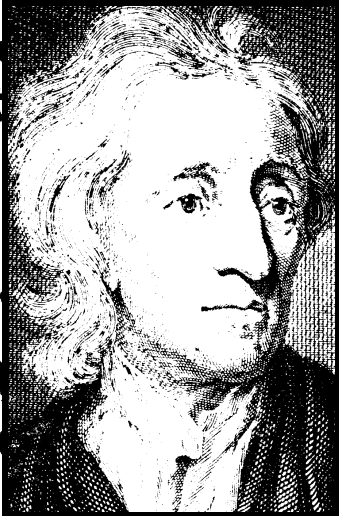


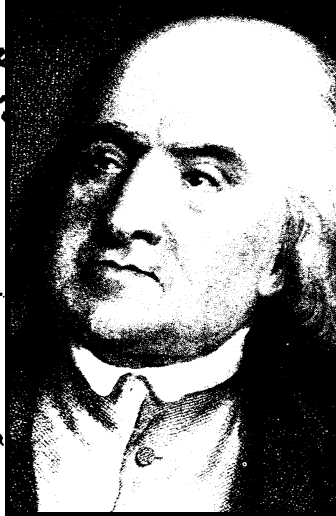


LIBERTY VERSUS LIBERALISM: HOW LIBERALISM NEITHER CREATED NOR DEFENDED ENGLISH LIBERTY

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FOR LIFE, LIBERTY AND PROPERTY

LIBERTY VERSUS LIBERALISM: HOW LIBERALISM NEITHER CREATED NOR DEFENDED ENGLISH LIBERTY

SEAN GABB

Passing from his survey of universal history to the England of his own day, William Winwood Reade felt able to assert in 1872 that

placing aside hereditary evils which, on account of vested interests, it is impossible at once to remove, ... the government of this country is as nearly perfect as any government can be.¹

Trade was free. Taxes were low. The Government, watched by the courts and by public opinion, confined itself largely to protecting life and property.

Today, most of this is gone. I was born into a welfare state. I live increasingly in a police state.² In either case, I have a government that takes and spends about half the national wealth, and gives detailed instructions on how the rest may be spent.

I have long wondered how the England of Reade's day could have become the England of my day. Is it that liberalism was found a defective doctrine? Was it suitable only to one stage of social evolution, now long past? Was it overcome by a conspiracy of special interests? If so, why did it prove so feeble in the contest?

I still have no complete answer. But the longer I think about the question, the more I suspect that there never was any strictly liberal ascendancy in England. What freedom was once enjoyed here owed far less to liberalism than to separate, if related, circumstances. I suspect also that the great diminution of freedom since Reade's day was set in motion by people like him.

LOCKE

Let me begin with John Locke's *Second Treatise*, published in 1690. According to paragraph 4,

[t]o understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.³

Now, this is one of the most extreme liberal statements ever made. Translated from his natural law terminology, Locke is saying: How we make and dispose of our money, and under what conditions; where we settle and live; what clothes we wear; what information we receive or impart, how and with whom we associate, what things we eat, or drink, or otherwise ingest — these, within the limits set by the equal rights of others, are matters solely for us to decide.⁴

While his own model of the best government bears a strong and perhaps unnecessary resemblance to an idealised English Constitution of his own day, Locke is clear that the main, if not the sole, function of government is the protection of life and property. If it goes substantially beyond that function, only on the grounds of convenience can an objection be raised to its remodelling or overthrow.⁵

Yet, for all he may appeal to us, Locke neither conquered the English mind of his day, nor can be taken as spokesman for its liberalism. During the seventeenth and eighteenth centuries, "the rights of Englishmen" was a phrase as much on the lips of politicians as "democracy" is in the twentieth. It pleased the public. But, then as now, there was a difference between lip-service and genuine belief. Nor among those who did believe was there much reason or desire to expand the phrase until it was co-extensive with Locke's "*state of perfect Freedom*". To show this, I move to the coalition that opposed the absolutist claims of the Stuart kings, and was to dominate English thought into the nineteenth century. The chief members of this were the common lawyers and the religious dissenters. These were not entirely distinct groups, but are most usefully considered in isolation.

THE COMMON LAWYERS

The first were always strongly conservative. For them, freedom meant the enjoyment of certain rights inherited from the past. The lawyers believed, or maintained, that the English Constitution had continued exactly the same in every age since "time immemorial". Except for a cycle of decay and restoration, nothing was claimed ever to have changed. Torture and ship money had been illegal in the reign of Henry II. Edward the Confessor had governed with the advice of a Parliament summoned in the usual way. Some appeal was made to natural or Divine law. But the main grounds of defence were historical. Indeed, they were considered its best grounds; and the lawyers defended them with fanatical zeal. For, lacking any real theory of prescription, the common lawyers accepted that a right granted, however anciently, was revokable by its grantor or by his representative. If they allowed that William I had governed by right of conquest, and that Parliament and the common law derived from the gift of one of his successors, these had no security in the present. It would be open to Charles I to abolish them.⁶

The doctrine was useful. It allowed a defence of the declared rights of individuals and corporations and the powers of the House of Commons against Royal encroachments. It stressed that government should act only by due process. It was even quietly expansive, since many of the rights claimed as ancient were actually modern or not yet existent. But its test of whether a law was good or bad was not in

itself liberal. A modern law could be judged on how well it harmonised with the others; and this in practice applied a liberal test to many Stuart measures. But an old law could be at best only reinterpreted. Otherwise, no matter how illiberal, it was regarded by the defenders of freedom as no less valid than Magna Carta.

THE DISSENTERS

All this suited the more radical dissenters. It allowed quite as much freedom as they wanted. Their complaint against the House of Stuart was that it maintained the supremacy of a church that they abhorred, and that it persecuted them. What they meant by freedom was the right to go about speaking in tongues and imposing a grim theocracy on everyone else. They hated Roman Catholics, and Anglicans, and pleasure. Their hatred of this last can hardly be conceived. Every pleasure, no matter how modest, that was not immediately joined with the contemplation of God and His Awful Day of Judgment, was to them abominable. They “hated bearbaiting” says Macaulay,

not because it gave pain to the bear, but because it gave pleasure to the spectators.⁷

For the truth of this epigram, they stand condemned by their own statements. “The more you please yourselves and the world” said one preacher to his flock, “the further you are from pleasing God. ... Amity to ourselves is enmity to God.” “Pleasures are most carefully to be avoided” wrote another: “because they both harme and deceiue.” “Christ did never laugh on earth that we read of” wrote yet another, “but he wept.”⁸

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

A MORE RESTRICTIVE VIEW OF FREEDOM

The defects of the common law defence slowly became apparent. The central decades of the seventeenth century had seen all the threads of legal continuity snapped. The men who saw the Monarchy restored, in 1660, had lived through two civil wars, a regicide, two military *coups* and four written constitutions. To them, inherited custom in itself no longer seemed so binding. There was the further unsettling influence of the Royalist antiquarians and absolutist philosophers. The first were showing how the Constitution had not remained fixed, but had evolved over hundreds of years. The second were asking what relevance in any case the past could have to the present. Law, they declared, was nothing but the expressed will of a sovereign law-giver.

The anti-Stuarts were forced to choose. They could continue insisting, against all the evidence, that there had been no Norman Conquest; or they could find another support. Those who looked for another drew on various traditions—on the Greek and Roman stoics, on the mediaeval schoolmen, on the Jesuit controversialists. The classic expression of the resulting synthesis can be found in Locke’s *Second Treatise*.

But, still, this was not a typical expression. The pure theory of natural liberty was unsuited to the age. It was too geometrical. It went too far. More congenial were the *Discourses Concerning Government* of Algernon Sidney, published in 1698. These cover roughly the same ground as Locke, but every point is supported at least in part by the usual appeals to history and Scripture. Sidney differs also from Locke in his more restrictive view of freedom. Sometimes, he falls into the ancient trap of confusing it with national independence. Thus, he heaps the most lavish praise on Sparta and Republican Rome, neither of which could be considered free countries in the Lockean sense.⁹ This was certain to please anyone who wanted another Puritan Commonwealth.

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

those who uphold popular governments, look upon vice and indigence as mischiefs that naturally increase each other, and equally tend to the ruin of the state. When men are by vice brought into want, they are ready for mischief: there is no villainy that men of profligate lives, lost reputation, and desperate fortunes will not undertake. Popular equality is an enemy to these; and they who would preserve it must preserve integrity of manners, sobriety, and an honest contentedness with what the law allows.¹⁰

Not surprisingly, the Glorious Revolution of 1688 produced few radical changes. The legal position of women improved only slowly. All through the eighteenth century, minority groups were persecuted by the authorities. Men who engaged in homosexual acts, for example, were hunted down more ferociously than in any of the absolutist monarchies of Europe — even if with less venomous persistence and fewer prohibitory laws than was later the case in England.¹¹ Of more general importance, perhaps, the English criminal law was, as Gibbon said of the Roman, “written in characters of blood”:¹² by 1760, 160 offences carried the death penalty; and one could be hanged for stealing a loaf of bread, and for cutting down a cherry tree.

GOVERNMENTAL ATROPHY

Yet, for all its intellectual limitations, the anti-Stuart coalition did produce an immense diminution of governmental power.

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

imposed. Religious dissent was punished. Monopolies and wage and price controls were enforced.

Then, in 1641, excepting the Privy Council, which was greatly weakened, the whole central administration was either abolished outright or made impotent. It had been used too extensively to usurp the authority of Parliament and the common law. It was not reconstituted after 1660, and the devolution of most government into local hands was quietly accepted.

Hereafter, whether local or national, the tendency of government was to atrophy. Even had anything been desired of it, what remained of the central administration was too modest and too corrupt to interfere. Funds were embezzled or unaccounted for during years on end. An actual civil service barely existed. The two Secretaries of State, who directed most Government business, had a total working staff, including caretakers, of about two dozen. As for the local justices and corporations, with the supervisory Councils abolished, these could govern as much or as little as they pleased. Since they had to raise their own funds, they generally preferred the latter.

The courts limited government still further. The whole concept of administration was narrowed to the fulfilment of duties imposed by the common or statute law. Any Minister or official who exceeded his legal authority could — and sometimes did — have to stand in court like any other trespasser. Reason of State was accounted no defence.¹⁴

EVOLUTIONARY GROWTH

It was the lawyers, indeed, who did most ultimately to limit the Government. The devolution of its remaining powers had, obviously, been welcomed by those into whose hands they passed. It had also been accepted by the nation as a whole. Those who had not minded the despotism of Charles I had suffered under that of Cromwell. Both Whigs and Tories inherited a fear of centralised power from their fathers; and this was renewed by the impartial despotism of James II. But, during the eighteenth century, while the relevant interests continued to benefit, the practical fear of centralisation diminished.

It was preserved in the dominant legal philosophy. Their old fictions abandoned, the lawyers now admitted a long evolutionary growth of rules and institutions, in which the test of legitimacy was not age but utility in its broadest sense. The Constitution of 1750 was not the same as that of 1550, and still less that of 1350 or 1150. Between each of these dates, innovations had been made. Which were good and which bad had been shown by experience. Innovations would continue to be made in the future, either because needs would arise that were not yet provided for, or because earlier innovations would turn out to be defective.¹⁴

Yet, while the eighteenth century Constitution allowed more freedom than any other in the world, the lawyers remained an essentially conservative force. They defended such freedoms as existed. They often approved modest extensions as and when these were demanded. But their chief practical doctrine was that all change should be piecemeal, avoiding breaks in continuity. That for them was the surest way to keep England free. For they saw a psychological value in age. They believed that institutions that were, or appeared to be, ancient could shelter within a ring of associations

powerful enough to deter all but the most determined tyrant or democratic mob. They believed also that abstract reason was weaker than experience. It might well seem on first inspection that a particular law or public custom had no use. But the fact of its survival indicated that it had once been, and might still be, useful — or that, even if useless or harmful in isolation, it was needed for the survival of the whole system. Thus, a presumption was accepted in favour of whatever was old and established.¹⁵

BENTHAM

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

Once we move forward to the nineteenth century, however, we enter not Reade's age of almost perfect liberalism, but the age in which the protections of freedom were eroded to the point of collapse. Writing in 1905, A.V. Dicey dates the beginning of this decline to around 1870, just as Reade was celebrating England's good fortune.¹⁶ In fact, it had begun 90 years earlier, with the publication in 1780 of Jeremy Bentham's *Introduction to the Principles of Morals and Legislation*.

This is not intended to be an illiberal work. It is a scathing attack on the deficiencies of English law as Bentham found it. He states three principles. First, legislation is a science. Second, its purpose is to allow "the greatest happiness of the greatest number". Third, since individuals are the best judges of what can make them happy, legislation should clear away all those barriers to free action not required to protect the equal freedom of others. Applying these principles, Bentham claimed that the lawyers' wonderful "organic" Constitution was in fact a sham.

Leading a growing school of "philosophic radicals", he spent the rest of his life arguing for a total recasting of English law on scientific principles. Claims about overall harmony were rejected as self-interested sophisms. Instead, every specific law and legal practice was examined, and the question was asked — "what use does this serve?" What need, he asked, to pay two fees for one appearance before a Chancery Master? Why had an action to establish title to land to begin with a mass of fictions about John Doe and Richard Roe? Why was a man denied counsel when charged with a felony, but not when charged with treason or a misdemeanour? Why, in short, was everything so slow, so expensive, so disorderly, so often grossly unjust?

ENGLISH RESPONSES TO THE FRENCH REVOLUTION

It was now, unfortunately, that the timidly liberal consensus of the eighteenth century collapsed. The French Revolution tore English opinion in two. On the one hand was the emergence of a radicalism that, in its demands for reform,

came close to rejecting the established order. Had the new radicals been only Bentham and his middle class followers, it would still have been impossible to overlook their break with the past. But there was also the emergence for the first time in our modern history of an autonomous working class movement. The minimal demand within this movement was manhood suffrage. Beyond this, some extremists were demanding a copying of the French example — even to the point of regicide and collectivist dictatorship.

On the other hand, the authorities came quickly to associate any reform with revolutionary violence. Instead of concluding that France was showing what happens when a regime resists all change for long periods, and then concedes it all at once out of weakness, they took events there as a warning to stop their own indulgence. Edmund Burke is the standard example of the liberal turned reactionary. Before 1789, he had supported the American rebels. After 1790, he was known as the supreme philosopher of reaction, his old friends now his bitter enemies, his old enemies now his adoring friends.¹⁷

The resulting debate was won by the extreme conservatives. They did not entirely get their way. The press remained free. Juries were often unreliable at returning guilty verdicts even in cases of high treason. The Parliamentary opposition functioned unchecked regardless of the country's domestic and foreign crises. But there was a consistent drive to limit the liberties which had been secured in 1688 and widened during the next century.

MODERN ENGLAND AND THE NEW CIVIL SERVICE

When the great revolutionary panic at last subsided, after 1822, the spirit of the Constitution had been entirely altered. Before 1789, its development was broadly in line with public opinion. By the 1820s, it seemed somewhat behind. In the 1780s, Parliamentary reform had been on the political agenda; and its only real impediment had been how far to go and how much to pay to buy off the vested interests. Even William Pitt the Younger, while Prime Minister, had introduced a Reform Bill. Forty years later, the unreformed representation was an article of faith among most conservatives. To lose on that issue was to signal a surrender on all the others. Accordingly, it took two years of repeated political crisis to secure the passage of the Great Reform Act in 1832: and the passage of that Act was an overwhelming psychological defeat for the conservatives.

Though complaining, the conservatives were pushed aside on almost every other issue; and English law was reformed in the nineteenth century on Benthamite lines. Certainly, government became as a result far more humane. But it also became capable of being more than the modest umpire of the *laissez-faire* society that the liberals wanted. By reforming government, they endowed it with a body of honest and efficient administrators. Whatever might be wished, no one expected anything of the old jumble of corporations and magistrates. But the new civil service could do — or was believed capable of — any number of things.

Naturally, the administrators themselves had an interest in expanding their functions, and every confidence in their ability to discharge them. Increasingly, their potential was realised for illiberal ends. The posts and telecommunications, where not already monopolised, were taken into pub-

lic hands. The provision of drains and clean water became a public concern. Hours and other conditions of work were regulated. Laws were made and enforced about the cleanliness of food. At the end of the century, voices were raised against the unrestricted purchase of firearms and recreational drugs. Modern England was taking shape.

The State grew not according to any single scheme, but in response to specific demands made by the advocates of different and often mutually hostile ideologies. There were the Tory paternalists, wanting a return to a past golden age of deference and protection. There were the militant imperialists, deeply impressed by German collectivism. There were the eugenicists, with their scheme of a master race — in the creation of which the State would stand to its citizens as a breeder stands to his pigs. There were the Christian activists, crying out for the suppression of sin. There were the professional bodies, willing to combine with any movement whatever for the sake of increasing the status and earnings of their members. Finally, there were the socialists, in such company almost benign.

LIBERALISM FAILED TO DEFEND LIBERTY

The liberals were powerless to resist these collectivist assaults. They never seem fully to have realised the degree to which the defence of freedom in England rested on the conservative foundations which they had done most to undermine. Even Macaulay and the other Whig intellectuals, who did understand the risks inherent in reform, never saw the near impossibility of combining reform with the maintenance of the old bias against State power.

This failure of understanding might have meant little in practice had they been able to advance a consistent argument for freedom that stood by itself. But this they largely failed to do. They did have a political economy that showed the benefits of leaving trade to the uncoordinated efforts of individuals. This was a powerful weapon against all restraints justified on economic grounds, and only its most famous victory was the repeal of the Corn Laws in 1846.

Yet, as a defence of freedom, the arguments from economic efficiency were of little psychological value. Their advocates tended far too often, by ignoring the wider issues of human liberation, to reduce liberalism to a set of prudential warnings about the rate of industrial growth. Worse, defects in the early theories of value and distribution played straight into collectivist hands. Even otherwise, the opposing doctrines were all so pleasantly utopian, all so appealing to the special interest groups, that economic logic was repeatedly overcome by sneering dismissals of “economic man” and “philistine Manchesterism”.

Nor, it should be said, were the arguments presented at all consistently. Not one of the major classical economists gave an unqualified endorsement to *laissez-faire*. McCulloch, for example, supposedly the most doctrinaire of his school, wrote:

The principle of *laissez-faire* may be safely trusted to in some things but in many more it is wholly inapplicable; and to appeal to it on all occasions savours more of the policy of a parrot than of a statesman or a philosopher.¹⁸

As for Benthamism, this was always an unstable blend of liberalism and collectivism. Bentham himself was not wholly opposed to certain socialist measures — such as the regulation of wages.¹⁹ Many of his followers, such as Edwin Chadwick, took a leading part in the growth of public health regulation, and stand in a line of development leading straight to Fabian socialism.

JOHN STUART MILL

Even those liberals least affected by Benthamism, or who rejected its darker tendencies, often put forward arguments that were riddled with inconsistency. John Stuart Mill, for example, the “apostle of liberalism”, almost drives me to despair. Take the statement in *On Liberty* that everyone must sometime have read:

[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.²⁰

This is wonderfully eloquent. Read when I was seventeen, it turned me on the spot into a liberal. Paid any close attention, it falls immediately apart. Mill’s distinction between “self-regarding” and “other-regarding” acts — a distinction seized on by every one of his critics, from James Fitzjames Stephen all the way down to Mary Whitehouse — is an absurd formulation. It even destroys the case for freedom of speech, which is normally supposed to be the one freedom on which he is consistent.

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

trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society. ... [T]he... doctrine of Free Trade ... rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay.²¹

This in turn lets him flirt with socialism without having to admit its incompatibility with freedom in any normal sense. The flirtation, though, does not end in itself. If I incite or procure you to commit a murder, I can be punished as a

principal to the act. There is no difficulty here, and Mill admits none. But suppose I persuade you to drink yourself into alcoholism. You ought not to be punished, for you are harming only yourself. Ought I to be punished, for having advised you to harm yourself? No, he says, for that is a self-regarding act:

If people must be allowed, in whatever concerns only themselves, to act as seems best to themselves, at their own peril, they must equally be free to consult with one another about what is fit to be so done; to exchange opinions, and give and receive suggestions. Whatever it is permitted to do, it must be permitted to advise to do.²²

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

The question is doubtful only when the instigator derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil. Then, indeed, a new element of complication is introduced; namely, the existence of classes of persons with an interest opposed to what is considered as the public weal and whose mode of living is grounded on the contraction of it. Ought this to be interfered with, or not?²³

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

Small wonder, then, that with so little real defence by its decared advocates, and so little left of the intellectual habits that held it stable, English freedom evaporated. The real wonder is how the process was made to take so long that, even today, I live in a semi-free country.

CAN LIBERALISM NOW DEFEND LIBERTY?

Now, I can think of no simple lesson to draw from this. I do not *generally* accept the conservative claim, that liberalism is so corrosive that it destroys even freedom in the end. Something like this did happen in England. But our conservatism was uniquely good, and our liberalism was not. I would never encourage my friends in Eastern Europe to read Burke instead of von Mises, and go grubbing through their collectivist heritage for some hidden wisdom.

Still, it is worth noting that if there is currently a reaction against collectivism, it is not the effect of liberal ideas, but of collectivist failure. And, though liberalism today — especially the Hayekian synthesis — is much improved on what it was, we have yet to see how useful it is for securing any of the freedom that circumstances may bring us.

NOTES

1. William Winwood Reade, *The Martyrdom of Man* (1872), Watts & Co., London, 1924, p. 418.

2. I could justify this statement with a recital of the Acts by which our liberty has been insensibly abolished. However, this would be an exceedingly long recital, and my readers still might not understand at its end what I am trying to describe. I will therefore quote what an Englishman, writing in the 1850s, could say about the French when distinguishing them from his own countrymen:

But this [inquisitorial judiciary], mischievous as it is, only forms part of a far larger scheme. For, to the method by which criminals are discovered, there is added an analogous method by which crime is prevented. With this view, the people, even in their ordinary amusements, are watched and carefully superintended. Lest they should harm each other by some sudden indiscretion, precautions are taken similar to those with which a father might surround his children. In their fairs, at their theatres, their concerts, and their other places of public resort, there are always present soldiers, who are sent to see that no mischief is done, that there is no unnecessary crowding, that no one uses harsh language, that no one quarrels with his neighbour. Nor does the vigilance of government stop there. Even the education of children is brought under the control of the state, instead of being regulated by the judgment of masters or parents. And the whole plan is executed with such energy, that, as the French while men are never let alone, just so while children they are never left alone. At the same time, it being reasonably supposed that adults thus kept in pupilage cannot be proper judges of their own food, the government has provided for this also. Its prying eye follows the butcher to the shambles, and the baker to the oven. By its paternal hand meat is examined lest it should be light. In short, without multiplying instances, with which most readers must be familiar, it is enough to say that, in France, as in every other country where the protective principle is active, the government has established a monopoly of the worst kind; a monopoly which comes home to the business and bosoms of men, follows them in their daily avocations, troubles them with its petty, meddling spirit, and, what is worse than all, diminishes their responsibility to themselves; thus depriving them of what is the only real education that most minds receive,—the constant necessity of providing for future contingencies, and the habit of grappling with the difficulties of life.

Thomas Henry Buckle, *History of Civilisation in England* (1857-62), Volume II, Chapter II, "History of the Protective Spirit, and Comparison of it in France and England"—in my edition, *The World's Classics*, London, 1904, pp. 97-98.

This is what I mean by a police state. Most Victorian liberals would have agreed.

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

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

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

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

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

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

5. See, for example:

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

Second Treatise, Chap. XVIII, 199, pp. 416-417.

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

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

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

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

quoted, J. W. Gough, *Fundamental Law in English Constitutional History*, Oxford University Press, 1958, pp. 140-141.

See also J. G. A. Pocock:

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

The Ancient Constitution and the Feudal Law, Cambridge University Press, 1957, p. 47.

See also:

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

Douglas, pp. 119-120.

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

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

9. For example,

... the Spartans desiring only to continue free, virtuous, and safe in the enjoyment of their own territory, and thinking themselves strong enough to defend it, framed a most severe discipline, to which few strangers would sub-

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

Chapter Two, section 22, pp. 203-204 of the edition published by Liberty Classics, Indianapolis, 1990.

10. Ibid, Chap. Two, sec. 24, p. 229. See also Foreword by Thomas G. West:

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

p. XXVII.

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

11. There were three main persecutions during the half century following the Glorious Revolution of 1688 - in 1699, in 1707, and in 1726. In this last, more than 20 molly houses were watched and raided. The likelier open places were patrolled. There was a spate of prosecutions for buggery and various less serious common law offences.

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

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

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

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

12. I give the reference: *History of the Decline and Fall of the Roman Empire* (1776-1787), Chapter XLIV; in the "Everyman" Edition—J. M. Dent & Dutton, London, 1910—Volume four, p. 431.
13. In the most famous case arising between an individual and the authorities, Entick, a printer, sued two officials for having broken into his house and seized his papers. The officials pleaded a warrant signed by one of the Secretaries of State. This was a vague document that appeared to sanction what is today called a "fishing expedition": the Government wanted to prosecute Entick, but first had to find enough evidence to support a prosecution. Passing judgment, Lord Chief Justice Camden of the Common Pleas declared the warrant unlawful with the words:

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

Entick v Carrington (1765), 19 State Trials at col. 1073.

By this decision, general warrants permitting search and seizure, which had till then been unquestioned in any other jurisdiction, were declared illegal in England—which, oddly enough, they still partially are, despite the provisions of the Police and Criminal Evidence Act 1984, the Public Order Act 1986, the Security Services Act 1989, and a multitude of other recent statutes.

14. See, among many other passages charting this transformation of views, the following:

... [W]hen by long procession of time, the conquered had either been incorporated with the conquering people, whereby they had worn out the very marks and discriminations between the conquerers and conquered; and if

they continued distinct, yet by a long prescription, usage and custom, the laws and rights of the conquered people were in a manner settled, and the long permission of the conquerers amounted to a tacit concession or capitulation, for the enjoyment of their laws and liberties.

Sir Matthew Hale (1676), quoted, Pocock, op. cit., p. 179.

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

Sir John Davies, *Irish Reports* (1612), quoted, *ibid*, p. 83.

A state without the means of some change is without the means of its conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve.

Reflections on the Revolution in France (1790), "Everyman" Edition, J. M. Dent & Sons Ltd, London, 1960, pp. 19-20.

15. This is my understanding of the following passage in Burke:

We are afraid to put men to live and trade each in his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice, and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.

ibid, p. 84.

16. A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century* (1905), Macmillan, London, 1914, 2nd edition. See Lecture VIII, "Period of Collectivism".

17. See also Edward Gibbon, a notorious enemy of superstition and a strong opponent of the slave trade before the Paris mob ran wild:

In the slave question, you triumphed last session, in this you have been defeated. What is the cause of this alteration? If it proceeded only from an impulse of humanity, I cannot be displeased, even with an error; since it is very likely that my own vote (had I possessed one) would have been added to the majority. But in this rage against slavery, in the numerous petitions against the slave trade, was there no leaven of new democratical principles? no wild ideas about the rights and natural equality of man? It is these I fear. Some articles in newspapers, some pamphlets of the year, the Jockey Club, have fallen into my hands. I do not infer much from such publications; yet I have never known them of so black and malignant a cast. I shuddered at Grey's motion; disliked the half-support of Fox, admired the firmness of Pitt's declaration, and excused the usual intemperance of Burke.

Letter to Lord Sheffield, May 30th, 1792; in *Autobiography of Edward Gibbon as Originally Edited by Lord Sheffield* (1796), Oxford University Press, London, 1907, pp. 277-278.

18. Quoted, Lionel Robbins, *The Theory of Economic Policy in English Classical Economy*, Macmillan, London, 1952, p. 154.

19. See, for example, Elie Halevy, *The Growth of Philosophic Radicalism* (1928), Faber and Faber, London, 1972, pp. 498-499.

20. John Stuart Mill, *On Liberty* (1859), published with other essays in the "Everyman" edition, J. M. Dent and Sons, London, 1972, Chapter I, "Introductory", pp. 72-73.

21. *Ibid*, Chapter V, "Applications", p. 150.

22. *Ibid*, p. 154.

23. *Ibid*.