

The Puzzle of Martial Law

David Dyzenhaus¹

In a truly violent, authoritarian situation, nothing is more revolutionary than the insistence of a judge that he exercises ... a “jurisdiction” [to sit in judgment over those who exercise extralegal violence in the name of the state]—but only if that jurisdiction implies the articulation of legal principle according to an independent hermeneutic. The commitment to a jurisgenerative process that does not defer to the violence of administration is the judge’s only hope of partially extricating himself from the violence of the state.²

Robert Cover

Introduction

Martial law was much invoked by those who maintained the British empire, as they sought to defend settler enclaves in seas of much more numerous and often very hostile local populations. In invoking it, they drew on examples from England’s own history when martial law was invoked to facilitate the executive’s suppression of internal challenge, and on very recent examples from Ireland, the colony closest to the imperial centre. While it is not invoked today, it has clear analogues in declarations of states of emergency, in legislative delegations of authority of virtually unlimited scope to the executive to deal with threats to national security, and in executive assertions of inherent jurisdiction to respond as the executive sees fit to such threats.

Martial law presents a puzzle, one raised also by its analogues, in that a proclamation of martial law combines two contradictory features of law. To use Robert Cover's terminology, a proclamation of martial law attempts at one and the same time to do two things. It attempts to be "jurisgenerative"—to constitute a field of legal meaning, a space within which public officials are legally authorized to act as they see fit to restore order-- and to be "jurispathic"—to kill off, albeit temporarily, a particular field of legal meaning, the narrative of the rule of law.³

In the case of a proclamation of martial law, the jurispathic qualities of the act are particularly striking, as to kill off the narrative of the rule of law seems tantamount to killing off law itself. The state, that is, the officials who act in its name, are legally authorized to act without any legal controls. Of course, those who regard martial law or its analogues as inevitable in times of severe political stress want to justify them as only a temporary killing off of law—a suspension—and as both lawful—done according to law—and in the long term interests of legal order.⁴

However, even on these terms the use of law to kill off law for the sake of preserving legal order presents a conceptual puzzle—"Is martial law really law?"--one which has obvious echoes in post 9/11 debates. Moreover, as we know from these debates, the puzzle has important political implications. For example, if officials cannot be legally authorized to act outside of the rule of law, those subject to such acts are thought to be entitled to a judicial declaration that the officials acted illegally, and so, if the illegal act is a detention, they are entitled to be set free.

This puzzle is at the heart of my paper. Notice that in the epigraph Cover talks about the judge's commitment to a jurisgenerative process manifested in a challenge to "extralegal violence in the name of the state". Cover has martial law and its analogues in mind.⁵ He does

not choose at this moment to cast the problem as a clash between legal narratives: the narrative of the lawyers for the state who will argue that the violence was perfectly legal and the narrative of the lawyers for the victims of the violence, who will argue that the violence was extralegal and thus that the officials lacked authority. Rather, he casts it as a clash between jurisgeneration and extralegal action.

Moreover, he generally regards a judicial assertion of jurisdiction as an assertion of power—of control over legal meaning-- which is inherently jurispatic,⁶ reenacting the moment of violence which he believes both to lie at the foundation of any legal order and to be ignored by most legal scholars⁷ “Every legal order”, he says, “must conceive of itself in one way or another as emerging out of that which is unlawful”.⁸ However, in this kind of case he talks about the possibility of a different kind of jurisdiction, a “natural law of jurisdiction that might supplant the positivist version”.⁹

My paper explores that possibility. In the next section, I will explore in some detail the puzzle martial law presents. I will then sketch a concrete example from the nineteenth century which provides a rich context for drawing out the theoretical implications of the puzzle. The implications will be discussed in two separate sections, one which devotes itself to the nineteenth century debate, the other bringing that debate into the present in a discussion of a post 9/11 debate. I will conclude with some reflections on the relationship between narrative, violence and the law¹⁰ in a post 9/11 world, one which might be better understood as a post-colonial world still struggling with the idea and the reality of empire.

The Puzzle of Martial Law

In what is still the most famous work on the English constitution, AV Dicey claims that the common law does not know martial law, by which he meant an executive prerogative to act as it sees fit in times of emergency. “Martial law”, he said, “in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals is unknown to the law of England”.¹¹ “This”, Dicey says, “is unmistakable proof of the permanent supremacy of the law under our constitution”.¹²

Dicey’s claim in itself is somewhat ambiguous between “martial law is not something that has occurred within the constitutional order” and “martial law is precluded by the constitution”. Dicey clearly intended the latter meaning. According to him, the English Constitution recognizes martial law only in two other, very different senses. There is the law that governs the military both in war and in peace, and there is the common law defence of necessity, which can be invoked by any citizen who responds appropriately to an immediate threat to peace and order. When it comes to the defence of necessity, the question of whether the response was appropriate, and therefore not illegal, is one for the courts to decide according to established common law criteria.

However, Dicey also recognizes that there might be legitimate recourse by officials to illegality in times of emergency, that is, to actions which cannot be justified by the defence of necessity. It is this category of morally justified but illegal acts which an Act of Indemnity, properly so called, is meant to cover. The fact that such a statute, one which retrospectively grants criminal and civil immunity to officials for their acts, amounts in Dicey’s words to the “legalisation of illegality”,¹³ is for him proof of his claim that the English Constitution does not know martial law.

One practical consequence of Dicey's position is that any trial of an individual who is not subject to martial law in the first sense, that is, anyone who is not a member of the military forces, must be conducted by the ordinary civil courts. So trial of civilians by military tribunals of civilians during times of stress is constitutionally precluded and the idea that such individuals could be tried by such tribunals on capital offences at a time when they posed no immediate threat is an even greater constitutional abomination. For example, the system of military tribunals set up by Congress¹⁴ in response to the Supreme Court's decision in *Hamdan v. Rumsfeld*¹⁵ would, on Dicey's view, be just as unconstitutional in England as was the attempt to set up such a system by executive order, which the Supreme Court declared invalid in that case. So what seems an open question in the United States despite the entrenched constitutional protection for habeas corpus and due process in the Bill of Rights is closed in England, a country where such protections are to be found only in the "judge-made constitution",¹⁶ as Dicey called it, that is, in the common law.

If that question is closed in England, it would follow for civil libertarians that Dicey was right that a judge-made constitution is superior to a written constitution. He argued that in the former the rights are part of the ordinary law and do not "depend upon the constitution" since the "law of the constitution is little else than a generalisation of the rights which the Courts secure to individuals". With a written constitution, Dicey elaborates, the general rights it guarantees are "something extraneous to and independent of the ordinary course of law", hence subject to suspension.¹⁷ In contrast, if the right to individual freedom is "part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation".¹⁸

There are, of course, reasons to doubt both Dicey's claim and its supposed results. First, the very thought that a judge-made constitution is superior because it has these results depends on the adoption of civil libertarian perspective, though one which does not say that it is better to have justice even if the cost is that the heavens fall. Rather, it says that the maintenance of such liberties is better able to preserve the heavens. In other words, it places a kind of consequentialist bet, as Dicey makes clear when he rejects the idea that the doctrines of political expediency or necessity justify the imposition of martial law. The idea amounts, in his view, to the claim that "at a great crisis, you cannot have too much energy", which, he says, is a "popular delusion". The activity of "public spirited despots would increase tenfold the miseries and the dangers imposed upon the country by an invasion".¹⁹

That bet, however, might seem naïvely parochial, even willfully blind, because it is made from the perspective of the relatively untroubled political history of an island nation, and, in Dicey's time, the experience of the colonies including Ireland had for many other Englishmen proved that martial law was on occasion necessary to maintain order. Indeed, Dicey had to deal with apparent counter examples from England's own constitutional history—recourse to martial law allegedly based on a constitutional prerogative of the Crown which had gone unpunished, as well as the Habeas Corpus Suspension Acts which had been passed during times of perceived emergency.

Moreover, his point about Indemnity Acts and illegality, while fine as a matter of logic, does make his claim about the unconstitutionality of martial law rather hollow. If there were such a thing as martial law in the sense of an executive prerogative to do what it deemed fit to deal with threats, everything the executive did would be legal, and so there would be no need for after the fact legislative indemnities. But Dicey notes that Indemnity Acts regularly follow official resort to illegality in times of stress and that their terms are up

to the legislature, ie they can cover and have in fact at times covered everything that the executive did. Thus it seems that what the executive would like to do in the name of martial law can be, and is in fact likely to be, rendered legal by a kind of retroactive legalization.

Second, there is a conceptual problem for Dicey's claim which, because it arises from his own theoretical commitments, threatens to implode his constitutional theory. According to Dicey, the sovereignty of Parliament is one of the two features of English political institutions, the other being the rule of law.²⁰ The principle of Parliamentary sovereignty means that Parliament has, "under the English Constitution, the right to make or unmake any law whatever; and further, no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament".²¹ However, it is clear that these two features can work against each other, if Parliament chooses to override the rule of law by explicit statutory enactment. It seems to follow that courts should invalidate an attempt to set up a system of military tribunals by executive order, but must uphold as valid such a system when set up by explicit legislation.

Now one response open to Dicey is to declare mistaken any data recalcitrant to his claim. For example, from a natural law perspective which judges legal events by their compliance with its fundamental normative principles (for example, civil libertarian principles), the data should not be accorded any legal significance. But such a response seems blocked since Dicey conceives his work on constitutional theory to be descriptive or scientific, not prescriptive. Even those not familiar with the details of his book will likely know of his agreement with Leslie Stephen's assertion that, were the English Parliament to enact a law requiring that blue-eyed babies be murdered, the preservation of such babies would be illegal, though one would conclude that the "legislators must go mad before they pass such a law, and subjects be idiotic before they could submit to it".²² In addition, the idea

that there could be an unconstitutional but legally valid law seems anathema to one of Dicey's themes, a familiar one in the common law tradition, that the men whose "labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds more intently on providing remedies for the enforcement of particular rights ... than upon any declaration of the Rights of Man or of Englishmen".²³ That is, the test of constitutionality is whether a remedy exists to invalidate a law.

Hence, Dicey's claim about martial law brings to the surface tensions in his general position that undermine his thoughts about the superiority of the judge-made constitution, and that make paradoxical his assertion that "the constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution".²⁴

My task in this paper is to show how a proper appreciation of that paradox in fact vindicates Dicey's claim about the English constitution and martial law, and thus also Robert Cover's point about judges and jurisgeneration. And it does so even in the imperial context where that claim seems so vulnerable because of, in Daniel Hulsebosch's words, the "fundamental tension of empire ... between the rule of law and the expansion of rule, a striving toward universals of government and rights on the one hand and toward increasing territorial jurisdiction on the other".²⁵ As Hulsebosch notes, in America the first striving came about because of a colonial resistance premised on an "intellectual transformation in the idea of the rule of law"—"the shift from jurisdiction to jurisprudence, the rules in a legal system to the rule of law, English liberties to American liberty".²⁶ But the context I will examine is particularly interesting because it required the English to engage in some soul searching about their commitment to liberty at home.

The Jurisprudence of Power

The title of this section is adapted from that of Rande Kostal's monograph on the political uproar in England that followed the ruthless suppression unleashed by Governor Edward John Eyre's proclamation of martial law in reaction to the Jamaica uprising of 1865.²⁷ The abolition of slavery had begun just 32 years before and former slaves and their descendants lived in conditions of dire poverty, recently exacerbated by a government scheme to clear squatters from land planters wanted to use for sugar production. In October 1865, a protest outside the courthouse in Morant Bay, a town in Jamaica, turned violent. The locus of the protest is important because the courthouse was a focal point for tension between blacks and whites. The decisions of the mostly white magistrates were correctly perceived as biased by poor Jamaicans involved in property disputes with white planters. Indeed, the Royal Commission which later reported on the uprising found that lack of confidence in the courts was with the desire to obtain land the most significant cause of the uprising.²⁸

After a period of building tension between the two groups, blacks led by a local preacher, Paul Bogle,²⁹ and whites led by the local magistrate, Baron Maximilian von Keyelholdt, Bogle and a crowd of black men and women killed the magistrate and seventeen others, and wounded around another thirty; nearly all the victims were white. Eyre, mindful of the fact that there were 13,00 whites living among 430,000 blacks and people of mixed race, declared martial law in the Morant Bay area and sent troops to suppress the insurrection. While the rebellion was effectively over in a few days, Eyre maintained martial law for a month during which time his forces killed 439 blacks (either shot on the spot or after a perfunctory court martial), flogged 600 black men and women, and destroyed about 1000 cottages and huts.

The event that loomed largest in the aftermath was the “trial” of George William Gordon. Gordon was an educated, half-caste landowner, former magistrate, and a member of the Jamaica House of Assembly. He was in Kingston, a town not covered by martial law, for medical treatment at the time of the declaration of martial law. While he had no hand in the uprising, he had prior to it been Eyre’s political bane. Learning that his arrest was imminent, Gordon turned himself in. Eyre had Gordon transported, we might say today extraordinarily rendered,³⁰ to Morant Bay where he was found guilty of treason without any proof of his involvement in the uprising and without his being allowed to make a proper defence. When Eyre refused to stay the sentence of execution, it was carried out.

Eyre made no secret of what he and his officials had done, convinced that in the precarious situation of white colonial rule over a large population of black impoverished inhabitants, it was not only constitutionally appropriate but also politically necessary that the governor had a prerogative authority, located in the unwritten constitution, to declare martial law and do whatever it takes to put down unrest. Moreover, in Jamaica that constitutional authority seemed to be explicitly confirmed by local statute and, Eyre, once he was sure the unrest had settled, ensured that an Act of Indemnity was passed which generously covered all that he and his officials had done.

In England, the Jamaica Committee, which came to include John Stuart Mill, TH Huxley, and John Bright, one of England’s leading political radicals, formed in order to bring Eyre to account before the law. That prompted the formation of the Eyre Defence Committee, which included Charles Dickens, Alfred Tennyson and Thomas Carlyle. A Royal Commission of Inquiry was sent to Jamaica, which issued a report critical of the duration of martial law and the measures adopted to enforce it. Prosecutions within Jamaica of officials and military officers for excessive behavior failed in the face of white settler

domination of the bench. The government in England refused to bring criminal proceedings and the Jamaica Committee thus initiated two private prosecutions, of Eyre on twenty one counts including the illegal removal of Gordon to Moran Bay in order to subject him to an illegal trial, and of the two officers who presided over Gordon's trial, Colonel Nelson and Lieutenant Brand, on the charge of Gordon's murder.³¹ These prosecutions failed in the face of English juries who were determined not to let the imperial side down.

Kostal's excellent study contains, in my view, the resources for appreciating the paradox in Dicey's constitutional theory because it provides a rich account of what is otherwise a sub-text of Dicey's discussions of martial law—the legal drama of the failed prosecutions of some of the principal actors in the suppression. In the last chapter of his book, Kostal suggests that Dicey's account of martial law owes much to the arguments of two of the lawyers who sought to bring the officials to justice, the barrister James Fitzjames Stephen, the main legal representative of the Jamaica Committee,³² and Sir Alexander Cockburn, Lord Chief Justice of England, who made the charge to the jury in the prosecution of Nelson and Black.³³

Kostal is, however, deeply skeptical of Dicey's claim about martial law and the English Constitution because he thinks that Dicey, like the lawyers who took up the cause of the Jamaica Committee, failed to resolve, “or even squarely to confront, a number of thorny issues engendered by martial law”: Among these are: whether Parliament could by statute implement martial law and indemnify acts done in its name, while respecting the rule of law; whether, if martial law is a prerogative of the Crown, it can be invoked and implemented while the civilian courts continue to operate; were “authorities acting under martial law justified in using *terror* as a means of pacifying a recalcitrant civilian population?”; do the

powers of martial law extend to prisoners and civilian detainees and if they extend to detainees, are the detainees entitled to a military trial prior to punishment?

One could conclude from the failure of the Jamaica Committee that the rule of law is a luxury which only stable democracies can afford, but which other sorts of society cannot; for example, a colonial setting where a small white settler group has to deal with the justified resentments of a much larger black population of former slaves, who still live in circumstances of dire poverty. Moreover, as Kostal suggests, the issue is not simply that the claims of power and survival will prevail over the claims of law. Rather, it is that even in a stable democratic society committed to legality, the legal constitution must make room for the claims of power and survival, as is indicated by the fact that the idea that the executive may resort to martial law did not receive any death blow in the aftermath of the Jamaica uprising, and has thrived afterwards, in the suppression of unrest in Ireland and other colonies, and in the analogues to martial law that have developed in the twentieth and twenty first centuries.

Indeed, in his magisterial work *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, AWB Simpson says of Dicey's claim about martial law that it is "grossly and perversely misleading" since under martial law "precisely what happens is the suspension of ordinary law, followed by the government of the relevant area by the military".³⁴ In particular, Dicey's "absurd legal theory" cannot account for punishment and reprisal as central techniques of martial law.³⁵ In sum, Dicey and his fellow enthusiasts of the rule of law cannot deal with the fact that political power will prevail when elites think they are faced with an emergency.

In this regard, the analogues are even more depressing for civil libertarians, since if martial law can be said to have received any death blow, that blow did not come from any

victory of lawyers and judges wedded to the same cause as that of the Jamaica Committee. Rather, it came from the fact that martial law need no longer be invoked by the military and the security services since Parliament in the twentieth century simply provided them with advance statutory authority to do whatever they would have claimed it necessary to do in the past under the cover of martial law,³⁶ a fact of which there is ample evidence in the post 9/11 era. In short, the executive need no longer rely on the idea of martial law to adopt the kinds of measures Dicey thought unconstitutional. It merely ensures that it has the authority so to act from statute. Thus, the conclusion seems fully justified of one review of Kostal's book that what Kostal shows is that it is "wishful thinking" to remark, as did Dicey just twenty years after the Jamaica uprising, that "Englishmen are ruled by the law, and the law alone".³⁷ In short, while the truth of the claim about martial law is not the only test of Dicey's general argument, it is a test such that, if Dicey cannot pass it, his general argument fails.

I agree that Dicey's remark is a kind of wishful thinking. But I will argue that such thinking is necessary to make sense of the aftermath of the Jamaica affair, indeed, of much of what Kostal finds remarkable about the story. I will also argue that it is wishful not in the sense of bearing little or no relation to reality, but in the sense of being an aspirational account of the rule of law, one which seeks to bring reality into line with the principles foundational to its account.

The basis of my argument is the very fact that might seem most undermining of it. If it is wishful thinking to say that "Englishmen are ruled by the law, and the law alone", we commit ourselves to the proposition that they are ruled by something else, by the usual contrast with rule under the rule of law--rule by the arbitrary power of the executive. But while claims of this sort are often made, they are made for dramatic effect since they almost

always boil down to the idea that we are ruled by law, albeit in times of emergency or alleged emergency by law which authorizes the executive to do more or less as it pleases. In other words, rule *by* law requires that valid executive acts have a legal warrant. But whether the legal warrant also requires that the executive act in accordance with fundamental principles of the rule *of* law is something contingent, one of the factors making it so being whether the executive regards itself as faced with an emergency. Further, it is a mistake to associate the rule of law with rule in accordance with these substantive principles, because the decision by the executive to rule by law is one which is taken in accordance with the principle of legality, the principle that commits it to acting only when there is a legal warrant. The executive thus meets the threshold for action in accordance with the rule of law when it rules by law.

Of course, there might seem little difference between the situation where the executive simply claims authority to act arbitrarily and the situation where it can point to a constitutional/legal basis for such authority. But even those who regard Dicey's kind of position as wishful thinking are reluctant to say that the rule of law is such an empty concept that the commitment by the executive to the principle of legality makes no difference.

For example, Kostal opens his study by pointing out in two sets of theses how remarkable it was that the debates and political action in England in response to the Jamaica affair were framed on both sides by legality and sought a resolution in the courts.³⁸ "Public sin" was agreed to be "expunged in courtrooms, not churches",³⁹ and the suppression of the uprising became controversial "because it called into question the moral—hence legal—integrity of the English people". And it did so not merely because of the reign of terror, but also because of the claim of those who imposed it that "what they had done was completely *lawful* under martial law".⁴⁰ While the Jamaica Committee failed to procure a "decisive legal

precedent”, it did cause the “English governing class to confront the contradiction between the love of power and the love of law”,⁴¹ and in this confrontation, that class proved itself more willing than other contemporary elites to “engage in a vigorous if ultimately indecisive reassessment of their jurisprudence of power”.⁴² But in all of this, Kostal says, English constitutional law “operated less as a body of substantive principles than as a reservoir of legal narratives about state power and its proper limits and constraint”.⁴³

These remarks are however as open to question as we have seen Kostal thinks Dicey’s position is. Were the two narratives equally valid as claims about what the law (the rule of law) required, or was the one which sought to justify Eyre and his officials in substance a discourse of power which sought to cover itself with a thin veneer of legality? If that discourse was not merely a discourse of power disguised by legality, do not the outcomes of the Jamaica affair show that it, rather than the discourse favoured by the Jamaica Committee, is the authentic discourse of the law, one which doomed the efforts of the Committee to failure? Or was the Committee’s failure the result not of the rule of law but of the fact that “English law lacked an effective mechanism for the resolutions of constitutional conflict”? Kostal suggests, that is, that the private criminal prosecution, while it gave access to the courts, was not a good means of “pursuing abstract legal and political goals” and that had the direct result that the “practical concerns and sympathies of English grand juries” derailed the “constitutional aims of the Committee”.⁴⁴

In sum, Kostal, no less than Dicey, fails “squarely to confront a number of thorny issues engendered by martial law”, in particular, whether the English Constitution did contain the substantive principles which the Jamaica Committee, James Fitzjames Stephen, Sir Alexander Cockburn and Dicey thought it did. Of course, an historian is not obliged to take sides in a conflict whose nuances he wishes to describe. But, as we will see, Kostal

signals that Eyre's supporters had the better of the legal argument. If the issue was one about rhetoric and narratives rather than constitutional substance, the Jamaica Committee's hopes for the rule of law was vain. However immoral Eyre and his officials were, and Kostal is unsparing in his description of their excesses, he often suggests that the fact of the matter was that if colonial officials were to deal legally with the resentful populations they governed, martial law was a necessary evil from the perspective of these charged with the imperial mission. As Kostal points out, this fact seems to have prevailed in Lord Chief Justice Cockburn's charge, leading him to undercut his own argument at crucial points,⁴⁵ as well as in Stephen's courtroom addresses, as Stephen expressed personal sympathy for the plight of Eyre and his officials, refusing to impugn their personal motives, at the same time as he argued that they were guilty of murder.⁴⁶

However, Kostal also takes as a given that the debate in England was a genuine one about what martial law meant, a product of the way that the principal actors accepted that the political and moral issues should be channeled into and resolved within the legal order. As I have indicated, he cannot in the end resist taking sides in that debate, despite his view that historians should avoid normative judgments. But the point I want to make is not just about the predicament of one *legal* historian, that is, an historian who wish to make sense of the special role of law in a particular context. It is that Kostal's position in the debate about martial law comes about because it is very difficult, perhaps even impossible, to avoid taking sides in this debate, given that at its heart is a contest about the very nature or point of legal order.

The only way of trying to avoid this predicament is to argue that if there were any immorality to be condemned in the Jamaica Affair, it resided in the colonial project itself, which, as Mill, a former official of the Dutch East India Company, once remarked required a

“vigorous despotism”.⁴⁷ As Michael Taggart points out in the review mentioned above, there is something mighty odd about Mill’s position as leading light of the Jamaica Committee, since he was a fervent advocate of colonialism, but the circumstances of the colonial project made inevitable such events as the excesses involved in the suppression of the Jamaica uprising.⁴⁸

On this argument, the confusions on both sides of the Jamaica debate arise because the English governing elites combined their love of power, as evidenced in the imperial project, with their love of law, as evidenced in their commitment to governing their exercise of power by law. The elites should have treated imperialism as a vast exception to the way they governed at home: rule of law in England, arbitrary power elsewhere. However, even this argument fails to avoid the predicament for two reasons.

First, the argument takes sides in supposing that rule by law requires the rule of law—Dicey’s rule of substantive constitutional principles—because it assumes that if one wishes to avoid subverting the rule of law in the imperial context one must avoid governing by law. Second, that the empire would be governed by law was an important even crucial idea in the legitimization of empire--the conception of the project of empire as the white man shouldering his burden of bringing civilization, including the rule of law, to less fortunate peoples.⁴⁹

Third, as Kostal forcefully points out, the governing elites were estopped from making this exception, because there was no way of confining it with any integrity to the colonial context. The Jamaica Committee was motivated by the same spirit that lay behind the anti-slavery movement, and its members were genuinely appalled by Eyre’s excesses. However, the Jamaica Committee was just as, perhaps even more, motivated by the issue of legal integrity at home. If rule by law permitted Eyre to do what he did in Jamaica, it also

permitted governing elites at home to do the same. In Kostal's words, "[t]he question of the day was not whether martial law justified the execution of Gordon, but whether martial law in England would justify the execution of [the political radical] John Bright".⁵⁰ It was no coincidence that the leaders of the Jamaica Committee were also leading the fight "for the greater accountability of Parliament to male voters", while the leaders of the Eyre Defence Committee were among those who most "loudly" opposed a "more democratic suffrage". Thus "reform of the franchise and the Jamaica affair raised the same question: what was the nature of legal accountability in a constitutional state?"⁵¹ Moreover, agitation over reform had recently led to the deployment of two thousand police to clear Hyde Park of pro-reform demonstrators, an incident which, while "small beer" compared to Jamaica, showed the potential for state repression of political dissent.⁵²

In the next section, I will analyse in some detail some of the central legal arguments made in the Jamaica affair, in order to bring to the surface the different jurisprudences of power to which each narrative was committed. I will argue that only the position represented by Stephen and Cockburn, later elaborated by Dicey, makes sense of the idea that there could be a jurisprudence of power.

The Charges to the Grand Juries

Because the prosecutions had to be done at private initiative, English law required a two-stage inquiry.⁵³ Suffice it to say that at the end of the first stage, if the accused were charged with a felony, the indictment was set down for review by a grand jury, a process in which the presiding judge delivered a charge explaining the law and setting out the facts, which left the

jury with the decision on the facts. Only if the grand jury found that there was a “true bill” of indictment did the matter proceed to a full-blown jury trial.

I will deal first with Sir Alexander Cockburn’s charge in the case of the officials who had presided over the court martial of George Gordon and then with the charge by his brother judge, Mr Justice Blackburn, in Eyre’s case. As we will see, Blackburn J tried to establish a middle ground between Cockburn LCJ and the more extreme position that had been staked out by the barrister who had in various publications taken up Eyre’s cause, WF Finlason. Finlason’s view was that once martial law was declared, the executive had an unfettered discretion to act as it saw fit. The crucial question, in my view, is whether there is any resting place on what we can think of as a continuum of legality between Cockburn LCJ’s Diceyan position, more accurately, Dicey’s Cockburnian decision, and Finlason’s. Further, if there is none, should we conclude that Cockburn LCJ’s position collapses into Finlason’s, with the result that the English constitution does and must know martial law?

That the Lord Chief Justice of England would go the Old Bailey to charge a grand jury was “not a routine matter”.⁵⁴ But as Cockburn LCJ began his charge to the jury by indicating, he thought his presence was required because the case was “one of the greatest difficulty as well as of importance”.⁵⁵ He clearly intended to settle the great questions of martial law: who has authority to proclaim it and what is it that is proclaimed by the one who has authority? In the case, these questions resolved themselves into whether Eyre had authority to proclaim martial law and, if he did, whether the army officers Nelson and Brand had authority by that proclamation to try Gordon, and thus whether his execution amounted to willful murder.⁵⁶

In regard to Eyre’s authority, it had to have its source, Cockburn LCJ said, either in the commission he had received from the Crown or from an imperial or local statute.⁵⁷ The

question of whether he had such authority by Commission of the Crown was thus the “great constitutional question—Has the Sovereign, by virtue of the prerogative of the Crown, in the event of rebellion, the power of establishing and exercising martial law within the realm of England?”⁵⁸ Of course, the question would never arise in England, Cockburn LCJ assured his audience, and if it did, the government would be a wise government and apply to Parliament for legislation authorising the actions it considered necessary.⁵⁹ However, they were in court not to consider policy, whether there “ought to be such a thing as martial law or not: the question for us is whether there is such a thing”.⁶⁰

At this point, Cockburn LCJ made plain his distaste for Finlason’s doctrines—of the “wildest and most startling character”-- and which, if true:

would establish the position that British subjects, not ordinarily subject to military or martial law, may be brought before tribunals armed with the most arbitrary and despotic power—tribunals which are to create the law which they have to administer; and to determine upon the guilt or innocence of person brought before them, with a total disregard of all those rules and principles which are of the very essence of justice, and without which there is no security for innocence.⁶¹

He was not exaggerating, as he quoted ample extracts from Finlason’s *Treatise on Martial Law* which emphasized that martial law was the law of the will of the military, something entirely unconstrained and arbitrary.⁶² Because, Cockburn LCJ said, these were “detestable” doctrines, “repugnant to the genius of our people, to the spirit of our laws and institutions, to all which we have been accustomed to revere and hold sacred”, it was essential to see whether there was sufficient legal authority for them.⁶³

Cockburn LCJ proceeded to argue that all supposed examples of the exercise of martial law, that is, cases where men were put to death or punished with “some form of

trial” and thus not deaths “in the field”,⁶⁴ were examples of illegality, something made plain by the Petition of Right, the statute which in 1627 put an end to attempts in England to exercise martial law by virtue of the prerogative.⁶⁵ That statute, he argued, was not an “enacting statute” with application only to England. It did not place any “new limitation upon the prerogative of the Crown”, but simply declared “where, according to the law and constitution of this country, the prerogative of the Crown ends and the rights and liberties of the subject begin”.⁶⁶

Cockburn LCJ admitted that the claim about the end of prerogative-based martial law could not be made about Ireland. But he pointed out that there the illegality of the exercises had been recognized through the enactment of Acts of Indemnity and that, after the famous case of *Wolf Tone*,⁶⁷ prior statutory authority was sought for the powers the executive thought it required. In this regard, he said that “nobody can deny for a moment the power of Parliament to enact that martial law shall be put into force”.⁶⁸

It might, as I have already suggested, seem to give the game away to admit that what cannot be constitutionally done by prerogative can be done by statute, but Cockburn LCJ had two strings to add to his bow. The second was his point that one of the advantages of seeking Parliamentary authority is that:

restrictions and conditions can be placed on the exercise of this anomalous jurisdiction as may insure the observance of those things which are essential to justice, and which tend to secure it from those disturbing influences which in times of public commotion are too apt to operate on the mind of those who may be called on to administer this rude and hasty justice, and to lead them to arbitrary and rash decisions.⁶⁹

Now this second string might seem but a pious hope. However, as I will now show, it is best appreciated in conjunction with the third string—Cockburn LCJ’s analysis of the Jamaica legislation on which Eyre and the officials relied. For Cockburn LCJ argued that the correct way to interpret general statutory authority to declare martial law is that such authority is bounded by specific understandings of martial law, as found in statutes, the common law, and authoritative pronouncements by lawyers.

One of the first statutes made after the legislature of Jamaica acquired from the Crown the power to make permanent statutes was one for establishing a militia in Jamaica, as there was no standing army. It provided that if the Commander-in-Chief apprehended public danger or invasion, he was to call a council of war, and with their advice and consent, command the Articles of War to be proclaimed, “[u]pon which publication the martial law is to be in force”.⁷⁰ The Act concluded with the proviso that nothing within it could give any official authority to do “any act or thing contrary or repugnant to the known law of England or this island”,⁷¹ which meant, Cockburn LCJ asserted, that it was subject to the Petition of Right.⁷²

Cockburn LCJ recognized that governors of Jamaica had in fact exercised martial law “in the amplest sense of the term” since the enactment of this statute, thinking that they had authority from the statute or from their commission.⁷³ But his view was that the statute gave them no such authority. It was simply a statute that enacted that once a militia had been raised, it would be governed by military law, a claim that was not only in accordance with authority, but also reinforced by the proviso about the law of England.⁷⁴

The second statute he considered, also a Militia Act, made it clear, in his view, that with the condition that the Governor could proclaim martial law only with the assent of a council of a war, and for periods of 30 days at a time, once he had that assent, he had the

powers of martial law “in the largest sense”.⁷⁵ This could not be the common law of necessity, which left two possible senses. It was either the law applicable to the military “applied to the civilian”, or a “shadowy, uncertain, precarious something, depending entirely on the conscience, or rather on the despotic and arbitrary will, of those who administer it”.⁷⁶

The substantive law applicable to the military was not, however, arbitrary or uncertain; rather it was “precise, specific, definite”.⁷⁷ The same was true of military, procedural law, with the exceptions of the “drum-head court martial”, which seemed closer in approach to what is called martial law, but which, Cockburn LCJ asserted, had fallen into disuse. There was also a summary procedure under the Mutiny Act, but such a court did not have the power to pass sentence of death.⁷⁸ Subject to these two exceptions, this kind of military law demanded the same standards as in a ordinary court of justice, save for the fact that an accused could not be represented by a lawyer of his choice, a defect but one which had until quite recently attended civilian trials on capital offences.⁷⁹ So if that were the martial law applicable to the soldier, Cockburn LCJ asked, why was something different claimed to be applicable to the civilian?⁸⁰ Other than what he called the “reckless assertions of Hume”,⁸¹ the major contribution to this idea came not from authority but from “excesses and abuses which have been committed in the exercise of this power”.⁸²

That left only the argument that martial law is necessary because of the need for “summary and terrible” examples. But if such examples were to be made “without taking the necessary means to discriminate between guilt and innocence” so that “in order to inspire terror, men are to be sacrificed whose guilt remains uncertain”, he trusted that “no court of justice will ever entertain so fearful and odious a doctrine”.⁸³

There are considerations more important even than the shortening the temporary duration of an insurrection. Among them are the principles of justice, principles

which can never be violated without lasting detriment to the true interests and well being of a civilised community.⁸⁴

In sum, the three strings are: the common law constitution does not know martial law in the sense of a prerogative-based unfettered discretion; the legislature can enact martial law, but we expect that if it does the powers granted will be carefully circumscribed; and, if that expectation is disappointed we are entitled to interpret the statute as circumscribing the powers in accordance with the best understandings of martial law from the common law, declarative statutes such as the Petition of Right and the Habeas Corpus Acts, and the authority of great lawyers. In combination, the three strings are powerful because they leave elites who want to exercise an unfettered discretion with only one option—enacting legislation that very explicitly gives them the specific powers that they want. That option is a difficult one to exercise because it is likely to attract adverse public criticism, and, moreover, criticism spurred by the fact that the public is uncomfortable with the thought that their society is officially not committed to the rule of law, a point I will come back to below.

Cockburn LCJ then expressed the view that if the Governor had no power to put martial law into force, it followed both that the court-martial lacked jurisdiction and that the execution was the crime of murder. If Nelson and Brand had made an honest mistake about there being jurisdiction when there was none, they would have to hope for a pardon. The “law must”, he said, “be vindicated” “however sorry we may be that gentlemen who have intended to do their duty ... should be made amenable at the bar of a criminal court for the crime of murder”.⁸⁵ And he made plain in a close analysis of the evidence at and process of Gordon’s court martial that much of the evidence that was admitted was inadmissible, that what was admissible was worthless, and that the process was a complete sham, such that it was as “lamentable a miscarriage of justice as the history of judicial tribunals can disclose”.⁸⁶

Given his view of the facts, and account of the law, it might thus seem that he was virtually directing the grand jury to declare a true bill. But he also, as I have already indicated, said some things that put his whole charge in doubt. Not only did he emphasize that he had “felt deeply sensible of the exceeding difficulty of the task” of “travelling over [the] untrodden ground” of martial law, but also that his views were his alone; he did not have the help of judicial decisions or learned authority or the guidance of other lawyers or judges.⁸⁷ He thus injected, as Kostal emphasizes, a serious note of uncertainty in a charge that was meant to clarify the law to the grand jury.

He then made things worse by arguing that if the jury found that the army officers who presided over Gordon’s trial had jurisdiction, they then had to decide whether it was honestly and bona fide exercised. That is, assuming that there was jurisdiction, if it looked to the grand jury as though the officials had abused it to get rid of a “mischievous and obnoxious character”, they should find a true bill.⁸⁸ While he seemed to indicate that the way the court-martial was conducted constituted evidence of dishonesty and bad faith,⁸⁹ this argument invited the grand jury to decide the legal questions at stake in the case and thus he charged them with an interpretative task which was properly his, not theirs.⁹⁰ Moreover, he muddied not only his charge on the law but also his charge on the facts by suggesting that he understood why in the circumstances of the uprising and in the light of Gordon’s political record, officials could honestly think that Gordon was both a cause of the uprising and that his punishment would bring an end to the insurrection.⁹¹

Kostal thus rightly says if there was ever a chance that a jury of twenty-three “affluent and (presumably) conservative men” were going to find a true bill, Cockburn LCJ had “surely scuttled it”.⁹² Kostal may even be right in saying that the charge was “naïve, even disingenuous”.⁹³ But Kostal goes too far, in my view, in the claim that the charge is an

“archetypal study in liberal confusion and self-contradiction about law and empire”;⁹⁴ faults made worse by the fact that Cockburn LCJ in a postscript to the published edition of the charge not only “accepted the fact of empire and the need to use force to preserve it”;⁹⁵ but also would not “categorically condemn martial law”⁹⁶ and “made just one recommendation--for the “necessity of legislation if martial law is ever again to be put into force”.”⁹⁷ For there is a difference between the incontrovertible claim, on the one hand, that Cockburn LCJ fatally undermined his argument with his doubts and with his mistake in charging the jury with interpretation of the law and, on the other, Kostal’s claim that the argument was self-contradictory.

While Kostal says that it is not the place of an historical study to say whether Finlason’s account of martial law was “correct, or at least more correct” than Cockburn LCJ’s, he does think that Finlason “presented an internally coherent account of the sources” and that he was “more forthright about the implications of empire for constitutional government”, underlining, as he did, “the indispensability of terror as an instrument of imperial government”.⁹⁸ But an internally coherent account of the legal sources is by definition more correct than a self-contradictory one and if it has only incoherent rivals, there is every reason to say it is the correct account. As Kostal points out, Finlason charged Cockburn LCJ with confusing what the law was with what the law ought to be. He thus, as Kostal says, criticized Cockburn LCJ from the “perspective of legal positivism” and claimed for himself a presentation of the law as “hard fact”.⁹⁹

However, Finlason’s position is no less open to the charge of being contradictory, indeed, more open to the charge of internal or self-contradiction than Cockburn LCJ’s. In his first work on martial law, Finlason argued, as we saw Cockburn LCJ indicate, that martial law was something entirely arbitrary, uncontrollable by ordinary law. In Finlason’s

view, martial law involves the “suspension of all law”, thus conferring “an absolute discretion for the doing of anything which possibly could be deemed necessary or expedient”.¹⁰⁰ It follows that anything done during the period of martial law is by definition not illegal. Indeed, strictly speaking there was no need for an Act of Indemnity following a declaration of martial law. Even if excessive acts were done, this was not something “material to their legality” and those who did them could not be legally liable.¹⁰¹

The position that if the idea of martial law is something different from the law that applies to the military and the law of the defense of necessity, it amounts to the suspension of all law might not seem incoherent. It is merely an all or nothing position, one that asserts that there would be “no difference between ordinary law and martial law” if the “governor or military authority” could be “legally liable for what is honestly done”.¹⁰² The problem is that it is difficult to see what role “law” plays in the idea, given that legal authority is universally supposed to be an authority to act only if the law supplies a warrant for one’s act. Put differently, legal authority is an inherently limited authority. Not only must one have jurisdiction to act, but the idea of jurisdiction entails that its limits are objectively determinable, that is, determinable by some independent legal authority. In short, the position is incoherent as an account of law. Finlason is acutely aware of this problem and so at times retreats somewhat from his position. He says, for example, that the power of martial law is “absolute” rather than “utterly arbitrary” and that “the military authorities are justified in all means and measures, they really deem necessary; though not in wanton and unnecessary acts of cruelty, which from their nature they cannot have really deemed necessary”.¹⁰³ In addition, he claims that martial law is controlled by the common law since the common law recognizes martial law as absolute, but only within its jurisdiction, and that its exercise is subject to those “dictates of natural justice ... which the law of England

considers as of universal obligation”.¹⁰⁴ He even suggests that “the entire and willful non-observance of this great duty might so far invalidate such proceedings as to impose a *criminal liability*”.¹⁰⁵

Moreover, Finlason does seem at times to provide a basis for enquiring into the validity of both the proclamation of martial law and its implementation. He talks consistently about “the lawful proclamation of martial law”¹⁰⁶ and suggests that the validity of a declaration of martial law depends on certain facts, for example, that there is a rebellion and no standing army whose might more than suffices to put it down.¹⁰⁷ He says that whether “there is or is not a rebellion, is, as our lawyers always held ... a question of fact; and, still more so, whether it is sufficiently formidable to require martial law for its suppression”.¹⁰⁸ He also frequently asserts that as long as officials act honestly, it does not matter whether they act in error. So, for example, even if it is the case that an official is in fact mistaken as to the existence of a rebellion, if he honestly thinks there is, he acts with full legal authority. This seems to suggest that the official could be legally liable if it could be shown that he did not honestly believe there was the necessity to declare martial law. However, Finlason also emphasizes that the legality of a declaration of martial law:

depends ... simply upon the *fact* of its having so been declared; otherwise there could be no security for any one ever acting under martial law, for it is a general principle that if there no *original* authority or jurisdiction, all who act under it act illegally, and so, if they take life (save in self defence, or in suppression or resistance of actual felonious outrage), are guilty of murder.

If the legality of martial law were made to depend ... upon the soundness of the judgment exercised in declaring it, in the opinion of other persons, at a great distance, and after the event, and under different, perhaps hostile influences, it is

obvious that no one could even venture to declare, or to act upon, martial law, and put in force its terrible powers for the salvation of a colony or a dependency.¹⁰⁹ As he makes crystal clear in these passages, if the fact of a declaration suffices to ground its legality, there is no scope for second guessing that fact on any ground.

Finally, Finlason says that the point of martial law is to avert danger by deploying terror, with any person a legitimate target who is not actively involved in supporting the military.¹¹⁰ It is unclear what role natural justice could play if this is the point, a fact highlighted by his statement that “the governing principle” of martial law is that its “basis” is “*danger* rather than guilt: and the meeting of danger by the exciting of terror”.¹¹¹

In sum, the only way for Finlason to preserve his position from self-contradiction is to stick with the claim about the utter arbitrariness of martial law, which means accepting that law is not properly part of the concept. It is, to quote him, “a state of things in which there no *law* at all, but the will of the Commanding officer”.¹¹² The retreats set out above turn out to be no more than his vain wish to have law, properly so called, play a role. The grip of that wish on him is further manifested in his introduction to his edition of Mr Justice Blackburn’s charge in Eyre’s case, since there he endorsed fully Blackburn’s position.

Blackburn J’s position is, however, at least on the surface, very different from Finlason’s. First, in his charge to the jury, Blackburn J did not commit himself to the claim that there is a prerogative to proclaim martial law. Even if there were such a prerogative, he did not think that it was as “unbounded, wild, and tyrannical” as “some persons have lately been saying that it is”,¹¹³ a reference which must include Finlason, since he was the most prolific and prominent exponent of such claims. Indeed, Blackburn J suggested that the prerogative, if it existed, was “strictly limited to necessity” and if that were the test, there could be “no reasonable doubt that ... [Eyre] did exceed much that would be authorized on

the most extended view of the prerogative”, such that Eyre rested his authority on the common law the jury would have to find a true bill.¹¹⁴

Where Blackburn J differed from Cockburn LCJ was mainly in his interpretation of the Jamaican statutes. In regard to the first statute, he put great emphasis on the fact that it stated that when the occasion had passed “martial law shall cease and the common law revive”.¹¹⁵ He did not think that the statute could therefore be limited to permitting the authorities to call out the militia and having military law apply to the militia, since authority to do that had been given in a separate section. In other words, in order to give sense to the idea of the common law reviving, he inferred that it had to be entirely suspended, allowing for martial law to be exercised “in the fullest sense”.¹¹⁶

But this inference is controversial. One could equally argue that the provision about the common law is there to emphasize the transition from control by military law of the militia to the general control of the common law over all of the population, including that part of the population that had formed the militia. Moreover, since the phrase “martial law” was used in both sections, it is logical to infer that it means the same in both, and there is also the rule that statutes should be taken to use phrases in accordance with their received common law meaning, unless there is good reason to suppose that some other meaning was intended.

More significant is that Blackburn J failed to mention the proviso that nothing within the statute could give any official authority to do “any act or thing contrary or repugnant to the known law of England or this island”, a significant omission given that he, unlike Finlason, accepted that the Petition of Right applied to Jamaica.¹¹⁷ And that casts into doubt Blackburn J’s claim that in the second statute, martial law meant doing whatever the governor thought necessary, checked only by the requirements that he had to have the full

consent of the Council of War and that the period of martial law was to operate for only 30 days at a time.¹¹⁸

In addition, Blackburn J noted that the statutes did not define martial law,¹¹⁹ and he did not himself venture a definition. However, as we have seen, he had laid down one negative condition: martial law is not as “unbounded, wild, and tyrannical” as Finlason and others would have it. Perhaps for that reason, Blackburn J set out we might think of today as a proportionality test:

“If a man of reasonable firmness, self-control and moderation would not have done it, then, I have no doubt, he would have been punishable for the want of that firmness and moderation”.¹²⁰

That question was for the jury to decide, and he made it clear that they should apply his test, putting themselves as much in Eyre’s position as they could, to the question of the proclamation of martial law, the question of its maintenance for 30 days, and to the question of the removal of Gordon to Morant Bay to stand trial.¹²¹

In the circumstances, as Finlason approvingly notes,¹²² this was a direction to the jury not to find a true bill. They had been told that Eyre had by statute indeterminate powers to do indeterminate terrible things and rural propertied gentlemen were not going to balk at finding that from his perspective he had acted appropriately.

In giving this direction, Blackburn J was not far from being disingenuous. Unlike Finlason, he saw law as inherently controlling so that martial law could not be arbitrary, even if it were created by a valid statute. But he was unwilling to specify its legal content, so he effectively left that issue up to the jury, thus silently inviting them to do what Cockburn LCJ had explicitly done—interpret the law for themselves. Moreover, the reasoning of his direction on the law is internally flawed. As we have seen, the parts of Cockburn LCJ’s

argument come as a package. Doubts about a prerogative power to proclaim an arbitrary regime of martial law should translate into a stance on statutory interpretation averse to finding that those same powers are authorized by statute, in the absence of an altogether explicit legislative statement that they are. If Eyre had, as we saw Blackburn J said, acted in a clearly excessive way at common law, given that Blackburn J also thought that there were constraints of reasonableness on Eyre's actions under statute, he owed the jury an explanation of why those constraints differed in such a way as to open up the possibility of Eyre being let off the hook of criminal liability.

Still Finlason should not have endorsed Blackburn J's charge, despite his agreement with its message. While that charge was crafted in such a way as to make the jury's conclusion inevitable, Blackburn J did go through the motions of setting up a genuine question of fact for the jury to decide.¹²³ And as we have seen on Finlason's view, no institution is capable of second guessing the governor or other responsible official on questions to do with martial law. In my view, Finlason was motivated both by his evident zeal to retaliate against Cockburn LCJ's harsh words about him and the temptation already described to temper somewhat his real position that martial law is utterly arbitrary.¹²⁴ In the second regard, since Blackburn J's charge had the desired result and was cloaked with respect for legality, Finlason ignored the obvious differences between their positions.

One might still object that these differences while obvious were insubstantial. But one can make much the same point about the differences between Finlason and Cockburn LCJ, or between all three figures. The moral of the story can be interpreted to be that when a society is faced with a radical challenge, law must give way to power, so that the three positions I have set out are just more or less elaborate forms of disguising this fact. Cockburn LCJ's position inevitably collapses through Blackburn J's into Finlason's.

However, one can equally claim that the need to take law seriously travels in the other direction, collapsing Finlason's position into Cockburn LCJ's, as long as Finlason remains unwilling to jettison the narrative of legality to describe his position. If one wants a jurisprudence of power because one regards it as essential that politics be conducted within a framework of legality, the "legal frame",¹²⁵ one is driven to the position that the constitution does not know martial law.

I believe that the only way to decide between these claims is by appeal to practice, a belief which, given the actual outcomes of the Jamaica affair, might seem fatal to the argument I wish to make--that Dicey's position, as first set out by Cockburn LCJ and other lawyers at the time of the Jamaica affair, is the only serious candidate to be a *jurisprudence* of power. However, as I will now show by moving via the Boer War to a contemporary US debate, what it means to appeal to practice is itself a complex normative question because a practice sometimes has to catch up with its normative presuppositions.¹²⁶

Constitutional Law and Constitutional Morality

We had however redeemed, so far as lay in us, the character of our country, by shewing that there was at any rate a body of persons determined to use all means which the law afforded to obtain justice for the injured. We had elicited from the highest criminal law judge in the nation an authoritative declaration that the law was what we maintained it to be; and we had given an emphatic warning to those who might be tempted to similar guilt hereafter, that though they might escape the actual sentence of a criminal tribunal, they were not safe against being put to some trouble

and expense in order to avoid it. Colonial Governors and other persons in authority will have a considerable motive to stop short of such extremities in future.¹²⁷

John Stuart Mill

Mill's optimistic take on the Jamaica Affair despite the failure of the prosecutions might seem a little overblown in light of subsequent events. The legal and moral hand wringing that followed the Affair might, when one takes a longer historical view, seem to have disappeared as elites came to terms with the fact that governing an empire is a dirty, brutal business. Notable here is the massacre in Amritsar, India, in 1919, where, as elsewhere, some participants in Ghandi's campaign of passive resistance turned to active violence. In Amritsar, martial law was proclaimed and Brigadier-General Rex Dyer ordered his troops to open fire on a crowd of 20,000 which had gathered in contravention of the regulations which prohibited meetings of more than four men.¹²⁸ The crowd was trapped within the walls of a meeting ground. Around 380 were killed and more than 15,000 wounded. Numerous in camera trials followed, at which 180 people were sentenced to death and 264 to transportation for life. The Hunter Committee in England rejected Dyer's justification that the massacre was necessary to intimidate potential disobedients elsewhere and he was condemned by the House of Commons, though not by the Lords.¹²⁹ However, Dyer was never prosecuted, his "punishment" only that he was invalided out of the army.¹³⁰ AWB Simpson says that the Hunter Committee adopted a Diceyan theory, according to which Dyer and others were "personally liable, and risked trial and indeed conviction for murder". But, Simpson adds, there "is no real sense in which this was or could ever be done".¹³¹

Moreover, if anything the legal portents for Dicey's theory were hardly good since in 1902 during the Boer War the Privy Council, the judicial committee of the House of Lords

that was the final court of appeal for the British Empire, decided *Ex parte DF Marais*¹³² against his theory. In issue was a petition for a special leave to appeal from a decision by the Supreme Court of the Cape Colony. In 1901, while the Boer War was still raging, Marais had been arrested without warrant and removed from the town in which he was arrested to a town some 300 miles away where he was detained. He petitioned the Supreme Court in Cape Town to release him on the ground that his arrest and his imprisonment were in violation of the fundamental liberties secured to the subjects of His Majesty. However, his jailer stated in an affidavit that Marais was detained by an order of the military authorities for contravening martial law regulations. These regulations permitted military courts to impose the death sentence on those it found guilty of various offences.

The Cape Court had held that martial law had been proclaimed in both the district in which Marais was arrested and the district to which he was removed and that a court could not go into the question of the necessity of the proclamation nor could exercise jurisdiction over the petitioner so long as martial law lasted. Marais contended that he had committed no crime, and had indeed not been arrested and tried according to law, that the civil courts were open for his trial and that the very judge who refused to release him was to sit in trial of offenders in the district where Marais was arrested. Marais thus claimed that he was entitled to an immediate discharge since his arrest, deportation and confinement in custody by the military authorities were wholly illegal.¹³³

Marais's lawyers argued that leave should be given as the question of law at stake was of "substantial importance". The civil courts were still exercising uninterrupted jurisdiction which went to show that the "ordinary course of law could be and was being maintained", thus a state of war did not exist and martial law could not be applied to civilians.

Alternatively, if a state of war existed, the application of martial law did not oust the

jurisdiction of the civil Courts which were still administering the law of the land and no necessity had been alleged to justify bringing the petitioner before a military tribunal whilst a civil court was still sitting. They relied among other authorities on Cockburn LCJ's charge to the jury and on *Ex parte Milligan*.¹³⁴

The Privy Council reduced this argument to the proposition that since some of the courts were open, "it was impossible to apply the ordinary rule that where actual war is raging the civil courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions".¹³⁵ In their view, the petitioner's own petition disclosed that war was raging. It followed that the "acts done by the military authorities are not justiciable by the ordinary tribunals".¹³⁶ The fact that "for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging".¹³⁷ Further, "once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities".¹³⁸ In regard to the Petition of Right, the judges said that its "framers ... knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure".¹³⁹ They thus seemed to suggest that as long as there was not peace, violations by officials of their constitutional obligations would be legally authorized.

This decision was considered momentous enough for the *Law Quarterly Review*, then as now the leading law journal in the common law world, to publish a four article symposium on it. In one, the distinguished legal historian WS Holdsworth, eschewed direct comment on the decision, preferring to deliver an historical treatment of the topic of martial law, but one which clearly leaned in favour of endorsing Cockburn LCJ's views.¹⁴⁰ In another, Cyril Dodd strongly criticized the decision, in particular because it could be

interpreted as suggesting that the proclamation of martial law authorizes the military to act as they see fit with impunity and because the Petition of Right was itself passed during a time of unrest, and was intended to make clear that in such times the Crown was constitutionally prohibited from claiming the power to “deal with subjects at any time by other means than by the ordinary courts”.¹⁴¹ In contrast, H. Erle Richards supported the decision on grounds very similar to those relied upon by Finlason.¹⁴² No less a figure than Frederick Pollock argued for a rather more moderate version of that same position.¹⁴³ Pollock in particular wished to stress that given the nature of modern warfare, old understandings of constitutionally appropriate measures might not be adequate.¹⁴⁴ Dicey joined in this debate, by adding an appendix on martial law to his *Introduction to the Study of the Law of the Constitution*.¹⁴⁵ There he expressed doubt about the holding in *Marais* and clearly aligned himself with Cockburn, Holdsworth and Dodd and thus against Pollock and Erle Richards.¹⁴⁶

One clear point of difference between Holdsworth, Dodd, and Dicey, on the one hand, and Erle Richards and Pollock, on the other, is that the first three are as concerned with the idea that military tribunals will preside over the detention and trial of civilians as they are with all the other things that might be done in the name of martial law. Indeed, they may be even more concerned with this issue than any other. In contrast, Erle Richards and Pollock do not seem to see any need to distinguish between what tribunals do and what officials do. For them, the issue of martial law is about the full gamut of things that are likely to be done in its name. Since martial law permits the executive to act as it deems appropriate, it does not matter whether it is acting by meting out immediate violence or by mediating that violence with some form of hearing or trial by military tribunal.

One might well wonder about an obsessive concern with passing control to the military over trials.¹⁴⁷ After all, as the events at Morant Bay underline, a lot of what happens under the rubric of martial law is the immediate violence of death, flogging and large scale destruction of property, next to which the trials of a few prominent leaders or alleged leaders of an uprising might look rather insignificant. If sheer human suffering is the measure, then of course the immediate violence is more significant than a few trials. But while the officials who perpetrate such violence claim that in dealing as they see fit with an uprising they have the authority of law, they do not thereby challenge what Dicey considered, as we have already seen, to be one of the two main features of the “political institutions of England”—the “rule or supremacy of law”.¹⁴⁸

Dicey took the rule of law to include three “distinct though kindred conceptions”.¹⁴⁹ First, the rule of law means that “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”.¹⁵⁰ Secondly the rule of law means not only that “no man is above the law” but also “a different thing” that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”. This Dicey termed the “idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts”.¹⁵¹

The third meaning is rather more ephemeral, the rule of law understood as “the predominance of the legal spirit [that] may be described as a special attribute of English legal institutions”:

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of a public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; ... whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.¹⁵²

This understanding of English constitutionalism, however arrogantly parochial it may seem, serves to bring out the nature of the common law constitution's antipathy to martial law. The immediate acts of violence will, according to the common law understanding of constitutionalism, be either justified or not by the defense of necessity, a matter on which the ordinary courts will decide. Put differently, while the public officials might claim the authority of law, whether they had it or not comes neither from that claim nor from any proclamation of martial law, but from the quality of their acts. Thus their claim poses no challenge at all to the rule of law.

However, if military tribunals are set up to determine both detentions of civilians as well as to try them, the challenge is to the rule of law. It is important to recall that the Petition of Right as well as the various Habeas Corpus statutes that followed it were events in a political struggle over legal order waged not primarily between the courts and the executive but between Parliament and the executive.¹⁵³ Moreover, the main focus of that struggle was not the acts of the military in times of stress in responding to particular threats, or in authorizing military actions such as forcible billeting of soldiers, but on the claim of the military to be able to set up a system of courts parallel to the civil courts.¹⁵⁴

The immediate consequence of Parliament's victory was the other main feature Dacey identified of English political institutions, the "undisputed supremacy throughout the whole country of the central government", an authority which had once belonged to the King as "the source of law", but which had passed into the "supremacy of Parliament".¹⁵⁵ As we have seen, this feature can and has been seen as threatening the rule of law since Parliament's supremacy makes possible Parliamentary abolition of the rule of law. However, in order for this possibility to arise, the rule of law has itself to be brought into existence. That requires the establishment of the supremacy of law over the executive, which involves establishing a centralized body for adjudication of disputes about law's limits, a body which is independent of the officials who claim to act in the name of the law. In other words, Dacey's genius and the solution to the puzzle of martial law lies in the insight that Parliamentary supremacy also makes the rule of law possible, since it provides the basis for accountability of the executive to law. Dacey is not then an apologist for either Parliament or judges. Rather, his insight is that both institutions are required to work in a cooperative relationship if executive accountability to law is to be secured. That insight is no less illuminating in our own context.

Consider, for example, Trevor Morrison's recent argument that when Congress suspends the writ of habeas corpus unlawful detentions are not converted into lawful ones.¹⁵⁶ His argument is specifically aimed at the model articulated by Justice Scalia in his dissent in *Hamdi v Rumsfeld*,¹⁵⁷ a model which Morrison calls "suspension-as-legalization". On this model, suspension provides not only an "affirmative grant of authority to detain, but also displaces any constitutional or other legal objection ...that might be raised against the detention".¹⁵⁸ Suspension thus creates a "lawless void, a legal black hole, in which the state acts unconstrained by law".¹⁵⁹ This model, as Morrison has pointed out, has attracted the

support of prominent academics, including David Shapiro, who argues that the “practical reality” of emergencies requires that the executive be freed “from the legal restraints on detention that would otherwise apply”.¹⁶⁰ For Shapiro, suspension amounts to legalization because otherwise executive actors might be “deterred from engaging in the very activity needed, and contemplated, to deal with the crisis by an ... understandable reluctance to violate their oaths to support the Constitution”.¹⁶¹ Morrison, in contrast, answers the question whether such executive abstention is desirable with a “resounding yes”.¹⁶²

Morrison reviews the history of both Suspension Acts in England and of the Indemnity Acts that often followed them. He concurs with Dicey in concluding that suspension did not “affect the availability of any post detention remedy for illegal detention”¹⁶³ and that the scope of Indemnity Acts supports this claim in that they confer immunity on officials for illegal acts done during an emergency, something which would not be necessary if suspension created a legal black hole.¹⁶⁴ On his account, the historical evidence of the practice of suspension and immunity through indemnity in the United States supports the same conclusions.¹⁶⁵

Morrison does note some wrinkles in his historical account,¹⁶⁶ and that Dicey himself was at times ambivalent, particularly when he vacillated between a claim that Indemnity Acts do not affect underlying questions of legality and a claim that they do because they legalize past illegality.¹⁶⁷ He perceptively diagnoses the source of Dicey’s ambivalence as residing in Dicey’s conception of law, in which “constitutional law” is the law that courts can enforce since law properly so called is those rules and norms that “are enforced by the courts”.¹⁶⁸ As Morrison notes, this understanding of law requires Dicey to distinguish between “constitutional law” and “constitutional morality”¹⁶⁹ and the distinction results in the view that because “an indemnity act removes all judicial remedies for unlawful detention, the

detention itself is no longer contrary to law”.¹⁷⁰ For the “modern U.S. reader”, Morrison goes on, Dicey’s view will appear odd, because the distinction between a right and a judicial remedy is now a “commonplace”; the reader, unlike Dicey, will know that there is such a thing as “extrajudicial constitutionalism”—principles of constitutional law that are appropriately enforced not by judges but by the legislature and the executive.¹⁷¹

I will not describe Morrison’s complex argument on this issue in any detail. Suffice it to say that he contemplates circumstances in which it is appropriate for the legislature to design a system of executive detention where the detainees are given due process, but the norms of due process are enforced by non-judicial actors. Judges will still have a role, because the question whether the detainees’ due process rights are adequately safeguarded by the process accorded to them is ultimately a question on which judges must decide and, moreover, the kind of question on which they should not too easily defer either to the executive or the legislature.¹⁷²

In taking this position, Morrison aligns himself by implication with Cockburn LCJ and the grand jury who decided the matter of *Nelson and Brand*, as well as explicitly with Dicey, in calling for a legislative answer to the challenge posed by martial law. The call of course is not for a blanket authorization to the executive to do whatever it sees fit, as the Bush administration has interpreted the post 9/11 Congressional resolution. Rather, it is for a carefully designed system of preventive measures in which due process is accorded those subject to the measures, with judicial review playing a role at least in ensuring that adequate due process has been given to those subject to the preventive measures, and, I would argue, both in ensuring that the decisions taken are reasonable and that the very decision by the legislature to embark on this course is reasonable.

Morrison does not suggest that his argument about suspension commits him to accepting judicial review of the legislative decision to suspend habeas corpus. However, his sympathies seem to lie with Amanda Tyler, who thinks that the question whether suspension is justified is justiciable.¹⁷³ It is also not clear exactly what his position is on judicial review of the decisions taken within a preventive process established by legislation. However, in my view, the five components—legislative authorization, adequate due process, judicial review of adequacy, judicial review of decisions taken in the process, judicial review of the necessity to resort to such a process—come as a package.

My argument is that only if all five components are in place can the executive claim to be acting constitutionally, where by constitutionally I mean not primarily in accordance with the written constitution, if there is one. Rather, I mean the constitutional fundamental of any legal order—the principle of legality which requires that the executive be able to show a legal warrant for all its acts. Only if that requirement is observed can the legal order in which the executive is operating sincerely claim to be such: an order of legality.

However, since if all five components are in place it follows that the executive is acting constitutionally when it detains or adopts other preventive measures, it also follows that there is no need to activate the suspension clause.¹⁷⁴ It is this kind of concern that in part motivates the suspension as legalization model. It might seem, that is, that if one is to make sense of the suspension provision—of its very existence in the constitution—it has to make a difference, with the difference being that it legalizes in advance what would otherwise be illegal. Morrison resists this suggestion, since he wishes to argue for suspension as immunity as opposed to suspension as legalization, not only because he takes suspension as immunity to be truer to history, but also and perhaps mainly because suspension as immunity upholds the principle of legality.

However, there is another way of understanding the suspension provision, which follows Morrison in taking its cues from the English Habeas Corpus Suspension Acts but with a rather different gloss. Those Acts were what we can think of as primitive derogations from the constitutional morality of the legal order, a claim which requires some unpacking. They were *derogations* because they did not purport to change constitutional morality but only to provide a temporary immunity from its normal operation. (Indeed, as Dicey pointed out, all they sought to achieve was a temporary immunity from habeas corpus for people detained on a charge or on suspicion of high treason.)¹⁷⁵ They were derogations from *constitutional morality*, not constitutional rules, because, following Ronald Dworkin's distinction between principles and rules, the choice of derogation is evidence of the fact that the legal norm derogated from is recognized as a fundamental principle that cannot be overridden except at the cost of constitutional revolution. And they were *primitive* in at least two important respects, both formally by comparison with the derogation process set out in the European Convention on Human Rights and informally because the institutional imagination of the time did not include the sophisticated apparatus of the administrative state of the late twentieth century.

Article 15 of the European Convention says:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3,¹⁷⁶ 4 (paragraph 1)¹⁷⁷ and 7¹⁷⁸ shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Derogation thus differs from suspension formally because it entrenches a monitoring mechanism that goes beyond Parliament and rights from which there can be no derogation. It puts in place a test of strict necessity which presupposes that the derogation itself as well as the derogating measures are subject to review and moreover subject to a rather exacting standard. It requires that rights be explicitly derogated from, which means that all rights not explicitly derogated from are in force, as well as all non-derogable rights together with the government's other international obligations. In addition, it leaves intact the principle of legality. As Tom Hickman has put it, the "derogation model creates a space between fundamental rights and the rule of law. Whilst governments are permitted to step outside the human rights regime their action remains within the law and subject to judicial supervision".¹⁷⁹

Informally, derogation takes place in a context where the administrative state has developed both sophisticated adjudicative mechanisms and ways of meshing these with judicial review to ensure compliance with constitutional fundamentals. And in the United Kingdom, under the direct influence of the European Convention on Human Rights,

specific mechanisms have developed for testing information relied on by the executive when making decisions on grounds of national security. As a result, when the United Kingdom derogated from the Convention in the wake of 9/11, it already had in place a legislatively created adjudicative body for review of decisions on grounds of national security, the Special Immigration Appeals Commission (SIAC) developed in order to achieve compliance with its human rights obligations.

It is eminently worth noting that these developments were themselves largely spurred by the same Defence of the Realm Acts that could be interpreted as legislative delegations to the executive of exactly the kind of power that it had in the past claimed under the prerogative to declare martial law.¹⁸⁰ That is, the experience of highly centralized government under delegated powers during the world wars laid the basis for the twentieth century administrative state. Dicey no more regarded the administrative state as having a place in the English constitution than he did the other French abomination, the state of siege: the emergency provision of the French Constitution which, as he described it, had the effect that the “authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (*autorité militaire*)”.¹⁸¹ Neither was, in his view, controllable by the rule of law.

However, as I have just mentioned, the twentieth century saw the development not only of such a state, but of one governed effectively by the rule of law, both through mechanisms internal to that state and through mechanisms that meshed the internal mechanisms with judicial review. The one exception was national security and other powers considered to be exercised by prerogative. But both the prerogative and national security are now recognized to be amenable to the controls of the rule of law, including judicial review. At present, the United Kingdom and other Commonwealth jurisdictions are involved in an

elaborate experiment, one which involves all three branches of government, the point of which is to design appropriate and adequate rule of law controls on the executive's decisions made on grounds of national security.¹⁸²

That experiment began at the moment Parliament began the practice of giving advance authorization to the executive to deal with threats to national security. One can view these statutes, at least in the early stages of the process, as authorizing the executive to do what it would previously claimed a prerogative power to do, and so, as indicated earlier, as putting an end to martial law in name but not substance. As we have also seen, under a common law constitution one can also view this step as removing from judges their only remedy—invalidation of executive acts that are unauthorized by legislation.

However, these views neglect the fact that legislative authorization begins, or at least potentially begins, a process of judicial scrutiny that has a logic whose scope transcends the remedy of invalidation. The political decision to authorize through legislation responds to what I have called elsewhere the “compulsion of legality”—the compulsion to justify all acts of state as having a legal warrant, the authority of law.¹⁸³ In the UK during World War I and World War II, the indefinite detention of individuals who were perceived to be risks to national security had to follow a procedure set out in regulations.¹⁸⁴ Each decision was in principle subject to an appeal to an executive committee, whose chairman had to inform detainees of the grounds of their detentions, so that they could make a case to the committee for their release. The Home Secretary could decline to follow the advice of the committee, but had to report monthly to Parliament about the orders he had made and about whether he had declined to follow advice. The committee, however, lacked rule of law teeth.¹⁸⁵ Not only did it fail to require the real reasons for detentions from the intelligence branch, but in

any case if it thought that someone had been wrongly detained, it could only advise the Home Secretary of its view.

When judges are required to pronounce on the legality of such a regime, they have three options. First, they can try to give the regime rule of law teeth. Second, they can say that the regime is legal without making the attempt, in which case they give the regime the imprimatur of the rule of law by equating that rule with rule by law. Finally, they might find that the regime is illegal because it is incompatible with fundamental principles of legality.

The majority of the House of Lords in *Halliday* and in *Liversidge* adopted the second option. They said that the demands of legality were satisfied by the detention regime and that such regimes were appropriate given the context—wartime emergency. In contrast, Lord Shaw in his dissent in *Halliday* chose the option of invalidation. He started with the assumption that Parliament must be taken to intend that its delegates act in accordance with the rule of law, which meant that it had explicitly to authorize any departures from the rule of law. As Lord Shaw put it, the judicial stance should be that “if Parliament had intended to make this colossal delegation of power it would have done so plainly and courageously and not under cover of words about regulations for safety and defence”.¹⁸⁶ For judges to allow the right to be abridged is to revolutionize the constitution, perhaps, more accurately to undertake a counter-revolution. It amounts to what he called a “constructive repeal of habeas corpus”,¹⁸⁷ a repeal by the executive which is then ratified by judges. He would, he said, have come to his conclusion even though the language of the statute “had been much more plain and definite than it is”.¹⁸⁸ Since the Defence of the Realm Consolidation Act 1914 did not explicitly authorize a detention regulation, the regulation which brought the detention regime into play was invalid.

When civil servants put together the detention regime for World War II, they took note of Shaw's dissent and so ensured that the authorizing statute explicitly permitted the establishment of a detention regime by regulation. Again, one can view this step as either a progress towards the realization of the rule of law or as yet another embellishment to a façade. But, in addition to this response to a dissenting judge, the government responded to concerns raised in Parliament about the wording of the initial version of the detention regulation. It substituted "reasonable cause to believe" when it came to the grounds for detention for the original proposal of "if satisfied that".

It was on the basis of that substitution that Lord Atkin held in his famous dissent in *Liversidge* that a court was entitled to more than the government's say-so that an individual is a security risk, thus seeking, in line with the third option, to make the scheme into something better. The majority disagreed on the basis that it was inappropriate in wartime for judges to go beyond the mechanism explicitly put in place, the toothless review committee. Lord Atkin thus accused his fellow judges of being more executive-minded than the executive and of acceding to arguments that had not been put to a court since the days of the Star Chamber.¹⁸⁹

In my view, *Liversidge* is best understood as but one episode in the story of what we can think of as the rule of law project—the project in which the writ of the rule of law progressively extends. First, Lord Shaw's insistence in *Halliday* on what we would call today a "clear statement rule", the rule that the legislature must expressly delegate authority to infringe fundamental rights, did have the result that the authorization to detain was put into the Defence of the Realm Act in World War II and was thus subject to parliamentary debate. That subjection meant that the question of the content of the regulation as well as the question whether there should be such a regulation came up for debate in Parliament,

instead of being regarded as matters of executive prerogative. And, as we have seen, debate on the former question led to the substitution in wording.

Second, while Lord Atkin put rather too much emphasis on the substitution, he was entitled to infer from it and indeed from the very existence of the toothless executive committee that the legislature and the executive did think that some review of detention decisions was not only possible but also desirable. Indeed, it is worth noting that in the leading speech for the majority in *Liversidge*, Viscount Maugham said that if an appeal against the Home Secretary's decision "had been thought proper, it would have been to a special tribunal with power to inquire privately into all the reasons for the Secretary's action, but without any obligation to communicate them to the person detained."¹⁹⁰ He too therefore thought that review is possible, though not in the absence of institutional innovation. And, to cut a longer story short, precisely such an innovation was attempted when Parliament responded to an adverse decision of the European Court of Human Rights by creating the Special Immigration Appeals Commission, a tribunal with full authority to review executive decisions made on national security grounds which has access to all the information on which the executive bases its claims and the service of a special advocate to test the executive's case.

The derogation model thus travels with another model, the legislative model, since it presupposes that strict necessity can only be observed if the rights displaced are replaced with a suitably proportionate, legislatively designed regime of legality. If that regime is not proportionate or if it is in conflict with rights not derogated from, or if it conflicts with non-derogable rights, then the derogation itself will be invalid. This is well illustrated by the *Belmarsh*¹⁹¹ decision of the House of Lords.

The Anti-terrorism, Crime and Security Act of 2001, the United Kingdom's reaction to 9/11, put in place a system of for aliens who were suspected of being security risks but who could not be deported because of the risk of torture. The statute was accompanied by a derogation notice under article 15, in which the government notified its intention to derogate from the Article 5 protection of liberty. In *Belmarsh*, the majority of the House of Lords found the derogation invalid and the system incompatible with the Human Rights Act (1998)¹⁹² both because the system was disproportionate and because it violated a right to equality (Article 14) which had not been derogated from.

In response, the government introduced by legislation--the Prevention of Terrorism Act 2005--a system of control orders which applies to both citizens and aliens. In terms of this system, there are two types of control order. There are derogating control orders, which impose obligations incompatible with the controlee's right to liberty under Article 5 of the European Convention, and which are made by a court. And there are non-derogating control orders, made by the Secretary of State and subject to judicial review. It thus set out two different tracks: the derogation model plus the legislative model and the legislative model, which was expected to be the norm and also assumed to be constitutional, by which I mean in compliance with the Human Rights Act (1998).

One can, in my view, take the following lesson from this story. The insistence on a clear statement rule makes sense only if it is followed by meaningful review of the executive decisions once properly authorized. Moreover, such insistence also makes possible such review, because it forces the executive to bring its activity within the scope of a deliberately and democratically designed statutory regime, one which has at least the potential of providing rule of law teeth. At least one can take that lesson, if the insistence does not

inevitably result in a mere thin veneer of procedural legality, to which judges give their blessing.

Dicey, as I have pointed out, was unable to imagine this kind of solution to the tension he perceived to be created by Habeas Corpus Suspension Acts for his argument about the constitutional status of the rule of law precisely because of his antipathy to the administrative state. While he yearned for a legislative solution to the problems posed by states of emergency that would impose the rule of law on the executive, all he could envisage was the common law of necessity, with perhaps the addition of a Habeas Corpus Suspension Act, and then an Act of Indemnity. He thus would not contemplate a constitutional or legislative solution which instead of suspending habeas corpus sought to preserve it through a system of tribunals which operated differently from the ordinary civil process developed by the courts. And even though he thought both that Indemnity Acts should be confined to providing immunity for acts that though unlawful were done in good faith and neither reckless nor cruel and that officials would be answerable before the courts for any illegal acts not covered by the indemnity, he still had to acknowledge that the combination could not cover the entire field.¹⁹³ Not only would there be a time when officials acted illegally and thus arbitrarily, but the Indemnity Act could rightly be itself viewed as a supreme act of arbitrariness.¹⁹⁴ Indeed, he also had to acknowledge that an Indemnity Act could cover far more than he thought appropriate. For example, as we have seen, the Indemnity Act Eyre procured in Jamaica covered literally everything he and his officials had done.¹⁹⁵

If the Suspension Clause entrenches, as Morrison argues it does, more or less Dicey's understanding of suspension, it also entrenches that same lack of imagination. That in itself is not a problem as, on my argument, at best the mechanism of suspension is a primitive form of derogation so that an institutionally mature legal order should simply bypass

suspension and put in place a system of derogation. In such a system, the space that is opened up by a derogation from constitutional morality, is different from the space of, say, ordinary criminal law where detention is legitimate only pending a trial. But the space is still highly structured by principles of legality. Moreover, the derogation model not only presupposes accompaniment by the legislative model, but far preferable is a legislative model which does not require derogation, since all the components are in place that make it fully constitutional.

It is even plausible to construe the events since 9/11 in the US as following this kind of path. On one view, for example, that taken by Justice Scalia in *Hamdi*,¹⁹⁶ if the executive wishes to detain people on national security grounds, it must ask Congress to suspend habeas corpus, in which case the executive can do what it likes except in so far as Congress explicitly limits the scope of its powers. The detainees are then in a legal black hole, though, as Morrison points out, the proponents of this model of suspension still regard what the officials do as legally authorized. By contrast, the majority in *Hamdi* took something like the path I have sketched, in that they regarded the system of detention as legislatively authorized by the Congressional Resolution passed immediately after 9/11 and as constitutionally appropriate as long as detainees were given adequate due process, a question on which the courts would make the ultimate decision.

I say “something like” because the Congressional Resolution did not explicitly authorize detention and because the test the Supreme Court appeared to signal was appropriate for determining adequate due process is cost-benefit analysis, a far cry from a proportionality analysis where the question is what is appropriate given the weightiness of the interest in liberty.¹⁹⁷ For the Court to follow exactly the path, it should in the first instance, as it was later to do in *Hamdan* in respect of criminal trials by military tribunals,

have found that detention cannot be authorized by implication. It should also have left the open the question of what sort of an authorized scheme would also meet the test of constitutionality, rather than, as it did, signaling to the executive that very bare due process would suffice.

Despite these concerns, *Hamdi* together with *Rasul*¹⁹⁸ and *Hamdan* can be regarded as having hauled the executive within the space of legality. More accurately, since the executive, even at its most extravagant, always claimed to be acting in a constitutionally and legally authorized fashion, either because of its inherent powers or its powers delegated by Congress, one might say that the Court forced the executive to live up to its professed commitment to legality. At the same time, at least since *Hamdan*, it has forced Congress to deliberate on and respond through legislation to what the executive had claimed as its preserve. As John Fabian Witt comments in his review of Kostal and other works on law and empire, *Rasul*,¹⁹⁹ *Hamdi* and *Hamdan* can thus be seen as having brought about a “rough restoration of British constitutionalism’s discursive boundaries”. Yet, as he also says, each new round “threatens to undo the Court’s embattled compromise”.²⁰⁰ Here he refers to the legislative response to *Hamdan*,²⁰¹ one which roughly gave the executive what it had in the first place wanted. If the Court finds this legislative scheme constitutionally appropriate the executive will have what I have called in other work a “grey hole”, a space which contrasts with “black holes” in that those in the space are given some legal protections but the protections are not sufficient to permit them to contest the basis of the preventive measures taken against them.²⁰² Indeed, Witt follows both Kostal, Finlason and presumably Carlyle in finding Cockburn LCJ’s charge wanting. He even quotes approvingly Finlason’s claim that the charge was “utterly indeterminate and indecisive; it laid nothing down clearly”²⁰³ and he

finds absurd that the grand jury asked “plaintively” that martial law should be more clearly defined by legislative enactment.²⁰⁴

In other words, one gets precisely the problem identified at various points in this paper—a determined executive with control over the legislature seems able to flout constitutional morality by giving itself the power to do through authorizing legislation what the courts might deny it in the absence of such legislation. Moreover, in the US context one observes that the presence of an entrenched bill of rights seems to be of no more avail than a judge-made constitution.

Dicey’s claim thus looks shaky that the judge-made constitution is superior to bills of rights. Recall that he said of the former that in it the right to individual freedom is “part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation”, while in the latter the general rights it guarantees are “something extraneous to and independent of the ordinary course of law”, hence subject to suspension.²⁰⁵ That claim should, it seems, be watered down to one that both kinds of constitution are equally susceptible to executive override.

Nevertheless, there is something to Dicey’s thought about constitutional superiority for at least two reasons. First, in the case of a judge-made constitution, where it is clear that Parliament enjoys what it called legislative supremacy, there is less scope for what we can think of as constitutional complacency and inertia: complacency, because of the temptation to suppose that the presence of an entrenched bill of rights means that fundamental rights are by definition adequately protected; inertia, because once such a bill is in place, it might seem that constitutional innovation ceases, unless circumstances are so extreme that the usually difficult process of constitutional amendment must be tried. Put positively, with a

judge-made constitution, a regressive legislatively- or executive-driven revolution in constitutional morality is often easier to see, and progressive change towards a better realization of constitutional morality is easier to bring about. Indeed, such a constitution puts a greater burden on politics and on the people, but, it is important to appreciate the burden is one of maintaining both constitutionalism and legality.²⁰⁶

Second, in regard to legislative supremacy, I qualified that phenomenon with “so called” not because the idea that legislative supremacy is vacuous, but because the common law conception of legislation is not well understood. Recall that Cockburn LCJ was derided for suggesting after the grand jury had failed to find a true bill for suggesting that the solution to the problem posed by the idea of martial law should be a legislative one.²⁰⁷ As we have seen, that derision is premised on the assumption that the executive can then get all it wants through statute. But a closer inspection of Cockburn LCJ’s thought on this matter reveals something different. He said:

If the legality of martial law be doubtful, still more if the exercise of it be illegal, and it be deemed desirable that there should be power to resort to it in great emergencies, let that power be recognised or established by Parliament. But in that case, let us hope that the exercise of martial law will be placed under due limitations, and its administration fenced round by the safeguards that were wisely provided by the legislature in the Act of 1833. Without these it may well be doubted whether martial law is not, under any circumstances, a greater evil than that which it is intended to prevent.²⁰⁸

The issue here goes back to the founding documents of the idea of the common law or judge-made constitution, at least to the tension between Blackstone’s claim on behalf of the common law that, following Coke, “it will control acts of parliament ... sometimes it will

judge them completely void”, and his attribution to the parliament of a “sovereign and uncontrollable authority”. As David Lieberman points out, most commentators regard this tension as showing that Blackstone’s commitment to natural law was vacuous.²⁰⁹ Indeed, Blackstone says that in times of necessity when the safety of the whole society is at stake, “future generations” might be forced to exercise “those inherent (though latent” powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish”. And he suggests that such “*extraordinary* recourses to first principles” could never be incorporated “in the *ordinary* course of the law”. Ordinary law could supply not remedy to the “oppressions” that might spring from such circumstances.²¹⁰ But, as Lieberman also points out, there is an interpretative mistake in “presuming that Blackstone’s attitude to parliamentary law-making was fully disclosed in his formal doctrines of constitutional sovereignty”.²¹¹ As Lieberman goes on to show, Blackstone saw Parliament as a key contributor to constitutional development through its legislation, especially in the Habeas Corpus Act, by which it fixed “this *theoretical* development of our public law” to the point where “the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by *law*”.²¹² Blackstone’s sense that legislators have to be properly educated in their constitutional responsibilities so that they may take the lead in perfecting the implementation of constitutional morality thus chimes with a theme in contemporary scholarship of the need to restore the legislature’s role as a, perhaps the, primary interpreter of the constitution, a restoration which all who advocate must and do recognize requires both reining in the executive and reinvigorating the office of legislator.²¹³

Another way of putting this point is to say that all legal orders suffer from institutional immaturity in that the resources are never fully in place to reach what we can

think of as the “utopia of legality”—the stage when all official acts are controlled by law.²¹⁴ One example of such immaturity is the lack of the centralized instruments of coercion that are a characteristic of the modern state which at one time in England and then later in the colonies meant that a militia had to be raised in times of civil strife. It was that institutional immaturity that was responsible for much of the confusion around the idea of martial law. But the lack of institutions to properly police what the executive claims under the head of prerogative powers is similarly a sign of immaturity, as is the lack of institutions to police powers delegated to the executive by statute, whether these be powers to deal with national security or more mundane matters. Another example is the cumbersome process of private prosecution to which the Jamaica Committee resorted in its effort to bring Eyre and his officials to book. Similarly, I want to suggest that the reliance on the combination of suspension and act of indemnity is a sign of immaturity, in light of the development of an alternative model to suspension as immunity, one better capable of preserving constitutional morality—the derogation model. Bill of rights legal orders may tend both to hide this problem and to make it more difficult to remedy it when it comes to light.

Out of these observations comes a more theoretical point, one inspired by Lon L. Fuller’s work, in particular his idea that legality is an aspirational ideal. A standard legal positivist retort to natural law positions is to point to the existence of wicked laws and wicked legal systems. That retort seems to show that claims about necessary connections between law and morality are wishful thinking, so that we should rather resort to hard social facts about legal validity if we want to understand the nature of law, and also legality. While much of Austin’s work was discarded by legal positivists following HLA Hart’s critique, the well known paragraph which he considered a knock down response to natural law was adopted by Hart and still characterizes the stance of legal positivists today. Austin advanced

the example of a man who is convicted of a crime punishable by death when the act he did was in fact trivial or even beneficial. The man objects to the sentence that it is “contrary to the law of God”, but the “inconclusiveness” of his reasoning, Austin says, is demonstrated by the “court of justice” by “hanging [him] up, in pursuance of the law of which [he had] impugned the validity”.²¹⁵ In much the same way, the failure of the prosecutions of Brand, Gordon and Eye can be taken as proof of the futility of the arguments of the Jamaica Committee and the lawyers who allied themselves with its cause.

It may be that this kind of retort works effectively against a Dworkinian position, one that says that a legal order in order to be such must contain the moral resources for judges to invalidate a manifestly unjust law.²¹⁶ However, it is less effective against a Fullerian natural law position that says that legal orders are always unfinished projects for the realization of the rule of law, works in progress that aspire to bring the legal order to the stage where remedies do exist for all breaches of constitutional morality. Positivists will object that there is no difference between these positions since the Fullerian one, no less than the Dworkinian one, faces the prospect of encountering the gap between aspiration and reality. But there is a difference, because the aspirational conception produces an ideal of fidelity to law that makes it incumbent on all officials of the legal order to act and decide in ways that live up to that ideal. That sometimes such work can only be performed by legislators, not judges, cannot count against the aspirational conception;²¹⁷ nor can the fact that judges or legislators or the executive or for that matters juries fail to live up to it, any more than the fact that individuals are prone to moral mistakes count against an aspirational conception of morality.

If we go back to the quotation from Mill at the beginning of this section, we are now in a position better to appreciate the idea behind his optimism, summarized in the thought

that “the character of our country” had been “redeemed” since there had come into being a “body of persons determined to use all means which the law afforded to obtain justice for the injured.” There are two explicit elements to that idea, first, that there has to be a body of people minded to and capable of struggling for justice; second, that the struggle of justice will be limited to the means that the law of the time happens to afford. But implicit is that statements of what legality—the presuppositions of the idea of legal justice—requires can be authoritative while outstripping what can be done according to the law of the time. One can find such statements outside of judgments, for example, in Cockburn LCJ’s charge, and in dissenting judgments, as in *Halliday* and *Liversidge*. Indeed the cycle of legality that terminated, at least for the time being in SIAC, could be said to be driven both by dissents and the political will of those elites who were not prepared to let power be undisciplined by law. A jurisprudence of power is thus not a welding together of two disparate notions, *ius*—a system of legal right or legality—on the one hand, and prudence is some Machiavellian, power-calculating sense, on the other. Rather it is the wisdom of legality, of the practice of governing by law, closely akin to Coke’s idea of the “artificial reason” of the common law. I will now turn to examine some of the implications of this point for the topic of martial law and empire.

Law’s Empire

Nobody answers this remarkable Lord Chief Justice, “Lordship, if you were to speak for six hundred years, instead of six hours, you would only prove the more to us that, unwritten if you will, but real and fundamental, anterior to all written laws and first making written laws *possible*, there must have been, and is, and will be coeval

with Human Society, from its very first beginnings to its ultimate end, an actual *Martial Law*, of more validity than any other law whatsoever. Lordship, if there is no written law that three and three shall be six, do you wonder at the Statute Book for that omission? You may shut those elegant lips and go home to dinner. May your shadow never be less; greater it perhaps has little chance of being”.²¹⁸

Thomas Carlyle

The precise issue we raise is this – that through our Empire the British rule shall be the rule of law; that every British citizen, white, brown, or black in skin, shall be subject to definite, and not to indefinite powers; that governors who govern by the sword must justify the necessity which compelled them to use it. Neither beyond the seas nor within them shall the executive place itself above law by simply declaring law abolished. Come what may, our colonial rule shall not be bolstered up by useful excesses or irresponsible force. Throughout our empire, as in this kingdom, government shall be responsible and defined; and there, as here, its basis shall be law, and not prerogative.²¹⁹

Frederic Harrison

Carlyle’s caustic rebuke is aimed directly at Cockburn LCJ, whom he regarded as part of the “knot of rabid Nigger-Philanthopists, barking furiously in the gutter”, who would, if successful, place a “rope around [the] ... neck” of any governor attempting to put down the “frightfullest Mob-insurrection ...by way of encouragement to him”.²²⁰ He also clearly saw that opposition to the Jamaica committee was of a piece with opposition to parliamentary reform in England.²²¹

Harrison, a barrister and member of the Jamaica committee's executive body, constructed a detailed response to Finlason's treatise on martial law in six letters to the *Daily News*.²²² He too, as we can see, regarded the issue not only as one about empire but about home: "the contagion of lawlessness spreads fast. What is done in a colony to-day may be done in Ireland to-morrow, and in England hereafter".²²³ In his view, the issue raised by the Jamaica affair was a universal one, about the very point of legal order. "If an Executive were left to decide who are the enemies of the State, and what necessity exists, political society would cease to be free".²²⁴ For him and for the others who rallied against Eyre, it mattered a great deal that the integrity of legal order be preserved, whether at home or abroad, and that the integrity be one of principle, most importantly the principle of individual liberty.

However, as we have seen, contemporary commentators, including Kostal and Witt find that the adoption of what Witt calls the legal frame for dealing with the vexed political issues of the day made little, perhaps no difference. Indeed, the legal frame might, Witt suggests, have obscured the real political questions.²²⁵ That is, the frame could not encompass the questions that arose out of the troubled legacy of slavery, as settler whites and poor blacks contested scarce resources on highly unequal terms, the whites with their access to power including legal and military power, the blacks with their resource of greater numbers.

Witt's diagnosis of the problem is that the legal materials—the authorities--on which the principal figures had to rely "were too thin to produce a robust set of rules ... The law of empire, in other words, was not like the law of contracts or property or negotiable paper". As a result, "the legal frame functioned as little more than the mouthpiece of the contending sides for whatever ... they could plausibly argue and forcibly maintain".²²⁶ He also thinks that the same problem besets contemporary debate in the USA, as the work of John Yoo,

the USA's Finlason, shows. Witt's rather gloomy analysis consciously tracks a constant theme of Kostal's book: "law talk on all sides risks becoming little more than a thinly disguised repackaging of political or even partisan positions".²²⁷

But the contention over the law of empire and the law of martial law comes about not because of the thinness of the legal materials compared to other legal topics. Rather, it comes about because of the fundamental nature of the questions posed by the very idea of martial law, if it is taken to be more than military law or common law necessity. This is Carlyle's point in the epigraph to this section. It is also the point which so concerned Robert Cover in much of his work: in the beginning was not the word but the deed and a violent one at that. Law is founded on violence and that fact hovers on the margins of all declarations within a stable well functioning legal order of what the law is.²²⁸ The fact becomes brutally apparent only when legal order itself is perceived by the powerful to be under threat, or, as in the imperial context, when legal order has not yet been fully established. At such a moment law must sanction the reappearance of what always underpins it and the narrative of legality recedes as the narrative of violence moves to centre stage.

However, even if it is the case that all legal and political orders are founded on some primeval act of violence,²²⁹ one need not conclude that that primeval force lurks beneath the surface of legal order, always ready to assert itself in some moment of exception.²³⁰ Rather the point of having a state which has a monopoly on violence and then of both centralizing the mechanisms of violence and subjecting their exercise to the rule of law is to ensure that all acts of states, no matter how exigent the circumstances, and no matter where they take place, treat the legal subject with dignity. One should never neglect law's capacity to move people in and out of categories within borders--law's capacity to reproduce the "alien

within”——and, as the events that followed 9/11 have shown, such attempts can be made within the borders of the nation state and in respect of citizens, though they are more likely to be successful when they are made in respect of non-citizens beyond those borders. Thus it is important to ensure that the person acted upon is characterized as the legal subject, not the citizen. It is also important to stress that what matters is the fact of the exercise of state power, not where it takes place.

The story of empire, whether in the nineteenth century, the twentieth, or the twenty first, starkly illuminates these ideas. It is for this reason that legal scholarship has recently taken what the distinguished historian Lauren Benton calls in a review of books on constitutionalism and empire the “imperial turn”.²³¹ As sovereign states spread their rule beyond their borders, they create both “anomalous legal zones”, for example, Guantanamo Bay,²³² and “anomalous legal actors”,²³³ categories which, as I understand them, come about because the zones and the actors seem both constituted by law and yet somehow immune to law’s constitution of principle. The distinction between black and white gets replaced by the distinction between citizen and non-citizen, though the latter distinction may often operate as a surrogate for racial or religious distinctions.²³⁴

Benton predicts that the imperial turn will succeed the “linguistic turn” in legal and other scholarship, that is, the turn to analyzing law and other phenomena in terms of narratives of socially-constructed meanings. My sense is that that the imperial turn in legal scholarship will not so much follow the linguistic turn, as it will better situate our understanding of the latter. It will help us to understand the relationship between Cover’s triad of narrative, violence, and the law.

Indeed, Cover thought that law inevitably makes an “imperial turn”, since it has two modes of operation, the “imperial” and the “paideic”.²³⁵ The latter is the normative field

common to a community which does not require force or institutions for its maintenance, only strong commitment, while the latter is the mode into which a paideic community moves when its reach extends over other communities. Since the other communities lack the stance of strong internal commitment, the norms must be presented as universal, objective, to be enforced by institutions. This interplay between the paideic and the imperial modes of law is the story of martial law, even of empire itself.²³⁶

As I have indicated, one way of conceiving empire was as a raw projection of power, in the sense of power unmediated by law. But however the advocates of empire conceived what it was to govern through law, they saw no option but so to govern, in part, as I have mentioned, because governing through law legitimized empire. As we have seen, even those like Finlason or Eyre who thought it appropriate to resort to raw power in times of stress wanted to claim that their resort was legally authorized. Indeed, they were tempted at times to go beyond this claim and say that law exercised some control over the exercise of that power.

Instructive here is that both James and John Stuart Mill thought it important to have law be the medium of imperial government, not the messy common law, but a system of top-down rational control, an idea inspired by Bentham and given its most systematic elaboration by John Austin.²³⁷ The focus of these utilitarian legal positivists was on law as a system of commands, a “one-way projection of authority”, as Fuller was later to term it.²³⁸ They were not therefore interested in the idea of legality in itself, except in so far as it was necessary to make the system into such, a *system of commands*.²³⁹

While Hart’s early work, in particular his 1958 *Harvard Law Review* essay “Positivism and the Separation of Law and Morals”, written as Britain had accelerated the process of dismantling its empire, sought to fix the attention of legal theory on the normative question

of the legality of law, he and his followers have never successfully made the transition from a legal theory designed in part for imperial top down control.²⁴⁰ Moreover, that kind of control was resisted by colonized subjects who argued that if they were to be governed by law, they deserved also the rule of law, that is, the legal protections afforded to subjects by the common law of England.²⁴¹ Recall that the Jamaicans who rose up in Morant Bay began their uprising in large part because of their dissatisfaction with the justice system.

Of course utilitarian legal positivism was only in part motivated by imperial concerns. While some utilitarians thought that the colonies presented an opportunity to experiment with law reform that could then be brought home to tidy up the mess of the common law,²⁴² the primary impulse of their legal theory was law reform at home. They thus demonstrated a commitment to integrity of the sort we saw Kostal identify—government according to law cannot mean one thing at home and another in the colonies. While there is no evidence that John Stuart Mill revised his commitment to this kind of theory, that he became one of the leading lights of the Jamaica Committee because of his fears about the implications of the Jamaica affair for politics at home is telling.²⁴³ It shows that he saw that the insular legal community of England, a paideic community to use Cover's term, was threatened by the way that legal power was projected into the empire. The issue of legal integrity is thus not simply about consistency between what one does at home and what one does outside. It is also about what one does at home. For there to be integrity, in other words, integrity must be with principles; hence the deliberate evocation of Ronald Dworkin's major work in philosophy of law for the title of this section.

It is, in my view, significant that Witt, while seeming to endorse Kostal's thought that the legal frame is no more than a contest of warring narratives, still hankers after an

aspirational conception of law in which law does provide a genuine constraint on power, even imperial power.²⁴⁴ For example, he says:

Law talk may produce and reproduce community. But the consequences of law talk are more extensive still. Legal discourse produces a particular form of community. The choice to engage in law talk is the choice to engage in a kind of discourse with its own internal morality—a morality that rests on reasons and that entails the dignity of the individuals who make claims on it.²⁴⁵

This self-consciously Fullerian statement, though made without reference to Fuller, suggests that Witt's idea of the legal frame adds a further element to Cover's trio of narrative, violence and the law. The legal frame, that is, has its own discipline, one which excludes certain narratives, including and especially one in which the centralized coercive apparatus of the state, its monopoly on violence, is uncontrolled by law. Moreover, not only does it contain substantive principles of constitutional morality, but our sense of what those principles are and how best to live up to them evolves. The legal frame thickens over time. That decisions taken by legal and political actors can undermine those principles does not demonstrate, as Cover at times seemed to think,²⁴⁶ that there is plurality of constitutional narratives. As Harrison said, the "vaunted doctrines of the English Constitution are either real or sham".²⁴⁷ One could choose "the cause of personal liberty, the inviolability of law, just procedure, official responsibility, equal justice, and ancient precedent". Or one could choose "arbitrary rule, military jurisdiction, wild injustice, martial licence, race prejudice, and strange prerogative".²⁴⁸

Here one has to take into account that the compulsion of legality can set in motion two very different cycles of legality. In one cycle, the institutions of legal order cooperate in

devising controls on public actors which ensure that their decisions comply with the principle of legality, understood as a substantive conception of the rule of law. In the other cycle, the content of legality is understood in an ever more formal or empty manner, resulting in the mere appearance or even the pretence of legality. In this cycle the compulsion of legality results in the subversion of constitutionalism—the project of achieving government in accordance with the rule of law. Arbitrariness is covered by what an English judge referred to recently as a “thin veneer of legality”.²⁴⁹ On the argument of this paper, those who participate in legitimizing this second cycle risk participating in a sham.²⁵⁰ That it is a sham demonstrates that it is possible to govern outside of the frame while pretending, or even believing, that one is inside it. There are, then, to revert to the epigraph to this paper, some assertions of jurisdiction by judges and also by other legal actors, most notably legislatures, that are jurisgenerative while not being jurispatic. They make possible the legal frame itself.²⁵¹

¹ Professor of Law and Philosophy, Toronto. I thank Mike Taggart, Adam Tomkins and those who attended a Toronto Law Faculty Workshop for comments on drafts of this paper.

² Robert Cover, “Nomos and Narrative” in Martha Minow, Michael Ryan, and Austin Sarat, eds., *Narrative, Violence, and the Law: The Essays of Robert Cover* (Michigan: Michigan University Press, 1998) 95, at 162. The words in square brackets come from the sentence preceding the quote.

³ Cover, “Nomos and Narrative”, 102, read with 109 and 139.

⁴ See for example, Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006).

⁵ See Cover, “Nomos and Narrative”, 161, referring among other things to Taney’s resistance to Lincoln in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

⁶ See Cover, “Nomos and Narrative”, especially 156.

⁷ *Ibid*, 104-5. These others are usually critics of liberalism, for example, Carl Schmitt. See Schmitt, a theme taken up by Walter Benjamin, Jacques Derrida, and more recently Giorgio Agamben,

⁸ Cover, “Nomos and Narrative”, 118.

⁹ *Ibid*, 161.

¹⁰ To use the apt title given to the collection of some of the most important of Robert Cover’s essays, note 1 above.

¹¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1924, 8th edition), 283-4, footnotes omitted. I use this edition, hereafter Dicey, because it is the last to contain Dicey’s Note X on “Martial Law in England During Time of War or Insurrection”, at 538-55. For a similar claim to Dicey’s, see Frederic Harrison, *Martial Law: Six Letters to “The Daily News”* (London: Published by the Jamaica Committee, 1867), 13, and his quotations from 12-13 from authorities to the same effect.

¹² Dicey, 283-4.

¹³Ibid., 233.

¹⁴ Military Commissions Act (2006).

¹⁵ 126 S. Ct. 2749 (2006).

¹⁶ Ibid., 192.

¹⁷ Ibid., 196.

¹⁸ Ibid., 197.

¹⁹ Ibid., 554-5.

²⁰ Ibid., XXX.

²¹ Ibid., 38.

²² Quoted, *ibid.*, 79.

²³ Ibid., 195.

²⁴ Ibid., 197.

²⁵ Daniel J Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005), 10.

²⁶ Ibid.

²⁷ Rande Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005).

²⁸ See John Fabian Witt, “Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)”, 776-7, relying particularly on Thomas C Holt, *The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain, 1832-1938* (Baltimore: Johns Hopkins University Press, 1992) and Diana Paton, *No Bond but the Law: Punishment, Race, and Gender in Jamaican State Formation, 1780-1870* (Durham, NC: Duke University Press, 2004). Kostal focuses on the element of legal dissatisfaction in *A Jurisprudence of Power* at 95-8.

²⁹ Bogle, was a cousin of and advisor to a defendant whose case of trespass was to be heard the day before the uprising started. See Paton, *No Bond but the Law*, 175.

³⁰ See Michael Taggart, “Ruled by Law?”, (2006) 69 *Modern Law Review* 1006, XXX

³¹ There was also a civil action against Eyre for false imprisonment.

³² Leslie Stephen’s older brother. Dicey was the Stephens’ first cousin—see Trowbridge A Forde, *Albert Venn Dicey: The Man and his Times* (Chichester: Barry Rose, 1985) 14. [Check Collini] Stephen’s and Edward James’s legal opinion for the Jamaica Committee can be found in William Forsyth, ed., *Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence* (London: Stevens & Haynes, 1869, 551-63. Stephen reproduced much of the opinion in his *A History of the Criminal Law of England* (Burt Franklin: New York, originally published London, 1883) volume 1, 207-16, stating at 207 that Cockburn LCJ “followed almost precisely the statement of the law given in this opinion”. The same claim could be made with even more force of the argument in Harrison, *Martial Law*.

³³ Ibid., 457. Kostal says that Dicey did not credit these influences, a claim which is true of the chapter on martial law in the main body of *The Law of the Constitution*, 280-90, but false about Note X, which relies significantly on Cockburn, and which was written after the edition (4th of 1893) on which Kostal relies.

³⁴ AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001) 60. I take Kostal’s reference at *A Jurisprudence of Power* 457, note 138, to Simpson to be an approving one.

³⁵ See Simpson, *Human Rights and the End of Empire*, 62-3 and in general the chapter “The Mechanisms of Repression”, 54-90.

³⁶ See Simpson, *Human Rights and the End of Empire*, 75-90, who chooses 1936 because of the comprehensive nature of the Palestine Martial Law (Defence) Order in Council of 26

September 1936, the making of which was authorized by the Defence of the Realm Acts, introduced during the First World War. Simpson remarks (86) that “[w]ith such a code in force who need martial law?” But his rhetorical question requires him to accept the correctness of the majority of the House of Lords’ decision in *R v. Halliday, ex parte Zadig* [1917] AC 260, discussed below, and that acceptance commits him to a normative position he may have no desire to hold. Others would date the statutory introduction of martial law to the Defence of the Realm Acts, beginning in 1914. See Charles Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford: Oxford University Press, 1993) and for a fine early treatment, Harold M. Bowman, “Martial Law and the English Constitution” (1916) 15 *Michigan Law Review* 93.

³⁷ Taggart, “Ruled by Law?”, at 1026, quoting Dicey, *Law of the Constitution*, 198.

³⁸ See Kostal, *A Jurisprudence of Power*, 18-21. In what follows I draw from the twenty theses the remarks most pertinent to my themes.

³⁹ *Ibid.*, 20.

⁴⁰ *Ibid.*, Kostal’s emphasis.

⁴¹ *Ibid.*, 19.

⁴² *Ibid.*, 21.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 19.

⁴⁵ *Ibid.*, 337-41.

⁴⁶ *Ibid.*, 303-15.

⁴⁷ Quoted in Taggart, “Ruled by Law?”, 1012.

⁴⁸ *Ibid.*, 1011.

⁴⁹ This burden is a prominent theme in a recent uncritical appraisal of the British Empire, presented as a model for American world domination: Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (New York: Basic Books, 2004)

⁵⁰ Kostal, *A Jurisprudence of Power*, 190.

⁵¹ *Ibid*, 133.

⁵² *Ibid*, 162.

⁵³ For the more detailed account, see Kostal, *ibid*, 277. In summary, reproducing at times verbatim his account, but without the tedium of quotation: The complainants, had to present their charge in a magistrate's court and were obliged to show cause why the accused could be compelled to attend the court on an arrest warrant or summons. If the magistrate was satisfied there was a case to answer, he would issue a bench warrant for the arrest of the accused. There followed a "committal hearing" in which the prosecution had to establish a prima facie case of guilt. Before evidence was called, the accused was entitled to challenge the form of the charge or the jurisdiction of the court and to cross-examine prosecution witnesses on the admissibility or sufficiency of their evidence. If the magistrate was satisfied that the prosecution had made out a sufficient case, and if the charge was one of felony, the indictment was then set out for review by the grand jury.

⁵⁴ Kostal, *A Jurisprudence of Power*, 324.

⁵⁵ Frederick Cockburn, ed., *Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court, in the Case of The Queen Against Nelson and Brand* (London: William Ridgway, 1867), 3. (Hereafter, Cockburn). Cockburn LCJ did not read the charge but spoke from notes, and it took him almost six hours to deliver it—see Kostal, *A Jurisprudence of Power*, 325. The text was taken from the shorthand writer's notes, which were then revised

and corrected by the judge, with the aid of his brother, the editor. Cockburn LCJ also added occasional notes, which are indicated in the text by his initials.

⁵⁶ Cockburn, 8-9.

⁵⁷ Ibid., 9. I will not deal with Cockburn LCJ's discussion of the legal status of Jamaica at 10-19, which issued in the conclusion that its inhabitants are "entitled to all the rights and liberties to which the subject is entitled at home"; *ibid.*, 19.

⁵⁸ *Ibid.*, 20.

⁵⁹ *Ibid.*, 20-1.

⁶⁰ *Ibid.*, 21.

⁶¹ *Ibid.*, 22,

⁶² *Ibid.*, quoting from Finlason, *A Treatise on Martial Law: As Allowed in Time of Rebellion; with Practical Illustrations Drawn from the Official Documents in the Jamaica Case and the Evidence Taken By The Royal Commission of Enquiry with Comments, Constitutional and Legal* (London: Stevens & Sons, 1866), 107. (Hereafter, Finlason).

⁶³ Cockburn, 23.

⁶⁴ *Ibid.*, 24-47, at 24-5.

⁶⁵ *Ibid.*, 45.

⁶⁶ *Ibid.*, 65.

⁶⁷ Tone was a prominent figure in the Irish Rebellion of 1798, a rebellion which had provoked a proclamation of martial law. He has been in France to raise support for a French invasion and was captured on board one of the French ships. He was tried and sentenced to death before a court martial. He asked that, as a soldier, he might be shot rather than hanged. This request was refused and his father made an application to the Court of King's Bench in Dublin for *habeas corpus* on the ground that he had been sentenced to death

by a court-martial and that the court-martial was illegal since the ordinary courts were sitting and thus retained jurisdiction. The Court granted habeas corpus in the face of the military's determination to execute Tone, even ordering the arrest of the officer commanding the barracks where Tone was held. But when the Sheriff arrived at the barracks to serve the writ he found that Tone was already dying—he had slit his throat in order to avoid the shame of a hanging. For a fuller account, see Cockburn, 51-3.

⁶⁸ Cockburn, 49-57, at 53.

⁶⁹ *Ibid.*, 53.

⁷⁰ *Ibid.*, 75-6.

⁷¹ *Ibid.*, 75-7. For a full statement of the text of the proviso, see Harrison, *Martial Law*, 20.

⁷² Cockburn, 78.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 77-8.

⁷⁵ *Ibid.*, 80.

⁷⁶ *Ibid.*, 83-6, at 86.

⁷⁷ *Ibid.*, 91.

⁷⁸ *Ibid.*, 92-7,

⁷⁹ *Ibid.*, 98.

⁸⁰ *Ibid.*, 99.

⁸¹ *Ibid.*, 104, referring to Hume's remark that martial law is "a prompt, arbitrary, and violent method of decision" [34] See David Hume, ...

⁸² Cockburn, 105.

⁸³ *Ibid.*, 108. This claim caused Cockburn LCJ some embarrassment at the hands of Finlason, who pointed out that as Attorney General, Cockburn had argued to Parliament

after martial law had been declared in Ceylon that when martial law is in force, the “ordinary criminal tribunals cease to have jurisdiction ... We don’t punish men merely for the offence they have committed. They are punished to deter others from following their example.” See Finlason, “Introduction” to Finlason, ed., *Report of the Case of The Queen v. Edward John Eyre, on his Prosecution in the Court of Queen’s Bench, For High Crimes and Misdemeanours Alleged to have been committed by him in his office of GOVERNOR OF JAMAICA; CONTAINING THE Evidence (Taken from the Depositions), the Indictment, and the Charge of Mr. Justice Blackburn* (Chapman and Hall: London, 1868) xxii. (Hereafter, Blackburn). See Kostal,

⁸⁴ Cockburn, 108. In addition, he doubted the necessity of such trials.

⁸⁵ *Ibid.*, 124-7, at 126 and 127.

⁸⁶ *Ibid.*, 129-154, at 154. In a note added later to the text of the address, he dismissed as “most dangerous and pernicious” a claim made by Finlason that the question in cases such as Gordon’s was one of deterring others through punishment, so that it did not matter whether a man had directly caused a rebellion; only that his death would stop it; *ibid.*, 154-5, quoting from Finlason, 61

⁸⁷ Cockburn, 127.

⁸⁸ *Ibid.*, 128-9.

⁸⁹ See, for example, *ibid.*, 129, 137.

⁹⁰ *Ibid.*, 152-3. At the end of his charge, he not only repeated his doubts but stated that the jury had to undertake a “review of the authorities” and of the law in general. *Ibid.*, 154-5.

⁹¹ *Ibid.*, 152. He repeated this point at the end, at 156.

⁹² Kostal, *A Jurisprudence of Power*, 339.

⁹³ *Ibid.*, 339.

⁹⁴ *Ibid.*, 482-3.

⁹⁵ Ibid., 483-4.

⁹⁶ Ibid., 367.

⁹⁷ Ibid., 483-4, quoting from Cockburn, 163.

⁹⁸ Kostal, *A Jurisprudence of Power*, 368.

⁹⁹ Ibid., 367.

¹⁰⁰ Finlason, 107.

¹⁰¹ Ibid., xvi and see further xxviii-ix.

¹⁰² Ibid., 51.

¹⁰³ Ibid., xxxvi. Finlason may here be relying on early understandings of absolutism, which regarded the quality of being absolute as virtuous—see James Daly, “The Idea of Absolute Monarchy in Seventeenth-Century England” (1978) 21 *The Historical Journal* 227. But how this reliance assists him is unclear.

¹⁰⁴ Finlason, xxxvii.

¹⁰⁵ Ibid., xxxvii. See further 87.

¹⁰⁶ See, for example, *ibid.*, 52, 55.

¹⁰⁷ Ibid., iv.

¹⁰⁸ Ibid., xxii.

¹⁰⁹ Ibid., 55. See also xxii—“It is apprehended that the declaration of martial law, in case of rebellion, is, as an act of State, necessarily valid, although it may be more or less censurable for erroneous judgment”.

¹¹⁰ Ibid., xxxii and 27.

¹¹¹ Ibid., 64.

¹¹² Ibid., vii.

¹¹³ Blackburn, 74.

¹¹⁴ Ibid., 74-5.

¹¹⁵ Ibid., 77.

¹¹⁶ Ibid., 79.

¹¹⁷ Contrast Finlason, iii, note (a) with Blackburn, 72 read with 77. See Cockburn's comments on Finlason's claim though without specific reference in Cockburn, 65.

¹¹⁸ Blackburn, 79-80. His only evidence in the language of the statute was the claim that martial law must "ever be considered as amongst the greatest evils" because of the "experience of the mischief and calamities attending it"; 79. Blackburn J's rather tendentious exercise in statutory interpretation also contrasts unfavourably with Harrison, *Martial Law*. 19-23.

¹¹⁹ Blackburn, *ibid.*, 79.

¹²⁰ Ibid., 81.

¹²¹ Ibid., 81-7.

¹²² Ibid., xxxviii.

¹²³ Cockburn LCJ's charge is, to say the least, bombastic, but to my ear, Blackburn J's charge oozes false sincerity. Note that Blackburn J claimed to the jury that his charge on the law had been approved in discussions with his fellow judges, including Cockburn LCJ, though he said he had to take personal responsibility for it—*ibid.*, 87-9. Cockburn LCJ angrily repudiated him from the Bench six days later, and forced a kind of apology from Blackburn J—see, *ibid.*, 104-8.

¹²⁴ Note in this regard the title of his second book on martial law: *Commentaries on Martial Law with Special Reference to its Regulation and Restraint* (London: Stevens & Sons, 1867), available at HeinOnline, ...

¹²⁵ John Fabian Witt's term: John Fabian Witt, "Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)" (2007) 120 *Harvard Law Review* 754.

¹²⁶ I would like to acknowledge a more general debt for this thought to my colleague, Ernie Weinrib.

¹²⁷ John Stuart Mill, *Autobiography* (London: Penguin, 1989) 219.

¹²⁸ Simpson, *Human Rights and the End of Empire*, 64-6.

¹²⁹ *Ibid.*

¹³⁰ See Ferguson, *Empire*, 276-9.

¹³¹ Simpson, *Human Rights and the End of Empire*, 66.

¹³² [1902] AC 109.

¹³³ *Ibid.*, 109-10.

¹³⁴ (1866) 4 Wallace, U.S. Rep. 2, 137.

¹³⁵ *Marais*, 110-12.

¹³⁶ *Ibid.*, 114.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*, 115.

¹³⁹ *Ibid.*

¹⁴⁰ WS Holdsworth, "Martial Law Historically Considered", (1902) 18 *Law Quarterly Review* 117.

¹⁴¹ Cyril Dodd, "The Case of Marais", (1902) 18 *Law Quarterly Review*, 143, at 148-9.

¹⁴² H Erle Richards, "Martial Law", (1902) 18 *Law Quarterly Review*, 133.

¹⁴³ WS Pollock, "What is Martial Law?", (1902) 18 *Law Quarterly Review*, 152. See his summary of his points of agreement and disagreement with Erle Richards at 158.

¹⁴⁴ Ibid., 56. See further Richard A Cosgrove, “The Boer War and the Modernization of British Martial Law” (1980) 44 *Military Affairs* 124.

¹⁴⁵ Dicey, Note X, “Martial Law in England During Time of War or Insurrection”.

¹⁴⁶ Ibid., 538, note 1, 544-7, 550-1, 551-5.

¹⁴⁷ Simpson points out that Fitzjames Stephen and James in their joint opinion for the Jamaica Committee took the position that trial and punishment might be permissible by the military, and thus hold a view incompatible with Dicey’s theory. Simpson, *Human Rights and the End of Empire*, 63, note 15, referring to Fitzjames Stephen and James, 560-1.

¹⁴⁸ 179.

¹⁴⁹ Dicey, 183.

¹⁵⁰ Ibid., 183-4.

¹⁵¹ Ibid., 189.

¹⁵² Ibid., 191, footnote omitted.

¹⁵³ See Edward Jenks, “The Story of the *Habeas Corpus*” (1902) 18 *Law Quarterly Review* 64 and Lindsay Boynton, “Martial Law and the Petition of Right” (1964) 79 *The Historical Review* 255.

¹⁵⁴ See in particular, Holdsworth, “Martial Law Historically Considered”.

¹⁵⁵ Dicey, 179.

¹⁵⁶ Trevor W Morrison, “Suspension and the ExtraJudicial Constitution” (2007) 107 *Columbia Law Review* 101.

¹⁵⁷ 124 S. Ct. 2633 (2004).

¹⁵⁸ Morrison, “Suspension and the ExtraJudicial Constitution”, 106.

¹⁵⁹ Ibid., quoting from David Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?” (2006) 27 *Cardozo Law Review* 2005, 2006.

¹⁶⁰ David L Shapiro, “Habeas Corpus, Suspension, and Detention: Another View” (2006) 82 *Notre Dame Law Review* 59, at 86 and 89. As Morrison points out, Shapiro does not contemplate a total black hole, as at 90-5, he confines his argument to the issue of detention thus removing from its scope issues like treatment during detention; Morrison, “Suspension and the ExtraJudicial Constitution”, 107. On my argument, Shapiro’s qualification merely evidences the grip of the compulsion of legality.

¹⁶¹ Shapiro, “Habeas Corpus, Suspension, and Detention: Another View”, 89.

¹⁶² Morrison, “Suspension and the ExtraJudicial Constitution”, 178.

¹⁶³ *Ibid*, 110-17, at 113.

¹⁶⁴ *Ibid*, 117.

¹⁶⁵ *Ibid*, 117-39.

¹⁶⁶ *Ibid*, 139-43. As I will argue in the next section, it is hardly surprising that there are wrinkles, given that accounts of the history on this kind of controversial issue are inescapably saturated with normative judgments.

¹⁶⁷ *Ibid*, 142, referring to Dicey, 10th edition, 233, in the 8th edition, 228-9.

¹⁶⁸ Morrison, “Suspension and the ExtraJudicial Constitution”, 142, referring to and quoting from Dicey, 10th edition, 23-4, 23 in the 8th edition.

¹⁶⁹ Dicey, *ibid*.

¹⁷⁰ Morrison, “Suspension and the ExtraJudicial Constitution”, 142.

¹⁷¹ *Ibid*, 142-3.

¹⁷² *Ibid*, 143-77, especially, 145-6, 156-8, 172-7.

¹⁷³ See Amanda L. Tyler, “Is Suspension a Political Question?”, (2006) 59 *Stanford Law Review* 333.

¹⁷⁴ Unless, of course, the written constitution contains more stringent requirements.

¹⁷⁵ Dicey, 224-6. See R. J. Sharpe, *The Law of Habeas Corpus* (Oxford: Clarendon Press, 1989, second edition) 94-5.

¹⁷⁶ Torture

¹⁷⁷ Slavery/servitude

¹⁷⁸ Convictions of only those criminal offences in existence at time of act.

¹⁷⁹ Tom R. Hickman, “Between Human Rights and the Rule of law: Indefinite Detention and the Derogation Model of Constitutionalism” (2005) 68 *Modern Law Review* 655, at 659. See Simpson on fake derogations

¹⁸⁰ I tell the story that follows in more detail in David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

¹⁸¹ Dicey, 283-4, footnotes omitted. For a discussion of the state of siege see William Feldman, “Theories of Emergency Powers: a Comparative Analysis of American Martial law and the French State of Siege” (2005) 38 *Cornell International Law Journal* 1021.

¹⁸² See Clive Walker, “Keeping Control of Terrorists Without Losing Control of Constitutionalism” (2007) 59 *Stanford Law Review* 1395 and David Dyzenhaus, “Cycles of Legality in Emergency Times”, *Public Law Review* forthcoming

¹⁸³ Dyzenhaus, “State of Exception”, in Chagnollaud and Troper, eds., *Treatise on Constitutional Law*, three volumes, (Paris: Dalloz, forthcoming). For further exploration of this idea see my “Cycles of Legality in Emergency Times”.

¹⁸⁴ This discussion is drawn from chapter 3 of my *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

¹⁸⁵ AWB Brian Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford, Oxford University Press, 1992). Simpson, especially chapter 3, points out that the government effectively pulled the wool over the judges' eyes. While the statutory scheme required the Secretary of State to have reasonable grounds and to communicate those grounds to the chairman of the advisory committee, not only were the grounds not communicated to the appealing detainee, but the Chair was also not given the reasons. To find out the true grounds, the public officials would have had to be subpoenaed and questioned in court.

¹⁸⁶ *Halliday*, 292-3.

¹⁸⁷ *Ibid*, 294.

¹⁸⁸ *Ibid*, 293.

¹⁸⁹ *Liversidge*, 244. Simpson does not have a high regard for Lord Atkin's dissent in *Liversidge*. He regards it as evidence for the claim that what judges care most about is their formal place in legal order; Simpson, *In the Highest Degree Odious*, 363. However, that claim is of a piece with his general rejection of Dicey's theory of martial law and fails to take into account the point in the text above about how the supremacy of law makes the rule of law possible.

¹⁹⁰ *Liversidge*, 220-2.

¹⁹¹ [2005] AC 68.

¹⁹² The Human Rights Act does not give judges the authority to invalidate a statute. All they may do is make a declaration of incompatibility.

¹⁹³ He also had to contemplate a statute which suspended habeas corpus and provided at the same time advance immunity for officials who acted unlawfully. See for example his discussion of the Act of 1881 (44 Vict. C. 4) for Ireland at 226-7 and see Morrison, "Suspension and the ExtraJudicial Constitution" at 128-34 discussing an 1863 US statute.

¹⁹⁴ “An Act of Indemnity ...though it is the legalisation of illegality, is also ...itself a law. It is something in its essential character, therefore, very different from the proclamation of martial law, the establishment of a state of siege, or any other proceeding by which the executive government at its own will suspends the law of the land. It is no doubt an exercise of arbitrary sovereign power; but where the legal sovereign is a Parliamentary assembly, even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law”. Dicey, 233.

¹⁹⁵ “The Suspension Act, coupled with the prospect of an Indemnity Act, does in truth arm the executive with arbitrary powers. Still, there are one or two considerations which limit the practical importance that can fairly be given to an expected Act of Indemnity. The relief to be obtained from it is prospective and uncertain”; *ibid.*, 231-2, Moreover, the public might be unwilling to allow Parliament to indemnify officials who had “grossly abused their powers” and the protection given will depend on the terms of the Act. Here Dicey contrasted the “moderate character” of an ordinary Act of Indemnity with the Act of the Jamaica House of Assembly which “attempted to cover General Eyre from all liability for unlawful deeds done in suppressing rebellion”; *ibid.*, 232-3.

Eyre’s Indemnity statute produced much anxiety in the executive administration in England, as politicians and civil servants debated whether it should be disallowed by order-in-council; a possibility for all statutes enacted at the time of North American or West Indian legislatures. See BA Knox, “The British Government and the Governor Eyre Controversy, 1865-1875”, (1976) 19 *The Historical Review* 877, 884-90. Ultimately, the Act was not disallowed. Unsurprisingly, Finlason thought the Act was superfluous. On his view, no bill

of indemnity can be required since no one who acts under martial law can “possibly be liable, civilly or criminally, or require such a protection ...; and that, so far as regards measures so taken, it is not material to their legality that they turn out in the event to have been excessive; and that whether or not they may be censurable or even culpable on that account, persons cannot be *criminal* for directing or carrying them out honestly, however erroneously, in obedience to orders, and under martial law”; Finlason, xvi, his emphasis. Further, the thought that there might be need for such Acts is “perilous to the defence of our distant colonies and dependencies, in cases of rebellion, if it were understood that Governors and Generals who declared, and acted on, martial law, were to be deemed guilty of wholesale murder, and entirely dependent on the indulgence of a bill of indemnity”; *ibid.*, xviii.

Somewhat surprisingly Blackburn suggested to the jury that it was doubtful that an Act of Indemnity could provide immunity against a true bill found in England; Blackburn, 101.

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¹⁹⁷ Reference to Fiss,

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¹⁹⁹ 124 S. Ct. 2686 (2004).

²⁰⁰ Witt, “Anglo-American Empire and the Crisis of the Legal Frame”, 796. Witt also reviews Hulsebosch, *Constituting Empire*; Ferguson, *Empire*; and John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005).

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²⁰³ Witt, “Anglo-American Empire and the Crisis of the Legal Frame”, 794, quoting from Finlason, *Commentaries Upon Martial Law*, 23.

²⁰⁴ Witt, “Anglo-American Empire and the Crisis of the Legal Frame”, 794.

²⁰⁵ Dicey, 196.

²⁰⁶ We can recall in this regard two well known examples of Learned Hand’s eloquence, both of which are wrong though instructively so. There is his claim in a dissenting judgment that “Think what one may of a statute ... when passed by a society which professed to put its faith in [freedom], a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do”; *Shaughnessy v Mezei* 345 US 206 (1953). And there is his thought that we should not “rest our hopes too much upon constitutions, upon laws and upon courts” because ultimately “liberty lies in the hearts of men and women” and that when liberty there lies, one “needs no constitution, no law, no court to save it”. Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* (London: Hamish Hamilton, 1954,) 189-90. Learned Hand was wrong because if the judges do not give the society “derring do”, it is not given the opportunity to decide whether to flinch or not. We need courts to alert men and women to the fact that government or the legislature or both are putting their liberty at risk and in order for courts to fulfill that role, judges have to have an understanding of constitutionalism which goes beyond the idea that judges are the guardians of rights only when they are working with an entrenched bill of rights. Absent an understanding of the presence and significance of the principles of legality in every legal order that deserves that title, judges will fail to perform their guardianship role, not only in common law legal orders, but also in the best examples of bill of rights legal orders.

²⁰⁷ Cockburn, 160.

²⁰⁸ *Ibid.*, 74-5. The reference is to an Act passed to deal with disturbances in Ireland, which set up a system of courts-martial to try offences and which provided for elaborate protections for those put on trial. See *ibid.*, 55-7.

²⁰⁹ David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989), 48-55.

²¹⁰ *Ibid.*, 52-3, quoting from Blackstone, *Commentaries*, 1, 245-250-1.

²¹¹ *Ibid.*, 55. For the importance of this issue in the imperial context, see Hulsebosch, *Constituting Empire*, especially 39-41.

²¹² Lieberman, 60-1, citing Blackstone, *Commentaries*, 438-40 and 439 n.

²¹³ Unger, Waldron, Tushnet, Tomkins. Note that Dicey also thought that statutes are part of the common law constitutional project. For an examination of some institutional implications, see David Dyzenhaus, in Ben Goold and Liora Lazarus, eds., (Oxford: Hart Publishing, 2007). Witt sums up his view of the relationship between the contemporary situation in the USA and that described by Kostal in the nineteenth century as follows:

There is at least one critical difference between the constitutionalism of the twenty-first and nineteenth centuries: the culture of American foreign affairs constitutionalism is radically more polarized than the constitutionalism of the nineteenth century British Empire; it includes claims of unilateral executive authority, on the one hand, and judicially enforceable individual constitutional rights, on the other. Its British predecessor, by contrast, rejected both executive unilateralism and judicially enforceable constitutional rights in favor of a model that placed virtually all questions in the hands of Parliament. ... What the [US Supreme] Court has done in

the past several years is rein in the polarizing outliers and restore something approaching the Anglo-American constitutional-imperial debates of old.

Witt, “Anglo-American Empire and the Crisis of the Legal Frame”, 757. As I have shown in the text, Witt’s claim is right that the current legal situation resonates with that of the nineteenth century British Empire, but he is wrong both in supposing that the culture of the nineteenth century was less polarized than that of the twenty first and in thinking that Dicey’s model placed in any simple manner virtually all questions in the hands of Parliament.

²¹⁴ See Lars Vinx,

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²¹⁶ “Dworkinian” because Dworkin might well be ambiguous on this point. Unambiguously committed to it is TRS Allan, with whom I have extensively discussed the issue—see Allan, ... forthcoming.

²¹⁷ For a similar idea in the US context, see William N. Eskridge and John Ferejohn, “Super-Statutes: The New American Constitutionalism” in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 320.

²¹⁸ Thomas Carlyle, “Shooting Niagara: and After?”, (1867) 16 *Macmillan’s Magazine*, 319, 324–5, his emphasis.

²¹⁹ Frederic Harrison, *Martial Law*, 4. The idea for juxtaposing these starkly contrasting ideas (though not exactly these quotations) comes from Charles Townshend, “Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940”, (1982) 25 *The Historical Journal* 167, at 173.

²²⁰ Thomas Carlyle, “Shooting Niagara: and After?”, 324.

²²¹ Ibid., 323-4, 325

²²² See Kostal, *A Jurisprudence of Power*, 150, 245-54.

²²³ Harrison, *Martial Law*, 39.

²²⁴ Ibid., 26.

²²⁵ Ibid, 795-6.

²²⁶ Ibid, 796.

²²⁷ Ibid.

²²⁸ See the famous opening line of Cover's, "Violence and the Word", in *Narrative, Violence, and the Law*, 203: "Legal interpretation ... takes place in a field of pain and death".

²²⁹ See Hobbes's claim that there is "scarce a Common-wealth in the world, whose beginnings can in conscience be justified" ... For discussion of this thought, one in clear tension with Hobbes's claim that all sovereigns are legitimate, see my "Hobbes Constitutional Theory" in Ian Shapiro, ed., *Leviathan* (New Haven, Conn: Yale University Press, forthcoming).

²³⁰ See my "The Politics of the Question of Constituent Power" in Neil Walker and Martin Loughlin, eds., ...

²³¹ Lauren Benton, "Constitutions and Empires" (2006) *Law and Social Inquiry* 177, reviewing Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass.: Harvard University Press, 2004); Hulsebosch, *Constituting Empire*; Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* (New Haven, Conn: Yale University Press, 2004).

²³² Ibid., 178, citing Gerald L Neuman's prescient "Anomalous Zones" (1996) 48 *Stanford Law Review* 1197.

²³³ Ibid., 179-80.

²³⁴ For a sensitive analysis of such issues, with specific reference to the Jamaica Affair and Carlyle's role in it, see Simon Gikandi, *Maps of Englishness: Writing Identity in the Culture of Colonialism* (New York: Columbia University Press, 1996), chapter 2, "Through the Prism of Race: Black Subjects and English Identities". Compare Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860-1900* (Princeton, NJ: Princeton University Press, 2007). Both Gikandi and Bell stress the importance of understanding the need of the English to deal with crises of various sorts by defining themselves against the "other".

²³⁵ Cover, "Nomos and Narrative", 105-6. Ernie Weinrib informs me that the word comes from the Greek *paideuo* (to teach) and especially the noun form *paideia* (education).

²³⁶ The interplay is wonderfully described in Hulsebosch, *Constituting Empire*.

²³⁷ See Eric Stokes, *The English Utilitarians and India* (Oxford: Oxford University Press, 1959, reprinted 1989) chapter 3, "Law and Government" and R.B. Friedman, "An Introduction to Mill's Theory of Authority", in J. B. Schneewind (ed.), *Mill: A Collection of Critical Essays* (London: Macmillan, 1968).

²³⁸

²³⁹ See the perceptive discussion of these legal theoretical issues in Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2006), chapter 2, "The Colonial Concept of Law", and 120-22.

²⁴⁰ See for example Joseph Raz's argument that Fuller's internal morality of law should be stripped down to formal criteria that make law, that is, particular laws, into an effective instrument of control—"The Rule of Law and its Virtue".

²⁴¹ See Hulsebosch, *Constituting Empire*, for a sustained exploration of this theme in the context of New York.

²⁴² See Stokes, XXX. However, not all utilitarians were enthusiastic imperialists—see Duncan S. Bell, “Empire and International Relations in Victorian Political Thought” (2006) 49 *The Historical Journal* 281, 285-7, noting at 287 that Bentham was a critic of empire. See further F Rosen, Eric Stokes, British Utilitarianism and India” in Martin I Moir, Douglas M Peers, and Lynn Zastoupil, eds., *J.S. Mill’s encounter with India* (Toronto: University of Toronto Press, 199) 18, at 28. Rosen also argues that Bentham’s utilitarianism was not authoritarian since Bentham opposed open grants of discretion to public officials, 24, and in general wanted powerful groups to be subject to the rule of law, 22. However, the question for Bentham as for Mill on this issue is whether a repudiation of the common law constitution does not lead to authoritarianism.

²⁴³ Mill regarded his speech to Parliament on the Jamaica Affair as the best of his political career, *Autobiography*, 218. But while it is a fine example of political rhetoric about the need for executive accountability to law, it is rather wanting when it comes to the role that law would play. Indeed, Mill accepts in the speech the view that martial law suspends law; see Hansard, House of Commons Debates, July 31, 1866, columns 1797-1806, at 1802-1803.

²⁴⁴ Witt, “Anglo-American Empire and the Crisis of the Legal Frame”, 796-7, referring to Kostal, *A Jurisprudence of Power*, 487.

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²⁴⁶ For example, in *Justice Accused* ...

²⁴⁷ Harrison, *Martial Law*, 39.

²⁴⁸ *Ibid.*, 42.

²⁴⁹ *MB v. Secretary of State for the Home Department* [2006] EWHC 1000 (Admin), [103].

²⁵⁰ I would include in the list Cass Sunstein, “Minimalism at War” (2004) *The Supreme Court Review* 47 and Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006). Sunstein is content with vague legislative authorizations and both he and Posner seem to argue for outright deference to the executive. I would also include Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007). They are willing to drop even the requirement of vague legislative authorization, on the wholly unsupported basis that cost benefit analysis shows that the executive generally makes better decisions than judges when it comes to emergencies. They argue that because what law requires coincides with the conclusions of cost-benefit analysis, the rule of law authorizes the executive to do as it will.

²⁵¹ There is a sense in which Cover is right. For example, the establishment of the legal frame in Jamaica killed off eventually traditional forms of law. See Paton, *No Bond but the Law*