The Politics of Common Law in Theory and History

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The Politics of Common Law in Theory and History

Abstract
This paper is concerned with the theme of law as an outsider, in theory and practice, and with its appearance as the cohesive force which intervenes to make social order possible. In the first part of the paper I look at two legal theories and at two examples of what I take to be liberal historiography. In the second part I discuss the English common law, and the implications of its close association with agrarian capitalism and City of London finance.
THE POLITICS OF COMMON LAW IN THEORY AND HISTORY

BY IAN DUNCANSON*

This paper is concerned with the theme of law as an outsider, in theory and practice, and with its appearance as the cohesive force which intervenes to make social order possible. In the first part of the paper I look at two legal theories and at two examples of what I take to be liberal historiography. In the second part I discuss the English common law, and the implications of its close association with agrarian capitalism and City of London finance.

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I. LEGAL THEORY

Neither of the two contemporary grand theories about law which are considered here seems to conceive of it as outsider to the society in which it is found. Hart’s espousal of ordinary language

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philosophy, for example, finds him insisting upon knowing how we use the term law as a condition of his—and our—understanding it. That much is well known.\(^1\) Equally well-known is that further into his *Concept of Law*, we seem to drop out of the picture. The ultimate criterion of legality is to be found in official conceptions of obligatedness in a "complex but normally concordant practice of the courts, officials and private persons."\(^2\) Later, the private persons drop out too. Their only necessary role is that of adherence to the requirements of the system, although Hart says that in a desirable system they will adhere because they wish to, rather than because they are afraid of the consequence of doing anything else.\(^3\) The organization of legality is better the more private individuals assimilate their attitudes and actions to those of the officials. In moral terms it is better still if legal rules are prospective, private sexual behaviour among adults is subject to minimal interference,\(^4\) people are treated as responsible agents\(^5\) and, perhaps, a right to life is recognized.\(^6\)

Hart's social-democratic political beliefs presumably commit him to a social security program of minimum income provision, affordable health care, education, and so on, similar to the model espoused by D.N. MacCormick.\(^7\) However, for Hart—as for MacCormick—the precondition for these valuable measures is the

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\(^3\) Ibid. at 113-14.


\(^6\) H.L.A. Hart, "Are There Any Natural Rights?" (1955) 64 Philosophical Review 175.

formal structure of laws, whose ultimate authority lies in the fact that it derives from the process of official recognition.\(^8\)

Twenty-five years after Hart's major work, Ronald Dworkin published his principal book, *Law's Empire*.\(^9\) At the beginning he writes of "our" legal system, and "people who have law." It is, he says, an argumentative practice, and only a participant's perspective can make sense of it, by examining how insiders argue about law, and how they ground their claims and seek to sustain their views.

Who are the participants? The list is a broad one, including at first everyone who argues about law: bankers, district attorneys, trade unionists, law teachers and citizens. Only minors and the mad seem not to be considered. But Dworkin takes judicial argument as his paradigm case of argument about law. Moreover, he says that in every case in which there is disagreement about what the law is, there will be a correct answer. The procedure he prescribes for reaching that answer seems to call for specialist skills beyond those of the citizen.

First, he says, we must make something like Kant's assumption,\(^10\) namely, that humans have certain rights merely by virtue of their being human: rights to rough equality, equal treatment and justice. A legal system which recognized these would include safeguards for securing due process and equality before the law.

Second, we look for what law students come to term the sources of law: statutes, judicial decisions, delegated legislation, and perhaps we should add, the pattern of expectations built up in particular trades or industries. Legal practitioners will have little difficulty in recognizing these phenomena, pre-interpretive law, in Dworkin's phrase. There can, he says, be no argument about the

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grounds of law, and therefore about the best possible interpretation of the rules, until the rules at this level have been identified.\textsuperscript{11}

There are two problems here which are worth noting before proceeding with Dworkin's schema. The first is that the list of people who argue about the law — citizens, trade unionists, bankers and others — seem at this point to have to defer to legal professionals. This returns us to a position in Dworkin's earlier writing in which professional competence is a prerequisite for understanding the nature of law.\textsuperscript{12} "Our" involvement in the legal system is thus crucially restricted. But nowhere is legal practice as such defined, except in relation to the pre-interpreted rules identified by legal practice. The circularity is reminiscent of that which surrounds Hart's ultimate rule, the rule of recognition, which is constituted by the officials whose official status it constitutes.

What is foreclosed by permitting legal practitioners to identify the basic legal data is the possibility of identifying both the practice and the data as embedded in a broader set of social relations and cultural assumptions.\textsuperscript{13} A theoretical perspective upon the process of embedding could explain all subsequent interpretation in terms of "our" political morality, or institutions, or legality as a form of ideological closure, or elision of alternative points of view.

It could begin, moreover, to explain how "our" community is producing more poverty, greater inequality and less accountability,\textsuperscript{14} despite Dworkin's sanguine assumptions that we all belong to it as broadly equal and reciprocally concerned members and that structural inequalities in the social orders to which he refers — the U.K. and the U.S. — do not preclude the expression and realization of a consensual notion of social justice.

This, however, is to anticipate. To return to Dworkin's schema for interpretation, the third phase involves giving the pre-

\textsuperscript{11} Law's, supra, note 9 at 90-91.

\textsuperscript{12} Taking, supra, note 10 at 284.


interpreted data the best possible interpretation. Bearing in mind the background rights, we take into account the entire set of political institutions, practices, morality and beliefs of the community and treat them as a single whole. We distil from them a meaning and apply it to the disagreement at hand in order to find the correct answer.\textsuperscript{15}

No human judge can hope to accomplish such a task, which means that the meaning of the community is never fully realized. Nevertheless, Dworkin provides an ideal in the shape of Judge Hercules, a man of infinite intellectual capacity and speed, who can perform all the calculations necessary. Human judges must ask themselves, "what would Hercules have done in my place?"

No real set of political practices will unproblematically yield a coherent whole, but it is the task of interpretation to try to render it one for the present.\textsuperscript{16} The interpreter must envisage the community as "an enterprise as a whole." The interpretation procedure is drawn from the hermeneutics of Hans-Georg Gadamer.\textsuperscript{17} Gadamer's interpreter, unlike the one in older hermeneutics, does not approach the object to be interpreted as if it belonged to the past, as if its meaning were to be located in the conditions of its production and first reception. Instead, he seeks "the historical meaning, for us, in the present."\textsuperscript{18} Understanding is "a matter of placing oneself in a tradition, and then in an event which transmits tradition to him."\textsuperscript{19} Perhaps, as a member of the community one is part of a tradition. The event — the text for Gadamer, preinterpreted law for Dworkin — is the means by which one comes to be aware of the tradition to which it belongs, something which stretches up to the present and encompasses

\textsuperscript{15} See Law's, supra, note 9 at 225.

\textsuperscript{16} Ibid. at 217.


\textsuperscript{18} R. Palmer, Hermeneutics: Interpretation Theories in Schleiermacher, Dilthey, Heidegger and Gadamer (Evanston, Ill.: Northwestern University Press, 1969) at 185.

\textsuperscript{19} Ibid.
oneself. In turn, the tradition tells us the meaning of the event —
text or law.

Both Gadamer and Dworkin assume the discrete wholeness
and potential coherence of tradition, and ignore the possibility or
significance of opposition. However, consensus is often achieved at
the cost of silencing opposition, and tradition will be "as often as
not, a monologue of the powerful to the powerless."^0

Political states which are communities are *qua* community,
"enterprises as a whole" governed by common principles, of which
Dworkin says, first, members regard their obligations to each other
as more important than obligations towards non-members. Second,
deriving from this, is a reciprocal concern for the well-being of
members. Third, within the community there exists a conceptual
egalitarianism, by which is meant not equality, but the idea that
nobody's life is to count for more than anyone else's.\textsuperscript{21}

It is hard to see how these criteria would enable one to
identify the existence of a community unless one already knew to
look for a territory over which jurisdiction was claimed by a political
state. On the other hand, looking at the practices of political states
like the U.K, the U.S. and Australia, it would be hard to recognize
them as communities on such criteria.

In Australia, Aborigines have an average life expectancy
twenty years less than whites. Further, men in the lowest
occupational group are 1.54 times more likely to die of cancer than
men in the highest group, 2.86 times more likely to die of an
accident, and 4.88 times more likely to suffer from a mental
disorder.\textsuperscript{22} The morbidity and mortality figures replay themselves in
the areas of education, housing and general use of the welfare state.
Where is the concern about other members' well-being, or the idea
that all lives are of equal worth?

The British state, with its carefully cultivated national identity
based upon the Home Counties, "the countryside of the mind," as it
has been called, presides over Wales, Scotland and Northern Ireland,

\textsuperscript{20} Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota
Press, 1983) at 73.

\textsuperscript{21} *Law's*, supra, note 9 e. 5 and 6.

\textsuperscript{22} *Melbourne Age* (10 November 1988).
as well as the preventibly depressed areas of the deindustrialized north. Outbreaks of jingoism apart, it is hard to see what makes this population a community.  

The interpretation of the political state as community is one that belongs in the sentimental rhetoric about families of nations rather than in serious analysis. Community, if it is to retain conceptual currency, should be reserved for small groups whose membership does not need an interpreter to reveal to them their reciprocal relations. Michael Taylor's criteria are especially plausible: members of a community must have beliefs and values in common; and the relations among them must be direct - "unmediated by representatives, leaders, bureaucrats, institutions such as . . . the state, abstractions and reifications" - and many-sided. A community properly so-called would be characterized by mutual aid, solidarity and exchanges.

A political state could conceivably be made up of such communities, but for justification of the state we should look elsewhere than at the unconvincing cachet conferred by the term "community." Where does this leave Hercules? It leaves him on the one hand performing the un-Herculean task of arbitrating easy cases which, as Nigel Simmonds points out, is the important but unspectacular task of most adjudicators most of the time. On the other hand, it leaves him with controversial cases, but without the pretense that he is applying community standards.

His qualifications for deciding routine cases are that he is experienced and that he is not personally interested in the outcome. As to the controversial cases, we have to accept that he

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23 Law's, supra, note 9 at 206, Dworkin asserts that aggressive nationalism is not a necessary accompaniment of his idea of "associative community." "We can now reply that the best interpretation of our own legal practices disfavours that feature, which is anyway no longer explicitly endorsed, even in bare practice." Where was he when Reagan campaigned on a foreign policy platform of making America respected again?


25 Simmonds, supra, note 13.

26 In Cuba, this principle is considered consistent with the requirement that provincial and municipal courts report periodically to the relevant popular assembly. See Domingo Garcia Cardenas, State Organization in Cuba (Havana: Jose Marti Press, 1986) at 92-93.
occupies a gendered position in any highly gender-structured common law jurisdiction. He also occupies a class position, and a position on another socially constructed dimension, namely that of ethnicity. Any truth which he produces for us can emanate only from his capacity to abstract himself from any of these sites into divinity.

II. RATIONALITIES AND ORDERING

Hobbes recognized this situation. For him, there were two choices. Such is human nature, in Hobbesian discourse, that people cannot rise above their differences on a routine basis. This does not mean that everyone is purely self-interested, egotistic and incapable of altruism. He meant that moral questions and questions about justice can be given objectively correct answers only when there is a power in the state invested with the capacity to supply them. So long as we are all entitled to assume the correctness of our subjective opinions, we shall spend our time in squabbling about them rather than in investing in cooperative schemes necessary for arts, commerce, agriculture and industry to flourish. This "private" activity, in what Hegel was to call "civil society," can supply us with the possibility of "commodious living" only when political questions are settled by an outside and superior rationality.

There is a particular urgency in the Hobbesian project. Because people are possessed of reason and because some of them are covertly malevolent, everyone exists in a state of mutual apprehension and hostility: the war of all against all. The solution, like the problem, is supplied by reason, whose exercise leads people to abandon their "free" subjectivism and enter agreements to vest their powers in a sovereign.

Garcia Cardenas, State Organization in Cuba (Havana: Jose Marti Press, 1986) at 92-93.


29 De Cive, supra, note 27 c. 2; Leviathan, ibid. c. 14-15.
Lawrence Stone’s picture of sixteenth and early seventeenth century man is not dissimilar from that of Hobbes.\footnote{L. Stone, \textit{The Family, Sex and Marriage in England, 1500-1800} (Harmondsworth: Penguin Books, 1979).} The population of \textit{Leviathan} and \textit{De Homine} is hot-blooded and quick to take offence, child-like in its desire to tell the best story, but coming to market for profit, not for the pleasure of company. Stone gives Hobbes a Bowlby-esque twist: his people are affectionless, prying and spiteful, always telling tales to the ecclesiastical courts about the pecadilloes of others.\footnote{Ibid. at 76.}

One of the reasons for this is maternal deprivation and cold uncaring parents, who rear children to become violence-prone, easily frustrated and incapable of forming deep emotional bonds or lasting relationships. The reason for this state of affairs is the high rate of mortality, especially among young children and women in childbirth. If life was precarious, Stone therefore suggests that it was also cheap. When rational order and community coherence evolved in a more stable way, it was because better living conditions among the rich enabled them to form more lasting and familiar bonds, and to become more patient and forbearing.\footnote{Ibid. c. 6.}

But Stone has been criticized for ignoring evidence about grief after the death of children. Mourning the loss of a spouse was one important reason why widows did not remarry if there were no young children. Ironically, infant mortality seems to have been highest among the rich, who put their children out to wetnurses, thus foregoing the birth-control benefits of breast-feeding and conceiving more or less annually.

Court records may not be good enough indicators of a Hobbesian state in any event, whatever the causes may have been. The ecclesiastical courts were accused by Christopher Hill's "industrious sort of people," the sixteenth century artisans who were often dissenters, of being over-zealous in pursuing alleged offenders in order to generate fines.

Many examples of individuals litigating may turn out to have been merely records of amicable settlement achieved elsewhere. Manorial court records were used for this purpose, and there is evidence that it was not uncommon in ecclesiastical courts. The initial setting down may have been intended to speed settlement up, or to prove one's seriousness. Discord in local communities was a cause for concern. Resources were mobilized, perhaps drawing upon the aid of the priest to restore amity — the harmony and the love which gave its name to the "love-days" set aside for the purpose.

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40 M. Clanchy, "Law and Love in the Middle Ages" in Disputes, *ibid.*
It seems that Stone, and Keith Thomas too at times, have reacted rather harshly at the vision of more intrusive, close-knit and collective life-styles than most middle-class people in advanced countries are accustomed to. Life in a Cuban neighborhood, with its elected block committee, has something of the same flavor. But if early modern communities seem to have confined the boundaries of private domesticity, they have not eliminated it. And if Laing and others are to be believed, enclosed domesticity, too, has its drawbacks.

Thomas connects the pattern of English witchcraft trials to the breakdown of community. The new Protestant Church left individuals feeling vulnerable to curses and spells because it did not offer rituals and counterspells to combat them, as the Roman church had done. Against this background, he suggests that a new individualistic ethos, one might say Hobbesian, pervaded the rural poor. Alms were refused, the refuser experienced feelings of guilt and the beggar responded with curses. This tension was resolved with the aid of the witchcraft laws.

Witchcraft accusations ceased only when the rural poor no longer felt guilty, perhaps because the Tudor Poor Law was put in place, and when the ruling order, whose consent was required to translate accusations into trials, ceased to believe in the evidence of witchcraft in which their inferiors still place credence. Newtonian physics, with its mechanical conceptions of cause and effect replaced mysticism.

Once again, one has the picture of a backward peasantry, sunk in superstition and anomie, being led into the modern world by rational administration and scientific revolution. However, Thomas says that there is no evidence one way or the other about an increase or decrease in accusations of witchcraft, because they were

42 P. Marshall, Cuba Libre: Breaking the Chains (Boston: Faber and Faber, 1987) at 80.
43 Houlbrooke, supra, note 36 at 22-23.
45 Thomas, supra, note 41 c. 14-18.
too informal to have left records. All we do have evidence about is the rate of prosecution, whatever prompted it. And, as Christina Larner has observed in the context of her discussion of Scottish witchcraft, the upper classes continued to believe in some fairly odd doctrines - a trinitarian god, a devil, resurrection and life after death. Why should they have baulked at witches?

The Tudor Poor Law in its 1601 form, with open vestry meetings, lowly overseers and deputy overseers, and fairly generous reliefs, refocused rather than replaced community norms of reciprocity within the structure of social hierarchy. It has to be seen in this light rather than as merely a problem-solving imposition by central government.

III. COMMON LAW AND AGRARIAN CAPITAL

It is important to stress the nature of local communities, not as autonomous, nor, of course, as bucolic arcadia, but as viable social units in a wider social ecology, maintaining what Edward Thompson has called a "moral economy," capable of being defended in skilful and prudent ways. If we concede to the suggestions - and often these are implicit rather than explicit - that brutish chaos and stultifying parochialism characterized life beyond the pale of privilege, the ascendancy of common law in the period after the civil war may come to seem like a response to a national requirement for order and rationality.

In fact, as Weber suggests, the organizational forms of and even informal demands for, local justice, stood in the way of the

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requirements of agrarian capital accumulation. At its service, as he also points out, more important than the common law, were the common lawyers, the "organic intellectuals" of capitalism as Maureen Cain calls them. They and their staffs, and the courts of record, must be accounted part of the state when one contrasts the small size of English central government bureaucracies with those of the European monarchies.

In the period that we might, after Wallerstein, call the "long seventeenth century" — from the last decades of Elizabeth, perhaps, through the first decade of George I, 1580s to the 1720s — the class which by the Victorian era was known as the "landocracy" took control of the apparatus of royal government. There was no long term program, no revolutionary agenda, and no self-conscious vanguard party leading the way, only a series of incremental steps designed to safeguard property.

As the common law was the law of real property, it was the common lawyers upon whom the landlords depended, and whose vocabulary they were to bequeath to whig politics in England and elsewhere. The landlords wanted a secure basis upon which to augment their estates, improve them in order to enhance their rent revenues, and project their designs into the future. The estates were a source of wealth to the principal beneficiaries, but they also had to support dependents, be sources of credit, and be flexible enough to survive contingencies associated with politics and personalities.


50 "In England... the development of the law was practically in the hands of the lawyers who, in the service of their capitalist clients, invented suitable forms for the transaction of business..." *Ibid.* at 1395.


It was clear from the failure of Coke to establish the supremacy of the common law, that while it might be used to facilitate the rational calculations of agrarian capital, it could not be insulated from hostile influences.\(^5\) For the king retained the power to appoint and dismiss judges, and to suspend and dispense with the ordinary operation of legal rules. There was also the disputed fiscal power, and the power to pardon. Each of these was a threat to the security of estates.

The seizure of Parliament and the decapitation, literally and metaphorically, of the executive, was insufficient because government by legislature proved impossible. Seizure of the executive, with its prerogative powers, was also required, and in the end accomplished.\(^5\) By this time the landlords and their common lawyer agents had available an extremely flexible set of devices for protecting their estates and achieving their plans.

These devices stretched from Petty Sessions — although in other respects Justices of Peace were still caught up in the politics of their localities — through the Assizes and the apparatus of the Prerogative. They included Chancery, the courts of Common Law and Parliament. On the one hand the lower orders were caught up in a web of patronage and deference.\(^6\) On the other hand, conflicting and competing objectives among the ruling class itself could be coordinated and articulated. With the agency of the common lawyers, through Chancery and Parliament, family settlements could be constructed and reconstructed, enclosures engineered, compulsory acquisition schemes devised to accommodate canal and railway investment, and capital raised for urban property

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\(^5\) J.H. Plumb, *The Growth of Political Stability in England, 1675-1725* (London: Macmillan, 1967). Once this had been accomplished, the Parliamentary term was extended from three to seven years, the franchise was narrowed, and competition for seats squeezed out by raising the cost of elections.

speculation. The common law was certainly the law of the land, but equally, it was certainly not the law of the people.

IV. COMMON LAW AND THE DEMOCRATIZATION THESIS

If this was "old corruption" as it was bequeathed to the Americans, many commentators want to report that, in England at least, it was transformed in the following century when the bourgeoisie at length challenged aristocratic power. It appears that successive extensions of the franchise presented the ruling class with precisely what Cromwell and Ireton had resisted in their debates about the franchise with the army agitators on Putney Heath in 1647. It gave the propertyless political power through the sovereign Parliament.

In British constitutional theory this would mean that the people controlled the law through a form of representative democracy. An intelligent ruling class, it might be supposed, would have long before retreated behind a written constitution so as to protect the form of social order necessary to safeguard their interests. Such a supposition does not also presuppose a monolithic class rule — old corruption had after all served both to maintain property and to manage intra-class tensions.

Indeed, the democratization thesis has evoked the suggestion that democracy has gone too far, that fairness and justice may have become hostage to the volatile whims of populism. There have been calls for limitations upon Parliamentary sovereignty, complaints


about the volume and complexity of legislation and its apparent immunity from judicial scrutiny, sporadic contemplations of military intervention and, finally, in the 1970s, talk of a bill of rights.

However, the alarm has not been proportional to the threat to property and privilege. If legal justice — due process and equality before the law — and political justice — each to count for one but no more than one — have been achieved, social justice in the form of greater material equality has been curiously elusive. The rhetoric in its favor may have been blunted by the vocabulary of incentives, but the puzzle remains that Ireton's forebodings of 1647, that the propertyless would use political power to redistribute property, have not been realized. Whether one examines health, education, longevity, control of the means of production, or, simply the differentials of income and wealth, it is the case that in material terms some count for very many more than one. As a letter to Lansbury's Labour Weekly put it, in 1922:

My Lords — I see you have forbidden the Poplar Borough Council to pay its labourers 4 pounds a week. None of you (except poor Wrenbury, who drags out a hungry existence on about 55 pounds a week — often when I see a man shivering at a street corner, I say "That may be poor Wrenbury") takes less than 120 pounds a week, not counting your savings from past emoluments. It needed high moral courage to announce to the world your profound conviction that any one of you was worth thirty ordinary men. Except, of course, poor Wrenbury who is only worth fourteen ordinary men.

The explanations of this puzzle have varied. It has been argued that the working class, who would be most attracted by a radical
redistribution, may have, as Keith Thomas thought of the rural poor in the sixteenth century, assimilated an individualist ethos. Another suggestion is that the working class has simply all but disappeared, absorbed into a new petty bourgeoisie. This is, as Callinicos, says, implausible unless one abandons the Marxist identification of class with ownership and control — and the lack of it — of the means of production. Capitalist restructuring continually alters the nature of the work process, but one should hesitate before assuming that the latest change towards cleaner work conditions and monthly wages means the end of the working class.66

More technical responses to the puzzle suppose that perhaps, after all, the truths of neoclassical economics contain some substance, and that there are immutable obstacles to egalitarianism and participatory decision-making in the economic sphere. Finally, there are those who see the answer in policy failures, and the resolution in close scrutiny of policy formation and implementation.

None of these somewhat ad hoc speculations is necessary if one accepts the arguments of Perry Anderson and others.67 They hold that there has never been a transition of power to the industrial bourgeois, and still less so to the working class. There is support for their denial of the democratization thesis from the burgeoning literature on the decline of Britain as an industrial power.68

The argument is that the composition of industrial capital in Britain was always modest, and always dwarfed by that of the


landocracy. The enormous fruits of agrarian capital accumulation were never channeled into industry, but flowed from the great estates, augmented by the revenues from mineral extraction and the urban booms, into finance, shipping and insurance, internationally oriented service industries based on the City of London.

There is a diversity of evidence for this position. City profits and the returns from associated overseas investments have consistently been higher than those from industry in the 1850s. Free trade and laissez-faire policies of a sort were maintained long after they ceased to make industrial sense. The British currency has always been kept at the highest possible level, something favouring capital exports and "invisibles" trading far more than industry. In the past few decades, progressive deindustrialisation has made the process more apparent. With a gross national product that has declined in world-relative terms to equal that of Italy, British overseas investments are second only to Japan's, and the City remains financially of global significance.

In cultural terms there has always been a disdain for "trade" in hegemonic discourse. "Educating our masters," as Beatrice Webb put it, has rarely included rigorous technical skills in its curriculum, and the construction of Englishness has emphasized the "countryside of the mind." British means Home Counties English and this projected image dwells partly south of the Cotswolds and partly in *The Wind in the Willows*. 69

The politics of this capital movement in part projects the cultural image of the gentleman, the amateur and the civilizer of inferior folk. For what made the curious configuration of the British state possible was the development and deployment of a new service class whose "natural" environment its members are taught to think, is the metropolis. 70

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Newly ancient public and grammar schools, and Oxbridge reinforced the cult of Englishness and fed the upper echelons of the professions, which were reformed in the Gladstone era, and the civil service. The latter may have been crucial for the stifling of social redistribution. The Northcote-Trevelyan reforms, 

served a unified, double objective that was obvious to informed contemporaries: namely the creation of a new, unified elite of Oxbridge-trained upper class men devoted to matters of policy and political management, and a simultaneous shift in the structure of political power in the state.\(^71\)

to the executive branch. At the same time, Treasury control over finance was installed and, of course, as was also recognized at the time, the City and the Treasury were closely linked.

The common lawyers are as closely implicated in this restructured capital as they were in the old. Through the commodification of dwellings, financial institutions based in the City reach, through the High Street solicitor,\(^72\) to virtually all but public housing. As well, the central government squeeze on housing authority funding is forcing those bodies into closer accommodation with city institutions through complex leasebacks and other deals.\(^73\)

The central courts are tied into international capital by the pattern of arbitration and litigation, the connection of whose parties with London is often through brokerage, insurance, shipping or money or commodity exchange contracts. Wealthy and corporate clients can use lawyers to negotiate settlements, to design standard contracts, devise tax schemes and create new configurations of

\(^{71}\) P. Gowan, ibid. at 31.

\(^{72}\) In 1968, more than 70% of solicitors' incomes was derived from property transactions, 56% from conveyancing, 2% from leasehold transactions, and 14% from probate and administration. See Solicitors' Remuneration NPIB reference (1968) Cmnd 3529.

Individuals must hope that, out of the professional mystification they encounter in a lawyer's office, some good will come.

The cost of operationalizing the legal system makes sense only where large sums are at stake, either in a particular instance or in the implications that a particular instance may have for other dealings. In the property and commercial areas, lawyers, like their clients, are alert to the need for coordination, and for efficient resolution of the tensions between competing capitals. This is not to say that in the rare occasions of litigation in a court the judges will not make mistakes from this point of view, but "wrong" or "unjust" decisions which evoke comments in law school manuals can be accommodated within large-scale commercial strategies by altering the phraseology of an exemption clause, or shifting the burden of insurance, balanced by price adjustments.

The doughty citizen of Diceyan legend is likely to fare less well. Such a person can probably not write off the costs and any penalties as tax losses. But more importantly, court offices act as conduits of economic power. Rich legal persons can extract settlements from others by the threat of escalating costs. Also, in low-level courts, the office acts significantly as a debt-collecting agency for credit companies, rarely examining the detail of a claim.

It may be worth repeating that the common law is within a framework of Parliamentary government, but as an agency for a class which, if Anderson and others are correct in their analysis, sets the agenda for Parliament to work within. It performs less a legitimating role than a facilitative one.

If we turn briefly to the criminal law, it is no part of my case that law acts as a particularly repressive agency. The bulk of the work done is a dismal process of administration, providing a link

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between the executive agencies of policing and disposals.\textsuperscript{76} Among the minority of contested cases, the adversary procedure doubtless offers the possibility and the substance of fairness. On the other hand, judicial institutions have not shown themselves resistant to the strategic use of state agencies to increase surveillance, and to discipline minorities or those who seek radical reform.\textsuperscript{77}

This is as one would expect. But if, as seems likely, the "freedom" to reconstruct the UK economy principally as a \textit{rentier} in international capitalism requires a narrowing of the political "freedom" to oppose that reconstruction, there is cause for disquiet. Again, it should be repeated, legal institutions are not supine, but rather agents for one side rather than another.

V. CONCLUSION

In social orders divided by the structures of class, gender and ethnicity, the neutrality and even-handedness of law can be maintained only if the system of legal institutions and rationality can plausibly seem to be an outsider.\textsuperscript{78} Despite its appearance as the agency of a particular class, a vestige of plausibility may remain if it appears that class rule is not actually self-interested, but a desirable intervention amid chaos and anomy which were its only alternative. A case of this kind has not been argued convincingly for England. As I have tried to show, quite the contrary.


\textsuperscript{78} M. Cain, "Necessarily Out of Touch" in P. Carlen, ed., \textit{The Sociology of Law} (Keele, Staffordshire: University of Keele, 1976).