

FINDING A HISTORY FOR THE LAW

THE PAST IN THE PRESENT

A generation ago EH Carr demonstrated the impossibility of reproducing in the present a single authentic past.¹ The past as Real simply overwhelms the capacity of any present to differentiate itself definitively from its pasts and exceeds the boundaries of any singular narrative with pretensions to coherence.² If the Truth of human history is to be written, philosophers have more recently added, it must await suprahuman agencies.³ In the meantime, historical truths cannot be separated from the politics of disciplinary authority; and as canons have fragmented in the humanities, these politics have become more open and flexible. Social history, "history from below" as it had effectively become, and feminist history have been both instrumental in, and beneficiaries of, this process.⁴

In this paper I want to pursue some of the implications for producing narratives about the contexts in which the past of law in England might be understood. From an Australian perspective this task still has some importance especially because some aspects at least of current politics envisage breaking with a past and a heritage.⁵ Once a predominantly

* LL B (Hons) (Southampton), BCL (Durham); Solicitor of the Supreme Court (England); Senior Lecturer in Law and Legal Studies, La Trobe University. I am grateful to a large number of people for comments on the ideas contained in the paper, and principally to: Brendan Cassidy, Judith Grbich, Diane Kirkby, Wilf Prest and Wes Pue. The errors are, of course, mine.

1 Carr, *What Is History?* (Penguin, Harmondworth 1961).

2 See Jenkins, *Re-Thinking History: Essays on the Historiography of Philosophy* (Routledge, London, 1st ed 1991).

3 Rorty, Scheewind & Skinner (eds), *Philosophy in History* (CUP, Cambridge 1984), Introduction.

4 See Hobsbawm, "From Social History to the History of Society" in Flinn & Smout (eds), *Essays in Social History* (OUP, Oxford 1974); Krantz (ed), *History From Below* (Blackwell, Oxford 1988); Angerman et al (eds), *Current Issues in Women's History* (Routledge, London 1989); Hall, *White, Male and Middle Class: Explorations in Feminism and History* (Polity, Cambridge 1992).

5 For a critical British perspective on the English heritage, see Wright, *On Living in an Old Country* (Verso, London 1985). On the relation between the

Anglo-Celtic colony of Britain, the story goes, Australia has become a distinctive, multi-ethnic community which should demarcate its independence from the past. What that past is conceived to be, and what therefore is conceived to constitute a break with it, may have implications for the attempt to construct possible legitimacies for the future.

History provides a strategic site for imagining the future to the extent that it provides tools for orientation and the breaking of silences: Orwell made the point in *1984*. And now that the major Australian social theory journals have committed themselves to silencing the use of Australian material to theorise social issues in order better to market themselves to 'international' audiences,⁶ historiography must assume a still greater responsibility.

Hirst argues that the nature of early white settlement at Botany Bay can be understood only in the context of late Hanoverian British politics, in particular that of the Benthamites' promotion of the penitentiary as against the penal colony.⁷ More recently the convict past has been thoroughly explored, but with much repetition amongst the dominant explorers. While the unjust nature of British society and its repressive criminal laws are granted a crucial role in transportation and the quality of the transportees, the convicts have been variously characterised as a "semi-criminal lumpenproletariat";⁸ anomic, emotionally stunted repeat offenders, unskilled and disloyal to each other;⁹ physically stunted "runts", unskilled, recidivist and fanatically loyal to each other.¹⁰ The motley crew of dwarfs in every sense, cheats, liars and ignoramuses who believed they could escape over the hills to China, was relieved only by the Whig legacy, according to which they were transported, and under which they,

Australian vision of the British heritage and some recent constitutional discussions, see Duncanson, "Close Your Eyes and Think of England" (1996) *3Canb LR* xx.

6 In *Thesis Eleven* Peter Beilharz does have a short item under "Notes and Reviews": Beilharz, "Social Theory in Australia: A Roadmap for Tourists" (1995) *43 Thesis Eleven* 120.

7 Hirst, *Convict Society and its Enemies* (Allen & Unwin, Sydney 1983).

8 White, *Inventing Australia: Images and Identity, 1688-1980* (Allen & Unwin, Sydney 1981) p16.

9 Davidson, *The Invisible State: The Formation of the Australian State, 1788-1901* (CUP, Melbourne 1991) ch 1.

10 Hughes, *The Fatal Shore* (Alfred Knopf, New York 1987) p174.

and subsequent generations came, Neal tells us, to demand to be governed.¹¹

In rejecting a middle class Lombrosian nightmare of beetle-browed felons endlessly reproducing themselves in the antipodean sun, the writers of history have nevertheless lent some of their authority to another story similar in some ways to the Whiggism of the English constitutional narrative. Davidson concludes that the juridicalisation of Australian politics has prevented the establishment of a genuine Australian popular sovereignty. Brian Galligan, on the other hand, thinks either that popular sovereignty was established prior to the enactment by the British Parliament of the Australian federal Constitution, or that the Constitution itself established that sovereignty (or both).¹² Davidson and Galligan alike imply that independence and popular sovereignty are constituted with the supremacy of local law¹³ and that the authoritarianism of authority relations (the pre-democratic rule of law) is ultimately mitigated both by the inherent permeability of those already-rational relations to the popular voice and by the increasingly rational (responsible) nature of that voice itself. The long phylogenetic history of English constitutionalism, the journey from the *leges henrici primi*, through the revolt against absolutism in 1688, to the advent of the working class and female franchise, is repeated (or repeatable) in the shorter ontogenesis of Australia from gubernatorial rule, to regulatory restraint of governors, to broadening franchises and popular self rule.

It is important to notice that the story has been challenged, since the frequently unamiable qualities which manifest themselves in what Wolin has described as "those parts of the world in which a political culture of tolerance has triumphed"¹⁴ are seldom coincidental. In his study of masculinity, Connell observes that the masculine nature of the state is not an obsolescent coincidence, consequent on most officials' being men. Instead, certain practices, relations among humans, appropriations of the world, for example, are prescriptively and descriptively associated with maleness, sanctioned and inscribed within hegemonic forms of political

11 Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (CUP, Melbourne 1991).

12 Galligan, *A Federal Republic: Australia's Constitutional System of Government* (CUP, Melbourne 1995).

13 For Davidson and for some contemporary republicans, the moment may not yet have arrived.

14 Wolin, *The Terms of Cultural Criticism* (Columbia University Press, New York 1992) p1.

practice.¹⁵ Goodrich has noticed the misogyny and the authoritarianism of common law texts, confirmed and amplified, he argues, in the formation of the "Anglican constitution".¹⁶ And in their different ways Gilroy and Reynolds relate the ready complicity of the apparatuses of modernist cultures, in which simultaneously tolerance has been held to be a virtue, in slavery - "capitalism with its clothes off" - dispossession and genocide.

The government of contemporary Australia remains in the hands in which the "founding fathers" felt it should be; those of the overwhelmingly Anglo owners and managers of foreign and domestic capital.¹⁷ I do not try here to account for that, but instead look at the centralisation of government and the two reconfigurations of the state which occurred in Britain and provide the broad context for ordering practices, including that of law. However, I do have a present purpose which I will declare in the next section. History, of course, does not 'teach' us anything, but some of the stories its conventions permit us to read allow us to draw certain tentative conclusions about the institutions which govern us and what can be expected of them. My intention is, then, not to recycle the clichè that repetition is the fate of those who ignore history, but to observe that in law, as in history, "representations of the social world themselves are the constituents of social reality".¹⁸ In placing too much faith in stories in which civilisation, order, liberty, and even democracy, trickle down from an elite, ordinary people lose sight of their own agency.¹⁹

CONTESTING AUTHORITIES

"The history of all hitherto existing society", Marx and Engels wrote, "is the history of class struggle."²⁰ Whatever the implications of the 'death of

15 Connell, *Masculinities* (Allen & Unwin, Sydney 1995). Margaret Thornton illustrates Connell's broad point in her study of the gender practices in Australian law schools: Thornton, "Discord in the Legal Academy"(1994) 3 *Australian Feminist Law Journal* 53. See also, Naffine, "Windows on the Legal Mind: The Evocation of Rape in Legal Writings"(1992) 18 *MULR* 741.

16 Goodrich, *Oedipus Lex: Psychoanalysis, Law, History* (University of California Press, Los Angeles 1995); *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld & Nicholson, London 1990).

17 Jamrozik, Boland & Urquhart, *Social Change and Cultural Transformation in Australia* (CUP, Melbourne 1995).

18 Chartier, "Intellectual History or Sociocultural History" in LaCapra & Kaplan (eds), *Modern European Intellectual History: Reappraisals and New Perspectives* (Cornell University Press, Ithaca 1982) p41.

19 Duncanson "Close Your Eyes and Think of England"(1996) 3 *Canb LR* 123.

20 Marx & Engels, *The Communist Manifesto* (Penguin, Harmondsworth 1967) p79.

Marxism', Derrida said, "the one who has disappeared still seems to be there and his apparition is not nothing. It does not do nothing."²¹ It supplies, he suggests, an incomparable problematic for rethinking current forms of democracy, the state "and the illusions of its legal autonomy" without compelling the conclusions reached by the historical Marx.²² To credit Marx with the last word (usually this is for the purpose of 'writing him off') is as absurd as to have written about the end of history, as though, Derrida says, we are riding on the train after the last train.

So I want to retain, to some degree, the notion of the class struggle, to think about what kind of history story we wish to place law in and to explore as a possibility a theme which has recently become popular:²³ that the classes of the "landocracy" and of the money men who annexed and redefined the British state in 1688, define it still. It might be said that power and wealth reinforce and reproduce each other intergenerationally in all societies except hunter-gatherer communities. Adam Smith said so, and David Hume was not the first or last to assert that in order to sustain material equality among people of differential capacities, tyranny would be necessary - to invoke, in short, a natural necessity for the unequal possession of social resources.²⁴

But I want to add that the transformations which British rulers' institutions have undergone and produced can in part be explained by the sometimes self-conscious, sometimes coherent and sometimes even constructive opposition of others whom legal history renders all but invisible: peasants, artisans and workers whose complaints that they are deprived of a genuine voice in how they are governed features in discourses other than those of legal history. Where the struggle for equal participation in government can end is impossible to say, but it must start with the recognition that there has always been participation from the ruled, albeit usually as resistance prompting new strategies from above.

The English nobility, who do figure in the narratives familiar to legal historians, emerge as an unusually small group of exceedingly rich landlords before we can see it branching out into commercial capitalism and incorporating a slightly broader constituency of sometimes untitled

21 Derrida, *Specters of Marx* (Routledge, New York 1994) p97.

22 As above p94.

23 Hutton, *The State We're In* (Jonathon Cape, London 1995).

24 Smith, *Lectures on Jurisprudence* (Liberty Press, Indianapolis 1982); Hume, *Essays concerning Human Understanding and concerning the Principles of Morals* (OUP, Oxford 1972) pp193-194.

men from the City to construct the regime which Cain and Hopkins refer to as "gentlemanly capitalism".²⁵

The prehistory of modernist legal rationalism, the government of laws which seems to have an answer to "Quis custodiet?" is largely constituted by silence in what are, after all, stories about the common law. "In the really feudal centuries ... the idea that men can fix their rights and obligations by agreement is ... an unruly, anarchical idea. If there is to be any law at all, contract must be taught to know its place."²⁶ If inevitable - and legal historians have learned from social historians that "Feudalism was born in the midst of an infinitely troubled epoch and in some measure was the child of those troubles"²⁷ - feudalism figures in the origins-of-the-state literature as a regressive move in the evolution from monarchy to nation-state.

Feudalism is "[all] about" military organisation in unprepossessing circumstances, van Caenegem tells us.²⁸ Unable to maintain an army in a largely cashless society, the king must lease out the royal estate in return for military services, thereby gaining an army in the short term but undermining centralised power and jurisdiction in the longer term.²⁹ When the textual focus is on the origins of the common law, territorial and special jurisdictions appear as impediments to the natural course of centralisation, the writ system and the universalisation of royal justice, products like the nascent bureaucracy which made them possible, of kingly energy.³⁰ The periods of anarchic failure of centralisation provide happy proof, in such accounts, of the strength of earlier administrative design.

We do learn from Milsom about the conflation of ownership and jurisdiction in feudal land holding - dominium - property forming "the object of legal protection from above, just as it was jurisdiction, the source

25 Cain & Hopkins, *British Imperialism: Innovation and Expansion, 1688-1914* 2 vols (Longman, London 1993).

26 Pollock & Maitland, *The History of English Law Before the Time of Edward I* Vol 2 (CUP, London, 2nd ed 1968) p233.

27 Bloch, *Feudal Society* Vol 1 (Routledge, Kegan & Paul, London, 2nd ed 1965) p8.

28 van Caenegem, *The Birth of the English Common Law* (CUP, Cambridge, 2nd ed 1988) p5.

29 van Caenegem, *An Historical Introduction to Western Constitutional Law* (CUP, Cambridge 1995).

30 van Caenegem, *The Birth of the English Common Law*.

of protection for rights below".³¹ Local custom, the primitive forerunner of the national doctrine of precedent, and the currency of manorial dominium, Plucknett explains, "may well have been ... intimately a product of the work and thought" of those in the locality; but we are led to know that it was doomed by the centripetal tendency, and its association with unsatisfactory forms of land tenure - villein tenure and copyhold - seems to suggest that this was not a bad thing.³²

What is absent from this legal history is the role of ordinary people in the dynamics of feudalism, its emergence and demise. If they left no archival traces, we may still find meaningful silences. Unless we decide that the aristocracy was shadow boxing we must decide that they were opposed and look for the shape of the opposition in their responses. Thus, no doubt from the point of view of the Carolingian and later monarchs, feudal social relations were "all about" military organisation and doubtless, too, the centralising process, bastard or fiscal feudalism and absolutism, formed part of monarchical ambitions and had noble support at times. But is that the whole story, or the only one that can be told? We are reminded of Brecht's question:

Caesar beat the Gauls.

Did he not even have a cook with him?³³

Several historians place the origins of feudal social order considerably before the Carolingians. The Roman imperial system had, they argue, in many places already disintegrated into

social structures that anticipated the feudal manor ... Diocletian's coercive policies had left open the possibility of retreat into a local economy controlled by quasi-feudal lords ... In some areas the masses and to a lesser extent the local elites appear to have welcomed barbarian rule.³⁴

31 Milsom, *Historical Foundations of the Common Law* (Butterworths, London, 2nd ed 1981) p99.

32 Plucknett, *A Concise History of the Common Law* (Butterworths, London 3rd ed, 1948) p273.

33 Brecht, "Questions from a worker who reads" quoted in Arblaster, *The Rise and Decline of Western Liberalism* (Blackwell, Oxford 1984) p49.

34 Mann, *The Sources of Social Power* Vol 1 (CUP, Cambridge 1986) p293.

Both Jones and de St Croix note an absence of loyalty to Roman rule and the context of apathy among the lower classes in which imperial collapse occurred.³⁵

In collision, Germanic and Roman cultures produced "regional powers ... stronger than the kingdoms because they were nearer to the human material and less preoccupied with inordinate ambitions".³⁶ Anderson observes that:

Folk justice of a popular character and a tradition of formally reciprocal obligation between rulers and ruled within a common tribal community left a widespread mark on the juridical structures of feudalism.³⁷

Feudalism for these writers did not begin as merely localised, relatively cashless and militaristic. It was also politically contingent upon structures which permitted the cultivators to entrench and exploit their indispensability. Agrarian economies are horticulturally, of course, grassroots organisations; the trick for the cultivators is collectively to discover and maintain the means by which material production can be translated into political power, even of a low level and defensive kind. The late Roman peasantry, those of East Europe's era of re-infeudalisation and, of course, the indigenes of the (to Europeans) New World, paid dearly for being unable to do this. Perhaps the western peasantry, for whatever reason, found ways of resistance. Morall writes that

the steady advance of the peasantry to greater control of the land forms one of the main motifs of European history down to the Industrial Revolution.³⁸

In immediately post-conquest England, this advance may have been imperceptible. During the inflation³⁹ and the population increases of the 1100s, for example, the landlords' power expanded in two directions: through the manorial courts they were able to increase the rents, especially

35 Jones, *The Decline of the Ancient World* (Longman, London 1966); de Ste Croix, *The Class Struggle in the Ancient World: From the Archaic Age to the Arab Conquests* (Duckworth, London 1981).

36 Bloch, *Feudal Society* p56.

37 Anderson, *Passages From Antiquity to Feudalism* (Verso, London 1978) p131.

38 Morall, *The Medieval Imprint* (Penguin, Harmondsworth 1967) p38.

39 On which see Harvey, "The English Inflation of 1180-1220" in Hilton (ed), *Peasants, Knights and Heretics: Studies in Medieval English Society* (CUP, Cambridge 1976).

labour rents paid by their tenants;⁴⁰ against a weakened monarchy they were able to assert favourable interpretations of their own obligations as tenants of the king. Magna Carta is the most obvious example; but the device of the use (trust) may be a better measure of their success. Through the use, a Royal official sanctioned a remedy which had the effect of depriving the king of his feudal taxes. Pollock and Maitland write of the origin of the practice in "a slight but unbroken thread of cases beginning whilst the Conquest is quite recent".⁴¹ But by the 1300s, the population was falling⁴² - most catastrophically in the Black Death - and landlords were faced with a better placed and more mobile peasantry demanding lower rents and higher wages.⁴³ Localism and custom had proved attractive to a nobility confronting a weakened king and peasantry, but became less so in the context of a resurgent class of tenant-cultivators whose common interests were, Palmer suggests, represented in the seigneurial as well as the county courts by richer peasants whose attendance as suitors declaring customary right was regular and who may have been hard to ignore.⁴⁴

For the upper classes, as feudal social relations changed, with bigger political units, Christianity and the resurgence of Imperial concepts of top-down government in the church (which triumphed with the twelfth and thirteenth century defeat of the conciliar movement and the establishment of papal supremacy),⁴⁵ Morall says, "the peasant question mark and the peasant voice, muted though it inevitably had to be for the most part, was a major and menacing medieval theme".⁴⁶ Braudel expands on this:

On a European scale during the five centuries covered by this book there were tens of thousands of incidents or disturbances ... an unmistakable picture emerges ... the

40 Martin, *Feudalism To Capitalism: Peasant and Landlord in English Agrarian Development* (Macmillan, London 1983).

41 Pollock & Maitland, *The History of English Law Before the Time of Edward I* Vol 2, p231. Both Milsom, *Historical Foundations of the Common Law* ch9 and Plucknett, *A Concise History of the Common Law* p547, infer a mid-13th century origin for the use.

42 Hallam, *Rural England, 1066-1348* (Fontana, Brighton 1981) ch12.

43 Hilton, *The Decline of Serfdom in Medieval England* (Macmillan, London 1969).

44 Palmer, *The County Courts of Medieval England, 1150-1350* (Princeton University Press, Princeton NJ 1982) p88 and ch 9; also Hilton, *Class Conflict and the Crisis of Feudalism* (Hambledon Press, London 1985).

45 Ullman, *Medieval Political Thought* (Penguin, Harmondsworth 1975) ch1.

46 Morall, *The Medieval Imprint* p38.

peasant community was in perpetual conflict with its oppressors: the state, the landlord, external circumstances, hard times, armed troops and anything that threatened or even impeded the village community which was the condition of its liberty. And in peasant eyes, all these foes were combined.⁴⁷

If insurrections were seldom successful, Braudel, like Thompson for a later period, points out that rulers were not seers, and the cost of restoring order once lost created conditions of governing conducive to negotiation rather than confrontation.⁴⁸ The state - which we should perhaps conceive quite widely to include the processes of negotiation, as, for example Brewer's and Styles' contributors do⁴⁹ - condensed around the compromises between the aristocracy and its tenants and between the aristocracy and the monarchy. To the extent that they accepted the encroachment by the centre on local government - the piecemeal construction of a state in the modern sense - this could be seen as a defensive gesture by the landlords.

The administration of maximum wages by Royal Justices of the Peace after the Black Death, for example, reflects the landlords' inability through uncoordinated local jurisdictions with peasant suitors, to deal with the mobile workforce emerging in a period of labour shortage.⁵⁰ And, if enclosure was still something to be accomplished locally (until the Tudors against ineffectual opposition from the crown), the effects of converting arable land⁵¹ to pasture - impoverishment, homelessness, travelling in search of work and habitation - seemed to indicate Royal intervention. Vagrancy statutes and, under the Tudors, a series of statutes designed to taxonomise and punish or ameliorate poverty, are a familiar mixture of central responsibility and administrative delegation, uniformity and

47 Braudel, *Civilisation and Capitalism: The Wheels of Commerce* vol 2 (Collins, London 1982) p495.

48 See Thompson, "The Moral Economy of the English Crowd" in Thompson (ed), *Customs in Common* (Merlin, London 1991).

49 Brewer & Styles (eds), *An Ungovernable People* (Hutchinson, London 1980).

50 Hilton, *The Decline of Serfdom in Medieval England*; Hilton, *Class Conflict and the Crisis of Feudalism*.

51 Lander, *Conflict and Stability in Fifteenth Century England* (Hutchinson, London, 2nd ed 1974), pp35-37 sets out 15th century wool prices, indicating the attraction to landlords of conversion to pasture.

adaptability.⁵² The gangs of ruffians and sturdy rogues who were believed to be roaming the highways and settling unlawfully on commons were a spectre seigneurial jurisdictions could not hope to exorcise.

During the Tudor reigns it becomes less anachronistic to talk of the sum of the attempts to respond to various problems as a state, utilising apparatuses of surveillance, propaganda and coercion. But in turning to such a device in order to defend themselves from pressure from below, landlords risked paying with more than the loss of jurisdiction. When they complained of the disorder of the dispossessed, for instance, they put into the hands of the state the capacity to deprive themselves of the freedom to be disorderly,⁵³ hitherto a regular means by which nobles and others signalled political discontent.⁵⁴

THE ESTABLISHMENT OF THE LANDLORD STATE

[I]f it be asked what has made us to differ from others, the answer is that we never lost what others are wildly and blindly trying to regain. It is because we had a preserving revolution in the seventeenth century that we have not had a destroying revolution in the nineteenth ... because we had freedom in the midst of servitude that we have order in the midst of anarchy. For the authority of law for the security of property for the peace of our streets for the happiness of our homes, our gratitude is due to the Long Parliament and ... to William of Orange.⁵⁵

Hilton writes that because of the deliberately scattered nature of the holdings William had used to reward his followers in 1066,

it was more realistic for the higher nobility to exercise power through influence at the king's court than to rely on their regional strength. Their local followings were

52 Baier, *Masterless Men: The Vagrancy Problem in England* (Methuen, London 1985); *The Problem of the Poor in Tudor and Early Stuart England* (Methuen, London 1983).

53 Lander, *Conflict and Stability in Fifteenth Century England*; Williams, *The Tudor Regime* (OUP, Oxford 1979); Goodman, *The New Monarchy: England, 1471-1534* (Blackwell, Oxford 1988).

54 Loades, *Politics and the Nation, 1450-1660* (Harvester, London 1974).

55 Macaulay, *History of England: From the Accession of James II Vol 2* (Dent & Sons, London 1953) pp380-381: first published in 1848.

important power bases, but for the sake of leverage at the centre.⁵⁶

In the course of amplifying their influence at court, the nobility established presences in London in town houses close to the inns of court, the homes of common lawyers by whose agency royal customary regulation of noble property was accomplished.⁵⁷ The High Court of Parliament, an influence of some significance during Elizabeth's reign, may not have met often, but according to Neale, the continued physical presence of a core of its members in London transformed it from a body of primarily provincially-based representatives and conferred some continuity beyond its brief deliberative spells.⁵⁸ Land, as well as geography, created a nexus of parliamentarians, lawyers and landlords; parliament was, above all, the representative of landed nobility. As Zagorin put it,

the boroughs were coming to be more and more represented by the gentry. This made the House of Commons a predominantly aristocratic assembly; in fact, there was probably no more aristocratic representative body of its kind in Western Europe.⁵⁹

There was an inherent tension whilst the landlords were *in* the state without themselves *being* the state. Edward Coke, landlord, lawyer, judge, member of parliament, and everywhere champion of the common law upon which title depended, nevertheless seems to have conceded that the king was entitled to his legally superordinate prerogative powers in areas "of government and deep matters of state".⁶⁰ Simultaneously, there was a widely held view that the king should respect property; after all, the "meshing of landed wealth with legal and administrative duties required a system of inheritance which promoted a stable ruling class".⁶¹ Even Sir Robert Berkeley, one of the majority who ruled in favour of the king's right to impose the ship money tax in 1637, emphasised that title to property was lodged in laws which could be changed only by "common assent in Parliament".⁶² The problem was that "government and deep

56 Hilton, *Class Conflict and the Crisis of Feudalism* p159.

57 Rowse, *The England of Elizabeth* (Macmillan, London 1951) ch5.

58 Neale, *The Elizabethan House of Commons* (Penguin, Harmondsworth 1963).

59 Zagorin, *Rebels and Rulers, 1560-1660* vol 1 (CUP, Cambridge 1982) p120.

60 White, *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester University Press, Manchester 1979) ch 5, esp pp172-175.

61 Bonfield, *Marriage Settlements, 1601-1640* (CUP, Cambridge 1983) p23.

62 Smith, *The Emergence of a Nation-State: The Commonwealth of England, 1529-1660* (Longman, London 1984) p403.

matters of state" required resources and the acquisition of those resources by the king appeared, to landlords and merchants alike, dangerously akin to the assertion of a proprietorial claim to their property by the king, although the point at which it became such and the point at which it became, therefore, illegitimate, was a source of disagreement.

The solution was that property and policy had to be placed in the same hands, but juridical and legislative means proved inadequate to the landlords, who were forced to take military measures and try to take possession of the state. In making an enemy of the king, the landlords once again found themselves squeezed, for, in order to check the Royal army they were compelled to summon to arms the people of "the middling sort": artisans and others who formed the Ironsides but with an obstinate attachment to a surprisingly sophisticated political radicalism. Victorious, but still collectively under arms, many of them demanded to know from their leaders why they should stop at removing the king; why not the House of Lords, the obscurantist common law, the mal-distributor of property and privilege?⁶³ As one Agitator, Wildman, put it:

We are now engaged for our freedom. That's the end of Parliaments: not to constitute what is already [established, but to act] according to the just rules of government.⁶⁴

Expressed by Cromwell and his son-in-law Ireton at the Putney Debates was a fear recurring among early modern rulers: if the property-less gain political power, what is to stop them from abolishing privilege and pursuing a path of egalitarianism? To Ireton's assertion that the vote should be exercised only by those with a proprietary stake in the realm, Rainborough responded:

This did not save Berkeley from impeachment by the Long Parliament in 1641 and an eventual fine of 20 000 pounds: Jones, *Politics and the Bench: The Judges and the Origins of the Civil War* (Allen & Unwin, London 1971) pp199-208.

63 The Ironsides' ghost occasionally haunts English contemplation of conscription: see Calder, *The People's War: Britain, 1939-45* (Cape, London 1969) p290; Grant, "Citizen Soldiers: Army Education in World War II" in Woodhouse (ed), *Formations of Nation and People* (Routledge, Kegan & Paul London 1984).

64 Woodhouse (ed), *Puritanism and Liberty, Being the Army Debates, 1647-49, From the Clarke Manuscripts* (Dent, London 1938) p66.

the [first] thing I am unsatisfied in is how it comes about that there is such a propriety in some free born Englishmen and not [in] others.⁶⁵

the poorest he that is in England hath a life to live as the greatest he ... I think it's clear that every man that is to live under government ought first by his own consent to put himself under that government.⁶⁶

The short term consequence - given, as Hill suggests, that prior to the 1650s purges and the Army's intellectual, morale and military decline, it contained "a fairer cross section of the population than the electorate"⁶⁷ - was alarm among the landlords that "the meanest of men, the basest and vilest of the nation, the lowest of the people" had "got the power in their hands".⁶⁸ But, as Manning says, they had not: rural workers, small masters and artisans were too weak and too dispersed to challenge the men of land and commerce. The latter, in turn, learned a number of lessons from the revolution that seemed nearly to get out of control. Certainly they learned that popular politics was a dangerous route leading away from the direction they sought and thus the eighteenth century became characterised by disenfranchisement, long parliamentary terms and uncontested elections leading to the "Old Corruption" of the one-party state.⁶⁹ The men of land and commerce also learned, Plumb says,⁷⁰ the need for a strong executive branch of government,⁷¹ the half-learned version of which led to the experiment with the Stuart restoration before the mature venality of Walpole's eighteenth century administration.

65 As above p64.

66 As above p53.

67 Hill, "The Poor and the People in the Seventeenth Century" in Krantz (ed), *History From Below*. Estimates of the proportion of men eligible to vote in mid-century are as high as 40%: Hirst, *The Representative of the People? Voters and Voting Under the Early Stuarts* (CUP, Cambridge 1975).

68 *Memoirs of Denzil Lord Holles* (London 1699) quoted in Manning, *The English People and the English Revolution, 1640-1649* (Heineman, London 1976) p317.

69 Thompson, Lirebaugh & Hay, *Albion's Fatal Tree* (Allen Lane, London 1975).

70 Plumb, *The Growth of Political Stability in England, 1675-1725* (Macmillan, London 1967).

71 The Oxford English Dictionary dates the use of the term "executive" to signify an agency of government with functions different from those of a legislature from 1649, the year when Charles' decapitation perhaps focused attention on the issue. The separation of powers identified by Montesquieu in the *Spirit of the Laws* Bk 11, Pt 6 (Collier Macmillan, New York 1949) pp151ff were the subject of vigorous debate in early eighteenth century England: see Neumann's Introduction to the Collier Macmillan edition, ppxlxf.

Although the landlord's coup was not complete until later, their assimilation of the lessons of seventeenth century politics, their particular twist to modernism with the seizure of parliament and their custody of the common law enabled them to do what Marx observed to be characteristic of all ruling classes: to define their interests as national interests, to declare themselves to be the nation, its meaning. They wrote a history of England which legal history still embodies. The pattern of their state is one that has become familiar:

The overweening power of the Treasury, a highly centralised financial system, a standing parliament, heavy taxation, an administrative class of gifted amateurs lacking training in the science of government, but with a strong sense of public duty, government deficits and a thriving market in public securities: all these features of modern British politics began under the later Stuarts and the early Hanoverians.⁷²

"ONE RECALLS WITH DIFFICULTY THAT ENGLAND BELONGED TO THE LABOURERS AS WELL"⁷³

The eighteenth century British state is frequently described in what Porter has termed "[the] sedative rhetoric of constitutional liberty".⁷⁴ Macaulay's remarks quoted at the head of the last section set the tone for undergraduate texts about the British constitution and judicial addresses until recently. Yet one could see the centre of the "Britannic world" of the United Kingdom, North America and the Caribbean⁷⁵ as embodying subordinate and superordinate economies, reconciled within larger economies of toleration and obligation. Hierarchical relations, between classes and sexes, for example - were simultaneously personalised and

72 Brewer, *The Sinews of Power: War, Money and the English State, 1688-1783* (Unwin Hyman, London 1989) p250.

73 Thompson, *The Making of the English Working Class* (Penguin, Harmondsworth 1968) p246.

74 Porter, *English Society in the Eighteenth Century* (Penguin, Harmondsworth, revised ed 1990) p115.

75 The term is from Venturi, *The End of the Old Regime in Europe, 1768-1776* (Princeton University Press, Princeton NJ 1989) chXII. See also Pocock, "British History: A Plea For a New Subject" (1975) 47 *Journal of Modern History* 601; Gilroy, *The Black Atlantic: Modernity and Double Consciousness*; Said, *Culture and Imperialism* (Chatto & Windus, London 1993).

diffused. Patronage and "friendship" (and at the higher levels this involved the exchange of women among landlords, and between merchants and landlords) secured evertng from wealth, capital and jobs to safety - "the mesh of continuing loyalties of which appointments were the outward sign".⁷⁶

Authority in the workplace, the neighbourhood and the household seemed to reside in patterns of loyalty and responsibility connecting employee and employer, landlord and tenant, husband and wife, the poor and the administrators of relief.⁷⁷ Legal institutions glimpsed behind authority were read through webs of friendship and patronage, deference and reward.⁷⁸ The constitution and the freeborn Englishman were the effects of everyone knowing his and her place. Foucault suggests that these situations are deeply implicated in the activities of power and resistance.

Reconciliation up and down, and reciprocity across, potentially oppositional lines depended upon the belief in the concept of nature or the personal existing behind the status quo - mediated, sometimes by the law of nature and the epitome of reason, the common law but most often, perhaps, by custom. At the same time, enormous changes were taking place. In order to pursue the apparently mundane goal of safeguarding their property, the landlords and financiers were logically led to try to control the context in which it existed, a context whose boundaries constantly expanded - to America and India, to oceanic trade and to the neutralisation of threats from Europe. War was constant and the Whigs who had opposed the Stuarts' standing army opened their Revolutionary regime by increasing the army's size sevenfold.⁷⁹ Above all, the revolutionary Whigs needed to control those who were the closest condition and context of its existence: the poor, servants and women at home.

Far from having the preserving character ascribed to it by Macaulay, the Revolution facilitated a series of radical departures throughout the eighteenth century and into the nineteenth, to the extent that by the 1790s, in Porter's words, "the political nation saved its skin only by jettisoning

76 Perkin, *The Origins of Modern English Society, 1780-1880* (Routledge, Kegan & Paul, London 1969) p49.

77 Thompson, *Customs in Common*.

78 Thompson, *Whigs and Hunters* (Allen Lane, London 1975); Thompson, Linebaugh & Hay, *Albion's Fatal Tree*.

79 Wallerstein, *The Modern World-System II: Mercantilism and the Consolidation of the European World-Economy* (Academic Press, New York 1980) p247.

much vaunted moderation and constitutional guarantees: its soul was bared".⁸⁰ The customary practices which gave some degree of predictability and stability to artisan and labourer, and which came under increasing challenge from above, involved prices, wages and employment conditions, and tenure.

A complex web of beliefs and expectations about how they should be able to live and be governed informed what Thompson has called the "plebian culture" of the seventeenth and eighteenth century lower orders.⁸¹ There were the notions of the just wage and the just price. Hiring was generally for periods of a year, which was long enough for the employee to earn the right to poor relief in the parish to which he or she may have moved. In urban work, perquisites were vital, since payment was in arrear, frequently greatly so. Rule observes that Admiralty wages at the Plymouth Navy dockyard

in 1762 were fifteen months behind, and the fact that in 1766 they were only six months [behind] ... was seen as a matter for congratulation testifying to the "honor and humanity" of the Admiralty.⁸²

Snell points to a distinction between a servant and a labourer - not in terms of the kind of work, but in terms of whether the employee lived in or not. Living in, receiving keep in lieu of part of the wages, provided the opportunity for betrothed couples to assemble the wherewithal for a future when they might rent a cottage and supplement wages with, in some regions out work, or with chickens and vegetables, and with grazing perhaps a cow and a pig on the commons, from which fuel and non-game animals might also be obtained.⁸³ Some aspects of this culture, even, on occasion its forcible vindication in geographically localised riot, were

80 Porter, *English Society in the Eighteenth Century* p351.

81 Thompson, *Customs in Common* p83. He adds that "moral economies" should neither be romanticised nor seen as peculiarly English, p531. See also McClelland, *The Crowd and the Mob* (Unwin Hyman, London 1989); Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth Century England* (CUP, Cambridge 1987) documents the participatory nature of the lower level criminal process at the beginning of this period; Bohstedt, *Riots and Community Politics in England and Wales, 1790-1810* (Harvard University Press, Cambridge MA 1983), emphasises the view that riot operated as part of local politics in the early liberal state.

82 Rule, *The Laboring Classes in Early Industrial England, 1750-1850* (Longman, London 1986) p117.

83 Snell, *Annals of the Labouring Poor: Social Change and Agrarian England* (CUP, Cambridge 1985).

recognised in the paternalist beliefs and practices of the greater and lesser gentry.

Enclosure and the attack on perquisites, where they did not alone immiserate the workers, Snell and Linebaugh argue,⁸⁴ rendered them impossibly vulnerable to economic vicissitudes which wage supplementation had enabled them to survive. For breach of an employment contract, the employee might be fined by a magistrate (who might be an employer himself) whilst the employer's breach was actionable only if the employee could afford to sue.⁸⁵ When a worker joined with his or her fellows to negotiate collectively over conditions or wages, it was a "conspiracy", or they found the Anti-Combination Laws arrayed against them:⁸⁶ if they sought to enforce minimum wages according to the old labourers' statutes they encountered Lord Ellenborough or Viscount Sidmouth ending the wage fixing and apprenticeship legislation.⁸⁷ The workhouses of the *Poor Law Amendment Act* of 1834 almost completed the revolution in the relationship among the classes of the ruling and the ruled.⁸⁸

From the mid-1750s, household incomes rose in the north, where manufacturing, albeit small scale,⁸⁹ became more important and employed women and children at higher rates than in the south and in London, where incomes fell.⁹⁰ As the world's biggest entrepôt and the centre of world capitalism, London was a focal point for a market in labour and goods from the Shenandoah to Stepney, as Linebaugh puts it. At the same time, the work offered to both locals and transients was low paid and seasonal

84 Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Allen Lane, London 1991). Linebaugh compares the "socking" of tobacco - the custom stevedores and seamen had exercised of appropriating small proportions of the product to "rural customs, particularly the common appurtenant". Without the perquisite, he says, the tobacco porter's wage was no more a living than the cottager's holding without the right to glean. "The attack on socking may be seen ... less as an attack on crime than as an intensification of the exploitation of river workers": p172.

85 Simon, "Master and Servant" in Saville (ed), *Democracy in the Labour Movement* (Lawrence & Wishart, London 1954).

86 A Musson, *British Trade Unions, 1800-1875* (Macmillan, London 1972).

87 Perkin, *The Origins of Modern English Society, 1780-1880*.

88 Williams, *From Pauperism to Poverty* (Routledge, Kegan & Paul, London 1981); Dean, *The Constitution of Poverty: Toward a Genealogy of Liberal Governance* (Routledge, London 1991).

89 Berg, *The Age of Manufactures, 1700-1820* (Fontana, London 1985).

90 Kriedte, *Peasants, Landlords and Merchant Capitalists: Europe and the World Economy, 1500-1800* (Berg, Leamington Spa 1983) p130.

until well into the Victorian period.⁹¹ Where their traditional work practices were re-defined as crimes, and when their wages were sufficiently below subsistence to compel them spasmodically to turn to further activities in twentieth century terms accepted as criminal, it is hardly surprising that these were often the people either hanged or transported to the colonies. What is surprising, as Stephen Nicholas has pointed out, is that Australian historians have persisted with the notion that the convicts of early New South Wales must have been members of a criminal underclass because they were neither "first offenders" nor martyred political activists.⁹²

From the Walpole era onwards, the cost of empire fell increasingly upon the poor; the excise, regressively backed by an efficient bureaucracy, secured the national debt through which the rich could lend to government. This in turn would be repaid by the government whilst using the money to award lucrative supply contracts to the rich so that the Navy could win more commerce, again for the principal benefit of the rich.⁹³ Like the earlier peasantry, and like the other sources of imperial wealth,⁹⁴ - Indians, Africans, Irish and Aboriginal people in Australia - the British poor were morally distanced and exoticised by their rulers. In the English south,

the decline of farm service contributed significantly to the deterioration of social relations. Its physical proximity, with the farm servant living with employer, and the shared leisure and mutual toleration fostered by this system gave way to social segregation - to the point where the Reverend John Cox could say 'I do not know how they reason at all'.⁹⁵

But Myles George argues that it would be simplistic to attribute economic motives to the Augustan employers, when what we may be seeing is the

91 Stedman Jones, *Outcast London: A Study in the Relations Between the Classes in Victorian Society* (Clarendon Press, Oxford 1971).

92 Nicholas (ed), *Convict Workers: Reinterpreting Australia's Past* (CUP, Cambridge 1988) esp ch 1.

93 Brewer, *The Sinews of Power*; Braudel, in *Civilization and Capitalism, 15th-18th Century* (1984) Vol 3, estimates that taxation represented 22% of British GNP, but only 10% of the French, in the eighteenth century.

94 Said, *Culture and Imperialism*; Said, *Orientalism* (Routledge, Kegan & Paul, London 1978).

95 Snell, *Annals of the Labouring Poor: Social Change and Agrarian England*, p101.

possibility of economics built around notions of bodies as machines to be deployed efficiently, from the choreography of the European battlefield to the cotton factory colony, the prison and the workhouse. Grbich writes of the political economists' "model of the nineteenth century labourer - the dullard who is automatically stimulated by the carrot of money or because she or he is hungry".⁹⁶ Even contemporary tax narratives, she says, borrowing from economics, retains the idea of the taxpayer as a machine wound up but in need of incentives, "kick-starting" and "stimulating".⁹⁷ In forcing labourers to rely on money wages alone, the employers could not have been anticipating the coming need for cheap industrial labour. It was the assertiveness and independence among the lower orders which their superiors disliked so much; for example, the "sauntering weaver" whom Maxine Berg notices forming such a provocation to political economists, who keeps "saint Monday", has time to race a horse and the energy to thumb his or her nose at social betters.⁹⁸

George writes:

productive labour was not invested with an economic meaning ... sustained and unremitting industry was simply a guarantee against ... moral temptation and an antidote against vice.⁹⁹

Thompson cites Dr McQueen's submission to the Board of Agriculture in 1816:

In regard to the Poor Rates, I always view these as coupled with the idleness and depravity of the working class. The morals and manners of the lower orders of the community have been degenerating since the earliest stages of the French Revolution. The doctrine of equality and the rights of man is not yet forgotten, but fondly cherished and reluctantly abandoned. They consider their respective

-
- 96 Grbich, "The Form of the Tax Reform Story: Marshall, Ordinary Meanings and the City Men" (1996) *Griffith Law Review* forthcoming.
- 97 Grbich, "The Taxpayer's Body: Genealogies of Exertion" in Fraser, Cheah & Grbich (eds), *Thinking Through the Body of the Law* (Allen & Unwin, Sydney 1996).
- 98 Berg, "Political Economy and the Principles of Manufacture, 1700-1800" in Berg, Hudson & Sonenscher (eds), *Manufacture in Town and Country Before the Factory* (CUP, Cambridge 1983).
- 99 George, *The Concept of Industrial Revolution: Textile History and the History of Discipline* (unpublished MPhil thesis, Griffith University 1983) p78.

parishes as their right and inheritance in which they are entitled to resort.¹⁰⁰

"One recalls with difficulty," Thompson adds, "that England belonged to the labourer as well."¹⁰¹

STORIES OF LEGAL AND POLITICAL CHANGE

[D]id you ever hear tell of the Irish famine ... the tater crop failed ... and it looked mighty dire. But the Rads wouldn't stand for that ... declared an Emergency and mobilised the nation. Lord Byron made a fine speech ... trains come day and night [to Bristol docks] from all over England with every kind of food. 'God bless Lord Babbage,' the poor Irish would cry to us with tears in their eyes, 'three cheers for England' ... They have long memories, our own loyal Irish.¹⁰²

In Gibsons and Sterlings' novel, the 1832 Parliamentary reform was lost, Wellington formed a reactionary government, was assassinated, and there followed a coup led by humane radical technocrats including Lord Byron - less incongruous, perhaps, when one recalls that his wife was Lady Melbourne's niece, and that their daughter, Ada, was a mathematical genius associated with the computing machine usually attributed solely to Charles Babbage. The novel has the State (the sovereign parliament) embracing industry and technological innovation whilst ameliorating the social and economic grievances of the working class and suppressing their political aspirations. A softened Bismarck may have been the model for the novel's Byron.

In contrast to that of Gibson's and Sterling's, the story told by Cain and Hopkins and others¹⁰³ has the British state apparently conceding, over a century, to the political demands of the disenfranchised for the vote, responding very diffidently to the social and economic conditions of the

100 Thompson, *The Making of the English Working Class* p246.

101 As above.

102 Gibson & Sterling, *The Difference Engine* (Bantam Books, New York 1992) p414

103 Cain & Hopkins, *British Imperialism: Innovation and Expansion, 1688-1914* (Longman, London 1993); Wiener, *English Culture and the Decline of the Industrial Spirit, 1850-1950* (CUP, Cambridge 1981); Newton & Porter, *Modernization Frustrated: The Politics of Industrial Decline in Britain Since 1900* (Unwin Hyman, London 1988).

working class, whilst continuing to pursue commercial and financial policies ultimately inconsistent with successful industry. Institutional legal histories, stories of the common law set in the (silent) context of an older style of political history, have not noticed the relevance of this material. For them, a law-governed state consequent upon the expansion of the common law and the parliamentary constitution, always pragmatic and adaptable, yielded to responsible demands for democracy by expanding the franchise:

A land of settled government ...
Where freedom slowly broadens down
From precedent to precedent.¹⁰⁴

The state they're in, to appropriate Will Hutton's title, may not be the state we're in - depending on who "we" are.¹⁰⁵ I have tried to demonstrate the case for not regarding the eighteenth century state as especially rule-governed. The ruling classes were not monolithic and they possessed ground rules for carving up social resources; the ruled were not without a capacity to resist. Thompson must surely be correct in his famous passage at the end of *Whigs and Hunters*,¹⁰⁶ that England was not like Prussia or Russia in the eighteenth century;¹⁰⁷ but his own text, as well as those of others, uncovers a complex social fabric of powers and resistances in which the legal institutions of royalty, common law, were more useful to the oppressors in their assault on customary reciprocities than to the oppressed and sufficiently plastic not to impede "progress".

104 Lord Tennyson, "You Ask Me, Why, Though Ill at Ease" in Ricks (ed) *The Poems of Tennyson* Vol I (Longman, London, 2nd ed 1987) p530.

105 Hutton, *The State We're In* .

106 Thompson, *Whigs and Hunters*, Consequences and conclusions.

107 Yet if ever rulers were in a position to compromise with their ruled, it was the British. Parliamentary sovereignty was not negotiable, for it was the mechanism of government: as Pocock observes, the Whigs would naturally rather have kept America, but not at the cost of Westminster's imperial supremacy, which was what early American demands required: Pocock, *Virtue, Commerce and History: Essays on Political Thought and History* (CUP, Cambridge 1985) ch 4. Braudel tells us that immediately after the treaty ceding American independence, a low point, one might think, Britain was able "to preserve and extend her markets ... pushing aside her European rivals, effortlessly reconquering the markets of her former colonies, imposing terms of trade on Russia, Spain, Portugal and the US": Braudel, *Civilisation and Capitalism 15th - 18th Century* Vol III (Collins, London 1984) p381. In the 1786 Eden Treaty, France, too was commercially subordinated.

The credentials of the nineteenth century constitutional reformers are just as suspect as the claims that the Revolution gave birth to the rule of law.

The Whigs said [of the 1832 Act] that they were creating a polity which embraced the 'middle classes' whose power and prestige ... had long since outgrown their political standing. This was not seriously attempted in practice.¹⁰⁸

Quoting Earl Grey, the 1832 Act's architect - "the more the Act is considered, the less it will be found to prejudice the real interests of the aristocracy"¹⁰⁹ - Beckett remarks that:

Perhaps the most significant outcome of 1832 was the prolongation of aristocratic power for a further half century within a partially reformed central and local political system.¹¹⁰

The spirit of popular power which had haunted the seventeenth century landlords still frightened their successors, and for the same reason. In the era of Paine, whose influence was enormous,¹¹¹ and the democratic lessons of the new America and revolutionary France, popular responses to destructive encroachments on expectations of just behaviour had become less conservative, and regional rather than local,¹¹² often, like Luddism, within a particular trade. Or they became national, like the parliamentary reform riots, the protests against the Poor Laws or Chartism. One problem under discussion at the 1819 meeting in St Peter's Fields, Manchester,¹¹³ was the question posed during the 1647-9 Army debates at Putney¹¹⁴ and subsequently the American question: how to achieve a government more sensitive to popular interests.¹¹⁵

108 Bentley, *Politics Without Democracy, 1815-1914: Perception and Preoccupation in British Government* (Fontana, London 1984).

109 Beckett, *The Aristocracy in England, 1660-1914* (Blackwell, Oxford 1986) p452.

110 As above p456.

111 See, for example, Keane, *Tom Paine: A Political Life* (Little, Brown, New York 1995) ch 9.

112 Bohstedt, *Riots and Community Politics in England and Wales, 1790-1810*.

113 This occasion was named "Peterloo" after the Yeomanry panicked and attacked the unarmed crowd.

114 Woodhouse (ed), *Puritanism and Liberty, Being the Army Debates, 1647-49, From the Clarke Manuscripts* (Dent, London 1938)

115 White, *Waterloo to Peterloo* (Heinemann, London 1957).

A second problem was that of how to accomplish fairness in the context of unrestrained economic restructuring. The radicals' solution to both problems was for the people to take control of government. If parliament was the site from which customary practices had been abrogated and liberties suspended, it seemed to the radicals to be the obvious site for them to occupy. Lenin called this kind of belief "parliamentary cretinism" and Stedman Jones has characterised Chartism, the most fully developed nineteenth century program of popular government, as an "obsolete" movement.¹¹⁶ Counterpoised to the Marxist convergence on the misguided goals of popular radicalism is the liberal progressive view that representative democracy through the extension of the vote to the working class was merely held up by the irresponsible excesses of Chartist demands. This reads back into events the views Mill expressed in his essay "Representative Government" in 1861: citizenship generates virtue, but requires responsibility - as measured by those with the power to confer or refuse the vote, of course. In the century after the collapse of Chartism, almost all of its demands were met "making it difficult to appreciate how radical they were in 1838", Thomson writes.¹¹⁷

The story can be told differently, and consequently we can take a different view of how far the British state has actually changed. Perhaps the Marxists are correct in retrospect; in view of the reactions to radicalism of the propertied it became impossible to pursue radical goals through parliamentary reform. Perhaps the radicals were, in the end 'successful', for the 'condition of England' question was resolved in favour of social reform and even, by the end of the 'long' nineteenth century, the beginnings of a welfare state. And finally, from their own perspective, perhaps the liberals were correct; they managed to accomplish what Ireton had dreaded, but without the consequences he dreaded it for - the property-less obtained the vote and did not vote to abolish property. But how else shall we tell the story?

The popular agitations for factory reform, for the Charter, and against the Corn Laws, could be said to have resolved the question of state intervention in society.¹¹⁸ Among those with formal political power, prior

116 Stedman Jones, "Rethinking Chartism" in *Languages of Class: Studies in English Working Class History, 1832-1982* (CUP, Cambridge 1983).

117 Thomson, *England in the Nineteenth Century, 1815-1914* (Penguin, Harmondsworth 1950) p84.

118 We have to recall that these decisions were in the same hands as in the eighteenth century:

The grip exercised by landed power had relaxed a little since 1841 but it still remained (and was perceived to be) of decisive

to mid-century there was, Lubenow says, no opposition and little support for state intervention.¹¹⁹ After mid-century, support grew for measures like factory legislation and later some intervention in railways, housing, food and sanitation, that was regulative and inexpensive; or charged to the local state in someone else's parish.¹²⁰ As a proportion of a growing economy, state expenditure may not have risen, but the preparedness to regulate does seem to have increased.¹²¹ But when we have praised famous men for the change, we should remember the influence of the demonstrators of an earlier generation who, Kitson Clark says, "would in their generation get nothing but hard knocks and prison sentences and scant sympathy".¹²²

But other changes were taking place. Parris notes that the Board of Trade was by this time "administered on the modern pattern. The majority of decisions were taken by permanent officials. Ministerial responsibility had become a political fiction."¹²³ In 1852, four years after the expiry of Chartism and the revolutionary outbreaks in Europe, Gladstone, then Chancellor of the Exchequer in the Aberdeen administration, commissioned the Northcote-Trevelyan inquiry into this 'permanent officialdom' of civil service. The conventional narrative places this in the context of the rationalising and modernist tendency to efficiency through the abandonment of patronage in government. Cardwell's 1871 Army reforms are often considered to be another example, replacing the practice of allowing commissions to be purchased.¹²⁴ But as Colin Leys points out, whilst Army commissions were no longer to be purchasable, they were in effect inaccessible except through the public school "volunteer

importance. Possibly the security of that dominance even increased as harvests became abundant after 1852.

Bentley, *Politics Without Democracy, 1815-1914: Perception and Preoccupation in British Government* p144.

119 Lubenow, *The Politics of Government Growth: Early Victorian Attitudes Toward State Intervention, 1833-1848*; (Archon Books, Newton Abbott: UK 1971) p187.

120 See Paulus, *The Search for Pure Food: A Sociology of Legislation in Britain* (Martin Robertson, London 1974); Parris, *Government and the Railways in Nineteenth Century Britain* (Routledge, Kegan & Paul, London 1965).

121 Although note for example that Midwinter's figures do not investigate local rates: Midwinter, *Victorian Social Reform* (Longman, London 1968). In an imperialist state, however, the statement that "the economy grew" does not mean that someone somewhere else was not paying the price.

122 Kitson Clark, *The Making of Victorian England* (Methuen, London 1965) p135.

123 Parris, *Government and the Railways in Nineteenth Century Britain* p209.

124 McConville, "Legislators, Judges and Jurors: Bureaucratic Processes and Law in Late Victorian England" (1989) 7 *Law in Context* 1.

corps".¹²⁵ The public school in turn reflected the concern in mid-century about the meritocratising influence which Matthew Arnold, among others, noticed in the United States.¹²⁶

From mid-century ... the public schools had provided a common education ... an intensive intersocialisation for the sons of the gentry and the upper bourgeoisie ... The values ... were markedly anti-industrial from the outset: a training for rule, not for trade. Subsequent university reforms at Oxford and Cambridge reinforced these, generating an academic ethos in which the disinterest of the scholar mingled and blurred with that of the aristocrat, and the ideals of service subliminally associated the profession of rule with the rule of the professions.¹²⁷

Peter Cowan's view is that the purpose of the civil service reforms proposed by Northcote and Trevelyan were to "consolidate the mid Victorian oligarchic state by winning acceptance of it from the middle classes" but retaining aristocratic predominance by creating an elite bureaucracy without "seeking to gain middle class entry into that elite". The service was to be divided laterally and access to the highest level was not to be by promotion from lower levels, but by examination based upon the subjects taught in the public schools. When the reforms were eventually implemented under Gladstone's Prime-Ministership, the Treasury was the senior branch. According to Gladstone's biographer,

Lord John Russell was the chief spokesman for the argument that it was a revolutionary and democratic step ... Gladstone denied that the kind of patronage it was proposed to abolish was necessary for the maintenance of party in Parliament and to Russell he wrote that the change would not work against the aristocracy but would "strengthen and multiply the ties between the higher classes and the possession of administrative power".¹²⁸

125 Leys, *Politics in Britain: From Labourism to Thatcherism* (Verso, London, revised ed 1989) pp48-49.

126 Roper, *Democracy and its Critics: Anglo-American Democratic Thought in the Nineteenth Century* (Unwin Hyman, London 1989).

127 Anderson, "The Figures of Descent" (1987) 161 *New Left Review* 20 at 41.

128 Feuchtwanger, *Gladstone* (Allen Lane, London 1975) pp91-92.

The creation of a "mandarinate" was initially rejected, but Cowan suggests,

it had become clear to the party leaders in the mid 1860s that the doors of the parliamentary oligarchy would have to be opened and a larger part of 'the multitude' would have to be given the vote. They thus faced the appalling prospect that had haunted the propertied classes throughout the century: that the formidable powers that had been concentrated in parliament would be within reach of other social classes, even the property-less. By passing the Second Reform Act of 1867 they were, in Lord Derby's phrase, taking a "leap in the dark". Here at last was the justification for shifting power from the parliamentary to the executive branch of the state.¹²⁹

CONCLUSION

Facing a similar prospect eight decades before, Friedenberg writes, the American "post-colonial upper class" had adopted a different means of self-protection. Checks and balances designed by a group of rich men in the shadow of Shay's rebellion "against unjust treatment by the wealth-controlled legislature" to keep things as they were:¹³⁰

the new American system was to a large extent propped up by political devices that had been organised by the rich and well-connected to control the different branches of government so well that what seemed like checks and balances was in effect a narrow corset of monied privilege trussed with corruption.¹³¹

Juridicalisation again reconfigured the form of the state in a way which broadly parallels the tendency of the British civil service reforms:

129 Gowan, "The Origins of the Administrative Elite" (1987) 162 *New Left Review* 4 at 31.

130 Zinn, *Declarations of Independence: Cross-Examining American Ideology* (Harper Collins, New York 1990) p112, and generally, pp110-114; Zinn, *A People's History of the United States* (Longman, New York 1980) p101, and ch5 generally.

131 Friedenberg, *Life, Liberty and the Pursuit of Land: The Plunder of Early America* (Prometheus Books, Buffalo, NY 1992) p359.

the new Supreme Court made itself into a supra-legislature ... simultaneously remov[ing] ... matters from the jurisdiction of the real legislature, and thus from the range of legitimate public debate.¹³²

Often in the standard legal history narrative, it seems as though both remedial and government systems gradually respond to popular demands for change, which renders mysterious

the fact that the modern era, replacing the arbitrary rule of men with the impartial rule of law, has not brought any fundamental change in the facts of unequal wealth and unequal power. What was done before ... is still done ... except it now has the authority of neutral, impartial, law.¹³³

If the narrative is changed, we notice the obstacles to the installation of the kind of government with which the elites of the modern era associate modernity on our behalf: popular authority, participation, democracy. Whether these obstacles are elite bureaucracies, party machineries, constitutional safeguards or judicial review - and usually there will be a mix of all of these - their pre-empting and agenda-setting operations are part of the means of rule and the preservation of hierarchy. They are not, any more than the disciplinary discourses in which they come to seem inevitable and natural, unresponsive to popular forces. Indeed, I have suggested that some of the larger changes to social ordering practices can be seen as defensive manoeuvres by those who rule, by no means preserving all their privileges from those who are ruled.

A conclusion one might draw from the past is that whilst political struggle is not guaranteed to produce progressive change, changes which *have* been produced through political struggle may be more inclusive and secure than those which issue in Porter's "sedative rhetoric of constitutional liberty".¹³⁴ One must not be misled by forms. The revolutions of wealthy English and Americans, assisted by radicals whom they often afterwards forgot or disowned, the revolutions against slavery and the franchise struggles, all resulted in, but not simply from, constitutional change in the polities in which they occurred. What those who control a polity give in

132 Lustig, *Corporate Liberalism: The Origins of American Political Theory, 1890-1920* (University of California Press, Berkeley, 1982) p95.

133 Zinn, *Declarations of Independence* p111.

134 Porter, *English Society in the Eighteenth Century* (Penguin, Harmondsworth, revised ed 1990).

the form of constitutional change, they may equally take away. It is difficult to envisage large-scale disenfranchisement or re-enslavement, on the other hand, let alone a return to Absolutism in Britain, or British government in America.

Having said that, one is constrained to recognise that confrontations are frequently disastrous and even successful revolutions have historically not lived up to expectations. The safest long term goal we can have in trying to achieve the broadest participation by people in the construction of their common existence, Chantal Mouffe suggests,¹³⁵ is the preservation of antagonism, conflict and disagreement. Like the Truth of human history, which I began by suggesting must await suprahuman narrators, human harmony must, for the same reason, await suprahuman government. During the wait, it seems to me that democracy is best built up from personal, domestic and institutional beginnings - none can be neglected on the ground that another must have priority - in the disciplines and practices to which one contributes. If I have made unusual use of historical writing, this conviction is the reason.

135 Mouffe, *The Return of the Political* (Verso, London 1993) Introduction.

