

HOW ENGLISH LIBERTY WAS CREATED BY ACCIDENT AND CUSTOM — AND THEN DESTROYED BY LIBERALS



SEAN GABB



“We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.”

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FOR LIFE, LIBERTY AND PROPERTY

HOW ENGLISH LIBERTY WAS CREATED BY ACCIDENT AND CUSTOM — AND THEN DESTROYED BY LIBERALS¹

SEAN GABB

One: The Question Stated

According to William Winwood Reade, writing in the early 1870s,

placing aside hereditary evils which, on account of vested interests, it is impossible at once to remove, it may fairly be asserted that the government of this country is as nearly perfect as any government can be.²

Now, this is not one of those vague boasts that turn up in the literature of every powerful nation. Reade was what may loosely be called a classical liberal — that is, he believed in free markets, in personal freedom, and in the rule of law. He denied that it was either the duty or the ability of government to make people happy, but only to enable the conditions in which they themselves could pursue happiness as they conceived it.³

It seems hard on his own grounds to disagree with him. The previous 40 years have been seen as a time of nearly continuous progress towards his state of perfection. The criminal law had been humanised, and the civil law made cheaper and more rational. Central and local government had been cleared of waste and sinecures. The armed forces had been likewise reformed. Religious disabilities had been lifted. Trade protection had been all but abandoned, and other taxes were low and falling: the standard rate of income tax was 3d in the pound in 1872, and was to fall to 2d in 1873 — or from 1.25 per cent to 0.833 per cent.⁴ And the old taxes on publication had been entirely abolished. At the same time, the National Debt was being repaid — down from £846.1m in 1836 to £784.2m in 1872; or, as a share of the growing national income, from 228.67 per cent to just 73.15 per cent.⁵ The Poor Law no longer pauperised the working classes; and these, by the steady rise of incomes and by downward extensions of the franchise, were now being brought within the pale of the Constitution. As Reade said, there was much still to be done. But much had been done. More than any other in the world, the mid-Victorian State could be described, in Carlyle's words as “anarchy plus the constable”.

Yet even as it was celebrated, this state of affairs was passing away. Year by year, the authorities were becoming more active — taking an increasing interest in the contractual and other relationships between individuals. By 1884, Herbert Spencer could take it for granted that

[r]egulations have been made in yearly-growing numbers, restraining the citizen in directions where his actions were previously unchecked, and compelling actions where previously he might perform or not as he liked; and at the same time heavier public burdens, chiefly local, have further restricted his freedom, by lessening that portion of his earnings which he can spend as he pleases, and augmenting the portion taken from him to be spent as public agents please.⁶

Perhaps worse from his point of view, much of this was being done by Liberal Governments, and in the name of liberalism. Joseph Chamberlain, for instance, not only called himself a liberal, but was President of the Board of Trade in the second Glad-

stone Ministry; and he was there making the sort of laws that Spencer abominated — Acts to allow local authorities to supply electric lighting, and to interfere with the running of the merchant marine. He justified this “new” liberalism on clever grounds:

When government was represented only by the authority of the Crown and the views of a particular class, I can understand that it was the first duty of men who valued their freedom to restrict its authority and to limit its expenditure. But all that is changed. Now government is the organized expression of the wishes and the wants of the people and under these circumstances let us cease to regard it with suspicion. Suspicion is the product of an older time, of circumstances which have long since disappeared. Now it is our business to extend its functions and to see in what ways its operations can be usefully enlarged.⁷

As Spencer saw it, however, all this was just an excuse for turning liberalism into a “new form of Toryism”, in which the old protective spirit could take on forms more suited to a democratic age.⁸ He was not alone. In 1882, the Liberty and Property Defence League was founded — a coalition of individualist liberals and conservatives and business interests, drawn together to fight under the motto “Individualism *versus* Socialism”. The contribution of this body to the preservation of English liberty cannot be overestimated. During more than 30 years, it spent lavishly on its own campaigns, and coordinated action for others. Though for the next generation it would fight often very successfully, there could be no doubt that it was resisting an immensely more powerful impulse, which it was able at best to hinder.⁹

Taking a longer view, E. S. P. Haynes felt certain enough in 1916, the middle year of the Great War, to say that

[t]here is no doubt that for the last forty years the whole tendency of British politics has been hostile to individual liberty. ... We are no doubt fighting Prussian aggression, but *not necessarily* Prussian ideals of internal government. Indeed the only effect of the war up to now has been to strengthen the hands of Prussian-minded Britons.¹⁰

Turning from opinions to facts, there is no doubt that, starting around 1870, the British State began a remarkable and largely continuous expansion. Since the end of the French Wars, Government spending as a percentage of national income had been drifting downwards — from about a third in 1815 to just over 7 per cent in 1870. Thereafter, the fall stopped. There was no significant increase in time of peace until after the naval race with Germany began after 1905, when it rose to 8.47 per cent in 1913.¹¹ But in an age devoid of large wars, when the national income was briskly increasing, a stable share for public spending allows a considerable expansion of state activity. After the Great War, of course, Government spending went back to the levels of 1815, and eventually far beyond, reaching a peak of 52 per cent in 1972. Since then, it has drifted back down to about 40 per cent, rising and falling in line with conditions in the economy at large.

These figures indicate but do not precisely show the extent of modern control over our lives. It is fair to say that almost nothing we do is beyond state supervision where not control. Our working lives are regulated in ways so various and often overlooked as almost to challenge description. Whether we offer our labour to an employer or our services directly to the public, the terms on which we do so are in perhaps a minority of cases negotiated solely between the contracting parties. Our food is regulated at every point between its creation and arrival on our plates. Our health and fitness have become things managed by the State, with a growing system of punishments for disobeying the experts' advice.¹² The raising of our children is closely watched; and there are even calls for procreation to be licensed by the State.¹³ Our entertainments are explicitly regulated, and sometimes forbidden, in the interests of our physical and moral well-being. We have a "War on Drugs" — something that, waged by the Chinese State, struck the Victorians as absurd.¹⁴ In fighting that "war", the British State is fast abolishing privacy in financial matters and reversing the burden of proof in criminal cases.¹⁵

By the standards of a classical liberal, most of us now alive were born into a welfare state. All of us now live in a police state. It may not be the sort in which the press is censored and people disappear. But it is the sort in which we stand beneath an absolute and arbitrary power. If that power is often used for benevolent ends — if the more plainly despotic laws are never fully enforced — that is because our masters please to rule us in this way. Give us new masters, or let the present ones please otherwise, and we shall soon discover the basics of how England is now governed.

The question here to be examined is — Why did this happen? How did the England of Reade's day become the England of our day? Is it — as the socialists and social democrats insist — that liberalism was found at last to be a defective ideology, and that the departures of the present century have been on the whole for the best? Or, to take a slightly different point of view, is it that liberalism was only suited to one particular stage of social evolution, now long past? Or was it overcome by bad luck — the drift into power politics that began in 1870 and culminated in the Great War? Or was it overcome by a coalition of special interests? If this last, why did it prove so feeble in the contest?

The question of why liberalism collapsed has been asked endlessly — and it was even being asked before it had collapsed.¹⁶ I have been asking it ever since I became a liberal in my early youth. I cannot claim any complete answer. But the longer I have thought about the question, and read the answers supplied by other people, the more I suspect that there never was any strictly liberal ascendancy in England. Undeniably, there was a *Liberal England*. But its rise and existence until 1914 owed comparatively little to *liberal ideology*. It owed far more to separate, if related circumstances. I suspect also that the great diminution of liberty that has occurred since Reade's day was set in motion by people like him.

Two: The Seventeenth Century Origins of Liberal England

To see this, let us begin by looking at the ideas that shaped and maintained English liberty between the seventeenth and the beginning of the nineteenth centuries. Because it is one of the very few political texts continuously published and read since the seventeenth century, we could go to John Locke's *Second Treatise*, published in 1690. According to paragraph 4,

[t]o understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.¹⁷

Now, this may be the most extreme liberal statements ever published by a great philosopher. Translated from his own rather abstract terminology, Locke is saying: How we make and dispose of our money, and under what conditions; where we settle and live; what clothes we wear; what information we receive or impart, how and with whom we associate, what things we eat, or drink, or inhale, or otherwise ingest — these, within the limits set by the equal rights of others, are matters solely for us to decide.¹⁸

While his own model of the best government bears a strong and perhaps unnecessary resemblance to an idealised English Constitution of the seventeenth century, Locke is clear that the main, if not the sole, function of government is the protection of life and property. If it goes substantially beyond that function, only on the grounds of convenience can an objection be raised to its remodelling or overthrow.¹⁹

Yet, for all he may appeal to us, Locke neither conquered the English mind of his day, nor can be taken as spokesman for its liberalism. During the seventeenth and eighteenth centuries, "the rights of Englishmen" was a phrase as much on the lips of politicians as "democracy" is in the twentieth. It pleased the public. But, then as now, there was a difference between lip-service and genuine belief. Nor among those who did believe was there much reason or desire to expand the phrase until it was co-extensive with Locke's "*State of perfect Freedom*".

For the most part, the political thinkers of the seventeenth century defined liberty in a far more restricted sense than it can be found in the pages of John Locke. We see this in the writings of men like Coke, Davies, Selden, Cotton, Prynne, Pym, Eliot, Hampden, Whitelocke, and Glanvil — all of them lawyers or students of the English Common Law. To them, freedom meant the enjoyment of certain rights inherited from the past. They believed, or maintained, that the English Constitution had continued exactly the same in every age since "time immemorial". Except for a cycle of decay and restoration, nothing was claimed ever to have changed. Immense industry went into the job of proving that every technicality of pleading or of the law of real property known to the courts of James I had descended unchanged from the very beginning of English history — a beginning that the lawyers were unwilling to date.²⁰ Torture and Ship Money had been illegal in the reign of Henry II. Edward the Confessor had governed with the advice of a Parliament summoned in the usual way. In the legal submissions made during the Case of Ship Money — *R v Hampden* (1637) — precedents were advanced, and seriously examined, from the reign of King Egbert (827-39).

Some appeal was made to natural or Divine law. But the main grounds of defence were historical. Indeed, they were considered its best grounds; and the lawyers defended them with fanatical zeal. For there was no understanding of prescription as we find it in the writings of Hume and Burke — that long possession should be seen as conferring title, regardless of origins. There are flashes of the later doctrine in the writings of Coke and Davies;²¹ and a line of descent between all these writers can be drawn through Sir Matthew Hale in the late seventeenth century.²² But in the early Stuart period, the Constitution was defended on the grounds that it was both immemorial and unchanging. And that is how it had to be. For without a full concept of prescription, the common lawyers accepted that if the Constitution could be shown not to be both immemorial and unchanging, it would be stripped of its legitimacy. They took it as self-evident that a right granted, however anciently, was revokable by its grantor or by his representative.

In particular, they allowed that if William I had governed by right of conquest, then Parliament and the Common Law must have derived from some later royal gift or consent; and that, this being so, neither could have any security in the present. It

would be open to Charles I to change or even abolish them at his pleasure. Men grew very frightened when they contemplated the Norman Conquest; and a continuing thread in English thought right into the eighteenth century was the attempt to show that William had ruled not a conqueror, but as the lawful successor of Edmund the Confessor who had just happened to find it necessary to assert his right of succession by force of arms.²³

This is a bizarre doctrine, and it is hard now to see how any intelligent person could have accepted it. It was also a doctrine that had only emerged to dominate legal thought in the recent past. Not only was the early Tudor period one of quite radical legislative activism — the Crown and Parliament both exercising their right to make changes in the law — but there had then also been a pronounced sense of the Common Law as just a local manifestation of a universal law. Men who had lived through the growth of Royal Councils such as the Court of Star Chamber, staffed by men schooled in the Roman Law, or had seen the Succession repeatedly changed by Act of Parliament and whole churches established and disestablished, could have little sense of immemorial custom. It was only with the political stability and the isolation of English thought that followed the Elizabethan Settlement, that the Common Law began to regain the primacy it had enjoyed in the middle ages. The common lawyers of the early Stuart period were able to advance their claims of rights inherited from the distant past only by forgetting a quite different state of affairs that had existed before the later years of Elizabeth.

Nevertheless, though bizarre and novel, the doctrine was undeniably useful. More by luck than intention, the English people had emerged into the modern period with a Constitution relatively untainted by despotism. Throughout Western Europe in the sixteenth century, the requirements of national defence or aggrandisement had raised up large standing armies under royal control. These had allowed kings to beat down the constitutional checks and balances that had previously been common across the whole region. The Kings of France and Spain had become absolute monarchs, able to tax and order their realms more or less as they pleased.

Only in England had this pressure been absent. Because of its island status, there had been no need of a standing army, and thus no occasion for a fundamental unbalancing of the Constitution. Indeed, the inflation of prices that had accompanied the flood of silver into Europe from the Spanish settlements in South America had even weakened the traditional powers of the Crown. A King was expected to “live on his own” — that is, to pay the normal expenses of government from the customary rents of his estates plus the proceeds of a few *ad valorem* duties granted at the beginning of each reign. With the real proceeds of these revenues in decline, Elizabeth was forced throughout her long reign to an extreme economy that allowed no army whatever in peace, and that was eased in times of emergency only by approaches to Parliament, which had the exclusive right to grant taxes. She might have used her popularity to coax more money out of Parliament, but this would have meant allowing it a share of government that no Monarch until William III could be brought to accept.

Yet, by the time James I succeeded to the throne in 1603, various doctrines of divine right and unfettered sovereignty had made their way into English thought. They can be found in the writings of the age.²⁴ All ideas have consequences, and those that exalt small and already powerful groups have a tendency to produce the largest consequences. We only need look at the present campaign against the motor car to see this. Most British people have either a car or access to one. They enjoy the pleasure and convenience of motoring. Yet they do no more than grumble at the rising burden of taxes and other restrictions on motoring. They do this because the debate over the motor car has been won by its enemies. So it might have been with the argument over

English liberty in the seventeenth century. A clear vision on one side of a Monarchy, exalted and served by a bureaucracy and able to try all the approaches to national greatness then fashionable; and on the other an unfocussed sense of unease as the loss of an ancient but derided Constitution — there would have been no contest. The doctrines then coming in from Europe would have been used to justify the introduction into England of a royal despotism that in Europe they had been devised to justify after the event. To keep these doctrines from having any mark on the Constitution, it was necessary to raise up some countervailing doctrine of limitation.

The rediscovery of the Common Law served this purpose. It allowed a defence of the declared rights of individuals and corporations and the powers of the House of Commons against royal encroachments. It stressed that government should act only by due process. It was even quietly expansive, since many of the rights claimed as ancient were actually modern or not yet existent. See, for example, the arguments during the reigns of James I and Charles I over the rights of the House of Commons; for all the antiquarian zeal of the Parliamentary leaders, much of what they were claiming had never been admitted in earlier times, let alone granted and enjoyed.

Yet the conventional test of whether a law was good or bad was not in itself liberal. A modern law could be judged on how well it harmonised with the others; and this in practice applied a liberal test to many Stuart measures. But an old law could be at best only reinterpreted. Otherwise, no matter how illiberal, it was regarded by the defenders of freedom as no less valid than *Magna Carta*.

All this suited the more radical dissenters, who joined their zeal for godliness to the defence of the Ancient Constitution. It allowed quite as much freedom as most of them wanted. Their complaint against the House of Stuart was that it maintained the supremacy of a Church that they abhorred, and that it persecuted them. With very few exceptions, this did not make them into secular libertarians.²⁵ Their own settlements in North America were in many respects as intolerant and conformist as Stuart England. Religious freedom meant for them the right to belong to an approved Dissenting church and to no other. The freedom of these churches from state control meant their right to enter politics and have their own views enacted into law. They hated Roman Catholics, and Anglicans, and pleasure. Their hatred of this last can hardly be conceived. Every pleasure, no matter how modest, that was not immediately joined with the contemplation of God and His Awful Day of Judgment, was to them abominable. They “hated bearbaiting” says Macaulay,

not because it gave pain to the bear, but because it gave pleasure to the spectators.²⁶

For the truth of this epigram, they stand condemned by their own statements. “The more you please yourselves and the world” said one preacher to his flock, “the further you are from pleasing God. ... Amity to ourselves is enmity to God.” “Pleasures are most carefully to be avoided” wrote another: “because they both harme and deceiue.” “Christ did never laugh on earth that we read of” wrote yet another, “but he wept.”²⁷

During their brief triumph, after 1649, they set about enacting their prejudices into law. They harried the Catholics and Anglicans. They closed the theatres. They cut down the Maypoles and abolished Christmas. They made all sex outside marriage a misdemeanour on first offence: on second offence, it was made a felony, punishable by death. To be sure, many dissenters became Lockean; but the main dissenting creeds were anything but Lockean.

This being said, the Dissenters did a service to the Constitution by attaching their own cause to it. They added a religious sanction to the defence of Common Law and Constitution in an age when religion was an immensely powerful force in politics, and

when Common Law and Constitution needed all the strengthening available. For them, royal despotism and the Catholic faith were one and the same. And in spite of all they did when they had the power to brush Parliament aside, it was their enthusiasm against the Stuarts that ensured the victory of Parliament in the Civil War.

But regardless of how badly damaged the Royalist cause emerged from the Civil War, the theoretical underpinnings of the Common Law argument were also damaged. Its defects had been sharply revealed. The central decades of the 17th century had seen all the threads of legal continuity snapped. The men who saw the Monarchy restored in 1660, had lived through two civil wars, a regicide, two military *coups* and any number of written constitutions, some adopted, others drafted and argued over. To them, inherited custom in itself no longer seemed to bind. In spite of its logical absurdity, the Common Law doctrine had been psychologically sufficient in an age when the institutions of state really did seem to have descended from time immemorial. It could not satisfy so well in an age when these institutions had been swept away and replaced by others, only eventually — and largely by surprise — to be restored.

Of course, time can smooth away any number of shocks; and a generation of stability after 1660 might have allowed the psychological threads to reconnect to time out of mind, just as they had a century earlier. But there was the further unsettling influence of the royalist antiquarians and the absolutist philosophers. The first were showing how the Constitution had not remained fixed, but had evolved over hundreds of years. The second were actually stepping outside the debate over the Constitution to pour scorn on all sides.

It was Sir Henry Spellman, writing under Charles I, who knocked the first real holes in the Common Law argument. Looking through the same records as the lawyers, but reading the Latin in its plain meaning rather than those attached by the lawyers, he discovered the feudal innovations of William the Conqueror, and was able to trace in outline the gradual softening of these over the centuries into the freeholding Constitution of the seventeenth century. Spellman remained to some extent fixed within the Common Law tradition — even repeating the insistence that William had not been a conqueror.²⁸ But he was followed by other antiquarians, culminating in Robert Brady, whose writings of the 1680s were a deadly response to the Whigs in their use of the Common Law against the despotic ambitions of Charles II and his brother James. Supported by masses of evidence, most of it true, these accounts undermined the notion of immemorial custom, and therefore cleared the way for an assertion of royal power. For if Parliament was younger than the Monarchy, everyone agreed, it was plainly subordinate to it in every respect.

About the only effective reply to this line of reasoning came from men like Thomas Hobbes. But they posed an even more deadly threat to the Common Law doctrine. What relevance, asked Hobbes, could the past have to the present, except as explanation? In every state, he argued, there must necessarily be a sovereign power, and this must have the full power to order things as it found convenient. It may be convenient to order a state in line with its historical experience. But this is not to posit any limitations on the power of the sovereign, whose will cannot be resisted. “The sovereign of a commonwealth” he argues,

be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may when he pleaseth free himself from that subjection, by repealing those laws that trouble him and making new; and consequently he was free before. For he is free, that can be free when he will: nor is it possible for any person to be bound by himself; because he that can bind, can release; and therefore he that is bound to himself only, is not bound.²⁹

Law, according to this way of thinking, is nothing but the expressed will of a sovereign law-giver. It overturns the Common Law argument — not by contesting it from within, as the Royalist antiquarians sought to do, but simply by denying it any logical force. For

[t]he opinion that any monarch receiveth his power by covenant, that is to say, on condition, proceedeth from want of understanding this easy truth, that covenants being but words and breath, have no force to oblige, contain, constrain or protect any man, but what it has from the public sword.³⁰

In the generation after 1660, the force of Hobbes’ thought was blunted by its novelty. Very few Englishmen could understand what he was saying. Moreover, his argument took people in directions that hardly anyone wished to go. The debate of the age was not the Common Law against divine right monarchy, but an argument within the Common Law tradition. Even the Royalists who had followed Charles II into exile accepted the immemorial nature of the English Constitution, and disagreed with the Parliamentarians only over its interpretation.³¹ They were not inclined to take up a line of reasoning that cut their opponents to pieces, but also meant accepting views no less deadly to their own, and that sanctioned a government vastly more absolute than anything they themselves wanted.

Far more dangerous were the works of Sir Robert Filmer. He also believed in absolute sovereignty but hedged it — often in ways that disguised it — with arguments about the origins of Parliament and a mass of Scriptural quotation.³² Read today, his writings cannot but strike as some of the most foolish things ever written in English. Published during the Exclusion Crisis of 1679-83, they had a tremendous effect. They gave heart to the radical Tory fringe who stood against every attempt to prevent James Duke of York from succeeding his brother Charles II, or even to limit his powers if he was to succeed. They caused explosions of outrage among the Whigs, cutting as they did through nearly a century of consensus over the Common Law.

The opponents of Charles II and James II faced ideological problems that the opponents of James I and Charles I had never had to consider. They were forced to choose. They could continue insisting, against all the evidence, that there had been no Norman Conquest; or they could find another support. Those who looked for another drew on various traditions — on the Greek and Roman stoics, on the mediaeval schoolmen, on the Jesuit controversialists. The classic expression of the resulting synthesis can be found in Locke’s *Second Treatise*.

But, as said, this was not a typical expression. It may be one of the few works of political philosophy to have been continuously read since the seventeenth century, but it was surely among the least understood and appreciated in its own day. Then, it was the *First Treatise* accompanying it that made Locke’s reputation as a writer on politics. Hardly read at all now, this is a long and elaborate refutation of Filmer’s *Patriarcha*, and is argued on Filmer’s own grounds. The oddly abstract speculations that followed it were out of sympathy with the age — even after the arguments from the immemorial and unchanging nature of the Constitution had been thoroughly unsettled. The pure theory of natural liberty was just as unsuited to the age as was the pure theory of sovereignty. It was too geometrical. It went too far with its uncompromising statement of rights that were not always recognised by the existing Constitution. It made scarcely more sense to the generation of Somers and Newton as would an explanation of quantum mechanics.

More congenial were the *Discourses Concerning Government* of Algernon Sidney, published in 1698. Another attack on Filmer, these cover roughly the same ground as Locke, but every point is supported at least in part by the usual appeals to history and Scripture. There are long discussions of the Norman Conquest — denying it happened, denying that William made himself mas-

ter of the soil, denying that the Stuart Kings had inherited any powers beyond those consistent with a limited parliamentary constitution.³³

Sidney differs also from Locke in his more restrictive view of freedom. Locke is a radical individualist. His argument begins with an assertion of the individual's inborn, inalienable rights to life, liberty and property. All social arrangements are merely contrivances for maintaining these rights and for making their possession more enjoyable. For Sidney, the community is at least as important. He follows the ancients into the trap of confusing liberty with national independence. Thus, he heaps the most lavish praise on Sparta and Republican Rome, neither of which could be considered free countries in the Lockean sense.³⁴ This was certain to please anyone who wanted another Puritan Commonwealth.

More importantly, he fails to conceive how freedom limited only by the equal rights of others can be combined with order and political stability. He is like those modern conservatives, who stand so nearly on the border with liberalism, and make such nearly liberal statements, that to a casual glance they can pass as other than they really are. Freedom is glorious, he proclaims — but requires moral supervision. For, without this, people will fall into vice; and private actions have public consequences. Therefore,

those who uphold popular governments, look upon vice and indigence as mischiefs that naturally increase each other, and equally tend to the ruin of the state. When men are by vice brought into want, they are ready for mischief: there is no villainy that men of profligate lives, lost reputation, and desperate fortunes will not undertake. Popular equality is an enemy to these; and they who would preserve it must preserve integrity of manners, sobriety, and an honest contentedness with what the law allows.³⁵

Not surprisingly, the Glorious Revolution of 1688 produced few radical changes on the surface. Alone of all the great revolutions, indeed, it was carried through by men who desired at all costs to deny that it was a revolution. Mindful of how their fathers had acted in 1641, they avoided both violence and grand gestures. Hardly anyone in the Convention called by William was anything but a firm believer in the Common Law and ancient Constitution. The only question debated was in what sense that Constitution was to be understood after four years of James II. It is almost surprising that the Resolution emerging from the debate contains even one clause that might be regarded as Lockean. It was resolved that James,

having endeavoured to subvert the constitution of this kingdom by breaking the original contract between King and People, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant.

This was a deliberately inclusive formula, uniting every element in the coalition that had assembled round William at Hungerford. But the main emphasis is on subverting the Constitution and violating the fundamental laws. These concepts went unquestioned in the debate. It was the words “original contract” that caused the most trouble. Gilbert Burnet tells how some of the Lords in the upper house of the Convention asked where this contract was kept, or how it might be come at. They were given a vague answer about how every legal government implied a contract of some kind; and it seems to have been understood that the words were not intended to have any meaning beyond being a synonym for ancient Constitution.³⁶

Somewhere in his writings, Marx calls the Glorious Revolution a “palace *coup*”. Somewhere else, Disraeli dismisses it as having done no more than introduce England to “French wars, Venetian politics and Dutch finance”. Recent historians have dropped the

adjective, and have taken to surrounding the noun with quotation marks. Undeniably, it was carried through not to establish the inalienable rights of man to life, liberty and property, but to preserve the inherited rights of Englishmen. Yet, looking past the intellectual timidity of the anti-Stuart coalition that finally triumphed in 1688, what they achieved was both revolutionary and, in liberal terms, glorious. They may have intended to achieve less than they did. But what they did achieve has justly earned them the veneration of all real friends of humanity.

Three: The Administrative Vacuum of the Eighteenth Century

Though never on the Continental scale, the Tudor and early Stuart monarchs had developed a centralised and fairly efficient administration. The counties might be ruled by the Justices of the Peace, and the towns by the municipal corporations — and both therefore by the leading local families. But these were in turn closely supervised by the Privy Council and the Councils of Wales and of the North. The Church was supervised by the High Commission, and the legal system by the Court of Star Chamber. Through these bodies, a mass of moral and economic regulation was imposed. Religious dissent was punished. Juries were intimidated. Monopolies and wage and price controls were enforced.

Then, in 1641, excepting the Privy Council, which was greatly weakened, the whole central administration was either abolished outright or made impotent. It had been alien to the Constitution. It had been used too extensively to usurp the authority of Parliament and the Common Law. It was not reconstituted after 1660, and the devolution of most government into local hands was quietly accepted. From then on, the only means of government were according to the Common Law or by Acts of Parliament made under the influence of the Common Law and interpreted and enforced by the courts of Common Law.

The result of this was a severe limitation of governmental power. It is worth emphasising that this was not brought about by explicit limitations on the power of government to seek specific ends, as happened in America. All through the eighteenth century, minority groups were persecuted by the authorities. Catholics and Dissenters were denied a range of civil and political rights. Men who engaged in homosexual acts were hunted down more ferociously than in any of the absolutist monarchies of Europe — even if with less venomous persistence and fewer prohibitory laws than was later the case in England.³⁷ The Common Law has never sought to prevent any stated end of government. It is the *procedure* of Common Law, with its requirement of due process and consistency between cases, that makes the ends to certain means impossible. There is no rule of Common Law that prevents a government from trying to regulate prices. It simply prevents the sort of administrative supervision and discretion without which they cannot be regulated. It was because of these limitations that the Tudor Monarchs had bypassed the Common Law and relied instead on their Councils and Commissions. Without these, administration in the European sense was abolished.

There was, for example, no concept of administrative law. In France, the object of royal policy all through this period had been to release administration from the control of law. The ordinary courts had been corrupted by the fiscal needs of the State. Judicial offices were created and sold to the highest bidder. The buyers joined a large class of irremovable office holders. Ignorant sometimes of the law, but never of their right to the fees from which their income derived, they made justice both expensive and uncertain. Yet, despite their corruption, these courts were still feared by the Government. They might apply the fixed rules of law, and might punish officials judged in breach of the law. So, from the Controller General down to the lowest contractor on the roads, public servants were granted immunity from

prosecution in the normal courts. Cases were heard instead by special administrative tribunals. The reason why was put very plainly by a Minister: “a state official indicted before an ordinary court would certainly find the judges prejudiced against him; and this would be to undermine the royal authority”.³⁸ The rules of justice were partially or altogether suspended whenever “the public good” was invoked.

Administrative law was the instrument by which France was made into an absolute centralised despotism — a despotism tempered only by inefficiency and corruption. The Government took property for public use without compensation. It censored the press. It imposed punishments without the shadow of due process. A *lettre de cachet* — that is, a signed letter from the Royal Council — was enough to have someone imprisoned or exiled for as long as directed, and without any legal redress. These were obviously used to put down dissidence — as when, in 1749, a mild criticism of state policy earned the poet Désforges three years in an iron cage. They were also the private weapon of anyone able to persuade or bribe a Minister into issuing one.

In England, punishments could only be imposed by the Common Law courts. This ensured that the administrative authority of government was continually checked in ways that Europeans found astonishing.

Take revenue collection. Even the imposition of Ship Money in the time of Charles I had been subject to challenge before the courts; and it was only by a majority of a packed Bench that this tax had been judged legal. The more regular taxes allowed by Parliament after 1660 were continually avoided by legal challenges and creative uses of existing law. In the 1660s, a Derbyshire innkeeper named Michael Heathcot found a way round the beer excise by serving beer free to his guests who paid for the untaxed food, lodging and fodder that he provided. The only response available to the authorities was to procure a change in the relevant Act of Parliament. In Monmouthshire, innkeepers simply shut their doors in the faces of the excisemen, who had no legal power to break doors open.³⁹ In France, tax gatherers were little more restrained than a gang of thieves. In England, taxes were effectively limited to things like land and windows and foreign trade. The first had the advantage of being assessable with minimum intrusion; and the few disputes that arose over assessment and collection could be reliably left to the courts. The second were paid either by foreigners or a small minority of the population.

The one serious attempt to expand the tax base before the end of the eighteenth century was Walpole’s Excise Bill of 1733. This would have achieved a number of desirable ends. It would have checked smuggling, and increased the carrying trade of England, and made London into a free port, and have allowed a reduction or repeal of the land tax. These were desirable except for the means. As proposed, the measure would have raised up a small army of officials with powers of inspection over shops and warehouses, and even private dwellings — powers that would have necessarily have been couched in terms alien to the Common Law. The proposal was shouted down by virtually the whole country, and was quickly abandoned.⁴⁰

Or take the suppression of political dissent. The only means allowed for this were the laws against high treason and seditious libel. On paper, these were ferocious laws; and they could be made into instruments of great cruelty and injustice in times of panic — as happened between 1679 and 1688, and again in the 1790s. For the most part, however, they were very limited instruments. Torture had always been illegal under the Common Law, and no forced confession could be received by the courts. The *Habeas Corpus* Act 1679 strengthened the old guarantees against arbitrary arrest and detention.

Above all, the political laws could be enforced only in courts where a Jury was the final judge of all matters of fact. After

Bushell’s Case (1679), the right was unquestioned of Jurymen to find whatever verdict their conscience directed, even if against all the prosecution evidence. This was an effective check on at least unpopular oppressions. It saved Lord George Gordon in 1780, and has continued to save large numbers of lesser victims to the present day. Added to this, Judges were given security of tenure during good behaviour after the Revolution; and the purges for political unsoundness that disgraced the reigns of Charles I and James II were not repeated. Thereafter, a Judge might be friendly to the authorities, and might try leading Juries into favourable verdicts — but there was no punishment available if he chose to enforce the law as he conceived it.

And as the eighteenth century advanced, such administrative discretion as had survived after 1641 was limited still further. The whole concept of administration was narrowed to the fulfilment of duties imposed by the Common Law or Act of Parliament. Any Minister or official who exceeded his legal authority could — and sometimes did — have to stand in court like any other trespasser. In the most famous case arising between an individual and the authorities, Entick, a printer, sued two officials in 1764 for having broken into his house and seized his papers. The officials pleaded a warrant signed by one of the Secretaries of State. This was based on a loose custom that had survived the lapse of the Licensing Act in 1695 — that is, the press censorship law with which the later Stuarts had tried to control public opinion. The Act had created wide powers of search and seizure of documents. The warrant used against Entick was a vague document that specified neither the place to be searched nor the things expected to be found there. It was a “general warrant” — or, in modern terms, it sanctioned a “fishing expedition”. It was hoped that a search of Entick’s papers would reveal evidence of on which could be based a prosecution for seditious libel.

These powers of search and seizure had survived their creating Act largely because they were hardly ever used after 1715, and so no one saw fit to question their survival. The early years of George III, however, saw a revival of political dissent; and the authorities looked round for means of suppression. The attempted prosecution of Entick was part of a general scheme that had been inspired by the reaction to the pamphleteering of John Wilkes. The problem for the Government was that it had to face absolutely independent courts to justify not merely its use of general warrants, but their very existence.

Entick v Carrington turned on a simple point. In pleading the Secretary’s warrant, the officials were relying on the Protection of Constables Act 1750, which barred prosecutions for search and entry under warrant when no evidence of illegalities was found. Entick’s lawyers claimed that the Act did not apply because the Secretary’s warrant was itself illegal. There was neither Common Law nor statutory authority for an individual Privy Councillor to act as a Magistrate except in cases of high treason. Nor, supposing such a jurisdiction to exist, was there any authority for warrants of this type.

Passing judgment in the case, Lord Chief Justice Camden of the Common Pleas agreed, declaring the warrant unlawful. He went further. In their alternative submissions — in case they lost on the strict legality of the warrant — the Crown lawyers had argued that public policy required a certain arbitrary discretion in crimes affecting the stability of government. He rejected this argument, saying:

With respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.⁴¹

By this judgment, Camden struck down the main remnants of a power that existed unquestioned at the time in every other civilised country, and that exists again unquestioned in both Bri-

tain and America. It was the classic statement of a view that had prevailed with increasing force since the beginning of the traditionalist opposition to royalist centralism in the days of James I — that it was the duty of officials not to do the bidding of government, but to obey the law. In *Entick v Carrington*, David Hume's comment on the Revolution Settlement finds its most concrete expression:

No government, at that time, appeared in the world, nor is perhaps to be found in the records of any history, which subsisted without the mixture of some arbitrary authority, committed to some magistrate; and it might reasonably, beforehand, appear doubtful, whether human society could ever arrive at that state of perfection, as to support itself with no other control, than the general and rigid maxims of law and equity. But the parliament justly thought, that the King was too eminent a magistrate to be trusted with discretionary power, which he might too easily turn to the destruction of liberty. And in the event, it has been found, that, though some inconveniences arise from the maxim of adhering strictly to law, yet the advantages so much overbalance them, as should render the English forever grateful to the memory of their ancestors, who, after repeated contests, at last established that noble principle⁴²

In general, whether local or national, the tendency of government was to atrophy. Even had anything been desired of it, what remained of the central administration was too modest and too corrupt to interfere. Funds were embezzled or unaccounted for during years on end. An actual civil service barely existed. The two Secretaries of State, who directed most Government business, had a total working staff, including caretakers, of about two dozen. As for the local justices and corporations, with the supervisory Councils abolished, these could govern as much or as little as they pleased. Since they had to raise their own funds, they generally preferred the latter. Without express repeal, much of the older regulatory legislation — even what needed no administrative discretion to enforce, fell quietly into desuetude.⁴³

Now, in looking at eighteenth century England, we see a state of affairs quite unlike any others that have existed anywhere else in the world, before or since. The anti-Stuart reaction in the previous century was unusual in its opposition to the whole trend of Continental thought; but its success can be explained by virtue of the wild passions aroused in the debates of the age. Obviously, the stifling of administrative law had been welcomed by the local *élites* into whose hands the remaining powers of the State was passed. Just as obviously, the final settlement made in the Glorious Revolution had been accepted by the commercial and noble classes as a whole. Those who had not minded the despotism of Charles I had suffered under that of Cromwell. Both Whigs and Tories inherited a fear of centralised power from their fathers; and this was renewed by the impartial despotism of James II. But, during the eighteenth century, while the relevant interests continued to benefit, the practical reasons to fear centralisation diminished.

We should, then, have expected to see a renewed impulse towards centralised government. The arguments used by Joseph Chamberlain in the late nineteenth century should have been heard in the eighteenth. Big government had been a bad thing under the Stuarts, the argument might have gone, because it was then the instrument of Kings who wanted to abolish the ancient Constitution. They had all been hostile to Parliament and the Common Law; and one of them had tried to undo the Reformation in England, and had briefly undone it in Ireland. It had therefore been right to resist them, and right to accept a conception of government that barred many desirable ends from being achieved. But now the Revolution was complete, and power rested in the hands of a Parliament chosen by the nation and a King whose title had no higher source than Act of Parliament, why keep up the old suspicions? Why not forget some of them

for the sake of convenience? With the great contest over, the passions used to exalt the Common Law might have subsided, and the more usual contest recommenced — in which the special interests wheedle and push for influence, resisted only by a general prejudice in favour of liberty.

But this did not happen. All through the eighteenth century, the passions that had inspired the Revolution Settlement were visibly subsiding, but the Settlement itself persisted — and, as said above, even continued shedding the despotic elements that had survived the Revolution. Men whose grandfathers had been too young to live under James II, let alone Charles I or Cromwell, retained prejudices against central and discretionary power that were not only irrelevant to their immediate interests, but often hostile to them. Even landowners, whose taxes would at least have fallen, were prominent in opposing Walpole's Excise Bill. Even householders, whose lives and property might have been better secured, opposed the slightest move towards a police force;⁴⁴ and, as Jurymen, they showed no mercy to officers of the law indicted for going beyond their legal powers in quelling riots and other disturbances.

The Revolution Settlement was preserved by the dominant legal and political philosophy of the age. This set the agenda of debate. It set the criteria by which people conceived their interests. Though not the same as the one that had justified resistance to the early Stuarts, this philosophical outlook was a plain development of it. The challenges of both antiquarians and naturalist philosophy had been faced and overcome. The enlightened urbanity of eighteenth century thinking removed further rough edges from it. What emerged by about 1760 was a clear and persuasive set of arguments in favour of maintaining an order of things inherited from the past.

The older fictions abandoned, it was now recognised that the Constitution was the product of a long evolutionary growth of rules and institutions. The Constitution of 1750 was not the same as that of 1550, and still less that of 1350 or 1150. Between each of these dates, innovations had been made. Which were good and which bad had been shown by experience. And innovations would continue to be made in the future, either because needs would arise that were not yet provided for, or because earlier innovations would turn out to be defective.

The Common Law view of the past remained, but in a modified form. It was still maintained that the Constitution was of immemorial origin, having been brought to England by the Angles and Saxons. This no longer meant asserting that Hengist and Horsa had carried with them the full English law of real property as known by Coke. It meant instead that English political culture had always placed high emphasis on the rights to life and liberty and of resistance to despotic power. This emphasis had been seen repeatedly at work throughout English history, shaping the growth of a free Constitution and preserving it against external and internal attack. The growth had been checked by William the Conqueror, but was restarted with new vigour in the national revolt that forced John to sign the *Magna Carta*. It had been checked again by the relatively despotic Tudors; but it was restarted with overpowering vigour during the Stuart period. In a sense, the Glorious Revolution introduced new principles into English Government — for instance, that Ministers had to be not merely responsible to Parliament, but continually acceptable to it. But it was also a deeply conservative reaffirmation of the ancient liberties of Englishmen.⁴⁵

There was still the question, as in the previous century, of how to maintain those liberties and hand them on undiminished to the following generations. The answer now was to develop the flashes of insight in the works of Coke and Davies and Hale into a general theory of social order. How this was done can be stated in a series of connected propositions:

First, human beings are not “rational” in the sense claimed by the philosophers of the European Enlightenment. We exist within frameworks of rules and expectations that are always complex and are usually well-suited to some standard of convenience, but which we have not ourselves made, and which were never in the past consciously designed or discussed, and which are mostly not even fully understood. Instead, these frameworks are the product of a social evolution analogous to the natural evolution that Darwin later discovered to underlie the variety of animal forms and their adaptation to environment.

An act is done and it benefits the actor. Sometimes, its benefit will be recognised. If so, it will be repeated by the actor as appropriate and imitated by others. Most often, it will not be recognised as a cause of benefit. If so, it may never be repeated, or it may be repeated and imitated along with much else that is purely incidental or even of contrary value to the benefit. Its adoption may entail the rejection of some other behaviour, or perhaps will need less radical modifications, in order for it to be fitted into an internally consistent body of existing custom. After a while, its origin — even if ever known — will be forgotten; and future generations will inherit another of the customs or institutions by which they will unthinkingly guide most of their behaviour.

In some cases, an institution can be explained and given rational justification in a later, more enlightened age than the one in which it emerged — private property, for example, or marriage. But this can happen in only a small number of cases, for much of the information that is available to us for directing our lives cannot be reduced to the status of discussible hypotheses. It will be instead embodied in custom and prejudice, the justification of which must often be obscure.

This view of human understanding is less flattering to human vanity than the rationalist notion of the conscious, designing intelligence. But it is more in accord with the known facts, explaining how people — no matter how learned or ignorant — have access to far more knowledge than they can develop for themselves, or prove by themselves.

Second, the view raise a presumption in favour of whatever is old and established. It may seem on first inspection that some particular law or public custom has no use. But the fact of its survival into the present indicates that it once was, and might still be, useful — or that, even if useless or harmful in isolation, it is necessary for the survival of something that really is useful, or even for the survival of the whole system.

When, therefore, we come to an examine a functioning social order such as our own, the most proper attitude is one of curiosity mingled with reverence. We are not to seize on its apparent faults and reject it in favour of something else spun out of a single head. Nor are we to advocate sweeping reforms simply on the grounds of “modernisation” or some other modish slogan. We must instead try to understand the inner workings of society — to conjecture by what innumerable and infinitesimal stages the present order of things evolved to its present sophistication. This will require us to look even to those habits and institutions that rest on justifications manifestly absurd, asking whether they might not nevertheless serve a useful purpose. Then, and only then, shall we be ready to consider what deliberate changes may be necessary, and how these may best be combined with what already is.

Third, the greatest danger to society in an enlightened age is the very attitude responsible for progress in the arts and sciences. These proceed most smoothly by a continual questioning of existing knowledge — asking if it is most in accord with the known facts, or if there is some other, more economical means of explanation. Applied to matters of social organisation, the scientific method must inevitably raise doubts regarding the wisdom of what is. As said, not everything can be readily justified.

Certainly, there are arguments to be put for presuming that customs and institutions contain a hidden rationality. But these will often seem — and occasionally will be — nothing but a sophisticated defence of great social evils for which a complete answer seems within easy reach. And one victory for the forces of radical enlightenment will establish a precedent for other attacks and victories, until the whole social order is overthrown in an orgy of apparent reforms.

The danger must be avoided by doing nothing to shake the existing power of custom. One of the mental habits with which the evolution of customs has equipped us is a reverence for whatever is old. It can be found in every primitive society, and is the essential preservative of what little civilisation is possessed by such societies. There is a psychological value in age. Institutions that are old, or that appear to be old, can shelter within a ring of associations that may be powerful enough to restrain all but the mist determined tyrant or democratic mob. Changes there must be, of course. But the best change is to be so cautious and incremental that only those directly affected notice its happening. Even the most radical, sudden change is best achieved so that within only a few years it becomes difficult to tell the old from the new.

All this has so far been expressed in abstract terms. An example may be best to complete the explanation. In giving this, let us avoid the standard ones that can be drawn from the French Revolution at the end of the eighteenth century. Let us look instead at one from a later time and from an alien and now dead civilisation.

In 1911, there was an epidemic of bubonic plague in Manchuria. This was large enough to worry all the usual governments and international organisations — there were fears of a new Black Death — and so much effort was put into containment.

Now, it was soon discovered that the carriers of the fleas which in turn carried the *Pasteurella pestis* bacillus were marmots, large burrowing rodents who were hunted for their skins. It was also discovered that the nomadic tribesmen who had hunted marmots for centuries were largely unaffected. Mostly affected were the Chinese hunters who had just poured into Manchuria following the collapse of the Manchu dynasty and the lifting of all controls on movement into the region.

The reason for this difference was that the native hunters followed certain customary rules that tended to minimise the risk of infection. They never trapped marmots, but only shot them. If an animal moved sluggishly, it was left alone. If an entire colony showed signs of infection, the hunters would at once pack their tents and move on.

Only in 1894 had the causes of bubonic plague been identified. Before then, its means of transmission had been an absolute mystery. Yet here was a nation of illiterate nomads not only doing as the newest research might have advised them, but doing it by custom since time immemorial. Asked why they acted so, they gave the most bizarre mythological justifications that said nothing about the avoidance of infection. There was no talk of some divinely inspired ancestor whose teachings had avoided the anger of the gods, or whatever. All the evidence pointed to a long history of slight and unconscious adjustments to environment. As with a purely natural selection, there had been small revisions of habits. Those contributing to greater well-being had been copied and passed on to later generations as ritual.

Ignorant of epidemiology, the Chinese hunters were rational enough to sneer at these rituals. Even if at second hand, they enjoyed the fruits of Western science and technology; and the Manchurian natives lacked the philosophical framework to justify customs in general for which they had no specific justifications. The Chinese went about their business of catching their marmots in the most cost-effective manner. They died in their thousands, and sent the bacillus down the new railway lines to-

wards the rest of humanity. It was only because the causes of plague were now understood that the bacillus did not sweep the world again as it repeatedly had in the past.⁴⁶

This whole line of thinking finds its most perfect expression in Burke's *Reflections on the French Revolution* of 1790. In place of the poor exposition given above, it might be better simply to quote at length from this marvellous distillation of all social wisdom: written with one great public event in mind, it remains a work of universal significance. But let us instead recall a single passage:

... [I]n this enlightened age I am bold enough to confess that we are generally men of untaught feelings, that, instead of casting away all our old prejudices, we cherish them to a very considerable degree, and, to take more shame to ourselves, we cherish them because they are prejudices; and the longer they have lasted and the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.⁴⁷

In England, it was the "men of speculation" who ensured that the eighteenth century saw no reaction against the Revolution Settlement. The consensus of opinion among them was almost total. Even Edward Gibbon, supposedly the least English of eighteenth century English writers — with his French tastes and Swiss education — was unable to judge the Roman Empire except by Common Law standards. Writing on the complexities of legal procedure, he comments:

The experience of an abuse from which our own age and country are not exempt may sometimes provoke a generous indignation, and extort the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decrees of a Turkish cadhi. Our calmer reflection will suggest that such forms and delays are necessary to guard the person and property of the citizen; and that the discretion of the judge is the first engine of tyranny; and that the laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry.⁴⁸

Sir William Blackstone is still more emphatic. At the end of Book IV of his *Commentaries*, he breaks forth in this eulogy of the established order of things:

Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due:— the thorough and attentive contemplation of it will furnish its best panegyric. ... To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and the noblest inheritance of mankind.⁴⁹

These men of speculation were not liberals in the manner of John Locke. They did not believe in the unrestrained right of individuals to life, liberty and property. Their defence of custom

did often include a defence of burning injustice — the negro slave trade, for example, the press gang, the religious and sexual discrimination by law, the often barbarous criminal punishments, the general sloth and confusion of the procedural law, and so forth.⁵⁰ But they did surround the Revolution Settlement with a palisade of words that no interested sophistry could break through. Such reforms as were achieved they carried through quietly, and most often by judgments of the courts — that is, by means that enabled reform to be presented as a statement of what always had been. They saved England from the same tendency to administrative despotism that emerged in Europe in the sixteenth century, and that was to continue undiminished into the nineteenth century, reaching its highest expression before our own century in the Napoleonic police state.

By itself, then, English liberalism was too weak or timid to explain all the freedom that was actually enjoyed during the eighteenth century. Its effect was magnified by the administrative collapse of 1641. This had in turn been brought about, and was in part maintained, by adherence to conservative ideologies that justified only a limited freedom. At first, this strange circumstance was wholly beneficial. Except after a foreign invasion, or some immense public calamity, no other country has come so close to administrative anarchy as England did. The restraints that held the rest of mankind back were broken down; and the way was cleared for the development of free market capitalism.

Four: The Decline and Fall of English Liberty

From here, we move into the nineteenth century — to the dawn of the age which Reade was to celebrate as one of almost perfect liberalism. The case in favour of his claim has already been put, and is a persuasive one; and it must be kept in mind throughout all that is now to be said. It cannot be denied that liberal ideas came to dominate public thought and policy in Victorian England to a degree unmatched before or since. It must ever be for liberals what Periclean Athens is for Hellenists, or what the thirteenth century is for Catholics — as the fullest embodiment of an ideal, and as the criterion by which all other ages are to be judged. But, rightly examined, the age is also one of liberal decay. There is no contradiction. A house may appear in its fullest order and beauty even as its foundations are crumbling. In the same way, Victorian liberalism, beneath its fine exterior, was crumbling.

And it was crumbling throughout the century. When A. V. Dicey took 1870 as the date of transition between liberalism and collectivism, he was mistaking symptoms for causes.⁵¹ All that happened around 1870 was that the subsidence cracks began to show unmistakably through the stucco. The whole century, not just its end, was an age of liberal decay. For its beginnings, we must go another 80 years back from 1870, to 1789. This was a year notable for two great events. It was the year in which the French *Ancien Régime* collapsed under the weight of its own corruption. And it was the year in which Jeremy Bentham published his *Introduction to the Principles of Morals and Legislation*.

This was not intended to be an illiberal work. Nor has it usually been regarded as one. Bentham states three principles. First, legislation is a science. Second, its purpose is to allow "the greatest happiness of the greatest number". Third, since individuals are the best judges of what can make them happy, legislation should clear away all those barriers to free action not required to protect the equal freedom of others. Applying these principles to English law and government, he denounced the ancient Constitution as nothing but a fraud.

Where Gibbon saw necessity and Blackstone wise contrivance, Bentham saw only a chaotic mess. English law, he said, had begun as the customs of an illiterate Germanic tribe, and then been added to and adapted in succeeding ages of feudalism and religious frenzy. Over the centuries, almost nothing had been

abolished, and the additions had nearly all been made by adapting existing forms and names to new purposes. The parts were often ingenious, but the whole was best regarded less as a “noble pile” than as a labyrinth of fictions in which the smallest conveyance or action required an army of expensive lawyers. As John Stuart Mill wrote half a century later in summarising the Benthamite critique,

the law came to be like the costume of a full-grown man who had never put off the clothes made for him when he first went to school. Band after band had burst, and, as the rent widened, then, without removing anything except what might drop off of itself, the hole was darned, or patches of fresh law were brought from the nearest shop and stuck on.⁵²

Bentham spent the rest of his long life examining and rejecting the details of what had been rescued and maintained by the Common Law thinkers of the seventeenth and eighteenth centuries. The overall justifications he brushed aside as self-interested sophisms. Instead, every specific law and legal practice was examined, and the question was asked — “what use does this serve? If there is a use, can it be served by more direct means?” What need, he asked, to pay two fees for one appearance before a Chancery Master? Why had an action to establish title to land to begin with a mass of fictions about John Doe and Richard Roe? Why was a man denied counsel when charged with a felony, but not when charged with treason or a misdemeanour? Why were the parties to a Common Law action not allowed to give evidence in court? Why might the same dispute require separate actions in a Common Law court and in the Court of Chancery — one to obtain damages, the other to obtain an injunction? Why, in short, was everything so slow, so expensive, so disorderly, so often grossly unjust?

In place of this jumble, he proposed a comprehensive remodelling of the law. The rubbish of past ages was to be swept aside and replaced with a set of clear rational codes of law, enforced by courts with procedures so easy to understand that justice would be swift, and comprehensible and affordable to all.

With this went similar arguments for administrative reform. The great Councils had been swept away in 1641, and the functions of administration had withered thereafter. But hardly a single *office* had been abolished. In place of anything worth calling a civil service, the Government at the end of the eighteenth century had an immense mass of patronage to distribute among its servants and supporters. Most of these offices had names stretching back to Tudor or even mediaeval times. Every area of government was filled with sinecures. The more lucrative were taken by the Ministers and Judges to swell their official salaries, or given to their friends and relatives to cement the bonds of obligation on which English politics then rested. Very few had actual duties attached to them. Some — such as the Tellership of the Exchequer — combined an absence of duties with salaries of more than £20,000 (which translates into about £1 million in 1990s terms). A few were even hereditary.

For personalities who filled these offices in the early nineteenth century, look at Lord Auckland, who received £1,400 a year as Vendue-Master at Demerara, a place he had never visited, and £1,400 as Auditor at Greenwich Hospital, without the least competence to audit an account, nor any obligation to try.⁵³ Or look at the Duke of St Albans, who was Hereditary Grand Falconer and Hereditary Registrar of the Court of Chancery. Without touching a single falcon or registering a single suit, he took an annual salary of £2,000.⁵⁴ Or look at the hundreds of aristocratic “wine-tasters”, “sweepers”, “store-keepers”, “harbour-masters”, “packers”, and “tide-waiters” who dirtied their hands only to the extent of going once every quarter to the relevant office in Whitehall to sign their names in a ledger and receive the latest payment of their salary.

There were thousands more of less valuable places. These were handed out as incentives to friendly journalists and organisers of election campaigns, or as rewards to favoured poets and painters, or as consolations to well-connected unfortunates.

Such duties as did attach to these offices were performed by clerks employed at a fraction of the salaries attached. Because the pay and prospects were so limited, these clerks were usually of little ability and often corrupt. At best, they were fitted for nothing beyond a drudging routine. At worst, their follies and speculations compromised the effectiveness of the armed forces. Anyone who reads their dispatches must half suspect that Nelson and Wellington fought their battles largely to relax from their much harder war to get their men paid on time and to get munitions that might be usable against the enemy.

The cost of this bizarre substitute for a civil service cannot be accurately known, but must have consumed a noticeable share of the British national income.

Then there was Parliamentary reform. The electoral system had been settled centuries before. The counties were each to send two Members, elected by the 40 shilling freeholders. Certain boroughs were each to send two, elected on whatever franchise might evolve locally. Apart from the addition of Scottish and then Irish Members, after the Acts of Union, there had been no big changes since the end of the middle ages, and none whatever since the reign of Charles II. Thus, by the end of the eighteenth century, there were boroughs where no one now lived — or which had even disappeared through coastal erosion — but which still returned their two Members; and there were new cities, like Manchester, growing up without any representation. In those boroughs which still existed, some allowed virtually every adult male to vote; others confined the vote to a closed corporation. There were “pocket boroughs”, where Members could be nominated by a landowner, whose tenants would vote as directed; and there were “rotten boroughs”, where the few eligible voters could turn every election into an auction for their votes.

Overall, fewer than five per cent of the adult population had the right to vote. It was possible for great shifts in public opinion to bring corresponding changes at a General Election — as in 1784 or 1830. But the bewildering inconsistency of franchises from one constituency to another meant that in ordinary times, the House of Commons only reflected the public mood by accident.

Serious calls for reform had begun in the 1770s, during the debate over the status of the American colonies. The Colonists had demanded “no taxation without representation”. They were told in answer that much of England had no representation, but was still taxed. This failed to satisfy the colonists, and set their English supporters on an examination of home abuses. At first, they had only wanted a modest redistribution of seats. As ever, Bentham and his followers preferred more radical solutions — abolishing the distinction between counties and boroughs, a redrawing of boundaries to equalise representation, and a standardising of the franchise. For them, indeed, Parliamentary reform was to become the means of achieving their vision of a rational, humane, centralised new order.

It would be wrong to suppose that Benthamism and nineteenth century liberalism were identical. They were not. The “philosophic radicals” — as the more ardent followers of Bentham called themselves — despised the Whigs and the moderates in general for their commitment to the past. These in turn were often flatly opposed to the full agenda of reform, entailing as it would a rejection of the Revolution Settlement. But with his writings on legal and administrative reform, Bentham reached out to a large audience. People whose eyes glazed over at the mention of his Panopticon scheme accepted his critique of actual abuses. It was both reasonable and pragmatic — qualities highly regarded in England. And his followers themselves exercised a

wide influence over the public mind: George Grote in history, John Austin in law, Samuel Romilly in law reform, Ricardo in economics, the two Mills in philosophy and psychology and just about everything else; and there were many others. They never dislodged the English habit of thinking of liberty as something inherited, rather than as something granted by a sovereign lawmaker. They certainly never gained so complete an acceptance as the Common Law thinkers had. But they did make the old complacency much harder to maintain. Insensibly, they shifted the foundations of English liberalism from reliance on the ancient Constitution to arguments about the utility of limited government.

The unsettling effect of Benthamism was combined with that of the French Revolution. Like the rush of water from an unblocked drain, the meeting of the National Assembly led to reform after reform. There was religious freedom and freedom of the press. The administrative map was redrawn on rational principles. The system of justice was entirely replaced. The power of the Monarchy and aristocracy was forever broken. Some English observers came to look on the French as having travelled further towards liberty in two years than they had in two centuries. "How much is it the greatest event that ever happened in the world" said Fox on hearing that the Bastille had fallen, "and how much the best." For Richard Price, Louis XIV was now "almost the *only* lawful king in the world, because the *only* one who owes his crown to the *choice of his people*".⁵⁵ For such people, the Glorious Revolution appeared less as a final settlement than as unfinished business.

Without any further cause, it was inevitable that the Revolution Settlement would be challenged after 1789 in ways that the earlier men of speculation had feared and tried to prevent. In the 1790s, however, the whole timidly liberal consensus of the eighteenth century collapsed in England. The Reign of Terror tore English opinion in two. On the one side, there were the radicals. Had these been only Bentham and his middle class followers, it would still have been impossible to overlook their break with the past. But there was also the emergence for the first time in English history of an autonomous working class movement. The minimal demand within this movement was manhood suffrage, to be followed by legal revolution. An extremist minority was even demanding a copying of the French example — the whole way to regicide and collectivist dictatorship.

On the other side, there were the defenders of the established order. These came quickly to associate any talk of reform with revolutionary violence. Instead of concluding that France was showing what happens when a *régime* resists all change for long periods, and then concedes it all at once out of weakness, they took events there as a warning to stop their own indulgence. Edmund Burke is the standard example of the liberal turned reactionary. In the 1770s, he had supported the American rebels. In the late 1780s, he had made a nuisance of himself to the authorities though his part in the impeachment of Warren Hastings for misgovernment in India. After 1790, he was known — however unjustly it may be seen in a careful reading of his *Reflections*⁵⁶ — as the supreme philosopher of reaction, his old friends now his bitter enemies, and his old enemies now his adoring friends.⁵⁷

The resulting debate was won by the extreme conservatives. They did not entirely get their way. The press remained free. Juries were often unreliable at returning guilty verdicts in cases of high treason. The Parliamentary opposition functioned unchecked regardless of the country's domestic and foreign crises. But there was a consistent drive to limit the liberties which had been secured in 1688 and widened during the next century. Acts of the period limit the rights of assembly and of speech for the working classes. The Government made furious efforts to suppress public reading rooms, where the working classes would come to read the newspapers and discuss their contents; to

sharpen the laws against trade unions; to seek out and punish anyone who published words that might be construed by a Jury as seditious. Letters were opened and read as they went through the Post Office. Spies and entrappers were unleashed on the non-Parliamentary opposition.⁵⁸

When the great revolutionary panic at last subsided, after 1822, the spirit of the Constitution had been entirely altered. Before 1789, its development had been broadly in line with public opinion. By the 1820s, it had fallen behind. In the 1780s, Parliamentary reform had been on the political agenda; and its only real impediment had been how far to go and how much to spend on buying off the vested interests. Even William Pitt the Younger, while Prime Minister, had introduced a Reform Bill. Forty years later, it seemed to many that the Constitution had been captured by a band of diehard reactionaries, who had blocked every reform to the point where only sweeping changes could bring it back into line with public opinion.

Between the extremes of reaction and remodelling lay the moderate reformers. Perhaps the leading spokesman for this point of view was Thomas Babbington Macaulay. Though willing to agree with Bentham on specific matters, he was deeply suspicious of the main Benthamite project. His attacks on James Mill and the demands for manhood suffrage caused serious damage to that project, and helped push Mill's son, John Stuart Mill, into a nervous breakdown.⁵⁹ Looking beyond the Benthamites, he utterly loathed and feared the socialists, calling them the common enemies of mankind.⁶⁰ In every sense, he was a conservative. In literature, he was "the last of the Augustans".⁶¹ As an historian, he saw his task as explaining the achievements of the seventeenth century Whigs to the readers of the nineteenth. In politics, he was no less conservative. He supported Parliamentary reform because he believed that timely compromise would head off the more radical demands. A generation of Benthamite propaganda and Tory reaction had combined to discredit much of the Revolution Settlement as a mass of abuses. By abandoning the less defensible parts of that Settlement, he hoped that its essentials could be preserved. "Reform" he said in Parliament, "that you may preserve. ..."

[N]ow, while the heart of England is still sound, now, while old feelings and old associations retain a power and a charm which may too soon pass away, ... take counsel, ... of history, of reason, of the ages which are past, of the signs of this most portentous time. ... Save property, divided against itself. Save the multitude, endangered by its own ungovernable passions. Save the aristocracy, endangered by its own unpopular power. Save the greatest, and fairest, and most highly civilised community that ever existed, from calamities which may in a few days sweep away all the rich heritage of so many ages of wisdom and glory.⁶²

At first, the gamble seemed to have paid off. The Great Reform Act had raised immense passions on both sides; and its passing into law had been an overwhelming psychological defeat for conservative opinion. It revealed that there were no untouchable fundamentals in the Constitution; that if the representation could be changed so radically, so in principle could anything else. But there was no forward lunge into remodelling of the sort that many had hoped or feared. The full Benthamite agenda was not enacted at full speed into law. Instead, Reform was followed by a return to political stability. Two moderate parties competed for the new middle class vote, with one and now another winning power. Other reforms followed, but came slowly and in an orderly manner.

During the rest of the century, English law and administration were remodelled on broadly Benthamite lines. The Poor Law was reformed. First the town corporations were replaced, and then the county Magistrates were largely superseded, by local authorities elected by consistent franchises. Substantive and pro-

cedural law were both reformed, the first in a series of codifying statutes — the Offences Against the Person Act 1861, for example, and the Sale of Goods Act 1893 — the second in the Judicature Acts 1872-76, which replaced the mediaeval jumble of Common Law and Equity courts with the modern hierarchy of first instance and appellate courts applying both systems of law.

Law and administration were both immeasurably humanised thereby. And the reforms were carried through mostly in full realisation of the need to hide the fact that things were changing. The Victorians had a genius for hiding novelty behind the appearance of age. Probably not one in a hundred visitors to the High Court in the Strand realises that neither the building nor any of the courts housed there is more than 130 years old. And that has probably been so for the past hundred years. The move out of Westminster Hall and the Judicature Acts were wrenching changes for those who experienced them. But the scars of change were so quickly and perfectly healed. It is the same with the new Royal Family — an ancient institution no older than the 1870s — and most of the customs of Parliament. Even the London railway stations have an air of antiquity about them. On the eve of reform, Lord Eldon had warned: “Touch one atom, and the whole is lost.”⁶³ For Reade in 1872, reform had been followed by obvious and unalloyed gains.

Even so, the gamble failed. Though concealed so far as they could be, and though their unsettling effects were thereby minimised, the reforms ultimately proved Lord Eldon right. The reformers tried to go carefully, but could not avoid destroying part of the Constitution’s hidden rationality. Inevitably, the reforms of the 1830s and 40s included the creation of a civil service.

This has usually been regarded as not merely a necessary but also a good development. W. D. Rubinstein, for example, sees the absence of a civil service before this time as a paradox. The Old Corruption that it replaced was, he says,

pre-modern and non-rational in the Weberian sense of failing to obey the rational criteria of all modern bureaucracies which Weber and other sociologists have distinguished as crucial to, and inherent in, the process of modernization.⁶⁴

And yet,

Britain was unique among European nations in the degree to which it had, long before, rid itself of pre-modern modes of thought and consciousness and adopted ... a national mentality of rationalism in Weber’s sense and an all-pervasive cash nexus which dissolved all pre-existing bonds.⁶⁵

But there is no paradox. As we have seen, “modernity” — which in this context can be taken as roughly equivalent to liberalism — was the result of administrative paralysis. It was precisely because the English people had no directing, ordering State above them in the seventeenth and eighteenth centuries that they had entered the nineteenth so free and independent. Those European states that came closest to the ideal of “enlightened despotism” — Prussia and the Habsburg Empire, for example — had been fitted out with “modern” bureaucracies powerful enough to keep their subjects in leading strings. England was “modern” not in spite of Old Corruption, but in part because of it.

The prejudice against any form of jurisdiction outside the Common Law prevented the growth of an effective civil service. The lack of an effective civil service then acted in turn as a preventive of such jurisdictions, even when ends otherwise unattainable were strongly desired. Dr Rubinstein himself gives a perfect instance of how the ancient Constitution stifled any reform that needed administrators to give it effect:

Sydney Smith opposed the appointment of factory inspectors [under the Factory Act 1802] because he was sure that, if such were appointed, they would not inspect any factories!⁶⁶

The inspectorships would instead become more sinecures.

Administrative reform removed this preventive. Gradually, the sinecures were abolished. In their place, a new, professional administration was created, with appointment by competitive examination and promotion on merit. The liberal reformers were very proud of this. But they had deliberately given up the rigid defence of the ancient Constitution. Now, they had — mostly without realising — given up the main practical barrier to government activism. They believed that an attack on incompetence and corruption would result in smaller, cheaper government. The real effect — not obvious, perhaps, till after the second Reform Act — was to provide what remains the greatest illustration that history affords of public choice economics.

According to James Buchanan and Gordon Tullock,⁶⁷ there are forces at work in politics analogous to those at work in economics. Among the most common desires of individuals are wealth and status, usually in some combination. Businessmen in a free market are driven, as if by an invisible hand, to offer new products to their customers, and to cut costs and prices. They do this not because they love their customer, but because this is only way in which they can struggle through to fortune and perhaps a place in the history books. In politics, these things are achieved by gaining and keeping office. This is most easily done in a democracy by promising the electors benefits for which others must bear the costs. These others may be later generations or a minority of the present generation. In either event, the benefits will be offered; and politics becomes a competitive auction for votes with other people’s money.

At the same time, the personal interest of most administrators will lie in welcoming and even proposing such schemes, because they must be put in charge of delivering the benefits. This will mean an increase in their budgets, in the number of their subordinates, and in the status that they possess in the public mind.

The public choice trinity is completed by pressure groups. Typically, though not always, these will have a personal motive. Political and administrative reformers nearly always stand to benefit from the adoption of their “reforms”. And for all they may celebrate private enterprise in their public utterances, few businessmen really like having to operate in a free market. It means competition in which they might lose, but in which they must always be acting against their own convenience. Even if they are not complete cynics, it takes little persuasion to make themselves believe in “market rationalisation” or “safeguarding the national interest”, or whatever. Other things being equal, these groups and their demands will be taken up by the politicians and administrators in proportion to how well their schemes require a bigger and more active State.

Quite often, opposition will fail even when what is proposed is not remotely in the public interest as conceived in the wider sense. The reasons for this have been most rigorously explained by Mancur Olson in his writings on collective action.⁶⁸ All voluntary associations involve their members in costs and benefits. When the actual or potential benefits to each member are large, the members will be happy to incur heavy costs. When the benefits to each are small, there will not be the same incentive to incur costs. Typically, producer groups in search of market privilege fall into the first category, and consumer groups into the second. The first will have the money to buy the best and most intensive publicity in favour of their desired privilege. They can hire economists to draw up the relevant graphs or tables of statistics, and to make the worse appear the better case. The second are compelled by lack of finance to reply with general arguments that do not seem actually to address the main points at issue. The first will be helped by politicians and civil servants who see their own interests served thereby. The second can rely, at best, on the support of political outsiders who have no interest in the present state of affairs, but who also have little popular or party support.

Today, examples of how we are ruled by this public choice trinity are beyond counting. Look at the *de facto* marriage between the Ministry of Defence and the arms companies, between the Department of Transport and the road building companies, between the Police and the moral purity campaigners. Look at the rigging of the gas market, at the professional closed shops, at the Common Agricultural Policy. These are marriages obviously against the public interest; but few members of the public have an interest great enough to spend money and effort in trying to annul them. And this process began with the sweeping away of Old Corruption. It cleared the path for the emergence of the boards of public health and public education, of the factory and food inspectorates, of the police forces, and of the municipal enterprises, that by the end of the century had utterly transformed the face of English government.

The most striking difference between the end and the beginning of the century lay in the use of delegated legislation. In 1800, any new powers conferred by Parliament on the authorities were specified in the Act. There was no allowance made for administrative discretion. By 1900, it was normal for powers to be conferred by an enabling Act. Nothing would be specified. Instead, there were phrases such as: "The Secretary of State shall make rules to bring this section into effect", or "in any dispute arising over the exercise of powers conferred by this section, the Minister shall adjudicate; and the decision of the Minister shall not be questioned in any court of law." For Secretary of State or Minister, read officials. They were silently acquiring the power to make laws, and to enforce or waive these laws as they saw fit. Even in 1888, Maitland was able to tell his students that

[y]ear by year, the subordinate government of England is becoming more and more important. The new movement set in with the Reform bill of 1832: it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.⁶⁹

It must be emphasised that the liberals were entirely to blame for this. There is no point in blaming the avowed statist. These all had some agenda of control. There were the Tory paternalists, wanting a return to a past golden age of deference and protection. There were the militant imperialists, deeply impressed by German collectivism. There were the eugenicists, with their scheme of a master race — in the creation of which the State would stand to its citizens as a breeder stands to his pigs. There were the Christian activists, crying out for the suppression of sin. There were the professional bodies, willing to combine with any movement whatever for the sake of increasing the status and earnings of their members. Later, of course, there were the socialists, with their own plans for big government. But none of these movements, even combined, could have been powerful enough to change the course of English development.

It is the liberals who did this. By relaxing the old worship of Common Law, and by promoting administrative reform, they untied the straitjacket of the Revolution Settlement.

The case against them is still worse. They could, even so, have prevented the worst effects of the untying; but they failed to do so. Public choice economics is about tendencies, not automatic laws of growth. These tendencies can be checked, and sometimes reversed, by the force of ideas. We have seen how this happened in the seventeenth century. To a limited extent, we can see this in the nineteenth — in, for example, the steady rejection by the authorities of any calls for a return to trade protection. Long after every other great nation had retreated behind a tariff wall, the British commitment to free trade remained unshakable. There was no shortage of special interest groups with money to spend and lies to tell. Every time, they were repulsed by a body

of opinion for which tariffs were as abhorrent as Ship Money had once been.

The nineteenth century liberals had an ideology of immense power. The older arguments about the value of free development could now be supported by the discoveries of political economy. Here was an example of spontaneous organism. A few psychological and physical laws sufficed to explain the growth of trade and industry without any coordination by the State. The value of letting alone could be shown by arguments from principle as well as from experience. It was the consensus that an economy grew best when left to the laws of the market supplemented by a few obvious human laws against force and fraud. Had anyone challenged him in 1830, Macaulay could have appealed to the whole existing weight of economic science in support of his claim that

[I]t is not by the intermeddling of ... the omniscient and omnipotent State, but by the prudence and energy of the people that England has hitherto been carried forward in civilisation. ... Our rulers will best promote the improvement of the nation by strictly confining themselves to their own legitimate duties, by leaving capital to find its most lucrative course, commodities their fair price, industry and intelligence their natural reward, idleness and folly their natural punishment, by maintaining peace, by defending property, by diminishing the price of law, and by observing strict economy in every department of the State. Let the Government do this: the People will assuredly do the rest.⁷⁰

But, however powerful, such arguments were blunted by three defects of reasoning:

First, the power of the economic arguments often allowed the others to fall into disuse. They were a deadly weapon against all restraints justified on economic grounds, and only its most famous victory was the repeal of the Corn Laws in 1846. Yet, as a defence of freedom, the arguments from economic efficiency were of little psychological value. Their advocates tended far too often, by ignoring the wider issues of human liberation, to reduce liberalism to a set of prudential warnings about the rate of industrial growth. This allowed a gradual painting of liberalism as a desiccated, calculating ideology that could not be avowed by anyone with a heart. We see this most famously in the works of Charles Dickens. In *Hard Times*, he contrasts the neat, philosophic justifications of Ralph Gradgrind for the reality of a Coketown run by the dreadful Josiah Bounderby. "How can one refute a sneer?" it was famously said of Gibbon's attack on religion. The same could be said of the attacks on "philistine Manchesterism".

Second, defects in the early theories of value and distribution played straight into collectivist hands. The labour theory of value, found in both Adam Smith and David Ricardo, was taken over by Karl Marx and a legion of — at the time — better-known socialist agitators. By the time Jevons and Menger could introduce the concept of the margin into economics, the harm was done. In any event, later economists tended to drop the habit of writing for the general public. They preferred instead to retreat ever more deeply into a mathematical mode of expression that could be understood only by other economists. Perhaps Mill was the last economist who could be understood by everyone. After him, the public was left to find its economics where it could. Not surprisingly, it came to believe all manner of things about exploitation and the goodness of government action.

Third, the most important liberals of the age never seem to have understood the public choice danger they had unleashed. Though more Lockean in their view of individual rights than the Revolution Whigs, they thought they could do without the same uncompromising defence of their ideology. Instead, having created an administrative state, they thought they could pick and choose the objects of administrative action, without regard to the

specific precedents thereby set, and without regard to the general dynamics of the new machinery.

This allowed them to make endless exceptions in the ideology of *laissez-faire*. To be sure, it was to be a general rule — but ... Not one of the main classical economists gave an unqualified endorsement to *laissez-faire*. McCulloch, supposedly the most doctrinaire of his school, wrote:

The principle of *laissez-faire* may be safely trusted to in some things but in many more it is wholly inapplicable; and to appeal to it on all occasions savours more of the policy of a parrot than of a statesman or a philosopher.⁷¹

This is true. Only an anarchist would deny any place for state action. For other liberals, there must be a formula to allow exceptions. To use the jargon of the law, there are certain state actions against which there should be an irrebuttable presumption — that is, they should never be allowed. Against others, there should be a rebuttable presumption: they should be allowed, but only on proof that the effects of doing nothing would be the greater of two evils. Where McCulloch and the other liberals of his age went wrong was in their standard of proof. The sophistry of the special interest groups is always such that the criminal standard — of proof beyond reasonable doubt — should be adopted. The standard adopted instead was the civil one — of proof on the balance of probabilities. This left the way open for being led to accept a mass of exceptions to the rule until the rule itself was forgotten.

Look again at Macaulay. He understood better than most the risks involved in disturbing the Revolution Settlement and its emphasis on government by Common Law principles. But he was also a strong supporter of limiting hours of work in the factories, of public education, and even of state direction of investment. In 1846, speaking on factory regulation, he commented:

Fifteen years ago it became evident that railroads would soon, in every part of the kingdom, supersede to a great extent the old highways. The tracing of the new routes which were to join all the chief cities, ports, and naval arsenals of the island was a matter of the highest national importance. But, unfortunately, those who should have acted for the nation, refused to interfere. Consequently, numerous questions which were really public, questions which concerned the public convenience, the public prosperity, the public security, were treated as private questions. That the whole society was interested in having a good system of internal communication seemed to be forgotten. The speculator who wanted a large dividend on his shares, the landowner who wanted a large price for his acres, obtained a full hearing. But nobody applied to be heard on behalf of the community. The effects of that great error we feel, and we shall not cease to feel.⁷²

The importance of this illustration is that Macaulay may have had a good point. It seems reasonable to believe that the country would have had a better railway network if the Board of Trade had been able to make the same kind of plans as the officials of Napoleon III later made for France. What is missing here is a wider conception of the public interest. Yes, planning would have given us better railways. It would also have added immensely to the prestige of administrative planning. The civil servants and the special interests would have used the precedent as ruthlessly as later in the century they used the precedent of municipal enterprise.

Government grew until the Great War hardly ever by way of denying the truth of liberalism. In almost every case, it grew because of what are now called arguments from market failure. Non-intervention was to be the rule, it was conceded — but not in this case. “The community” needed to be heard against the private interests. Sometimes, as conceded, there may have been market failure. More often, though, it was manufactured and

then fed to liberals. It is astonishing how seldom they bothered looking beyond the packaged statistics to the truth. Even more astonishing, outside purely commercial matters, they generally accepted the antithesis offered them — on the one hand of an unreformed State unable to provide education and clean water and policing, and on the other a reformed State that could provide them. They ignored the other alternative that was then available, of private action. They were so thoroughly deceived, it is only since the 1960s that historians have begun to uncover the reality.

Take education. Long before the Education Act 1870, the majority of the people in England had access to at least a basic education. Studying the records of accused criminals committed for trial in the late 1830s, R. K. Webb notes that 44.6 per cent were reported as able to read *and* write.⁷³ Of the children maintained in the workhouses of Suffolk and Norfolk in 1838, 87 per cent could read to some extent, and 53 per cent could write. Similarly, in 1840, 79 per cent of mineworkers in Northumberland and Durham could read, and more than half could write.⁷⁴ These figures are taken from surveys of the poorer classes. They compare well with the 1960 literacy figures for Portugal, where less than 60 per cent of the whole population could read or write.⁷⁵

There was in England a vigorous and rapidly expanding private market in education for the poorer classes. Aside from those run by the various religious denominations, few schools had anything like a qualified, salaried staff. Instead, they took an endless number of forms — run by retired naval officers, or foreign refugees, or bankrupted tradesmen, or widows. Some taught a full curriculum of studies comparable to that in the old grammar schools. Others taught just basic literacy and arithmetic. Fees varied from a few pennies to a few shillings per week. Parents chose the best education they could afford, moving their children to better schools as these opened or finances improved.⁷⁶ But, without any prompting by the authorities, or help from them, millions of children were receiving an education of sorts before 1870.

After the beginning of state education in 1870, these private initiatives were gradually killed and then forgotten. First, the School Boards were able to offer subsidised education. Then it was made free. Then, in 1891, it was made compulsory. By the end of the century, the huge red brick schools were being built that still punctuate the older districts of English cities. The School Board Man was beginning his war on truancy. The introduction of a standard curriculum and strict — at times overtly military — discipline was creating a generation for whom the horrors of the Flanders trenches were an unpleasant but not unnatural development from their school days.

And the reason why these private initiatives were killed? Because the more statist special interests wanted it that way. The teaching organisations wanted freedom from what they saw as the degrading need to sell their services on the market, and from the need to compete with the unqualified. The Benthamites wanted a centralised and rational system of education in which they could write the curriculum. Others wanted state education because they feared the effects of an expanding working class over which there was no directing moral authority. Since the facts showed no reason to claim that private effort was failing, the facts were simply misrepresented.

The commonest misrepresentation was to assert that the “school age population” consisted of those aged between five and thirteen, and then to show what percentage of children attended “no school whatever”. This could always be used to support claims of national illiteracy, because the average length of schooling for working class children was not eight years, but just under six years.

In 1869, for example, a Government report found that the school age population of Liverpool was 80,000. Of these, 20,000 were not at school. A further 20,000 were discounted on the grounds that they were getting an education “not worth having”. Extrapolated across the whole country, the headline statistic revealed that half the children of England must be growing up illiterate. No one noticed that reducing the assumed length of schooling to 5.7 years produced a school age population of 60,000 in Liverpool — the same number as were attending a school of some kind.⁷⁷ It was this report that propelled the Education Act 1870 to the statute book.

Again, take policing. Most of the submissions to the 1839 Constabulary Report denied the need for a state police force, and expressed satisfaction with the existing means of protecting life and property. The lack of policing by the State before 1829 did not mean the absence of policing. In England, between 1750 and 1850 a network of private law enforcement agencies grew up to provide services that ranged from the systematic use of newspaper advertising for the return of stolen property, to professional detectives and thief catchers.⁷⁸

A significant contribution was made to law enforcement by private associations dedicated to prosecuting criminals — which was then a private matter. People came voluntarily together to share the costs of prosecution. Between 1744 and 1856 some 450 such associations were set up. By 1830, the larger groups — for instance, the Barnet Association — had effectively become private police forces in their own right, serving communities and responding to local conditions. By no means confined to serving the wealthy, this market-based system proved to be efficient, popular, and responsive to consumer demand.

But Edwin Chadwick, one of the “founding fathers” of the new Civil Service, was responsible for the final draft of the Constabulary Report; and he took care to suppress whatever evidence failed to support his own case for state action.⁷⁹ In the case of sanitation, he not only drafted the final Report in 1842, but had himself appointed Head of the Department set up in consequence of the Report. Because of the lip service paid to liberal ideology, the myth was quietly accepted of a dirty, illiterate, insecure England that had only been rescued by heroic civil servants resisted at every point by the corrupt and the ignorant.

Or look at John Stuart Mill, the “apostle of liberalism”, whose influence on the liberal English mind was second only to Macaulay’s. His service to the cause was decidedly ambiguous. In his essay *On Liberty*, he makes the famous claim that everyone must sometime have read:

[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁸⁰

This is wonderfully eloquent. Paid any close attention, though, it falls immediately apart. Mill’s distinction between “self-regard-

ing” and “other-regarding” acts — a distinction seized on by every one of his critics, from James Fitzjames Stephen all the way down to Mary Whitehouse — is an absurd formulation. It even destroys the case for freedom of speech, which is normally supposed to be the one freedom on which Mill is consistent.

The breach in his argument opens at commercial freedom of speech. His distinction of acts lets him proceed to the conclusion that

trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society. ... [T]he ... doctrine of Free Trade ... rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay.⁸¹

This in turn lets him flirt with socialism without having to admit its incompatibility with freedom in any normal sense. The flirtation, though, does not end in itself. If I incite or procure you to commit a murder, I can be punished as a principal to the act. There is no difficulty here, and Mill admits none. But suppose I persuade you to drink yourself into alcoholism. You ought not to be punished, for you are harming only yourself. Ought I to be punished, for having advised you to harm yourself? No, he says, for that is a self-regarding act:

If people must be allowed, in whatever concerns only themselves, to act as seems best to themselves, at their own peril, they must equally be free to consult with one another about what is fit to be so done; to exchange opinions, and give and receive suggestions. Whatever it is permitted to do, it must be permitted to advise to do.⁸²

But suppose I am a publican, or have some other financial interest in the sale of alcoholic beverages — does this defence cover advertising? That is an activity intimately connected with trade, and “trade is a social act”. Mill continues, with evident perplexity:

The question is doubtful only when the instigator derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil. Then, indeed, a new element of complication is introduced; namely, the existence of classes of persons with an interest opposed to what is considered as the public weal and whose mode of living is grounded on the counteraction of it. Ought this to be interfered with, or not?⁸³

He devotes a page and a half to equivocation, giving no clear answer. He plainly hates the thought on any limitation on his arguments for freedom of speech, but also wants to leave the way open to some public control of economic activity. But, whatever Mill may have thought of advertising, his chosen distinction between acts has allowed a potential distinction between kinds of speech that can be exploited by anyone who cares to read him.

Or take Walter Bagehot, another of the great Victorian liberals. He is famous for his warnings about the dangers of extending the vote to the working classes — for his fears that democracy would be made the means of a systematic plundering of the rich. Yet near the end of his *English Constitution*, he makes virtually the same point as Joseph Chamberlain about unshackling the State:

One of the most curious peculiarities of the English people is its dislike of the executive government. ... By definition, a nation calling itself free should have no jealousy of the executive, for freedom means that the nation ... wields the executive.⁸⁴

And he laughs at the older prejudices:

I remember at the census of 1851 hearing a very sensible old lady say that the ‘liberties of England were at an end’; if Government might be thus inquisitorial, if they might ask who slept in your house, or what your age was, what, she argued, might they not ask and what might they not do?⁸⁵

So far as they really believed in a limited state, the mid-Victorian liberals were behaving like the Sorcerer’s Apprentice. They conjured up the power to do what they wanted, but they neglected to learn the spell for stopping that power from running out of control.

Now, not every liberal was so ambiguous or foolish. The democratic fallacy was repeatedly exposed. The Liberty and Property Defence League has already been mentioned. Scholars like Chris R. Tame delight in uncovering forgotten liberals of the age who understood exactly what was happening, and who cried out against it.⁸⁶ But this is beside the point. The liberals mentioned above were the influential ones. It was they who were most widely read and admired. It was not their intention. To repeat the point, it was not their immediate achievement: they created the pillars of the Victorian liberalism that Reade celebrated in 1872. But, ultimately, they did all that was required to undermine the conservative foundations on which English liberty had rested for centuries, and to send it sliding into oblivion.

That it has not yet reached oblivion says much for the forces of English conservatism. Even now, those objects of Benthamite scorn — the Monarchy, the House of Lords, and the Established Church — remain unabolished. Even now, the Common Law has not been superseded by codification. Even now, England remains one of the two or three freest countries in the world, where no one rots in prison merely for having published unpopular opinions, and where the Courts can occasionally hit back at the masters of a Parliament that is now absolutely supreme to do as the placemen who sit there are directed to vote.

Conclusion: The Prospects for Liberty

When John Major became Prime Minister in November 1990, the prospects for liberty in this country had reached what seemed their lowest point short of actual despotism. The Thatcher Government had done much that was good. It had privatised a mass of state assets, and lifted many of the more destructive barriers to enterprise. It had also stopped the steady rise in Government spending as a share of national income. Its achievement was to stop and even reverse the country’s relative economic decline. But all this had been accompanied by the shredding of the Common Law and Constitution. Outside those areas of national life seen as economically useful, the State was rolling forward like Juggernaut over his worshippers.

And there was almost no intelligent criticism of this in the media. On the one hand were the socialists, whose loudest complaint was against the Government’s positive achievements. On the other were the leaders of the “New Right”. The great revival of classical liberalism over the past two decades had thrown up a generation of activists who knew their economic analysis and nothing else. Let the drains be privatised, they argued, and whatever was happening with police powers and legal procedure could safely be ignored. They would have applauded identity cards, so long as the issuing of them were contracted out in the approved manner. The few libertarians who saw the gathering collapse of what remained were confined to small circulation news letters and pamphlets.

However, when John Major left office in May 1997, everything seemed to have changed. The collapse of Communism was breaking down the old categories of left and right; and libertarians from all traditions were beginning to realise that the enemy was neither capitalism nor socialism, but the bureaucratic corporatism of a “New World Order”. At the same time, the Internet was connecting libertarians and conservatives from all over the

English-speaking world. For a long time, the threat had been international. Now, so too was the response. The small newsletters and pamphlets were suddenly reaching an audience of tens and hundreds of thousands. Individuals who had spent their lives raging in silence against the horrors of the age were beginning to find an international voice. Abuses of power that would once have been misrepresented into nothingness by the controlled media were being revealed and discussed without the smallest chance of censorship.

Looking ahead, the growth of the Internet and of strong encryption technology will not merely spread the various messages of anti-authoritarianism, but will also make it possible for individuals to conceal their assets and activities from surveillance. Already, governments are being forced to contemplate a reduction of their activities, as the taxes begin growing harder to collect.

We may stand at the beginning of another cycle of liberty — not just in England, but in all those parts of the world moulded by or settled from England. All this is far too early to say. But one thing is clear. Unless we can understand the ways in which ideology and material forces work together to maintain an establishment, and how the last period of liberalism grew and flourished and decayed, we can expect little permanence for such liberty as circumstances may be about to enable.

NOTES

1. Throughout this work, I will refer sometimes to Britain, but mostly to England. The reason is that I shall be referring mostly to *English* history, not to Scottish, Welsh or Irish, and to *English* modes of thought. Before 1707, there was no constitutional entity known as Britain; and though during the end of the eighteenth century, the modes of thought I am discussing were often most fully and memorably expressed by Scottish and Irish philosophers, these were for the most part joining in an English debate.
2. Now — April 1998 — when the United Kingdom is plainly on the verge of disintegrating, there seems no point in maintaining the polite fiction that has grown up in the present century of referring to specifically English things as British. For this reason, I only refer to Britain when discussing issues affecting the whole United Kingdom.
3. William Winwood Reade, *The Martyrdom of Man* (1872), Watts and Co., London, 1924, Chapter VI, “Intellect”, p. 418
4. For explicit statements of Reade’s liberalism, see: Human nature cannot be transformed by a *coup d’état*, as the Comtists and Communists imagine. It is a complete delusion to suppose that wealth can be equalised and happiness impartially distributed by any process of law, Act of Parliament, or revolutionary measure. ... [A] government can confer few benefits upon a people except by destroying its own laws (*ibid.*, pp. 417-18).
5. Source: B. R. Mitchell, *Abstract of British Historical Statistics*, Cambridge University Press, Cambridge, 1971, pp. 427-29.
6. *Ibid.*, pp. 336-67, 402.
7. Herbert Spencer, *The Man versus the State* (1884), The Thinker’s Library, No. 78, Watts & Co., London, 1940, “Preface”, p. xi. Accounted one of the greatest sociologists of his age, Spencer’s unmaintained grave in Highgate Cemetery, about six feet from that of Karl Marx.
8. Joseph Chamberlain, speech to the “Eighty” Club [a grouping of Liberal MPs first elected in the 1880 General Election], 28th April 1885; reported in *The Times*, London, 29th April 1885.
9. Spencer, *op. cit.*, p. 19.
10. For a history of the League, see Norbert C. Soldon, *Laissez-Faire on the Defensive: The Story of the Liberty and Property Defence League, 1882-1914*, unpublished PhD thesis, 1969 — copy in the possession of Chris R. Tame. See also Thomas Mackay (ed.), *A Plea for Liberty: An Argument Against Socialism and Socialistic Legislation* (1891), republished by Liberty Classics, Indianapolis, 1981; and Auberon Herbert, *The Rights and Wrongs of Compulsion by the State and Other Essays*, Liberty Classics, Indianapolis, 1978.

10. E. S. P Haynes, *The Decline of Liberty in England*, Grant Richards Ltd, London, 1916, "Introductory", pp. 14-15, 19-20.

11. Public Finance Statistics, United Kingdom, 1855-1938

| Year | Gross Govt Spending (£m) | Net National Income at Current Prices (£m) | % |
|------|--------------------------|--|-------|
| 1855 | 69.1 | 636 | 10.86 |
| 1860 | 69.6 | 694 | 10.03 |
| 1865 | 67.1 | 822 | 7.16 |
| 1870 | 67.1 | 936 | 7.17 |
| 1875 | 73.0 | 1113 | 6.56 |
| 1880 | 81.5 | 1076 | 7.57 |
| 1885 | 88.5 | 1115 | 7.93 |
| 1890 | 93.4 | 1385 | 6.74 |
| 1895 | 105.1 | 1447 | 7.26 |
| 1900 | 193.3 | 1755 | 11.01 |
| 1905 | 147.0 | 1776 | 8.27 |
| 1910 | 167.9 | 1984 | 8.46 |
| 1913 | 192.3 | 2265 | 8.49 |
| 1938 | 909.3 | 4671 | 19.47 |

Source: *Ibid.*, pp. 367-69, 397-99.

12. For an authoritative statement of the lifestyle regulators' creed, see Alweyn Smith and Bobbie Jacobson (eds), *The Nation's Health: A Strategy for the 1990s: a Report from an Independent Multidisciplinary Committee Chaired by Professor Alweyn Smith*, King Edward's Hospital Fund for London, London, 1988.

13. See, for example, Judy Jones, "Top doctor urges legal controls on parenthood", *The Observer*, London, 7th August 1994 — report of how Professor Sir Roy Calne argues "that people in Western nations should have to pass a parenting test and gain a reproduction 'licence' before being allowed to have children".

14. See, for example, T. B. Macaulay (then Secretary of State at War), Speech on the War with China, delivered in the House of Commons on the 7th April 1840:

We may doubt whether it be a wise policy to exclude altogether from any country a drug which is often fatally abused, but which to those who use it rightly is one of the most precious boons vouchsafed by Providence to man, powerful to assuage pain, to soothe irritation, and to restore health. ... We have learned from all history, and from our own experience, that revenue cutters, custom-house officers, informers, will never keep out of any country foreign luxuries of small bulk for which consumers are willing to pay high prices ...

The Miscellaneous Writings and Speeches of Lord Macaulay, Longmans, Green, and Co., London, 1889, pp. 607-08.

15. For the abolition of financial privacy, see Sean Gabb, *The New Tyranny of Global, European and British State Control of Financial Transactions*, Legal Notes No. 23, Libertarian Alliance, London, 1995. See also Sean Gabb, review of William C. Gilmore (ed.) *International Efforts to Control Money Laundering* (Cambridge, 1992), and Rowan Bosworth-Davies and Graham Saltmarsh, *Money Laundering: A Practical Guide to the New Legislation* (London, 1994), published in *Free Life*, London, No. 23, August 1995.

For the reversal of the burden of proof, see J. Enoch Powell, *The Drug Trafficking Act versus Natural Justice*, Legal Notes No. 2, Libertarian Alliance, London, 1987. See also Anthony Furlong and Edward Hume, review of the Proceeds of Crime Act 1995, published in *Free Life*, London, No. 24, December 1995.

16. See, for example, Albert Venn Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (1905), second edition, Macmillan and Co. Limited, London, 1914, Lecture VII, "The Growth of Collectivism".

17. *An Essay Concerning the True Original, Extent, and End of Government* (1690), Chapter II, paragraph 4 — in Peter Laslett's edition (Cambridge University Press, Cambridge, 1960), p. 287. The italics are original.

18. As might be expected, there is some controversy regarding just what Locke meant by this "State of perfect Freedom". I will not give a lengthy analysis of the *Second Treatise*. I will instead refer the reader to the following:

He that will carefully peruse the history of mankind, and look abroad into the several tribes of men, and with indifferency survey their actions, will be able to satisfy himself that there is scarce that principle of morality to be named, or rule of virtue to be thought on (those only excepted that are absolutely necessary to hold society together, which commonly too are neglected betwixt distinct societies), which is not, somewhere or other, slighted and condemned by the general fashion of whole societies of men, governed by practical opinions and rules of living quite opposite to others.

John Locke, *Essay Concerning Human Understanding* (also published in 1690), Book I, Chapter ii.

There is no absolute morality. There are those rules "that are absolutely necessary to hold society together". Any that cannot be shown to be necessary may be abolished as restraints on freedom.

Locke is an inconsistent philosopher. The empiricism of his *Essay* not merely conflicts with, but wholly undermines the natural law position adopted in his *Second Treatise*. But tolerance is more a state of mind than an opinion; and it is, I think, legitimate in this case, to quote from the *Essay* to expand on a statement made in the *Second Treatise*.

19. See, for example:

... Tyranny is the exercise of Power beyond Right, which no Body can have a Right to. And this is making use of the Power any one has in his hands; not for the good of those who are under it, but for his own private separate Advantage. When the Governour, however intituled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservations of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion.

Second Treatise, Chap. XVIII, 199, pp. 416-17.

... Revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient Laws, and all the slips of humane frailty will be born by the People, without mutiny or murmur. But if a long train of Abuses, Prevarications, and Artifices, all tending the same way, make the design visible to the People, and they cannot but feel, what they lie under, and see, whither they are going; 'tis not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands, which may secure to them the ends for which Government was first erected ...

ibid., Chap. XIX, 225, p. 433.

Compare this, by the way, with the following:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

From Thomas Jefferson, *The Declaration of Independence of The United States of America*, 1776,

It is hard not to accept that Jefferson had the text of Locke open before him as he drafted this most powerful of manifestos, or at least had a clear recollection of it in his mind.

20. See, for example, *The Country Justice*, a manual of law published in 1661:

The common laws of this realm of England, receiving principally their grounds from the laws of God and nature (which law of nature, as it pertaineth to man, is also called the law of reason), and being for their antiquity those whereby this realm was governed many hundred years before the Conquest.

quoted, J. W. Gough, *Fundamental Law in English Constitutional History*, Oxford University Press, Oxford, 1958, pp. 140-1.

21. See, for example:

For a Custome taketh a beginning and groweth to perfection in this manner: When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a *Custome*; and being continued without interruption time out of mind, it obtaineth the force of a *Law*.

Sir John Davies, *Irish Reports (Les Reports des Cases & Matters en Ley, Resolves & adjudges en les Courts del Roy en Ireland. Collect & digest per Sir John Davies, Chivaler, Attorney del Roy en cest Realm*, written 1612, published 1674, quoted, J. G. A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, Cambridge University Press, Cambridge, 1957, p. 33.

22. ... [W]hen by long Succession of Time, the Conquered had either been incorporated with the conquering People, whereby they had

worn out the very Marks and Discriminations between the Conquerors and Conquered; and if they continued distinct, yet by a long Prescription, Usage and Custom, the Laws and Rights of the conquered People were in a manner settled, and the long Permission of the Conquerors amounted to a tacite Concession or Capitulation, for the Enjoyment of their Laws and Liberties.

Sir Matthew Hale, *The History of the Common Laws of England*, written 1676, second edition published 1716, quoted, Pocock, *op. cit.*, p. 179.

23. According to Pocock,

[t]he typical educated Englishman of this age, it seems certain, a vitally important characteristic of the constitution was its antiquity, and to place it to a very remote past was essential in order to secure it in the present.

op. cit., p. 47.

See also:

Should we allow our laws to have an uncertain Original, I fear that some people would of themselves fix their original from William I, and if that should be taken for granted, I don't know what ill use the Champions of Absolute Monarchy may be inclined to make of such a concession.

Douglas, *op. cit.*, pp. 119-20.

24. See, for example, Francis Bacon, who served under James I as Lord Chancellor:

Let judges also remember that Salomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.

Essays (second edition, 1612), No. LVI, "Of Judicature" — edition quoted published by Oxford University Press, Oxford, 1911, p. 164

25. For an exception to, and an elaboration on, this statement, see Sean Gabb *Henry Vane, 1613-1662: America's First Revolutionary*, Libertarian Heritage No. 8, Libertarian Alliance, London, 1992.

26. Thomas Babington Macaulay, *History of England from the Accession of James II.* (1848-60) Everyman Edition, J. M. Dent and Sons Ltd, London, 1910, volume one, p. 129 — or, in any other edition, the eleventh paragraph of Chapter II.

27. All quoted by Buckle, *op. cit.*, Volume III, Chapter. IV, "An Examination of the Scotch Intellect During the Seventeenth and Eighteenth Centuries" — in my edition Volume III, pp. 254-5. Admittedly, these are Scottish examples. But they can stand for the more extreme of the English sectaries.

28. Pocock, *op. cit.*, p. 149.

29. Thomas Hobbes, *Leviathan: or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (1651), Chapter XXXVI, "Of Civil Laws" — in my edition (George Routledge and Sons, London, 1885), p. 124.

30. *Ibid.*, Chapter XVIII, "Of the Rights of Sovereigns by Institution", p. 85.

31. Royalists of the school of Hyde, for instance, remained common lawyers in their predilections and consequently believers in the ancient constitution; the limit of their political beliefs was the assertion that a freely functioning royal prerogative formed an essential part of the constitution, and the limit of their use of history was the attempt to find precedents proving its existence.

Pocock, *op. cit.*, p. 148.

32. The modern edition of Filmer's works is *Patriarcha and Other Political Works of Sir Robert Filmer*, edited by Peter Laslett, Oxford University Press, Oxford, 1949.

33. See, for example, Chapter Three, section 29, "The King was never Master of the Soil" in Algernon Sidney, *Discourses Concerning Government* (1698), pp. 493-97 of the edition published by Liberty Classics, Indianapolis, 1990.

34. For example,

... the Spartans desiring only to continue free, virtuous, and safe in the enjoyment of their own territory, and thinking themselves strong enough to defend it, framed a most severe discipline, to which few strangers would submit. They banished all those curious arts, that are useful to trade; prohibited the importation of gold and silver; appointed the Helots to cultivate their lands, and to exercise such trades as are necessary to life; admitted few strangers to live amongst them; made none of them free of their city, and educated their youth in such exercises only as prepared them for war. I will not take upon me to judge whether this proceeded from such a moderation of spirit, as placed felicity rather in the fullness and stability of liberty, integrity, virtue, and the enjoyment of their own, than in riches, power, and dominion over others ...

ibid., Chapter Two, section 22, "Commonwealths Seek Peace or War according to the Variety of their Constitutions", pp. 203-4.

35. *Ibid.*, Chapter Two, sec. 24, "Popular Governments are less subject to Civil Disorders than Monarchies; manage them more ably, and more easily recover out of them", p. 229. See also "Foreword" by Thomas G. West:

[A]lthough Locke was more often quoted, the core of Sidney's thought probably represents better than Locke's the spirit of American republicanism (p. XXVII).

Certainly, no edition of Locke's *Second Treatise* appeared in America between 1773 and 1937 — Locke, *op. cit.*, Laslett's Introduction, p. 125.

36. Gilbert Burnett, *History of His Own Time* (1723-34), Book IV.

37. There were three main persecutions during the half century following the Glorious Revolution of 1688 — in 1699, in 1707, and in 1726. In this last, more than 20 molly houses were watched and raided. The likeliest open places were patrolled. There was a spate of prosecutions for bugery and various less serious Common Law offences.

In 1726, one William Brown was entrapped while cruising in Moorfields. Asked at his trial what could have led him to make advances to the *agent provocateur*, he replied:

"I did it because I thought I knew him, and I think there is no crime in making what use I please of my own body"

Select Trials for Murders, Robberies, Rapes, Coining, Frauds and Other Offences at the Sessions House in the Old Bailey, London, 1742, Volume 3, pp. 39-40; quoted, Alan Bray, *Homosexuality in Renaissance England*, Gay Men's Press, London, 1982, p. 114.

Had the Jury been composed of Lockceans, he ought surely to have been acquitted, if not carried shoulder high into the street. The City Jurymen were unimpressed; and Brown was sentenced to stand in the pillory.

38. Translated from Alexis de Toqueville, *L'Ancien Régime*, Livre II, Chapitre IV, Oxford University Press edition of 1969, p. 64.

39. Michael J. Braddick, *The Nerves of State: Taxation and the Financing of the English State, 1558-1714*, Manchester University Press, Manchester, 1996, p. 163.

40. For a good account of the Excise Crisis, see John Morley, *Walpole*, "Twelve English Statesmen", Macmillan, London, 1890, 166-82.

41. *Entick v Carrington* (1765), 19 *State Trials*, at col. 1073. Oddly enough, such warrants still are partially illegal — despite the provisions of the Police and Criminal Evidence Act 1984, the Public Order Act 1986, the Security Services Act 1989, and a multitude of other recent statutes.

42. David Hume, *History of England* (1762), Vol. V, p. 280.

43. On this point, see Oliver Goldsmith:

There is scarcely an Englishman who does not almost every day of his life offend with impunity against some express law, for which in a certain conjuncture of circumstances he would not receive punishment. Gaming-houses, preaching at prohibited places, assembled crowds, nocturnal amusements, public shows, and an hundred other instances are forbid and frequented. These prohibitions are useful; though it be prudent in their magistrates, and happy for their people, that they are not enforced, and none but the venal or mercenary will attempt to enforce them.

Oliver Goldsmith, *Citizen of the World* (1765), quoted, Dicey, *op. cit.*, Lecture V, "The Period of Old Toryism", p. 75.

44. Opposition to a state police force was as firm as opposition to a general excise — and for the same reason, that it would have required the existence of powers alien to the Common Law. See William Paley:

The liberties of a free people, and still more the jealousy with which those liberties are watched, and by which they are preserved, permit not those precautions and restraints, that inspection, scrutiny and control, which are exercised with success in arbitrary governments. For example, neither the spirit of the laws nor the people, will suffer the detention and confinement of suspected persons, without proofs of their guilt, which it is often impossible to obtain; nor will they allow that masters of families be obliged to record and render up a description of the strangers or inmates whom they entertain; nor that an account be demanded, at the pleasure of the magistrate, of each man's time, employment, and means of subsistence; nor securities to be required when those accounts appear unsatisfactory or dubious; nor men to be apprehended upon the mere suggestion of idleness or vagrancy; nor to be confined to certain districts; nor the inhabitants of each district to be made responsible for one another's behaviour: least of all will they tolerate the appearance of an armed force, or the military law, or suffer the streets and public roads to be patrolled by soldiers; or, lastly, entrust the police with such discretionary powers as may make sure of the guilty, however they involve the innocent. These expedients, although arbitrary and rigorous, are many of them effectual: and in proportion as they render the commission or concealment of crimes more difficult, they subtract from the necessity of severe punishment.

William Paley, *Principles of Moral and Political Philosophy* (1785), 17th edition 1809, Vol. II, pp. 295-97.

45. For perhaps the most developed expression of this view, see Chapter I of Macaulay's *History*, *op. cit.*, and the noble passage that concludes Chapter X.
46. For those interested in following this case further, its full citations can be found in the notes to Chapter 4 of William H. McNeill, *Plagues and Peoples*, Basil Blackwell, Oxford, 1977.
47. Edmund Burke, *Reflections on the Revolution in France* (1790), Everyman edition, J. M. Dent and Sons, Ltd, London, 1910, p. 84.
48. Edward Gibbon, *History of the Decline and Fall of the Roman Empire* (1776-87), Everyman edition, J. M. Dent and Sons Ltd, London, 1910, Volume Four, Chapter XLV, pp. 443-44.
49. Sir William Blackstone, *Commentaries on the Laws of England* (1765), quoted, Dicey, *op. cit.*, pp. 71-72.
50. One defect worthy of particular mention was the survival in Common Law procedure of what may be described as torture. If a man accused of a felony refused to plead guilty or not guilty and to be tried "by God and my country", he could not be tried. To make him plead, he was subjected to the *peine forte et dure*. His wrists and ankles were shackled, and he was suspended by these from the walls of a dungeon. He was fed only a scrap of bread and a mug of dirty water. Every day, a new iron weight was placed on his chest. So he continued until he agreed to enter a plea in court or until he died. Many preferred death, because, by dying unconvicted, they saved their families from the forfeiture of assets that followed a conviction for felony.
- This disgraceful practice was not abolished until 1771, after which a refusal to plead was to be interpreted as a plea of not guilty.
51. See Dicey, *op. cit.*, Lecture VIII, "Period of Collectivism".
52. John Stuart Mill, *Bentham* (1838), in Mary Warnock (ed.), *Utilitarianism, On Liberty, Essay on Bentham, together with Selected Writings of Jeremy Bentham and John Austin*, Fontana, London, 1962, p. 107. This work also contains the first part of Bentham's *Introduction to the Principles of Morals and Legislation*.
53. John Wade, *Extraordinary Black Book*, 1816, pp.488-9, quoted, W. D. Rubinstein, "The End of 'Old Corruption' in Britain", *Past and Present*, London, Number 101, November 1983, p. 66.
54. *Ibid.*.
55. Quoted, Burke, *op. cit.*, p. 12.
56. See, for example:
A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve"
Burke, *op. cit.*, pp. 19-20.
57. Rather than quote Burke again, I turn to Edward Gibbon, notorious before the Paris mob ran wild as an enemy of superstition and an opponent of the slave trade. Writing in 1791 to his friend Lord Sheffield, who had just spoken in Parliament against abolishing the slave trade, he retracted thus:
In the slave question, you triumphed last session, in this you have been defeated. What is the cause of this alteration? If it proceeded only from an impulse of humanity, I cannot be displeased, even with an error; since it is very likely that my own vote (had I possessed one) would have been added to the majority. But in this rage against slavery, in the numerous petitions against the slave trade, was there no leaven of new democratical principles? no wild ideas about the rights and natural equality of man? It is these I fear. Some articles in newspapers, some pamphlets of the year, the Jockey Club, have fallen into my hands. I do not infer much from such publications; yet I have never known them of so black and malignant a cast. I shuddered at Grey's motion; disliked the half-support of Fox, admired the firmness of Pitt's declaration, and excused the usual intemperance of Burke.
Letter to Lord Sheffield, 30th May 1792; in *Autobiography of Edward Gibbon as Originally Edited by Lord Sheffield* (1796), Oxford University Press, London, 1907, pp. 277-78.
Thousands, or even tens of thousands, of similar conversions took place within the English political class after 1790.
58. For an account of the treason trials of 1793, see Sean Gabb, *Thomas Erskine: Saviour of English Liberty*, Libertarian Heritage No. 1, Libertarian Alliance, London, 1990.
59. The three relevant essays were published in *The Edinburgh Review* — "Mill on Government" (March 1829), "Westminster Reviewer's Defence of Mill", (June 1829), "Utilitarian Theory of Government" (October 1829); all republished in Macaulay (1889).
60. See his speech in the House of Commons on the People's Charter, 3rd May 1842:
My conviction is that, in our country, universal suffrage [one of the Chartists' demands] is incompatible, not with this or that form of government, but with all forms of government, and with everything for the sake of which forms of government exist; that it is incompatible with property, and that it is consequently incompatible with civilisation.
Macaulay (1889), p. 626.
61. See G. M. Young, *Portrait of an Age*, Oxford University Press, Oxford, 1936, p. 102.
62. Speech in the House of Commons, 2nd March 1831, Macaulay (1885), p. 492.
63. Quoted, Rubinstein, *op. cit.*, p. 76.
64. *Ibid.*, p. 65.
65. *Ibid.*, p. 71.
66. Rubinstein, *op. cit.*, p. 83, n. 65.
67. See James Buchanan and Gordon Tullock, *The Calculus of Consent*, University of Michigan Press, Michigan, 1962. See also: Gordon Tullock, *The Vote Motive*, Institute of Economic Affairs, London, 1976; and James Buchanan, *The Economics of Politics*, Institute of Economic Affairs, London, 1978.
68. Mancur Olson, *The Logic of Collective Action*, Yale University Press, Connecticut, 1964, and *The Rise and Decline of Nations*, Yale University Press, Connecticut, 1982.
69. *The Constitutional History of England*, A Course of Lectures Delivered by F. W. Maitland, Cambridge, University Press, 1908, "Period V: Sketch of Public Law at the Present Day (1887-8)", p. 501. For a full discussion and attack on the growth of delegated legislation, see: Lord Hewart of Bury (Lord Chief Justice of England), *The New Despotism*, Ernest Benn Limited, London, 1929.
70. T. B. Macaulay "Essay on Southey's Colloquies" (January 1830), reprinted in his *Critical and Historical Essays*, "Everyman" edition, J. M. Dent and Sons, London, 1907, Volume II, p. 224.
71. Quoted, Lionel Robbins, *The Theory of Economic Policy in English Classical Economy*, Macmillan, London, 1952, p. 154.
72. Speech in the House of Commons, 22nd May 1846, Macaulay (1885), pp. 719-20.
73. R. K. Webb, "Working Class Readers in Early Victorian England", *The English Historical Review*, 1950 — cited, E. G. West, *Education and the State: A Study in Political Economy*, Institute of Economic Affairs, London, 1965, p. 128.
74. West, *op. cit.*, pp. 129-30.
75. *Ibid.*.
76. *Ibid.*, p. 169.
77. *Ibid.*, p. 146.
78. Stephen Davies, *Economic Affairs*, The Journal of the Institute of Economic Affairs, Vol. 7, No. 6, August/September 1987.
79. Sir Leon Radzinowicz, *A History of English Criminal Law*, Stevens, London, 1968, Vol IV, pp. 259-60.
80. John Stuart Mill, *On Liberty* (1859), published with other essays in the "Everyman" edition, J. M. Dent and Sons, London, 1972, pp. 72-73 (Chapter I, "Introductory").
81. *Ibid.*, p. 150 (Chapter V, "Applications").
82. *Ibid.*, p. 154.
83. *Ibid.*.
84. Walter Bagehot, *The English Constitution* (1867), Fontana, London, 1963, p. 262.
85. *Ibid.*, pp. 262-63.
86. When it is published, Mr Tame's *Bibliography of Freedom* will become an instant classic. It lists thousands and thousands of works by liberals that cover every subject. It goes far beyond the Locke-Smith-Bentham-Mill narrative of other writers. A separate work will give quotations from these works, showing how there were liberals who were not fooled by the statist arguments.