
April 1986

**Book Review: Without the Law II - 'Without the Law:'
Administrative Justice and Legal Pluralism in Nineteenth-Century
England, by Harry W. Arthurs**

Robert W. Gordon

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

Book Review

Citation Information

Gordon, Robert W.. "Book Review: Without the Law II - 'Without the Law:' Administrative Justice and Legal Pluralism in Nineteenth-Century England, by Harry W. Arthurs." *Osgoode Hall Law Journal* 24.2 (1986) : 421-436.

DOI: <https://doi.org/10.60082/2817-5069.1874>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol24/iss2/7>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Book Review: Without the Law II - 'Without the Law:' Administrative Justice and Legal Pluralism in Nineteenth-Century England, by Harry W. Arthurs

WITHOUT THE LAW II

'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England. By H.W. Arthurs. Toronto: University of Toronto Press, 1985.

*Reviewed by Robert W. Gordon.**

This is a work of history — mostly, as I shall argue, very good history. But make no mistake about it, Harry Arthurs's purpose in writing this book is not in the least antiquarian, but present minded and polemical. He is out to slay a dragon. The dragon is 'Legal Centralism', otherwise known, in the classic formulation of A.V. Dicey,¹ as the Rule of Law.

I

Legal Centralism, as Arthurs explains it, is the dogma that there exists (in England and other polities governed on English legal models, including Canada and presumably also the U.S.) a dominant normative order, defined by a general set of rules and principles (the law), emanating from the state, governing all members of society equally and impersonally, and enforced and applied through the ordinary courts. An important corollary of the dogma is that there can be no rival sovereigns, no "Alsatia where the King's writ does not run," no coordinate or superior sources of normative direction or coercive enforcement. Alternatively, at least to the extent there are such rivals, their actions must be made subject to the Rule of Law by means of review in the ordinary courts. Any rule-making, dispute-settling, norm-creating group or institution that is not a court or accountable to a court, or required to employ a court as its enforcement arm, or is not part of the state, or is not administered through legal professionals has nothing to do with 'law' in any meaningful sense and has thus no claim on the attention of lawyers; or, at least — in case practising lawyers should be so perverse as to involve themselves with such extralegal institutions — no claim on the attention of legal scholars.

Arthurs's description of Legal Centralism resembles Weber's notion of formal-legal rationality, but with an Anglo-American tilt in favour of *judicial* rationality. The modern liberal state, in the Legal Centralist's

© Copyright, 1986, Robert W. Gordon.

* Professor of Law, Stanford University.

¹ A.V. Dicey, *Introduction to the Law of the Constitution*, 3rd ed. (London: MacMillan, 1889).

view of things, has emerged from the pluralist jungle of overlapping and competing jurisdictions of mediaeval primary groups — feudal manors, churches, free cities, guilds, patriarchal households, *et cetera* — as the dominant or universal order to which all others must be subordinate. The state is the monopolist of legitimate coercion — legitimate because coercion is regularly and rationally imposed through the forms of law. But, whereas for Weber the paradigm rational-legal institution of the modern state was the bureaucracy, for Dicey, of course, it was the ‘ordinary courts’ applying ‘ordinary law’ in reviewing the applications to individual subjects of the rules made by Parliament and its bureaucratic minions. Legal Centralism, thus defined, is both descriptive and normative. It claims that the Anglo-Saxon polities have *actually evolved* toward the condition of the rule-of-law (the primacy of formal state law applied through the ordinary courts). Also, it posits that condition as the desirable order of things, the order against which current regimes must be tested and judged and deviant practices condemned. Lord Hewart was acting as the quintessential Legal Centralist, by Arthurs’s definition, when in 1929 he branded as “the New Despotism” the increasing delegation of law-making authority in the English welfare state to administrative bodies.² So were the American lawyers recently described by Jerold Auerbach, who, unable to tolerate the speed and informality of commercial arbitration, superimposed upon it layers of judicial reviewability that defeated most of its purposes.³ So too, of course, are those law teachers of the present day who decline to teach or write about the decisional practices of administrators or arbitrators on the ground that, until or unless such practices are subject to judicial review, they have nothing to do with ‘law’.

Evidently ‘Legal Centralism’ is not a single, simple thing but a cluster of things, a protean term encompassing a wide variety of attitudes and practices: belief in the sovereignty of the state and the separation of powers, specifically the channelling of the exercise of state authority through judicial forms; a corresponding drive to submit to judicial control such subordinate sub-state associations and non-judicial state organs as appear to exercise pseudo-legal authority, or else to eliminate them entirely; and, finally, a cultural predisposition to depreciate the claims to legitimacy — and to ignore the pervasive *de facto* reality — of non-judicial agencies and sub-state associations acting as institutions of governance. Legal Centralism is a classical-liberal lawyer’s vision of

² Lord Hewart, *The New Despotism* (London: E. Benn, 1945, 1929).

³ J.S. Auerbach, *Justice Without Law?* (Oxford: Oxford University Press, 1983).

governance, a vision — if one were to try to sum it up in a phrase — of the *common-law state*.

Arthurs's aim is to demolish the ideology of Legal Centralism in all its aspects. As description, he argues, it is bad history and bad sociology; as a normative ideal, it is flawed, problematic, demonstrably unfortunate in many of its instantiations; as a culture, it is intellectually stultifying. He wants to identify and isolate as primarily a *lawyers'* ideology a sort of fantasy of ideal order that the legal profession has constructed in order to magnify the importance of the peculiar practices in which lawyers and judges have achieved their monopolies and special competencies; but it is such an influential ideology that it has spread out and attracted adherents among many other groups as well.

II

Against the claims of Legal Centralism, or at least as a supplementary notion, Arthurs wishes to assert the claims to historical and present actuality and to the frequently superior decisional capacity of an alternative vision of institutional practices that he calls 'Legal Pluralism'. Legal Pluralism is never quite as well defined as Legal Centralism, and, in fact, tracing its contours involved Arthurs in some conceptual difficulties, which I will return to. His book's chief device for elaborating, by example, the concept of Legal Pluralism and establishing its claims to our preference is to rescue from relative oblivion a marvelously interesting collection of extrajudicial regulatory and dispute-settlement organs that proliferated in England between 1830 and 1870 — that is, in the very period in which the *ideology* of Legal Centralism came to full flowering. Arthurs, among other things, seeks to explain this paradox: How did Centralism come to triumph as the ruling ideology with the reality of Pluralism all around it?

The standard story of this period, much influenced by Legal-Centralist thinking, has been that it witnessed the gradual obsolescence of the remnants of the old local and customary rivals to central state adjudication — manor courts, stannary courts, forest courts, and the like. Arthurs partially confirms this story, but with a bitter twist: these pluralist rivals did not simply decay — they were hounded into extinction. The legal profession and common-law judges organized determined attempts to eliminate customary local law where they could and subjected arbitration and administration to strict review. Among the more interesting victims of Centralist reform were the courts of requests in the principal cities, presided over by lay justices who tried small claims in an informal manner, providing (according to their admirers) simple, equitable, and relatively cheap and accessible justice in a particularizing and paternalistic

spirit, serving primarily (according to both admirers and detractors) as debt collectors.⁴ Motives of reformers were mixed. Some were Benthamite rationalists, who could not tolerate the sloppiness of this local 'kadi justice' and wanted it brought under the control of a uniform system of rules. Some were common lawyers, revolted by deviations from familiar pleading and review procedures, and still more so by competition from the amateur attorneys and lay justices who represented clients and sat on these courts.⁵ Some were business people who wanted still more efficient machines for debt collection. As Arthurs later relates, Benthamites, common lawyers, and business people were to split on most other reform issues, but their collaboration doomed the courts of requests along with most of the other similar survivals of communal justice.

So far the Centralist's Whig history is more or less vindicated, though Arthurs, who has a soft spot for these local, informal tribunals, is disinclined to call it a history of progress. Yet the main theme of his book is that the trend toward centralization was overwhelmed by a much more important set of countertrends toward the creation of decentralized institutions.

These countertrends were partially manifested in the increasing demand by commercial groups for dispute-settlement procedures that were faster, cheaper, and more in tune with particular trade practices and norms than the common-law courts, which had long been regarded by merchants as treacherous and alien. What followed, in Arthurs's fascinating account, was a long period of tussling between business people and lawyers to settle whether commercial arbitration tribunals would be given any legal recognition at all and, if they were, how far they would be 'legalized' in their procedures and personnel, and how far subjected to judicial review. The outcomes of this struggle were paradoxical. Arbitration — despite the intense hostility of lawyers who argued that merchant tribunals were staffed with incompetent judges whose particularizing decisions would frustrate the growth of a certain and uniform legal science of principle — grew more common. Indeed, it was promoted by judges sending complex disputes out to 'reference'. But, as arbitrations increased, so did the demands of parties for coercive enforcement of awards, which could only be had through the courts. This offered the lawyers and judges, as it always has, their opening to push for legalization. Moreover, as the historians Robert Ferguson and

⁴ H.W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985) at 26-34.

⁵ *Ibid.* at 43-44.

David Sugarman have pointed out⁶ and as Arthurs here confirms, the fact that merchants had to depend ultimately on the common-law system to enforce their contracts actually helped them to establish their autonomy from legal regulation. By drafting trade-made law in standard form contracts to displace state-made law, business people recruited state sanctions to the enforcement of commercial norms. Thus, the relation of state to non-state, judicial to non-judicial, law making depicted in this chapter, though oppositional in the rhetoric of business and lawyers' groups, was practically symbiotic.⁷

At the heart of Arthurs's project is his history of mid-nineteenth-century administrative agencies. There were many kinds of these, but the most important for his purposes were the inspectorate and the independent regulatory commission. The inspectorate, set up by the *Factory Act* of 1833, was responsive both to government reformers' desire for a more efficient way of policing work conditions than trying to get the courts to impose criminal sanctions and to owners' hostility to toughening such sanctions. Inspectors were at first given power to make regulations and had unreviewable authority (co-ordinate with the justices) to punish violators. In 1844, they lost both of these powers but picked up in exchange more areas of responsibility and the power to make remedial orders, which were sent to arbitration if contested. Ultimate coercive enforcement after 1844 reverted to the courts, which were notoriously unco-operative with the inspectors.⁸ Judicial review, which drafters of administrative statutes usually tried to preclude or limit, was reinstated. By the 1850s, there was a decided swing in favour of full review.⁹ The story of the mines inspectorate is a similar one. In the face of steady owners' resistance, the government gradually expanded the administrative functions of inspectors. But enforcement had to go through the resolutely obstructive mechanisms of both criminal and civil justice — corrupt local coroners and petit juries, biased judges, and very expensive litigation. This system, Mines Inspector Mackworth concluded in 1854, had given owners a "practical immunity from all responsibility." He added:

During [the inspectorate's] three years' existence, there has not been a single conviction obtained, although about 3,000 lives were sacrificed. In no instance I believe in England, were the widows and children of the sufferers able to recover

⁶ See R. Ferguson, "The Adjudication of Commercial Disputes and the Legal System in Modern England" (1980) 7 *Brit. J.L. & Soc'y* 141; and J. Sugarman, "Legality, Ideology and the State in England, 1750-1914" in D. Sugarman, ed., *Legality, Ideology and the State* (London: Academic Press, 1983).

⁷ See Arthurs, *supra*, note 4 at 56-77.

⁸ *Ibid.* at 103-106.

⁹ *Ibid.* at 146-48.

compensation, however great the neglect or default which caused the death of those on whom they depended for subsistence.¹⁰

Nonetheless, Arthurs insists, the inspectors made surprisingly effective use of their confined authority. Though they could not coerce, they could threaten: they bargained and cajoled with mine owners; they used their reports and the newspapers to reach the middle-class Victorian conscience with stories of working conditions; they stimulated engineers to design safer technologies, and owners to take preventive measures; and they drafted and lobbied for new legislation expanding their powers. By gradual degrees, they nudged and wheedled factory and mine owners into higher levels of compliance: "[A]bove all, they secured, through all the formal and informal activities recounted here, adherence to law's purposes and policies."¹¹

The Independent Regulatory Commissions, responsive only to Parliamentary rather than ministerial control, of the 1830s and 1840s were among the most creative of such administrative bodies at leveraging their limited powers to give or withhold benefits. For example, the Railway Commission parlayed its authority to certify railways as 'complete' into flexible techniques for what we would now call 'negotiated regulation'.¹² The Railway Commission, too, was temporarily wrecked on the reef of Centralist ideology when, from 1854 to 1873, administrative jurisdiction over rates and routes was "exiled . . . into the wilderness of a reluctant and inept Court of Common Pleas."¹³ In 1873, Parliament finally judged that Court's cumbrous procedures an ineffective method for carrying out its legislative mandate and revived the Commission. Unfortunately, it was in a form so weak as to render it rather ineffectual, though far less so than Common Pleas had been.¹⁴

The story Arthurs relates is thus one of the gradual expansion, against heavy opposition and with many setbacks, of administrative alternatives to judicial regulation. Opposition to administration came from complexly mixed motives and interests. Much of it was inspired, of course, by regulated interests — entrepreneurs who believed correctly that the courts, committed to slow and expensive adjudication and staffed by *laissez-faire*-minded judges, could often wear out the meagre enforcement resources of the bureaucrats. But Arthurs finds insufficient this instrumental explanation for the actions of the chief opposition leaders, who

¹⁰ Cited in Arthurs, *ibid.* at 108.

¹¹ *Ibid.* at 115.

¹² *Ibid.* at 120.

¹³ *Ibid.* at 126.

¹⁴ *Ibid.* at 126-29.

were mostly lawyers. Some, of course, were lawyers for powerful client groups; others feared the loss of business, though in England, as elsewhere, the growth of administration brought forth fruit in abundant new sources of lawyers' business. Yet many were genuine ideologues of Legal Centralism, committed believers in the common-law state. They took for granted that law was unsafe in any but judicial hands working through judicial procedures; that where common-lawyers' law was absent, there was nothing but 'discretion'. The Crown's law officers, for instance, habitually interpreted statutes conferring administrative authority in a common-law *conventional* as well as narrowly restrictive way.¹⁵ Lawyers generally professed — and doubtless sincerely believed — that by professional training and experience they simply *knew* the art of competent and principled decision making in a way no one else could know it.¹⁶

Though Arthurs gives the common lawyers credit for sincere belief, he savages the belief itself. At the height of the apparent dominance of Centralist ideology, he points out, the roles of the courts in administering vast areas of social and economic life — compared to that of private, associational, and administrative rule making and dispute settlement — was relatively small. Where the courts took over administrative tasks directly or reviewed administrative action, so far from *knowing* what they were doing, they were inert and incompetent. So far from being principled in adjudication, they caved in repeatedly to *ad hoc* pressures from local and entrepreneurial interests. So far from being neutral executors of Parliamentary will, they read regulatory statutes so restrictively as to frequently nullify legislative intent. If what the ideal liberal subject of the time wanted was predictable and uniform application of the laws, the place he could least expect to get it was from the courts.

Indeed, as Arthurs observes in one of the most pointed ironies of his study, the utilitarian law reformers were driven to try to supplant judicial with arbitral and administrative bodies precisely because they felt they had little hope of realizing their own centralizing and rationalizing ambitions through the courts and the common law. Like Bentham, they had come to think of the courts and the common law as a hopelessly irrational muddle. The leading inspectors, commissioners, and senior departmental officers were as much centralizers in spirit as their common-law opponents; they were often also lawyers, but ones who regarded traditional lawyers and judges as obstacles to their version of the Centralist program of rational legislation and administration.¹⁷

¹⁵ *Ibid.* at 156-57.

¹⁶ *Ibid.* at 175-76.

¹⁷ *Ibid.* at 180-83.

Traditional legal ideology thus probably helped to stimulate institutional innovation much more than it retarded it. The inefficiency and bias of the courts led reformers to create supplementary institutions. Professional jealousy of any extrajudicial activity that smelled even faintly of adjudication forced administrators to develop novel instruments of regulation — the practical techniques of modern administrative law — such as publicity, safety technologies, negotiation, and conditional licensing. The upshot was that the two conflicting ideologies of Centralism combined to produce a *de facto* Pluralism, a wild proliferation of competing regulatory jurisdictions. The common-law ideology, though very influential at key moments, never succeeded in occupying the whole field. It mainly worked to keep extrajudicial institutions off balance, suspect, marginal to real law, and doubtfully legitimate; but, increasingly, it was the extrajudicial institutions that gathered up the reins of governance.

III

Arthurs's book is a remarkable accomplishment. The reader with the patience to thread the maze of its complex argument will be well rewarded. Arthurs has exhumed a fascinating sunken civilization, the underground juridical life of mid-nineteenth-century England. Indeed, my only complaint about the descriptive parts of his book is that there are not more of them, that he does not relate in more detail the doings of his arbitrators, inspectors, and commissioners. He is prodigal with quotations from the parochial and vindictive legal foes of administration but curiously abstract in narrative and stingy with illustration of administrative ingenuity — reports, circulars, certificates of convenience, recommendations to Parliament, *et cetera*. He has also valuably re-emphasized that the terms of ideological struggle between proponents of two models of rationality, the judicial and the administrative, which we are accustomed to locating in twentieth-century battles over the legitimacy of the regulatory and welfare states, were really established much earlier. Almost every argument against or in favour of judicial supremacy or administrative discretion made by apologists or opponents of the New Deal was already well rehearsed by 1850. All this is well worth saying, as is the debunking of the Whiggish view of the courts and legal profession — pictured here as generally reactionary, corrupt, incompetent, or ineffectual, and concerned mainly to preserve their own jurisdiction and profits — as the protectors of the liberties of the subject. Finally, Arthurs is very fair minded. Though a man with a mission, he is anything but a single-minded ideologue. My summary has not even come close to conveying the subtlety of his account, its flair for paradox

and ironic consequences, its careful qualifications, and its attention to contradicting detail.

So it should not be taken to detract from my admiration of Arthurs's achievement if I raise a few quarrels with him. These are quarrels mostly over matters of omission and emphasis; the careful reader of Arthurs's book will see that he has briefly anticipated most of them anyway.

1. *Antecedents.* Arthurs's Pluralist thesis is, of course, the latest in a long line of such theses. For a legal historian, he is strangely silent about those who came before. Harold Laski is not in his index, although it is Laski, along with J.N. Figgis, F.W. Maitland, Otto von Gierke, and Leon Duguit,¹⁸ who usually comes to mind when one hears the word 'Pluralism'. Indeed, their Pluralism, with its insistence on recognition of a multitude of associational groups in society, competing with the state as sources of 'sovereignty' (normative allegiance and effective sanctions), is not unlike Arthurs's own. These political Pluralists were concerned with vindicating, against the intensifying power of a centralizing state on the one hand and of an atomizing individualism on the other, the claims to self-government of associations, such as trade unions and churches, and to enlarge the opportunities for people to realize their political and spiritual goals through participation in such groups. They also wanted, as Arthurs does, to urge that, for good or ill (and they were understandably ambivalent about its virtues), the law-making and governance roles of substate associations, especially business corporations, was a sociological reality and one that should therefore find recognition in legal categories. Theirs is a rich tradition, which has attracted a rich body of criticism. The reader is naturally curious to know what Arthurs makes of them.

Arthurs's more immediate predecessors are surely the (chiefly American) Realists of the 1920s and 1930s — R.L. Hale, James Landis, Thurman Arnold, Walton Hamilton, Louis Jaffe, and their like. They also do not appear in his book, though ideas uncannily like theirs echo all through it.¹⁹ A typically hilarious early article (1932) of

¹⁸ H.J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917); J.N. Figgis, *Studies of Political Thought from Gerson to Grotius: 1414-1625* (Cambridge: University Press, 1956); O. Gierke, *Political Theories of the Middle Ages*, trans. F.W. Maitland (Cambridge: University Press, 1958); O. Gierke, *Associations and Law: The Classical and Early Christian Stages*, trans. G. Iteiman (Toronto: University of Toronto Press, 1977); L. Duguit, *Law in the Modern State*, trans. F. and W. Laster (New York: H. Fertion, 1970).

¹⁹ R.L. Hale, *Freedom Through Law: Public Control, Private Governing Power* (New York: Columbia University Press, 1952); J.M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1951); T. Arnold, "The Role of Substantive Law and Procedure in the Legal Process" (1932) 45 Harv. L. Rev. 617; W.H. Hamilton, *The Politics of Industry: Five Lectures Delivered to the William W. Cook Foundation at the University of Michigan, Feb.-Mar., 1955* (New York: Knopf, 1957); L. Jaffe, "Law Making by Private Groups" (1937) 51 Harv. L. Rev. 201.

Arnold's²⁰ sounds all the Arthurian themes: that lawyers and legal scholars absurdly mystify the value and importance of judge-made law, while depreciating, deligitimating, or simply ignoring the vastly more consequential law-making functions of administrative bureaus and private associations.²¹ Jaffe published in 1937 his fundamental "Law Making by Private Groups,"²² which was written shortly after the U.S. Supreme Court, in a fit of Legal Centralist indignation, had condemned the devolution, through the *National Industrial Recovery Act* and *Bituminous Coal Conservations Act*, of law-making authority onto private trade associations as unconstitutional delegations of public power.²³ Jaffe pointed out some hundreds of ways in which individuals and groups assumed and exercised the power to make legally binding rules for the conduct of others: trespass-to-property sanctions to legislate segregated theatres and restaurants; contract sanctions to enforce trade-association agreements, union closed shops, stock-exchange rules, and industrial standards; and devolution of formal regulatory authority on professions and licensed occupations, commodity producers' groups, neighbourhood associations, sewer districts, and countless other bodies.

Arthurs has done useful service in calling our attention to the fact that the proliferation of such novel law-making authorities was

²⁰ Arnold, *ibid.*

²¹ *Ibid.* at 624-25, 627.

The distinction between bureaus and courts is important. Courts are bound by precedent, and bureaus are bound by red tape. Of course courts are forced to follow precedent even when it leads to absurd results because of their solemn obligation not to do anything in the future very much different from what they have done in the past. But bureaus in allowing themselves to be bound by red tape do so out of pure malice and lack of regard for the fundamentals of freedom, because they have taken the oath not to violate the rules and analogies of the past. Therefore they are much worse than courts because courts only act unreasonably when they can't help it, and bureaus act unreasonably when it is in their power to do differently. . . .

Yet in spite of the comparative unimportance of what they do, courts appear to have found a way of doing it which has brought them overwhelming prestige and respect. They seem to have induced the feeling, even among persons who know nothing of court methods and have never been inside a court room, that there they will find protection. Even when they fail miserably to give protection to someone who seeks it, such is their demeanor and attitude that he — or at least his friends — feel that it was not the fault of the court that protection failed. Perhaps it was the fault of the legislature, perhaps of the jury — at least the court did the best it could, and had it done otherwise it would have, in some mysterious way, imperilled the whole system of protection to others. Commissions, composed of experts, can be violently criticized by editorial writers. But if the matter is appealed to a non-expert court, sitting on the same question and using the same criteria, it appears to be settled in the only way possible under the law. Our quarrel is, then, with the law, which we must respect until it is changed, and not with the court which applied it.

²² Jaffe, *supra*, note 19.

²³ *A.L.A. Schechter Poultry Corp. v. U.S.* (1935), 295 U.S. 495 and *Carter v. Carter Coal Co.* (1936), 298 U.S. 238.

not so novel after all, that Realists such as Jaffe and Arnold could have written much the same pieces about England a century earlier; but the Realists' writings helped to form the modern legal consciousness on these issues, and their formulations are so powerful as to be well worth reading still. Recent work by Professor R.C.B. Risk reveals that the Realists attracted some Canadian disciples too, legal writers such as John Willis who produced a strain of deviant, but brilliant scholarship about administrative law.²⁴ It is a strain that Arthurs could be said to have inherited.²⁵

2. *Vestigial Spell of the Public-Private Distinction.* This recollection of Arthurs's predecessors in his project has the effect of making me wonder — perhaps unfairly, for a broader-based scholar than Arthurs would be hard to come by — whether he has not focussed the attention of his work too narrowly, under the spell of the very Legal Centralism he seeks to dissipate. The Centralist vice is its consignment of non-judicial and non-state ('private') law making to the nether world of Not Law. Yet Arthurs uses basically Centralist criteria to identify most of his objects of study — the administrative and private agencies and tribunals that have appropriated areas of jurisdiction that traditionally belonged to courts and were handled by adjudication. This is a perfectly sensible focus, especially if one wants, as Arthurs does, to write the history of Centralist ideology; it was against precisely those institutions that tried to mimic or displace adjudication that Centralist lawyers directed their jealous range. But I cannot help thinking that the focus diverts attention from some of the main historical actions of the time.

The main point that the *fin-de-siècle* Pluralists (Maitland, Gierke, *et cetera*,) wanted to make was that the Legal-Centralist model of the relation of the state to the subject was already obsolete by the time Dicey wrote his *Law of the Constitution* in 1885. By that time, the incredible proliferation in the industrial countries of interest groups and intermediate associations — corporations, trusts, cartels, trade unions, marketing associations, political parties, lobbying groups — thickly interwoven in a quasi-official legal space "were overflowing the juridical categories of the nineteenth-century state"²⁶ and crying out for recognition in political theory and legal doctrine. Arthurs's

²⁴ R.C.B. Risk, "John Willis — A Tribute" (1985) 9 Dal. L.J. 521.

²⁵ Arthurs does acknowledge the strong influence on his work of another modern offshoot of Realism, the law-and-society movement. For an argument for Legal Pluralism closely paralleling Arthurs's from a leading law-and-society scholar, see M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 J. Legal Pluralism 1 at 19.

²⁶ C. Maier, "Fictitious Bonds . . . of Wealth and Law: On the Theory and Practice of Interest Representation" in S. Berger, ed., *Organizing Interests in Western Europe: Pluralism, Corporatism, and the Transformation of Politics* (Cambridge: University Press, 1981) at 27, 41, 43.

history, once again, does valuable service in reminding us that those juridical categories were always mythic, that the common-law state had never had any real existence. Max Weber commented that the formal generality of centralized law was being increasingly challenged by anti-formal tendencies — social groups' demands for substantive justice, populist demands for lay justice, corporate interest-groups' demands for arbitration, corporate self-regulation and trade-sensitive dispute settlement, and expert specialized agencies.²⁷ Some writers supposed the state had disappeared entirely except as the medium for (or, at best, the honest broker of) the struggle of interest groups. "When the groups are adequately stated," Arthur Bentley intoned in a famous edict, "everything is stated. When I say everything, I mean everything."²⁸

The most perceptive of the Realists deepened the critique of Legal Centralism beyond the demonstration that the social conditions of modern life and the multiplication of intermediate groups with some pretensions to sovereignty had hopelessly blurred the distinction between public law making (under the colour of governmental, official authority) and merely private action. The Realist point was that the distinction had never been valid to begin with because it ignored all the ways in which ordinary private law, the law of property and contract, devolved the public power of effective coercion onto private individuals and firms.²⁹ A person makes law every time he or she says, "You can't smoke [join a union, quit work before six, *et cetera*,] on my property" on pain of suffering the trespass sanction, fully reinforced, if necessary, by state violence. The Realist R.L. Hale, responding to Legal-Centralist objections to labour-arbitration tribunals vested with non-judicially reviewable legal authority, argued not so much that such quasi-official groups were already common in society (though he might have done, since they were) as that employers already exercised coercive legal authority as property owners and contracting parties — an arbitrary and unreviewable authority at that.³⁰ The English common-law courts of Dicey's generation, committed though they claimed to be to maintaining legal authority in state and judicial forms, were actually engaged in wholesale handing over of the legal power

²⁷ M. Rheinstein, ed., *Max Weber on Law and Economy in Society* (Cambridge: Harvard University Press, 1966) 303-21.

²⁸ A.F. Bentley, *The Process of Government* (Cambridge: Belknap Press of Harvard University Press, 1967) at 208-9.

²⁹ M.R. Cohen, "Property and Sovereignty" (1927) 13 Cornell L.Q. 8; R.L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 Pol. Sci. Q. 470.

³⁰ R.L. Hale, "Law Making by Unofficial Minorities" (1920) 20 Colum. L. Rev. 451.

to set the terms of economic life (much of it in former times actually exercised by courts, such as wage and price regulation) to private firms allowed full liberty to regulate the terms of access to their property, to consolidate, and even to cartelize through contract. Arthurs's hardy little bands of arbitrators and commissioners tend to pale in importance as law-making entities in contrast to the business corporations that received huge delegations of uncontrolled sovereignty at the urging of lawyers and judges who piously insisted that public rule making must be kept accountable to "ordinary courts and ordinary law."³¹

Hardly one to be accused of lacking sophistication, Arthurs sees these aspects of his subject but, except at occasional moments when he refers to them explicitly, keeps them off to one side, as it were at the corner of his eye. Can we speculate about why he does so? One (entirely sufficient) reason is that one cannot write about all non-judicial regulators in one book; it makes sense, if one's project is to broaden the parochial lawyers' field of vision by gradual degrees, to begin with an account of those institutions that most nearly duplicated the functions of ordinary courts. Another reason, I suspect, is the vestigial spell of the public-private distinction, which makes us still think of public faces of justice and regulation and even private ones aping the forms and manners of public ones as somehow basically different from standard-form mortgages, insurance classification guidelines, bankers' policies on credit extensions, factory operating manuals, or personnel review boards. Finally, though in parentheses, footnotes, and asides, Arthurs can be a hardheaded skeptic about non-judicial governance too; his book projects a clear conviction of the superiority of non-judicial to judicial regulation. One is entitled to wonder, if the business corporation rather than the administrative agency were elevated to the status of paradigm Pluralist regulator, whether that conviction could always be sustained.

3. *Pluralism in the Modern World*. This thought suggests a final set of reflections. Arthurs has written a polemic plainly intended for our own time. What is the contemporary force of his critique of Legal Centralism and his promotion of Pluralism as a substitute? The question has a special point because, although at times his thesis reminds one

³¹ "The common law commitment to contractual liberalism, and (far more than in the United States) the readiness of firms to resolve disputes by arbitration rather than litigation, meant that British courts had a far less active regulatory role than their American counterparts. The fifty major British industrial companies figured in only twenty-two reported cases from 1895 to 1935." M. Keller, "The Pluralist State: American Economic Regulation in Comparative Perspective, 1900-1930" in T.K. McCraw, ed., *Regulation in Perspective: Historical Essays* (Boston: Div. of Research, Grad. School of Bus. Admin., Harvard University, 1981) at 56, 64.

of the (now seemingly) naive enthusiasm for administration of reformers from Chadwick to Landis, he has lived through a period of considerable disillusionment with the capacities of administrative agencies to engage in the efficient and progressive supervision of the economy and with the capacities of corporatist trade associations and collective bargaining to 'rationalize' the terms of industrial competition and strife. The state bureaucracies, in particular, have come under savage criticism from both right and left for the very faults that Arthurs finds with nineteenth-century courts: they are considered to be encrusted with expensive, slow-moving procedures, captured by special-interest clienteles, lazy and inefficient, insufficiently politically accountable, *et cetera*.³²

It is instructive to compare Arthurs's view with, for example, Professor Theodore Lowi's well-known critique of (Lowi's own view of what is entailed by) Pluralism.³³ Lowi views the plurality of law-making authorities in the modern state as undermining the positive possibilities of Centralism, not the Centralism of Dicey's (or Friedrich Hayek's or Richard Epstein's) common-law state, but of *democratic* centralism, the strong central state ideally capable of articulating, through clear legislative planning, something like a public interest. Arthurs likes the proliferation of little bureaucracies and informal dispute-settling groups because, in comparison to the common-law state (to the limited extent such a state was once a reality), such agencies exhibited at least some capacity to palliate the pathologies of *laissez-faire* capitalism. Lowi sees in the same phenomena the state's authority to legislate being parcelled out, sold off piecemeal to diverse factions and interest groups through a series of fragmented deals.

In the meantime, the courts have come to look more attractive to modern left liberals than they did to Dicey's reformist contemporaries precisely because, in a society whose effective rule-making authority has been parcelled out among multiple corporate decision makers and to government agencies frequently allied with them, few institutions besides the courts have possessed any independent leverage to hold these Pluralist law makers accountable. In the United States, where the judiciary is admittedly unusually activist in temper, the slogans of Legal Centralism and the Rule of Law have delivered very concrete

³² Arthurs acknowledges these critiques. See Arthurs, *supra*, note 4 at 196-99. Arthurs may also have overrated the comparative virtues of nineteenth-century bureaucracy and administrative mentalities. Mr. Gradgrind is hardly more admirable than Mr. Tulkinghorn, or the Circumlocution Office than the Court of Chancery.

³³ T.J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: Norton, 1979); T.J. Lowi, *The End of Liberalism: Ideology, Policy and the Crises of Public Authority* (New York: Norton, 1969).

benefits to groups with limited economic power. Such groups have on occasion been able to vindicate the more modest claims of unorganized minorities against entrenched corporate and official bureaucracies by persuading judges that the abstract norms of legalism require some alteration of the ground rules of social struggle, such as the distribution of legal entitlements and legitimate bargaining weapons, in favour of the weaker parties. Contrary to the thrust of Arthurs's critique, the courts in performing this role have sometimes exhibited a technical capability, a sensitivity to local circumstance and custom, a flair for informal mediation, a willingness to listen to diverse political and ideological interests, and an ingenuity in administering remedies, far exceeding those of any rival institutions likely to have been called on to perform the same tasks.³⁴ Not surprisingly, the conservative opinion that relied on aggressive judicial review to save us from regulation through 1937 has, since 1954, been urging strict curbs on judicial 'legislation'. However, American conservatives are likely to rediscover the virtues of the federal judiciary now that almost half of it has been restocked with President Reagan's appointees. Such experiences ought to remind us that calls for informal, discretionary administration and a preference for negotiation and bargaining over formal and adversary litigation are often just strategies of the powerful to move authority out of institutions where they have been losing back into contexts they are more sure to dominate.³⁵

Arthurs's account of the relative competences of institutions seems to me, therefore, sometimes surprisingly abstract, an excessively formal and inadequately social account, treating courts and administrative bureaus as institutions with settled and continuous identities over time and across contexts. I would urge instead, citing his book among others in my brief, that there are no *inherent* attributes of judges or administrators as decision makers: each can be rigid or flexible, hidebound or imaginative, captured or independent, depending on their personnel, purposes, constituencies, placement in the wider political economy, and contingent opportunities.

³⁴ R. Cavanaugh and A. Sarat, "Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence" (1980) 14 *Law & Soc'y Rev.* 371; A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv. L. Rev.* 1281; T. Eisenberg & S. Yeazell, "The Ordinary and the Extraordinary in Institutional Litigation" (1980) 93 *Harv. L. Rev.* 465; W.H. Clune, "Courts and Legislatures as Arbitrators of Social Change" Book Review of *Educational Policy-making and the Courts: An Empirical Study of Judicial Activism*, by M.A. Rebell & A.R. Block (1984) 93 *Yale L.J.* 763.

³⁵ R.L. Abel, ed., *The Politics of Informal Justice* (New York: Academic Press, 1982).

IV

Arthurs could concede all this — he does in fact here and there concede much of it — and still insist upon the main point of his critique of Legal Centralism: lawyers and legal scholars have badly misallocated their resources and have overinvested both intellectual attention and political faith in the Diceyan Rule of Law ideal. The role of courts as law makers and reviewers of law makers was a marginal one even in mid-nineteenth-century England and is more so today. The administrative law text-writer and teacher who take judicial review of administrative action as their whole subject, ignoring completely the substantive rules made by agencies, will be wasting their substance on relatively trivial and peripheral issues of governance.

Of course the reader is entitled to ask: If our law-making institutions are actually Pluralist, why bother if lawyers pretend they are Centralist? Is not the ideology of the centrality of adjudication a fairly harmless sort of fantasy? Arthurs has argued elsewhere³⁶ passionately and at length that the cult of the common-law state has been an intellectual disaster, producing a professional culture narrowly focused on the analysis of case law, resistant to the study of conflicting values and policies, and actively hostile to seeing law in a social context. So narrow a focus has political costs as well as intellectual ones. It devalues careers in administrative service compared to those in private practice. It leads to a naive trust in legalism; in 'rights' vindicated through lawyer-operated quasi-adjudicative procedures as a method of controlling state and private power without adequate regard to the expense and time and access to legal skills needed to exercise such rights; and to underrating alternative institutional arrangements, such as client-responsive informal professional discretion,³⁷ bureaucracies organized to encourage participation by affected groups,³⁸ and democracy.³⁹ Above all, it encourages the more comfortable and privileged of us to hold the absurd delusion that the problem of domination in social life can be adequately solved by coating over the manifold hierarchies of political and civil society with a thin layer of judicial process. Harry Arthurs's book is both a fine history of some of the people who first tried to dispel that delusion and seek other solutions and a continuation of their work.

³⁶ Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (Ottawa: The Council, 1983).

³⁷ See W.H. Simon, "Legality, Bureaucracy and Class in Welfare Administration" (1983) 92 Yale L. Rev. 1198.

³⁸ See J.F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (New York: Russell Sage Foundation, 1986).

³⁹ See J. Cohen and J. Rogers, *On Democracy: Toward a Transformation of American Society* (New York: Penguin Books, 1983).