# Historiography, Empire and the Rule of Law

## Imagined Constitutions, Remembered Legalities

Ian Duncanson

ROUTLEDGE
a GlassHouse Book

# Historiography, Empire and the Rule of Law

## Imagined Constitutions, Remembered Legalities

Ian Duncanson



Routledge
Taylor & Francis Group
a GlassHouse book

First published 2012
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

A GlassHouse Book

*Routledge is an imprint of the Taylor & Francis Group, an informa business*



*British Library Cataloguing in Publication Data*
A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*
Duncanson, Ian.
Historiography, empire, and the rule of law : imagined constitutions, remembered legalities / Ian Duncanson.
p. cm.
1. Rule of law. 2. Legal positivism. 3. Historiography. I. Title.
K3171.D86 2012
340'.11—dc22

2011013938

ISBN 13: 978–0–415–67886–5 (hbk)
ISBN 13: 978–0–203–80244–1 (ebk)

Typeset in Times New Roman
by Keystroke, Station Road, Codsall, Wolverhampton


Printed and bound in Great Britain by
TJI Digital, Padstow, Cornwall

# Acknowledgements

Too much is owed to too many people to mention all of them. For encouragement of my earlier work, I owe a debt to the late Sir Neil MacCormick, MEP and Professor of Jurisprudence at the University of Edinburgh. More lately, I thank colleagues and friends at the Law and Society Association of Australia and New Zealand, most especially Luke MacNamara and Rick Moer of the Legal Extensions Program at the University of Wollongong. David Sugarman of the University of Lancaster proved an encouragement. Wes Pue, at UBC has been a great support, both at a distance and in providing me with a home at Green College, UBC, electronic facilities and access to the university's excellent libraries. Wes provided remarkable light in what were, for me, some dark times. The Sociolegal Research Centre at Griffith University has funded conference travel and other resources.

Phillip Darby, of the Institute for Postcolonial Studies, University of Melbourne, and my doctoral supervisor, provided both enthusiastic reinforcement of what I was attempting whilst restraining some of my quirkier ideas on numerous occasions over sherry on his delightful roof garden overlooking the Institute. I was very proud to have such a learned and humorous scholar undertake supervision of my work.

I owe most to my friend, colleague and wife, Judith Grbich, a genius with titles and technicalities, and with whom I have had long discussions about intellectual matters concerning our work over the years. Scholarly impasses, after many hours of conversations were always resolved with, "write what you think, remembering that everything is open to dispute and nothing is final": a timely injunction in the gloomy and sometimes oppressive era of the modern university.

From my late son, I learned that great things can be gained in the direst circumstances.

# Foreword

These are perilous times – perhaps not unlike those times that Thomas Paine characterized as trying men's souls. But they cannot be tackled with hollow and empty categories. States of exception are apparently everywhere and permanent. Torture is no longer anathema to a liberal legal order, but regulated within the horizon of a 'ticking bomb'. National sovereignty is reasserted by progressives as the response to rapacious capitalism. The political subject, if she survived the many proclamations of her demise, is reduced to an opaque 'figure' of political philosophy. Empire, we are told, is an infinite order with no 'outside'. Much of this inanity in political and legal thinking could have been avoided if there was some attention to historical specificity when thinking law, the subject, sovereignty, or Empire. That is the major corrective offered by this book.

Empire was an enterprise through which imperial states learnt to govern themselves by governing others. With close attention to the British Empire, and the English in particular within that formation, this book examines how imperial law was a process of *learning-to-be*. The book asks how subjects were constituted and re-constituted through education and legislation – in the metropolis *and* the outer reaches of empire. The result is an elaborate and historically rich account of how statecraft is contingent on the rule of law. Taking up classic concerns of jurisprudence and legal theory – Duncanson shatters their torpidity by deploying Lacan and Foucault to explain how legality constitutes the subject. At the heart of imperial legality is a constitutional imaginary folded into the educative aspirations of legislation. This process is not only of significance to the study of the British Empire, but also to all postcolonial polities constituted by that order of rule. This book is thus essential reading for any scholar or student of empire and imperialism, constitutions and constitutionalism, or utilitarianism, liberalism, and the rule of law.

Stewart Motha
Reader in Law, Kent Law School
University of Kent, UK

# Preface

> For really I think that the poorest he that is in England hath a right to live as the greatest he; and therefore truly sir, I think it's clear that every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to a government that he has not had a voice to put himself under. I should doubt whether I was an Englishman or no, that I should doubt of these things.
>
> Colonel Rainsborough, in ASP Woodhouse (ed), *Puritanism and Liberty: Being The Army Debates 1647–9, from the Clarke Manuscripts*, London, Dent (1938), 53.

> I deplore the neglect of Civil War battlefields. I'd really like to see Naseby commemorated as Bosworth is. It's incomparably more significant. Bosworth was just a change of dynasty. Naseby changed the world men and women lived in.
>
> Diane Purkiss, *The English Civil War: A People's History*, London, Harper (2006), Q&A section, 4.

Very little in the histories of political communities or the means of their constitution as such has a clear beginning, and historiography which suggests otherwise strays away from the controversies endemic to the discourses of the humanities and sciences into the land of mythology and fantasy. Nevertheless, we are familiar from the work of Thomas Kuhn with the idea of *moments* in which, for some scholars and others, different ways of seeing, living and acting in the world suddenly seem possible.[1] Establishing the plausibility of such differences is seldom unaccompanied by bitter, occasionally violent, resistance from those who prefer the *status quo*, and there is no iron law of progress to determine whether or not they are correct to do so.

1 Thomas Kuhn, *The Structure of Scientific Revolutions*, 2nd edn, Chicago, IL, University of Chicago Press (1970).

In political and constitutional affairs, seventeenth century England was a moment in which differences were glimpsed. It has to be contrasted with other events in western history. As Purkiss observes in the opening quotation, whilst the Battle of Bosworth, (famous from the closing scenes of Shakespeare's *Richard III*), replaced the dynasty of York with that of the Tudors; and, we might add, whilst treaties like those between Protestant and Catholic powers at Augsburg (1555) and Westphalia (1648) on mainland Europe also actually changed the constitutional practice of monarchy little, the politico-religious outcomes in seventeenth century England altered, in Kuhn's term, the paradigm through which politics began to be practiced. The European mainland treaties established that dynasties chose the religious practices to be followed by their subjects and to respect each others' choices. Although some international lawyers trace the modern state system, at least to Westphalia, this is, we shall see, contested. The dynasties were not states in any modern sense. By contrast with the events that led to them, the period from the English Petition of Right of 1628, through the Parliamentary victories at Naseby and Marston Moor (which Purkiss mentions elsewhere), to its Revolution of 1688 created, or at least deployed, a new vocabulary in which government could and would everywhere eventually be conceived. However miserably put into practice, by 2000, popular sovereignty and equality before the law were seldom denied in theory. Seventeenth century English Whigs, military and civilian, remembered, and some had called for, popular sovereignty, but even those who by 1688 shuddered at the prospect, had created a language in which such an idea could be thought.

And here we encounter several puzzles. The participants in the revolutions settled by the English, abetted by the southern Scots, and followed, as we shall see, a century later by the Americans, saw themselves, so far as their rulers were concerned, as revolutionaries in the old sense of returning to the past – the English to the Saxon freedoms of Tacitus' German imaginings; the Americans to the life of the freeborn Englishman. Their revolutions were actually breaks from the past. New, innovatory and potentially encompassing constitutions emerged, but in the language of the old. The revolutions of France and Russia, as Hannah Arendt has commented,[2] were revolutions in the new sense, aspirations to a new utopian beginning, which, in the event, however, led back to the Bourbon-like absolutism of the Terror and the Napoleons in France, and to the Romanov-like Leninism and Stalinism of post-1917 Russia.

A second puzzle: Westphalia did not, if we follow Teschke,[3] produce states, but merely endorsed cumbrous dynasties, but what did the Glorious Revolution of 1688 produce for England, soon, after the Union, to become Great Britain? John Brewer's is a nice title,[4] but it does not, in my view, reflect the constitutional

2 Hannah Arendt, *On Revolution*, Harmondsworth, Penguin Books (1952).

3 Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations*, London, Verso (2003).

4 John Brewer, *The Sinews of Power: War, Money and the English State 1688–1783*, London, Unwin Hyman (1989).

aspirations of Britain's contemporary rulers: security of landed title, fiscal and commercial efficiency and the economical possibility to "balance" Europe to avert threats to these accomplishments, just as they balanced government power at home with the gentlemanly apparatus of Parliament and common law, an oligarchy in perpetual negotiation with its own factions and with the common people, but not – god forbid – a state, with all its connotations of overbearing power. Arthur Cash has neatly encapsulated the widespread mistrust of George III's centralizing ministries of the 1760s and its connection with American secession.[5] In Great Britain, the Wilkes affair may have been one of the last gasps of the common law's protection of white male, and potentially others' rights. His use of the courts to resist executive power was an inspiration to the supporters of the Americans.

However, while an important concern in the text that follows is the English disruption of Absolutism in the seventeenth century and the social, religious and cultural accommodations prerequisite to preserving the gains it achieved, another concern is the corrosive yet not fatal impact of empire on civil rights. And this is really the final puzzle my text pursues and it can do so only adequately in the wake of much more profound historical research, gesturing, perhaps, to future assessments of the trajectory of the American empire anticipated by Benjamin Franklin[6] in the 1770s, as it expanded through first nation lands, continental territory claimed by Mexico, and across the Pacific to Hawai'i and the Philippines.

The question for the future is about what I have termed the corrosion effected by empire: Chalmers Johnson has termed it "blowback".[7] Blowback, as Johnson develops the idea in a number of books, accompanies the endless wars during which empires are frequently established, and whose techniques and justifications rebound, through habits of conquest and constant vigilance against resistance, upon their origin, the "home" country.[8] James Bryce long ago distinguished two kinds of empire.[9] In one, like the Roman and perhaps modern equivalents, an ultimately futile geographical, cultural or economic contiguity is sought. The conqueror seeks a form of assimilation important to itself and in a classical register of power tries to persuade the disempowered that what the powerful want, they want, too.[10] In another form, the British Raj, in Bryce's view, the imperial power seeks merely to rule, generally for reasons of trade and profit and abandons the effort when it perceives the cultural or commercial returns to be insufficient. Bryce

5 Arthur Cash, *John Wilkes: The Scandalous Father of Civil Liberty*, New Haven, CT, Yale University Press (2006).

6 Richard Immerman, *Empire for Liberty: A History of American Imperialism from Benjamin Franklin to Paul Wolfowitz*, Princeton, NJ, Princeton University Press (2010).

7 Chalmers Johnson, *Blowback: The Costs and Consequences of American Empire*, New York, NY, Henry Holt (2000).

8 Daniel Ross, *Violent Democracy*, Cambridge, Cambridge University Press (2004).

9 James Bryce, *The Ancient Roman Empire and the British Empire in India*, New York, NY, Elibron Classics (1914, reprinted 2005).

10 Steven Lukes, *Power: A Radical View*, London, Palgrave Macmillan, 2nd edn (2005); Daniel Beland, Review of Lukes, July/August, *Canadian Journal of Sociology On-Line* (2006).

would have been unsurprised by Great Britain's abrupt and largely unsentimental departure from the sub-continent in 1947.

The final puzzle the text explores – and here I can in part simply generalize and signal a trend to which many exceptions may be found. Whilst the Americans experimented with the new ways envisaged by Wilkes to balance the constitutional power of executive government by judicial means, English and Scottish courts became increasingly conservative and retiring.[11] Nevertheless, and this is why I should like to see the study of social ordering, including law, broadened, a new avenue was constructed by which the governed many could access and influence the manner of their governance, connected with law in its ordering effect, yet disconnected by an increasingly authoritarian and positivist notion of law. The participatory notion of coming to order as it developed in, say, the institutions of municipal government, locally directed policing and, above all, in education, had more in common with the spirit of the early modern Whigs than with either the command/sovereign conceptions of law or with the reaction to them. The tenor of the civil war debates, after all, was not that of smashing and beginning afresh, a Jacobin or Bolshevik imperative, but rather one of augmenting government and increasing participation. Radical politics by the nineteenth century saw neither revolution nor litigation, but participation, as the route toward change and they had a two-century tradition of discussion and action to guide them.

11 Although not uniformly so. Judges were indulgent to large landowners, allowing creative re-drawing of loan contracts secured on estates so as to lower interest rates if the contractually agreed rate seemed to them unreasonably high. See David Sugarman and Ronnie Warrington, Land Law, citizenship and the invention of "Englishness": the strange world of the equity of redemption, in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property*, New York, NY, Routledge (1996), ch 6. Such creativity was not generally extended to other borrowers.

# Contents

Chapter 1

# The themes introduced

## Law, the subject, sovereignty and certainty

We live in the twentieth and twenty-first centuries in times like those which Thomas Paine described as trying men's souls.[1] Our world is one of perpetual emergency, pointless wars, invasions justified by deceptions and accompanied by imprisonment without trial and torture. The literature is large and growing. Paine was writing during the American Revolution, a period in which all political categories, law, the subject of politics and empire were undergoing the changes outlined in the preface, and the resistances to them. The categories of political, including imperial, practice, subjectivity and law were interwoven. And, to continue the spinning metaphor, important sub-threads will become apparent. The British Empire, as Paine was writing, had already entered what many historians have seen as its second, and more authoritarian phase. One inquires, historically, in a kind of dialectic. We find our object inevitably from a perspective, with particular motivations. Yet if we are narrativists of an open, but disciplinary kind rather than writers of myths and legends, the object of inquiry assumes not simply its own integrity, as well as a lesson for ourselves. In Paine's world we find much of relevance to our own, if we are looking for it.

After the end of the Seven Years' War, in 1763, the empire of Great Britain was increasingly, if unrealistically seen as one of conquest and occupation, by the inept new ministries which took office shortly after the accession of George III. There were, of course, slaves in British America, and Britain was a major, perhaps *the* major trafficker in Africans destined to labor in the Americas. But white men, at least, had permitted themselves to believe that in the Atlantic world, there existed only free-born Englishmen, loyal subjects of the Crown, but each more or less self-governing through their legislatures and courts, whether those institutions were in Britain, Massachusetts, Pennsylvania, the Caribbean or elsewhere. On the one hand, Great Britain's invincibility seemed to have been proved everywhere on the globe, from Plessey in Bengal, to Quebec in Canada. Yet this is the material from which paranoia is constructed. Success had been achieved, but as constitutional

1 Thomas Paine, The Crisis Number 1, in Bruce Kuklick (ed), *Thomas Paine: Political Writings*, Cambridge, Cambridge University Press (2000), 41.

law at that time required, the new monarchy necessitated a new government, one, of course confining the monarch, but at the same time requiring his "confidence", as it was put. Lord Chatham, Pitt the Elder, an experienced statesman who had overseen the Seven Years' War, was replaced by, for the most part, men of little experience and less acumen.

The threat from the defeated European Catholic powers, but not only them, as perceived in London by George's new ministries, seemed to require a consolidation of imperial government. India provided a model. Thanks to Sir Robert, later, Lord Clive, millions of Indians had fallen under British rule – by the East India Company, to be sure, but the Company was chartered under English law and was therefore technically subordinate to the Westminster Parliament.[2]

The environment of the free-born Englishman, heir to the liberties of person and property achieved in the seventeenth century, began to disintegrate, to appear to be a danger, again from a London perspective, a London of new ministries under the new king. Colonists and colonial subjects, American, Indian or West Indian, now began to be considered, from London, as naturally subordinate to Westminster sovereignty. Sub-continental Indians were clearly not suited to self-government, so why should Americans demand it for themselves? There was certainly emergency, as Paine wrote: London waited for resurgence of French and, to a degree, Spanish power.

The Americans, whom Paine hoped by his writing to help constitute as united, faced a bleak defeat until the successful intervention of France and Spain on their behalf. Ironically, this intervention was an outcome that had led London into its vigorous assertion of Westminster sovereignty in the first place. Another way of looking at events is to see, as a number of contemporaries did, the first empire as not really an empire at all.[3] Many Scots, English Whigs, and prominent Americans later associated with the move to independence, saw a confederation whose center of gravity would in time move to the larger land. Many British rulers after 1763, on the contrary, began to wish for a more centralized form of empire. A feature of empire proper, I shall argue, or at least empire in the European tradition, is constant paranoia. If the possession it represents – whether outright occupation or dominance in the form of economic exploitation – is not threatened with seizure from without, it is faced with disintegration from independence movements within. Only a strong sovereign can withstand the constant emergency. It is where s/he emerges from in the form of strong executive government and lack of constitutional or civic restraints. Even in the United States, where, as we shall see, Hannah Arendt considers sovereignty in the old sense to have been abolished with the repairs to the 1688 Whig constitution effected by the new Republic in the

2 See Nick Robins, *The Corporation that Changed the World: How the East India Company Shaped Modern Multinationalism*, London, Pluto Press (2007).

3 See David Armitage and Michael Braddick (eds), *The British Atlantic World 1500–1800*, London, Palgrave Macmillan (2009).

1780s, some modern commentators have warned of the dangers of overweening central executive power. The best-crafted documents have, as we know from recent memory, not protected us from executive action sanctioning war and torture in "civilized" countries, or at their behest.

White governments in many parts of the world have supported, adopted or reverted to what I have elsewhere termed meta-legal sovereignty, an office *of* the law, but somehow not *within* the law. I see this idea as bogus and implausible from a Whig/liberal position, but also, of course dangerous. A Hobbesian/Benthamite sovereign that is antecedent to the law, whose will the law is, should, I will argue, be regarded as a preposterous barbarity, a lunacy for which only a person who would buy the Eiffel Tower from a man in a pub would fall. But we saw apparently intelligent prime ministers and presidents lining up to do the precise equivalent of that prior to Gulf War II and the faltering intervention in Afghanistan. It is this time that tries men's souls in which I write. I have written in this book about the English subject – had I been Canadian, Australian, or US-American, I would no doubt have written about those subjects and perhaps much the same could have been said about any of them. The English subject, to put it in a simplistic way that I shall later qualify, exists as a culturally constituted artifact – a product, as Locke puts it, of education – and as a legal subject, a being-subject, as Bentham sees it, of the will of the sovereign. Neither constitution can be separated, but as will be clear, my view is that a pre-domination of the subject by the will of the sovereign allows least scope for participation and change. Nor does it, I believe, permit a progressive concept of legality.

On the issue of times that try men's souls, I can cite Matthew Sharpe:

> The only antidote for the increasing framing of law and politics in the vague and anxiety-ridden terms of "national security", "enemies", and "unusual and threatening circumstances" . . . will *have* to start with continuing vocal opposition to today's executive exceptionalism. But it will not end without the vigorous promotion of public education, the defense of an open, free (which means not monopolized) media and the encouragement of active participation at every level of the political process of citizens in the economic and political decisions that affect their lives.[4]

The implication, in the above quotation is that "difficult times" can, as we have seen, erode democratic political practice and associated civil liberties with alarming rapidity and completeness unless a new understanding is learned about the subject of politics and its relation to social order. Anglophone jurisdictions are familiar with "emergencies" that render what would otherwise be unacceptable

4 Matthew Sharpe, "Thinking of the extreme situation . . .": On the New Anti-Terrorism Laws, Or, Against a Recent (Theoretical) Return to Carl Schmitt (2006) 24 *Australian Feminist Law Journal* 95–123, 123.

and systematic abuses of government power apparently acceptable: in the case of the United Kingdom one thinks of Ireland, but also, over a long period of time the colonies – rebellions throughout the British Empire and in US territories such as the Philippines, or during world wars. The fond hope is that these are geographically or temporally contained, "exceptions" in their way, resiled from when the emergency is over. The burden of Sharpe's article and other writings is that citizens of so-called liberal democracies (whose colonialist practices, some would say, have invited reprisals from exploited regions, or at least made otherwise unacceptable violent responses appear justifiable to the perpetrators) must reassess their relations with executive governments only too eager to use the vaguely-defined "war on terror" to extend their control domestically. The role of citizen, or the ordered subject of liberal democracy, is a learned role, in need of repeated rehearsal, as Sharpe suggests.

## Legality and politics in "exceptional times"

What I trace in my book is a legality which has been taught not to see the exceptional times in which it exists, or the possibility of alternative careers of education and law in the production of this ordered subject. The careers of learning and legislating are entwined, although they frequently present profoundly gendered alternatives when taken to extremes – empires need a strong sovereign – the manly Westminster legislators and Viceroys of an earlier colonialism, or the stereotypical he-man US Presidents in our own era.[5] The teaching depicted in Dickens' *Hard Times* would have to figure as a stern manly institution, a lower orders' version of Dr Thomas Arnold's reformed mid-Victorian Rugby.[6] In the period referred to in my thesis, sovereign order, order by legislation, appears just as the woodcut from the first edition of *Leviathan* pictures the sovereign author of legality, the final word of what is to be obeyed as the sole condition of order, as a man, carefully bounded and composed of smaller men who have, in their various degrees, ceded to him their rights. *Learning* the arts of co-operation, a curiosity-led as well as prudential route to the management of diversity, and what I have termed "agreeable disagreement", has been an important source of social order, but one at different times characterized as effete, effeminate, and definitely hostile to the project of empire.

As Sharpe observes in the article from which the above quotation is taken, a "naïve faith in the rule of law" is not sufficient to preserve democratic politics in

5 During the 2008 competition of the two main contenders, a woman and a black man, to be nominated by the US Democratic Party, there was some speculation that, despite, or perhaps because of racist attitudes about black masculinity, a black man was seen as more suited to govern an empire than a woman. And see Frank Rich, *The Greatest Story Ever Sold: The Decline and Fall of Truth: The Real History of the Bush Administration*, New York, NY, Viking (2006).

6 Kathryn Tidrick, *Empire and the English Character: The Illusion of Authority*, London, IB Tauris (1992), ch 6 indicates the severe limitations of the reforms. Fighting, drinking and constant bullying continued.

times like the present, times that can be designated by those who control the law, exceptional. Indeed, it is the possibility of that control, vested in the practical imagining of law, that constitutes one of the problems. The "war on terror" simply intensifies what has been implicit since at least the time of Thomas Hobbes, to cite a conveniently succinct and schematic writer. Alternately demonized for recommending tyranny and lionized for promoting a template for the restoration of order, Hobbes was for the most part simply emphasizing to a largely skeptical audience, and updating the benefits of Absolutist rule. If peace, prosperity and "security" are to be made stable, then it seems that law is necessarily the primary instrument in this tradition, and the most tempting and easily understood model of law has been seen as a body of rules ultimately traceable to a primordial sovereign. This office of sovereign may be designated by, but is, according to many writers, ultimately beyond, the law.

Not all writers, I observed, have been happy with the abstract template designed by Hobbes. As Sharpe warns, it vests power in a place, in the end, uncontrolled. The template, suitably airbrushed, is, or has become, a lawyer's model, one which has come to dominate political thinking. As a consequence, in the minds of many who are skeptical of what is colloquially regarded as "spin", in other words, propaganda, "the enemy within" is not principally the infiltrated terrorist, but an executive branch of government, first unleashed to calculate the public's best interests and then to design draconian countermeasures to any threat to those interests.

I shall argue that, undeniably, laws perform invaluable technical work – in the disposition of property and populations, for example; but that their elevation to a more fundamental status on the sovereignty model of their operation is associated with empire, the government of subordinate peoples, uncontrolled and dangerous. Lawyers can, and do, argue that in modern liberal democracies, it is the people who elect legislatures, and it is elected governments who, one way or another, appoint judges. But this is not enough. We shall see the metaphysics that underlies even that most liberal of twentieth century jurisprudential writers, HLA Hart, concerning the validity of laws: the recognizing laws as valid by "officials and certain private persons". We can guess which private persons; the officials are hidden even from the elected legislators. In a recent conspiracy which might have come from a Robert Ludlum thriller, some of them led several liberal democracies into a war declared illegal by an international majority, that, while merely a catastrophe, could have been a cataclysm, and may yet provoke one.[7] The "ungovernable people" of England whom I shall refer to – Braudel writes of obdurate peasants in France, too – the crowd, whose "moral economy" governed peaceful resistance, did not believe in the authority of law; they believed in examining its substance for its moral force and its use, for them. I will later qualify Hume's remark that government authority is based on opinion, but it has enough

7 See the remarks by the UK Ambassador to *Le Canard Enchaine*, reported in a Melbourne *Age* editorial, 3 October 2008, to precisely this effect.

truth for the moment. If we opine that law is based on sovereign authority, then it *will* be, we will have made it so. Is that what we want? Perhaps some of us do. We have, on the other hand, examples of imagining subjects differently, I shall suggest, examples from the indubitably undemocratic time of post-1688 England, when its rulers sought a glue to hold the social order in place; but their solution may help promote ideas of democratic practice in the present. I shall argue that the law of the post-Benthamite lawyers, which has recently dominated legal theory, is a product of empire.

The first British Empire, as many term it, was anomalous. Like post-Revolutionary England (1688), whilst externally predatory, it became a confederation of propertied white men who gave government to themselves. Their property included African slaves and land stolen from indigenous peoples, but, like post-Revolutionary England more generally, it contained the political germ of something better. I shall explore this more fully later in relation to Great Britain. In Britain's second empire, which was not only rule over and the exploitation of brown people, but increasingly over "natives" at home – the working class, women – the doctrine of sovereignty increasingly informed discourse about law.

The twelfth century common law writ of Habeas Corpus, which many commentators have noted in connection with the ideal of "the rule of law", came a little later after the initial revolution, to give legal form and technical application to a preceding political commitment to informed adversarial processes among equals, but it was an *effect*, never that commitment itself, an inscription of the political idea behind it, which is implicit in the now-expanded idea of "the free man". The constitution, similarly an effect, whether the "balanced" Whig constitution of eighteenth century Great Britain or the document reflecting the transformation of colonies into states in America, and their subsequent relinquishing of independent status in a new union, can be the basis of laws, I suggest, to the extent that subjects work to learn who they might be under it. My focus is not North American history, but, to repeat, I suspect that behind the transition of the "free-born Englishman", the white male property-owner of the Pennsylvania colony, say, to citizen under the new constitution of the United States, was a process of learning, reflected in the advances made by the new system over its Whig model, which seemed to Americans as they re-made themselves, to have failed in the continuation of its aspiration of balancing government power. In the British case itself, I shall suggest that a great deal of learning, negotiation, and compromise underwrote the choreography of the "English" subject. If that learning project ultimately failed, with the temptations of empire and conquest, it could scarcely with equal safety to the public be replaced by that insubstantial and insecure being, the subject of law. So I will argue, differentiating between what, for shorthand purposes I have sometimes called legislation, an abrupt exercise of power; and education, which implies learning, the participation of its subjects.

But we must not – this is Sharpe's message as I read it – allow lawyers to run away with the law. However good their intentions, their model of law can literally court disaster when taken beyond its technical remit. Edmund Burke, with his

disdain for abstract and universal concepts – the expression, "the rights of man" was in sights at the time of his writing – in effect divided law as he saw it in the Great Britain of the late eighteenth century, into two. One was the rules and techniques beloved of the "pettifoggers" (a term preceding Burke and not actually used by him). This resembles the model of law about whose efficacy in safeguarding freedom and democracy Sharpe has reservations and I shall say more about it in due course. The putting into effect of such a model of law is useful in the routine administration of commerce and property, the disposition of criminal cases and the like, but, if Burke's conviction of the necessary dispersal of power were to be realized, it would need to be subject to the scrutiny of his other division of legality. Here is the broader, more constitutionally contextualized landscape of changing but socially ordered being. This resembles the recommendations contained in the last part of the quotation from Sharpe. To understand them it is useful to notice Burke's insistence on the importance of the history and changing customs and expectations of particular communities. He considered that, although there had been many changes in the English and, as it became, British underpinnings to constitutional and, based on this, legal practice, a balance still existed and ought to exist, between the various operations of government. Burke was profoundly not democratic, but along with the task of blending continuity with customary expectations of change, he felt that the application of the pettifoggers' rules required mediation by a conscientious regard for the public good. This is an appeal to the possible "grandeur of law", which, he writes, cannot be left to lawyers.

The priority apparently given to "law" here must not, then, be taken to indicate its priority in the argument that follows. Law is an imperatival language practice that subjects learn. And they may reject its presumptions of ultimate authority because those subjects are also speakers of other languages, in the examples I look at, those of empire and those of Englishness. Law is a language which changes and which also brings about change. The danger to which Sharpe alludes is the belief that sovereign authority seems to subvert moral responsibility and diminish the power and purchase of ethical evaluation.

I shall claim no essential nature for any of the practices to which I have adverted, law, the subject and the empire. I have sometimes referred to them as characters, since they appear in an unfolding drama in constant dialog with each other, not reciting a given script, to be sure, but confined at any given moment within certain limitations on what it is possible to say. They each exist, for the book, as interacting, and changing with every interaction, as I shall explain. The thread that joins these shifting identities is, for my purposes,[8] the effort discernible no doubt in many societies and the subjects of them, to establish certainty. The law,

8 And, of course, nobody educated in Anglophone history can miss the irony and the irresistibility of England's having been importantly defined in the enormous Bayeux Tapestry, commissioned in the late eleventh century by a Viking-Norman mere decades after England's conquest by William I. England's wealth lay in wool; its identity would for many years be defined by a woven cloth.