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## Sovereignty: Some considerations

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## **Abstract**

The purpose of this paper is to assert that sovereignty is not a useful doctrine when applied domestically in modern times in the form it often assumes, namely a locus of legal or political authority which has an existence beyond the political system governed by it and which may therefore have resort to extraordinary power in exceptional circumstances. The conviction that this must be so has gained the status of common sense in some circles: after all, must the state not have emergency powers to protect itself? But what is 'itself'? — a question that arises whenever 'state' infrastructure is sold to largely wealthy purchasers. Is the state not the taxpayers' agent? Why should they be asked to pay over again for assets they already own?

# Sovereignty: Some considerations

Ian Duncanson

And because the name of tyranny signifieth nothing more nor less than the name of sovereignty, be it in one or many men, saving that they that use the former word are understood to be angry with them they call tyrants, I think that the professed hatred of tyranny is a toleration of hatred to the common-wealth in general and another evil seed (Hobbes 1968: 32).

When we enquire by what means ... the many are governed by the few ... we shall find that force is always on the side of the governed, the governors have nothing to support them but belief. It is therefore on opinion only that government is founded (Hume 1987: 32).

The purpose of this paper is to assert that sovereignty is not a useful doctrine when applied domestically in modern times in the form it often assumes, namely a locus of legal or political authority which has an existence beyond the political system governed by it and which may therefore have resort to extraordinary power in exceptional circumstances. The conviction that this must be so has gained the status of common sense in some circles: after all, must the state not have emergency powers to protect itself? But what is 'itself'? — a question that arises whenever 'state' infrastructure is sold to largely wealthy purchasers. Is the state not the taxpayers' agent? Why should they be asked to pay over again for assets they already own?

Yet the notion that emergency powers always already exist *in potentia* beyond the community of persons who lay claim to constitute the state by their membership of it carries enormous dangers. Who decides if there is an emergency? People either sufficiently mendacious or incompetent that they see threats to state security in every foreign garbage bin? If it is the sovereign who must decide, and if the sovereign is at the same time defined by the capacity to own that power of decision, the reasoning is circular and viciously so, for the temptation to lower the threshold of emergency or to use it opportunistically must be seen as in all likelihood irresistible. As we have seen.

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The idea, too, that all legitimate authority in the state, symbolised by its law, originates directly from or is delegated by a sovereign of this kind, as Bentham has it (Hart 1970: ch 1), is an archaic relic believed in by few but some lawyers and the more mystically inclined political theorists. It is the trace of the transition from feudalism to absolutism. Although assuming different forms in different places, European absolutism long ago represented the aspirations of feudal monarchy's ultimately successful campaign to reduce the patchwork of baronial jurisdictions that succeeded the collapse of the Western Roman Empire and to create central foci of military power outside the mutual obligations of feudal lordship (Anderson 1974: ch 2).

Absolutism as it was developed in the major European kingdoms simultaneously broke the power of the peerage and challenged the more precocious medieval city states' financial power in the south — of Venice and of the Lombards, for example. Something grander still haunted Western thought but it was not to be realised, if fantasies can be realised, until European impositions on America and Asia. Charlemagne imagined himself as a successor of the Roman Emperor, if far to the north. But culturally outclassed, and militarily humiliated by the Arabs, by the Magyar threat from the east and the Scandinavian incursions from the north, all of which were to turn Europe into a backwater under siege, Charlemagne's Carolingian successors certainly did not bring about a renewal of the glories of Rome (Bloch 1965: ch 1, 2). Gregorian ambitions for a Christendom, the rule of Christ on earth, may have been more pretentious and perhaps crueler, driven by a theocracy incapable of distinguishing Christian diversity from the 'Saracen' enemy or of recognising that enemy as an equal humanity entitled to its difference. But, as Frances Yates writes, this 'phantom' of Rome had stalked through European thought since Rome's fifth-century end in the west (Yates 1975: 41). Charlemagne saw himself not only as the head of the earthly city, as opposed to Augustine's City of God, but as the worldly and necessarily unitary defender of the eternal:

As all the powers within an individual man must be under one ruler, his intellectual power, as there must be one man to rule a family, the paterfamilias; one to rule a city; one to rule a kingdom; so there must be one to rule the universal world (Yates 1975: 9).

Whether the Crusades, designed to establish a Christian European dominion (Berman 1983: ch 2, 5), the establishment of the ecclesiastical legal canon derived from Roman law, the slightly later purging of Jews and Muslims from Iberia, the beginning of the attempt at genocide by the Spanish in America, are all coincidental, may be doubted. The connected and neurotic compulsion to certainty and unity are too plain to ignore. Obviously not a complete catalogue of European imperial endeavours, they all exemplify purposeful manifestations of an imperialist urge to unitary sovereign power. Arguably, they produced and re-produced new certainties and I shall mention later the connections that can be made between epistemology and political action. Luther's and Calvin's vigorous convictions, and the equally fierce counter-reformation associated with the Tridentine Council, were all within a few decades of the Iberian expulsions and the arrivals of the Conquistadores in the Americas. If, as some argue, the Renaissance began not with the Italians but in Moorish Spain by the 1500s, a newly self-confident Europe was prepared to reject Muslim effete-ness and banish and murder its human embodiments. Its own multiple schisms — true Catholic and heretic, Protestant and Catholic, true and false protestantisms — were more than ready to murder each of their enemies in the name of faith and certainty. But as certainties multiplied, perhaps a fear was also gaining momentum among Europeans, whom the Arabs had known collectively as Franks during the two centuries of the Crusades, and in stories repeated orally for centuries after, as brutal and ignorant. If the Europeans had become yet more brutal, the fear may have been about their own safety from themselves. This is what Hobbes perceived, and surely what frightened him. Here is the paradox. We can all make ourselves certain; there is indeed a certain illusory security in that; and Protestantism brought matters to a head on all sides.

Christianity, then, acquired a zeal in the sixteenth and seventeenth centuries that it had not exhibited since the Crusades. How are issues not considered consistent with each other to be resolved when the other fellows are plainly mistaken and probably wicked, except at the point of a sword or a matchlock, the imperial solution familiar, of course, *from* the Crusades and more recently from the 'new' world of Castilian Spain and its overseas empire? Moreover, the problem was not confined to 'religion' in its narrow sense, although it used religious vocabulary for a long period. If I cannot see inside another's head, rational prudence dictates the possibility that he or she may mean me harm. When the threat is embodied, as it must be, in a person or body of persons in a kind of antidote to the Yeatsian 'the centre cannot hold', it impliedly addresses a supposed dichotomy in social life: order or anarchy; prosperous, if coerced, cooperation or the impoverishing claim of all to all. Perhaps when too much stress resides here, the conflation made by Hobbes of tyranny with commonwealth becomes at length irresistible. The stress of uncertainty gives way to a yearning for a strong master, a father above and beyond the control of his children, to assume responsibility. And what, therefore, as Arendt was to write of Eichmann, renders one freer than a strong master?

Sovereignty retains, for this reason, its seductive charm for some, and the 2006 Wollongong Law and Society conference, 'The Protection of Law: Right or Racket', at which a version of this paper was originally presented, provided a refreshing opportunity for raising the relation of sovereignty and law as an issue, implying not only that law may be seen to be on the side of the good or on that of the fraudulent and exploitative, but that, in all of its guises, it may be part of the problem of social order and justice. Al Capone's 'racket' of course was 'protection' from his gang — a tax which, if left unpaid, would risk dire consequences of damage, injury or death. When paid, prosperity and safety were likely, a victory over one's opponents and an albeit contemptuous blessing from one's protectors a distinct possibility. Failure to pay the tax naturally spelled ruin for the debtor. But, under a system in which law is commodified, how different is right? If I can afford expensive lawyers and protracted litigation and you cannot, you

must accept my terms. Lawyers, the title of the conference asks us to query, may be just another gang whose protection we buy.

In the shadow of a war of opposing religious and political fundamentalisms in the seventeenth century, it seemed to Hobbes that the order that could resolve the racket, the only order that could reliably be maintained, was one achieved not by a continuously renewed adherence to a reconciling law but by strong rule, specifically by one or a group outside and above the conflict which law had hitherto been incapable of resolving — by a sovereign to whom all political, moral and legal authority had been ceded. Dissent was dangerous. It led, famously, to the war of all against all, the cold war of suspicion, with which we are deeply familiar, and potentially the hot war of blows. This Hobbesian view, largely resisted in the century after his writing, became an important component in the ideology of late eighteenth- and nineteenth-century ideologies of empire. As late as the twentieth century, imperial rule from a metropolis beyond the governed communities was justified as all that saved ‘native’ societies from descent into irrational chaos (see the summary in Wilson 2007 and Hall 2007). The Indian insurrection of 1857, that of Morant Bay in Jamaica in 1864, Amritsar in the last century, and the tragic Partition wars at the end of the Raj all supply imperial diehards with support for their conviction that this was always the case. The part played by European adventurism in producing these events is conveniently overlooked from this perspective.

The possibilities for tragic or unpleasant outcomes, then, for a population governed by those exceptional to it are obvious — summarised, Hannah Arendt reminds us, in the German jurisprudential concept of ‘Act of State’, ‘even more tellingly in German ... *gerichtsfrei* or *justizlose Hoheitsakte*’ (Arendt 1994: 49). It is an encouragement, or a disincentive, to *think*, as she puts it, to make the effort to see the other’s point of view in the case of difference or disagreement; and this is the context in which, she writes, the ‘banality of evil’ manifests itself. In this space, Eichmann carried out his orders, not sadistically, but merely without seeing the need to consider the ethics or the

consequences. In Abu Ghraib and Guantanamo Bay — and in the predictably absurd terminology of ‘rendition’, whereby victims not convicted of any offence are sent to regimes instructed, even assisted, by that tower of democracy the United States, with its hitherto craven ally Australia, to inflict torture — are reminders that Western governments are never far from creating such contexts (see Rothschild 2007 and Zinn 2007). Torture, humiliation and firm, paternalist discipline are the administrative tools required to transform a squabbling mob into responsible adults capable of self-government. Lies, fear campaigns, fake motives, are all part of a necessary means to an ostensibly good end.

The argument of this paper, to reiterate, is that the danger of authoritarianism is always inherent when the ultimate legitimacy, the foundational authority of the state, is conceived as beyond the community from which its citizens derive their identity. It always has imperial overtones. Bentham (1988: 3) set his work in the context of the ‘perfection’ of scientific advances, the European conquest of nature and ‘the most distant and recondite regions of the earth traversed and explored’ by Europeans. His disciple John Austin considered himself a cartographer and giver of order to what was in common law apparently arbitrary and unconnected, perhaps like native visions of the world (Austin 1955: 379). Fitzpatrick notes the colonialist assumptions in Hart’s schematic anthropology, which maps ‘pre-legal’ societies onto modern societies and finds them wanting. In pre-legal societies there are only simple or primary norms, requiring or forbidding certain behaviour. Modern societies, with proper law, have, in addition to primary rules, secondary rules, creating institutional means, such as courts and legislature, for changing primary rules. In Ronald Dworkin (1986), the agents of change have become the American Legal Realists’ social engineering judges, the princes of the crassly titled *Law’s Empire*, although Dworkin’s judges are somewhat more conservative. They do not rule on what must be, only on what has always already been, if unseen by punier men, those who lack the biceps pictured on the cover of the paperback 1986 edition of the text. In one way or another a knowing subject, or possibly a sudden action from without, resolves confusion and brings law. The possibility of an acceptable, law-free Act

of State haunts much jurisprudential thinking. Even Jacques Derrida (1990) finds the expression ‘We the people of the United States’ in need of some grammatical gymnastics to justify it. How could a people be constituted before the constitution that constitutes them as a people? As New Zealand Solicitor-General and leading jurist Salmond (1920: 124) wrote just after World War I:

It is requisite that the law should postulate one or more first causes, whose operation is ultimate and whose authority is underived.

Democracy itself can seem to have a violent beginning (Ross 2004). Yet if the danger of authority’s being even conceivably outside, unaccountable to constitutional restraint, is, as we have seen, present in the most unpredictable of places — if fear can be invoked by unscrupulous rulers — authority may so conceive itself, and treat others too, as outside and beyond. But how else are we to think of authority? Does it, could it, not always come from a beyond?

What is sometimes forgotten is that in 1688 the English political classes gave government to themselves, assembling in a *convention* parliament without a king, having removed the ruling monarch because he posed a threat to what had come, during almost a century of struggle, to be the sanctified association of property, liberty and the independence of gentlemen to decide on the mode of their government. The Scots parliament may have felt the need to find constitutional grounds for deposing the monarch they shared with England, but the English Houses did not. They were prepared to act pragmatically in order not to provoke unnecessary dissension and to ground legitimate authority on, precisely, the shifting bases of convention, agreement and re-agreement.

And this brings us to the quotation from Hume. Hobbes — the geometer, convinced that the truth was measurably out there and that he had glimpsed it — believed that the route from the terrifying state of nature was discoverable by the use of human reason correctly used, in the way contemporaries believed Isosceles and the other Greek heroes to have worked. A little later Hume and his immediate predecessors and contemporaries, on the other hand, linked understanding the world

and acting in it in a more quotidian and less absolute sense. Writing in an era very different from that of Hobbes — one in which a solution to earlier conflict had developed new dimensions — epistemological questions about thought and belief acquired more significance in the production and maintenance of order. The thinkers with arguably the most social and political influence, until British conquests in India and the task of governing brown people without their consent prompted renewed interest in Hobbesian notions of sovereignty (see Dirks 2006, especially ch 5), adopted a defeasible ‘as if’. For Victorian reformers, with their problems of ruling brown people, women, the feckless poor, of course the *content* of law must constantly adapt to changing social circumstances, but the *form* of law was a given in ‘advanced’ societies even where, like the coastlines and continents being mapped by the Admiralty, and the laws of physics, it had continually to be clarified according to positivist scientific principles.

For the Victorians’ predecessors, by contrast, an inquiring subject does not expect to find a world that mirrors his or her thoughts about it, but adopts strategies that seem best adapted to how things seem until the strategies no longer work. Dogmatism and certainties are no longer options. One is tempted to understand sovereignty from the point of view of these late seventeenth-century and early eighteenth-century post-civil war writers by invoking the memorable phrase coined by the American Legal Realists in the twentieth century: ‘there is no *there* there’; ‘its’ existence and form had for the eighteenth-century gentry, and those much below, to be discussed in a seemly way; and the manner of seemliness, not its ultimate object — since there was none — was of central importance. The norms were broached in times of social distress, dragoons might sometimes be dispatched, but often with such disastrous results that negotiation with those distressed was the preferred option. Of course for Hobbes himself sovereignty was not entirely *there* either but had sternly to be created and accepted as a condition of peace and thereafter rigorously maintained at risk of society’s falling once more into the chaos of the state of nature.

In Locke's experience, sovereignty in the form claimed by the Stuart monarchy had been attempted as a practice of government as a living performance, with personally dangerous and nationally disastrous consequences for himself and his country. Locke and his successors were for that reason more subtle, less sure of themselves and their ideas, scientific and social (between which categories, for political purposes, they made no absolute distinction), less absolute. And, save for the brief flirtation with sovereignty among white men that led to the downfall of the Atlantic empire after 1776 (Simms 2007), the British route to order among *themselves* avoided the pitfalls of sovereignty as the beyond (despite the particularly noisy bluster of lawyers in the wake of Bentham, through James Fitzjames Stephen to Dicey) and followed a generally cultural route, the difficult and far from perfect production of social coherence through manners and politeness and, later, education.

Locke approached what he considered the compound of science and art involved in social analysis and action allusively and with a remarkably modern-sounding approach to knowledge and understanding. He wrote of the heuristic process of 'framing ideas': these are not 'precise imitations of anything that really exists' but devices 'for the easier and readier improvement and communication' of the understanding (Locke 1979: 420, 431). In a posthumously published essay on the science of astronomy, Adam Smith (1982: 105) said much the same: the laws through which scientists try to grasp reality are not *part* of reality, but dwell in the creative imaginations of the inquirers and so will in time change. The sovereign-beyond, the mystical beginning, the ambiguous outside/inside, if we apply this reasoning, is not an empirical component of an ordered community but a presupposition that we make or are sometimes misguidedly persuaded to make, especially if we do not, in Arendt's terms, 'think' — a presupposition to which we then respond, perhaps absolving ourselves from responsibility, but certainly by conferring more power on leadership than is necessary.

Arendt distinguishes the British Whig tradition, from which the American Revolution sprang, from the Bourbon absolutism which

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provoked and gave a vocabulary for the French Revolution. The first two do not assume an ‘outside’ origin for government legitimacy and law, which invite us to concede the possibility of a state of exception, a realm of acts of state beyond reach of the community, but rather a convention among the governed regarding the practices of self-government. With an inheritance of divine origins, the monarch as carrying out God’s will on earth, France resorted, on the dissolution of the office of God’s anointed, to the people’s or general will which, as Arendt, and Edmund Burke long before, pointed out, required human intervention in order to function, and found it in Robespierre and the Terror (Arendt 1973).

The Whigs did not risk creating a sovereign over and above themselves. The convention that Parliament cannot legislatively bind itself, far from an assertion of Parliamentary sovereignty, is the design that it is an assembly that governs by *consent* — at least that of the political classes. Since consent will seldom be signaled by unanimity, the next best thing is consent by subsequently defeasible majority. Parliament itself, in the evolving conventionally and largely Whig plan, consisted of the monarch who would act executively through his or her ministers in Parliament subject to their having the confidence of Commons and Lords. After 1701 the common law judges had security of tenure (Plumb 1967). This was the famous ‘balanced constitution’.

We might note here Hannah Arendt’s observation that the Americans, also, did not adopt the inside/outside notion of sovereignty emerging, as she notes, from the Whig tradition which they believed the ministries of George III to be sabotaging:

In the long run, perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same (Arendt 1973: 153).

Momentarily, in the proper sense, she forgot the Whigs. The Americans were not, indeed, a ‘we, the people of the United States’ *avant la lettre*. They were, as Arendt had already observed, even then existing political associations (of white men) with elected assemblies that organised their own supply. They were also, as Fetter (1976) tells

us, as or more determined than the Latitudinarian Whigs to create a secular state in which personal beliefs might be respected, one also in which legitimate authority was divided and 'balanced'. The original emigration to America had been to some extent in search of those religious freedoms imperfectly achieved by the parties to the Convention of 1688, but this was only possible where God was seen as 'the ultimate good chap', in Paxman's phrase. The 1776 Declaration describes the desire of those in whose authority the delegates assembled at the Continental congress of the united colonies to re-form each of them each as sovereign states, united in light of their opposition to George's ministries' invasion of the rights of free-born Englishmen. At that point they agree in the Articles of Confederation to 'stile' themselves the United States of America (the Declaration refers to the united (lower case) States of America), the later Constitution recognising the need for greater union.

The sentiment of balance, tolerance in face of uncertainty and pragmatism was pervasive. The impudence of the Americans in acting out what many in Britain believed — that the executive was arrogating to itself too much power — generated some British patriotism, and Pitt's Parliamentary reformist ambitions were then drowned in the French wars following the Revolution; but the conviction of an agreement beyond law and sovereignty of an absolutist kind survived. Earlier it had taken the form of, as we have seen, a convention of gentlemen, including the invited monarch, upon how government was to be managed, trade aggressively maintained and empire defended towards commerce's ends. The 'ungovernable people' were included in this convention insofar as their activities and conventions consorted with the expectations and pragmatism of their governors.

Subsequently, legal positivists, unable to conceive of law otherwise than Bentham, Salmond and others, have found in Blackstone's Oxford lectures, published as the *Commentaries*, support for their thesis. Denying Locke's argument that ultimate power rested with the people, who might in circumstances abolish it and begin again, the *Commentaries* characterise Parliament as 'that absolute despotic power'. What the positivists have

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not noticed or taken seriously is Blackstone's requirement that secular law conform with the law of nature. He clearly supposed that English common law did, but he held out the possibility of its ceasing to be binding if it did not 'for no human law should be suffered to contradict these' (Blackstone 1765: 42). Of Locke's social contract theory — that power rests in the hands of the people, and which does not commend itself to Blackstone — Blackstone himself states: 'So long as the English constitution lasts, we may venture to affirm that the power of parliament is absolute and without control' (1765: 157). And in what consists the essence of that constitution? 'It is highly necessary for preserving the balance of the constitution that the executive power should be a branch, though not the whole of the legislature' (Blackstone 1765: 149). This is how the safety of the people is to be maintained. Since Locke, like Blackstone and Hume, considers the good of the people the end of government, there seems little between them.

Of course Locke was too cautious a writer, having already guessed correctly the reactionary revolutionary intentions of James II, to have meant to write a revolutionary tract. The construction and maintenance of a social order and also 'of melting it down and making all new', as Lady Mordaunt remarked to Locke (Morduant in Laslett 1965: 58), was of a piece with his other preoccupations — reading and advising on how a gentleman should best be educated — when composing the *Treatises* that took him into exile in the 1670s. The sections in the *Second Treatise* in regard to the dissolution of government are confident that such an exercise will not be undertaken lightly. A gentleman, though, must be taught early and thoroughly the elements of civic humanity:

Education literally humanizes the child by bringing him to reason and virtue, the defining marks of man, and of that community of mankind which was so important ... virtue is important to a gentleman; (Locke's) concern also had a deeper and more dynamic motive that virtue was the very fabric and basis for humanity (Locke in Yolton & Yolton 1989: 25, 39).

The Yoltons argue that education and the exercise of responsible citizenship are indissoluble; in effect, this is what makes Locke an

optimist and, without being too teleological, a proto-liberal, denying Hobbes's dread that without authoritarianism anarchy and the war of all against all will prevail. As a scientist and a political writer committed to progress and change, Locke was aware that disagreement was essential but that it must be constructively managed. 'Tis not the owning of one's dissent from another that I speak against, but the manner of doing it' (Locke in Yolton & Yolton 1989: 205).

Carriage, deportment, grace and an agreeable manner of disagreeing were all vital ingredients of social cohesion, the foundation of the evolving constitution about which Edmund Burke (1775) was later to be so eloquent, underlying law, grasped adequately, scorning lawyers' understandings as too literal, ignoring its central character of compromise and change. Burke insisted that beneath the literal constitution existed fundamental dictates of prudence and the shifting customs and expectations of the people. Thus if the Americans had come to understand their assemblies as co-equal with Westminster under the Crown, it would be foolish to insist on Westminster sovereignty. This way of approaching government was anticipated by Locke's pupil, the Third Earl of Shaftesbury, who wrote extensively about the importance of manners, politeness and the avoidance of enthusiasm and dogmatism for stability, liberty and the peaceful exchange of views (Klein 1994, Cooper 1999). Their positions were thoroughly vindicated when the Americans' efforts to establish a federation under George III, giving the colonial assemblies a status equal to that of Westminster, were rejected by a British ministry that seemed to have abandoned earlier Whig principles.

Burke, throughout his political writings and speeches, epitomised Whig philosophy. Whether in Britain, America, France or India, a government capable of claiming its subjects' loyalty must be so constituted as to reflect their habits and expectations, commerce and religious practices. 'Nations', he wrote, 'are not primarily ruled by laws: less by violence ... the temper of the people amongst whom he presides ought therefore ... to be the first study of the statesman' (Burke 1770). Technically, no doubt, Westminster had the right to tax the colonies, just

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as the monarch had the right to veto the Houses' legislation, but both in Burke's estimation would be equally ill-judged. No one, no body, occupied a space of exception from the norms of its community. No body, not the legislature nor the Crown, had arbitrary power to exercise, in anybody's name. Warren Hastings's arrogation to his Governor-Generalship of Bengal of, as Burke saw it, a Hobbesian sovereignty was mere mysticism, dictatorship. The French assembly attempted to assume sovereignty under the heading of the General Will and, as Burke (1910) correctly predicted, that attempt would lead to a tyranny much worse than the clumsy and incompetent administration of Bourbon absolutism. The British betrayed the Americans and, had the revolutionary war turned out differently, would have produced a tyranny policed largely, one supposes, with mercenaries recruited from Germany.

The arrogance that followed the United Kingdom's sudden precipitation to global dominance after the Seven Years' War in 1757, and particularly the victories of Clive, Munro and others on the Indian sub-continent, of course, produced the hubris of America. Civil libertarian movements at home, revolutionary ideology from across the channel, changing work practices and the responses of workers to those — well-documented elsewhere — produced two quite different responses. One was fairly swift and repressive and fed off Benthamite utilitarianism and Malthusian political economy. Notoriously, Thomas Malthus, lecturer at Haileybury, the college for aspiring Indian Civil Servants, felt that the unemployed who could not attract charity must starve to death. In Malthus's words, for such a person, 'at nature's mighty feast here is no cover for him' (quoted in Hollander 1997: 896). As for Benthamite utilitarianism, Eric Stokes (1959: 177) remarks that 'Bentham found himself more at home with the enlightened despots than turbulent assemblies, for is not the legislator in some sense necessarily single and despotic?'

The poor, the resisters, even the sick and the old, were to be, if we can put it so, panopticed. But India, as many have noted, was a laboratory, always paternalistic. But paternalism takes different forms and may be highly desirable in some. I may be called a 'guest' on some

airlines, but I want my behaviour to be organised on my ignorant behalf should something amiss occur. Slick university advertising identifies students as ‘customers’, adopting the fiction that consumers can always make informed choices, but in that case one wonders why their professors, rather than themselves, are organising the courses. In India, Thomas Macaulay initiated the process of legal codification; its design, long before its implementation which was decades after Macaulay’s departure from India, was interestingly pedagogical, the normative formula followed by examples of how it would apply (Clive 1987). His alternative and not entirely original or unanticipated plan for the ordering of millions by a few thousands of white administrative supervisors was for the education of ‘a suitable class’ of Indians in English, who might then transmit European rationality to the educable remainder in their various vernaculars. As Legal Officer to the Supreme Council of India in Calcutta, Macaulay’s famous Minute of 1835 initiated the enterprise.

In 1833, before setting out for India, Macaulay had announced his vision of the imperial enterprise to the House of Commons:

Victory may be inconstant to our arms. But there are victories which are followed by no reverse. There is an empire exempt from all causes of decay. Those triumphs are the pacific triumphs of reason over barbarism; that empire is the imperishable empire of our arts, and our morals, our literature and our laws (Macaulay in Ellis 1889: 572).

As a later administrator was to put it in 1838, subjugating the population of the sub-continent by force was impractical, even with the huge army of Indian troops the East India Company was recruiting; policing them by law, ‘the gospel of the English, the sum and substance of what we have to teach them’, in James Fitzjames Stephen’s pious intonation, was difficult (Cocks 1988: 87). This was especially so because, as Maine noted, the wily locals delighted in the subtle argument that imported common and codified English law permitted. The rascals could outwit their masters, indeed (Cocks 1988: 90). The answer, according to the company official JR Farich, was to convince Indians that some form of cultural assimilation was the wisest, most improving strategy for them (Viswanathan 1997: 113).

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To write that there was mutual benefit is risky, like a Jewish joke related by a non-Jew. Macaulay's biographer insists that English learning was a turning point in India's intellectual development (Trevelyan 1876: 486). If that is too gushing, India was a multicultural society and Bengalis, at least, did not have to reject their own learning and language in order to appreciate yet another. Furthermore, the company's early appetite for credit gave every incentive for Indian bankers to learn the language of their debtors.

But my point is Pennycook's: 'colonialism needs to be seen as a primary site of cultural production whose products have flowed back' (Pennycook 1998: 35). Macaulay returned to an England now almost as complex as the India he had perceived, and searched for a remedy consistent with English Whig rule. Educational assimilation for a 'suitable class' with downward influence was, of course, the answer.

Some little time later, in the early 1840s, he rejected the second Chartist demands for the vote on the grounds that the working class was insufficiently educated to make informed choices and would become prey to demagogues and opportunists. Further into the 1840s he is advocating government sponsorship of elementary education so that the working classes might be so informed. His 1833 speech on India followed an important essay by Samuel Taylor Coleridge four years earlier (Coleridge 1990). Coleridge, a former radical and sympathiser, with Wordsworth, with the French revolutionary cause, retained two concerns about the oppressed and exploited. One was that they would bring revolution, which seemed at the time not impossible; the second, and increasingly important for Coleridge, was that they were owed a duty. Everyone, to paraphrase Coleridge somewhat radically, should be given the pastoral support and pedagogical opportunity to better themselves. Like the Scottish Kirk, which paid for a school in each parish, the English state should 'educate', in his words, the best in everyone — draw out the best in every boy and girl.

Matthew Arnold — intellectual, schools inspector and professor of poetry at Oxford — would repeat the admonition: it is not by law, the utilitarian way; it is by educating, 'improving', assimilation, and

the holding out of all that is best in the world, that civilisation will progress. Sadly, for the 1970s Marxists, who wished retrospectively for the smashing of the capitalist state, the autodidacts of the working class, the self-improved and those they wished to have as allies, wanted to join the state, to exercise the vote and have representatives in parliament, to change state policy from within. Arnold, both like and unlike Macaulay, saw in this apparently inevitable trend to greater democracy pressing pedagogical problems, but also opportunities. The mob was undoubtedly unruly, in need of both instruction and leadership — the colonial mindset is clear in this thinking — but the aristocracy, the long-traditional leaders of society (Arnold's 'barbarians'), are in his estimation in serious decline in a number of ways. What is necessary is a middle class capable of replacing them. From the aristocracy the country learned not only individualism and chivalry but politeness and grace, courage and self-confidence (Lipman 1994: 72). Arnold's scorn for the contemporary middle class, his 'philistines', was that they had no program equivalent to that of the now archaic leadership of the barbarians — nothing to offer the mob who would soon rule. They had nothing but a petit bourgeois model of vocational training, so licensed grocers and commercial travellers would teach their children no civic skills beyond those of the trades of making money (Lipman 1994: 80, Paul 1902: 128–9). Arnold's travels in France and Prussia convinced him that nation-building required a cultured middle class committed to transmitting civility, as Macaulay put it, but more — a desire for learning for its own sake that would calm society and lift its gaze, not entirely, but to a civilising extent, from money-grubbing and brawling.

He was at one with JS Mill:

We were now much less democrats than we had been, because as long as education continues to be so wretchedly imperfect, we dreaded the ignorance and especially the selfishness and brutality of the mass (Mill 1989: 175).

In Macaulay, shall we say, more faintly, but in Coleridge, Arnold and Mill most definitely, the social fabric of the empire, the one overseas and the one at home, was to be preserved by education. In *Friendship's*

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*Garland*, Arnold has his intellectual mouthpiece, the Prussian Arminius comment acidly on the contrast between the German commitment to learning in higher education and the trade school mentality of the English. The England of the time was assaulted on many fronts. Eighteenth-century Scots had inspired higher learning in both pre- and post-revolutionary America. One thinks of John Witherspoon — academic, Scottish emigrant to what would be the United States, signatory to the Declaration of Independence — and the debt which both Hegel and Marx acknowledge to the Scots, their universities and their dedication to scholarship. Both Prussia and the United States were challenging British global supremacy and industrial leadership by the 1860s, when Arnold was writing, and research and education seemed part of this dynamism. Additionally, Edward Freeman (1876) was extolling the debt owed by the English to the free institutions of the Teutonic forests, brought with the ‘Saxon’ invasions following the withdrawal of the Roman legions.

When Germanophobia surfaced with the German Empire’s brief challenge to Royal Navy supremacy, and, of course, during and after World War I, two perceptions emerged. One was that, *pace* Arnold, it was not central European philosophy and its support for disinterested learning — and its technological spin-off — but its authoritarian manifestation in the form of state sovereignty and its constitutionally unconstrained capability for actions of state that had made it a threat. Was it not the ungentlemanly Junkers, the dictatorial Kaiser and the weakness of the German legislature which lay at the heart of the problem? The second, and this is connected with the Bolshevik hazard unleashed by the war and embraced by many working class and some intellectuals in the 1920s, was that the era of capitalism was nearing its end. Parochially, the age of Elgar and the solidarity of squire and tenants joined in cricketing solidarity on the village green seemed under threat. The genius of Stanley Baldwin’s speeches was to invoke the centrality of this rural England that was in reality heavily urbanised, its workforce in coal, steel and ship-building still world leaders. How many of its inhabitants would have seen a hay-wain at dusk, smelt the

woodsmoke of village fires or admired the scent of wild anemones in spring, all tropes of Baldwin's addresses to the nation via the BBC?

Once again this brings us back to sovereignty and the law. Of course, like Chartism, the General Strike was crushed by the sovereign state: the troops, the battleships on 'Red Clydeside'. But the longer-term solution was, as Coleridge, Macaulay and Arnold had foreseen, cultural assimilation. Certainly not homogeneity but, as in India, those who could must learn and believe in the canon which mythology extends from Chaucer through Shakespeare, Milton, Wordsworth and innumerable others. The others must take it on trust that this is civilisation at its highest; and satirising it, rejecting its power, substituting *Coronation Street* and especially *Monty Python's Flying Circus* and *Fawlty Towers*, merely elevates its status.

This was the task begun with the 'missions' to the East End and the industrial north, and summarised in the Newbolt Report commissioned shortly after the Great War. Cultural studies of English were to lay the foundation for English identity, articulated by those who could be taught it and admired and held in some awe by those who were deemed not capable of absorbing its nuances. Science and technology were not of course to be neglected — the Spitfire and the Lancaster bomber were not produced by languid members of the Athenaeum between the fish and the meat courses whilst rehearsing iambic pentameters — but the hope and largely the realisation of cohesion, perhaps by an inculcation of deference that one may not subscribe to, was education in English as a cultural study. English professors were to be the 'ambassadors' of culture, and so they proved to be, taught by Adam Smith and his progenitors in the Scottish Kirk — Scots who, like the Irish, taught the English how to be.

My final point here is to repeat some themes. Arnold's admiration for the Prussian system of higher learning was generous, long-sighted and a progressive warning to the UK that the partial loss of the Scottish momentum for the country as a whole was unwise. Macaulay made the same point. But Arnold missed the sinisterly developing role of the cult of the *volk* that seemed to its rulers essential to meld a

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heterogeneous political system into a powerful and culturally unified nation. This required, it seemed, the strong form of sovereignty to cement the historically diverse German principalities and ultimately, of course, *Anschluss* with Austria. English experiments with sovereignty of that kind have not, as we have seen, been happy. The Atlantic empire was lost, where a happier outcome may well have been a shift of political centrality to the larger continent. Perhaps not. With Ireland, dramatically, and for many centuries tragically, Westminster sovereignty was a disaster; and more softly than the convulsions of 1776 or 1921, Scotland and Wales were peacefully if not finally yet devolved. Unlike Australia and the United States, the British Isles have no claim to nationhood. As they drift apart, as drift they may well, according to Linda Colley (1994) any connecting relations, any commonality, will be the product rather than the foundation of further cultural relations. I do not share the pessimism her remarks about the break-up of Britain imply, although I may misinterpret them. The Isles seem to me to have a future despite Blair's complete blunder over Iraq, but it will not — if it includes a devolved Scotland and Wales, a partnership with a resurgent Irish Republic that will hopefully soon incorporate Ulster, and a continuance of its ties with the European Union — be one of sovereignty. How could it?

Foucault's remarks seem of particular relevance here:

What I would like to show is that as an episode and transitory form, law itself is, rather, part of a much more general history of the techniques and technologies of practices of the subject with regard to himself, of techniques and technologies which are independent of law and which have priority with regard to it (Foucault 2005: 112).

He continues:

My idea is that it is not all necessary to relate ethical problems to scientific knowledge. (Morality could be) a very long structure of existence without any relation to the juridical per se, with an authoritarian system, with a disciplinary structure (Foucault in Paras 2006: 140–1).

He is using 'scientific knowledge' not as conceived by Locke or Smith but as used by the guardians of the hospital, the prison and the

other heteronomous systems of control from which the subject may, but in some cases will not, escape; but as with Lacan, if there is one who sees and describes there must be those who reinvent themselves.

The empirical dimension of Foucault's remarks is well described in both Lloyd and Thomas's (1983) and Baldick's (1983) account of the 'mission'. The former note the transition in Britain from the utilitarian ideal of the 'night-watchman state', reliant on regulation overseen by courts, the police and the military, to the 'ethical state'. In the ethical state, the subject constructs him- or herself additionally by means of trades unions, the workplace, charities and schools. And, we could add, the 'English heritage': myths, theme parks, castles, country houses and, perhaps, sport (Wright 1985). The girl learns to be a good wife (Clarke 1995); the boy or girl from a respectable working-class home has to learn about 'our' culture from 'an instructed minority' acting as 'tutors in citizenship and representatives of the state at a local level' (Mill in Lloyd & Thomas 1983: 5). It is, after all, 'not useful, but hurtful that the constitution of the country should declare ignorance to be entitled to as much power as knowledge' (Mill 1991: 188). Mill's middle class, like Arnold's, must 'establish its intellectual authority' (Mill 1976: 184).

In the aftermath of the Great War, barrister (and, it is generally acknowledged, bad poet) Sir Henry Newbolt was charged with the task of re-identifying the nation (HMSO 1921). He and his colleagues wanted a formula to govern the UK, as Macaulay wanted one to govern India — by cultural assimilation and a possibly endlessly deferred promise of self-government. Why they chose the English discipline as their medium has an irony which those fashionably hostile to cultural studies would doubtless miss. Initially the motive was xenophobic. England and English were no longer Germanic, but as Leavis and his wife and colleagues gained influence it became clear that, absent xenophobia, the English discipline as cultural studies had an enormous advantage, certainly over other arts disciplines. It had long been the primary curriculum in women's and teachers' colleges, among working-class 'self-improvers' intent on familiarising themselves with the cultural canon. And, as Leavis et al had demonstrated, it could not

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properly be understood without a grasp of social history, social theory and, if possible, comparative literature. It amounted in a word to a study of culture, and if the Newbolts, less so the Leavises, underestimated the extent to which the parvenus, women, non-Anglos, the working class, gays, queers and others would use the cultural skills they gained to urge social change, all we can say is that they opened gates that they did not anticipate and probably would not regret.

If we go back to Adam Smith we are reminded that legal studies are not a training school for business law, although there is no reason that they should not open a route for a career in that direction, but a broad study of the best that we can grasp of the social development and context of any normative social order. If we return to Edmund Burke we are reminded that there are particularities as well as critiques. To comprehend the English/British constitution, we have to study the study of its subjects; to comprehend the French, the French; and so on. To attempt to cut a swathe, politically or epistemologically, should they differ, through that tradition, or to fabricate another tradition and the reform each offers, is to court disaster. We know.

## References

- Anderson P 1974 *Passages from Antiquity to Feudalism* New Left Books London
- Arendt H 1973 *On Revolution* Penguin Harmondsworth (first published 1963)
- 1994 *Eichmann in Jerusalem: A Report on the Banality of Evil* Penguin Harmondsworth (first published 1965)
- Austin J 1955 *The Province of Jurisprudence Determined Etc* Weidenfeld and Nicholson London
- Baldwick C 1983 *Social Mission of English Criticism* Oxford University Press Oxford
- Bentham J 1988 *A Fragment on Government* Cambridge University Press Cambridge (first published 1776)
- Berman H 1983 *Law and Revolution: The Formation of the Western Legal Tradition* Harvard University Press Cambridge MA
- Blackstone W 1765 *Commentaries on the Laws of England Vol 1* Oxford University Press Oxford

- Bloch M 1965 *Feudal Society* Vol 1 RKP London
- Burke E 1770 'Thoughts on the Present Discontent' in Clive 1987: Part II
- 1775 'Speech on Moving His Resolutions for Conciliation with the Colonies' in Stanlis 1963
- 1910 *Reflections on the Revolution in France* Dent London (first published 1790)
- Clarke A 1995 *The Struggle for the Breeches: Gender and the Making of the English Working Class* University of California Press Berkeley
- Clive J 1987 *Macaulay: The Shaping of the Historian* Harvard University Press Cambridge MA
- Cocks R C 1988 *Sir Henry Maine: A Study in Victorian Jurisprudence* Cambridge University Press Cambridge
- Coleridge S T 1990 'On the Constitution Of Law and State' in Morrow ed 1990
- Colley L 1994 *Britons: Forging the Nation 1707–1837* Yale University Press New Haven
- Cooper A A 1999 *Characteristics of Men, Manners, Opinions, Times* Cambridge University Press Cambridge (first published 1711)
- Derrida J 1990 'Force of Law: The Mystical Foundations of Authority' *Cardozo Law Review* 11: 919–1045
- Dirks N 2006 *The Scandal of Empire: India and the Creation of Imperial Britain* Harvard University Press Cambridge MA
- Dworkin R 1986 *Law's Empire* Collins London
- Ellis T F ed 1889 *The Miscellaneous Speeches and Writings of Lord Macaulay* Longmans Green London
- Fetter F 1976 'The Revision of the Declaration of Independence in 1941' *William and Mary Quarterly* Third Series 31/3: 133–8
- Fitzpatrick P 1992 *The Mythology of Modern Law* Routledge London
- Foucault M 2005 *The Hermeneutics of the Subject: Lectures at the Collège de France 1981–2* Picador New York
- Freeman E 1876 *The Growth of the English Constitution from the Earliest Times* Macmillan London (first published 1872)
- Hall C 2007 'Of Gender and Empire' in Levine P 2007: 46–76
- Hart H L A ed 1970 *Jeremy Bentham: Of Laws in General* Athlone Press London

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- HMSO 1921 *The Teaching of English in England* (The Newbolt Report)
- Hobbes T 1968 *Leviathan* Penguin Harmondsworth (first published 1651)
- Hollander S 1997 *The Economics of Thomas Robert Malthus* University of Toronto Press Toronto
- Hume D 1987 'Of the First Principles of Government' (first published in 1777) in Miller 1987: 32–6
- Klein L 1994 *Shaftesbury and the Culture of Politeness: Moral Discourse and Cultural Politics in Early Eighteenth Century England* Cambridge University Press Cambridge
- Laslett P ed 1965 *John Locke: Two Treatises of Government* Signet New York
- Levine P ed 2007 *Gender and Empire* Oxford University Press Oxford
- Lipman S ed 1994 *Matthew Arnold: Culture and Anarchy* (first published 1869) Yale University Press New Haven
- Lloyd D and Thomas P 1983 *Culture and the State* Oxford University Press Oxford
- Locke J 1979 *An Essay Concerning Human Understanding* Oxford University Press Oxford (first published 1692)
- McClintock A et al eds 1997 *Dangerous Liaisons: Gender, Nation and Postcolonial Perspectives* University of Minnesota Press Minneapolis
- Mill J S 1976 'Democracy and Government' in Williams 1976: 179–85  
— 1989 *Autobiography* Penguin Harmondsworth (first published 1873)  
— 1991 *Considerations on Representative Government* Prometheus Books New York (first published 1861)
- Miller E ed 1987 *David Hume: Essays Moral, Political and Literary* Liberty Classics Indianapolis
- Morrow J ed 1990 *Coleridge's Political Thought: Property, Morality and the Limits of Traditional Discourse* Macmillan London
- Paras E 2006 *Foucault 2.0: Beyond Power and Knowledge* Other Press New York
- Paul H 1902 *Matthew Arnold* Macmillan London
- Pennycook A 1998 *English and the Discourses of Colonialism* Routledge London
- Plumb J H 1967 *The Growth of Political Stability in England 1675–1725* Penguin Harmondsworth

- Ross D 2004 *Violent Democracy* Cambridge University Press Melbourne
- Rothschild M 2007 *You Have No Rights: Stories of America in an Age of Repression* New Press New York
- Salmond J 1920 *Jurisprudence* Sweet and Maxwell London (6th edn)
- Simms B 2007 *Three Victories and a Defeat: The Rise and Fall of the First British Empire 1714–1783* Allen Lane London
- Smith A 1982 'The Principles Which Lead and Direct Philosophical Enquiries Illustrated by the History of Astronomy' in Wightman and Bryce 1982: 33–105
- Stanlis P ed 1963 *Edmund Burke: Selected Writings and Speeches* Regnery Press Washington DC
- Stokes E 1959 *The English Utilitarians and India* Oxford University Press Oxford
- Trevelyan G O 1876 *Lord Macaulay's Life and Letters Vol 1* Longmans Green London
- Viswanathan G 1997 'Currying Favor: The Politics of British Educational Policy in India 1813–1854' in McClintock et al 1997: 113–29
- Wightman W and J Bryce eds 1982 *Adam Smith on Philosophical Subjects* Liberty Classics Indianapolis
- Williams G ed 1976 *John Stuart Mill on Politics and Society* Harvester Press Brighton
- Wilson K 2007 'Empire, Gender and Modernity' in Levine P 2007: 14–45
- Wright P 1985 *On Living in an Old Country* Verso London
- Yates F 1975 *Astraea: The Imperial Theme in the Sixteenth Century* Penguin Harmondsworth
- Yolton J and J Yolton eds 1989 *John Locke: Some Thoughts Concerning Education* Oxford University Press Oxford (first published 1693)
- Zinn H 2007 *The Unraveling of the Bush Presidency* Seven Stories Press New York