that it is not possible to fly beyond the reach of the Omnipotent.⁴⁰

It is interesting to note that much of the same tension on this issue exists in the writing of Kemp and Barbette as we noted earlier in Defoe's Journal.⁴¹ The difference, however, lies in the concern the authors demonstrate for the lawfulness of the activity. A similar reference to the legal implication of flight is found in a lengthy work called The Plague Checkt, signed simply through the monogram "T.M."⁴² This author wrote simply:

I shall not now dispute the case concerning removing into the Country, how farr it may be lawfull, how farr not; who may be allowed to provide for their safety that way, who not; others have performed that, and for my part I have favourable and friendly thoughts concerning such as do, onely I would have them to consider, that there is no flying from God.⁴³

It is not clear whether Kemp's reference to the "lawfulness" of flight was a reference simply to some moral law, or rather to some actual statutory or other official constraint on flight for certain functionaries. T.M. does not tell us if those with official responsibility were required to stay, or if he is referring to the legal impediments to the

⁴⁰Paul Barbette, "Preservatives Against the Plague," in his Chirurgical and Anatomical Works (London: J. Darby, 1672), p. 32. The text of "Preservatives Against the Plague" begins following p. 342 of the main work, and the pages are numbered separately.

⁴¹See above, Introduction, p. 14.

⁴²T.M., The Plague Checkt (London, 1665). Printed privately by the author.

⁴³Ibid., pp. 55-56.

free movement of the sick. The only assistance we have in deciphering these references to the law is in the work of Richard Kephale, in which he comments favourably on the proclamation of King James I in which those who counselled flight were to be punished.⁴⁴ Otherwise, it appears that Kemp and T.M. must have been referring to official duty, or perhaps Christian moral duty, when they referred to the law in this context.

It is relatively clear, then, that for certain of those clerics and medical professionals writing during and shortly after the Great Plague of 1665, the law was either a divinely ordained set of regulations to be observed for the good of the city, or a time-honoured, traditional set of rules that had stood the test of a series of epidemics since the days of King James I. The effectiveness of the law in controlling the spread of the plague did not seem to carry much weight with these authors, except perhaps in the cases of Thomas Willis and Roger Dixon, whose endorsement of certain aspects of the law seemed to be connected to the law's success. William Kemp, the only writer among this first group who offered something like a wholesale endorsement of the law, as opposed to simply the scattered references of Willis and Dixon, tied his support to reasons other than effectiveness, preferring to preach on the law's tradition and connection to God in an attempt to compel obedience in his readers.

Criticism of the Law

Generally speaking, the authors who contested the wisdom of the law of quarantine were much more systematic in their description of the law, making it their

⁴⁴See above, chapter four, at pp. 108-109.

prime focus in at least sections of works devoted in the main to describing the effects of the disease. This is especially the case in the treatises of Thomas Cock,⁴⁵ William Boghurst⁴⁶ and John Gadbury,⁴⁷ each of which contained long sections complaining about the inhumanity of the shutting up of houses in particular, and of other aspects of the law as well. Cock and Boghurst are identified as physicians in the title pages of their work, and, while Gadbury does not reveal his occupation explicitly, it is relatively clear that he is a “man of God” with a strong interest and belief in astrology.

The two remaining works with relevance for this section of this chapter, those by Richard Kingston⁴⁸ and Thomas Vincent,⁴⁹ are not so thorough in their consideration of the law, and I will review them first. Both Kingston and Vincent are identified in the title pages of their books as preachers, but the sympathy they expressed for the poor during the time of the epidemic distinguishes them clearly from their colleagues Matthew Mead and William Kemp. Kingston, for example, provided his readers with a relatively dispassionate and prosaic account of the role of sin in contributing to the severity of the plague, but, interspersed throughout the otherwise dry text are short poetic verses, set

⁴⁵Thomas Cock, Hygiene, or a Discourse upon Air (London: Philem. Stephens, 1665).

⁴⁶William Boghurst, Loimographia: An Account of the Great Plague of London in the Year 1665, Joseph Frank Payne (ed.) (London: Shaw and Sons, 1894). First printed privately by the author in 1665.

⁴⁷John Gadbury, London's Deliverance Predicted (London: E. Calvert, 1665).

⁴⁸Richard Kingston, A Spiritual Receipt for Cure of the Plague (London: W.G. for Edward Brewster, 1665).

⁴⁹Thomas Vincent, God's Terrible Voice in the City (London: George Calvert and Sam. Sprint, 1671). First published in 1665.

apart through the use of italics, that describe Kingston's understanding of the terrible suffering experienced by the people. It is in these verses that Kingston mentions the law, referring to certain aspects of the London Order in an attempt to describe the disruption to ordinary life that accompanied the plague.

No Paper then over our Dores were set
 With Chambers ready furnish'd to be Let;
 But a sad *Lord have mercy upon us*, and
 A Bloody *Cross*, as fatal marks did stand
 Presaging th' noisome *Pestilence* within,
 Was come to take revenge of us for Sin.
 [emphasis in original]⁵⁰

From lines like these we can see that Kingston is not so much critical of the law *per se*; rather, he seems to associate the law of quarantine with other miserable consequences of the plague, a pragmatic precursor to the inevitable aftermath of sin. He describes the plight of the people with a tone of resignation, a sadness that, for the most part, seems to escape many of his contemporaries. And, for Kingston, the law is a contributing factor in that mood, its marks upon infected houses acting as portents of death.

Thomas Vincent's prose is perhaps the most accomplished, in the sense of its technique and beauty, of any of the works reviewed for this chapter. Like Kingston, Vincent understood that the suffering of the poor was overwhelming, despite the fact that, in the authors' assessment, they brought it on themselves through their sinful behaviour. But Vincent took his description of the impact of the plague to a different plane, concentrating in large measure on the psychological consequences of the disease and the

⁵⁰Kingston, *A Spiritual Receipt*, p. x.

attempts to control it through the law of quarantine. Certainly, at least among those preachers who left written record of their experiences during 1665, Vincent is alone in identifying and sympathising with the enormous stresses placed on ordinary people as a result of the restrictions suffered under the law, and he seems to have a particular understanding of the changes undergone in citizens' states of mind.

Now many houses are shut up where the Plague comes, and the inhabitants shut in, lest coming abroad they should spread infection. It was very dismal to behold the Red Crosses, and read in Great Letter LORD HAVE MERCY UPON US on the doors, and Watchmen standing before them with Halberds, and such a solitude about those places, and the people passing by them so gingerly, and with such fearful looks, as if they had been lined with Enemies in ambush, that waited to destroy them.⁵¹

Here we have a poetic vision of the impact of the London Order, the pall that was cast both within and without an infected house by the markings of the law, the stigma that was attached to the realization that the inmates of the house were confronting the plague and all the horrors that accompanied it. The consequences of the law were "dismal;" they stood for "solitude;" they provoked fear and thoughts of personal destruction. And here we find the only reference anywhere in the literature to the watchmen carrying arms, the "halberd," that particularly dreadful axe and spear combination that must have served the watchmen in gaining access to locked up houses, in subduing the residents in times of especial distress, and, of course, in self-protection.

Vincent's concern with the psychological impact of the plague and the legal measures that were used to confront the disease permeates his book, a preoccupation that

⁵¹Vincent, God's Terrible Voice in the City, p. 26.

emerges with more or less clarity depending on the author's particular focus. Later in the book, Vincent repeats his claim that the practice of shutting up of houses evoked fear in the residents, causing many to abandon their homes in advance rather than wait for the compulsion of the law.

Now most parishes are infected both without and within; yet there are not so many houses shut up by the Plague, as by the owners forsaking of them for fear of it; and though the Inhabitants be so exceedingly decreased by the departure of so many thousands, the number of dying persons encreaseth fearfully ... & the Serjeant Death hath arrested them, and clapt to the doors of the Houses upon them, from whence they have come forth no more, till they have been brought forth to their Graves: We may imagine the hideous thoughts, and horrid perplexity of mind, the tremblings, confusions, and anguish of spirit ...⁵²

In these lines, Vincent treats the law as the awful companion of the plague, the symbol of death, the instrument of confinement that helped to drive people away from their dwellings by the thousands. It was through the force of the law that the sick and the members of their families were abandoned to their isolation, left to suffer in solitude both the physical ravages of the disease and the mental strain of fear and seclusion. And Vincent, alone among our authors, recognized the disruption that the shutting up of houses imposed on otherwise ordinary relationships, inserting a barrier between the confined and the free:

... when their doors have been shut up and fastned on the outside with an Inscription, *Lord have mercy upon us*, and none suffered to come in but a Nurse, whom they have been more afraid of, than the Plague itself; when Lovers and Friends, and Companions in sin have stood aloof, and not dared to come nigh the door of the

⁵²Ibid., pp. 28-29.

House, lest death should issue forth from thence upon them ...
[emphasis in original]⁵³

Vincent presents a horrible vision of fear and anxiety, a picture of the ways in which the legal measures imposed by the London Order, in combination with the dread of the plague itself, affected the lives of the common people. But while he is quite unique among preachers in understanding the psychological impact of the plague and the law of quarantine, he does return to the standard ministerial refrain, that those who were fortunate enough to escape the horror should count themselves among the blessed, and should take the opportunity to reform their otherwise sinful lives in case they were put to the test again.

Think with your selves, you that are alive, and remain escaped;
how fearful would the Plague have been, if it had come home to
your houses: you were afraid to hear of others houses visited and
shut up; what would you have been, if it had entred your doors?
You were afraid when others were struck with the disease, what
would you have been, if you had been struck your selves? Sinners,
what would you have done if the arrow had pierced through your
Livers, if under such guilt and wrath you had been smitted? When
you had such a plague of sin in your hearts, if you should have had
the Plague of Pestilence in your bodies; if when you were so rotten
and corrupt and defiled inwardly, you should have had boyls, and
blanes, and running sores outwardly ...⁵⁴

Vincent's rhetorical technique is obvious, combining a sympathetic and graphic account of the horrors of the plague with an admonitory plea to survivors of the epidemic to repent and reform so as to avoid a similar fate. For Vincent, the law was an element of

⁵³Ibid., p. 29.

⁵⁴Ibid., p. 133.

the horror, another aspect of the terrible judgment against which his readers might protect themselves through reconciliation with God.

While both Vincent and Kingston understood the plight of those who experienced the law of quarantine firsthand, and expressed considerable sympathy for their predicament, neither writer seemed to recognize that the law, as a factor contributing to that plight, was actually in the control of the legislators and other officials, and, as a result, was not an inevitable consequence of God's judgment, even if it were true that the plague itself was a product of sinful lives. Again, as we saw in considering the works of other clergy earlier in this chapter, Vincent and Kingston did not weigh into their thoughts the effectiveness of the law in dealing with the disease, but rather chose to concentrate on its impact on other aspects of their readers' lives. This is especially true of Vincent, given his preoccupation with the psychological impact of the plague and quarantine law.

Such is not the case, however, with the work of Thomas Cock.⁵⁵ His book, Hygiene, or a Discourse upon Air, included in its preface (called "A Peroration to the Right Hounourable the Lord Maior, with the Right Worshipful the Aldermen his Brethren in general; and all the worthy Members of it In Particular") a direct appeal to responsible officials. This was an impassioned plea to reform the law of quarantine and to lobby for the repeal of King James's Act, advanced by a physician who drew upon his experience with the sick to argue for the ineffectiveness of the law as represented in the terms of the

⁵⁵Referred to above, chapter four, p. 122, note 45.

London Order. But despite its tone of urgency, Cock's work appears perfectly logical and rational, an appeal to the officials' sense of the contingencies of history which, when coupled with the unfortunate consequences of the law, makes a compelling case for repeal of the legislation.

Cock begins by arguing that when King James's Act was first debated in 1603, the choice facing the legislators was between the shutting up of houses on the one hand, and separating the well and the sick on the other.⁵⁶ But, as will be remembered from chapter three above, King James's Act was passed and promulgated while the memory of the plague of 1603 was still very fresh, and, according to Cock, Parliament decided on the shutting up of houses as the appropriate remedy only reluctantly, and because of the immediacy of the danger. Otherwise, argued Cock, the preferred alternative, separating the sick to isolated locations, would have prevailed in debate. Cock suggested that the error was recognized in later years, even during the then current reign of King Charles II, when "the Lords of his Privie-Council" were appointed as "a Committee for Inspection, into what was most expedient and proper, for the preventing, spreading and increase of this Plague,"⁵⁷ Cock's suggestion being that the ineffectiveness of King James's Act was at least tacitly recognized through the establishment of this Committee. But then, as Cock reported, the Lords delegated their responsibility to the College of Physicians, and, in doing so, removed the possibility of corrective legal measures.

⁵⁶The pages of Cock's "Peroration" are unnumbered. His discussion of King James's Act begins at the second unnumbered page.

⁵⁷Cock, "Peroration," third page.

Their Lordships accordingly required the Honorable and Learned Colledge of Physitians to “Add, alter, and ordain as they should find the present times and occasion to require: But still with this Restriction, viz. *In pursuance of former Presidents in the Reign,*” &c. Or else, surely it would have been thought on as a thing most eligible to have caus’d a Separation of the Well and Sick, (which cannot but be acknowledg’d as necessary as water to quench fire) but yet by such proper aids and helps as might best answer its end and Intention. [emphasis in original]⁵⁸

The College of Physicians, as a result, was forced to continue with the practice of the shutting up of houses, not because it was the most expedient means of dealing with the plague, but because it was the only method available, given historical precedent.

Cock goes on to advance his argument for abandoning the historical practice and for substituting what he calls a middle ground between shutting up the well with the sick, and letting the infected run free in the streets. This middle ground, he wrote, involves removing the sick to isolation, away from the well. He admitted that the shutting up of houses had many good arguments in its favour (though he fails to suggest what those arguments were), but insisted that the practice contributed just as much to the spread of the disease as letting all infected people run free. In Cock’s opinion, those who survived the experience in a shut up house were actually more likely to succumb to the disease, later on, due to their weakened condition, and then suggested that the greatest plagues in London’s history were those in which the shutting up of houses was employed most insistently. For all these reasons, he argued, a reform of the law was needed.⁵⁹

⁵⁸Ibid., third and fourth pages.

⁵⁹Ibid., fifth, sixth and seventh pages.

Cock's sensitivity to the persuasive authority of history continued in his reliance on examples from the reign of King Charles I. He cited to the Mayor and Aldermen evidence from a great plague during that reign⁶⁰ in which he suggested that the mortality rate actually declined when people were separated rather than shut up. This was the case, he argued, for both the sick and the well, meaning that the law of quarantine represented in King James's Act and the London Order contributed to a high mortality rate for all residents of the city. The reason, according to Cock, was "imputed to their freedom of Airing, Walking, Recreating, and refreshing of themselves by an honest and free Conversation one with another," and, instead of the visits of medical personnel encouraging anxiety and symbolizing impending death,

...they had the voluntary, free and freequent Visits of the best and most able Physitians, Chirurgeons, and Apothecaries, little hazard by this means attending their Cures: the dejection, horror, fear, and consternation of their Spirits (great Incendiaries and Promoters of a Pest) were hereby also taken off, and much abated: Searchers, Bearers, Nurses, and other licensed Visitors (whose walks are far more perillous then divers that are occluded and shut up) would hereby also become almost void and useless.⁶¹

Here we find the first clear statement by any of the authors reviewed to this point that the law actually contributed to an increase in the severity of the plague. It is the first argument we have encountered that suggests the law was not simply the irrelevant tool of the officials, an impotent human construct with little importance in resisting God's

⁶⁰Cock does not reveal the year to which he refers, but we can speculate that it could have been 1644, the year of the Oxford Order.

⁶¹Cock, "Peroration," sixth page.

judgment, or perhaps the plague's accomplice in spreading misery and consternation.

Here we find an assertion that those who are responsible for the law are also responsible for its effects, that the impact of the law of quarantine might be improved so as to contribute to a lessening of the plague's horrible consequences. The law, argued Cock, had real social potential, and it was up to those with the requisite authority to ensure that that potential was realized for the benefit of the citizens.

Hereby also the Publick magistrate may with Courage, Confidence and Security, manage city affairs: Citizens and Tradesmen, safely keep their houses, and follow their employments: many childing-women, and sucking children, fatherless, helpless, and friendless persons supported and preserved. ... The outrages, insolencies, number and neglects of Nurses restrained, prevented, and abated: Thousands of persons lives preserved; poor people cheaper and better provided for and attended; and above all, God better pleased...⁶²

Cock's insistence that the law of quarantine actually contributed to the severity of the disease was supported by William Boghurst, another physician, in his lengthy work Loimographia: An Account of the Great Plague in London in the Year 1665.⁶³ In various places in this treatise, Boghurst complained that the law of confinement made the experience of the disease much worse for the citizens. In a list of 100 factors called by Boghurst "Some other more generall observations proving fatall this plague," Boghurst cites the shutting up of houses and "removeing servants and poore people to Pest-houses and to other houses in their sicknesse" as number 59B, arguing that these practices

⁶²Ibid., eighth page.

⁶³Referred to above, chapter four, p. 122 , note 46.

“killed many,” and could only be termed “preposterous Physick.”⁶⁴ As number 81, Boghurst echoed Vincent’s concern for the psychological impact of quarantine law, suggesting that weakened spirits contributed to weakened bodies as well.

One friend growing melancholy for another was one maine cause of [the plague’s] goeing through a family, especially when they were shutt up, which bred a sad apprehension and consternation on their spirits, especially being shutt up in dark cellars.⁶⁵

In a further list of treatments that Boghurst suggested were widely thought to be “preservative against the plague,” but which Boghurst claimed were largely ineffectual, he included the “shutting up of houses, ... warding towns, prohibiting goods and people intermission coming from infected places, ... and noe less ineffectual is the shunning and running away from searchers, warders, dead-carts, shut up houses ...”⁶⁶ Under the heading of “Other Things to be Avoided,” Boghurst lists “shutting up of houses when once it is hot weather, and the disease is grown thick (for it hath been oft enough tried and alwaies found ineffectual).”⁶⁷ Boghurst believed that the despondency suffered by those confined to their houses by the law contributed greatly to the intensity of the disease, writing that “one great cause why this disease sweeps away whole families is because they grow Melancholy and discontented, one friend for another, especially being

⁶⁴Boghurst, *Loimographia*, p. 25.

⁶⁵*Ibid.*, p. 27.

⁶⁶*Ibid.*, pp. 54-55.

⁶⁷*Ibid.*, p. 57.

shut up brings a sad cloud upon their spirits.”⁶⁸ And finally, in a direct indictment of those responsible for the law but slow to heed the warnings of Cock and Boghurst of its dangers, Boghurst wrote that “as soone as any house is infected all the sound people should bee had out of it, and not shut up therein to bee murdered.”⁶⁹

If Boghurst invoked a reference to murder in an attempt to stimulate action towards reform of the law of quarantine, then John Gadbury suggested that the failure of the responsible officials to act was unChristian, too. In his work London’s Deliverance Predicted,⁷⁰ Gadbury made direct reference to official inaction, arguing that the restraint of historical precedent, likely the same issue referred to by Cock in which the Privy Council tied the hands of the College of Physicians, made the plague all the worse for the citizens. For Gadbury, the plague “proves Custome a most terrible Tyrant, in following whereof, the Magistrates shut up people infected in Houses or Rooms, to prevent the spreading thereof.”⁷¹ Further, shutting up actually contributed to the spread of the disease, and “denying [the people] the advantage of the Air, is no small propinquate cause (at least) of the increase of the Contagion.” The magistrates were responsible for “abridging the customary liberty” of the people, and that, in turn, was directly connected to an increase in the people’s fear. At least according to Gadbury, “the greater their fear,

⁶⁸Ibid., p. 65.

⁶⁹Ibid., p. 99.

⁷⁰Referred to above, chapter four, p. 122, note 47.

⁷¹Gadbury, London’s Deliverance Predicted, p. 36.

the sooner do they meet the ill they dread.”⁷² And, in a direct reference to ancient Jewish law,⁷³ Gadbury closed his attack on official ineptitude in the following words, holding up the law of quarantine as reprehensible and misguided:

A custome strangely tyrranous! And I am afraid favors more of a Barbarism then Christianity; and as it is contrary to the Laws of Old, and to Charity, so beyond question it is, and hath been considerably detrimental, and injurious to the lives of very many thousands in this great City!⁷⁴

Summary

The literature of 1665 and shortly after is rich in comment on the law, but it is noteworthy that the authors are not unanimous in the ways in which they understand the significance of the law and its impact. For a great many writers of the day, primarily but not exclusively clergymen, the law was simply to be endured, given that the alternative for the sinners of London was the prospect of facing the severity of divine law in the afterlife. Very little sympathy was expressed by these writers for the sick, and very little hope for improvement in their condition was offered, except through reconciliation with God. William Kemp’s appeal to nationality and tradition is anomalous in this group of works, an apparently unnecessary appeal given his denunciation of those who complained of the severity of temporal law. This denunciation was deserved, so Kemp argued,

⁷²Ibid., p. 39.

⁷³See “Leviticus,” chapter 13, in The Holy Bible (the text conformable to that of the edition of 1611 commonly known as the authorized or King James’ version) (Philadelphia: A.J. Holman Company, 19**), at pp. 132-135.

⁷⁴Gadbury, London’s Deliverance Predicted, p. 40.

because of the failure to recognize the law as an expression of God's mercy. In any event, the effectiveness of the law was not an important consideration for the writers in this tradition; if the law was to be followed, it was because it was divinely ordained, or grounded in tradition, or an expression of the authority of officials acting out their Christian duty.

But there is another tradition, that exemplified in the work of Thomas Cock, John Gadbury, and William Boghurst. It is in these authors that we find the intellectual challenge to the authority of the magistrates and other law-makers, the pleas of intelligent, educated lay people to reform the law before it resulted in an exacerbation of the dangerous conditions it was designed originally to subdue. Significantly, none of these writers actually counselled disobedience to what was perceived to be a destructive law, but each of them was vehement in their attack on that law and its makers.

This pattern in the relationship between the literature of the Great Plague of 1665 and the law of quarantine remained largely undisturbed until after the passage of Queen Anne's Act in 1711. It was then that Daniel Defoe began a decade long campaign for reform of the law, expressed in a series of letters and essays that culminated in publication of the Journal and Preparations in 1722, coincident with the reform of the law of quarantine by the administration of Robert Walpole. It is in this literature that we find the most heartfelt expressions of sympathy for the plight of the ordinary poor of London and their existence under King James's Act and subordinate Orders. Gaining inspiration from the works of Gadbury, Cock and Boghurst, Daniel Defoe was relentless in his pursuit of the reform of what he perceived to be an unjust and ineffective law.

CHAPTER FIVE

DEFOE AND WALPOLE'S REFORMS OF 1721-1722

As we saw in the previous chapter, opinion on the wisdom of the law of quarantine was sharply divided among intellectuals of the late seventeenth century. For clergy and others sympathetic to the rigours of pre-Enlightenment theology, the hardships suffered by those whose lives were disrupted by plague and the effects of the law were to be endured simply through recognition of a higher and more powerful law. The plague and the attempts to control it offered Londoners the opportunity to recognize the sins of their lives, to thank God for their chance of redemption, to re-direct their lives toward piety and reconciliation. Others, however, understood the law as the product of the activity of legislators, and realized that the law so constructed could be re-made in a form more humane, more effective, less cruel and invasive. For these writers, the ineffective law simply heightened the indignities attendant upon the plague itself. Implicitly at least, those critical of the law, like Thomas Cock,¹ suggested that the disruption inevitably accompanying plague and the law of quarantine might be softened, might be justified more easily, if positive results could be expected.

The tension in the literature produced by these opposing groups was reproduced to some extent in the writings of Daniel Defoe. Even though Defoe's writing on plague and quarantine law did not start to appear until 1711, after the passage of Queen Anne's Act and over forty years after publication of most of the literature reviewed in chapter four

¹See above, chapter four, p. 122, note 45.

above, many of the themes that emerged from the earlier body of literature were also explored by Defoe. Principally, he focused on the debate concerning the law's effectiveness and its humanity, contributing very little to the theological discussions of Kephale² and Matthew Mead,³ and mentioning only as a matter of fact the argument from tradition advanced by William Kemp.⁴ As will be seen from what follows in this chapter, Defoe concentrated on the essentially modern difficulties voiced by those who resisted reform of the law of quarantine, particularly in connection with the impact of reform on England's growing foreign trade and the struggle to define a fair and consistent set of civil liberties. Certain of the reforms to legal procedure referred to above in chapter two, especially with respect to individual rights against the state (in *habeas corpus*, treason and other criminal matters), were representative of a continuing struggle to assert civil liberties that captured Defoe's attention. Defoe's concern with quarantine law and plague culminated in publication of the Journal and Preparations in 1722, coincident with the reform of quarantine law by the Whig administration of Robert Walpole,⁵ and coincident with the appearance of Richard Mead's A Discourse on the Plague.⁶ A detailed review of

²See above, chapter four, p. 107, note 10.

³See above, chapter four, p. 112, note 18.

⁴See above, chapter four, p. 109, note 15.

⁵Walpole's reforms resulted in three significant legislative enactments, including 7 Geo. I c.3, 8 Geo. I c.10 and 8 Geo. I c.18. In the balance of this thesis, the first will be referred to as the "Quarantine Act," the second as the "Amending Act," and the third as the "Supplementary Act."

⁶See above, Introduction, p. 5, note 12.

Defoe's earlier writings helps us to establish the independence of the voice we hear in the Journal and Preparations, and that, in turn, supports the argument that his fictional work from 1722 offers historical evidence on the nature of quarantine law distinct from the evidence gleaned from more conventional sources.

Defoe's Writings on Plague and Quarantine Law - 1711-1722

Prior to reviewing the Quarantine Act, the Amending Act and the Supplementary Act in detail in the next section of this chapter, I want to summarize briefly Defoe's apparent preoccupation with the plague over the course of the years 1711 to 1722.⁷ So as to more fully understand the significance of the Journal and Preparations as works that help to bridge the gap between an understanding of legal doctrine and a sensitivity to the social impact of law, it is helpful to position them, not simply in juxtaposition to that doctrine, but also in relation to Defoe's wider literary output. It is in Defoe's journal writings, over the course of the twelve years leading up to publication of the Journal and Preparations, that we find demonstrated the social conscience, the empathy with common people, that to some extent distinguishes Defoe from many of his contemporaries. More importantly for our purposes, even in these earlier shorter essays and letters we find attempts by Defoe to highlight the weakness of the prevailing regulatory regime.

These earlier essays will also help us understand more completely the differences between the Journal and Preparations on the one hand, and Richard Mead's work on the

⁷Again, biographical information in this section is taken from Backscheider, Daniel Defoe: His Life, and Lee, Daniel Defoe: His Life and Recently Discovered Writings, both referred to above in the Introduction, p. 9, note 14.

other, especially in the extent to which each text can contribute to a wider understanding of the history of quarantine law. Considered independently from Defoe's earlier work on plague, the Journal and Preparations are more liable to suffer from some of the theoretical difficulties explored in the Introduction to this thesis, especially the argument from political bias in favour of the Whigs. But that is to isolate and decontextualize Defoe's work, to ignore the relationship the Journal and Preparations bear to Defoe's concern about the adequacy of quarantine law he demonstrated long before his allegiance to the Whigs could possibly have interfered with his objectivity. In contrast, of course, we have Richard Mead's work, produced precisely because of political demands.⁸ It is expected, then, that the contrast in the contribution each work can make in widening our understanding of the social impact of quarantine law will become clear.

We can begin on 13 September 1711, when Defoe published a relatively lengthy article on plague in Volume VIII, No. 74 of his Review.⁹ The Review, of course, was Defoe's own publication, enjoying a more or less uninterrupted run from 19 February 1704 to 11 June 1713.¹⁰ Defoe appears to have two purposes in this essay. First, he took great pains to point out the extent of suffering from the plague experienced at the time by people in Denmark and Sweden. He opens his essay by saying that "[h]e that can think on the calamities of his fellow creatures without any concern ought to be very sure the

⁸See above, Introduction, pp. 5-6.

⁹Quoted by Payne, The Best of Defoe's Review, pp. 218-222.

¹⁰*Ibid.*, p. ix.

turn shall never be his own,”¹¹ an apparently clear suggestion that the disinterested English must be certain to enact the appropriate measures so as to save themselves from like misery. He writes of his own “sympathetic pity for the poor people” of the affected areas,¹² speaking of their “great hardship” and their “desperation,”¹³ and advises that this pity has been growing in him “for two or three years past.”¹⁴ His description of the suffering is enhanced by quotations from a series of letters to Defoe from correspondents in Denmark and Sweden, seemingly offered by Defoe to lend credibility and objectivity to his account.

They serve to support, as well, his second apparent purpose in publishing the essay, that is, to highlight the weaknesses of legal attempts to control the spread of the disease, and to warn England to enact measures to prevent the spread of plague across the sea. Even at this early date, Defoe appears to doubt the potential of Queen Anne’s Act in effectively controlling imports from infected ports. He said that, in Denmark, “all possible measures” had been taken, to no avail, to protect the Danes from an importation of the plague from Sweden, including the isolation of returning soldiers and the encirclement of infected towns.¹⁵ And, in speaking particularly of the difficulty in getting foodstuffs through the lines of guards and into the villages, Defoe lamented that the

¹¹Ibid., p. 218.

¹²Ibid.

¹³Ibid., p. 220.

¹⁴Ibid., p. 218.

¹⁵Ibid., pp. 219-220.

inhabitants “... suffered great hardships by this severe restraint, having not been allowed to flee for the safety of their lives ...”¹⁶

This is the first reference we have encountered in the literature to the encirclement of infected towns. While, it will be remembered, certain of the literature emerging from the Great Plague of 1665 debated the lawfulness of fleeing an infected town,¹⁷ none seemed to mention, directly at least, any official attempt to isolate entire communities. There is tangential reference to such a practice in John Tabor’s work, when he describes how those who flee one town were liable to be turned back by the armed citizens of the next. “And others wandering up and down the Fields; \ No Town, or Village them admittance yields.”¹⁸ But this is clearly a reference to encircling a town for its protection, rather than for its quarantine. Nothing in King James’s Act, the Oxford Order, the London Order or the Privy Council Order provided for encirclement, and none of the Royal Proclamations mentioned in chapter three above are relevant to this issue. There is reference in both the London Order and the Privy Council Order to restraining the free movement of beggars, and, in the Privy Council Order, to the requirement of a “Certificate of Health” for each traveller, but these restrictions are far from the isolation of entire towns. Perhaps, as suggested by Paul Slack,¹⁹ certain customary law of pre-Jacobian times did not find expression in the formalization of the law of quarantine

¹⁶Ibid., p. 220.

¹⁷See above, chapter four, pp. 119-121.

¹⁸Tabor, “Reflections on the Pestilence,” p. 12.

¹⁹Slack, The Impact of Plague in Tudor and Stuart England, p. 200.

during the seventeenth century, but it is odd that the literature of the Great Plague, concerned as it was with the lawfulness of flight, made no direct mention of encirclement in that context. It is not clear, then, why Defoe criticized the practice so severely, unless he was concerned that his plea for more effective law might lead to the imposition of more harsh, but equally ineffective, regulations on encirclement.

Defoe's combined focus on the suffering of plague victims and the weakness of the regulatory regime continued to surface in his essays of 1712. He published two successive comments in the Review during that year, the first on 23 August and the second on 26 August,²⁰ which served to underscore his alarm at English indifference to the spread of plague and his understanding of the terrible suffering the English might expect should the plague return. In the first of these, Defoe displayed some impatience with those who scoffed at his earlier warnings, complaining that his position had been "... turn'd into Ridicule and Banter, by the People of this Age,"²¹ criticism which had been fuelled by "...the Jests of an eminent Physician."²² He then intensified his call for enhanced legal protective measures by closing the essay as follows:

... as none but a stupid Generation, that scoff at every Judgment of Heaven, and value not their Maker till they feel his Hand, can be so blind, as not to see the visible approaches of such a Thing to us; so nothing, but a dreadful indifferency in the Event, can make the Hints I have given, Unseasonable.²³

²⁰Shugrue, Selected Poetry and Prose of Daniel Defoe, pp. 145-151.

²¹Ibid., p. 145.

²²Ibid., p. 146.

²³Ibid., p. 148.

Defoe continued his response to criticism in the essay of 26 August, but here he was more interested in demonstrating to his readership just how calamitous the last plague in England, that of 1665, really was. He quoted from the most alarming of London's Bills of Mortality for 1665, that of 19 September, when 7165 residents were reported to have died of plague in a single week.²⁴ He wrote of "the terrible Appearance of Death in so many dismal Shapes," and that, in the case of death by plague, "... the Misery and Horror is inexpressible ..."²⁵ Consistent with the letter of 23 August, he closed with a further call to action, perhaps muted by the force of the criticism he was trying to answer:

I think no one can call [my warnings] ... terrifying the People; I think the Thing a little too much forgotten among us; but if ye think otherwise, I will terrifie you no longer; this may be sufficient for those that make a Mock of the present Circumstances, to let them see what kind of a Thing a Plague is in this City, and what it may be, *if it comes again*; those who think we are in no danger of it, need be under no Concern at this Account, and those who think we are, will make a good Use of it.²⁶ [emphasis in original]

It is relatively clear, then, that quite early in his career Defoe did not hesitate in expressing a forceful opinion in favour of a reform of measures designed to protect the English from plague. While he seems insistent on some sort of enactments to prevent the importation of plague, it is not so clear that he supported stern domestic restrictions, there always being some hesitation in his endorsement of measures like the encirclement of

²⁴Ibid., pp. 150-151.

²⁵Ibid., p. 151.

²⁶Ibid.

towns. It is on the domestic front, of course, that the Journal and Preparations focus their descriptions, as we shall see in the last chapter of this thesis. For now it is enough to recognize that both his attitude toward measures against importation of the plague and his concern about the severity of domestic regulations appear to have been motivated by the sympathy he expressed, as early as 1711, for the plight of the common people.

Defoe's preoccupation with the plague heightened considerably in the period from 1719 to 1722. He published some sixteen letters on the issue during that time,²⁷ most of which made the state of quarantine law and domestic restrictions their focus. Each of these letters contributes to our understanding of the relationship between the reform of quarantine law and the appearance of Preparations and the Journal, and each contributes in a way to Defoe's discussion of various themes particularly relevant to the reforms of 1722.

First, Defoe took great pains to alert his readers to the fact that ships sailing from infected ports were barred entry to several healthy ports on the continent. As will be seen, this was a difficult issue for the Whigs in their attempts at reform, resulting in the alienation of the trading community and leading directly to the debate surrounding the Supplementary Act, with its measures designed to prevent the clandestine running of goods. Defoe's earliest letter on this issue, an issue that directly challenged the provisions of Queen Anne's Act, was published on 12 August 1720 in the Daily Post. In this letter, he merely hinted at the need for tough import restrictions, suggesting that, in

²⁷See above, Introduction, p. 16, note 28, for bibliographical references to these letters.

the seriously infected Marseilles, “[t]he Commerce is universally stopp’d,”²⁸ and indicating that goods were stored some leagues distant from the city so as to lessen the likelihood of infection.²⁹

In his letter to Applebee’s Weekly Journal of 22 October 1720, however, Defoe intensified his attack on weak import restrictions by giving various examples of procedures in place on the Continent. He recounted the story of a ship from Marseilles being turned away from a port in Spain, and of how the sailors from that ship, being entirely without provisions, were compelled to steal ashore during the night to “plunder two Villages.”³⁰ In the same letter, Defoe told the terrible story of a ship cast adrift off Majorca, all its sailors dead on board, and of how the Governor had the vessel burnt at sea rather than allowing a proper burial on shore. A third story told of how healthy sailors from an infected ship were taken ashore near Naples and quarantined in a ruined castle, only to die for want of adequate nourishment.³¹ In each of these cases, Defoe underscored the need for strict, effective measures against the admission of trading vessels from infected ports, and referred to examples from Spain and Naples, it is presumed, to lend force to his position. The sometimes tragic side-effects of such measures, we can only assume, were described by Defoe so as to demonstrate that even the most effective law is accompanied by suffering, but the need for such law remains

²⁸Lee, Daniel Defoe: His Life and Recently Discovered Writings, Volume II, p. 265.

²⁹Ibid.

³⁰Ibid., p. 291.

³¹Ibid., pp. 291-292.

nonetheless.

The clandestine running of goods was the direct subject of Defoe's letter to Applebee's Weekly Journal of 1 July 1721, published six months after enactment of the Quarantine Act but before the introduction of the Supplementary Act which, of course, was designed in large part to deal with this very problem. In this letter, Defoe recounted the story of one Durand, a furrier in Lyons, who defied quarantine law and imported several bales of silk from an infected location. After his place of business was surrounded by 2500 armed militiamen, Durand was summarily shot, "... and that, when he was shot they carry'd Earth and threw upon him where he lay, and so bury'd him as it were above ground," they being afraid to touch him for fear that he had been infected through contact with contaminated goods.³² Defoe's position in this letter may appear ambiguous, in that he may as well be condemning the severity of French quarantine law as supporting it, but this ambiguity melts away when the letter is considered in light of his unequivocal letter to Applebee's Weekly Journal of 29 July 1721. There, Defoe took an unmistakeably clear stand against the trading community that had lined up in opposition to Walpole's reforms, condemning them for daring "... to venture the Welfare of the whole Kingdom, and the Lives of Men, Women and Children, for the wretched Gain of a private Man, and perhaps that Gain a Trifle."³³ Strict and comprehensive laws, Defoe argued, were necessary to protect the populace against the plague, and equally

³²Ibid., p. 401.

³³Ibid., p. 409.

strict laws were needed to punish those who would defy the quarantine for personal gain, and those who would compromise the effectiveness of the law in its drafting.

If I were to propose an equal and just Treatment of such Men, it should be, that if such a dreadful thing should ever happen among us, (as God forbid,) they who had concern'd themselves to obstruct the making needful Laws to prevent, or who had endeavour'd to leave out proper Clauses in such Laws, to make them more effectual; should be oblig'd, by the same Law, to stay in the City, and take their risk with the Poor, who are not able to fly, and have not wherewith to shift from one Country to another, as the Rich have.³⁴

As he had in his letters of 1711 and 1712, Defoe reveals his sympathies here with the poor and defenceless, deriding those who would take advantage of their position of relative wealth to manipulate the law intended to secure the country from the plague. It seems that the tale of Durand the furrier, and the stories of calamities on board quarantined ships off Spain and Naples, can only have been offered by Defoe in support of Walpole's reforms, and against the opposition from traders.

This conclusion would be relatively certain were it not for Defoe's letter to Applebee's Weekly Journal of 4 November 1721, in which he returned to his tone of despair about the possibility of stemming the smuggling of goods in contravention of both quarantine and high import duties. The latter factor had apparently driven traders to ever more daring risks in contravention of the law, and according to Defoe the result was a trading community whose clandestine practices would be extremely difficult to stop.

We lye more open to [the plague] than other nations, by Reason of that cursed Trade of Smuggling, by which the Distemper may be

³⁴Ibid., p. 408.

brought in upon us in a Moment; and I do not believe all the Power and Wit of Man can find any Remedy that will be effectual to put a Stop to this Wicked Trade, while the high Duties on Importation of Goods from Abroad are such as tempt Men to incur the utmost Hazards to run them on Shore.³⁵

It is relatively clear from this passage that Defoe's scepticism about the promise of law could only have undermined Walpole's attempts at reform. As we shall see in the next section of this chapter, Walpole faced considerable opposition from the trading community, especially concerning the quarantine of imported goods to be provided for in the Supplementary Act, and it would be inconsistent, of course, for Walpole's paid propagandist to subvert his legislative initiative. It appears, then, that Defoe must have been writing independently of his allegiances to the Whigs, and therefore independently of the political voices heard most prominently in conventional legal-historical inquiry.

All of this is not to say, however, that Defoe was insensitive to the very real complaints of the trading community relative to Walpole's proposals to stiffen restrictions on imports from infected locations. In fact, Defoe expressed considerable sympathy for the losses that were bound to occur through the delays associated with the quarantine of shiploads of perishable goods, in particular. The following is from his letter to Applebee's Weekly Journal of 29 July 1721:

The Damage of obliging Ships to Quarantine, is ... very considerable to the Merchants; it spoils their Goods, and many sorts of Goods are perishable, and subject to decay in others. The Profit of the whole Voyage depends upon the Season of coming into the Market ... [S]ome Times [the merchants are] quite disappointed, the profits of the voyage lost, and the Merchants

³⁵Ibid., pp. 450-451.

perhaps ruin'd, by the ships lying for six Weeks for Product, as 'tis called. ... Yet all this we chearfully submit to for the Reason of it; 'tis allow'd to be just, to be necessary, and what really ought to be done. But if one Villain can pass the Barriers set, ... he may lodge the Plague among us, [and] the Merchants suffer all the Inconveniences for nothing.³⁶

Defoe is clear here that the imposition of quarantine on ships arriving from infected ports is necessary for the public good, despite the likelihood that certain citizens, the merchants, would suffer as a result. But the important element of the law for Defoe is its effectiveness, without which the sacrifices made by the merchants cannot be justified. The justice of the law, for Defoe, lies in the extent to which it protects the community as a whole, despite the sufferings of the few, an early utilitarian view of the law unpalatable to the trading community that eventually assembled in opposition to Walpole.

While Defoe's position on import restrictions is relatively straightforward, his opinion on the wisdom of domestic regulations is more complicated. In this case, it appears from his letters that a rational recognition on his part for the need of some significant legal intervention was tempered by a keen awareness of the hardship and misery that could only be exacerbated by inhumane restrictions and confinements. Defoe was particularly interested in using the French example for instruction, and was careful to point out that some of their most effective domestic measures had significant adverse effects on the population generally. This is from his letter to Applebee's Weekly Journal of 16 September 1721:

The Methods therefore which they have taken, have been certainly

³⁶Ibid., pp. 409-410.

just and prudent, with Respect to the rest of the Country; but suffering not the Sound to come away from the Sick, must most certainly be infinitely the worse for those towns which have been visited; and where, had the People had Liberty to have gone away, one half of that Number could not have died.³⁷

Defoe's ambivalence is quite clear in this passage. His concern for the possible adverse social impact of law is strong, but yet he recognizes the justice and prudence of difficult measures. And, of course, whatever inclination he may have had to support strict domestic measures was further tempered by his belief in a set of freedoms and privileges available to the English, if not to the French. His reference to the absence of "Liberty" for the French in the passage just cited was not without its significance. Later in the same letter he drew the distinction explicitly, by writing: "It is true, we have those Things call'd Privileges and Liberties, which will not allow the Government to Proceed with the people as they do in France."³⁸ He concludes the letter by remarking that, in the case of effective, comprehensive English legislation, "[t]hese happy, unhappy Obstructions, call'd Privileges and Liberties, stand in the Way of all this,"³⁹ and it may have been because of these perceived restrictions on innovative law reform that Defoe suggested that the government of England was not prepared to recognize the existence of the plague in France at all.⁴⁰

³⁷Ibid., p. 428.

³⁸Ibid., p. 429.

³⁹Ibid.

⁴⁰In his letter to the Daily Post of 12 August 1720, Defoe related information about the disease received from correspondents in France, and alleged that "[o]ur Government are not willing it should be call'd the Plague." See Lee, Daniel Defoe: His Life and Recently

To comment in this fashion on the role of civil liberties in the debate over domestic law reform was to join a controversy that had arisen following passage of the Quarantine Act in January 1721 and before passage of the Amending Act in 1722.⁴¹ As we shall see in the next section of this chapter, London's civil libertarians raised a strong voice against the emergency measures of the Quarantine Act, and in his letters Defoe offered some support for their position. Commenting, obliquely at least, on the constitutionality of those parts of the Quarantine Act in question, and again using the French example as instructive, Defoe wrote the following in his letter to Applebee's Weekly Journal of 4 November 1721:

It is true, [the enforcement of the French law] is attended with great Severities, and sometimes Cruelty, such as we in our Country *cannot put into practice*, unless many of our Laws are repeal'd, and standing Forces rais'd for the Purpose, which, I hope, we shall not see done ...⁴² [emphasis added]

Defoe had grave concerns, then, that the strict domestic regulation provided in the Quarantine Act could not be implemented for fear of offending against civil liberties. Apart from adding credence to our argument that Defoe's voice is not simply an echo of that of the Whigs in Parliament, the issue of civil liberties, to some extent, seems to have

Discovered Writings, Volume II, p. 265. If the government were to confront the possibility of the importation of plague from the continent, then it would of necessity be forced to balance the claims of civil libertarians, traders and others who claimed a special interest in the results of law reform on this issue. It is arguable that Defoe is suggesting that the government deliberately downplayed the threat so as to avoid political controversy.

⁴¹Henderson, London and the National Government, 1721-1742, p. 41.

⁴²Lee, Daniel Defoe: His Life and Recently Discovered Writings, Volume II, p. 450.

settled for Defoe the problem of the dual character of domestic law reforms. But, while he may have decided on the unconstitutionality of parts of the Quarantine Act, he remained committed to domestic law reform of some sort, perhaps of his own design. As he wrote on 4 November 1721:

There are some Methods which I do not find the Government have yet thought of, and which I could propose if Occasion requir'd. But 'tis not my Business to be officious; neither is this a proper Place for it.⁴³

The proper place, as we shall see, turned out to be his Preparations, published but six months later.

Defoe was motivated to devise humane and effective domestic legal measures because of his sensitivity to the suffering experienced by victims of the plague, both those of the Great Plague of 1665 and those of the various plagues infecting Europe during the early years of the eighteenth century. Time and again Defoe wrote detailed descriptions of the plight of the French, largely, it must be assumed, to encourage the reform of the law through fear of the consequences of inaction. He said in his letter of 10 September 1720 that France “is now threatened with a Desolation so dreadful as has hardly ever been heard of before;” he went on to say that “the Town [of Marseilles] is almost empty of People, by the universal Flight of the Inhabitants, as well as the Mortality, yet there continues to dye near 1000 a Week;” and concluded that “[t]he Fury of this Distemper can’t be describ’d.”⁴⁴ Because of the severity of the plague, and because of the people’s

⁴³Ibid., p. 451.

⁴⁴Ibid., p. 277.

terror and their unrestricted flight into the countryside (apparently Marseilles was not encircled by troops, or was encircled inadequately), the authorities had tried everything to confine the disease, to no avail. "All possible Measures are made use of to Prevent the spreading of this Distemper, but they are not without fear that it will be ineffectual."⁴⁵ In a later letter (1 October 1720), Defoe went to great lengths to describe the inability of the French to devise proper regulations to dispose of the dead, at great risk, of course, to the living, and went on to criticize the French for making inadequate rules for the movement of essential goods in and out of infected towns, adding greatly to the suffering of those confined within.⁴⁶ In a similar vein, in his letter of 20 May 1721 Defoe described in minute detail the terrible famine in "Thoulon," another French city decimated by the plague and suffering from the weak French laws governing the free movement of essential goods, like food. In this same letter, we find Defoe arguing a further indictment of the laws respecting the encirclement of the city, saying that the people of "Thoulon" were driven by their hunger to storm the lines of troops around the city in a desperate, suicidal attempt to escape and secure food.⁴⁷ Similar descriptions were provided in his letters of 1 July 1721,⁴⁸ 16 September 1721,⁴⁹ and, by way of comparison to the Great

⁴⁵Ibid., p. 278.

⁴⁶Ibid., p. 285.

⁴⁷Ibid., pp. 378-379.

⁴⁸Ibid., pp. 399-401.

⁴⁹Ibid., pp. 427-430.

Plague of 1665, in his letter of 6 October 1721.⁵⁰ All of these horrible accounts were provided by Defoe in a continuation of his campaign for reform of the domestic law of quarantine, and for a tightening of the laws restricting imports, as provided in Queen Anne's Act. In Defoe's view, immediate action was required, and delay could prove disastrous.

What then must we do? And what Remedy must we prepare for our Preservation, and to prevent the Confusions which threaten us in case of an Infection? I am not entering too far into such an Enquiry, because People will take more Alarm from such Things than is intended; but certainly it cannot be our Prudence entirely to neglect such a Thing, till it comes to the very Door, the consequence of which will be, that then we shall be all in Confusion and Distraction.⁵¹

This, then, was the setting in which Defoe wrote and released the Journal and Preparations. His concern with the plague had manifested itself in letters and essays published over the course of some twelve years, all consistently supportive of measures designed to protect the defenceless, and all consistently critical of those who stood in the way of reform and did their best to circumvent the law. It seems quite clear that Defoe harboured a sincere sympathy for common people and a relatively deep understanding of their predicament in times of plague. It seems equally clear that the need for reform of quarantine law was a principal motivating factor in Defoe's production of at least the letters and essays referred to above. The extent to which that sympathy and motivation played a part in the writing of Preparations and the Journal will be examined in the last

⁵⁰Ibid., pp. 436-438.

⁵¹Ibid., p. 429.

chapter of this thesis.

Walpole's Reforms of 1721-1722⁵²

On 25 January 1721, the Quarantine Act was passed by Parliament, apparently arousing little opposition and creating but minor, if any, controversy among merchants and common people. Besides operating to repeal Queen Anne's Act in its entirety (legislation found to be "defective," "insufficient" and "not adequate," according to recitals in the Quarantine Act), the legislation made two bold attempts to address the concerns we found described by Defoe in his essays and letters.

First, a method was prescribed by which ships arriving in England, having sailed from "infected Places," were to perform quarantine as the King might direct. No provision was made as to the site or duration of the quarantine, those matters being left to the discretion of the King. Penalties were prescribed for a number of offences relating to possible breaches of quarantine, primarily directed toward the ship's master or others in control. For example, it was made a felony for a master to fail to report that he had on board a person infected with the plague, whether the master was aware of the infection or not. No one was permitted to leave a vessel committed to quarantine; anyone violating this prohibition would be compelled to return to the ship and forfeit £200. A term of imprisonment of six months was also provided for offenders of this provision, to be served, presumably, after the period of quarantine had run. Provision was made for the

⁵²Information in this section of this chapter relative to the progress of the legislation, the debates in Parliament and the various opposition factions was taken from Henderson, London and the National Government, 1721-1742, pp. 33-54, 138 and 211-13.

ship to be forfeited or, in some cases, burnt, and the master fined £200 for a variety of offences, including the failure to respond promptly to notice requiring the removal of the ship to quarantine. Very little attention was paid to the question of the illegal importation and possession of goods received from ships still liable to quarantine; the goods themselves would be committed according to the original quarantine orders, and the person found in possession was liable to a fine of £10. All of these provisions, of course, were similar to those reported by Defoe to be in force in Spain and Naples.

In almost every respect, the Quarantine Act offered tighter measures to control the importation of goods than had Queen Anne's Act. This is especially obvious in the removal of policing responsibilities from the Master of a quarantined vessel, a provision that, in its original terms, must have allowed for the abuses of which Defoe complained so bitterly. The Quarantine Act was much more directed and detailed than Queen Anne's Act had been, providing for penalties and forfeitures for specific offences to which only vague reference was made in the earlier legislation. It was clear from the recitals to the Quarantine Act that the legislators felt that the weaknesses in Queen Anne's Act were overcome in the Quarantine Act, and that complaints about the ineffectiveness of the earlier statute, complaints like those offered up by Defoe, were answered by this new, more restrictive law.

Secondly, a series of powers was reserved to his Majesty in Council and his proper officers in the event that the plague were to establish itself onshore. These sections of the Quarantine Act had two primary thrusts. Powers were provided to construct separate facilities for the "Entertainment of Persons infected," effectively

allowing for the removal of persons from their homes to ships, lazarets or specially built houses of quarantine, and providing isolated places for the airing of once contaminated goods. The proper officers were empowered to use all necessary force to compel committed persons to submit to quarantine, and to ensure that those otherwise entering the quarantine area remained there as directed. The other principal focus of these sections of the Quarantine Act allowed for the isolation of individual homes, neighbourhoods or towns, as required. Basically, powers were granted to dig trenches around infected areas so as to isolate the inhabitants more completely, and members of neighbouring parishes were to be conscripted so as to stand watch. Precedent for these measures could be seen in the way in which the French had responded to recent infections, all as reported by Defoe.

The Quarantine Act created a number of new capital offences, including the refusal to remove to a place of quarantine despite a lawful order, escaping a place of quarantine (whether the escapee was healthy or not, and whether or not an order existed for the committal of the escapee), crossing a line established for the isolation of a house, neighbourhood or town, and, in the case of a watchman, permitting any person or goods to leave an infected area. It seems clear that Parliament tried, through these penalties, to enhance the effectiveness of the legislation, ensuring through the threat of death the compliance of both the infected and those unfortunate enough to be charged with their supervision.

The Quarantine Act makes no reference to King James's Act, which, as we saw in chapter three above, was still considered to be in force as late as the date of the Privy

Council Order in 1666. There is no obvious reason why Parliament neglected to provide for the repeal of the earlier statute, as it had for Queen Anne's Act. Like Queen Anne's Act, King James's Act was less detailed in its provisions than the Quarantine Act, especially respecting the description of capital offences. It may be that the government decided to leave King James's Act in place so as to avoid the necessity to repeat the special taxing provisions found in the earlier legislation, but there is no apparent reason why the balance of King James's Act was not repealed. It is noteworthy, too, that King James's Act provided nothing in the way of regulations like the encirclement of towns, and it may be that government did not wish to draw attention to the extent to which the Quarantine Act potentially effected restrictions on the civil liberties of the citizens by reminding the people of the more benign terms of the earlier law.

While the Quarantine Act passed Parliament and was proclaimed into law with little fanfare, the trading community soon became concerned, especially with the prospect of perishable goods being liable to quarantine for lengthy periods in unfavourable weather. These concerns led to various schemes to bring goods ashore in violation of quarantine, schemes that compelled Defoe to publish in Applebee's Weekly Journal the caustic letter of 29 July 1721 referred to above.⁵³ Because of the weakness in the provisions of the Quarantine Act related to the importation and possession of otherwise quarantined goods, the "clandestine running of goods" was largely successful, leading Walpole to introduce the Supplementary Act into the House of Commons on 8 July 1721.

⁵³See above, chapter five, p. 147, note 34.

While this legislation is relatively long, having a variety of aims apart from strengthening the Quarantine Act, for our purposes the relevant provisions are few. In the recitals, recognition is made of the “infamous and pernicious Practices” of illegal importation, despite clear law to the contrary and despite the threat to the health and lives of “many thousands of his Majesty’s innocent Subjects.” In Article X, the penalty for purchasing goods imported in defiance of quarantine was increased to £20 from £10, half of which was to be paid to the informer on the strength of whose information a conviction was had, and the other half of which was to be distributed to the poor. More severe penalties were provided in Article VI for those directly involved in the illegal importation of goods. Depending on the conditions under which the goods were run, persons convicted could be transported to America for seven years. Other provisions of the Supplementary Act are stated to be directed toward importation of goods in defiance of customs and excise laws, among other things, and therefore are not directly relevant to the question of quarantine.

Now this legislation caused more difficulty for Walpole’s administration than had the earlier Quarantine Act. The trading community rallied against it, enlisting the support of prominent opposition members in both the Commons and the House of Lords. Apparently seizing the opportunity to discredit the administration generally, the opposition Lords began a campaign to force repeal of the domestic provisions of the Quarantine Act (despite their failure to speak against those provisions when they were debated in the earlier session), as well as to prevent passage of the Supplementary Act. It was at this point that the issue of civil liberties was raised, an issue that found considerable favour among London’s municipal politicians, being fearful of widespread

civil unrest. The public at large, too, despite the failure of the opposition to have argued the point earlier, began to express its displeasure at the prospect of the potentially invasive provisions of the domestic aspect of the Quarantine Act. As Defoe pointed out in his letters to Applebee's Weekly Journal of 16 September and 4 November 1721, published at the height of the controversy and referred to above,⁵⁴ the model for these severe domestic provisions was found in France, and Walpole's parliamentary opposition capitalized on English contempt for what was perceived as French despotism by rallying the populace in defence of civil liberties.

At first, Walpole's government resisted the calls to reform the Quarantine Act. A petition lodged with the House of Lords by the City of London, asking that the City be heard on the adverse implications of the legislation for both trade and public order, was rejected by the Lords on 6 December 1721,⁵⁵ and many of the Opposition Lords were outraged that such an eminent body as London would be turned away on a matter of such importance. In a "Dissentient" filed as part of the parliamentary record, these Lords stated their disgust with the rejection in unequivocal terms:

Because the liberty of petitioning the king (much more that of petitioning either House of Parliament) is the birth-right of the free people of this realm, claimed by them, and confirmed to them, soon after the Revolution, in an Act, declaring the rights and liberties of the subject, and settling the succession of the crown; and whenever any remarkable check hath been given to the free exercise of this right, it hath always been attended with all

⁵⁴See above, chapter five, pp. 150 and 148, notes 37 and 35 respectively.

⁵⁵Cobbett, Parliamentary History of England, Volume VII, column 930.

consequences to the public.⁵⁶

Again, the appeal was to civil liberties, an attempt to force Walpole to amend the legislation by reminding the government of the post-Revolution gains that had been made in the establishment of the rights of the individual against the state.

A similar appeal was made by the same group of Lords when they introduced amendments to the Quarantine Act on 13 December 1721. These amendments were the initial attempt to repeal the domestic quarantine provisions of the legislation, but they were rejected in the House of Lords by a vote of 39 to 20.⁵⁷ Another “Dissentient” was filed, and the Opposition Lords again appealed to concern for civil liberties as the grounds for their indignation. For our purposes, this record is especially interesting for its reference to King James’s Act, and its suggestion that the reformed legislation actually reversed libertarian allowances made in the act of 1604. In the following excerpt, the Opposition Lords are speaking specifically of those aspects of the Quarantine Act related to the encirclement of towns and the removal of the infected to lazarets and pesthouses:

Because such powers as these are utterly unknown to our constitution, and repugnant, we conceive, to the lenity of our mild and free government; a tender regard to which was shown by the act of James I, which took care only to confine infected persons within their own houses, and to support them under their confinement, and lodged the execution of such powers solely in the civil magistrate; whereas the powers by us excepted against, as they are of a more extraordinary kind, so they will probably (and some of them must necessarily) be executed by military force; and the violent and inhuman methods which, on these occasions, may,

⁵⁶Ibid.

⁵⁷Ibid., column 933.

as we conceive, be practised, will, we fear, rather draw down the infliction of a new judgment from Heaven, than contribute any way to remove that which shall then have befallen us.⁵⁸

The Opposition Lords, in addition to drawing attention later in the “Dissentient” to the parallels between the Quarantine Act and the “arbitrary powers” exercised by the government of France,⁵⁹ argued forcefully against the Act as it was originally framed, appealing at once to the fear of military intervention, to humanitarian responsibilities during times of epidemic disease, to the fear of God and the idea of plague as punishment for sinful conduct, and to tradition in the shape of King James’s Act. Despite such a persuasive attempt, the Opposition Lords were defeated, at least temporarily.

Faced with mounting criticism from the trading community, London’s municipal council, and the general population, Walpole quickly introduced the Amending Act into Parliament. By its provisions, the offensive domestic restrictions and penalties of the Quarantine Act were repealed in their entirety. The Amending Act was marshalled through Parliament and passed on 29 January 1722. By 20 February 1722, the Supplementary Act, modified somewhat to appease the merchant community, had passed the Commons. Eventually it, too, was approved by the Lords, and finally received royal assent on 7 March.⁶⁰

⁵⁸Ibid., column 934.

⁵⁹Ibid.

⁶⁰Despite Henderson’s remarks about the controversy surrounding the Supplementary Act and the Amending Act, history has been remarkably quiet in considering the full implications of these statutes. See, for example, Chapters 19, 20 and 21 of Volume I of Coxe’s three volume Memoirs of the Life and Administration of Sir Robert Walpole, Earl

As described above, despite Defoe's general ambivalence about the domestic provisions of the Quarantine Act, his sympathy for the concern about possible infringement of civil liberties aligned him against Walpole in this instance. While he demonstrated time and again a deep sympathy for the poor and defenceless, and continually commented on a variety of legal measures designed to contain the plague despite the hardship resulting to those quarantined, his overriding concern, one strong enough to convince him to speak out against his benefactor, seems to have been the preservation of those "happy, unhappy Obstructions, call'd Privileges and Liberties." Again, the implication from Defoe's writings, given his general commitment to the Whigs and his employment as a Whig propagandist from time to time, must be that, at least with respect to his lobbying for reform of the law of quarantine, he was writing from his own observations and opinions, and was not simply repeating the official Whig position on the issue. If that is the case, then Defoe's work from 1722, to be reviewed in the next chapter, can stand as an historical source independent of contemporary official sources, and so can serve to broaden our historical understanding of the law.

In contrast, certain experts of the day, Richard Mead among them, were convinced of the need for stringent domestic measures, despite the concerns and fears of Defoe and

of Orford, pp. 126-158. The neglect of the quarantine legislation by historians can be explained by remembering that debates in Parliament during sessions in 1720, 1721 and 1722 were dominated by the "South Sea Bubble" affair, an issue that threatened English public credit and jeopardized England's growing status as the world's premier trading nation. Coxe devotes virtually all of his discussion of the period to that question, applauding Walpole for steering England through especially difficult times. See especially pp. 147-155.

the opposition. In the “Preface” to the 1744 edition of his commissioned work A Discourse on the Plague, Dr. Mead wrote the following:

The Truth of the Matter is this: Some great Men, both of the Lords and Commons, who were in the Opposition to the Court, objected that the Ministry were not to be intrusted with such Powers, lest they should abuse them; since they might, upon Occasion, by their Officers, either remove or confine Persons not favoured by the Government, on Pretence that their Houses were infected.

Vain and groundless as these Fears were, yet the Clamours industriously raised from them were so strong, that a great Officer in the State thought fit to oblige his enemies by giving way to them...⁶¹

Mead insisted, therefore, that the concern about civil liberties was completely without foundation, and that Walpole was forced to relent simply because of contrived public pressure. Moreover, Mead blamed the Opposition directly for sacrificing public safety for the sake of political gain.

This I very well remember, that a learned Prelate, now dead, who had more of Political than of Christian Zeal, and was one who made the loudest Noise about the Quarantaine [sic] Bill, frankly owned to me in conversation, that tho’ the Directions were good, yet he and his Friends had resolved to take that Opportunity of shewing their Disaffection to the Ministry.⁶²

The uncertainty and doubt so typical of the age continued to plague issues even as superficially straightforward as the reform of quarantine law, and continued to divide

⁶¹Richard Mead, A Discourse on the Plague, pp. xxxvi-xxxvii.

⁶²Ibid., p. xxxvii. The “learned Prelate” referred to by Mead could have been either Bishop Roffen or Bishop Cestriens, both of whom voted with the Opposition to condemn the rejection of the City of London’s petition and to amend the Quarantine Act in December 1721. See Cobbett, Parliamentary History of England, Volume VII, Columns 932 and 934.

intellectuals as politically astute as Daniel Defoe and Richard Mead. But the law was reformed in spite of those doubts, and uncertainty eventually succumbed to political expediency. It was in that context, then, that Preparations and the Journal were released to the public in the spring of 1722, coincident with the release of Richard Mead's A Discourse on the Plague.

CHAPTER SIX

LAW REFORM AND THE LITERATURE OF 1722

It appears from our review in chapter five of Defoe's work on plague and quarantine law, leading up to publication of Preparations and the Journal in the early spring of 1722, that much of the focus on the law by intellectuals of the 1660's and 1670's had been altered, if not abandoned altogether, in Defoe's thought. To a large extent, this is true. Defoe showed little interest in advocating punitive measures against the citizens of London, in manner similar to Richard Kephale,¹ William Kemp² and Matthew Mead,³ who argued that severe, perhaps even inhumane, law was but part of a merciful divine judgment brought upon the population through its own wickedness. As we shall see below, while in Preparations Defoe spent considerable time explaining the need for spiritual arrangements in anticipation of the plague, this had little to do with his critique of the law and bore little resemblance to the admonitions of earlier writers.

Likewise, Richard Kephale's parallel argument on the requirement to obey the law because of its divine ordination, or perhaps because of the simple authority of tradition,⁴ attracted little attention from Defoe. His letters and essays over the course of the eleven years leading up to Walpole's reforms show only slight interest in the methods

¹See above, chapter four, p. 107, note 10.

²See above, chapter four, p. 109, note 15.

³See above, chapter four, p. 112, note 18.

⁴See above, chapter four, pp. 107-108, notes 11-14.

of earlier governments, and the possibility that the law is just simply due to its enactment (a point advanced by Kemp) is not mentioned. Instead, we find Defoe challenging over and over again the wisdom of the law as it stood after passage of Queen Anne's Act, and though we do not find Defoe counselling defiance of the law, we do read from him a persistent attack on the government of the day and its inaction on reform of the law of quarantine.

It is this persistence that aligns Defoe with those writers of the 1660's and 1670's whose work represented an intellectual approach to the law distinct from that of Kephale, Kemp and Matthew Mead. In this particular group of writers, and in Defoe, we find a concentration on the law's effectiveness, independent of its connection to God's judgment, independent of its roots in tradition, independent of the possibility that the monarch actually represented the will of the Divine. Like Cock,⁵ Boghurst⁶ and Gadbury⁷ before him, Defoe recognized the instrumental value in law as a tool for social change, manifesting what would later be called a utilitarian view of law as a means by which the citizens might be protected from natural calamity, if only government would act quickly and responsibly. His insight into the social impact of law, the understanding that the law is actually experienced by real people leading real lives, also sets Defoe (and, to some extent, Cock, Boghurst and Gadbury as well) apart from the traditional treatment of law

⁵See above, chapter four, p. 122, note 45.

⁶See above, chapter four, p. 122, note 46.

⁷See above, chapter four, p. 122, note 47.

represented in Kephale, Kemp and Matthew Mead.

The ultimate outcome of the debate over reform of the quarantine legislation was all but known when Preparations appeared in February and the Journal in March of 1722.⁸ It is certain, of course, that both books must have been in preparation during the previous fall, but because they were released after the legal and political issues had been resolved it is unlikely that they were published purely, or even primarily, for political ends, as some scholars have suggested.⁹ Rather, the more likely explanation for their publication lies in Defoe's social conscience, an attempt by him to deal with "... certain aspects of eighteenth-century psychological and social experience common to all ...[,]” offering historians "... a reflection of Defoe's experience of life as he perceived it in the 1720's projected through an account of the plague...”¹⁰ The backdrop for these reflections, it seems clear, was the reform of quarantine law, providing a critical, if not exclusive, theme for both books.

The same can not be said of Richard Mead's A Discourse on the Plague,¹¹ written expressly in response to government's request for assistance in designing a new law of

⁸Pat Rogers, Eighteenth Century Encounters: Studies in Literature and Society in the Age of Walpole (Sussex, UK: the Harvester Press, 1985), pp. 152-153.

⁹John Robert Moore, Daniel Defoe: Citizen of the Modern World (Chicago: The University of Chicago Press, 1958), p. 320.

¹⁰W. Austin Flanders, "Defoe's Journal of the Plague Year and the Modern Urban Experience," in Max Byrd (ed.) Daniel Defoe: A Collection of Critical Essays (Englewood Cliffs, N.J.: Prentice-Hall, Inc.), pp. 150-169, at pp. 150-151.

¹¹See above, Introduction, p. 5, note 12.

quarantine.¹² Mead's book was published immediately prior to the introduction and eventual passage of the Quarantine Act,¹³ and the reformed legislation was largely a product of Mead's input. As we shall see, many of the suggestions made by Mead in A Discourse on the Plague found their way into the legislation, and in the "Preface" to the edition of 1744 Mead argued a direct connection between the recommendations in the original edition and the provisions of the Quarantine Act.¹⁴ Though A Discourse on the Plague meets the definition of "literature" put forward in the Introduction to this thesis, the information gained through reading the book gives us little more than access to the inspirational source of much of Walpole's reforms. Mead's book is a very pragmatic one, long on examples of precedent in law-making from the continent, but short on real life or "true to life" anecdotes on the severity or humanity of competing versions of the law, ultimately providing very little insight into the ways in which the law of quarantine was

¹²See above, Introduction, p. 6, note 13. See also the first page of the "Dedication" in Mead's book, addressed "To the Right Honourable James Craggs, Esq; one of His Majesty's Principal Secretaries of State," in which Mead wrote: "I most humbly offer to You my Thoughts concerning the Prevention of the Plague, which I have put together by your Command." Mead continued on the second page of the "Dedication" like this: "As soon as you were pleased to signify to me ... that their Excellencies the Lords Justices thought it necessary for the publick Safety ... that proper Directions should be drawn up to defend our selves from such a Calamity; I most readily undertook the Task, though upon short Warning, and with little Leisure ..."

¹³Mead, A Discourse on the Plague, page i of the Preface to the edition of 1744.

¹⁴At page i of the Preface to the 1744 edition of A Discourse on the Plague, Mead proudly stated that, as soon as the original edition was released, "an Act of Parliament [was] immediately after made for performing Quarantaines etc. according to the Rules here laid down ..." There was no doubt in Mead's mind that his Discourse contributed significantly to the ultimate shape of the reformed legislation.

actually experienced by common people. Despite the fact that the book emanates from a writer who, in conventional legal-historical inquiry, might not be encountered at all, we find that the scope of our social-historical knowledge about the law is not broadened a great deal. Mead's book does give us some special insight into the controversy surrounding the lobbying for repeal of the domestic provisions of the Quarantine Act, however, as referred to at the end of chapter five above, and consequently does expand our understanding of the forces that influenced the final form of quarantine in the mid-1720's.

In contrast to A Discourse on the Plague, although there can be little doubt that Preparations was written primarily for the purposes of responding to quarantine law reform and providing the common people with some personal means of defence against the plague, Defoe cast his comments on the law in a long work with real human content, giving historians glimpses into what life must have been like during and before episodes of plague. It is not clear whether Defoe's stories in Preparations, the first on voluntarily shutting up their home by a family of means,¹⁵ and the second, the lengthy dialogue among members of a family concerning spiritual preparations for the plague,¹⁶ are fact or fiction. But there is no reason to doubt that, in any event, the stories must represent a reasonably accurate portrayal of seventeenth century life in times of epidemic.

Preparations thus serves our aims well, showing the way in which the law acted as

¹⁵Defoe, Preparations, pp. 45-90.

¹⁶*Ibid.*, pp. 90-183.

impetus for production of the book, and at the same time providing a glimpse into the social context in which the law was to be applied. The first thirty-five pages of the work, about one-fifth of its length, is devoted exclusively to commenting on Walpole's reforms and suggesting alternatives, true to the promise Defoe published in his letter to Applebee's Weekly Journal of 4 November 1721,¹⁷ and these comments on the law served as backdrop to the family anecdotes that form the balance of the book. In contrast to A Discourse on the Plague, therefore, we find in Preparations an attempt by Defoe to illustrate the social conditions in which the law was to be applied. If the strength of A Discourse on the Plague lies in its purely legal or political utility, then the strength of Preparations lies in its utility for social and domestic arrangements, giving us a wider historical understanding of the law as a result.

In the Journal, meanwhile, any direct pragmatic purpose to the literature of 1722 evaporates. It is here where we find the equivocating Defoe, the Defoe who recognizes in the law both boon and bane for the citizens of London, the Defoe who at once acknowledges both the necessity of harsh legal restrictions and the suffering that directly ensues. There are no obvious proposals for reform in the Journal, nor are there discussions of the comparative strength of various continental legal responses to the plague. There are, nonetheless, many descriptive accounts of horror and desperation at the instance of the law, and several accounts of heroism in spite of the calamitous conditions. In short, the Journal takes us yet further from a conventional legal-historical

¹⁷See above, chapter five, p. 152, note 43.

account of the reform of quarantine law that culminated in the initiatives of 1722 by serving as a telescopic lens into the actual social experience of the law as it must have been in the seventeenth century. This is so, despite the fact that the Journal is admitted to be a work of fiction.¹⁸

To explore the differences among A Discourse on the Plague, Preparations and the Journal with respect to the assistance each might offer in a legal-historical inquiry, I want to examine the treatment three separate legal issues received in each book. The questions of the illegal importation of goods from infected ports, the shutting up of houses (including, generally, other domestic regulations), and the encirclement of towns, were three of the most significant issues arising in the context of Walpole's reform of quarantine law, and the treatment each issue received in the three books will help us understand the way in which our understanding of developments in legal history can be expanded using literature emerging at various distances from conventional legal-historical sources. It must be kept in mind, however, that the edition of A Discourse on the Plague used for this thesis is the edition of 1744, and Mead admitted in the "Preface" to this edition that changes had been made in the text since it was first released, "to shew the Reasonableness of the Methods prescribed."¹⁹ As we shall see below, much of the motivation for Mead's "Preface" was political, addressed particularly to defending Walpole's administration against the concerns of traders and civil libertarians. It is safe

¹⁸See the discussion of this issue above in the Introduction, pp. 18-20.

¹⁹Richard Mead, A Discourse on the Plague, p. i.

to assume, as a result, that his modifications to the text were intended to align his book more closely to the actual legal reforms, rather than to distance his work from them, such that our inquiry into the differences between Mead's work and Defoe's two books in this respect is assisted, rather than weakened, by the revisions.

The Importation of Goods

In Preparations, Defoe began by condemning once again the traders who would smuggle goods in defiance of quarantine, seeming to suggest that there was something peculiar about the demands of English commerce that made defiance of the law so widespread.²⁰ Defoe gave unqualified support to the Government's reforms related to importation of goods, in the following words:

The preparations against the plague in this case must be the work of the Government. It is confessed that this is a difficulty even to the Government itself, and it will be hard to say what they can do more than is done effectually to prevent this dreadful trade; and without some very great severity, I believe it will never be done; and yet till it is done we cannot pretend to take effectual measures in this nation for preventing the plague coming among us.²¹

The severe measures of which Defoe wrote can only be the enhanced penalties of the Supplementary Act, providing for transportation to America for some offences and increased fines for others. These provisions, it will be remembered, were passed into law over the objections of the trading community, who argued that the success of its import business was jeopardized by unduly restrictive quarantine. Preparations, released

²⁰Defoe, Preparations, pp. 10-11.

²¹*Ibid.*, p. 11.

virtually simultaneously with passage of the Supplementary Act, but after much of the acrimonious debate of the previous twelve months had cooled, gave unqualified support to Walpole's regime. Defoe's condemnation of those who would violate the import restrictions, expressed earlier in his essays and letters,²² continued in Preparations, perhaps with even more vehemence:

We have a set of men among us so bent upon their gain, by what we call clandestine trade, that they would even venture to import the plague itself if they were to get by it, and so give it to all that lived near them, not valuing the gross and horrid injustice that they do to other people. What a man ventures for himself is nothing, because it is his own act and deed; but what he ventures for others is the worst of violence upon them, and perhaps, in such a case as this, is the worst sort of murder.²³

It is difficult to imagine a more vigorous denunciation of the greed Defoe alleges to have motivated much of the surreptitious importation of goods in defiance of the law. Because Defoe acknowledged that even the best lawmakers struggled to devise effective law to restrain the practice, he appealed to the traders' character, impressing upon them the gross unfairness that resulted from their activities.

Richard Mead's work was similar to Preparations in supporting Walpole's tightening of import restrictions. In his "Preface," Mead defended the quarantine of ships, arguing for the absolute necessity of the regulations, but, softening his tone somewhat, he offered that "I hope, I have not recommended any Thing prejudicial to Trade[,] my advice being very little different from what has been long practised in all the

²²For example, see above, chapter five, p. 147, note 34.

²³Defoe, Preparations, pp. 10-11.

trading Ports of Italy, and in other Places.”²⁴ Besides, suggested Mead, because ports on the continent practiced quarantine, they would be unlikely to admit ships from English ports if similar quarantine were not practiced there. In this way, Mead argued that the provisions of the Supplementary Act were actually beneficial to English merchants by keeping open avenues of export to Europe.²⁵

In the principal text of A Discourse on the Plague, Mead gave a detailed programme by which ships and goods from infected ports might be quarantined. In brief, Mead recommended the following steps:

1. Lazarettos were to be built in convenient places, on specially constructed islands if appropriate, for the reception of both men and goods from ships arriving from the continent. Quarantine on board the vessel, argued Mead, was ineffective because the disease might be maintained in the clothes and other materials stored on the ship.
2. If the plague had been found on the ship during its voyage, then the men were to leave everything behind. The men were to be washed and shaved and given fresh clothes, and were to spend thirty or forty days confined to the lazarettos.
3. Sick men leaving the ship were to be kept in lazarettos especially reserved for them, some distance from the lazarettos reserved for the well. When a sailor recovered, he was to perform the same quarantine as the others.
4. If the ship arrived without incident of the plague during its voyage, then Mead

²⁴Richard Mead, A Discourse on the Plague, p. xiv.

²⁵*Ibid.*

suggested that there was no need for quarantine. This is a surprising recommendation, given Mead's insistence on the dangers of importation, but he tempered his approach by suggesting that the clothes worn by these men be aired for about one week in a lazaretto reserved for that purpose.

5. The lazarettos at which goods were to be aired were to be at some distance from those reserved for the men. Goods were to be unpacked and exposed to the fresh air for forty days. In an apparent answer to the complaints of traders about this recommendation, Mead argued that there was no reliable evidence to suggest exactly how long goods must be aired before the danger is past, such that one might as easily argue for a longer rather than shorter quarantine of goods. Besides, he suggested, there was precedent for the practice in the law of Italy.

While Mead's general recommendations on the quarantine of ships were detailed enough, he failed to suggest any specific penalties for breach of the law. He simply argued that penalties for breach should be as strict as possible, and that the clandestine importing of goods should be punished with the utmost severity. He did recommend that, if a ship were to arrive from a highly infected port, it would not be too harsh to sink both the goods and the ship, rather than risk importation of the infection.²⁶

At first glance Mead's recommendations to and support for the government on the question of the importation of goods, and therefore his position on the complaints of the trading community about the severity of the law, are not dissimilar to the stance adopted

²⁶Mead's recommendations on the importation of goods are detailed in A Discourse on the Plague, pp. 81-99.

by Defoe in Preparations. However, Defoe's work differs in the extent of the description he offers on the consequences of disobedience to the law. In the extended analysis in which Defoe engages on the material preparations without which a family can have no real protection from the plague once it is established, he underscores the importance of preventing the importation of plague as a first priority, and emphasizes the enormous dangers of disregarding the law against unrestrained importation of goods. This is Defoe at his subtle, yet powerful, best. In page after page of agonizing detail, Defoe described the care and precision, the planning and effort, that one family underwent so as merely to increase their chances of survival. Time after time in the course of this description, Defoe emphasized that even these elaborate preparations were no guarantee of good health, and time after time he took his reader to the point where it appeared that the group was doomed despite the best efforts of the merchant who was head of the family.²⁷

Perhaps most importantly, given Defoe's appeal to the humanity of the trading community in his attempt to persuade them to obey the law, he described these material preparations in terms that made it perfectly clear that only the wealthy, privileged few had the means to protect themselves in such a manner. The vast majority of the population, he emphasized, were defenceless against the consequences of the clandestine running of goods. In other words, Defoe stressed that the greed that drove merchants to defy the law of quarantine of ships was doubly contemptuous of the safety of the public.

²⁷Defoe's detailed description of the material preparations taken by this merchant's family, especially the manner of their voluntarily shutting up their home and confining themselves there for almost a full year with virtually no outside communication, is related at Preparations, pp. 45-90.

It is true that the poorer inhabitants are not able to do thus, and, therefore, this example, or this advice, does not immediately reach to them.

...

If the poor could live within doors, as the rich may, the poor would be as safe as the rich are, but that necessity that sends them abroad to get their bread brings them home infected.

...

I will not say but that it makes their cure more difficult, and want of food and of physic makes them sink under it; but it is their going abroad among one another that infects them, and then want of conveniences and of being assisted and looked after causes them to perish faster than others.²⁸

The consequences of the defiance of the law by nefarious traders, according to Defoe's description, were disastrous, especially for the vast majority of the public whose means did not allow them to engage in the elaborate private protections that were necessitated by the arrival of plague. But in the painstaking detail in which Defoe described those protections, he gave a quiet but potent warning to the trading community about the strength of the destructive force they courted through their law-breaking. And this warning could only have supported the initiatives of Walpole in providing for the harsh penalties for breach of the law found in the Supplementary Act, defending the government against the criticisms of the merchant community.

On this issue the Journal is largely silent. This is not surprising, since, although the Journal was published in 1722, it purported to have been set in 1665. At that time, of course, there was nothing in the formal law that dealt with import restrictions of the sort

²⁸Defoe, Preparations, pp. 80-81.

proposed by Mead and discussed by Defoe in Preparations. Queen Anne's Act, passed in 1711, was the first attempt to deal with the quarantine of ships in something like a systematic way, despite the apparent *ad hoc* recognition by the government in earlier years of the danger of infection from imported goods. On the first page of the Journal, Defoe mentioned that, once it was recognized in late 1664 that the plague had arrived in Holland, "several councils were held about ways to prevent its coming over." Nevertheless, as Defoe wrote, "all was kept very private," apparently to prevent panic spreading needlessly among the people.²⁹ Later in the Journal, Defoe did comment on the difficulties that were experienced in London because of the cessation of trade during 1665, but he did not offer any detailed description of the law on this issue, nor on its effectiveness and impact. In one short paragraph, Defoe said:

Two particular trades were carried on by water-carriage all the while of the infection, and that with little or no interruption, very much to the advantage and comfort of the poor distressed people of the city, and those were the coasting trade for corn and Newcastle trade for coals.³⁰

Apart from these rather vague references, however, the Journal offers little insight into the actual social experience of the law of the quarantine of ships.

In summary, although the Journal is largely silent on the legal interference with trade during times of epidemic, this first issue gives us some insight into the differences between A Discourse on the Plague and Preparations in widening the scope of our

²⁹Defoe, Journal, p. 3.

³⁰*Ibid.*, p. 186.

historical knowledge of the law of quarantine in its social context. Through A Discourse on the Plague, we can gain some understanding of the strict reasoning behind many of the provisions that eventually appeared in the Supplementary Act, and Mead's "Preface" to the edition of 1744 is helpful in positioning his recommendations relative to the political difficulties faced by Walpole's government as a consequence. But for a more thorough understanding of the ramifications attendant on breach of the law, we must turn to Preparations, with its dire warnings of catastrophe for all but the most wealthy, most prepared, most diligent of the citizens of London, should the plague ever establish itself onshore in spite of the best efforts of the lawmakers. This sheds further light on the foundations of the law, explaining through actual (or perhaps "true to life") examples the tragic consequences of a weak, ineffectual, and largely unenforceable legal regime. From Defoe's perspective, recognition of these weaknesses and their consequences must have strongly supported the position in favour of reform of the law he had assumed since at least 1711.

The Shutting Up of Houses (and other Domestic Regulations)

The shutting up of houses occupied a good deal of Richard Mead's attention in A Discourse on the Plague, both in the "Preface" to the 1744 edition and in the text itself. Mead took some pride, it appears, in having recommended to the government that the shutting up of houses be discontinued as a method of dealing with the infection. In a direct challenge to the provisions of King James's Act, Mead wrote the following in his "Preface:"

The Usage among Us, established by Act of Parliament, of

Imprisoning in their Houses every Family the Plague siezes on, without allowing any one to pass in or out, but such as are appointed by authority, to perform the necessary Offices about the Sick, is certainly the severest Treatment imaginable; as it exposes the whole Family to suffer by the same Disease; and consequently is little less than assigning them over to the cruellest of Deaths: As I have shewn in the Discourse.³¹

No mention was made in the Quarantine Act of this practice, although, as will be remembered from chapter five above, King James's Act, in which shutting up was given legislative sanction, had never been formally repealed. It may be that uncertainty about the wisdom of abandoning the practice contributed to the failure of Parliament to repeal the earlier legislation, for, despite Mead's recommendation, the shutting up of houses remained at least a technical legal possibility, even after passage of the Amending Act by which offensive domestic portions of the Quarantine Act were repealed.

Mead's proposals for legal regulation as an alternative to the shutting up of houses are long, detailed and comprehensive. He began by denouncing the provisions of the London Order, especially those portions dealing with shutting up, the red cross and the words "Lord Have Mercy Upon Us." These rules, argued Mead, generated a "most dismal scene of misery," rather than offering to the sick and their families the comfort and assistance they so urgently needed.³² In a passage quite uncharacteristic of the rest of his book, Mead seemed to recognize the adverse psychological impact that might be experienced through suffering the law of confinement, in manner reminiscent of Thomas

³¹Richard Mead, *A Discourse on the Plague*, pp. xvii-xviii.

³²*Ibid.*, p. 102.

Vincent's God's Terrible Voice in the City:³³

It is not easy to conceive a more dismal Scene of Misery, than this: Families lock'd up from all their Acquaintance, though seized with a Distemper which the most of any in the World requires Comfort and Assistance; abandoned it may be to the Treatment of an inhumane Nurse ... [A]nd Strangers to every thing but the melancholy Sight of the Progress Death makes among themselves: with small Hopes of Life left to the Survivors, and those mixed with Anxiety and Doubt, whether it be not better to die, than to prolong a miserable Being, after the Loss of their best Friends and nearest Relations.³⁴

Apart from this exceptional glimpse into the psychological impact of the law of confinement, Mead gives a simple condemnation of the shutting of houses, setting up his recommendations as an alternative to an ill-founded, misguided law.

Mead's principal suggestion for reform is not dissimilar to Thomas Cock's proposal for separating the sick from the well as soon as the plague was discovered.³⁵ In fact, Mead cited Cock's Hygiene, or a Discourse Upon Air as an authoritative source for the strength of his proposals.³⁶ In short, Mead recommended a series of measures for domestic quarantine much like those he had proposed for foreign ships. He argued that, as soon as the plague was discovered (using "understanding and diligent men" as searchers rather than the "ignorant old women" employed under the London Order!³⁷), the

³³See above, chapter four, p. 122, note 49.

³⁴Mead, A Discourse on the Plague, pp. 102-103.

³⁵See above, chapter four, p. 130, note 60.

³⁶Mead, A Discourse on the Plague, p. 107.

³⁷*Ibid.*, p. 110.

families should be removed to specially constructed lazarettos three or four miles outside of town, the well in one location and the sick in another. Again, the well were to be stripped, washed and shaved, but Mead neglected to specify the length of quarantine, as he had in the case of foreign ships. He recommended, too, that all goods left behind in the homes of the removed families were to be buried so as to destroy the infection, and that any bodies dead of the plague should be buried well away from human habitation, and at an appropriate depth in the ground.³⁸

It is significant that Mead argued forcefully for greater public involvement in the attempts to control the spread of the disease, and in doing so he proposed several interesting and innovative measures. First, he suggested that no public expense should be spared in attending to the sick. In Mead's view, care and attention for those suffering from the plague was a public responsibility, and fulfilling this responsibility yielded a public good:

No manner of Compassion and Care should be wanting to the Diseased; to whom, when lodged in clean and airy Habitations, there would, with due Cautions, be no great Danger in giving Attendance. All Expences should be paid by the Publick, and no charges ought to be thought great, which are counterbalanced with the saving a Nation from the greatest of Calamities.³⁹

The justification for the expense of public funds lay not in simple benevolence for the sick and the poor, nor even in an appeal to Christian charity, but rather in the return the

³⁸Mead's proposals for reform of domestic quarantine are detailed at pp. 109-139 of A Discourse on the Plague.

³⁹*Ibid.*, p. 112.

public might reap through stemming the spread of the disease. In this argument, Mead reflects the sentiment discovered earlier in the recitals to King James's Act, where the special tax to provide relief for the poor was justified on the grounds of the protection it offered to the taxpayers themselves.⁴⁰

Mead also argued for the establishment of a "Council of Health,"⁴¹ to be composed of "some of the principal Officers of State, both Ecclesiastical and Civil, some of the chief Magistrates of the City, two or three Physicians, etc."⁴² Apparently, Mead thought that such a council might oversee the regulation of activity in times of epidemic, although he is a bit vague on the exact nature of the council's responsibilities:

And this Council should be intrusted with such Powers, as might enable them to see all their Orders executed with impartial Justice, and that no unnecessary hardships, under any pretence whatever, be put upon any by the Officers they employ.⁴³

While specific duties to be assigned to the council were unclear in Mead's work, it is fairly certain that he intended the council to take an active role in trying to manage poverty as a social source of ill health. He made recommendations for the regular inspection of the homes of the poor, so as to ensure that they were kept clean, and so as to prevent the poor from living in conditions too cramped for reasonably good health. He went so far as to suggest that the poor might be relocated if conditions were found on

⁴⁰See above, chapter three, pp. 70-72.

⁴¹Richard Mead, A Discourse on the Plague, p. 109.

⁴²Ibid.

⁴³Ibid.

inspection to be unsuitable to good public health. In a similar recommendation, the proper officers were to make regular inspections of prisons to ensure appropriate cleanliness and to prevent overcrowding.⁴⁴

Except perhaps in the suggestion of the establishment of the Council of Health, and in the insight that the poor might be “managed” so as to lessen the threat to public health, Mead’s proposals for eliminating the shutting up of houses and replacing the practice with a policy on separating the well from the sick are relatively unremarkable. As noted above, Thomas Cock had made similar suggestions as early as 1665, and Mead himself cited examples from the Italian cities of Ferrara in 1630⁴⁵ and Rome in 1657⁴⁶ as authority for the wisdom of his position. Many of Mead’s recommendations were provided for in the Quarantine Act, but were then repealed with the Amending Act, an event that apparently caused some bitterness for Mead. As noted earlier at the end of chapter five, Mead argued that the repeal of the domestic provisions of the Quarantine Act was done for purely political purposes, simply to appease critics advancing the cause of civil liberties, rather than for purposes of public health. His government suffered, he said, from “too much of Faction, and too little of a Public Spirit.”⁴⁷

Like Mead, Defoe offered his readers a comprehensive plan for reform of the law in Preparations, but most of Defoe’s suggestions arose in the context of the encirclement

⁴⁴Ibid., p. 122.

⁴⁵Ibid., p. 113.

⁴⁶Ibid., p. 115.

⁴⁷Ibid., p. xxxvii.

of towns and will be referred to in the next section of this chapter. As noted above, the principal focus of the balance of Preparations, after the early section on law reform, is personal advice for spiritual preparation for the plague, and for preparing the household by laying in stores of various provisions and isolating healthy family members from contact with the world outside the home. But it is in this longer section of the book, devoted to “Family Preparations Against the Plague,”⁴⁸ that Defoe does make mention of the difficult legal problem of the shutting up of houses. This problem would occupy a good deal of his attention in the Journal, while, in Preparations, the long centre portion of the book seems designed to assist families in voluntarily shutting up their homes as a means of self-protection, avoiding the more awkward legal issue of the confinement of healthy people in infected houses against their will. Oddly, Defoe seems to have resolved this issue in his own mind, introducing the section of Preparations devoted to personal advice in the following words:

When a house is infected with the plague, we shut it up; this was done in the late plague, 1665, with great severity; the design is to keep the common people from conversing with the infected families. When a house is sound and uninfected, they should shut themselves up, to keep them from conversing with the common people, who perhaps may be infected. The first is done to keep the families from giving the plague to the common people; the last should be done to keep the common people from giving the plague to the family; and the reasons are a just alternative. Nature dictates the one as well as the other; and let the inconveniences be what they will, it is certain the thing is so necessary, and the success so visible and promising, that no family can repent the design of doing it; many have repented sorely that they did not do it, or did

⁴⁸This section of Preparations begins on p. 45.

not do it in time.⁴⁹

There is very little equivocation here on the issue. This seems to be an endorsement of the forced confinement of infected families, an endorsement that would certainly align Defoe against Mead and other reformers of the day. But there is no detailed discussion of the shutting up of houses in Preparations (except, of course, shutting up as a voluntary measure), and no evidence to suggest why Defoe casually suggested that the practice was employed with great success during the Great Plague of 1665. Earlier in Preparations, Defoe mentioned the practice in his denunciation of the encirclement of towns, but only to raise it as an exception to the argument against the restriction of civil liberties through the enforcement of domestic restrictions.⁵⁰ There was no comparison to be drawn, he argued, by suggesting that, if encirclement of infected towns was an infringement of civil liberties, then so too was the shutting up of houses.

Besides, in private houses there is some difference in the equity of it, how they are all of a family, and have some obligation upon them to take the risk one with another; but it is not the same in a whole town, and I cannot but think men have a natural right to flee for the preservation of their lives, especially while they are sound and untainted with the infection ...⁵¹

The shutting up of houses, then, was to be distinguished from the confinement of entire towns, based upon the shared fate of members of a family, a fate that could not equitably be forced on strangers.

⁴⁹Defoe, Preparations, pp. 45-46.

⁵⁰Ibid., p. 15.

⁵¹Ibid., p. 19.

Perhaps there is no real reason to be surprised at Defoe's apparent support for the forced confinement, in their own homes, of infected families. As will be remembered from chapter five above, in his essays and letters Defoe expressed considerable sympathy for the plight of common people during times of epidemic disease. But his concern manifested itself in a call for tighter import restrictions and for more humane regulations on the encirclement of towns, and he failed to make any specific mention of the shutting up of houses. This is an interesting omission, one repeated to a large extent in Preparations. For a writer and political commentator like Defoe, so heavily involved in the debates of the day over the extent and protection of emerging civil liberties, it is certainly curious that he did not devote more of his thought to probably the most controversial legal practice in the domestic control of disease.

In the Journal, published but weeks after Preparations, Defoe is less convincing in endorsing the shutting up of houses. He devotes various sections of the book to the issue, but a long early section is telling.⁵² Again, he appears to support the severity of the law, but he is much more interested in describing to his reader the devastating consequences of its enforcement. For our purposes, Defoe gives us a clear picture of the relevant law and its practice,⁵³ primarily by quoting at length from the London Order, with its horrible detail on inspections, burials and the like. But Defoe also takes great pains to describe to us the consequences of these measures, and despite his general endorsement of the law,

⁵²Defoe, Journal, pp. 32-50.

⁵³Ibid., pp. 33-41.

he cannot help but lament the suffering that results. He recognized that the law represented an invasion of the private sphere, but argued that "... it was a public good that justified the private mischief ..." ⁵⁴ At the same time, however, that justification did not help to relieve the suffering of those confined against their will:

But I come back to the case of families infected, and shut up by the magistrates. The misery of those families is not to be expressed; and it was generally in such houses that we heard the most dismal shrieks and outcries of the poor people, terrified and even frightened to death by the sight of the condition of their dearest relations, and by the terror of being imprisoned as they were. ⁵⁵

If there is a direct relationship between Defoe's projects in Preparations and the Journal, it is probably to be found in this issue. He concludes in both books that the shutting up of houses is a necessary legal invasion of the private realm. In the Journal, he describes as well the terrible social consequences of the enforcement of that regulation, while in Preparations he proposes ways to soften the impact of the law through its modification. But in the Journal Defoe was much more keenly aware that the law of confinement was actually to be experienced by the citizenry, and despite its apparent effectiveness the consequences of its enforcement had devastating implications.

This shutting up of houses was at first counted a very cruel and unchristian method, and the poor people so confined made bitter lamentations. ... It is true that the locking up the doors of people's houses, and setting a watchman there night and day to prevent their stirring out or any coming to them, when perhaps the sound people in the family might have escaped if they had been removed from the sick, looked very hard and cruel; and many people perished in

⁵⁴Ibid., p. 43.

⁵⁵Ibid., p. 49.

these miserable confinements which, 'tis reasonable to believe, would not have been distempered if they had had liberty ...⁵⁶

For Defoe, even given the harsh consequences of the enforcement of a law that sent many healthy people to their doom, "it was a public good that justified the private mischief," and, as a result, the law was to be endured in service of that greater good.

Defoe's difficulty in the Journal with the shutting up of houses, his concern with its social implications despite what he believed to be its ultimate effectiveness in promoting the common good, may have related as well to his disagreement with the conscription of healthy citizens to stand watch, a provision given the force of legislation in the Quarantine Act. In the Journal, Defoe commented at various points on the hardships suffered by the watchmen at the hands of the confined, and used the ineffectiveness of the watch to argue for alternatives to confinement generally. In the following short excerpts, Defoe is summarizing some comments on the unavailability of trained guards, and on the harm that sometimes came to those who were conscripted:

During the shutting up of houses, as I have said, some violence was offered to the watchmen. As to soldiers, there were none to be found; the few guards which the king then had ... were dispersed ...

...

This made the watchmen be the less regarded, and perhaps occasioned the greater violence to be used against them. I mention it on this score to observe that the setting watchmen thus to keep the people in was, first of all, not effectual, but that the people broke out, whether by force or by stratagem, even almost as often as they pleased ...⁵⁷

...

⁵⁶Ibid., pp. 42-43.

⁵⁷Ibid., p. 61.

This is one of the reasons why I believed then, and do believe still, that the shutting up houses thus by force, and restraining, or rather imprisoning, people in their own houses, as I said above, was of little or no service in the whole. Nay, I am of opinion it was rather hurtful, having forced those desperate people to wander abroad with the plague upon them, who would otherwise have died quietly in their beds.⁵⁸

To argue in this short section of the Journal that the shutting up of houses was “of no service in the whole” was to contradict his earlier attempt to justify the practice on the grounds of promotion of the common good. The inconsistency cannot be explained with any certainty, except to say that Defoe himself was unsure as to the wisdom of a law that caused so much private misery, even in the service of the public good.

Defoe also found cause in the Journal to comment on the unlikelihood of enforcing an unpopular provision when the officers of enforcement were not committed to their roles. It will be remembered that, in the Quarantine Act, it was made a capital offence for a watchman to allow any persons or goods to escape from confined areas, and Defoe addressed this issue in the Journal by having his narrator, H.F., appointed as an “examiner of houses.” Essentially, the role of these conscripts was to ensure that the watchmen were performing their duties properly, and to recommend to the appropriate alderman when punitive actions were required. H.F. tried all possible means to avoid the appointment, but finally accepted it on the condition that he would be replaced at the first possible opportunity. In any case, H.F. made the argument against his appointment like this: “... I alleged that I was against shutting up houses at all, and that it would be very

⁵⁸Ibid., p. 62.

hard to oblige me to be an instrument in that which was against my judgment, and which I did verily believe would not answer the end it was intended for...”⁵⁹ Again, Defoe is commenting here on the severity of the prevailing regulatory regime, underscoring how difficult was the task of the watchmen in the enforcement of restrictions abhorrent to the public at large and to their private opinions. Providing the death penalty for failure in fulfilling such a duty could only have intensified an already impossible situation.

The final issue I want to mention in this section relates to those provisions in the Quarantine Act directing the removal of infected persons to ships or lazarets anchored offshore. It is obvious that the idea behind these provisions must have been that persons isolated in this manner had less chance of passing the plague to others, so that movement between ship and shore was tightly restricted and severe penalty, in some cases death, was prescribed for violation. In the Journal, Defoe explored this issue by reversing it, suggesting that ships anchored offshore served as a refuge for healthy citizens, wealthy enough to buy their way on board.⁶⁰ But, as Defoe argued, even in the isolation of the ship the plague found a way to take its toll, coming aboard perhaps through deliverymen or infected provisions. The results were horrifying.

But it was also true that all the people who thus left the land and lived on board the ships were not entirely safe from the infection, for many died and were thrown overboard into the river, some in

⁵⁹Ibid., pp. 136-137.

⁶⁰Ibid., pp. 96-97. The practice of fleeing to a ship anchored offshore was explored in depth by Defoe in Preparations, where the family that formed the subject of his inquiry into spiritual preparations removed itself to a family-owned ship for the last four months of 1665. See Preparations, pp. 159-183.

coffins, and some, as I heard, without coffins, whose bodies were seen sometimes to drive up and down with the tide in the river.⁶¹

The implication of this, of course, is that the plague could just as well move from the ship to the shore as it could the reverse, rendering the effectiveness of these parts of the Quarantine Act highly suspect. Again, the realization that the prevailing legal regime might be largely impotent in dealing with the devastation to be expected should the plague arrive from the continent could only add strength to Defoe's own suggestions for reform, providing as they did for a large number of protective measures to be taken as soon as the threat appeared imminent. Only in that way could the law's effectiveness be improved, and its harshness for the common people be softened.

On the issue of the shutting up of houses, then, the three books under consideration give us somewhat different impressions of the law as it stood in 1665, and as it was to be reformed in 1722. In A Discourse on the Plague, Mead dismissed the practice absolutely, commenting briefly on the hardship it caused among the citizens, but concentrating on its ineffectiveness in controlling the spread of the disease as the argument for its replacement by more sound practices. Defoe, on the other hand, gave the law an offhanded endorsement in Preparations as an effective, and therefore justified, encroachment on civil liberties. In the Journal, however, we find a more broad consideration of the law, a consideration that leads Defoe to more equivocation on the wisdom of a regulation that sent many healthy citizens to certain death. In its broad social context, explored in depth by Defoe through the medium of fiction in the Journal,

⁶¹Defoe, Journal, p. 97.

the character of the law was not so certain, not so straightforward, not so beyond reproach simply because of its apparent effectiveness. The terrible implications of the law for the lives of common people gave Defoe pause in the Journal, underscoring for him the dual characteristic of necessary but invasive regulation.

The Encirclement of Towns

In Preparations, the balance of Defoe's direct response to quarantine law was oriented toward alternatives to the strict encirclement of towns. He actually provided a thirteen point proposal for reform in this respect,⁶² some aspects of which were consistent with the repealed provisions of the Quarantine Act, but most of which were not. In general, his proposals were designed to prevent suffering as a result of the essential, but regretted, severity of the law, and in this way Defoe answered his own ambivalence about the overall character of domestic restrictions. While acknowledging that particular houses, neighbourhoods or towns might of necessity be isolated so as to prevent the spread of plague, Defoe designed a series of measures to soften the effects of isolation on those least able to survive. He suggested that poor people be allowed a period of time to join relatives in distant towns, and that funds be made available to assist in this respect. All "beggars, vagabonds or loose people" would be granted assistance to return to their parishes of origin, and "alms poor" and "parish pensioners" of London and area would be provided with special accommodation distant from the city. Debtors' prisons were to be emptied, their inmates moved to new quarters away from the infection, and accused

⁶²Defoe, Preparations, pp. 21-23.

persons awaiting criminal trial “should be forthwith tried.” Except for those sentenced to death, convicts were to be immediately transported, or “let out on condition of going forty miles from the city, not to return on pain of death.” Five of Defoe’s thirteen proposals were directed toward the safety of children, whether they be workhouse children, hospitalized children, charity children, children of the poor or children of the wealthy. “In short, all the children in the city and the suburbs should be sent away,” the government providing accomodation for those in need, and the wealthy paying a fee for lodging. Finally, Defoe allowed for healthy citizens to leave encircled neighbourhoods by providing certificates of health, by submitting to physical examinations on three successive days, and by remaining in isolation in government-provided barracks for a further twenty days.

By proposing measures designed to protect the poor, the confined and children, Defoe made a strong attempt to accommodate the essential severity of the law to the hardship that that severity nevertheless caused in times of plague. He wanted to protect the public, yet leave its members with their freedoms and their dignity. He wrote at great length of the inhumanity of laws that abandoned healthy people to the confines of a plague-stricken community,⁶³ and insisted that public funds be used as the means to assist in their removal. This was especially his plea in the case of children:

By this means the lives of an hundred thousand poor innocent creatures, who, as God was pleased to say of Nineveh, know not their right hand from their left, would be saved, and these children would be preserved for the good of posterity; most of whom would

⁶³Ibid., pp. 24-27.

otherwise inevitably perish, some by want, some by neglect, some by the loss of their parents, and the rest by the distemper.

But by this means not a child would be left in the whole city of London, and in all its vast extended suburbs; whereas the distress of poor families in the time of the last plague, by reason of the great numbers of children that lay starving upon their hands, was inexpressible, and the numbers of them that perished in the streets and in empty houses, and in other places full of misery, added exceedingly to the height of the bills of mortality.⁶⁴

These paragraphs capture at once Defoe's contempt for the inflexibility of domestic restrictions, his overriding sympathy for the plight of affected families, and his talent in pointing out to his reader the dreadful consequences of a strict legal regime. He made similar comments on the poor and the infirm, and extended his advice to include suggestions on sanitation, slaughterhouses, the disposal of domestic animals, and street paving.⁶⁵ In short, Defoe gave a comprehensive proposal for law reform designed to alleviate what he considered to be the inhumanity of an unduly severe set of laws.

It is noteworthy that Defoe considered his stand against the strict encirclement of towns to be a direct challenge to Mead's proposals in A Discourse on the Plague. Defoe's argument with encirclement arose through his commitment to the civil liberties of the English, and this, despite what appears to be his equivocation on the true nature of civil liberties in either advancing or detracting from real freedom.⁶⁶ Defoe mentioned

⁶⁴Ibid., pp. 25-26.

⁶⁵Ibid., pp. 27-31.

⁶⁶See above, chapter five, pp. 149-152, for a review of Defoe's reluctant support of English civil liberties, "these happy, unhappy Obstructions."

Mead specifically in the context of Mead's apparent support for the strict practice of encirclement enforced by the French, a practice roundly condemned by Defoe, as it will be recalled from chapter five above, in his essays and letters.

The physicians seem at present to fall in with the French methods, viz., of preventing the spreading of infection by surrounding the towns where it shall happen to be with troops of soldiers, cutting off all communication with the countries or parts of the country where such towns are that shall be infected. This Dr. Mead has been pleased to propose also in his treatise called "A Short Discourse."⁶⁷

But for Defoe, Mead's support for the French regulations in this respect was misguided, largely because of Mead's failure to consider in the appropriate way the enhanced system of civil liberties in England that would prevent anything like the French model from ever being enforced.

I must confess I do not see that this can be made practicable in England, and we see already it has not been effectual in France, notwithstanding greater severities have been used there than I presume will ever be allowed to be used here.⁶⁸

Defoe was careful to point out, however, that his argument against the encirclement of towns was not based purely on the invasion of civil liberties represented by the practice. If the practice could be demonstrated to be effective, he argued, then perhaps it could be justified, as was the case in other situations where individual loss was imposed legitimately, so as to promote the public good. But Defoe doubted that any demonstrable public welfare could be so desirable as to justify such a cruel and

⁶⁷Defoe, *Preparations*, p. 11.

⁶⁸*Ibid.*, p. 12.

devastating destruction of liberty.

I shall not enter here upon the debate of the invasion of liberty, and the ruin of property, which must necessarily attend such a practice as this, I mean in case of investing towns. The equity of the case does by no means agree with things done in cases of other extremities, as the blowing up of houses in case of fire, drowning lands in case of an enemy, and the like; but this is really shedding innocent blood, which is a kind of evil not to be done that good may come, no, not of any kind.⁶⁹

Defoe's condemnation of those who would advance the argument in favour of encirclement, even if it could be demonstrated that such a practice had positive potential in controlling the spread of the disease, was complete and unrestrained, directed specifically at Mead and others who advanced the provisions that eventually found their way into the Quarantine Act.

Mead made a spirited attempt to answer Defoe's criticism in the "Preface" to the 1744 edition of A Discourse on the Plague. Defoe's position had been vindicated, of course, in the quick introduction and passage of the Amending Act, by which Mead's recommendations on the encirclement of towns, initially endorsed in the Quarantine Act, were repealed in their entirety. Mead was not one to admit defeat, however, arguing that it was simple political expediency, and not any genuine interest in civil liberties, that forced Walpole to retreat on the question of domestic restrictions. And he defended himself with some indignation against the suggestion that his original proposals engendered cruelty and misery in their enforcement.

No doubt, but at all Times, these Powers ought to be so limited and

⁶⁹Ibid., pp. 18-19.

restrained, that they may never endanger the Rights and Liberties of a People. Indeed, as I have had no other View than the Publick Good in this my Undertaking, and the Satisfaction of doing somewhat towards the Relief of Mankind, under the greatest of Calamities; so I should not, without the utmost Concern, see that any Thing of mine gave the least Countenance to Cruelty and Oppression.⁷⁰

After defending his own intentions in this way, he continued by distancing himself from the practices of the French on encirclement, apparently answering Defoe's challenge directly and unequivocally.

The rigorous Restraints observed at their Lines, are attended also with the like Inconveniences. For by absolutely denying a Passage to People from infected Places, they subject to the same common Ruin, both from the Disease, and from the Disorders committed in such Places, those, whom their Fortunes would otherwise furnish with Means of escaping: and this, no doubt, in every free Country, must be looked upon as an unjust Infringement of Liberty, and a Diminution of Mens natural Rights, not to be allowed.⁷¹

Mead provided a series of measures in the text of A Discourse on the Plague that, in his view at least, would allow the authorities to see to the protection of the public through a modified encirclement of infected areas, but at the same time would ensure that individual liberties remained unoffended by the practice. To a large extent, these suggestions mirror Mead's proposals on the quarantine of the crews of foreign ships. According to Mead, infected towns were to be encircled, but anyone might obtain a certificate of health, allowing free passage through the lines, after performing a quarantine of twenty days in tents and buildings provided for the purpose. In this way,

⁷⁰Mead, A Discourse on the Plague, pp. xv-xvi.

⁷¹Ibid., p. xx.

argued Mead, the severity of the French law of encirclement might be avoided, yet the public would be protected through a system of quarantine, the penalty for the breach of which was to be as severe as possible.

The best Method [for preventing the spread of the disease]... is to cast up a Line about the Town infected, at a convenient Distance; and by placing a Guard, to hinder People's passing from it without due Regulation, to other Towns: but not absolutely to forbid any to withdraw themselves, as was done in France, according to the usual Practice abroad; which is an unnecessary Severity, not to call it a Cruelty. I think it will be enough, if all, who desire to pass the Line, be permitted to do it, upon condition they first perform quarantaine for about twenty Days in Tents, or other more convenient Habitations.⁷²

Not willing to relinquish his position on the encirclement of towns as an effective measure for controlling the spread of the disease, even given criticism like Defoe's, and even given the implicit rejection of his position through passage of the Amending Act, Mead put forward a recommendation that he felt accommodated both the concern for public safety and the preservation of individual liberty.

While Defoe commented at length on encirclement in Preparations, his comments are much more scattered on this issue in the Journal. Again, the reason for this neglect is not easy to determine. It may be that London was not affected terribly much by the practice during 1665 for, as Defoe reported in the Journal, most of those who decided to escape the city did so before any rumoured encirclement could become a reality.

This hurry, I say, continued some weeks, that is to say, all the month of May and June, and the more because it was rumoured that an order of the Government was to be issued out to place

⁷²Ibid., p. 142.

turnpikes and barriers on the road to prevent people travelling, and that the towns on the road would not suffer people from London to pass for fear of bringing the infection along with them, though neither of these rumours had any foundation but in the imagination, especially at first.⁷³

This reference is not unlike that of John Tabor,⁷⁴ in which Tabor discussed the encirclement of towns as a defensive mechanism against the local importation of plague from neighbouring infected communities. It is odd that Defoe did not comment more extensively on the practice in the Journal, especially given his vehement denunciation of the law in Preparations. Only in the passage just quoted, and in occasional comments during the long story about the three men who wandered about the countryside to escape the confines of the city,⁷⁵ did Defoe even mention encirclement, and perhaps this can be explained by the setting of the Journal. Defoe's narrator, H.F., spent the entire plague year in London, and Defoe's purpose is largely to demonstrate the impact that the disease and the attempts to regulate its spread had on life in the city. Encirclement, then, barely entered into the picture, except in ways tangential to other purposes.

In conclusion, despite the superficial inconsistency between Preparations and the Journal in representing Defoe's attitude toward the shutting up of houses, the two books read together offer us a comprehensive picture of Defoe's position relative to the prevailing regulatory regime, its prospect for reform, and the sometimes devastating

⁷³Defoe, Journal, pp. 8-9.

⁷⁴See above, chapter five, p. 141, notes 17 and 18.

⁷⁵Defoe, Journal, pp. 105-128.

social impact that the attempted enforcement of that law might have for the common people. Primarily, Defoe continued to be alarmed at government inaction, a concern he expressed time and again in the letters and essays reviewed in chapter five. Walpole's reforms were a beginning, of course, but the wholesale repeal of the domestic provisions of the Quarantine Act, without their replacement by humane enactments designed to safeguard the public while at the same time protecting individual liberties and alleviating suffering, must have frustrated Defoe. In fact, he continued his assault against the government on the first page of the Journal, warning that hopes and prayers were not enough to avoid the unavoidable:

But it seems that the Government had a true account of it, and several councils were held about ways to prevent its coming over; but all was kept very private. Hence it was that this rumour [of the approach of the plague] died off again, and people began to forget it, as a thing we were very little concerned in, and that we hoped was not true ...⁷⁶

The warning from Defoe is clear, that without some firm legal action the events of 1665 would be repeated, and the sufferings of the common people, at the hands of both the plague and the law, would return once again. The impact of the law on the lives of the common people during times of epidemic disease was described with painstaking scrutiny in the Journal, in ways that horrified its readers and presented the law in a light much different than could be understood simply through a review of the various statutes, amendments and orders.

In Preparations, too, although with perhaps less artistry than in the Journal, Defoe

⁷⁶Ibid., p. 3.

underscored his insistence that a complete reform of the law was necessary to prevent a recurrence of the disaster of 1665. But in Preparations, Defoe is more subtle in his warnings. It is true that he provided a direct attack on Mead and other like-minded reformers, and that he outlined a relatively comprehensive programme for revising the law. But in his description of family life during the time of the epidemic of 1665, Defoe cleverly provided his readership with powerful examples of the consequences of breaching quarantine and allowing the establishment of plague onshore.

Such a rhetorical technique was beyond the purpose of A Discourse on the Plague, a book primarily intended to demonstrate the author's arguments for reform based on reason and effectiveness. There is virtually nothing in Mead's work to assist us in looking beyond the strict letter of the law of quarantine, and nothing but defensive replies and revisions to answer Defoe's criticisms on Mead's contribution to the attack on civil liberties. Through A Discourse on the Plague, then, we have the conventional legal-historical voice of a writer directly involved in the process of law reform, interested too in the preservation of his own reputation. In Preparations, the author not only considers both the strict terms of the law and engages the reformers on their own ground, but also uses subtle literary techniques designed to bring home to the reader the impact that a weak legal regime might have on the lives of common people. And finally, in the Journal, Defoe describes in page after page of agonizing detail the suffering undergone by the unfortunate citizens who were forced to suffer the law of confinement, a law that, despite its apparent harsh results, was endorsed by the author as a necessary evil in calamitous times.

CONCLUSION

It is probably correct to say, with Richard Posner, that the field of inquiry known as “law and literature” opens up a number of interesting avenues that, until relatively recently, have been ignored in conventional academic discussion, for the most part at least. But Posner unduly restricts his inquiry by insisting on the theoretical or methodological confinements of one of the two disciplines or the other, continuing to define new avenues for exploration by investigating the areas in which law and literature can be seen to overlap. Posner’s own description of his subject matter serves to underscore the scholarly limitations imposed by disciplinary boundaries, even when the subject of inquiry is arguably “interdisciplinary.” In Posner’s words,

[t]he study of law and literature seeks to use legal insights to enhance understanding of literature, not just literary insights to enhance understanding of law. The field envisages a general confrontation or comparison, for purposes of mutual illumination, of two vast bodies of texts, and of the techniques for analysing each body. The result is a rich but confusing array of potential links between law and literature.¹

It is clear that Posner’s work, despite its admitted interdisciplinarity, remains confined by the separate constraints that might be encountered in either a purely legal or purely literary study. He is looking for “links,” or overlap, between two distinct textual traditions. Techniques and insights not supplied by one of law and literature remain unavailable to Posner because of his paying obeisance to the boundaries between disciplines. The two subjects are in confrontation, and the challenge for Posner is to

¹Posner, Law and Literature: A Misunderstood Relation, p. 1.

overcome that confrontation by forcing interdisciplinary communication. Because his inquiry must begin necessarily from either a legal or literary perspective, his available questions must also be limited to those that can be posed within the confines of one or the other discipline. The inevitable result is the monotony in law and literature scholarship that formed the focus of Gretchen Craft's complaint.²

The attempt to overcome these limitations is a valuable one, especially in the context of a project in history. It is through the migration of ideas from one discipline to another, ideas about both theory and method, that the real benefits of interdisciplinarity can be realized, not through the simple exploration of the ways in which the disciplines, by one happy coincidence or another, may overlap in their treatment of themes, or in their use of peculiar vocabularies. The recognition of the instrumental value of the theories or methods of one discipline in answering questions ostensibly asked within the confines of another cements the notion that true interdisciplinarity is achieved by overcoming disciplinary boundaries, not by drawing them ever more tightly around the object of inquiry.

In conventional terms, legal history is limited by its focus on legal doctrine, as a result of which the range of voices from history that carry acceptable authoritative weight, and the range of types of evidence on which credible historiography can be based, are limited to parliamentarians, judges and lawyers, and their statutes, cases and academic tracts. This result is fine, of course, so long as the inquiry is limited to the attempt to

²Referred to above in chapter one, p. 23.

discover doctrine for professional ends, rather than some wider purpose. But when we allow the importation of the notion from legal studies that the law means something more than just doctrine, that it means as well the experience of the law by real people in real situations, then the conventional voices and sources in legal history become inadequate to the task of approaching a more complete description of the object of our inquiries.

It is at this point that the intellectual freedom found in true interdisciplinarity can yield real advantages for scholarship. Given the wider conception of law put forward in the legal studies context, where can we look for evidence of that law in legal history? Whose voices have relevance? On what texts might we rely? Theories and methods that might assist in finding answers to these questions can be supplied to the student from outside the confines of legal history, at least where legal history fails to provide suitable answers itself. If we look to literature, for example, to assist in providing evidence useful to our understanding, then we establish a “link” (to use Posner’s term) between the two disciplines that is simply non-existent when law and literature are considered from within their separate arenas. In certain respects, ideas supplied by the new historicism help us to understand the significance of such interdisciplinary borrowing, suggesting to us that the texts on which we rely in one historical context or another are really available as evidence in a variety of different inquiries in history. The description of these various texts as “autobiography,” “propaganda,” “fiction” or “theology” simply serve to limit the uses to which they might be applied, categorizing a work without recognizing its embeddedness in the social and cultural conditions of its emergence.

When the influence of a variety of different disciplines is felt in a project in legal

history, then the possibility of participating in the process of the “democratization” of legal history (to use Joan Wallach Scott’s term³) is opened up for the student.

Immediately, the range of acceptable voices from the past is widened to points beyond the world of politics and the legal professions. Automatically, the range of texts to be considered in describing the law is expanded. Such is the case with the literature of 1665 and shortly after, reviewed in chapter four above. In this literature, most of which is only tangentially about the law as it might be described through reading King James’s Act, the London Order and other contemporary proclamations and regulations, we find a wide variety of perspectives on the significance of the law in the lives of ordinary Londoners during time of plague. We find expressions of indifference, obedience, and submission. We find resistance, frustration and insistent calls for reform. We find intellectuals divided on the role of the law in people’s lives, some dismissing it as irrelevant and some condemning it for unjustifiable interference in the private sphere. And we find fear, the fear of an unknown fate symbolically attached to the watchman’s halberd and the ominous words, prescribed by law, “Lord Have Mercy Upon Us.”

Without the freedom that comes with the understanding of interdisciplinary inquiry put forward in chapter one above, the type of evidence in legal history reviewed in chapter four would not likely be contemplated if the history of the law of quarantine were to be written from a conventional legal-historical perspective. But this is not to say that there is no value in reviewing political conditions, general legal developments and

³Referred to first above in chapter one, p. 26, note 2.

specifics of doctrinal quarantine law for the historical period in question, all as attempted in chapters two and three above. These events and issues form a starting point for a wider inquiry into the social impact of quarantine law, and allow us to attempt to describe in its most complete sense the effect of the law in real social situations. The upheaval in English political life, lasting from the 1640's through to the 1720's, had real implications for the way in which the law developed generally following the Restoration. The growing independence of Parliament during the period, coupled with a heightened concern for civil liberties and procedural legal reforms, all contributed to the social conditions under which the law of quarantine might have been enforced had it been necessary in the 1720's, and the realization of this fact had significant and direct impact on the reforms initiated by Walpole's Whigs in the early years of that decade.

Throughout the years from 1711 to 1722, the writings of Daniel Defoe on plague and the law of quarantine give valuable assistance in the attempt to complete the description of the effect of the enforcement of the law and the process of its reform. Again, many of the essays and letters referred to in chapter five above are not of use in an inquiry devoted exclusively to questions about the history of the doctrinal law of quarantine, but they are of tremendous significance when considered as a source of evidence about the social impact of that law, and when they are read in the context of the years leading up to the reforms of 1722. Only when we allow our inquiry to be influenced by ideas imported from legal studies and the new historicism do Defoe's publications gain strength as legal-historical sources, and it is only then that we give voice to an historical actor more likely to be encountered in a purely literary context, or

perhaps in political history, than in a legal-historical inquiry. This is a demonstration of the democratization of legal history, in the sense contemplated by Joan Wallach Scott, by giving voice to those whose perspectives have been ignored through the domination of particular approaches to the past. In contrast to Scott's concern with giving voice to those who have been silenced in history because of who they are, however, the position advanced in this thesis is an attempt to give voice to those who have been ignored for what they say or fail to say about the law as it was written on the statute books of the day.

Intellectuals like Defoe were concerned with the impact of the law, with its effectiveness, with the way in which ordinary people were compelled to submit to an authority over which they had little control and which appeared to work in mysterious, incomprehensible and cruel ways. In Preparations, especially, we find Defoe attempting to explain to his readership the wisdom of the law, particularly with respect to the importation of goods but also with respect to difficult domestic restrictions like the shutting up of houses and the encirclement of towns. And in the Journal, Defoe expresses such confusion and uncertainty about the impact of the law that his words capture many of the doubts and anxieties of the age in general, especially as those doubts and anxieties might manifest themselves during the particularly stressful times of epidemic disease. But again, however, unless our inquiry is influenced by approaches to the subject from a variety of disciplinary sources, a history of the law of quarantine would overlook Defoe's works as illustrative of the law at all.

In the case of Richard Mead's A Discourse on the Plague, meanwhile, we find an example of literature that fails to broaden (to any great extent, at least) our understanding

of the history of quarantine law in its social context. This is so, despite the usefulness of the work in an inquiry devoted to the immediate political impetus for the reforms of 1722. There is little contribution to be made by Mead's work in our attempt to democratize legal history; the voice heard in his text is little different from the voices that might be encountered in the parliamentary debates of the day. As late as 1744, Mead was boasting to his readers about the direct impact his work had on the way in which the statutes were revised,⁴ and it is true that much of what he recommended in A Discourse on the Plague found its way into the reforms, at least as they were originally proposed. So, while such a work is valuable in its place, it does little to assist us in our specific project of expanding our historical knowledge of quarantine law beyond the terms of the statutes themselves.

Our understanding of the interdisciplinary study of law and literature, then, must not be confined to the recognition of areas of overlap between the two disciplines. The expansion of knowledge depends on the ability to overcome confinements, whether in the range of questions that can be asked, or in the methods available to answer those questions, or in the theoretical orientations that, to some degree, give rise to the questions in the first instance. There is little to be gained in this regard by restricting inquiry to an ever more narrow focus. Rather, there seems to be a great deal to gain by allowing academic inquiry, including inquiry in "law and literature," the freedom to draw theoretical and methodological inspiration from a variety of otherwise disparate sources.

⁴See above, chapter six, p. 169, note 14.

For legal history in particular, the expression of this freedom experienced by looking at the past through the telescopic lens of literature carries great potential for the expansion of our historical understanding, and for our definition of what an inquiry in legal history actually entails.

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