“The Rule of Law in British Colonial Societies in the 19th Century: Gaseous Rhetoric or Guiding Principle?”

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Elsewhere there might be the sultan’s caprice, the lit de justice, judicial torture, the slow-grinding mills of the canon law’s bureaucracy, and the auto-da-fe of the Inquisition. In England, by contrast, king and magistrates were beneath the law, which was the even-handed guardian of every Englishman’s life, liberties, and property. Blindfolded Justice weighed all equitably in her scales. The courts were open, and worked by known and due process. Euphonic fanfares such as those on the unique blessings of being a free-born Englishman under the Anglo-Saxon-derived common law were omnipresent background music. Anyone, from Lord Chancellors to rioters, could be heard piping them (though for very different purposes). Roy Porter, English Society in the Eighteenth Century (Harmondsworth: Penguin, 1982) at 149

A. Introduction

Anyone seeking to delve into the history of the rule of law might well be accounted a fool, or, at least, a masochist. If one accepts that the phrase originates with Aristotle, as Brian Tamanaha suggests, it is so freighted with diverse political, social and legal contexts that one can easily become lost in a maze of contingency. Even using 17th century as marking the emergence of this conception as a seminal idea in the Anglo-American world, it is by any standards an imprecise and contested notion. There is a considerable gap between the political or constitutionalist vision of the rule of law pressed by radicals and reformers in the 18th century and during the 19th century, and the legalistic and, as some would argue, desiccated version advocated by Alfred Venn Dicey in the late 19th century. In the context of contemporary political rhetoric the invocation of the rule of law by President Obama on the one hand and Robert Mugabe on the other, might well persuade one that the term has lost any pretence of meaning, and should be cast into the ash can of noble, but useless, ideas.

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2 The distinction between constitutionalist and legalistic versions of the rule of law is elaborated in Paul Romney, “Very Late Loyalist Fantasies: Nostalgic Tory History and the Rule of Law in Upper Canada” in W. Wesley Pue and Barry Wright, Canadian Perspective on Law and Society: Issues in Legal History (Ottawa: Carleton University Press, 1988) 119-148.

3 In his inaugural address President Obama reaffirmed that his administration would uphold and be guided by the rule of law.
For the Mugabe quote, see Tamanaha, On the Rule of Law, 2.
There are, of course, those who have argued just that. Others, on the left and in post-colonial studies, have attacked the concept on the ideological ground that the term and its application have amounted and continue to amount to an elite or liberal ruse to give dignity and moral validity to a legal system which has been inherently unequal and unjust in its application, if not downright oppressive. Despite these attempts at erasure or intellectual burial, the concept seems to be so embedded in the western legal consciousness and attractive at a rhetorical and even discursive level that the concept survives. It is even deployed at the level of global politics, by advocates from diverse political and legal cultures in support of quite different political and even economic goals. The rule of law, complex and contested though it is, continues to hover over the conduct of human and, indeed international relations, as an aspirational ideal, a gauge for legal and moral judgment, and in certain contexts a stimulus to action.

**B. The Rule of Law in 18th Century Britain and its Empire**

In the elegant quotation which prefaces this paper, the late English social and intellectual historian, Roy Porter, pointed to the rule of law's pervasiveness as a rhetorical and discursive device in 18th century England. Many of those mentioned by Porter, as well as others in both English society and British colonial settler communities, believed that it also had substantive content. Despite the narrower version associated with Alfred Venn Dicey in the late 19th century, the rule of law in the late 18th and early 19th century was a highly tensile notion. Its meaning varied depending on who was employing it and for what purpose. In one guise or another the rule of law embraced: the right to justice by the judgment of one's peers conceded by King John in *Magna Carta*, and trial by jury (both elements of claims of an Ancient Constitution); habeas corpus a protection solidified during the latter half of 17th century; freedom from suspension of or dispensation from laws of Parliament secured in the settlement associated with the Glorious Revolution of 1688; the independence of the judiciary established by the *Act of Settlement*, 1701; and

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6 Tamanaha, *On the Rule of Law*, 3. The author indicates that it is invoked by some in the cause of freedom, others for the preserving of order, and, yet others to encourage economic development.


9 *Habeas Corpus Amendment Act* (1679) 31 Car. II, c. 2.

10 *The Bill of Rights* (1689) 1 Will. & Marry, Sess. 2, c. 2.

11 *Act of Settlement* (1701) 12 & 13 Will. III, c. 2, s.3. The independence of the judiciary in the colonies was only recognized in the mid-19th century, and then only in the white settler Empire.
its corollary, the right to a trial according to law and established legal procedures involving the application of rational principles; and, freedom from intrusion and arrest by the invocation of general warrants developed by the courts during the mid-18th century.  

Closely allied and overlapping with the rule of law were a series of “constitutional rights”, some of which seemed settled, at least in Britain, such as no taxation without representation and the right to petition the Crown, and others that were contested - freedom of the press, freedom of association, freedom of assembly, freedom of conscience, and freedom of religion. The rule of law was a permeable net of processes, principles and ideals that embodied the values of government according to law, and justice under the law.

My contention is that the liberal or conservative discourses on the rule of law that embodied all or some of these elements were central to the assessment by community members in both the metropolitan power and the colonies of the quality of the performance of both government in general and the administration of justice in particular. In other words, in the absence of a written constitution, the rule of law provided a standard (or perhaps more correctly a set of standards) by which to judge the performance of those possessing governmental and judicial authority. I suggest, too, that where courts stood on these rights both reflected and influenced the political and legal culture of imperial governance, as well as the politics and law in various colonial jurisdictions and how narrowly or broadly the rule of law was construed within them. Moreover, the fact that in the metropolis the rule of law was embodied in respected institutions of law and protective legal mechanisms in the metropolis was a stimulus to claims for their establishment in those possessions as well. In the Empire the shape and content of the rule of law was subject to limitation by the exercise of the Prerogative and Parliamentary sovereignty.

Interpretations of liberty and the rule of law within the Anglo-American world in the eighteenth and early nineteenth centuries also need to take account of a tension between law as a centralized system of decision-making, and law as a product of local and particular custom. Jack Greene notes that after the demise of the Stuart kings there was a significant withdrawal of central authority from local affairs in England and Great Britain. Thus the eighteenth century, far from being a period of consolidation of centralized power, witnessed a reaffirmation of the dominance of localized privilege and special jurisdictions. Most people still experienced law and administration as the product of decisions of local magnates and the gentry, whether in regulating their economic and social relations, or subjecting them to the processes and penalties of the criminal law. Local law and its administration and the customary rights associated with them lived on in both practice and the realm of ideas in Britain, although increasingly

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threatened by the intensification of enclosure under the banner of improvement, and in more remote areas by the breaking up of tribal or clan cultures.  

During the century the role of the criminal law as an instrument of social control expanded, as the propertied, through the Hanoverian state sought to protect their interests by proliferating legislation proscribing a myriad of theft situations and treating them as capital offences. Enclosure was in part a strategy to root out local custom, and the enactment of the Bloody Code an attempt to underline the punitive capacity of the state and strike fear into the minds of would-be malefactors. However, through the work of E.P. Thompson and others it is possible to see that the apparent domination involved in process of seeking on the one hand to exclude populations from customary rights in land, and to direct an expanding corpus of criminal law against an increasing number of displaced and masterless people had hegemonic characteristics. In particular it took place within a legal order in which there was a broad cultural commitment to the “rights of freeborn Englishmen” [sic] and to the rule of law, which were considered to be the basis for both resistance to the homogenizing forces of state sponsored control, and, of at least occasional vindication of rights within the system. Moreover, the work of other historians on court records in the 18th century demonstrates that the law including the criminal justice system was accessible to those of “middling” and “lowly” status, as well as the well-bred and well-healed.

As John Phillip Reid and Janice Potter have demonstrated, liberty was a shared constitutional and legal concept in the 18th century Anglo-American world. It lay at the crux of a balance between arbitrary power on the one hand and licentiousness on the other. Debates over the nature of liberty and of the rule of law had divided political and legal opinion in mid-18th Britain. On the one side there were those government or court Whigs committed to the deployment of liberty as the guarantor of order, status and deference (an 'ordered liberty') as the basis for resistance to 'faction'. For these forces a narrow conception of the rule of law that tied legitimacy to the observance of the formal requirements of justice generally sufficed. On the other side were the country Whigs and populist Wilkites, who saw liberty as a necessary bulwark against arbitrary and corrupt government, whether that of a monarch or of Parliament. The rule of law for these people was a more expansive notion, encompassing constitutional protection of rights, the

criteria for resisting corruption and arbitrariness, and effective mechanisms for the redress of grievances.

These ideological tensions were in time to be replicated in the debates between Loyalists and Patriots in the American colonies both before and during the War of Independence. Distance, periods of imperial disinterest, and the growth of a strong North American sense of political community had produced democratic organs of local government and justice administration that wielded considerable power and enjoyed support among settlers. As a consequence, unique domestic legal solutions to colonial problems were devised. Thus, when tension developed after 1760 between an imperial government, committed to stressing the dependent status of its colonies, and a colonial majority pressing for political equality and the removal of constitutional and legal impediments to their development, the notion of the rule of law could be passionately and honestly invoked by both sides. Various readings of 17th century constitutional history, and, in particular, the significance of the “Glorious Revolution” were employed in both patriot and loyalist rhetoric and discourse.

In an interesting loop back of the debate over the meaning of liberty and the rule of law to the British Isles from America competing interpretations were also at the centre of political conflict in Ireland between Ascendancy conservatives and reformist Whigs in the 1780s and early 1790s. If Britain had been insufficiently solicitous of its American colonies and their governance before the 1760s, quite the reverse was true of Ireland. There, British anxieties about the loyalty of the Roman Catholic majority in its oldest and nearest colony had resulted in close and oppressive rule by London, a subordinate protestant Parliament, and judges notoriously servile to government interests. As the British government sought to underline the dependent status of the American colonies, its treatment of Ireland proved a cautionary and emotional spur to the patriot cause in the American colonies. Conversely their struggle struck a responsive chord in Ireland. A conjunction of Irish Whig reformism inspired by the success of the American patriots, an Irish militia under arms, and a transitory willingness in Westminster to make concessions led to ostensible reform of the constitutional relationship between Ireland and Great Britain in 1782. However, what the Irish reformers hailed as autonomy and as a compact between the Irish people and the Crown was quickly subverted by the continuation of executive control from London and parliamentary resistance by the conservative wing of the Anglo-Irish ascendancy. The country slid into the United Irishmen rebellion of 1798, to which the British rejoinder was the imposition of martial

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20 Greene, Negotiated Authorities, 78-130. See also Elizabeth Manke, “Colonial and Imperial Contexts” in Philip Girard, Jim Phillip and Barry Cahill eds., The Supreme Court of Nova Scotia: From Imperial Bastion to Provincial Oracle (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2004), 30-52 at 30-39.

21 Potter, The Liberty We Seek.

22 John Phillip Reid, In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison and the Coming of the American Revolution (University Park, Pennsylvania State University Press, 1977)135-149.


law on parts of the island and the abolition of the Irish Parliament and the Act of Union of 1800.\(^{25}\) This ended the short lived Irish Whig constitutional experiment, although not necessarily its ideological legacy.\(^{26}\)

The West Indian colonies, not without some griping by a minority amongst the settler population who felt aggrieved at the interruption of trade caused by the conflict, remained loyal during the American War of Independence. Their planter dominated assemblies had been somewhat more successful in the years leading up to the North American war in arguing for the consolidation of their power, and resistance to British attempts to emphasize their subordinate status.\(^{27}\) In their objections to the prerogative powers vested in governors they were quick to raise the spectre of absolutism by appealing to the lessons of 17\(^{th}\) century English history, the ancient constitution and the Glorious Revolution. As Andrew O’Shaughnessy wryly puts it: “[T]he colonists saw every governor as a potential reincarnation of Charles II and James II.”\(^{28}\)

What of the relationship between the “subject” peoples of the colonies and the rule of law, however interpreted, during the 18\(^{th}\) century? The answer, as with most issues in imperial and legal history, is complex. Several legal historians have pointed to the coexistence of legal pluralism and colonial systems of governance and law in the history of the British and other European empires, before the emergence of the fully-fledged colonial state.\(^{29}\) There is clear evidence of a poly-jural reality in the 18\(^{th}\) century British Empire whereby other conceptions of law and its rule were recognized, and which encouraged and produced negotiation across jurisdictional boundaries. In the case of territories acquired by conquest of or cession by other European powers, such as Quebec and Grenada, strategic and pragmatic considerations argued in favour of the preservation of at least part of the pre-existing legal system.\(^{30}\) A similar policy obtained in the case of territories, India being the prime example, in which ancient legal systems already co-existed with English law originally introduced under extraterritoriality agreements, particularly in matters of personal law, for example that relating to marriage and inheritance.\(^{31}\) A general exception to this flexible policy was the progressive introduction of English criminal law which was believed to be more civilized than its civilian or traditional counterparts.

In the case of Aboriginal communities, imperial policy during the 18\(^{th}\) century tended towards recognition of their sovereignty, their customary title to land and autonomy in


\(^{26}\) See text infra.


\(^{28}\) Ibid., 117-119.


\(^{31}\) Benton, *Law and Colonial Cultures*, 127-149.
conducting their own governance and law.\textsuperscript{32} The relations between these nations and the European newcomers were a matter for negotiation through treaties and diplomacy. However, the evidence is also strong from the American colonies that in areas of heavy European settlement pressure for land on the Atlantic seaboard, starting in the previous century, had already resulted in violence and the dislodging of some indigenous populations. They were either forced to move to seek to preserve their culture or consigned to cultural limbo on the margins of colonial society, with little or no protection from the dominant rule of law.\textsuperscript{33}

One population constituted an exception to this policy of what might be described as positive poly-jurality. Slave populations lay outside the rule of law as understood by the European colonists that employed and exploited them. Slaves had little or no protection from the traditional law of their dominators. They were considered by their owners and to lie outside the Common Law and its protections, and, as property, subject to the latter’s largely uninhibited discretion, as well as brutal slave codes.\textsuperscript{34} At the same time their African cultures and languages were proscribed.

At the close of the 18\textsuperscript{th} century constitutional values and a liberal conception of the rule of law in the British Isles were under attack. In England and Scotland Pittite legislation, fuelled by anxieties about Jacobinism directed from republican France, abrogated or severely limited freedom of speech, association and assembly, extended the embrace of sedition and treason, and suspended \textit{habeas corpus}.\textsuperscript{35} The British government was beginning to recognize more clearly the value of legislation in coping with actual or perceived threats to national security.\textsuperscript{36} In Ireland the 1898 uprising led by the United Irishmen had resulted in the proclamation of martial law in many parts of the country, and was to drive the last nail into the coffin of Irish constitutional independence.\textsuperscript{37}

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\textsuperscript{36} Ibid., 72-74.

C. Contested Interpretations of the Rule of Law in Britain’s Nineteenth Century Empire

What of the fate of rule of law thinking and its embodiment of constitutional values in Britain’s second empire? At the level of imperial policy and understanding of the constitutional relation between the metropolis and the colonies in the last decade of the 18th century and the first third of the 19th century, the very clear emphasis at an official level seems to have been on the conservative and formalistic notion noted earlier. In the remaining British North American colonies the lesson that Pitt the Younger and his Secretary of State for the Colonies, William Grenville, drew from the American War of Independence was that the thirteen American had enjoyed too much liberty in their political and legal arrangements.38 The new constitutional order in the flagship possessions of Lower and Upper Canada, while giving the superficial impression of replicating the combination of executive rule and local legislative authority that had marked the structure of government in the lost colonies, and was still in place in the old West Indian colonies, in fact was designed to maintain close British control. This London sought to ensure through the grant of clear executive powers over the legislative bodies in the colony, the dominance of appointed legislative councils over elected assemblies, and a degree of fiscal independence bestowed on governors.39 Pitt and Grenville also imagined that the dominance of Loyalists in Upper Canada would make for a peaceful and orderly polity resting comfortably under the providential benefits of British rule and English law. In its sister province it was supposed that mutual interest of both the colonial government and its commercial supporters, and the traditional Canadien political and religious elite was in order and stability, and that the latter, would impress this message on their constituents.40 In all the surviving or new British North American colonies superior courts of record were established and trial by jury granted.

In the new multi-racial colonies Great Britain was acquiring through war against the French, Spanish and the Dutch, imperial policy was even less yielding. These territories comprised European, creole, African and remnants of indigenous populations. In most of them chattel slavery was practiced. The British government, following earlier policy in both the ethnically diverse possessions in India and Quebec decided that, because of the challenges and complication surrounding the grant of representative government in these territories, they would be given Crown colony status, typically ruled by a governor with full plenary powers of governance.41 Initiating legislation for the colonies lay with Westminster, and, while a governor might have the benefit of working with an appointed council, the latter was advisory only. Not without some havering, the European legal

39 See the Constitutional Act, 1791 (1791) 30 1 Geo. III, c. 31, ss. XIII, XXVI (calling and proroguing assemblies); s. III (appointment of member of the Legislative Council).
41 John Manning Ward addresses the issue in Colonial Self-Government, 82-123. See especially 82-91
systems of civil justice introduced by imperial predecessors were left in place. At the same time English criminal justice which was chauvinistically trumpeted as more humane that that of France, Spain and Holland generally replaced the previous system. The multi-racial, slave colonies inherited from the first Empire were allowed to keep their representative assemblies. In the case of the slave colonies generally, a new and disturbing factor for the white political, economic and social elite in those territories was the meteoric rise of the anti-slavery movement in Britain and the pressure being put on government and Parliament to abolish the slave trade.\(^{42}\) Ironically, then, in an era of political conservatism and deep anxieties about security of state and empire, a new rhetoric and discourse of freedom and the equality of human kind was being superimposed on British imperial law and politics.

As a result of the American War of Independence there emerged a special purpose colony at the end of 18\(^{th}\) century which was to have a unique form of governance and law - the convict colony of New South Wales.\(^ {43}\) The system of governance appropriate to what was a vast open prison involved the bestowing of extensive administrative power (and discretion) on the governor, while reposing legislative power in London.\(^ {44}\) The system of justice, on the criminal side, was quasi-military in character, likely based on a model taken from the strategic military colony of Gibraltar. For the first twenty years of the colony’s life, both this special form of criminal justice and civil justice were exclusively in the hands of amateur judges. Although the historiography does not reveal simple answers to the question of what the intention of the British government was as to the future of this isolated possession at the other end of the planet, it seems to have assumed that it would be possible to construct a civil society out of this motley community established there.\(^ {45}\)

One notable and common element in the constitutional ordering of the British Empire at the beginning of the 19\(^{th}\) century which flew in the face of domestic British understanding of the rule of law was the absence of judicial independence. As was the case through the 18\(^{th}\) century, British colonial judges were appointed at pleasure, not, like their English counterparts, during good behaviour.\(^ {46}\) The reason was simple in the imperial psyche. Judges and particularly chief justices were seen as important players in colonial government in which the separation of powers was only hazily discernible. In


addition to their judicial functions, they were often key members of executive and legislative councils (in some instances acting as unofficial prime ministers), and close advisers to governors. In the absence of legal talent elsewhere in the community they were also in some instances required to draft legislation and regulations. Given these important administrative and legislative roles, it was considered imperative that they be loyal to the colonial regime, at least at a political level. Accordingly, London sought to ensure that the terms of judicial employment provided the local colonial government with the power to remove a jurist who had become an embarrassment by subversive political activity, or possessed a personality which brought the administration of justice into disrepute. Appointment at pleasure allowed for prompt decision making and the ridding of a colony of what could be a powerful disruptive force. The main instrument for achieving this end was Burke’s Act of 1782. This differential treatment of the colonial judiciary had been a growing irritant with several of the colonies in the Americas, during the 18th century and was to become so again in the 19th century settler colonies.

Not surprisingly, given the deep psychological commitment of those of British heritage to the rhetoric and discourse of liberty, and to the rule of law, however broadly or narrowly conceived, and whatever its practical purchase, the conception was as alive and well in the Second, as it had been in the First Empire. Moreover, despite the realities of a war torn nation and an imperial government obsessed with state security, and a clearer policy of the need to control and emphasize the dependency of the colonies, the liberal constitutionalist interpretation of the rule of law was as much in evidence as the narrower, conservative legalist construction. As Australian legal historian, David Neal, and Canadian political historian, Greg Marquis, have indicated, the cultural reasons are not hard to find. For populations uprooted for one reason or another, whether voluntarily or involuntarily, to a new land with whose history they had no identification, it was natural to transpose their own history and how they imagined it to their new surroundings. This was so even where, as in New South Wales, the local politics did not seem particularly hospitable to such thinking.

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48 An act to prevent in future any Patent Office to be exercised in any Plantation or Colony, now, or at any time hereafter, belonging to the Crown of Great Britain, for any longer Term than during such time as the Grantee thereof, or Person appointed to, shall discharge the Duty thereof in Person, and behave well therein (1782) 22 Geo. III, c. 75. Under s. 3 of the Act the judge had a right of appeal to the Privy Council. In colonies with representative assemblies an alternative procedure was for the Assembly to petition the Privy Council to remove a colonial jurist. It was also open to London, using the prerogative, to recall a troublesome judge.


An irony of this process of translation of the rule is that it was assisted by the writings of one of the leading advocates of the ordered British constitution so beloved of 18th century conservative apologists, William Blackstone. In his famous *Commentaries on the Laws of England* he had lauded both the constitution and English law as embodying an ordered liberty and elevating the rule of law over that of men, which was the envy of other nations.51 While no friend of factionalism or dissent, Blackstone through his appeal to history that explained the blessings of the “rights of freeborn Englishmen”, and his emphasis on the central values of liberty of person, property and security provided a rich and flexible source of rhetorical and discursive inspiration to individuals and communities trying to make sense of their cultural identity in strange lands.52 In Blackstone there was something for almost everyone regardless of where they were located on the political spectrum. Blackstone’s writings were without doubt the most influential source of both English law and legal culture in the colonies during the 19th century.53

The impact of Blackstone’s *Commentaries* as a guide to the substance of English law and procedure on the one hand, and a stimulus to constitutional contention on the other was to be assisted by a phenomenon of empire (only recently explored in imperial historiography) and that is the networking among and peripatetic careers of colonial officials and judges, amongst others.54 For our purposes the path-breaking work of Caribbean historian, Bridget Brereton, on Sir John Gorrie, in sequence puisne justice in Mauritius and Chief Justice of Fiji, the Leeward Islands and Trinidad and Tobago,55 and of Australian legal historian John Bennett in his magisterial *Lives of the Australian Chief Justices*56 demonstrates how the movement of judicial personalities with liberal or conservative views on law and constitutionalism influenced legal and political discourse and affected law and legal culture in various parts of the Empire.

David Neal talks of the strength of the rule of law ideology in New South Wales:

In short, the convicts, like other settlers – from officials, to army personnel, to free settlers – bore with them a strong conception of what the rule of law meant,

52 Ibid.
the uses to which it could be put, and its importance in English political life. While new and unusual circumstances called for some reorientation of the rule of law model, they drew on this heritage when confronted by the problems of establishing a new political order. Like their seventeenth-century forebears, they summoned up the ancient constitution, their birthright and inheritance, rather than adopting the revolutionary road and philosophical schemes of the French or American revolutions. 57

An example is that of John Grant, gentleman convict, who had been denied the right to land valuable property on his arrival in the colony, was barred from the agricultural enterprise he had in mind and, as the crowning indignity, was given a conditional pardon which required that he stay in the colony until his sentence expired. 58 In an angry letter to Governor Phillip Gidley King in 1805 Grant took his inspiration from Blackstone’s account of the rights that English colonists took with them, including “the fundamental Principles of [the] Magna Charta of England, viz. Personal Security, Personal Liberty, Private Property.”59 He then inveighed: "Now Sir! I ask you as an Independent Englishman, witnessing with astonishment the miserable state to which Thousands of Unfortunate Men are reduced in this Country, by what Authority do those in power at home, by what Right do you make Slaves of Britons in this distant quarter of the Globe?"60

Talk of the rule of law was everywhere in this colony, in the courts which were the only institutions to which the vast majority of the population, convict or free, had access to protect their interests, in official and private correspondence, memoirs, and wherever groups met to discuss politics and law. It was invoked by those seeking to further their own narrow interests, such as the Rum Corps in their rebellion against Governor William Bligh in 1808,61 as well as their antagonists in the emancipist population looking toward a more inclusive society. The emergence of a colonial press in the 1820s reflecting largely reformist and emancipist interests gave a considerable boost to the use of the rule of law as a rhetorical and discursive device for critiquing executive action while pressing for representative government and trial by jury.62

In his work, which covers the period in the political culture of the Maritime colonies of British North America from the 1820s on, Greg Marquis provides a series of examples of how settlers in that region constructed their history and sense of constitutional entitlement out of their memories of English history. He notes:

57 Neal, The Rule of Law in a Penal Colony, 76.
58 Yvonne Cramer, This Beauteous, Wicked Place: Letter and Journals of John Grant, Gentleman Convict (Canberra: National Library of Australia, 2000) 6-12 and letters to Governor King that John Grant recorded in his journal (MS 737, item 42, pp. 28-29, 1-2 May, 1805) at 104-106
59 Ibid., 105.
60 Ibid. [emphasis in the original] This vigorous and impertinent invocation of the rule of law by Grant landed him in trouble. King had him tried before Judge Advocate Richard Atkins on a charge of sedition. After expressing similar sentiments to the judge, Grant was convicted and sentenced to five years secondary transportation with hard labour to Norfolk Island – 10-11).
61 Neal, The Rule of Law in a Penal Colony, 93-94.
62 Ibid., 77. See also W.C. Wentworth, Statistical, Historical and Political Descriptions of the Colony of New South Wales and its Dependent Settlements in Van Diemen’s Land (Sydney: Doubleday, 1978) reprint of 1819 original.
Rather than seeing themselves as residents of an imperial backwater, Maritime British North Americans took solace in a thousand-year history that was elevated to a form of civil religion. . . . The presumed antiquity of English and legal and political institutions, which produced in the 17th century a school of thought known as the Ancient Constitution, lent prestige to local political questions. Both proponents and opponents of change found refuge in the past. . . . The cornerstone of English liberty, the common law, as an ancestral gift was not to be taken lightly, it was a birth right to be guarded.  

As an example of the invocation of the constitution to preserve the status quo Marquis highlights the comments of the Speaker of the Nova Scotia House of Assembly in 1825. Now sir, one thing has come down to us, immemorial from usage, and has stood the test of ages is trial by jury . . . It is a right which is founded upon and preserved by the common law – in all matters connected with it, we are guided by its practice. Whence comes I ask the trial by Jury? It is from our ancestors, but its first establishment is now covered with the dust of obscurity – and it is sanctioned and rendered venerable by its antiquity. For God’s sake do not touch it.  

Marquis notes that what were often imaginative versions of English history were invoked by legal and lay advocates alike.  

As both Australian and Canadian legal history demonstrate, major issues of constitutional debate and even political dissension were framed by rule of law rhetoric and discourse, and it was invoked by groups and movements as diverse as Tories, Liberals, radicals, imperialists, nationalists, loyalists, rebelling gold miners, Orangemen, Roman Catholics and striking trade unions.  

If should be no surprise, then, that it was also used by elite interests in the West Indian colonies, fearful of imperial intentions. This was the case both in older colonies with representative assemblies, such as Barbados and Jamaica, and in newly acquired Crown colonies, such as Trinidad. In the former, rule of law language was increasingly combined with threats of resistance and even secession, as the campaign to abolish slavery throughout the empire developed strength. In the latter its invocation was typically designed to persuade London to grant an assembly and introduce English law, in other words the settlers’ birthright, and to provide the autonomy to consolidate and expand slavery internally.  

There is also evidence that the peculiarly English discourse of liberty was being invoked by non-white leaders, especially, those of the creole or “free coloured” populations to argue for some recognition of their rights.  

Within European colonist societies the rule of law was invoked in conflicts across the Empire between governors and their officials and the judiciary, among the members of  

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63 Marquis, “In Defence of Liberty”, 77-78  
64 Ibid.  
65 For interesting insights into the use of the concept by “outsiders” in Upper Canada, see Greg Marquis, “Doing Justice to ‘British Justice’: Law, Ideology and Canadian Historiography” in Pue and Wright eds., Canadian Perspectives on Law and Society 43-70.  
68 Brereton, A History of Modern Trinidad, 43-44; Millette, Society and Politics, 264-266.
colonial benches, between and among colonial assemblies and councils and governors, and those bodies and judges, and between various interest groups in settler and subject communities and those in the executive, judiciary and legislative bodies. The examples that follow, drawn from various parts of the 19th century empire, are designed both to demonstrate how ubiquitous, tenacious and open textured rule of law rhetoric and discourse was. In the main, they are drawn from the writer’s work on judicial tenure and accountability in the 19th century Empire.

It is important to remember that debate surrounding the rule of law continued to animate political rhetoric and discourse in Britain itself. This was a society riven by class distinctions and the social disruption associated with both the Agricultural and Industrial Revolutions. It was also one in which the anxieties of those in power, whether Tories or Whigs, were capable of manifesting themselves in the use of oppressive policies, harsh social regulation, discriminatory laws and state sanctioned violence, as events such as the Peterloo Massacre of 1819, the introduction of the Six Acts, and overheated reaction to the Swing riots of the early 1830s and the Chartist disturbances of the 1840s show.

Even as mild a form of collective action as that of the Tolpuddle Martyrs in 1831 in taking a secret oath as union members was capable of so putting the wind up a reformist Whig government that they were treated as having shot an arrow into the heart of society. However, within the engaged politics of the metropolis there was a vigorous countervail among politicians, newspaper editors and social critics who felt outrage over policies and actions which to them stank of “Old Corruption”. Liberal constitutional rule of law rhetoric and discourse was deployed in commenting on and criticizing these actions and responsibility for the conditions which had led to dissent and protest.

In the British North American colonies the assumption of the British government that the populations of these territories, basking loyally and gratefully in the roseate glow of peace, order and good government of the 18th century British constitution, proved naive. In Lower Canada differences in ethnic and religious culture inevitably worked against the new order. In Upper Canada, the presence of differing shades of opinion among Loyalists over what it meant to be a North American in political and legal terms, and later migration of Americans, Britons and Irish to the territory were to create what can only be described as an ideological stew.

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69 Hilton, A Mad, Bad & Dangerous People? 3-12
70 Ibid., 252-253, 416-417, 612-615.
71 Ibid., 494.
72 For accounts of these events and the criticisms raised against the governing elite, see Joyce Marlow, The Peterloo Massacre (London: Rapp & Whiting, 1970); Eric Hobsbawn and George Rude, Captain Swing (London: Lawrence & Wishart, 1970); Joyce Marlow, The Tolpuddle Martyrs (London: History Book Club, 1971), and Tolpuddle: An Historical Account through the eyes of George Loveless (London: Trade Union Congress, 1984). In an interesting twist on migration through the Empire the Martyrs, after their involuntary sojourn in New South Wales, returned to England, only to migrate once more, this time voluntarily, to Upper Canada in the mid-1840s where they settled down to peaceful and productive lives.
justice and constitutional values were quick to surface, manifesting themselves in battles between conservative executives and their local supporters on the one hand, and reformers and radicals on the other, over, religion and religious toleration, land policy, and the grant of monopolies. The colonial judiciary was not immune from these ideological conflicts, as the case of Robert Thorpe demonstrates. An Irishman of Whig sensibilities, he was appointed puisne justice of the Court of King’s Bench of Upper Canada in 1805. He quickly allied himself with a disaffected group of Irish immigrants who were critical of the conduct of what they considered to be a haughty and uncaring colonial government in managing land settlement, sidetracking the Assembly on fiscal matters, and introducing the draconian Sedition Act of 1804. In his charges to grand and petty juries he appealed to the “rights of freeborn Englishmen”, to the constitutional struggles of 17th century England, and the writings of Blackstone. When he was elected to the Assembly and assumed the mantle of the leader of the opposition, Lieutenant Governor Francis Gore lost patience and removed him from office, a decision confirmed by Thorpe’s patron and Secretary of State for the Colonies, Lord Castlereagh. However, this was not before Thorpe had penned what amounted to a manifesto for responsible government for the colony, drawing on Irish Whig ideas about compact constitutionalism. While Thorpe himself was to suffer silencing as a North American judge, his ideological inspiration was to be revived by more moderate and judicious reformers in the province in the 1820s and beyond.

In Lower Canada the judiciary was to a person allied to the conservative ruling elite during the first twenty years of the life of the colony. In this possession serious tension existed between the executive and judiciary on the one hand, and the increasingly French speaking and reformist Assembly on the other. The reformers who blended liberal British constitutional discourse and French revolutionary inflection became outraged at

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74 Fraser, “All the Privileges”, xlvii-xlxi.
75 Thorpe had already served for two year as the Chief Justice of Prince Edward Island where he felt frustrated at his inability to influence the politics of the island, especially those surrounding the parlous state of its land settlement regime – see G.H. Patterson, “Robert Thorpe, Dictionary of Canadian Biography On Line http://www.biographi.ca/009004-119.01-e.php?id_nbr=3696&&PHPSESSID=t7ad88ed22rmhmmik8ocd7ma7
77 Ibid., 19.
the special measures taken against their leaders by Governor Sir James Craig in 1810 (‘Craig’s reign of terror’). In particular they decried the arrest, seizure and detention of lawyer Pierre-Amable Bedard and other members of the Assembly, associated with the reformist newspaper Le Patriot. Particularly galling to these interests was the involvement of the Chief Justice of Quebec, Jonathan Sewell, a conservative Loyalist, as the close adviser and even unofficial “prime minister” to Craig, and his manipulation of the justice system in corrupt ways to silence the opposition. Sewell, along with the Chief Justice of Montreal, James Monk, was also suspected, with some justification, of designs to substitute English private law for the civil law of Quebec. All of this angst on the part of legislators became grist for the mill in the Assembly’s attempt to impeach the two jurists in 1814-1815. In a series of indictments which read like a bill of impeachment from 17th century England, Sewell was accused _inter alia_ of “traitorously and wickedly [endeavouring] to subvert the Constitution and established Government of the . . Province,” and of introducing “an arbitrary, tyrannical Government against Law, which he had declared by traitorous and wicked opinions, counsel, conduct, judgments, practices and actions.” Both justices were charged with interfering with what French Canadian understood as their law and its rule. Through an astute strategy developed by Monk which shifted the focus of imperial attention from the Assembly’s charges to the judiciary as protectors of order and stability in the colony, the judges were vindicated. The conservative imperial government of Lord Liverpool refused to consider the charges against Sewell. Moreover, the Privy Council found no substance in the allegations against both judges of seeking to subvert the civil law of Quebec. Faced with tension between the forces of law and order and representatives of dissent and faction, there was in the imperial halls of power no contest. The only concession to reformist criticisms of the administration of justice through all of this was that London had persuaded itself in 1810 that allowing judges to sit in Lower Canadian Assembly was no longer good policy.

Elite hauteur, manipulation of the levers of colonial governance and law, and an obsessive fear of disloyalty in segments of the population was evident in Upper Canada in the years after the War of 1812 in Upper Canada. The law officers of the Crown and

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83 Greenwood, _Legacies of Fear_, 237 where the author describes Sewell as Craig’s “prime minister” and notes his report to Craig on the security issues. See also Evelyn Kolish and James Lambert, “The Attempted Impeachment of the Lower Canadian Chief Justices, 1814-1815” in Greenwood and Wright, _Canadian State Trials, Vol. 1_, 462. For Sewell’s career, see F. Murray Greenwood and James H. Lambert, Jonathan Sewell *DCB* Online http://www.biographi.ca/009004-119.01-e.php?&id_nbr=3655&interval=25&PHPSESSID=1pcm5f6vdk2rlstpr7746n45
84 This attempt at impeachment is covered extensively in Kolish and Lambert, “The Attempted Impeachment”, 450-486.
85 Ibid., 450-451.
86 The heads of impeachment against Sewell, as set out in the _Proceedings in the Assembly of Lower Canada on the Rules and Practice of the Courts of Justice and the Impeachments of Jonathan Sewell and James Monk Esquires (1814)_ are included in Greenwood and Wright, _Canadian State Trials, Vol. 1_, 688-694. For the charges against Monk, see ibid., 694-696.
87 Kolish and Lambert, “The Attempted Impeachment” 469-475. the details of the strategy are set out in Library and Archives of Canada (LAC), _Sewell Papers._
88 Ibid, 460.
most of the judges were associated with a group described as the Family Compact – including colonial officials, businessmen and churchmen – which was committed to preserving and replicating their own high Tory, anti-democratic values in the governance of the colony. Attorney General John Beverley Robinson and Solicitor General Henry John Boulton were more than ready to use criminal law to deal with political troublemakers and radical newspaper men. Their first victim was Robert Gourlay, a Scottish immigrant of radical tendency, who developed a strong sense that the colony was being mismanaged and had the temerity to advocate a people’s assembly to discuss its constitution. After eloquent pleas to juries that the Crown was acting to subvert freedom of expression and the press and the spirit of Fox’s Libel Act of 1792, he was twice acquitted, only to be banished from the province under the Sedition Act. This decision to invoke this legislation was reached after a secret conclave between the Court of King’s Bench and the law officers, which produced a tortured interpretation of the legislation which made it impossible for Gourlay to have complied with its terms.

For the Crown lawyers the justice system was a legitimate instrument for neutralizing, or even ridding themselves of those with a different vision of society. The exclusivist views of these men did not go unchallenged, however. The presence of lawyer, William Warren Baldwin, in the Assembly in the early 1820s was to introduce the discourse of a more liberal constitutional tradition, drawing strength from 18th century English country Whigs, Irish Whig ideology, and expansive readings of Blackstone. Baldwin went on the attack against the Sedition Act. He argued that as long as the Act remained in force Upper Canadians were “without a constitution, at least a free one”. “The statute”, he continued, “remained in force not only in the face of Magna Carta, but directly in the face of all the statutes made for the liberty and protection of the subject.” Perhaps drawing on the inspiration of Robert Thorpe’s earlier tract, Baldwin began asserting that the Constitution Act of 1791 represented a compact between the Crown and people of Upper Canada (reflecting his own Irish Whig heritage) which could not be altered without the consent of the governed (a position close to the English reformist and radical Whigs of the mid-18th century). Here were the seeds of what became in a short time the reformers’ manifesto for the grant of responsible government.

It was the disjuncture between their apparent enthusiasm for prosecuting radicals for sedition while apparently turning a blind eye to physical assaults and damage to the

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90 For the careers of Robinson and Boulton, see Patrick Brode, “John Beverley Robinson”, *DCB online* http://www.biography.ca/009004-119.01-e.php?id_nbr=6399&interval=20&PHPSESSID=1pcm5tf6dqk2rlstpr7746n45 and Hereward and Elinor Senior, “Henry John Boulton” *DCB online* http://www.biography.ca/009004-119.01-e.php?id_nbr=4311&interval=20&PHPSESSID=1pcm5tf6dqk2rlstpr7746n45


92 Ibid., 491-496. For Gourlay’s defence of himself against the prosecutions launched by Boulton and the outcome of the conclave between the law officers and the judges of the Court of King’s Bench, see Greenwood and Wright, *Canadian State Trials, Vol. 1*, 701-702, Supporting Documents N 2.


94 Ibid., 335-336.
property of their actual or imagined enemies that most offended the advocates of a liberal notion of the rule of law in the province. In two notorious cases in the late 1820s the law officers sat back and remained mute or lent moral support when their supporters committed depredations against the opponents of the Tory cause.95 The first involved the trashing in 1826 of the printing presses of the radical newspaper editor, William Lyon Mackenzie by young Tory hoods, including several law clerks in the offices of Attorney General Robinson (the so-called Types Riot) for the editor’s intemperance in attacking their superiors. The second was the tarring and feathering of George Rolph the clerk of court in Ancaster, and brother of the reformist Assemblyman, John Rolph, by hooded men including two local magistrates and a sheriff.96 Reformers were outraged at these examples of vigilantism and the apparent connivance of the law officers. The Treasurer of the Law Society, William Warren Baldwin, bitterly reproached Robinson for not calling the types rioters to account, especially those from his office. Mr. Attorney’s lack of action was, Baldwin asserted, a discredit to the legal profession which demanded of its members “that [they] will to be best of their ability uphold the Constitution and defend the rights of his fellow citizens”.97 This was not, he asserted, “idle form” but an obligation embodying not only “legal wisdom” but also one flowing “from morality and the true spirit of English liberty.”98 Similar distaste was shown by the reformers towards Solicitor General Boulton representing the tar and feather culprits in a civil action brought by George Rolph.99

The issue of partiality in the administration of justice in the province came to a very public head in 1828, through the intervention of one of the puisne judges, John Walpole Willis, recently appointed from England.100 This vain and ambitious man, for motives which are not entirely clear (it remains a puzzle whether his actions were principled or rather prompted by self-interest in a bid for the chief justiceship), challenged Robinson in court for the law officers’ failure to launch prosecutions in serious cases of breaches of the peace by Tory supporters. He did this sitting on a libel prosecution of radical Irish newspaper editor, Francis Collins, for defamation of the law officers.101 The editor complained vigorously to the judge about the double standard being applied in the

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96 Romney, Mr. Attorney, 109-114. This attack had been made on the erroneous pretext that the clerk had committed adultery with a married woman he had taken into his residence. She was in fact fleeing an abusive husband, and Rolph had done nothing to take advantage of her.

97 Romney, “Very Late Loyalist Fantasies” at 131-132, quoting from draft letter, Baldwin to Robinson, 31 May 1828, W.W. Baldwin Papers, Metro Toronto Library.

98 Ibid., 132.

99 Romney, Mr. Attorney, 136.


101 Paul Romney, “Upper Canada in the 1820s: Criminal Prosecution and the Case of Francis Collins” in F. Greenwood and Wright, Canadian State Trials, Volume I, 505-521and Romney, Mr. Attorney 130-133.
administration of criminal justice. After listening to Collins, Willis dressed Robinson down for failure to do his duty and determined to refer the matter to His Majesty’s government. The clear implication of the judge’s comments was that discretion to prosecute did not extend to serious breaches of the peace, and that the law officers were bound to act regardless of the circumstances and the identity of the culprits. Robinson in his later justification of the law officers’ decisions, relying on English precedent, made it clear that they were perfectly justified in exercising discretion in whether or not to prosecute.102 Moreover, the alleged offences were ones in which it was expected that the victims would take the initiative in prosecuting, not the Crown. The Attorney General was arguing that both he and his colleagues had complied with the formal requirements of the law, and that was all that was demanded of them.

Willis’s relations with the governing elite, especially the Lieutenant Governor, Peregrine Maitland, Robinson, Boulton and his judicial colleague, Levius Sherwood, already soured by this incident, deteriorated even further. This happened when the judge challenged the legality of the Court of King’s Bench sitting with less than three judges under the Court of King’s Bench Act of 1794, and refused to sit on a bench with any fewer.103 In this he was launching a head on attack on how sloppily the governing elite, legal advisers and even the judges had practiced their constitutional obligations in relation to the administration of justice, as he saw it. The patience of the colonial executive having been tried to the limit, Maitland removed Willis from office in July 1828, a decision approved by Secretary of State for the Colonies, William Huskisson.104

The Willis “scandal” was used by the reformers in the Assembly with whom the judge had earlier consorted, to petition the British government for reform of the governance of the colony (a move to responsible government). This was warranted, they claimed, because of the subversion of the wishes of Assembly, “the constituted guardian of our rights and liberties”, by the existing clique of government placemen.105 The document also complained of the all too cozy relationship between the judges and the executive and their partiality, and advocated appointment “during good behaviour” and the judges’ exclusion from both the Executive and Legislative Councils. Although the British government of the day was nowhere close to contemplating responsible government for its North American colonies, it did show a willingness to rethink the relationship between the judges and the executive. The new Chief Justice, John Beverley Robinson, was excluded from the Executive Council on orders from Westminster.106 From 1834 on judges to the colony were appointed during good behaviour, and ten years later judges

102 See Canadian Freeman, 17 April, 1828 and CO 42, Vol., 385, letter Robinson to Lieutenant Governor Maitland, 20 May, 1828, for elaboration of Robinson’s position.


104 Ibid., 28. Willis appealed his removal. The evidence for both Maitland and the former judge can be accessed in Printed Papers in Indian and Colonial Appeals, folio series (P.C.I.C.A.), Vol. 15 (1829) in the Archives of the Judicial Committee of the Privy Council, 12 Downing Street.

105 Petition by Dr. Baldwin and others to King George IV on the case of Justice Willis. July, 1828, CIHM No. 41338.

106 Romney, Mr. Attorney, 151.
had been excluded from all executive and legislative bodies in the province.\textsuperscript{107} This was a pattern to be later adopted in all the settler colonies which were granted responsible government between 1848 and 1856.

This developing sentiment that colonial judges should be immunized from an unduly close relationship with executive government was to prove the undoing of Chief Justice Henry John Boulton of Newfoundland in the mid-1830s.\textsuperscript{108} Surprisingly, this scion of Upper Canada’s Family Compact was appointed to the colony in the wake of the grant of a representative assembly with a franchise broader than anywhere else in the Empire included the majority Roman Catholic population.\textsuperscript{109} Also, against the advice of Governor Thomas Cochrane who feared trouble with a judge too closely identified with politics, Boulton was given the position of president of the Legislative Council.\textsuperscript{110} Directed by the Colonial Office to expand the application of English law and underline the need for law and order in what was viewed in London as an unruly possession, he was immediately marked by the reformers, the reformist press and the activist Roman Catholic bishop, Michael Anthony Fleming, as a dangerous enemy.\textsuperscript{111} Among the charges against him were resisting full Roman Catholic involvement in the life of the community by changing the jury selection rules and limiting admission to the legal profession, imposing draconian punishment for infringements of the criminal law, attacking press freedom, and seeking to reverse the unpalatable results of the Assembly elections of 1836 (a reformist majority had been returned).\textsuperscript{112} The rhetoric and discourse of the reformers and the bishop and his priests was replete with talk of attacks on liberty and the corruption of the administration of justice by Boulton, who had become a lightning rod for all the evils charged against the colony’s elite and the British government. In one of number of missives by Bishop Fleming to the Irish nationalist M.P., Daniel O’Connell, who took a close interest in the welfare of his coreligionists in the colonies, the prelate (missing the irony in his judicial parallel) charged the Chief Justice with being “a violent Tory, . . . in the Assembly a coercionist and on the Bench a Jeffries”.\textsuperscript{113} Boulton countered his critics with the assertion that he was carrying out faithfully his role as a colonial judge according to the law. Ultimately the Assembly, now reformist to a man, petitioned the Queen to have Boulton removed from office for his arbitrary and insensitive actions as a judge.\textsuperscript{114} With what looks like the connivance of the Colonial Office which had concluded that this judge had become a dispensable embarrassment in a period of serious unrest in other North American colonies, the Privy Council recommended that he be removed from his position and he was.\textsuperscript{115}

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\textsuperscript{107} Peter Oliver, “Power, Politics and the Law”, at 456-457.
\textsuperscript{108} Hereward and Elinor Senior, “Henry John Boulton”, DCB Online.
\textsuperscript{109} Gertrude Gunn, The Political History of Newfoundland 1832-1864 (Toronto: University of Toronto Press, 1966) 19.
\textsuperscript{110} Ibid., 4-5, 13.
\textsuperscript{111} Ibid., 122.
\textsuperscript{112} Ibid., 22-23, 25-26, 33-34, 36.
\textsuperscript{113} Quotation from John Fitzgerald, Conflict and Culture in Irish Newfoundland Catholicism. (Ph.D. dissertation, University of Ottawa, 1997), 194-195.
\textsuperscript{114} Gunn, Political History of Newfoundland, 39, 43-44.
\textsuperscript{115} P.C.I.C.A., Vol. 18, 1838, Advice of the Privy Council to Her Majesty, 5 July 1838. This advice was based on the report of an ad hoc committee not the Judicial Committee of the Privy Council which had declined to hear the matter because it involved “the expediency of removing the judge rather than the
The contentious issue of whose law and its rule should prevail in bi-jural colonies was not limited to Lower Canada, but existed in several possessions wrested from other European empires – the Cape Colony, Ceylon, Trinidad, Demerara and St. Lucia during the late 18th and early 19th century. In Trinidad which the British had taken from the Spanish in 1796 the matter of whether Spanish law should subsist or be replaced by English law became a bone of contention between the British planters and merchants on the island on the one hand, and the first professional Chief Justice on the other. George Smith, like Thorpe a protege of Lord Castlereagh, had persuaded his patron to allow him to write his job description in 1808. Smith who clearly had a touch of egomania sought to combine in his office several, discrete Spanish offices. He favoured the retention of the existing legal system which he saw as in some ways superior to English law in property matter and its treatment of slaves. The judge had ties to James Stephen Senior, a committed anti-slavery advocate, described by his enemies as “evil genius of the Colonial Office”, to which he acted as a consultant. Smith, like Stephen, was strongly opposed to the grant of a representative assembly for the colony which both feared would give planters and merchants the power to entrench a more oppressive slave economy than it already possessed. Smith’s view brought him into direct conflict with those commercial interests, the Governor, Thomas Hislop, and the island’s law officers. The vigorous and increasingly intemperate debate was suffused with rule of law rhetoric and discourse, with Smith asserting the need for respect for judicial independence and the virtues of Crown colony government in protecting the non-European population, and his opponents the “rights of freeborn Englishmen” which could only be guaranteed by an Assembly representing their interests and the inherent virtues and liberality of English law. Smith who became increasingly difficult to live with was suspended by Hislop in 1811, a decision confirmed by the Privy Council two years later. Ironically, Smith’s view on governance and law were largely adopted by the Liverpool government when it constituted Trinidad a Crown colony and approved the continuation of Spanish law as the dominant system on the island in 1811. One of its prime motives in choosing close control of the colony was a concern to protect the “free coloured” population who had petitioned the King for the recognition of their rights (albeit limited) as loyal subjects of the Crown. Smith had shown sympathy for this element of the population.

It was not only in bi-jural colonies that tension of whose law and its rule emerged. The issue was a major one in the convict colony of New South Wales. For reasons of distance,
lack of clear direction from London distracted by the French wars, the discretion granted to governors, and sheer pragmatism, the legal system that developed in the first twenty years after its founding had unique local features. The ignoring of the rules of felony attainable, for example, made the system more liberal than that in place in Britain. While the former military elite and the growing number of free settlers might look askance at such local innovations, they were encouraged by governors and lay judge advocates mindful of the need to construct a viable civil society in the possession. When the imperial government began taking the future of the colony and its governance more seriously in the 1810s, appointing judges who had legal training, and revised the system of civil justice, clashes between lawyer judges and the executive were soon to follow. Both Ellis Bent, appointed Judge Advocate in 1810, and his brother Jeffrey Hart Bent, the first judge of the Superior Court of Civil Justice from 1815, were to lock horns with Governor Lachlan Macquarie over his attempts to introduce harbour dues (which the judges treated as legislative usurpation by the colonial executive). Jeffrey, along with the free settler exclusivists, bridled at Macquarie’s attempts to introduce wealthy emancipists to the magistracy, and refused to sit while only convict attorneys could represent parties before his court. The hiatus that resulted was sufficient to induce the Secretary of State for the Colonies, Lord Bathurst, to recall the uncooperative jurist in 1817.

The clash of exclusive and inclusive legal cultures was to intensify during the tenure of Judge Barron Field, Hart Bent’s successor. Field, also of conservative sensibilities, was to set the cat amongst the colonial pigeons by ruling in a suit brought against him by emancipist lawyer, Edward Eager that the law of felony attainable applied in the colony and prevented suit by or against convicts. Moreover, since the pardons granted to emancipists had not been correctly registered in London their status remained legally that of convicts. The reintroduction of felony attainable raised all sorts of complications about the validity of contracts entered into by and the property holdings of convicts and emancipists alike. In the absence of any ameliorating response from London the New South Wales judiciary was forced to resort to fictions to preserve the vested rights of emancipists or those holding from them.

Tensions relating to the more open introduction of English and sensitivities over the rule of law were to surface with even greater intensity in New South Wales in the 1820s. Chief Justice Francis Forbes who had already developed a liberal reputation in Newfoundland in that role for his apparent warmth to local custom and antipathy towards

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124 Ibid., 55-57.
126 Ibid., 101-119
127 Ibid., 146-147.
130 Kercher, An Unruly Child, 36-38.
surrogate courts manned by naval officers, was appointed to the new Supreme Court of New South Wales in 1823. Clear in his view that English law and the rule of law should generally apply in the colony, he favoured the introduction of juries in civil cases. Forbes justified his position by references to Magna Carta and the “rights of freeborn Englishmen.”

He also asserted (supported by his judicial brethren after 1825) that the judges were the guardians of the rule of law against its ignoring or subversion by the colonial executive. When Governor Ralph Darling abused his power, as the Chief Justice and his colleagues saw it, the time had come, in their opinion, for the court to rein in the executive. In some instances Forbes was assisted by the fact that under the New South Wales Act of 1823 the Chief Justice was given the power of reviewing legislation proposed for the colony to vet it for repugnancy to the laws of England. The governor, as a military man, believed in decisive action and was clearly frustrated by what he saw as legal technicalities. In several seminal decisions the court determined that Darling had exceeded his powers in the treatment of convicts and their assignment.

The battle royal between the two antagonists developed round the governor’s attempt to silence the editors of the reformist press – an able group of lawyer-newspaper men who advocated the emancipist cause and greater political freedom with unremitting zeal. After several abortive attempts to prosecute them for criminal libel, Darling sought to introduce legislation which would require registration of newspapers at his discretion, and imposed a stamp duty which was clearly designed to put his detractors out of business. Forbes, using the power vested in him, pronounced the registration system repugnant, and, once he discovered the hidden agenda behind the stamp duty, invalidated it as well. In so doing, the Chief Justice was to criticize the governor’s actions as an infringement of freedom of the press, which he described as a privilege in the British constitution. As Bruce Kercher has observed “that was as much a statement of political aspiration as law, given the repressive nature of English press law” at that time. The contretemps was treated as so serious in London that Forbes came close to being recalled along with his nemesis in 1828. When the dust had settled, however, Forbes survived and is applauded by legal historians as being the architect of the judicial review of

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132 See Ian Holloway, Simon Bronitt and John Williams, “Rhetoric, Reason and the Rule of Law in Early Colonial New South Wales” in Foster et al., The Grand Experiment, 78-100 at 87-94.

133 Bennett, Sir Francis Forbes 117-121, 73-82.

134 New South Wales Act (1823) § Geo. IV, c. 96, s. 29.


138 Kercher, An Unruly Child, 85-86. Press freedom in Britain was still limited by emergency legislation passed during the period of social unrest after the end of the Napoleonic Wars.

139 Bennett, Sir Francis Forbes, 100.
administrative action in the colony, and by extension Australia.\textsuperscript{140} Moreover, in most instances as Chief Justice he adhered to a liberal, constitutional interpretation of the rule of law.\textsuperscript{141}

The late 1820s were a time of increasing tension in Britain’s Caribbean colonies. The British government had put in place a program for ameliorating slavery in these colonies in the 1810s, providing models for the older representative possessions in its legislation and orders-in-council applicable to Crown colonies such as Trinidad. Even when colonial assemblies passed amelioration legislation it was often grudging and inadequate, as legal counsel to the Colonial Office, James Stephen Junior, (the “lap dog” of Wilberforce as his planter enemies described him) was quick to point out.\textsuperscript{142} As pressure built up in Britain for the complete abolition of slavery in British territories, sentiment in planter communities hardened and they became more obsessive about dissension among slave and “free coloured” communities.\textsuperscript{143} One colony in which conflict developed between the planter elite and a Chief Justice about oppressive treatment of the subject population was Grenada.\textsuperscript{144} Having been secured by the British from the French before 1790 and the new rounds of war, it had been granted a representative assembly. Long standing fears about a slave rebellion, following an uprising in the 1790s, created suspicion about dissension among the French-speaking Roman Catholic slave and creole population. By sleight of hand the assembly had managed to exclude the Chief Justice from membership of the legislative bodies.

It was this colony to which the conservative and ostensibly unbending Jeffrey Hart Bent was appointed in 1820. After apparent peace and harmony for eight years the judge, to the chagrin of the planter elite, took the part of a Roman Catholic priest popular with his slave and poor coloured parishioners who his bishop wanted to replace.\textsuperscript{145} When Bent summoned before him and labelled as “vagabonds” the episcopal representatives sent to carry out the bishop’s wishes, the President of the Council reacted angrily and ordered the judge to desist. This engendered a less than subtle rejoinder from Bent in which he lectured his detractor on the importance of judicial independence. After being suspended from office, a decision quickly countermanded by the Colonial Office, the Chief Justice reacted to the imprisonment of the priest by magistrates under legislation passed during his suspension, by issuing a writ of \textit{habeas corpus} ordering the cleric released. When the judge openly criticized the treatment of slaves in the colony and sought to provide a

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  \item\textsuperscript{140} Ian Holloway, “Sir Francis Forbes and the Earliest Public Law Cases” (2004), 22 \textit{Law and History Review} 209-242; Holloway, Bronitt and Williams, “Rhetoric and Reason”, 87-90.
  \item\textsuperscript{141} As exception was his attitude towards bush ranging where he took a hard line, upholding legislation (that he had helped formulate), which placed a reversed onus on those suspected of engaging in this practice, see Kercher, \textit{An Unruly Child}, 105-108 and \textit{The Bushranging Act} (1830), 2 Geo. IV, c. 10.
  \item\textsuperscript{143} Gad Heuman, “The West Indian Colonies”, 474-476.
  \item\textsuperscript{144} For an outline of Jeffery Bent’s controversial career first in Grenada, then elsewhere in the Caribbean, see Currey, \textit{The Brothers Bent}, 157-65. See also George Brizan, \textit{Grenada: Island of Conflict: From Amerindians to Peoples Revolution 1498-1979} (London: Zed Books, 1984) 106.
  \item\textsuperscript{145} Ibid., 159-160.
\end{itemize}
forum to hear their complaints, he was suspended a second time for his partiality, slurs on
the community, encouraging unrest among the lower orders, and perverting the
administration of justice.\textsuperscript{146} On Bent’s appeal to the Privy Council the latter, no doubt
mindful of pending abolition of slavery throughout the British Empire, found no evidence
to warrant the Chief Justice’s removal from office to satisfy planter opinion.\textsuperscript{147} At the
Colonial Office legal counsel James Stephen Jr., while deprecating Bent’s intemperate
language, could find no fault with the judge’s application of the law.

The jury was, as we have seen, long considered a venerable bastion of justice according
to law and a field of conflict over the extent to which it should be controlled by the
judiciary. Within the 19\textsuperscript{th} century empire the jury was the focus of both attempts to
downgrade its status and praise for its potential to protect the rule of law from arbitrary
challenge. In several colonies difficulties associated with finding the numbers to select
grand juries, as well as a desire to simplify procedures led to the demise of or at least
attempts to abolish this institution.\textsuperscript{148} Petit juries were also to come under scrutiny in
the cause of introducing summary procedure trials in lower and intermediate courts.\textsuperscript{149} Juries
generally were suspect among the apostles of utilitarianism.\textsuperscript{150} Algernon Montagu, puisne
justice of the Van Dieman’s Land Supreme Court from 1832 to 1848, who was described
in the press as a Benthamite, made no bones about his feelings of frustration at having to
deal with juries and to suffer their misguided findings.\textsuperscript{151} A similar sense of angst seems
to have affected Chief Justice Matthew Baillie Begbie of the colony of British Columbia
during the 1860s.\textsuperscript{152} It is not fanciful to believe that in his case, his experience in equity
practice where juries were unknown may have jaundiced his view of this institution. A
further gripe about juries, typically from reformist interests, was jury packing,
particularly at the behest of elite interests in colonies. This was the case in Upper Canada
during the ascendency of the Family Compact in governing circles in the province.\textsuperscript{153}
Moreover, one of the many charges by reformers in Newfoundland in the mid 1830s,
most of whom were Roman Catholics, against the Tory Chief Justice, Henry John
Boulton, was that his revision of the rules for selection of juries effectively excluded

\textsuperscript{146} Ibid., 160.
\textsuperscript{147} The Committee reported that “there were not sufficient grounds to justify the Act of President Houston
in suspending the Chief Justice of Grenada and that he is entitled to restitution to the exercise of the
functions of his Office.” See ibid., 161-163, the decision was dated 15 February, 1832. Documentation
relating to the attempts of the executive and legislative assembly of Grenada to get rid of Bent are
\textsuperscript{148} On the long story of attempts to abolish the grand jury in Upper Canada, see Romney, Mr. Attorney,
298-311.
\textsuperscript{149} Romney, Mr. Attorney, 290-298.
\textsuperscript{150} Ibid., 299.
\textsuperscript{151} See Stephan Petrow, “Moving in an ‘Eccentric Orbit’: The Independence of the Judge Algernon Sidney
Montagu in Van Dieman’s Land, 1833-47” in Hamar Foster, et al., \textit{The Grand Experiment: Law}, 156-175
\url{http://www.adb.online.anu.edu.au/biog/A020213b.htm?hilite=algernon%3Bmontagu}
\textsuperscript{152} Tina Loo, \textit{Making Law, Order and Authority in British Columbia, 1821-1871} (Vancouver: UBC Press,
\textsuperscript{153} Romney, Mr. Attorney, 291-295.
Roman Catholics from the process, and thus their coreligionists from the judgment of their peers.\footnote{Gunn, \textit{The Political History of Newfoundland}, 22}

The ability of juries to exercise independent judgment was capable of producing findings which vindicated a liberal reading of the rule of law. In Canada a prime example is the case of Joseph Howe.\footnote{Barry Cahill, \textit{“R v. Howe (1835) for Seditious Libel: A Tale of Twelve Magistrates”} in Greenwood and Wright, \textit{Canadian State Trials Vol.1}, 547-575; \textit{J Murray Beck, “Joseph Howe” DCB Online} http://www.biographi.ca/009004-119.01-e.php?id_nbr=5049&&PHPSESSID=ldolv3omtr8bk6mjsgt05g3em4.} Howe, the editor of the newspaper, the \textit{Novascotian}, professed to stand for \textit{“the Constitution, the whole Constitution, and nothing but the Constitution.”}\footnote{Beck, \textit{“Joseph Howe”}.} He had the temerity in 1835 to publish a letter alleging that for 30 years the magistracy and police of Halifax had \textit{“by one stratagem of other, taken from the pockets of the people in over exactions, fines etc., etc., a sum that would exceed in the gross amount £30,000.”}\footnote{Ibid..} He was charged with criminal libel against the magistrates. Representing himself, he spoke in defence of his publication of the offending letter and freedom of the press for six hours, and won an acquittal from the jury. In its wake, Howe proclaimed that \textit{“the press of Nova Scotia is free.”}\footnote{See also Cahill, \textit{“R v. Howe”}, at 731-732, Appendix 3, Q, letter Howe to sister, 17 March, 1835 describing the trial and remarking : \textquote{The verdict is most important to all the colonies as it fixes principles of the highest value, & had it gone the other way would have taken twenty years to reverse it . . ”.}} In the wake, Howe proclaimed that \textit{“the press of Nova Scotia is free.”}\footnote{Ibid., 75-87.} He was to continue to speak out vigorously on a variety of issues without being subject to the attention of the criminal law. Even more remarkable was the outcome of the trial of a group of gold miners and their leaders who challenged militarily constituted authority in the colony of Victoria in the Eureka Stockade in 1854.\footnote{John Molony, \textit{Eureka} (Ringwood VICT: Penguin Australia, 1989); \textit{Ian MacFarlane, Eureka from the Officials Records} (Melbourne: Public Records Office of Victoria, 1995).} They smarted under what they considered the unjust license and regulatory system in place on the gold fields and its heavy handed enforcement by police.\footnote{Ibid., 187-201.} The miners developed a manifesto inspired by British Chartist protests that sought \textit{“no taxation without representation”}, and a representative legislature based on manhood suffrage.\footnote{“Principles and Objects of the Ballarat Reform League”, 11 November, 1854, from Eureka: From the Official Record (Melbourne: Public Record Office, 1995), p. 207} In the documents they also complained of the tyrannical and arbitrary rule to which they were subjected, and asserted their rights to remove the source of that power. When Governor Charles Hotham refused to release three of their number held on charges of burning down a Ballarat hotel, a group of rebels barricaded themselves in a stockade with the Southern Cross flag unfurled above them.\footnote{Ibid., 174-186. See also http://www.slv.vic.gov.au/ergo/eureka_stockade} Easily suppressed by a joint force of militia and police, many of those who had not been killed in the engagement were captured and thirteen were charged with treason. In a series of state trials in 1855 all of these men, but one, were acquitted by the juries, whose sympathy for the rebels trumped a strict reading of the law.\footnote{Ibid..} The Commission, looking
into the event, advocated a new regime on the goldfields marked by greater sensitivity to miners’ rights.

Comment was made earlier on the existence of poli-jurality in the British Empire in the 18th century. During the 19th century the pattern was to undergo some change as the colonial state consolidated its power and its ability to apply it. Older European systems of civil law were sustained in territories in which the non-British populations were numerous or the system well-embedded, Lower Canada/Quebec, Cape Colony and Ceylon. The same was true of India, where the system of personal law continued. In both sets of possessions the criminal law was English in inspiration, a reality strengthened in the multi-racial possessions by the proclamation of the Indian Penal Code of 1861 and copied elsewhere in Asia, and later in most African colonies. The co-existence of these parallel legal systems did not inevitably ensure that they were fully understood where British judges had a primary role in interpreting their institutions and principles.

In the case of Aboriginal peoples, earlier respect for, or at least neutrality about the continuation of their culture, law and customs was displaced by policies designed to underline British sovereignty, vest title to land firmly in the Crown, facilitate white settlement, displace indigenous systems of governance and law, and assimilate indigenous populations by one means or another. Steps had already been taken to extend colonial criminal law to Aboriginal communities and intra-group violence by characterizing their members as British subjects. The domination of indigenous peoples was a pattern that, with varying degrees of intensity, reached across the white settler empire in Australia, British North America and New Zealand, from the 1820s on. The humanitarian policies of the British government and especially the Colonial Office, which had for a time in the 1830s and 1840s preached benign, albeit paternalistic, notions of trusteeship of these populations, were progressively replaced by the hard-nosed realpolitik of local governments representing settler self-interest. In Paul McHugh’s concise and pertinent conclusion about this shift and its legal effects: “Nationalism and liberal democracy pervaded legal doctrine. By positivizing sovereignty – by setting what had been a fluid, historically contested, and contestable concept into a hardened legal form requiring an ultimate constitutional authority – the traditional political forms of the tribal peoples were juridically eliminated.” The intention was or

164 Martin Wiener, An Empire on Trial: Race, Murder and Justice under British Rule, 1870-1935 (Cambridge: Cambridge University Press, 2007) 8-9
165 For Upper Canada, see the correspondence relating to Shawanakiskie’s Case from Derek Smith ed., Canadian Indians and the Law: Selected Documents 1663-1972 (Toronto: McClelland & Stewart, 1975) 21-5. On the extension of the rule of law to Australian Aboriginal peoples in New South Wales, see http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_murrell_and_bummaree__1836.htm
167 McHugh, Aboriginal Communities, 130-135; Harris, Making Native Space, 3-16.
168 McHugh, Aboriginal Communities, 179.
became the erasure or close confinement of Aboriginal modes of government, law and legal institutions, a process which solidified for the rest of the century and into the 20th. Moreover, while formally British subjects and so theoretically entitled to the protections of the dominant rule of law, both the judgment that they were “uncivilized” and the forms of legal regulation to which they were subject denied them equal status with the European populations of these territories. These policies and processes were resisted in various ways by the indigenous peoples to whom they applied, by concealing activities, keeping alive the memory of their law, often against the odds, and, where they felt that it had strategic value in furthering their claims, appealing to imperialist rhetoric and discourse about the liberal and equitable nature of the dominant justice system and its concept of the rule of law.

The abolition of slavery within the British Empire in 1834 was in theory meant to introduce former slave populations to equality under the law and the benefits of British justice. The Colonial Office recognized that this process would not be self-executing, and took some steps to try and reduce the influence of the highly partial administration of justice in these territories by the planter magistracy by appointing stipendiaries from England. This short lived experiment did little to cure the basic problem of the discriminatory administration of justice in these possessions. While Britain took the moral high road in abolishing slavery, the government subverted that position by both compensating the planters and supporting the continuation of plantation economies in these territories. The result was that the power and authority of this social and economic elite was broadly sustained and their control over the sources of labour continued. The black population remained outside the political mainstream, as did most of the “coloured” or creole population. Although some steps were taken in particular colonies to revise the local courts system to make it more sensitive to the needs of these people, they continued by and large to be on the receiving end of the administration of justice, whether the criminal law or master and servant legislation. For those former slaves who continued to work on the plantations (many refused to do so, preferring to eke out an independent existence on their small plots of land) although they were to some extent protected from the excessive harshness of the slavery codes, they were still regimented and closely

169 See e.g. Brian Titley, A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada (Vancouver: UBC Press, 1986). The mindset of Scott is impressively captured in the National Film Board documentary: “The Poet and the Indians: Duncan Campbell Scott”.


171 Hamar Foster and Benjamin Berger provide an intriguing instance of the latter in “From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the British Columbia Land Question” in Foster, Berger and Buck, The Grand Experiment, 240-267.

172 W.L. Burn, Emancipation and Apprenticeship in the West Indies (London: Jonathan Cape, 1937).


regulated.\textsuperscript{175} The same was true of newcomers to the plantations, the indentured labourers imported from India and China, with the encouragement of the imperial government, to fill the labour deficit caused by the refusal of the former slaves to work in this environment.\textsuperscript{176} Often subject to overwork, exploitation, neglect and harsh treatment they could expect little or no empathy from the planter magistracy.\textsuperscript{177} As Douglas Hay and Paul Craven have noted the fact that the Empire-wide system of master-servant law was administered by magistrates mean that to a great extent it operated outside the surveillance of the superior courts.\textsuperscript{178}

The planters continued to be haunted by fears of revolts. One of the most notorious episodes of Caribbean history during the 19\textsuperscript{th} century was the Morant Bay Rebellion in Jamaica in 1865 and the brutal treatment of actual and suspected rebels in its wake. The actions of the Governor, Edward Eyre, in invoking martial law and supporting its vigorous and indiscriminate enforcement, proved that the rule of law was meaningless when minority white populations felt themselves in mortal danger from their subjects of colour.\textsuperscript{179} Even membership of the Legislative Assembly was not a sufficient shield from drum head justice, as reformer Assemblyman, George William Gordon, summarily tried and hanged for supporting political dissent in the possession, was to find to his cost.\textsuperscript{180} The events in Jamaica became a cause celebre in Britain as liberals, led by John Stuart Mill, reflected on the subversion of the rule of law by Eyre and its possible implications for domestic politics, and sought to bring him and several of his minions to book, while conservative imperialists, led by Thomas Carlyle, rallied to his cause for taking resolute action against subject people who needed to know their place, and realize the will and capacity of colonial governments to use force in the event of their using or threatening violence.\textsuperscript{181} The English high court judges who the liberals imagined would be able to cut through the politics and vindicate the rule for law, proved indecisive on the limits of martial law, or unduly sympathetic to the circumstances in which the former governor found himself, and the accused either survived indictment or were acquitted.\textsuperscript{182}

Two Chief Justices appointed to Caribbean colonies who valued and enthusiastically pursued the rule of law in a liberal sense were to fall victims to a shift in policy in the imperial government, affected by the Indian Mutiny in the late 1850s, the Maori Wars of the early 1860s, and the Eyre scandal. This change sought to repose greater imperial control in multi-racial colonies by vesting plenary powers in governors, abolishing or

\textsuperscript{176} Ibid., 484-485.
\textsuperscript{178} Hay and Craven, Masters, Servants and Magistrates, 54-58.
\textsuperscript{180} Kostal, A Jurisprudence of Power, 88, 90-95.
\textsuperscript{181} This campaign and counter-campaign is the focus of Kostal’s exhaustive study
\textsuperscript{182} Kostal, A Jurisprudence of Power, 320-415.
reducing the powers of legislative bodies, and reacting unfavourably to internal bickering between governors and chief justices. While judges had secured at least formal independence in the white settler possessions, they were still viewed as key players in executive government in colonies with majority non-white populations, and expected, above all else, to be loyal. Chief Justice Joseph Beaumont was dispatched to British Guiana in 1863. He quickly became embroiled in conflicts with the Governor, Francis Hincks, and the planter elite. Among the judge’s concerns was the harsh treatment of indentured workers in the colony, which along with Trinidad, had received the lions’ share of this new labour pool. When he overturned the decisions of magistrates in cases of worker discipline on what his enemies considered technicalities, and sought to exercise supervisory control over the administration of justice in the lower courts, the temperature began to rise. It reached boiling point after Beaumont sought to establish his authority over gaol delivery and the process of commutation of sentences, and then committed for trial William Campbell, the clerk of the Supreme Court, for tampering with the relevant judicial records, alleging that the colonial executive was behind this. Hincks suspended the jurist from office, action which was abruptly countermanded by the Secretary of State for the Colonies, Edward Cardwell. The Governor in justifying his actions sought to paint himself as the protector of peace and order in the colony, and the fearless foe of the sort of agitation and violence that had recently plagued Jamaica. When Beaumont then proceeded with the Campbell case and imprisoned a hostile newspaper editor for contempt in his vituperative references to the judges sitting on that hearing Hincks and his friends in the Assembly engineered Beaumont’s constructive dismissal by refusing to vote him a salary. The matter was then referred to the Privy Council. In 1868 that body recommended the removal of the Chief Justice from office, having found him guilty of “proofs of indiscretion and a want of judicial temper.” His conduct was characterized as calculated “to embarrass the Executive Government rather than promote the ends of justice.”

Beaumont returned to England and to practice, embittered at his treatment. He set out his frustrations in The New Slavery in which he described the abuses of justice committed against indentured workers in the colony and the difficulties he had faced in securing fair

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185 Hincks, a mercurial Northern Irishman, had led a reform government in the early 1850s in the Province of Canada, but left Canadian politics under a cloud involving fiscal manipulation of railroad construction for his own benefit. London, apparently unconcerned about these charges, appointed him in succession as governor of Barbados and British Guiana. See William G. Ormsby, “Sir Francis Hincks” DCB http://www.biographi.ca/009004-19.01-e.php?id_nbr=5583&&PHPSESSID=ak0igii6oq92vol3aet1fvdin0
186 Mangru, “The Hincks-Beaumont Imbroglio” 99-100
187 Ibid., 101-102, 104-107.
188 Ibid., 109-10. Mangru notes that the planters’ lobby group in London was active in seeking to persuade the Secretary of State for the Colonies, the conservative Duke of Buckingham and Chandos, to dismiss Beaumont. The Chief Justice also had his supporters, both missionaries and representative of the creole community who petitioned the Colonial Office on his behalf (at 110-1).
189 Ibid., 111.
and decent treatment for them. His protestations may not have been entirely in vain. London, responding to the complaints of his friend, Frederick Des Voeux, a former stipendiary magistrate in Guiana who supported Beaumont’s attempts to bring justice to the estates, established a commission to consider the indenture system in the colony. This body recommended changes to the system of which the former judge would have approved.

John Gorrie had been a straight-talking, at times garrulous, judge in Mauritius, Fiji and the Leeward Islands, who had developed a reputation in these postings for taking the part of the most disadvantaged and vulnerable members of these multi-racial communities. Inspired by paternalistic notions held by Liberal reformers and impelled by a romantic vision of what the Empire could be, he felt a genuine concern for the oppressed in the colonies in which he served. Through his judicial decisions, the legislation he drafted and the commissions he took he sought to provide them with the protection of the law. His demise came in Trinidad and Tobago where he was appointed Chief Justice in 1886. He riled the settler elite who were well represented in the counsels of the colony by his open criticism of their attitudes and actions, and those of their police minions towards the former slave population. He also incurred their wrath by his manipulation of the justice system to better serve the poor and oppressed by advising them of their legal rights and how to use them. Gorrie’s enemies pressed vigorously for the removal of this “tyrannical judge.”

A blue ribbon commission appointed by London to look into the administration of justice on the islands found evidence the judge had abused his powers to satisfy his own visions of justice. The Colonial Office gave into the local pressure and ordered Gorrie removed from office in 1892. He died soon thereafter, before he could present his case to the Privy Council. Like Beaumont, his removal from office was deeply regretted by those whose interests he had tried to serve and his memory lived on among the oppressed as a reminder of the promise of a more inclusive and balanced justice system.

Although there may have been some sympathy for the stands taken by the two judges in official imperial circles, the tensions they were seen as having created with executive power in British Guiana and Trinidad and Tobago were ultimately considered

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192 The life of Gorrie as a judge in these far flung colonies is the subject of a fine biography by a Caribbean historian: Bridget Brereton, *Law, Justice and Empire: The Colonial Career of John Gorrie 1829-1892* (Kingston, Jamaica: University Press of the West Indies, 1997).
194 On Gorrie’s judicial career in Mauritius, see ibid., 66-103; in Fiji and the South Pacific, see ibid., 104-192; and the Leeward Islands, see ibid., 193-226.
195 On the Trinidad and Tobago phase of Gorrie’s career, see ibid., 227-314.
196 Gorrie’s activities in Trinidad and Tobago in support of plantation labourers and elite planter reaction to them are canvassed respectively in ibid., 227-258 and 259-285.
197 The denouement is described in ibid., 286-314.
unacceptable. In an Empire in which the wisdom was now that in multi-racial colonies executive power had to be consolidated and insulated from challenges from within the governing system, judicial independence of the type exhibited by these two judges was no longer palatable, and if this meant that they were dispensable, so be it.  

While the consolidation of political power in these territories was prompted in part by the desire to clip the wings of the planter elite, the result was for many decades the freezing of further constitutional development of the relationship between these colonies and the metropolis. Moreover, with a main objective of the colonial mission as preserving law and order the traditional centres of social and economic power in these possessions continued to exercise influence.

By the last third of the 19th century there were two distinctive trajectories in imperial policy to its colonies. In the case of the settler (now predominantly white) colonies a significant degree of self-government had been granted by the concession of responsible government (and in the case of Canada dominion status from 1867). With that move on the part of London, government and law (including the administration of justice) became localized. With the occasional cavil by the imperial authorities and the cantankerous jurist, interpretations of the rule of law and its scope were left to political and legal players in the possessions in question. Overall what was achieved by European settlers in the name of the rule of law tracked closely its evolution in Britain itself. The development of internal constitutional structures meant that, insofar as the rule of law had constitutional dimensions, it became entwined with how the constitutions were constructed and interpreted. So, for example, Paul Romney has argued that in Canada the rule of law as a constitutional inspiration in colonial times was effectively transformed after the grant of self-government into one of whose rule of law operated, that of the federal parliament or provincial legislatures.

In these “white” jurisdictions, whatever the relationship between new constitutional forms and the rule of law in its different hues, the concept continued to be contested terrain. In many ways, as in Britain in the 18th century, the focus of contention shifted from the risk of autocracy associated with powerful, seemingly untrammeled executive authority to the dominance of local legislative assemblies. While increasingly democratic in their composition as representatives of the white settler populations, these bodies could and did prove narrow minded and exclusionary when it came to dealing with the “other” within their societies. It was legislatures, the local inheritors of parliamentary sovereignty, that led the charge in adding to the growing list of restrictions on both Aboriginal and non-European populations (especially Asian and Pacific island migrants).

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198 See the story of the two successive Chief Justice of the Bahamas who were forced out of office in the 1890s after spats with the colonial executive and the influence of the then Secretary of State for the Colonies, Joseph Chamberlain on these events in Martin Wiener, *An Empire on Trial*, 115-127.
in these territories. Independence of the judiciary, formally granted to all of these possessions, could produce detached and balanced judgments in some instances. However, it was compromised in others by an identity of judicial sentiment on race and, in some instances, class, with mainstream opinion in white society, and by the political nature of appointments to the bench.

The second trajectory was that of closer imperial government and supervision of the multi-racial Empire, primarily through the exercise of the royal prerogative administered by governors with plenary powers. In the last three decades of the century advocates in Britain of a liberal and inclusive notion of the rule of law and the protections of the common law were clearly on the defensive as the pessimistic, and even apocalyptic, proponents of racial superiority and the need to keep the “untrustworthy”, “mutinous” and inherently “dangerous” coloured populations under close control influenced the imperial agenda. Although to some extent balanced by continuing notions of trusteeship and the guidance of subject populations, this mindset compromised judicial independence (already limited) in these territories, as the pressures for loyalty and compliance became stronger, and put off to some vague, and presumably distant, point greater political freedom for majority populations.

If the 19th century had brought the blessings of a growing commitment to democracy and a broader application of the rule of law to the male population of the British Isles, conditions in the empire were somewhat different. It was only in the white colonies that these movements had a clearly substantive impact, and then only in relation to the settler communities. Their counterparts in the multi-racial colonies had lost their direct political clout, although their social and economic power allowed them to pull strings indirectly, and the administration of justice continued to make their legal needs a priority. For the non-white subjects of Empire things were different. For some the benefits of the rule of law continued to be elusive, for others the law applied to them, in the place of their own law and customs, was viewed by them as offensive to their culture and legal sensitivities.

E. The Many Faces of the Rule of Law and its Role in Empire

Where does this leave in terms of the question posed by the title to this paper? Rule of law rhetoric and discourse was ubiquitous in the expectations of British colonists about the relationship between the colonial state and its subjects. They also believed that the

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204 Catherine Hall, *Civilizing Subjects*, 25. As Caribbean historian Bridget Brereton has noted, even under these conditions subject populations, were able through self-advancement through education to lay the basis for challenging “the divine right of colonial whites to rule,” – *Race Relations in Colonial Trinidad 1870-1900* (Cambridge: Cambridge University Press, 1979).
rule of law had or should have substantive meaning in the construction of their legal institutions, how they were run, and in the crafting of constitutional values and rights. The interpretations of the rule of law in the 19th century white British Empire ranged from the legalistic to the constitutional. In the former rendering, if decisions were made according to the formal and understood structures of the law – the courts or legislature – then they were commensurate with the rule of law. This conservative view sometimes also comprehended well entrenched and venerable constitutional values, such as the independence of the judiciary and constitutional rights, including trial by jury, the protection of private property and the proscription of illegal detention. In the constitutional rendering, the rule of law in addition to recognizing formal requirements of legitimacy for decisions in the name of law, demanded that those requirements were not subject to manipulation, and in particular the use of arbitrary and partial discretion by administrators, legal officials and judges. This more liberal understanding contemplated the existence of rights protecting the individual from arbitrary interference with person and property, including the older constitutional rights, and also newer contested rights, such as freedom of speech and expression, freedom of association, freedom of the press, and freedom of religion. By its very nature this more political conception of the rule of law was used as both a moral and legal measure of the performance of governments, legislatures and justice systems. Within the imperial system, more broadly conceived, there also was an ongoing tension between the representatives of the imperial system, including Westminster politicians, officials in the Colonial Office, some governors and judges on the one hand, and representatives of local settler majorities or minority settler elites on the other about who was in and who was out in terms of benefiting from the protections of the rule of law, as well as what it meant.

Battles over the rule of law and its meaning in the 19th century Empire were in many ways as vigorous as those in 17th England and 18th century Britain, America and Ireland. The inherent contradiction within imperial rule of the liberal and increasingly democratic nature of politics and law in the metropolis, and the belief that strong executive, even autocratic, power was needed to run an Empire, naturally induced those manning the ideological barricades to look back to the only history they knew, that of the struggles of 17th England and the autocratic pretensions of Stuart monarchs, and the different meanings attached to the 1689 Bill of Rights and its political and legal consequences during the 18th century debates in Britain and its empire. To liberal reformers pressing for representative or responsible government or trial by jury, or to white elites or majorities seeking to protect themselves from London’s distemper with their antediluvian attitudes on race or class, this history had resonance, because it could be and was used and manipulated to serve their political agendas.

The view of the rule of law as experienced and viewed by non-European subject populations of the colonies is contested and complex. In the case of Aboriginal peoples, populations which in earlier periods of empire had continued to live under their traditional systems of governance and law were divested of those, and their cultural heritage attacked during the 19th century, as the colonial state consolidated its power and flaunted a monist theory of sovereignty. It is not difficult to claim, as Robert Williams has done in the case of North America, that in the process western conceptions of law,
including the rule of law, were deployed in a conscious process of erasure.\textsuperscript{205} Ample evidence exists that Aboriginal communities wanted to live according to the rule of their own law not that imposed on them by the newcomers.\textsuperscript{206} The rule of law as part of a different and alien culture is not what they craved, although they recognized that the arrival of and relations with the visitors with their own conception of the rule of law would require legal initiatives which drew on both traditions, reflected in treaties and other forms of diplomacy. However, as the relationship became one of dominance by settlers, Aboriginal peoples were forced to pursue claims to land and protection of their cultures, as well as equal justice within the dominant system in the courts. There they found it necessary to couch their arguments in conceptual language, including that of the newcomers’ rule of law, that white politicians, officials and judges would understand. The motivation was strategic rather than representing any strong intellectual or emotional commitment to the rule of law in the British sense.\textsuperscript{207}

The status of the rule of law in multi-racial colonial possessions in which some elements of legal pluralism continued to exist remains controversial. If one is attracted to the critiques of the exponents of subaltern studies, for example Ranajarit Guha, then British imperialism involved domination plain and simple.\textsuperscript{208} Although elite interests among the indigenous peoples might buy in to elements of the imposed rule of law, the vast bulk of the population were the objects of coercion by the imperial political and legal culture which had no relevance or value to them.\textsuperscript{209} Imperial governance was characterized by dominance rather than hegemony – coercion rather than persuasion, and met with resistance rather than collaboration by the subject peoples.\textsuperscript{210} These assertions are coupled with the strong assertion that modern Indian leaders have not tapped into, but have culpably ignored their cultural roots. The historical evidence, for example that revealed by Lauren Benton, certainly supports the contention that legal pluralism was sustained in India during the 19\textsuperscript{th} century, even if the other legal systems suffered at the


\textsuperscript{208} Ibid., ix-xiv.

\textsuperscript{210} Ibid., 20-23.
hands of culturally biased British judges and officials.\textsuperscript{211} Moreover, the criticism of elites should not deflect attention from the fact that most Indian political leaders were impressed with elements of British political and legal culture and saw it as providing a degree of inspiration for the establishment of a modern democratic state after the departure of the imperial rulers. In chiding the British for their undemocratic rule and cultural exclusiveness in the sub-continent, ready resort was made by these activists to the British rule of law as a repository of ideas about liberty, the fair and equal administration of justice, and important constitutional rights. Although this was in part a strategic ploy in the campaign for greater autonomy, it also reflected a genuine belief in some of the benefits of the British system of law and justice including the rule of law, a phenomenon noted by Benton in her sympathetic treatment of E.P. Thompson’s warmth towards the rule of law.\textsuperscript{212}

Whatever the situation in India and other colonial possessions with ancient political and legal cultures, the situation in multi-racial colonies with populations descended from African slaves or mixed populations from slave and immigrant heritages made it inevitable that the discourse of politics and law would embody significant elements of the dominant culture. Slave communities in the colonies by their very definition had suffered brutal erasure of their political and legal institutions and laws, and detachment from their birth places. Although these peoples managed to preserve elements of their pre-contact beliefs systems and small groups were able to establish remote independent communities, the only exposure to governance and law that most would have had was that of their masters. One of the effects of abolition, the politicization of these communities and education was a realization of the potential of both democratic government, and a liberal construction of the rule of law. Both were to feature in the increasing pressure for greater political freedom and equality at law in these territories.\textsuperscript{213}

Mention was made earlier of the propensity of the British to substitute English criminal justice for indigenous or earlier European systems in the colonial territories it acquired. In multi-racial colonies it was not at all guaranteed that the protections of that system would be afforded to non-Europeans, whether as victims of white violence, or as themselves perpetrators of violence against white subjects. The settler or planter mentality was one in which the rule of law was lauded as part of their birth right, but only applicable within the white community. As Martin Wiener has recently shown, this exclusiveness in criminal justice systems in the Empire became the site of increasing conflict between those interests and imperial politicians, colonial officials, judges and, not least representatives of indigenous communities arguing for the application of the rule of law, its values and protections to the population at large.\textsuperscript{214} After a tough struggle in the waning decades of the 19\textsuperscript{th} century, more liberal proclivities in colonial policy in the first third of the 20\textsuperscript{th} century made for more pressure on white minorities in these territories and produced beneficial changes in the legality of colonial criminal justice.

\textsuperscript{211} Benton, \textit{Law and Colonial Cultures}, 127-166, especially the sections on Bengal.
\textsuperscript{212} Ibid., 253-265.
\textsuperscript{213} Brereton, \textit{Race Relations in Colonial Trinidad}.
\textsuperscript{214} Wiener, \textit{An Empire on Trial}.
In the final analysis, I am drawn to the view articulated by both Benton and Wiener that that the meaning and application of the rule of law in its British sense in the 19th century and its impact on subject populations and their legal cultures was more complex and subject to negotiation than reductionist explanations allow. Wiener’s reference to the work of Sally Engel Merry seems apposite here. He says:

[She] has noted that at the same time that the law served as an instrument of control, it not only ‘provided a way for [colonized groups] to mobilize the ideology of the colonizers . . . [but also] provided a way to mobilize the ideology of the colonizers . . . to resist some of the more excessive demands of settlers for land and labor . . . . [and] provided a way for the colonial state to restrain the more brutal aspects of settlers’ exploitation of land and labor.” In practice, then “the legal arena becomes a place of contest among the diverse interest groups in colonial society,” even if the contest was . . . an unequal one.\[^{215}\]

Perhaps the last work on this topic should go to Lauren Benton who, after noting the shift from various forms of legal pluralism in the imperial world to the crystallization of the colonial state during the 19th century, in which the former “conditioned (and helped to propel) [that] shift to state and capitalist hegemony”, observes: “[W]e should label legal transformations in the long 19th century not as the rise of the rule of law but as an iterative cultural politics centering on rules about law.”\[^{216}\]

Since the middle of the 19th century, the conception of the rule of law, already well-freighted with meanings, has become further burdened with overlaps with democratic principles and appropriation by advocates of various economic systems, ranging from the free market to the social welfare state. To some extent, however, its content has been reduced by the entrenchment, or at least legislating of constitutional rights in the Anglo-American world. What this paper has sought to do is to lay out its narrow and broader parameters as a concept with procedural and substantive, as well as aspirational features, and to suggest that it use was variously rhetorical, discursive, normative and architectural.


\[^{216}\]Benton, Law and Colonial Cultures, 264.